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## Background Principles, Takings, and Libertarian Property: A Reply to Professor Huffman

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*One of the principal, if unexpected, results of the Supreme Court's 1992 decision in Lucas v. South Carolina Coastal Commission is the rise of background principles of property and nuisance law as a categorical defense to takings claims. Our writings on the background principles defense have provoked Professor James Huffman, a devoted advocate for an expanded use of regulatory takings to protect landowner development rights, to mistakenly charge us with arguing for the use of common law principles to circumvent the rule of law, Supreme Court intent, and the takings clause. Actually, ours was not a normative brief at all, but instead a positivistic explanation of takings cases in the lower courts since Lucas, which include judicial recognition of statutory background principles. In this Article, we respond to Huffman, examining the continuing importance of the background principles defense and explaining the trouble with his vision of libertarian property and his peculiar notion of the rule of law. We focus especially on wetlands regulation, which Huffman thinks is a recent development when in fact its origins date to medieval England, and therefore is particularly suited to the background principles defense. We conclude that background principles, as "the logically antecedent inquiry" into the nature of a claimant's property interest, are now a permanent feature of the takings landscape.*

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## INTRODUCTION

One of the surprising results of the Supreme Court’s 1992 decision in *Lucas v. South Carolina Coastal Commission*,<sup>1</sup> which established a categorical rule awarding constitutional compensation to landowners suffering complete economic wipeouts from government regulation, was that the categorical rule turned out to be far less consequential than the exception the Court established for “background principles” of property and nuisance law. This exception provided the government with a defense against numerous takings claims.<sup>2</sup> Over the last two decades, many courts have employed the “background principles” defense to uphold government regulations accused of working unconstitutional losses of property rights.<sup>3</sup> The fact that the author of the *Lucas* opinion, Justice

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

2. *Id.* at 1029 (stating that regulations that mirror background principles “inhere in the title itself,” and therefore do not work takings, even if they prohibit all economically beneficial uses).

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

Antonin Scalia, may not have intended this result is perhaps a leading example of the law of unintended consequences.<sup>4</sup>

The proliferation of background principles capable of defeating takings claims has disturbed libertarian property advocates, who call for increased reliance on the Constitution's takings clause to restrain regulatory controls.<sup>5</sup> One of the leading advocates of the libertarian perspective on property is our friend and colleague, Professor Jim Huffman.<sup>6</sup> Huffman has taken both of us to task for writing on the subject of background principles, although his criticism of our work varies over a couple of articles.<sup>7</sup> We agree with him that the incorporation of the concept of ecosystem services into the common law of nuisance may not be smooth or uncomplicated, and that there are questions concerning the evolution of the common law,<sup>8</sup> which we explore at length in *Making Nuisance Ecological*.<sup>9</sup> However, we think most of his criticism is misguided, and we want to use this space to respond, explaining why Huffman's libertarian perspective on property is ill-suited to the complexities of the twenty-first century, and why background principles will remain central to takings jurisprudence in the future.

Our response develops through three sections of analysis, each divided into several Parts. The first section lays out the broad themes over which Huffman and we differ. Within this section of analysis, Part I of this Article illustrates the disconnect in Huffman's normative critique of our positivistic work. Part II portrays Huffman's libertarian notion of property and its faults. Part III responds to Huffman's erroneous claim that background principles do not include statutes or constitutional provisions.

To ground those fundamentals in practical application, the second section of analysis works through discrete categories of background principles to illuminate Huffman's flawed and incomplete conception of

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4. See *id.* at 322. The phenomenon of unintended consequences in law is so common it has been elevated to the status of a "law" itself. As one author observes: "There is something called the 'Law of Unintended Consequences.' Who enacted this law, who enforces it, and its exact scope are obscure. However, from time to time it manifests itself . . ." A.A. Sommer, Jr., *The Role of State Law in an Era of Federal Preemption: Preempting Unintended Consequences*, 60 LAW & CONTEMP. PROBS. 231, 231 (1997).

5. The most prominent example of this use of the takings clause is in RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

6. See James L. Huffman, *A Coherent Takings Theory At Last: Comments on Richard Epstein's "Takings: Private Property and the Power of Eminent Domain"*, 17 ENVTL. L. 153 (1986) (laudatory review of EPSTEIN, *supra* note 5).

7. See James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years after Lucas*, 35 ECOLOGY L.Q. 1 (2008) [hereinafter Huffman, *Background Principles*]; James L. Huffman, *Beware of Greens in Praise of the Common Law*, 58 CASE W. RES. L. REV. 813 (2008) [hereinafter Huffman, *Beware of Greens*].

