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Background Principles and the Rule of Law: Fifteen Years after *Lucas*

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Property right advocates welcomed the Supreme Court's 1992 decision in Lucas v. South Carolina Coastal Council. Justice Scalia's opinion for the Court established a categorical taking when all economic value is lost as a result of regulation. Advocates of unconstrained environmental and land use regulation were quick to suggest (wishfully) that Lucas's impacts would be minimal since most regulations do not destroy all economic value.

Fifteen years later, some who saw only dark clouds on the regulatory horizon as a consequence of Lucas now see a rainbow with a pot of gold at its end. This newly optimistic understanding of Lucas stems from Justice Scalia's reference to "background principles" of common law nuisance and property. These background principles serve not only as an exception in categorical takings, but also as an affirmative defense that immunizes government from virtually all takings claims.

In this Article, I argue that there is nothing extraordinary in Justice Scalia's statement that background principles of the common law are relevant to the definition of property rights. What is extraordinary is the claim that, consistent with the historic evolution of the common law, these principles are almost infinitely malleable in the hands of courts and legislatures. It is this claim that creates the deception of a pot of gold at the end of the Lucas rainbow, and it reflects a misunderstanding of the common law process, a distortion of Justice Scalia's meaning in Lucas, and disregard for the requirements of the Fifth Amendment takings clause.

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INTRODUCTION

After many decades of criticizing the common law as inadequate to the imperatives of environmental protection, if not a cause of environmental harm, some environmentalists are now embracing the common law as an important tool in the struggle to protect the environment. The common law institutions of property, contract, and tort provide the essential infrastructure for the efficient allocation of scarce (including environmental) resources. But this new-found interest in the common law as protector of the environment stems from the hope that the common law will serve as a shield against takings claims—claims which can disrupt governments’ efforts to protect the environment. This 180 degree reorientation arises from the assertion that the common law is, and always has been, subject to judicial and legislative adaptation in the public interest as perceived by the judge or a legislative majority. But this assertion turns the common law on its head, and Justice Scalia, of all people, gets the credit for this idea, based on his 1993 opinion in *Lucas v. South Carolina Coastal Council*.¹

I. THE LUCAS OPINION

Before the Supreme Court’s 1993 decision in *Lucas v. South Carolina Coastal Council*, takings law generally left property owners to bear the costs of government regulation, even when regulations forced “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”² One exception was physical invasions, which constituted a categorical taking without regard for the magnitude of the economic harm to the property owner or the anticipated benefit to the public.³ Although the Supreme Court acknowledged in *Penn Central Transportation Co. v. City of New York* that a taking occurs when a particular regulation goes “too far” in

1. 505 U.S. 1003 (1992).

2. See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

3. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The physical occupation of private property deprives the owner of the right to exclude, making it more like eminent domain, where compensation is routinely paid.

constraining the use of private property, as a general matter property owners seldom prevailed under *Penn Central*.⁴ The creation of a second categorical taking in *Lucas* was, therefore, something of a surprise—and a rare boost to property rights advocates.

In *Lucas*, a property owner claimed that his beachfront property was improperly taken without compensation upon passage of the South Carolina Beachfront Management Act.⁵ This law prevented the construction of any permanent habitable structure on the property, and, the owner claimed, deprived the land of all economic value. Writing for the majority, Justice Scalia held that when “a regulation . . . declar[ing] ‘off-limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.”⁶ Thus, in addition to physical invasion, *Lucas* confirmed a second categorical taking where regulation results in a total loss of economic value. With one exception, prior case law had not held to the contrary,⁷ but in several cases the Supreme Court had found that *nearly* total loss of economic value did not constitute an unconstitutional taking.⁸ Although *Lucas* established a new categorical taking, it was, at best, only a small victory for plaintiffs in regulatory takings cases since most regulations do not prohibit *all* economic uses of property.

In addition to confirming a second categorical taking, *Lucas* also recognized that property rights are defined, in part, by principles of common law nuisance and property law. Justice Scalia noted that when “existing rules or understandings that stem from an independent source such as state law” bar an owner from putting his property to a certain use, the owner is not entitled to compensation under the Takings Clause.⁹ Only when the taking goes beyond these “rules or understandings” and results in complete deprivation of economic value, is the owner entitled to compensation.¹⁰ In his dissent Justice Blackmun found “the Court’s reliance on common-law principles of nuisance in its quest for a value-free takings jurisprudence” perplexing. He suggested that a court looking to the background principles of common law nuisance

4. Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922). After several decades of difficult to rationalize takings decisions, the Court set forth a three-factor balancing test in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). See *infra* note 28.

5. S.C. CODE ANN. §§ 48-39-10 to -360 (2007).

6. *Lucas*, 505 U.S. at 1030.

7. The one exception is *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972), in which the Wisconsin supreme court stated: “[w]hile loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.” *Id.* at 771. The court concluded that the Justs still had the “natural and indigenous uses” of the land as an undeveloped swamp. *Id.* at 768.

8. See, e.g., *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding zoning regulations that reduced plaintiff’s property value from \$10,000 per acre to less than \$2,500); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (finding no taking where prohibitions on mining reduced a property’s value from \$800,000 to \$60,000).

9. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

10. *Id.*

would be weighing public and private harm and benefit, and would necessarily come to the same conclusion as the South Carolina General Assembly when it enacted the Beachfront Management Act. In other words, the Act reflected and codified South Carolina's common law nuisance.¹¹ Blackmun stated that "[o]nce one abandons the level of generality of *sic utere tuo ut alienum non laedas*, one searches in vain . . . for anything resembling a principle in the common law of nuisance."¹² Commentators picked up on Blackmun's theme in arguing that Scalia had achieved no greater certainty by substituting the traditional balancing test of nuisance law for the balancing test of constitutional takings law.

While some environmentalists were dismayed, believing their agendas require unconstrained regulatory authority,¹³ most commentators read Scalia's opinion for what it was—a narrow ruling having application to a very limited array of existing or likely future regulations.¹⁴ Notwithstanding the narrow impact of this new *per se* taking, however, the *Lucas* holding was criticized as failing to bring greater certainty to takings doctrine. Although Justice Scalia purported to establish a brighter line rule giving greater certainty to property owners and government regulators alike, critics, led by Justice Blackmun in dissent, argued that by recognizing nuisance laws as an exception to this new categorical taking,¹⁵ Justice Scalia had merely substituted the vagaries of nuisance law for the uncertainties of the *Penn Central* balancing test. Thus, said Blackmun and some commentators,¹⁶ the background principles exception to a

11. *Id.* at 1054.

12. *Id.* at 1055 (internal citation omitted) ("*Sic utere tuo ut alienum non laedas*" means that one should use one's property so as to not harm others.).

13. See, e.g., Kenneth Berlin, *Just Compensation Doctrine and the Workings of Government: The Threat from the Supreme Court and Possible Responses*, 17 HARV. ENVTL. L. REV. 97 (1993); Michael C. Blumm, *Property Myths, Judicial Activism, and the Lucas Case*, 23 ENVTL. L. 907 (1993); Jerry Mitchell, *Lucas v. South Carolina Coastal Council: The Remaking of Takings Law and the Re-emergence of Lochner*, 9 J. NAT. RESOURCES & ENVTL. L. 105 (1994).

14. See, e.g., John Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 27 (1993) (stating that "[t]he holding of *Lucas* is narrow, and its substantive effects will be easy enough for legislatures to avoid"); Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1431 (1993) (stating that *Lucas* may indicate "the emergence of a takings analysis that is more receptive to environmental concerns"); Michael J. Quinlan, *Lucas v. South Carolina Coastal Council: Just Compensation and Environmental Regulation—Establishing a Beach Head Against the Evisceration of Private Property Rights*, 12 TEMP. ENVTL. L. & TECH. J. 173, 184 (1993) (asserting that "the ultimate impact of *Lucas*' categorical rule on environmental regulation is likely to be limited").

15. Background principles are not really an exception under the no remaining economic value *per se* rule. See *infra* discussion accompanying notes 63–80. Rather, background principles may establish that a claimant has no property right to be taken. But where there is a property right with no remaining economic value as a consequence of regulation, there is no exception to the categorical taking rule established in *Lucas*.

16. See, e.g., Paula C. Murray, *Private Takings of Endangered Species as Public Nuisance: Lucas v. South Carolina Coastal Council and the Endangered Species Act*, 12 UCLA J. ENVTL. L. & POL'Y 119, 156 (1993) ("Unfortunately, as Justice Blackmun in his dissent aptly points out, the law of nuisance is not exactly the picture of clarity."); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1093 (1993) ("This result is astonishing, not only because it makes takings analysis turn on the various common-law

per se rule—that loss of all economic value results in an unconstitutional taking—left courts balancing public and private harm and benefit as they have always done, at least since Justice Holmes' 1922 decision in *Mahon*.¹⁷ This exception, said the critics, complicated existing takings doctrine without accomplishing any greater certainty for property owners or regulators.