8. See Huffman, *Beware of Greens*, *supra* note 7, at 831–36.

9. See J.B. Ruhl, *Making Nuisance Ecological*, 58 CASE W. RES. L. REV. 753, 764–80 (2008) [hereinafter Ruhl, *Making Nuisance Ecological*].

history and the common law. Using wetlands as its environmental medium, Part IV provides a probing history of the common law of nuisance and the evolution of its background principles from the twelfth century through modern times, showing that Huffman's position cannot withstand scrutiny under the factual record. In less detail, but with no less a conclusive result, Part V explains the role of the public trust doctrine, state ownership of wildlife, and customary rights as background principles.

From there, the third section of analysis addresses remaining questions we have with Huffman's account of background principles. Part VI examines Huffman's peculiar conception of the "rule of law," a curious erection of stasis that professes that some legal changes (but not others) violate the takings clause. Part VII explains the inevitable role and continuing importance of background principles in takings analysis. The Article concludes that Professor Huffman's attempt to create a vision of property that was rejected nearly a century ago does not warrant a judicial revival in the twenty-first century, although he seems interested in pursuing a political revival.

#### I. HUFFMAN'S MISGUIDED NORMATIVE CRITIQUE

We explained the rise of background principles in takings analysis and the role of nuisance in particular in previous articles, to which Professor Huffman responded. Huffman's *Background Principles and the Rule of Law* claims that background principles, or at least our understanding of them, are inconsistent with his vision of the rule of law and the takings clause and are a distortion of Justice Scalia's intent.<sup>10</sup> An ensuing piece, *Beware of Greens in Praise of Common Law*, criticizes Professor Ruhl's suggestion that the background principle of nuisance law is capable of accounting for ecosystem services as part of the takings calculation, something Huffman considers to be tantamount to judicial legislation.<sup>11</sup> He bases these assertions on his belief that we argue background principles should be "almost infinitely malleable in hands of courts and legislatures."<sup>12</sup> Huffman is simply mistaken. Ours was not a normative argument; instead, it was a positivist study examining the case

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10. Huffman, *Background Principles*, *supra* note 7, at 1 (abstract).

11. Huffman, *Beware of Greens*, *supra* note 7, at 814 (criticizing J.B. Ruhl, *Toward a Common Law of Ecosystem Services*, 18 ST. THOMAS L. REV. 1 (2005)); *see also* Ruhl, *Making Nuisance Ecological*, *supra* note 9; J.B. Ruhl, *The Background Principles of Natural Capital and Ecosystem Services—Did Lucas Open Pandora's Box?*, 22 J. LAND USE & ENVTL. L. 525 (2007); J.B. Ruhl, *Ecosystem Services and the Common Law of the "Fragile Land System"*, 20 NAT. RESOURCES & ENV'T 3 (2005).

12. Huffman makes this largely unsubstantiated "infinitely malleable" charge repeatedly. *See* Huffman, *Background Principles*, *supra* note 7, at 1 (abstract), 12, 17, 19.

law interpreting background principles since the *Lucas* decision.<sup>13</sup> We were not arguing that these principles were, or should be, “infinitely malleable,” although we did note that Justice Scalia might be surprised at the results his opinion produced.<sup>14</sup>

Huffman repeatedly attributes our study of background principles to a theoretical argument, overlooking the fact that we were describing an ongoing state of affairs in the lower courts. For example, he alleged that “[t]he historic understanding of the common law matters little if we accept the claims for common law evolution” that we supposedly advanced.<sup>15</sup> But our claims were grounded on a long list of case law that Huffman almost completely ignored,<sup>16</sup> although he did attempt to dismiss the various categories of background principles we identified in a series of footnotes filled with undocumented assertions<sup>17</sup> and mischaracterizations.<sup>18</sup>

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13. See Blumm & Ritchie, *supra* note 3, at 341–58.

14. *Id.* at 368.

15. Huffman, *Background Principles*, *supra* note 7, at 12.

16. Huffman did mention *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972), which employed a “natural use” doctrine to reject a takings claim, *id.* at 768, but he contended that the result was called into question by a South Carolina case, *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628, 633 (S.C. 2000) (suggesting that the *Lucas* decision may have overruled *Just* sub silentio). Huffman, *Background Principles*, *supra* note 7, at 9 n.40. We also discussed the *McQueen* case, but considered its suggestion to be an outlier in light of case law in a half-dozen other jurisdictions approving *Just*, including post-*Lucas* decisions like that of the Wisconsin Supreme Court in *Zealy v. City of Waukesha*, 548 N.W.2d 528, 534 (Wis. 1996). Blumm & Ritchie, *supra* note 3, at 345–46 & n.158. Apart from *McQueen*, Huffman ignored this case law, although he opined that the natural use doctrine “is based on shaky common law.” Huffman, *Background Principles*, *supra* note 7, at 9 n.40. The *Just* natural use doctrine holds that transformative land uses, like wetland fills, are not property rights, and therefore their banning by regulation is not a taking. See Blumm & Ritchie, *supra*, at 344–46.

17. For example, Huffman maintained that “the potential of the public trust doctrine is perceived by many to be almost without limits” without identifying who the “many” might be. Huffman, *Background Principles*, *supra* note 7, at 9 n.39. See also *supra* note 16, on the undocumented “shaky” nature of the natural use doctrine.

18. For example, Huffman claimed that there is “little in the common law to support the idea of a wildlife trust,” citing secondary sources and ignoring recent case law recognizing state ownership of wildlife as a defense to takings claims. Huffman, *Background Principles*, *supra* note 7, at 10 n.44; see Blumm & Ritchie, *supra* note 3, at 353 (discussing *New York v. Sour Mountain*, 714 N.Y.S.2d 78, 84 (2000), and *Sierra Club v. Department of Forestry & Fire Protection*, 26 Cal. Rptr. 2d 338, 347 (Ct. App. 1993)); see also *Ctr. for Biological Diversity v. FPL Group*, 83 Cal. Rptr. 3d 588, 595–600 (Ct. App. 2008) (expressly recognizing the applicability of the public trust doctrine to wildlife). Huffman also claimed that our *Unlikely Legacy* article, *supra* note 3, “acknowledge[d]” that “it is not plausible to suggest that the doctrine of custom . . . falls within what Justice Scalia meant by background principles.” Huffman, *Background Principles*, *supra* note 7, at 9 n.42. We acknowledged no such thing. Although we quoted from Justice Scalia’s dissent from a denial of certiorari in *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207, 1209 (1994), we maintained that “custom remains a viable threshold [takings] defense,” discussing *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 903 P.2d 1264 (Haw. 1995), interpreting Native Hawaiian customary rights to gather plants and driftwood on undeveloped land, as well as public customary rights recognized in several other jurisdictions. See Blumm & Ritchie, *supra* note 3, at 348–50 (discussing cases

Perhaps the courts have misunderstood the “background principles” defense established by *Lucas*. Perhaps Justice Scalia would be disappointed in the results of the case law. Huffman suggested that Justice Scalia intended to “limit judicial discretion” and, relying on a 1911 case involving a cattle drive across Yellowstone National Park, to protect “economic development consistent with local patterns of use.”<sup>19</sup> Although there is some truth to the notion that law is sensitive to situations in which certain landowners are singled out for disparate regulatory treatment,<sup>20</sup> Huffman’s suggestion that the common law as a whole is committed to maintain local use patterns is without foundation. In reality, the roots of common law property lie in the “do no harm” principle embodied in the *sic utere tuo* maxim, which limited development rights and emphasized interrelationships among landowners and between landowners and the community.<sup>21</sup>

At any rate, one would think an attack on the post-*Lucas* case law would focus on that case law and explain its faulty reasoning. Instead, Huffman mounted a normative attack claiming variously that our discussion of the cases was inconsistent with Scalia’s intent, Roman and English law, Blackstone, and a libertarian view of American constitutionalism.<sup>22</sup> We question the persuasiveness of this methodological approach.

## II. LIBERTARIAN PROPERTY AND ITS SHORTCOMINGS

We believe that Huffman misunderstood our positivist study of the legacy of *Lucas*’s background principles defense because of his ideological blinders. His libertarian opposition to the evolution of

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from Texas, Florida, and Idaho). Unlike Huffman, who ignores case law he does not like, we also cited cases rejecting customary rights. *Id.* at 350 n.191.

19. Huffman, *Background Principles*, *supra* note 7, at 13 (referring to Scalia’s reliance on *Curtin v. Benson*, 222 U.S. 78, 86 (1911), for the proposition that the common law aims to protect “essential use[s]” of land, from which Huffman inferred implicit protection for “economic development consistent with local patterns of use,” a standard he claimed “would appall most environmentalists and be unfamiliar to many a modern judge”).