More significantly, said the critics of *Lucas*, the background principles exception had the effect of eroding well-established judicial deference to economic and social legislation designed to adapt the common law to changing conditions.¹⁸ Rather than presuming constitutional validity and burdening property owners with proving that government had gone too far, the burden was shifted to the government to prove that plaintiffs do not possess the rights claimed to have been taken.¹⁹

Justice Rehnquist coined the term “nuisance exception” in his 1978 dissent in *Penn Central*, saying that “[t]he nuisance exception to the taking guarantee is not coterminous with the police power itself.”²⁰ But many analysts had for some time taken the position that there was an immunity from takings liability where government regulated to prevent nuisances.²¹ While Scalia acknowledged in *Lucas* that not every legitimate exercise of the police power is exempt from the takings clause, he also recognized that government can

precedents of the fifty states, and not only because the ‘common-law principles’ of nuisance that judges must now consult are themselves an ‘impenetrable jungle’”); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1438 (1993).

The case is not as far reaching as its rhetoric suggests. . . . Regulation that would be sustained under established common law “principles” of nuisance and property law is not affected. Presumably, states will have substantial latitude in determining the extent to which their existing legal principles limit property rights.

17. In *Pa. Coal v. Mahon* Justice Holmes stated, “[t]he general rule . . . that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” 260 U.S. 393, 415 (1922). If “too far” is the test, only balancing will provide the answer.

18. See, e.g., Humbach, *supra* note 13, at 3 (“Historically, it was ‘the great office of statutes . . . to remedy defects in the common law,’ adapting the common law ‘to the changes of time and circumstances.’ After *Lucas*, however, remedial statutes to improve the common law will now be subject to preemption by the common law.” (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

19. While the *Lucas* majority thought it “unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land,” 505 U.S. 1003, 1031 (1992), they did not say the South Carolina legislature was wrong in its weighing of harm and benefit. But by remanding to the South Carolina courts the majority did make clear that the courts, not the legislature, have the final say.

20. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 146 (1978).

21. See, e.g., Douglas W. Kmiec, *The Original Understanding of the Takings Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1633 (1988); Jan G. Laitos, *Water Rights, Clean Water Act Section 404 Permitting, and the Takings Clause*, 60 U. COLO. L. REV. 901, 921 (1989); Frank Michelman, *The Jurisprudence of Takings*, 88 COLUM. L. REV. 1600, 1602–03 (1988). Ironically, the nuisance exception arose not as an exception to government liability but rather as an exception to government immunity. Where a government invasion of private property would be considered a nuisance if the result of private action, there was an inverse condemnation for which government was liable notwithstanding the general presumption of immunity. See Van Alstyne, *Governmental Tort Liability: A Public Policy Prospectus*, 10 UCLA L. REV. 463, 493–98 (1963).

regulate to confer benefits as well as prevent noxious uses without incurring takings liability.²² He thus abandoned whatever had existed of a nuisance exception and clarified the relevance of common law nuisance to the definition of property rights.

Although any lawyer versed in the principles of common law would understand that common law principles of both nuisance and property law help to define the scope and content of property rights, Blackmun and most commentators described Justice Scalia's recognition of the relevance of these principles as an exception to the newly articulated categorical taking where all economic value is lost. In addition to his suggestion that reliance on nuisance law risked making takings law less rather than more certain, Justice Blackmun urged that Scalia's immediate recognition of this "exception" to his per se rule evidenced a lack of confidence in the new rule's viability.²³

II. BREATHING NEW LIFE (AND LESS PROTECTION OF PROPERTY) INTO BACKGROUND PRINCIPLES

Justice Scalia made reference to background principles at three points in his opinion. He stated that when uncompensated "regulations . . . prohibit all economically beneficial use of land, . . . limitation[s] so severe . . . must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."²⁴ Two pages later he stated that South Carolina, "as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, . . . must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found."²⁵ In a footnote response to the dissenting Justice Blackmun, who objected that background principles are no less subject to judicial discretion than the harm prevention/benefit conferral distinction to which the majority took exception, Scalia wrote "[t]here is no doubt some leeway in a court's interpretation of what existing state law permits—but not remotely as much, we think, as in a legislative crafting of the reasons for its confiscatory regulation."²⁶

Shortly after the *Lucas* decision, John Echeverria and Sharon Dennis suggested that the background principles of nuisance law might more than consume the per se takings rule,²⁷ but the idea did not attract serious attention until recently. This newfound interest in nuisance law has led pro-regulation interests to rely on Scalia's reference to background principles of nuisance and property law, which they say open a treasure trove of exceptions to the

22. *Lucas*, 505 U.S. at 1022–23.

23. *Id.* at 1052 (Blackmun J., dissenting).

24. *Id.* at 1029 (majority opinion).

25. *Id.* at 1031.

26. *Id.* at 1032 n.18.

27. John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 705 (1993).

categorical taking rule of *Lucas*, particularly when one takes into account the evolutionary nature of the common law.

In a nutshell, the pro-regulation argument goes like this:

Before *Lucas*, regulatory takings cases were resolved by applying the *Penn Central* balancing test.²⁸ The only exception was where property was physically occupied by or at the behest of the state, in which category of cases there is a per se taking.²⁹ *Lucas* established a second categorical taking where regulation or other government action leaves private property with no remaining economic value. This second exception to *Penn Central* balancing has its own exception in the background principles of common law nuisance and property that help to define the nature and content of private rights in property. Where a particular use of property could have been enjoined through an action in the common law courts, government regulation to the same end is not a taking. In effect, it is said, this creates an affirmative defense for government in takings cases. In the already narrow range of cases to which the total loss of economic value exception would apply, the existence of background principles limiting the property owners rights further narrows the range of cases qualifying as a categorical taking. Not only is the second categorical taking thus reduced to almost nothing, but the background principles are relevant to all takings claims. In what would otherwise be a case calling for *Penn Central* balancing because neither per se taking rule applies, the existence of appropriate background principles will eliminate the need to apply the *Penn Central* test. Because the common law is always evolving to serve contemporary needs, background principles can be understood to include virtually any present day notion of public interest-serving limitations on property use.

Implicit in this argument is the idea that Justice Scalia has unwittingly provided governments with an array of categorical defenses to takings claims while greatly narrowing the range of cases in which property claimants will succeed. The work of three thoughtful scholars, J.B. Ruhl, Michael Blumm, and Lucas Ritchie, illustrates this newly positive perspective on *Lucas* among environmentalists.

J.B. Ruhl, who fairly places himself in the “radical middle” among environmental law scholars,³⁰ argues that the background principles of public nuisance law can be used by courts and legislatures to circumvent takings claims in the context of governmental ecosystem services preservation

28. In *Penn Central* the Court held that, in the absence of a physical occupation of a plaintiff's property, a judicial finding of an unconstitutional taking would depend upon “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . [and] the character of the governmental action.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

29. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

30. J.B. Ruhl, *A Manifesto for the Radical Middle*, 38 IDAHO L. REV. 385, 387 (2002).

schemes.³¹ Ruhl relies on two key principles. One is the “discipline of ecological economics, which . . . has focused on putting an economic price tag on degradation of ecological integrity.”³² The other is the recognition by Justice Scalia in *Lucas* that “[c]hanged circumstances or new knowledge may make what was previously permissible no longer so.”³³ Ruhl’s argument is that because we now know much more about the economic benefits of ecosystem services than we did during the earlier development of nuisance law, courts and legislatures can constrain ecosystem services destruction consistent with historic principles of nuisance law and, thus, without running afoul of the takings clause.

Ruhl not only focuses on insulating ecosystem regulations from takings claims, but also acknowledges the powerful forces of economic development and takes a self-described instrumentalist approach to making ecosystem protection competitive in both public and private decisionmaking.³⁴ While recognizing that many orthodox environmentalists will object to his willingness to put a price tag on environmental protection, Ruhl takes the view that ecosystem services are more likely to be protected if people understand their economic value.³⁵ He also recognizes the cost internalization and information generation benefits of a case-specific process like nuisance litigation, although he does not address the more significant benefits to private market transactions that would result from the clearer and more consistent definition of property rights that inheres in common law nuisance as compared to regulation. At the end of the day, however, Ruhl’s embracing of common law nuisance is as much about expansion of background principles and thus circumventing takings challenges—it is, he says, his “Trojan horse”³⁶—as it is about creating markets where those who value ecosystem services might shop.

While Ruhl focuses exclusively on the background principles of nuisance law for a silver lining to Scalia’s *Lucas* opinion, my colleague Michael Blumm and former Lewis & Clark student Lucas Ritchie concentrate more on the background principles of property law. In the immediate aftermath of the *Lucas* decision, Professor Blumm concluded that “from a property lawyer’s perspective, *Lucas* is a flawed decision because it assumes that property rights amount to development rights.”³⁷ Yet nearly fifteen years later, he and Ritchie see great promise in *Lucas*’s acknowledgement of background principles of

31. J.B. Ruhl, *Making Nuisance Ecological*, 58 CASE WESTERN L. REV. (forthcoming 2008) (manuscript at 4), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931248 (follow one of the download hyperlinks under “SSRN Electronic Paper Collection”).

32. *Id.*

33. *Id.* at 7 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992)).

34. *Id.*

35. *Id.* at 7–8.

36. *Id.* at 28.

37. Blumm, *supra* note 13, at 916. It may be that Professor Blumm’s dim view of the case reflected the fact that he was responding to comments by people who “don’t understand property law.” *Id.* at 907.

property law. Blumm and Ritchie suggest that because nuisance involves “case-specific factual balancing, which is the antithesis of categorical decision making . . . [and is, therefore,] not unlike the multi-factor balancing required by the *Penn Central* takings test,” the categorical principles of property law have received more attention by the courts.³⁸

Blumm and Ritchie’s list of background property principles is long. The list consists of public trust,³⁹ natural use,⁴⁰ navigational servitude,⁴¹ customary rights (including native gathering rights),⁴² various doctrines of water rights law,⁴³ wildlife trust,⁴⁴ Indian treaty rights⁴⁵ and preexisting state and federal

38. Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 367 (2005).

39. *Id.* at 341–43. To date, as evidenced by all of the cases cited by Blumm and Ritchie, expansive interpretations of the common law public trust doctrine have been constrained by a respect for the water-based roots of the doctrine (although within those constraints some states have lost sight of both the doctrine’s historic purposes and geographic boundaries), but the potential for public trust expansion is perceived by many to be almost without limits ever since Professor Sax published his seminal article on the subject in 1970. Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

40. Blumm & Ritchie, *supra* note 38, at 344–46. One might say that the natural use doctrine naturally insulates environmental regulations from takings claims. This doctrine can be problematic because it is based on shaky common law. The doctrine’s most prominent appearance in American law was in *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972). While some have argued that *Lucas* overruled *Just*, see, e.g., *McQueen v. S.C. Coastal Council*, 530 S.E.2d 628, 633 (S.C. 2000), the doctrine holds too much promise to be abandoned on the basis of nothing more than a majority opinion of the United States Supreme Court declaring that regulations “requiring land to be left in its natural state . . . carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992). Blumm and Ritchie claim the doctrine as articulated in *Just* has good common law precedent, but the reality is that most of the cases cited as precedent are, in Blumm’s and Ritchie’s terms, “natural use–like” nuisance cases. Blumm & Ritchie, *supra* note 38, at 345. Blackstone makes no mention of such a doctrine in his *Commentaries on the Common Law*.

41. Blumm & Ritchie, *supra* note 38, at 346–47. The navigational servitude is a federal common law doctrine rooted in Congress’s power to regulate commerce pursuant to Article I, Section 8 of the Constitution. As Justice Scalia made clear in *Lucas*, it is exactly the sort of background principle he had in mind. 505 U.S. at 1028–29. Of course there are ambitions to expand the historic parameters of the navigational servitude both with respect to its purposes and its geographic reach. Congress (with the Supreme Court’s endorsement) has for decades stretched the concept of commerce beyond anything plausibly within the intentions of the Framers, so it will be a simple matter to extend the navigation servitude accordingly.

42. Blumm & Ritchie, *supra* note 38, at 347–50. As Blumm and Ritchie acknowledge, it is not plausible to suggest that the doctrine of custom as interpreted by the Oregon Supreme Court in the case of *Thornton v. Hay*, 462 P.2d 671 (Or. 1969), and as applied in *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), falls within what Justice Scalia meant by background principles. Blumm & Ritchie, *supra* note 38, at 348. Scalia’s forceful dissent to the denial of certiorari in *Stevens* makes that clear. *Id.* at 348–49.

43. *Id.* at 350–52. The various doctrines of state water law referenced by Blumm and Ritchie will help to answer the first question that should be addressed in every takings case: to wit, what are the property rights of the claimant? Although Blumm and Ritchie suggest that the posing of this question is an innovation of the *Lucas* decision, it will be explained that Scalia was merely affirming what should have been the obvious and necessary first question in every takings case. See *infra* discussion accompanying notes 63–80. Two aspects of Blumm and Ritchie’s brief discussion of water rights warrant comment. First, the widespread, often constitutional, assertion by western states of state ownership of water does not necessarily preempt a usufructuary right in water granted by the state.

statutes and constitutions.⁴⁶ Blumm and Ritchie include in their list of background principles additional doctrines acknowledged not to be background principles but thought, nonetheless, to be relevant to Justice Scalia's holding in *Lucas*; namely destruction by necessity,⁴⁷ criminal forfeitures,⁴⁸ and revocable grants to public resources.⁴⁹

Indeed the claim of state ownership might better be understood as a declaration of the public's special and significant interests in water; in the same sense as state declarations of wildlife ownership evidence a strong public interest, but do not mean states own wildlife in a proprietary sense. See *Hughes v. Oklahoma*, 441 U.S. 322, 335 (1979). Second, the reference to "a water-based version of the . . . public trust doctrine," Blumm & Ritchie, *supra* note 38, at 351, is confusing considering that the common law public trust doctrine is exclusively water based.

44. Blumm & Ritchie, *supra* note 38, at 352–53. There is little in the common law to support the idea of a wildlife trust. Blumm and Ritchie dismiss *Hughes* and other Supreme Court decisions declaring state ownership of wildlife to be a fiction as having application only in relation to conflicting federal laws. *Id.* at 352 n.205. Of course state courts and legislatures can declare what they will, but property rights are protected under the Federal Constitution making such declarations of no consequence where vested private rights are thereby taken. It is said by some that the doctrine of state (public) ownership of wildlife has deep roots in the common law, see, e.g., Oliver A. Houck, *Why Do We Protect Endangered Species, And What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 311 n.77 (1995), but persuasive evidence suggests that in both Roman law and English common law wildlife was held by the public only in the sense that it was owned by no one (and therefore everyone) until it was reduced to possession. The capturer of wildlife acquired an exclusive proprietary interest without any reserved or superior interest in the state or public. See, e.g., James L. Huffman, *Speaking of Inconvenient Truths: A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. (forthcoming 2008).

45. Blumm & Ritchie, *supra* note 38, at 354. Treaty rights have nothing to do with the common law, but may be relevant to determining the property rights of the plaintiff in a takings case. See *infra* note 51 on the impact on water rights of treaties between tribes and the United States.

46. Blumm & Ritchie, *supra* note 38, at 354–61. Although Blumm and Ritchie acknowledge that Justice Scalia expressly rejected the notion that preexisting statutory provisions are a bar to takings claims, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992), and that the Supreme Court expressly rejected the same notion in a later case, *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001), they make a protracted argument for why such legislative and constitutional provisions might nonetheless function as a "threshold bar to takings challenges." Blumm & Ritchie, *supra* note 38, at 354. There are persuasive economic reasons to reject the "notice rule"—namely that someone in a chain of title (if not the plaintiff) will have suffered the economic losses resulting from restrictive regulation adopted sometime after first possession. *Id.* But the merits of a taking claim aside, while statutory and constitutional law may be relevant to determining the property rights of a plaintiff, they have nothing to do with background principles referenced by Justice Scalia. *Id.* at 360–61.

47. Blumm & Ritchie, *supra* note 38, at 361–62. The doctrine of necessity is rooted in the common law and is explicitly mentioned by Justice Scalia. *Lucas*, 505 U.S. 1029 n.16. Most law students are baffled by the rule of necessity when they first encounter it, and for good reason if one takes even a slightly libertarian view of American constitutionalism. In the classic context of a raging fire destined to burn an entire city, it will seem to make sense not to compensate for structures purposely destroyed in an effort to stop the fire and save the rest of the city. After all, those structures would have been lost to the fire in any event. But in the case of *Miller v. Schoene*, 276 U.S. 272 (1928), cited by Blumm and Ritchie, *supra* note 38, at 361, that rationale is absent. Only a purely social utilitarian perspective can justify destroying the property of some to protect the property of others thought to have more value to the community without seeing the justice in requiring the community to pay for the destroyed property (that would not have been otherwise lost) from its net gains.

48. Blumm & Ritchie, *supra* note 38, at 362. Though irrelevant to the holding in *Lucas*, certainly there can be no taking claim for property legitimately seized pursuant to criminal forfeiture statutes. The criminal forfeiture cases cited by Blumm and Ritchie suggest that in acquiring property people should

There are several levels on which one might question Blumm's and Ritchie's summary discussions on these topics. Have they accurately described the scope and content of acknowledged common law doctrines? For example, their expansive account of the public trust is at odds with the historical roots of that doctrine.⁵⁰ Does every topic listed by Blumm and Ritchie really qualify as a common law principle? For example the reserved rights doctrine in water law purports to be nothing more than an interpretation of various treaties between the United States government and Indian tribes.⁵¹ And how is it that statutes and constitutions, whether preexisting or not, qualify as background principles of the common law in a legal system that has long distinguished the common law from statutory and constitutional law?⁵²

Although these and other questions relating to the historic understanding of the common law are important, in the interest of space and time I will turn to the overriding theme of common law evolution in Blumm and Ritchie's

take care to assure that the law will permit their use or transportation of the property and should be careful in their selection of co-owners. *See id.*

49. *Id.* at 363–64. Though also irrelevant to the holding in *Lucas*, few will dispute that there can be no taking where the government declines to renew a federal lease or permit. Of course it is a different story if the government cancels a lease or permit before its expiration, unless by its terms the lease or permit is subject to unilateral termination.

50. *See Huffman, supra* note 44.

51. While not a principle of the common law, Indian reserved water rights are relevant to a takings claim involving water rights in the same way as common law principles are relevant to any takings claim. Both may be part of the definition of a property interest claimed to have been taken. As indicated *infra* at discussion accompanying notes 63–66, the determination that a takings claimant actually possesses the right said to be taken should be the first query in every takings case. That is the point of Justice Scalia's reference to background principles. It might also be noted that while fairness and good public policy may have supported the Supreme Court's decision in *Winters v. United States*, 207 U.S. 564 (1908), the claim that these rights had existed from the time of various treaties that made no mention of such rights is as implausible as Professor Ruhl's claim that the common law of nuisance extends to ecosystem services protection or Blumm's and Ritchie's claim that a common law wildlife trust justifies endangered species protection on private property. The point of the takings clause in all of these cases, including Indian water rights, is that government should (and could) compensate affected property owners.