20. Justice Scalia suggested that “the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant” “ordinarily imports a lack of common law prohibition.” *Lucas v. S.C. Coastal Comm’n*, 505 U.S. 1003, 1031 (1992); *see also* *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 134 (1978) (rejecting a claim that Grand Central Terminal was unfairly singled out by an historic preservation ordinance, on the ground that the city implemented a comprehensive plan that affected over four hundred individual landmarks). On the implicit equal protection afforded by the takings clause, *see* Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT 279 (1992).

21. *See generally* ERIC T. FREYFOGLE, *THE LAND WE SHARE: PRIVATE PROPERTY AND THE COMMON GOOD* (2003) (arguing against absolute private property rights and maintaining that community concerns must temper landowner prerogatives, as they did prior to the nineteenth century, in order to restore land health).

22. Huffman, *Background Principles*, *supra* note 7, at 12 (Scalia’s intent), 10 n.44 (Roman and English law), 9 n.40 (Blackstone), 10 n.47 (libertarian view of American constitutionalism).

background principles is a product of his advocacy for an invigorated application of the takings clause.<sup>23</sup> Huffman's criticism of our explanation of the fate of the background principles in the lower courts largely reflects libertarians' abstract approach to property rights.<sup>24</sup>

To libertarians like Huffman, property is an idealized abstraction: a pre-political, natural law concept that cannot be altered by democratic processes like regulation.<sup>25</sup> This largely static view of property is mistaken; property is actually a product of the state and subject to different interpretations by the state's legislature and its courts over time.<sup>26</sup> As Massachusetts Chief Justice Lemuel Shaw declared more than

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23. See Huffman's review of Epstein's book, *supra* note 6. Huffman was an enthusiastic proponent of a takings initiative, known as Measure 37, that the Oregon electorate passed in 2004, promising landowners complete compensation for any reduction in value imposed by any regulation passed after they or a family member purchased the land. Huffman even successfully argued the measure's constitutionality to the Oregon Supreme Court in *MacPherson v. Department of Administrative Services*, 130 P.3d 308 (Or. 2006). However, in 2007 the Oregon legislature referred to the voters, and the voters approved, an amendment to Measure 37—known as Measure 49—that cut back available compensation substantially. See generally Michael C. Blumm & Eric Grafe, *Enacting Libertarian Property: Oregon's Measure 37 and Its Implications*, 85 DENV. U. L. REV. 279, 360–65 (2007) (discussing Measure 49).

24. On property as an abstraction, see JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 52 (1990) (describing ownership of property as “a very abstract idea . . . a correlation between individual names and objects, such that the decision of the named individual object about what should be done with the object is taken as socially conclusive. The rules of real or postulated legal systems assigning rights, liberties, powers, immunities, and liabilities to people in regard to particular resources amount to conceptions of that abstract concept.”).

25. See, e.g., Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1568 & n.72 (2003) (“Property is a ‘natural’—inherent, prepolitical, and prelegal—right because its pursuit secures . . . natural goods [such as] self-preservation, the preservation of one's family, and the wealth needed to practice other virtues that require some minimum of material support.”).

26. See FREYFOGLE, *supra* note 21, at 37–89 (tracing some significant shifts in property law resulting from industrialization and westward expansion); see also ERIC T. FREYFOGLE, *ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND* 29–60 (2007) (explaining changes in the law of trespass during the early nineteenth century when courts and legislatures curtailed the public's right to use unenclosed land); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, ch. 2 (1977) [hereinafter *TRANSFORMING AMERICAN LAW, 1780–1860*] (describing a fundamental shift in American property law during the early nineteenth century from an absolute dominion model to a more flexible, dynamic model that supported productive use and development of land); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, ch. 5 (1992) [hereinafter *TRANSFORMING AMERICAN LAW, 1870–1960*] (discussing the evolution of the concept of relativism in property law in the late nineteenth and early twentieth centuries leading to dramatic changes in the judicial oversight of government-regulated rates); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988) (cataloging the legal “muddying” over time of *caveat emptor*, mortgage law, and the American recording system); Carol M. Rose, *Property and Expropriations: Themes and Variations in American Law*, 2000 UTAH L. REV. 1 (2000) (describing three kinds of disruption in property law: “housekeeping” for routine management; “regulatory” resulting from changes in environment, demography, or technology; and “extraordinary” during revolution or warfare).

a century-and-a-half ago, property serves the needs of the community.<sup>27</sup> When the interests of the community require, the definition of property evolves.<sup>28</sup> Justice Scalia's invocation of background principles acknowledged the reality of evolutionary property rights,<sup>29</sup> but Professor Huffman is committed to a vision of property that is unchanging, or at least changing very little.<sup>30</sup>