52. It might be suggested that some statutory provisions are principles of the common law to the extent they modify or serve similar purposes as the common law. State statutes govern the property and tort regimes that were once exclusively the concern of the common law courts. The state police power is said to be the source of authority for much of what legislatures do. Often it is said that the police power has been employed to regulate what would be considered nuisances under the common law. But the fact that a state legislature has the authority to declare and regulate nuisances and to alter the property and tort regimes does not make the laws it enacts a part of the common law. Indeed, if everything the state does pursuant to the police power is considered a part of the common law, then there can be no such thing as a regulatory taking if common law limits on property are exempt. Although Justice Scalia insisted background principles "cannot be newly legislated or decreed," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992), Justice Kennedy said, in a concurrence cited by Blumm and Ritchie and other anti-takings theorists, *supra* note 38, at 334, "[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and independent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions . . ." *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). By "prevented," Justice Kennedy clearly meant required to pay for impacts on private property. As indicated *infra* at discussion accompanying notes 128–127, this is a standard, though inaccurate, way of describing the effect of the takings clause.

discussion of property law, as well as in Ruhl's nuisance argument. The historic understanding of the common law matters little if we accept the claims for common law evolution made by Ruhl, Blumm, and Ritchie.

III. THE ANTI-TAKINGS PROJECT

Central to Ruhl, Blumm, and Ritchie's newfound interest in Justice Scalia's background principles is the notion that the principles evolve consistent with the traditions of the common law. After acknowledging that "nuisance doctrine . . . has never been considered as having much at all to do with management of ecological concerns," Ruhl suggests that "nuisance law evolves with changed circumstances and new knowledge."⁵³ Similarly, Blumm and Ritchie recognize that while "Justice Scalia's majority opinion emphasized the value of longstanding concepts of nuisance and property law in the background principles analysis, [he] . . . also acknowledged that 'changed circumstances may make what was previously permissible [for a landowner] no longer so.'"⁵⁴

If it were to be accepted that the common law evolves as these scholars suggest and that Justice Scalia's holding in *Lucas* can fairly be understood to embrace the notion that the common law is almost infinitely malleable at the discretion of any court or legislature, then the ambitions of those who would read the takings clause out of the constitution are finally and fully realized. But the common law cannot be so pliable at the hands of adjudicators and lawmakers or it no longer serves its core purpose: the rule of law. To be sure, legislators have power to alter or repeal the common law through legislation, but they do not, consistent with the rule of law, have power to declare the common law something it is not.⁵⁵ Nor is it plausible to contend that Justice Scalia intended for background principles to include ex post declarations that the law is (and therefore was) what it was not. Justice Scalia is as much a formalist as any Supreme Court justice in the last half century, yet what Ruhl, Blumm, and Ritchie claim for background principles is the antithesis of formalism.

53. Ruhl, *supra* note 31, at 1.

54. Blumm & Ritchie, *supra* note 38, at 343 n.139 (quoting *Lucas*, 505 U.S. at 1031).

55. In the middle ages, statutory and common law were understood to derive from independent sources. As late as the fourteenth century, judges and lawyers looked to legislative and executive authorities to interpret their own statutes. Although that approach had inherent logic, it became impractical with the rise of Parliament and the growth of legislation. Statutory interpretation would later become a task of the common law courts, but the performance of that function did not mean that Parliament became a direct participant in the common law process. Indeed Sir Edward Coke argued that legislation was invalid if in conflict with fundamental law as expounded by common law courts. Although the theory of parliamentary sovereignty prevailed over Coke's view in England, meaning that legislation could override the common law, it was never understood that legislation is part of the common law or that legislating is part of the common law process. See THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 328-41 (5th ed. 1956).

No doubt those who find a cornucopia of defenses to takings challenges in Justice Scalia's reference to background principles take pleasure in hanging their hats on a Scalia opinion, but they surely know he cannot have intended that result. Anyone who has read Justice Scalia's writings on statutory interpretation will know that he has a narrow view of the scope of judicial discretion.⁵⁶ One does not have to look beyond his *Lucas* opinion to get that message. Scalia speculated in *Lucas* that "it seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land," citing a 1911 case for the common law principle that prohibition of the "essential use" of land is rarely allowed.⁵⁷ "Essential use" implied economic development consistent with local patterns of use,⁵⁸ a concept that would appall most environmentalists and be unfamiliar to many a modern judge. Scalia had in mind the common law as it was and not as some might like it to be.⁵⁹ In later opinions, Scalia makes his intentions in *Lucas* clear. His dissent in *Stevens v. City of Cannon Beach* emphasized that, "[o]ur opinion in *Lucas* . . . would be a nullity if anything that a State court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights."⁶⁰ More recently, in defense of the Court's overruling of a state court's interpretation of state law, Justice Scalia concurred in Chief Justice Rehnquist's opinion, drawing an analogy to the takings clause that "would . . . afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights."⁶¹

Despite Justice Scalia's general objective to limit judicial discretion, Blumm and Ritchie characterize background principles as "categorical defenses" to takings claims with the hope of reframing the traditional takings analysis to allow government an early exit without having to defend the imposition of the costs of public benefits on isolated individuals.⁶² While the *Lucas* Court intended to create a second categorical taking that would shift the

56. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998).

57. *Lucas*, 505 U.S. at 1031 (citing *Curtin v. Benson*, 222 U.S. 78, 86 (1911)).

58. In *Curtin v. Benson* the plaintiff was forbidden to drive cattle across public lands to and from his in holdings in Yosemite National Park. In finding for the plaintiff, the Court stated: "the right of appellant to pasture his cattle upon his land and the right of access to it are of the very essence of his proprietorship." *Curtin*, 222 U.S. at 86.

59. Justice Blackmun recognizes this in his dissent, writing that "[t]he Court's references to 'common-law' background principles . . . indicate that legislative determinations do not constitute 'state nuisance and property law' for the Court." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1052 n.15 (1992) (Blackmun, J., dissenting).

60. 510 U.S. 1207, 1334 (1994). To emphasize his point, Scalia quotes from *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967): "a state cannot be permitted to defeat the constitutional prohibition against taking property without due process by the simple device of asserting retroactively that the property it has taken never existed at all." *Stevens*, 510 U.S. at 1334.

61. *Bush v. Gore*, 531 U.S. 98, 115 n.1 (2000).

62. Blumm & Ritchie, *supra* note 38, at 322.

burden to government to justify impositions on private property owners in particularly egregious cases, Blumm and Ritchie's categorical defenses concept shifts the burden back to property owners and thus short circuits established takings analysis. For governments, advocates of regulation unconstrained by property interests, and judges inclined to discount the importance of property rights, the idea of ever-changing categorical defenses will likely have great appeal. But as advanced by Blumm and Ritchie (and more modestly by Ruhl), it distorts the *Lucas* holding and might provide the last few nails in the coffin of constitutionally protected property rights.

The initial error in this way of thinking about takings doctrine rests on the claim that Justice Scalia's background principles are a modification of traditional takings analysis and an exception to the per se rule of *Lucas*. When Justice Scalia referred to "the logically antecedent inquiry into the nature of the owner's estate,"⁶³ Blumm and Ritchie take him to be articulating an entirely new preemptive stage in takings analysis, "a new era of categorical takings jurisprudence."⁶⁴ But to say the determination of a takings claimant's property rights is "logically antecedent" to an assessment of whether or not a taking has occurred is only to recognize there is really no other logical way to analyze a takings case. In suggesting that the Supreme Court is unlikely to reverse the course inadvertently set by Justice Scalia, Blumm and Ritchie assert that "[t]o abandon this threshold inquiry would imply that a takings claimant could prevail on the merits without a protected property right, an implication at odds with over a century of American takings jurisprudence."⁶⁵ Of course they are correct in saying the antecedent inquiry into a claimant's property rights is here to stay, although their suggestion that American takings jurisprudence is clear on this point credits the Supreme Court's takings doctrine with clarity few have divined previously. If there is no property right it cannot be taken. But to suggest that Justice Scalia's welcome clarification of this basic point is somehow a transformation of takings jurisprudence is to read more into it than is there.⁶⁶

Pursuant to *Penn Central's* generally accepted restatement of takings doctrine, the question of whether or not a taking has occurred depends upon the economic impact on the claimant, the extent to which the claimant has investment-backed expectations, and the character of the challenged government action.⁶⁷ This balancing test essentially asks whether a regulation

63. *Lucas*, 505 U.S. at 1027.

64. Blumm & Ritchie, *supra* note 38, at 367. Earlier they summarize the impact of *Lucas* as follows: "In effect, the *Lucas* decision fundamentally revised all takings analysis by making the nature of the landowner's property rights a threshold issue in every takings case." *Id.* at 322.

65. *Id.* at 365.

66. The inclusion of non-common law sources in their list of background principles is an implicit recognition by Blumm and Ritchie that what Scalia was really calling for is a determination of what rights a takings claimant actually possesses. Their explicit objective, however, is to provide justification for uncompensated, ex post redefinition of property rights.

67. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

has gone “too far.” It requires a court to balance the impact on the property owner against the benefits to the public—a balance that will almost invariably go against the property owner who stands alone against a diffuse and numerous public. Justice Scalia’s modest assertion in *Lucas* is that in every takings case, whether subjected to *Penn Central* balancing or categorical analysis, a preliminary question is whether or not a property right exists. This is a logical and necessary query in any property rights dispute.

Had the Court and others with an interest in clarifying takings doctrine paid more heed to Richard Epstein’s 1987 book on takings,⁶⁸ Scalia’s background principles observation would have been redundant. Epstein concludes that the Fifth Amendment requires a court to ask four distinct questions in a takings case: (1) Is there a taking? (2) If so, is there any justification? (3) If not, is there a public use? and (4) If so, has just compensation been paid?⁶⁹ Background principles are only relevant to the first question. There can be no taking unless the claimant actually possesses the right said to be taken. Background principles are not an exception to the requirement of compensation where a taking has in fact occurred. At least since *Mahon*,⁷⁰ the Court has jumbled these four questions into a balancing test. It is thus not surprising that some might fail to ask whether or not the claimant even has a property right to be taken.⁷¹

Illustrative of this failing in recent takings jurisprudence is a case in which the South Carolina Supreme Court twice found no taking where a permit to construct bulkheads and backfill was denied to the owner of a coastal lot on filled but eroding tidal lands. In its first opinion the court held that a history of regulation dating back to the Rivers and Harbors Act of 1899⁷² established that there were no investment-backed expectations, and therefore no taking.⁷³ After granting certiorari, the U.S. Supreme Court vacated and remanded for further

68. RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

69. *Id.* at 31. Epstein reiterates this set of questions in RICHARD A. EPSTEIN, *SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY* 97 (2008).

70. *Pa. Coal v. Mahon*, 260 U.S. 393 (1922).

71. The practical effect of the *Penn Central* balancing test is to make the existence of a property right depend upon the anticipated benefit to the public of the state intervention, the nature of that intervention and the impact of the intervention on the property owner, even taking into account the personal circumstances of the property owner. Rights are, therefore, contingent and not to be determined with simple reference to the rules of property law. Also contributing to a failure to inquire into the nature and scope of asserted legal rights is the widespread trend, inherent in what Bruce Ackerman and Anne Alstott call “the stakeholder society,” to recognize purely political interests as having standing in courts of law. BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999).

72. 33 U.S.C. § 403 (1994).

73. *McQueen v. S.C. Coastal Council (McQueen I)*, 530 S.E. 2d 628 (S.C. 2000), *vacated and remanded by McQueen v. S.C. Dep't of Health & Env'tl. Control (McQueen II)*, 533 U.S. 943 (2001). The court reasoned that from as early as 1899 owners of coastal property were on notice that development might be restricted by government regulation designed to protect coastal resources. *Id.* at 634–35.

consideration⁷⁴ in light of *Palazzolo v. Rhode Island*,⁷⁵ in which the Supreme Court held that a preexisting regulation does not necessarily preempt a taking claim. On remand the South Carolina court reaffirmed its earlier no taking conclusion, this time on the basis that the public trust doctrine precluded the plaintiff from constructing a bulkhead and backfilling.⁷⁶ The court got the right answer, but for the wrong reason. Having failed to protect the lot against erosion over a period of thirty years, plaintiff had simply lost title pursuant to the common law principles of accretion and deliction.⁷⁷ The public trust doctrine had nothing to do with it.⁷⁸

If a consequence of Justice Scalia's background principles reference is that courts are now expected to actually determine the nature and extent of a takings claimant's property rights before asking whether or not there has been a taking, then perhaps it is a bit of a revolution. But the upshot of such a change in takings analysis should not be fewer successful takings claims, as the latter-day background principles devotees suggest.⁷⁹ There hardly could be fewer successful takings claims. The outcome should be, and was likely intended by Justice Scalia to be, a more formalistic approach in takings jurisprudence. Recognition of the relevance of background principles of nuisance and property law is a first step in restoring the rule of law to constitutional takings doctrine. Rather than persist with the notion that property rights are contingent on government officials' balancing of interests (including their own), the background principles inquiry should be the first step (the "logically antecedent inquiry"⁸⁰ in Scalia's terms) in determining what the law commands.

74. *McQueen II*, 533 U.S. 943.

75. 533 U.S. 606, 626 (2001).

76. *McQueen I*, 580 S.E.2d 116.

77. A straightforward analysis of the case would have revealed that the land in question was submerged and tidal (and therefore subject to the public trust) prior to its acquisition by plaintiff. The land was converted to fast land and alienated by the state, making it the private property of the plaintiff and no longer subject to the public trust. Over time the land was accreted to the state as a result of coastal erosion forces. The accreted land was again subject to the public trust, but that is not why the plaintiff's claim failed. The claim failed because the plaintiff no longer held title to the land claimed to have been taken. John Eccheverria, counsel for South Carolina in the second *McQueen* argument, explained in a private conversation that the accretion/deliction argument had not been raised below so they were forced to press the public trust rationale. Interview with Professor John Eccheverria, in Columbia, S.C. (Sept. 21, 2007). But there can be little doubt the prospect of a favorable ruling on the public trust theory was otherwise appealing, so to speak.

78. The public trust doctrine protects certain public uses of submerged and tidal waters. It does not establish state title nor does the existence of the trust depend upon state title. See Huffman, *supra* note 44, at discussion accompanying notes 412-85.

79. Blumm and Ritchie anticipate not only that there will be fewer successful takings claims in the face of the categorical defenses they say arise from *Lucas*, but also that the defense of takings claims will be less costly and time consuming for governments. "[C]ategorical defenses are attractive to government defendants because they can defeat takings claims at early stages of litigation," "without presenting detailed evidence about the public purposes served by the contested law or regulation." Blumm & Ritchie, *supra* note 38, at 322, 367.

80. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992).

Blumm and Ritchie seem to be critical of “nineteenth-century formalism,”⁸¹ although they note, without comment, that courts “seem to” prefer formalism “because [it] . . . involve[s] interpretations of law instead of case-specific factual determinations and difficult balancing based on context.”⁸² Yet later Blumm and Ritchie celebrate the “[f]ormalistic decision making” flowing from their perceived categorical defenses as “allow[ing] judges to decide cases without detailed inquiries into the merits or fairness of the context.”⁸³ Formalism suits them when it operates as categorical defenses to takings claims, but not when it provides some degree of certainty for individuals whose property has been taken.

Indicative of their understanding of property rights as contingent is Blumm’s and Ritchie’s suggestion that Justice Scalia’s “antecedent inquiry” into the property rights of takings claimants is part of the “denominator question.”⁸⁴ Heretofore the denominator problem has been the determination of the relevant geographic scope of a property right.⁸⁵ For example, if regulation precludes all use of 10 acres in a 100 acre parcel, has the property owner lost the use of 100 percent of 10 acres or 10 percent of 100 acres—is the denominator 10 or 100? This becomes a particularly important query under a per se rule making total loss of economic value a taking. For example, does the fact that a regulation takes away the economically viable use of only a portion of the property make it a per se taking of that portion?⁸⁶ As Blumm and Ritchie apply the concept, the numerator will always be zero so long as use-limiting regulations are found to be based upon background principles—there is no loss to the property owner if he or she is denied that to which there is no entitlement.⁸⁷ So by this view, in a world of infinitely malleable background

81. Blumm & Ritchie, *supra* note 38, at 328 & n.35.

82. *Id.* at 322.

83. *Id.* at 368.

84. Blumm & Ritchie, *supra* note 38, at 325.

85. See, e.g., *Loveladies Harbor v. United States*, 28 F.3d 1171, 1180 (Fed. Cir. 1994).

86. Although Judge Plager provided a persuasive argument for finding a partial taking where regulation resulted in a severable portion of a single property having no economic value in *Loveladies*, *id.* at 1181–82, the Supreme Court has continued to rely on the *Penn Central* analysis in partial takings cases. In *Penn Central* the Court stated: “this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978). In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 327 (2002), the Court confirmed “that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on ‘the parcel as a whole.’” The only exception is where property is physically occupied, thus bringing the occupied portion within the per se rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

87. To the extent that takings doctrine requires a determination of what portion of a property’s economic value has been destroyed by regulation, with 100 percent resulting in a per se taking under *Lucas*, the denominator represents the whole of the property and the numerator represents the amount destroyed. Blumm and Ritchie appear to see the denominator as the economic value of the uses to which an owner is entitled, with background principles helping to define those entitlements. Because background principles are changeable at the discretion of the legislature and the courts, use-limiting regulations said to enforce background principles will result in a smaller denominator but a numerator of

principles, a property right signifies only that property may be used for uses currently permitted. It is perfectly plausible for a state to recognize private rights of use in particular resources subject to the state's unbounded discretion to revoke such rights—such property systems are commonplace in other countries, but they are not consistent with the property rights system of Anglo-American history nor are they consistent with the rule of law.⁸⁸

Pro-regulation supporters will likely claim that regulatory limits on property rights are based on established principles of common law nuisance and property rather than unconstrained government discretion. This approach is troubling from a rule of law perspective. Unlike the broad nuisance exception of *Keystone* and *Mugler*,⁸⁹ “the *Lucas* defense is not limited to harm-preventing nuisance restrictions. Instead, the background principles defense potentially applies to any use-limiting regulation, regardless of whether or not it prevents a statutory or common law nuisance.”⁹⁰ Yet the background principles are supposed to derive from the common law.