There is no support for a static view of property in law or in history.<sup>31</sup> For example, when the natural flow doctrine of riparian water rights inhibited the development of grist mills in the early nineteenth century, the courts changed riparianism to protect only reasonable uses, not natural flows.<sup>32</sup> And when water law moved westward into arid regions, some courts discarded riparianism entirely.<sup>33</sup> The waste doctrine provides a similar example of more than evolutionary change as, for example, Justice Joseph Story explained in discarding the English notion that improvements on leased lands were for the benefit of the landlord.<sup>34</sup> There are numerous other examples of revolutionary changes in property

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27. See *Commonwealth v. Alger*, 61 Mass. 53, 84–85 (1851) (“[E]very holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.”).

28. See, e.g., *Charles River Bridge Co. v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420, 548 (1837) (denying an injunction to a toll-bridge operator to halt construction of a competitor bridge, refusing to imply that a seventy year old charter conveyed exclusive rights, and stating, “While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation.”).

29. *Lucas v. S.C. Coastal Comm’n*, 505 U.S. 1003, 1031 (1992) (“[C]hanged circumstances or new knowledge may make what was previously permissible no longer so”).

30. See Huffman, *Background Principles*, *supra* note 7, at 20–22 (discounting the role of public policy in common law judging); see also *id.* at 21 (“The genius of the common law rests in its derivation from the customs and practices of everyday life, not in the creativity of judges.”).

31. See *supra* note 26.

32. See HORWITZ, *TRANSFORMING AMERICAN LAW, 1780–1860*, *supra* note 26, at 34–42 (1977) (discussing the courts’ transformation of riparianism). Huffman does recognize this change in water law, although he seems to think that the advent of grist mills promoted the natural flow doctrine. Huffman, *Background Principles*, *supra* note 7, at 25. Actually, the grist mills encouraged the courts to reject natural flow in favor of reasonable use to allow the dams accompanying the mills to pond water. See HORWITZ, *TRANSFORMING AMERICAN LAW, 1780–1860*, *supra* note 26, at 37.

33. See, e.g., *Coffin v. Left Hand Ditch*, 6 Colo. 443 (1882) (abolishing the riparian doctrine and establishing the so-called Colorado doctrine). In addition to Colorado, eight other western states completely reject common law riparianism under the Colorado doctrine, including Alaska, Arizona, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. See JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES* 294 (3d ed. 2000).

34. See, e.g., *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137 (1829). Justice Story explained that the English rule of waste was unsatisfactory because America “was a wilderness, and the universal policy was to procure its cultivation and improvement.” *Id.* at 145. Thus, the waste doctrine should “encourage the tenant to devote himself to agriculture, and to favor any erections which should aid this result . . .” *Id.*

law, many accomplished by legislative changes.<sup>35</sup> None was restrained by the takings clause.<sup>36</sup>

Although Huffman did grudgingly acknowledge that property law evolves, he aims to constrain its evolution to judge-made changes that are “a reflection of customary practices evidenced in precedent.”<sup>37</sup> In his view, the common law is only “a formalization of custom, meant to evolve as custom evolves.”<sup>38</sup> His worry is that common law judges, if unconstrained by custom, might change the law “in response to abstract arguments of reasonableness and good public policy.”<sup>39</sup> This sort of judicial lawmaking is taboo because it risks having judges “intrude upon the legislative function, thereby circumventing whatever constraints the law, including the constitution, may place on the legislative process,” and so compromising “[i]ndividual liberties, including property rights . . . when the rule of law is thus ignored by the courts.”<sup>40</sup>

Huffman’s attempt to resist, or at least severely retard, common law legal change recalls late nineteenth and early twentieth century Gilded Age legal formalism, an era in which some judges thought the law was autonomous and logical, and their role was limited to mechanically deducing answers.<sup>41</sup> This effort to make law a science distinguished between public and private spheres and created a jurisprudence that emphasized categorization of concepts, not the consequences of

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35. For example, under Thomas Jefferson’s influence, the Virginia legislature abolished primogeniture and entail; virtually all the new American states soon followed. See Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 12–18 (1977). A more recent example of revolutionary change in property law is state pooling and unitization regulations that require surface owners to manage underlying oil and gas resources in a collective fashion under state supervision. See, e.g., *Wronski v. Sun Oil Co.*, 279 N.W.2d 564 (Mich. 1979) (adopting the so-called Texas rule); see also HOWARD R. WILLIAMS & CHARLES J. MEYERS, 6 OIL AND GAS LAW §§ 908–992 (Patrick H. Martin & Bruce M. Kramer eds., 2008).

36. See HORWITZ, *TRANSFORMING AMERICAN LAW, 1780–1860*, *supra* note 26, ch. 2 (discussing the transformation of property law in antebellum America); HORWITZ, *TRANSFORMING AMERICAN LAW, 1870–1960*, *supra* note 26, ch. 5 (discussing the transformation of property law in the post-Civil War era).

37. Huffman, *Background Principles*, *supra* note 7, at 20.

38. *Id.* at 23.

39. *Id.* at 25. In his attachment to custom, Huffman is a disciple of James Coolidge Carter, a nineteenth-century opponent of the codification movement, who defended common law judging on grounds that it made no law but instead enforced custom. See HORWITZ, *TRANSFORMING AMERICAN LAW, 1870–1960*, *supra* note 26, at 118–21. Justice Oliver Wendell Holmes initially endorsed custom as a template for common law decision making in his book, *THE COMMON LAW* (1881), but gave it up as an unworkable attempt to protect natural law property rights amid the tumult of late-nineteenth-century social and economic change in his essay *The Path of the Law*, 10 HARV. L. REV. 457 (1897). See HORWITZ, *TRANSFORMING AMERICAN LAW, 1870–1960*, *supra* note 26, at 139–42.

40. Huffman, *Background Principles*, *supra* note 7, at 22.

41. See BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2009).

particular decisions.<sup>42</sup> The most famous result of formalistic thinking was the Court's decision in *Lochner v. New York*, in which the Supreme Court struck down a state attempt to regulate workplace practices in bakeries because it interfered with the rights of employers and employees to freely contract for labor and therefore violated the liberty protected by the Due Process Clause of the Fourteenth Amendment.<sup>43</sup> Huffman's attraction to the categorical thinking of formalistic jurisprudence seems linked to his call for an aggressive expansion of the takings clause.<sup>44</sup>

Formalism is apparently appealing to Huffman and libertarians as a vehicle to limit the judicial discretion they believe to be behind the evolution of background principles as a categorical defense to takings claims.<sup>45</sup> A particular cause for concern are balancing tests, which Huffman seems to equate with legal realism,<sup>46</sup> even though it is a mistake

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42. For an overview of legal formalism, see Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) (arguing that legal phenomena are objective and immanently knowable); Michael Corrado, *The Place of Formalism in Legal Theory*, 70 N.C. L. REV. 1545, 1545 (1992) (contending that law is autonomous from politics, morality, and sociology); Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Realism*, 36 IND. L. REV. 57, 100 (2003) (concluding that legal formalism is not likely to triumph because American society does not tolerate "apparent injustice" and because legal professionals demand a more dynamic model); Daniel A. Farber, *Legal Formalism and the Red-Hot Knife*, 66 U. CHI. L. REV. 597, 605-606 (1999) (warning against the rigidity of legal formalism).

43. *Lochner v. New York*, 198 U.S. 45, 64 (1905). Although *Lochner* became the eponym of formalist jurisprudence, the notion that the Fourteenth Amendment's Due Process Clause protected individuals from state regulation that interfered with employment was evident thirty years earlier in the dissenting opinion in *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 89 (1873) (Field, J., dissenting).

44. Huffman displayed some irritation at our suggestion that the use of background principles to defeat takings claims at the threshold relieved courts of having to undertake the difficult balancing required by the Supreme Court's decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). See John D. Echeverria, *Making Sense of Penn Central*, 23 U.C.L.A. J. ENVTL. L. & POL'Y 171, 172 (2005) (describing the *Penn Central* framework as suffering from "chronic vagueness"). Huffman claimed that while we were critical of the Rehnquist Court's formalistic Commerce Clause jurisprudence, we celebrated the formalistic decision making "flowing from [our] perceived categorical defenses" that allowed judges to avoid the detailed factual inquiry required by *Penn Central*." Huffman, *Background Principles*, *supra* note 7, at 17. He charged that "[f]ormalism suits [us] 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." *Id.* However, we were not celebrating anything; instead, we were observing the evolution of the background principles defense in the years since *Lucas* and the irony that a formalistic-like inquiry into categories of background principles was among the foremost recent developments in takings law. See Blumm & Ritchie, *supra* note 3, at 367-68.

45. See, e.g., Huffman, *Background Principles*, *supra* note 7, at 16 (attributing to Justice Scalia's *Lucas* opinion an intent to establish "a more formalistic approach in takings jurisprudence.").