What Justice Scalia said about background principles is this:

Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.⁹¹

zero. Indeed the numerator will remain at zero no matter how small the denominator becomes. For example, assume that pre-regulation an owner is entitled to 100 percent of the economic use of his property valued at \$100. The denominator is thus 100 and the numerator is zero since there is no value lost to regulation. If a regulation limits use to 10 percent of the property's economic value, the denominator will be reduced to \$10, but the numerator will remain zero because regulations enacted in the name of background principles take nothing from the property owner. He still has 100 percent of what his property rights entitle him to.

88. Blumm and Ritchie contend, in effect, that this is, in fact, the American system. In discussing constitutional provisions as background principles they reference several constitutional declarations of specific and general public interests in resources as background principles that can serve as defenses to takings claims. Blumm & Ritchie, *supra* note 38, at 359–60. For example they cite Article IX of the Hawaii Constitution, which provides:

[F]or the benefit of present and future generations, the State and its political subdivisions shall protect and conserve Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

HAW. CONST. art. XI, § 1. There is no limit on property rights that could not be said to come within this broad declaration and thereby immunize a takings claim.

89. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Mugler v. Kansas*, 123 U.S. 623 (1887) The legislative prohibitions on liquor production in *Mugler* and removal of surface estate support in *Keystone* were said to prevent harms that are public nuisances. Affirmative benefits like ecosystem services and endangered species habitat have no relation to established understanding of common law nuisance.

90. Blumm & Ritchie, *supra* note 38, at 333.

91. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

In the broad context of takings jurisprudence, Justice Scalia was recognizing a second categorical taking in addition to that applying to physical occupation of private property. In good lawyerly fashion, Scalia was also acknowledging the possibility that private property might have been acquired, and therefore might be held, subject to limitations that in some cases could preclude all economically beneficial use.⁹² In such cases the property owner has no legal complaint since the limitation inheres in the title. When property is acquired, the purchaser is well advised to do a title search to confirm any existing easements or other encumbrances. If no title search is conducted and one purchases without knowledge of a neighbor's or a public easement, there is no legal remedy for the resulting disappointment when the easement is used. Scalia's point about background principles was nothing more than a reminder that private title is also limited by long-established nuisance and property rules that help define and protect correlative private and public rights. Just as a prospective purchaser of property will want to confirm that the seller actually has the rights he is offering for sale, Justice Scalia would have the courts confirm that takings plaintiffs have the rights they claim have been taken by government regulation. In eminent domain proceedings every responsible government will confirm that claimants actually own the property taken. Justice Scalia merely states the obvious—that the same should be true in regulatory takings cases.

IV. EVOLUTION OF THE COMMON LAW

There is nothing innovative or surprising about Justice Scalia's reference to background principles of common law nuisance and property. What is new in the background principles discussion is the suggestion by Ruhl, Blumm, and Ritchie and many others that these background principles are almost infinitely malleable at the discretion of courts and legislatures. These scholars rely on two separate statements by Scalia in *Lucas*: (1) acknowledgement that "changed circumstances or new knowledge may make what was previously permissible no longer so,"⁹³ and (2) a footnote statement that "an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found."⁹⁴ Blumm and Ritchie rely upon these two narrow caveats—both general assumptions that property rights will be what they appeared to be when

92. It is not improbable that one would purchase property for value knowing that a court might later declare that common law principle precludes any economic use. The purchaser could value the property for its nonrevenue generating values like exclusion, scenic beauty or solitude. Or the purchaser might take a calculated risk that an economic use will be permitted, presumably having discounted the purchase price based on the probability of use. As an example of the latter, Scalia suggests the case of a nuclear power plant prohibited from operating when found to be located on an earthquake fault. *Id.*

93. *Id.* at 1031 (referencing RESTATEMENT (SECOND) OF TORTS § 827 (1979)).

94. *Id.* at 1032 n.18.

property was acquired—to justify virtually all regulation as consistent with the takings clause.⁹⁵ This interpretation is surely not what Justice Scalia intended,⁹⁶ nor is it consistent with the historic understanding of common law evolution.

A. *Public Policy and the Common Law*

One argument put forth in favor of flexible and expansive background principles is the idea that the common law is a source of public policy. Oliver Wendell Holmes, one of America's most influential commentators on the common law, did emphasize that the common law is rooted in policy as well as precedent.⁹⁷ But the policy of the common law is a reflection of customary practices evidenced in precedent, not an independent expression of judicial will. When Holmes wrote that the law draws from "considerations of what is expedient for the community," he was not suggesting that common law judges independently assess the good of the community and adjust the law to promote that end.⁹⁸ Rather he was recognizing that what is expedient for the community is reflected in what people have chosen to do. An understanding of real life on the ground, so to speak, allowed judges to fill gaps in the common law consistent with contemporary custom and behavior. The common law was thus not frozen in time, rather it followed the evolution of social practice and norms—not as imagined or wished for by the judge, but as evidenced by the life of the community. James Willard Hurst's instrumentalist approach to legal history derived from this understanding of legal development.⁹⁹ The historical development of the common law is not driven by judicial opinions, but is a grass-roots, bottom-up, demand-driven expression of what is expedient for the community.¹⁰⁰

95. Blumm and Ritchie contend, for example, that virtually all wetlands regulations are exempt under *Lucas's* background principles.

Cases concluding that denial of a permit to dredge and fill a wetland worked a compensable taking do not seem consistent with *Lucas's* definition of nuisance as any harm "to public lands and resources, or adjacent private property, posed by the claimant's proposed activities." In almost all situations, the filling of a wetland produces harm to public and private lands adjacent to the filled site and beyond.

Blumm & Ritchie, *supra* note 38, at 337 (quoting *Lucas*, 505 U.S. at 1030–31).

96. Justice Scalia prefaced his statements about possible changes in the common law by noting that "[t]he fact that a particular use has long been engaged in by similarly situated owners" and "the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant" "ordinarily imports a lack of any common-law prohibition." *Lucas*, 505 U.S. at 1031.

97. OLIVER WENDELL HOLMES, *THE COMMON LAW* 32 (1881)

98. *Id.*

99. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950); *see also* JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956).

100. The view that judges and legislators are free to amend and even repeal common law rules with an eye to purposes not reflected in custom and precedent takes the instrumentalist explanation of legal history to be a justification for prospective instrumentalism by judges in response to their own or a

For centuries both individuals and governments have looked to judges to discover and articulate the common law. This deference to judges has always been retrospective—that is, judges are expected to say what the law was at a particular point in time, not what it should have been or how it should be in light of one or another public purpose. Public policy has always been understood to be the responsibility of the legislative and executive authorities of the state.¹⁰¹ This separation of governmental powers is essential to the maintenance of the rule of law.

Legal realists might suggest that it is naive to assert that judges discover and articulate the law. Like all humans, judges cannot divorce themselves from their past, their interests and their associations. But it is precisely this realist recognition that makes respect for the limited role of judges and the constraints of the common law so important to maintenance of the rule of law. Because they are people too, judges must take pains to understand and respect their limited role.¹⁰² Those who invite judges to amend and adapt the common law to satisfy changing perceptions of the public good would have us abandon the rule of law in favor of the rule of generally well-motivated but, as the realists remind us, unavoidably self-interested men and women. That is one way to go about the governance of society, but it is not the way of the common law.

The genius of the common law rests in its derivation from the customs and practices of everyday life, not in the creativity of judges. This does not mean that judges have been unimportant to the common law. To the contrary, they have had to be keen observers of society with an ability to extract the truth from evidence provided by interested parties. But judges are meant to resolve disputes with reference to the law, rather than with an eye to privilege, interest, or influence. Sometimes that is a straight-forward task, in which case there is unlikely to be any disagreement sufficient to involve a court, but sometimes the law or its application to a particular case is not clear. We might say it is fiction in such circumstances to insist that the judges discover rather than make the law. But once we accept that judges make the law, we have abandoned the rule

litigant's notion of good public policy. Although there are certainly examples of judges using their power in this way, in the vast majority of cases common law judges were not themselves the instrumentalists. They were simply responding to, in a sense reporting on, the instrumentalism of the communities they serve. That is why good legal historians of the instrumentalist school spend most of their time in the musty archives of county courthouses and other depositories of grass roots legal record.

101. "In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law." MONTESQUIEU, *SPIRIT OF LAWS*, bk. 11, ch. 6 (1748), *reprinted in* 1 *THE FOUNDERS' CONSTITUTION* 625 (Philip B. Kurland & Ralph Lerner eds., 1987).