46. See *id.* at 21 (arguing that "changing perceptions of the public good" should largely remain out of the judicial balance); *id.* at 25 (maintaining that nuisance balancing may reflect "local custom and practice, but not . . . abstract arguments of reasonableness and good public policy.").

to think that the formalists he admires eschewed judicial balancing.<sup>47</sup> Further, there is no small irony in Huffman's attempt to limit judicial discretion in the context of background principles at the same time he employs a revolutionary vision of the takings clause that would be policed by the judiciary.<sup>48</sup>

In addition to inaccurately describing post-*Lucas* case law, the libertarian property claims advanced by Huffman suffer from a number of shortcomings beyond their heavy reliance on the judicial activism associated with the *Lochner* Era.<sup>49</sup> His vision of property largely shielded from government regulation relies on a perspective of liberty that protects only landowners, and rejects any duty to future generations.<sup>50</sup> Libertarian property also favors intensive, industrial land use over sensitive uses, sees no intrinsic value in nature, and discounts socially generated public goods like ecosystem services.<sup>51</sup> For all of these reasons,

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47. See Brian Z. Tamanaha, *The Bogus Tale About the Legal Formalists* (April 2008) (St. John's Legal Studies Research Paper No. 08-0130), available at <http://ssrn.com/abstract=1123498> (claiming that the received wisdom about the legal formalists—that they believed that law was “comprehensive, gapless, and logically ordered, and . . . that judges reasoned mechanically or deductively from this body of law to produce right answers in individual cases”—is false); see also Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anti-Classical Jurisprudence of Anti-Codification*, 19 YALE J. L. & HUMAN. 149 (2007) (maintaining that those resisting the codification movement of the nineteenth century defended common law judging not on the basis of Langdellian formalism, in which judges use a conceptually ordered legal structure to logically resolve cases from general principles, but instead on the basis of the freedom the common law system gave to judges to reach fair results on the basis of the particular facts of a case).

48. See, e.g., Huffman, *supra* note 6; *infra* note 57 (applauding Epstein's view of the Takings Clause); *supra* note 23 (noting Huffman's advocacy of revolutionary landowner compensation scheme in Oregon); Huffman, *infra* note 189 (celebrating Justice Scalia's *Lucas* opinion as “a small step in the right direction”). On the other hand, for discussions of the importance of judicial discretion in the evolution of property rights, see Hope M. Babcock, *Does Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are?: Of Beavers, Bob-O-Links, and Other Things That Go Bump in the Night*, 85 IOWA L. REV. 849, 857–862 (2000) (explaining how wildlife laws create indeterminacy for property rights); Marc R. Poirier, *Property, Environment, Community*, 12 J. ENVTL. L. & LITIG. 43, 53–56 (1997) (arguing that property is a social construction and that therefore property rights evolve with society); Richard J. Lazarus, *Debunking Environmental Feudalism: Promoting the Individual through the Collective Pursuit of Environmental Quality*, 77 IOWA L. REV. 1739, 1758–1760 (1992) (describing how environmental concerns will continue to shape property rights in the future).

49. On the *Lochner* era, see Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (identifying the lesson of the *Lochner* era as the “need for judicial deference to legislative enactments”); Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 609–10 (1996) (concluding that modern takings doctrine represents a return to the judicial activism of the *Lochner* era at the expense of the liberal economic agenda).

50. See Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75, 101 (2010).

51. See *id.* at 102.

the libertarian vision of property is not a fit paradigm for contemporary America.<sup>52</sup>

### III. STATUTES AND CONSTITUTIONS AS BACKGROUND PRINCIPLES

One persistent objection that Huffman has levied against our work was to the inclusion of statutes and constitutional provisions as background principles.<sup>53</sup> This criticism is partly another consequence of his mistaking our positivist explanation for a normative argument.<sup>54</sup> Huffman is again shooting the messenger when he should be analyzing the courts' interpretation of the nature of background principles. But he also asserts that, "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."<sup>55</sup> First, background principles are a chief means of determining the nature and scope of private property rights. Huffman's attempt to separate background principles from the question of the nature of the property interest is unsuccessful, as even he seems to concede in acknowledging that "antecedent inquiry into a claimant's property rights is here to stay."<sup>56</sup> Because the "antecedent inquiry" includes an examination of background principles, the inquiry seems unsettling to Huffman.<sup>57</sup>