102. Judge Richard Posner, a leading advocate of judicial lawmaking in the name of pragmatism, nonetheless says it is important for judges to cover their law and policymaking tracks with traditional legal arguments rooted in precedent. RICHARD POSNER, *LAW PRAGMATISM AND DEMOCRACY* (2003). That judges may sometimes actually do what Posner recommends is not surprising. But that Judge Posner would urge such clandestine pragmatism as a judicial philosophy should be more than troubling to those who value the rule of law.

of law.¹⁰³ Where the law governing a particular case is unclear, there is a critical difference between the judge who seeks to fill the gap with reference to the law and the judge who resolves the matter with reference to his or her perception of good public policy.¹⁰⁴

No doubt there is some lawmaking in either case, but in the common law tradition the lawmaking inherent in gap filling requires restraint and humility. The judge's duty and challenge is to estimate what the law would have been had the matter at hand been anticipated in advance. Those who would have judges adapt the common law to the perceived needs of present day or future society, even where there are no gaps to be filled, would require judges to adopt the attitude of legislators. Not only would such judges step outside the judicial role, but they also would intrude upon the legislative function, thereby circumventing whatever constraints the law, including the constitution, may place on the legislative process. Individual liberties, including property rights, will be compromised when the rule of law is thus ignored by the courts.¹⁰⁵

B. *Restrictions on the Use of Nuisance Law*

Illustrative of the view that courts should rely on nuisance doctrine to influence public policy are two recent actions in federal court asserting that global climate change is a nuisance for which power generators¹⁰⁶ and automobile manufacturers¹⁰⁷ should be found liable. In both cases the federal district court held that the cases were nonjusticiable under the political question doctrine. While these holdings are directly rooted in federal constitutional separation of powers doctrine, they are ultimately grounded in a common law understanding of the legitimate role of the courts relative to the legislative and executive functions of government. In dismissing the most recent of the two cases, the judge stated that adjudicating “[p]laintiff’s claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development.”¹⁰⁸ This is precisely what a nuisance claim for loss of ecosystem

103. “It can be of no weight to say that the courts . . . may substitute their own pleasure to the constitutional intentions of the legislature. . . . The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGEMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.” THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

104. “Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.” *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824).

105. “For I agree that ‘there is no liberty, if the power of judging be not separated from the legislative and executive powers.’” THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 103, at 523.

106. *Connecticut v. Am. Elec. Power Co., Inc.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (dismissed).

107. *California v. Gen. Motors Corp.*, No. C06-05755, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007) (dismissed).

108. *Id.* at *23–24.

services would require of a court. Whether pursuant to the political question doctrine of federal constitutional law or an understanding of the legitimate role of the courts in a rule of law system, such claims are not properly justiciable.

Cases exist in which courts have explained explicit changes in the common law with reference to public policy. But such examples neither reflect the traditions of the common law nor justify future changes. What they do represent is what Douglas Whitman has labeled a “supply-side” view of the common law.¹⁰⁹ Supply-siders, like Ruhl, Blumm, and Ritchie, see the common law in terms of the preferences of those who make the law, namely judges, who are in turn influenced by those who petition the courts to amend the law to suit their policy preferences. As Todd Zywicki has stated it, supply-siders believe “the purpose of law is . . . to satisfy articulated social goals, whether economic, social, or moral.”¹¹⁰ Demand-siders, on the other hand, view the common law as a reflection of the behavior and expectations of potential, as opposed to current, litigants. By this view, the judge’s task is to explicate the law as it would most probably have been understood by the litigants faced with the possibility but not the reality of disagreement. This demand-side view provides a far more accurate account of the long history of the common law.¹¹¹

The common law is a formalization of custom, meant to evolve as custom evolves, not as judges’ preferences change. Justice Benjamin Cardozo, a pragmatist like Holmes, argued that the rule of precedent “ought to be in some degree relaxed,” but only “when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants.”¹¹² Cardozo was

109. “Supply-side models . . . explain the evolution of legal rules primarily in terms of the preferences and behavior of the makers of law, judges.” “[D]emand-side models,” on the other hand, “explain the evolution of legal rules primarily in terms of the behavior of potential litigants, whose actions are driven in part by the efficiency and other properties of the legal rules that affect them.” Douglas G. Whitman, *Evolution of the Common Law and the Emergence of Compromise*, 29 J. LEGAL STUD. 753, 775–76 (2000). On the demand-side theory of common law evolution see, for example, Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL. STUD. 51 (1977); see also George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL. STUD. 65 (1977).

110. Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 Nw. U. L. REV. 1551, 1629 (2003).

111. “The common law judge’s responsibilities are different from the duties that legal realists assign judges, namely to create the efficient or just policy. Instead, the judge is little more than an expert trained in articulating the tacit beliefs and expectations that undergird the ongoing order of the community.” Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 991 (1996) [hereinafter Zywicki, *A Unanimity-Reinforcing Model of Efficiency*].

112. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 150, 151 (1921). Cardozo went on to quote with approval a concurring opinion in *Dwy v. Connecticut Co.*, 89 Conn. 74, 99 (1915), arguing

[t]hat court best serves the law which recognizes that the rules of law which grew up in a remote generation may, in the fullness of experience, be found to serve another generation badly, and which discards the old rule when it finds that another rule of law represents what

surely correct in this view. If precedent is followed without exception, the common law will have frozen custom in time. But if precedent is disregarded without respect for settled expectations, the social and private benefits of custom and the rule of law will be lost.

The common law can evolve to provide remedies for injuries not imagined a century or even a decade ago, while at the same time respecting the rule of law. Few would question that runoff from the impermeable surface of a neighbor's parking lot is as much an injury under common law principles as is the runoff from a neighbor's diversion of water to create more arable farmland. In both cases all parties would have reasonably understood the established common law principles to preclude actions leading to such runoff, even if the former case was the first involving a paved parking lot. In other words, recognizing a common law remedy in the parking lot case affirms the existing allocation of resources and distribution of property rights inherent in the earlier wetlands draining case. But asserting that destruction of ecosystem services constitutes a nuisance turns a legally uncognizable claim into an injury for which damages or injunctive relief is available. Unlike the runoff example where the injury of excess water remains actionable though the cause of the injury has changed, the ecosystem services case would provide a remedy for impacts that were not previously understood to be actionable injuries. Where changed values or new understandings lead one party to desire that ongoing impacts from the use of the property of others be curtailed, the parties may alter the allocation of resources by contractual agreement. As suggested by Zywicki,¹¹³ only when such contractual or informal adjustments become the norm would the underlying assignment of rights be properly shifted by a common law court.

The same analysis should apply to background principles of property law like the public trust doctrine. It is clear that grantees of submerged and tidal lands hold those lands subject to the public's right to navigate and fish in overlying and adjacent waters.¹¹⁴ This is as true for the grantee who uses the land as a second home as for the grantee who uses it as a base for commercial fishing. But a claim that riparian landowners must provide access across granted lands or that barriers against riparian erosion are precluded (by a public right for the coastline to migrate as it would without human interference) is to reassign established rights by judicial or legislative dictate.¹¹⁵

should be according to the established and settled judgment of society, *and no considerable property rights have become vested in reliance upon the old rule.*

Id. (emphasis added).

113. See Zywicki, *A Unanimity-Reinforcing Model of Efficiency*, *supra* note 111.

114. See Huffman, *supra* note 44, at discussion following note 478.

115. That the latter (barriers against riparian erosion are precluded) is a reassignment of rights is made manifest by the fact that a grant of submerged or tidal lands clearly allowed for the filling of those lands when the grant was made. Indeed the grant would have been worthless without a right to fill and to armor against the ocean's persistent intrusions. See Huffman, *supra* note 44, at discussion following note 372 (discussing *Appleby v. City of New York*, 271 U.S. 364 (1926). The grants of submerged lands

It is true that the assignment of rights is somewhat less certain in the case of public nuisance law, but even there it is not difficult to recognize when a court has altered settled expectations contrary to the rule of law. Although a public nuisance is said to be “an unreasonable interference with a right common to the general public,”¹¹⁶ it is rare to find cases in which public rights are found to be violated by commonplace activities that are important to the local culture and economy. As local circumstances change over time, what constitutes “unreasonable interference” may change to reflect local custom and practice, but not in response to abstract arguments of reasonableness and good public policy. Practice and custom, not public policy analysis, are the common law evidence of reasonableness. For example, where local economies were dependant upon water power for the operation of mills, it was unreasonable and therefore a public nuisance for the natural flow to be significantly altered. But where local economies are dependant on irrigation during dry months, diversion and retention of natural flows is considered a reasonable use.¹¹⁷ The same variation in reasonableness can be seen in the appropriation doctrine that recognizes as beneficial those uses important to the local economy. This recognition might change over time, but only in response to changes in the local economy, not because a judge thought the local community would be better off with a different rule.

The common law does evolve, and change is inherent in evolution, but not all change is evolutionary. When statutory enactments displace the common law, the change is not evolutionary in the sense of being part of the common law process. Such legislative interventions may be legitimate exercises of state power, but describing them as aspects of common law evolution distorts centuries of common law history and tradition. Also interfering with the common law process are judicial changes that have no grounding in custom and practice. Change does not equate with evolution, and some change that is otherwise part of the common law process may be prohibited by constitutional limitations. Indeed, the federal and state constitutions are interventions in the common law. While embracing the ongoing authority of the common law, they also constrain both its future evolution and some interventions that would alter established common law rights. Among those constitutional constraints on changes to the common law are the Fifth Amendment takings clause and parallel state constitutional protections of private property. In other words, judicial alterations of common law property rights that would have been

to Appleby and hundreds of others had the undisputed purpose of providing for the private construction of docks and harbor facilities on fill.

116. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

117. By way of comparison, see *Buddington v. Bradley*, 10 Conn. 213 (1834) (holding that a riparian property owner in Connecticut has a “right to the use of the water which flows in the stream adjacent to his land, as it was wont to flow, without diminution or alteration”) and *Suffolk Gold Mining & Milling Co. v. San Miguel Consolodated Mining & Milling Co.*, 48 P. 828, 830 (Colo. Ct. App. 1897) (confirming that “a diversion . . . [is] essential to the completion of a title to water”).

consistent with the common law process in the preconstitutional era may result in unconstitutional takings today.

V. COURTS APPROACHES TO THE COMMON LAW

Shortly after the *Lucas* decision was announced, Frank Michelman published his version of what he thought the South Carolina Supreme Court opinion should be on remand.¹¹⁸ He concluded his “jurisprudence of principles” opinion with the following:

As Justice Scalia wrote in his opinion in this very case, the law of nuisance contains the principle that “changed circumstances or new knowledge may make what was previously permissible no longer so.” This capacity of the common law—the “background” law—to extend itself to new conditions is today, and has long been understood to be, an integral part of this State’s background principles of property law. As such it enters into and inheres in all property titles claiming recognition under our law, including the titles acquired by Mr. Lucas. Case dismissed.¹¹⁹

Michelman thus anticipated the background principles arguments of Ruhl, Blumm, and Ritchie. Michelman suggested that Scalia’s opinion in *Lucas* effectively put the matter into the hands of state courts, and he observed with satisfaction that “[j]udicial conservatives . . . do not control the judiciaries in all of the States.”¹²⁰ So it seems that the “jurisprudence of principles” will only be recognized by judicial liberals. Blumm and Ritchie report that some, presumably liberal, state courts have already adopted Michelman’s jurisprudence of principles.¹²¹ What are these principles that conservative courts will fail to recognize? They are, says Michelman “adaptive and evolving principles . . . including [those] of public trust and social responsibility.”¹²² Is this because conservative judges know little of public trust and social responsibility? Or is it because conservative courts are blinded by a bias for free markets and private profit? What Michelman recommends is better labeled a jurisprudence of politics. A jurisprudence of principles warrants the title only if it can transcend the inevitable coming and going of liberal and conservative judges.

Michelman, further adds that state judiciaries may vary their outcomes according to political pressures “hostile to beefed-up constitutional protection for property, or . . . by desires to help minimize their States’ exposures to

118. Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 316 (1993).

119. *Id.* at 316.

120. *Id.* at 317.

121. Blumm & Ritchie cite numerous examples of state court decisions relying on asserted background principles of common law nuisance and property. Blumm & Ritchie, *supra* note 38, at 341–58.

122. Michelman, *supra* note 118, at 317.

regulatory-takings liabilities.”¹²³ Michelman characterizes the jurisprudence of principles argument as

deployable by any moderately capable state judge to justify uncompensated imposition of any state regulatory restriction of land use that passes the basic due process test of rational relation to a legitimate state goal—no matter how confiscatory the regulation’s impact and no matter how sharply deviant from past practice some may find it.¹²⁴

Michelman thus sees great promise in relying on “jurisprudence principles.”

What Michelman urged in 1993, and Ruhl, Blumm, and Ritchie have elaborated on recently, might be called judicial pragmatism or a jurisprudence of political progressivism, but not a jurisprudence of principles. Principles do not adapt and evolve. Principles are, by definition, foundational and unchanging—deriving from the Latin *principium* meaning beginning, origin, basis. Changing circumstances and new knowledge may require reconsideration of what adherence to particular principles requires, or may even lead to the abandonment of old principles and the adoption of new ones. But the latter task is not one for the courts, particularly courts sworn to uphold the higher principles of the constitution.

Michelman’s main purpose was to “minimize . . . States’ exposures to regulatory-takings liabilities.”¹²⁵ That is what Ruhl, Blumm, and Ritchie seek to accomplish as well. There is a good chance that this takings avoidance strategy will be successful. It will certainly succeed in at least some of the states. But it should not be allowed to succeed under the principle of an evolving common law. It is accurate to say, as Justice Scalia did in *Lucas*, that the common law of nuisance and property help to define the content and scope of many property rights. However, it is a distortion of the common law process to suggest that state courts and legislatures can modify or abandon established common law principles in the name of present day notions of the public interest and public rights.¹²⁶

123. *Id.* at 317.

124. *Id.* at 317–18.

125. *Id.* at 317.

126. An unsettled question is to what extent the takings clause applies to the courts. It is widely assumed that the courts are exempt, an assumption that greatly fortifies latter day advocates of background principles defenses in takings cases. But as Barton Thompson has demonstrated, Supreme Court case law does not fully settle the matter, and the case for the courts being exempt is not very persuasive. Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1527–29 (1990). If the point of the takings clause is to prevent government from imposing the costs of public benefits on a few property owners, there is no plausible explanation for the prohibition applying only to the legislature and executive. Of course, if one really believes the courts are exempt, there would be no need to insist that judicial declarations of changes in the common law mean that a claimed property right never existed in the first place.

CONCLUSION

Takings clauses were included in federal and state constitutions in anticipation of precisely such changes in public policy affecting private property rights.¹²⁷ The purpose was not to prevent policy change. The purpose was to require government to pay, on behalf of the beneficiaries of government action, the costs borne by affected individuals.¹²⁸ It has been a persistent strategy of pro-regulation interests to insist that “beefed up” enforcement of the takings clause precludes government from fulfilling its mission. This is not the case. If government has authority to pursue ends that incidentally take private property, enforcement of the takings clause does not prevent the desired government action. Rather it only requires the government to compensate affected property owners. Sometimes that will happen in the form of reciprocal advantages,¹²⁹ but where the costs are imposed on one or a few individuals, compensation is due. Governments and their interest group-enablers will inevitably plead that compensation cannot be afforded by cash strapped governments.¹³⁰ But government does find money for a multitude of other projects, including billions for political pork. It is true that many local

127. Illustrative of the late-eighteenth and early-nineteenth century understanding of takings clauses is this statement from *Lindsay v. East Bay Street Commissioners*: “the right of property is held under the constitution, and not at the will of the legislature. In what way, then, does the common law authorize the power of taking private property for public uses? ‘by providing,’ says Mr. Blackstone, ‘a full indemnification for it.’” 2 S.C.L. (2 Bay) 38 (S.C. 1796) (Waties, J., concurring).

128. This speaks to the purpose of the compensation requirement. The public use requirement has the quite different purpose of assuring that governments’ powers are not used to feather the nests of those who govern or of their friends. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (“A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”).

129. The concept of reciprocal advantages derives from Justice Holmes’ opinion in *Mahon* that there is no taking where there is “reciprocity of advantage” among those regulated. *Pa. Coal v. Mahon*, 260 U.S. 393, 415 (1922). Richard Epstein would later clarify that in such cases there has been a taking but the reciprocal advantages serve as implicit compensation. EPSTEIN, *supra* note 68, at 195–99. Holmes first used the term in an earlier case the same term. *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922).

130. Illustrative of this argument is the response to Oregon’s Measure 37 (OR. REV. STAT. § 197.352 (2005)), which requires the government either to compensate for regulation-induced losses in property values or to waive the offending regulation. As of October 26, 2006, only a single case out of over 7500 pending and settled claims has resulted in compensation. Matthew Preusch, *Prineville Offers Measure 37 Pay*, PORTLAND OREGONIAN, Oct. 26, 2006, at A1 (describing only one payment offer to date, which was rejected by the owners). An up to date registry of claims is available at Oregon.gov, Measure 37, <http://www.oregon.gov/DAS/SSD/Risk/M37Registry.shtml> (last visited Apr. 3, 2008). In fact, the presumption that government cannot afford to pay is so pervasive and strong that very little attention has been paid to assessing the validity of claims in terms of their alleged dollar value. The unsubstantiated assertion that Measure 37 compensation claims will bankrupt the Oregon government has played a significant role in the legislature’s referring to the voters a measure (Measure 49) that would significantly limit the impact of Measure 37. Oregon voters approved Measure 49 on November 6, 2007. OREGON SECRETARY OF STATE ELECTIONS DIVISION, NOVEMBER 6, 2007, SPECIAL ELECTION RESULTS, <http://www.sos.state.or.us/elections/nov62007/>. For a distinctly anti-Measure 37 account of the history and implementation of the two measures, see Michael C. Blumm & Erik Grafe, *Enacting Libertarian Property: Oregon’s Measure 37 and its Implications*, 85 DENV. U. L. REV. 279 (2007).

governments are strapped for revenue, but there is no more reason to accept that they should be allowed to provide environmental amenities by taking private property without compensation than that they should be allowed to build public highways without paying for the asphalt.

At the end of the day, the takings issue is an aspect of a much bigger question, to wit: What kind of society does our Constitution help establish and preserve? The latter-day common law advocates who look to background principles as justification for virtually all uncompensated takings of private property envision a purely utilitarian society in which individual rights may be sacrificed to their perception of the greater public good.¹³¹ That is a vision often implemented in other countries where constitutional rights are contingent on the government's discretion to override them in the interests of the state. It is not a vision consistent with a serious commitment to individual liberty and the rule of law. The common law has long limited the scope of private property rights in the name of the public good. Those limits are defined, as they must be for rights to have meaning, in relation to fixed principles. The application of those principles—the rules of common law nuisance and property—has been “forged in the slow fire of the centuries.”¹³² An early twenty-first century bonfire from which will emerge new rules never imagined by owners of private property is not in the common law tradition. And it most assuredly is not what Justice Scalia had in mind when he penned “background principles” into his *Lucas* opinion.

131. Most of those looking to background principles of common law nuisance and property will be quick to explain that their utilitarianism does not justify similar government discretion in the context of civil and political liberties. This distinction between civil and political liberties on the one hand and economic liberties on the other has considerable support in Supreme Court case law, but no foundation in the founding history or the language of the constitution. As Justice Stewart wrote in *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972):

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a “personal” right, whether the “property” in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

132. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 220 (1890).