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52. Huffman makes no attempt to justify his libertarian property in terms of social utility, and indeed criticizes utilitarianism when used to justify "destroying the property of some to protect the property of others thought to have more value to the community." Huffman, *Background Principles*, *supra* note 7, at 10 n.47. He also claims that our description of background principles "envision[s] a purely utilitarian society in which individual rights may be sacrificed to [our] perception of the greater common good." *Id.* at 29 (referring to us as "latter-day common law advocates"). Huffman may assume that aggressive judicial protection of landowners' development rights will enhance economic efficiency through wealth maximization, something often assumed in the law-and-economics literature. *See, e.g.*, EPSTEIN, *supra* note 5, at 29-34; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26 (1974) (discussing the classic liberal notion that the role of the state should be limited to a "night watchman," providing protection from only violence, theft, fraud, and non-enforcement of contracts). For criticism of law-and-economics' weak idea of the affirmative obligations that landowners owe to their communities, see Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 753-57 (2009) (arguing that a social obligation norm provides a better explanation of American property law, and a morally superior one, to law-and-economics theory).

53. *See, e.g.*, Huffman, *Background Principles*, *supra* note 7, at 11 ("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?"); *id.* at 18 ("Yet the background principles are supposed to derive from the common law.").

54. *See supra* Part I.

55. Huffman, *Background Principles*, *supra* note 7, at 10 n.46.

56. *Id.* at 14.

57. Huffman stated that our recognition that background principles were a fundamental part of the "antecedent inquiry" that Justice Scalia called for was part of an argument that the *Lucas* decision established "an entirely new preemptive stage in takings analysis," which he claimed "read[s] more into [the decision] than is there." *Id.* Yet he proceeded to endorse

Second, while Justice Scalia seemed to emphasize common law background principles, the only law he aimed to exclude from background principles were “newly legislated or decreed” requirements.<sup>58</sup> That statement obviously does not exclude all statutes or constitutional provisions. Moreover, Justice Kennedy’s concurrence in *Lucas* made clear that he, at least, viewed common law nuisance as “too narrow a confine for the exercise of regulatory power in a complex and interdependent society,” suggesting that states should be able to enact “new regulatory initiative[s] in response to changing conditions.”<sup>59</sup> Certainly Justice Kennedy, whose opinion is often determinative in cases affecting the environment, would not reject all statutes as background principles.<sup>60</sup>

Third, as we pointed out in our earlier study, a number of courts have interpreted background principles to include statutes and constitutional provisions.<sup>61</sup> Professor Huffman ignored these cases. It is true that in *Palazzolo v. Rhode Island*, Justice Kennedy’s majority opinion rejected the idea that all statutes enacted prior to a landowner’s acquisition of title qualified as background principles.<sup>62</sup> But, as we explained, the opinion also stated that development rights were subject to “valid zoning and land-use restrictions,”<sup>63</sup> a position subsequently endorsed by Chief Justice Rehnquist and Justices Scalia and Thomas in

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Professor Epstein’s four-part test to determine whether a taking has occurred, the first element of which is: “[I]s there a taking?” *Id.* at 15 (citing EPSTEIN, *supra* note 5, at 31). Although Huffman did recognize that background principles were relevant to this initial factor, he then added a puzzling statement: “Background principles are not an exception to the requirement of compensation where a taking has in fact occurred.” *Id.* But because background principles help determine the nature of private property, a court cannot determine whether a taking has in fact occurred without engaging in a “logically antecedent inquiry” employing such principles. *See Lucas v. S.C. Coastal Comm’n*, 505 U.S. 1003, 1027 (1992).

58. *Lucas*, 505 U.S. at 1029.

59. *Id.* at 1035 (Kennedy, J., concurring). Kennedy also stated that in deciding takings claims, courts “must consider all reasonable expectations whatever their source.” *Id.*

60. *See* Michael C. Blumm & Sherry Bosse, *Justice Kennedy and the Environment: Property, States’ Rights, and a Persistent Search for Nexus*, 82 WASH. L. REV. 667 (2007).

61. *See* Blumm & Ritchie, *supra* note 3, at 354–60. New York’s highest court concluded that a wetlands protection statute defeated takings claims in *Gazza v. New York State Department of Environmental Conservation*, 679 N.E.2d 1035 (N.Y. 1997); federal courts found statutory limitations contained in the Magnuson-Stevens Fishery Conservation and Management Act and the Federal Land Policy and Management Act to be background principles in *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363 (Fed. Cir. 2004), and *Reeves v United States*, 54 Fed. Cl. 652 (2002), respectively.

62. 533 U.S. 606, 627 (2001) (discussed in Blumm & Ritchie, *supra* note 3, at 356).

63. *Palazzolo*, 533 U.S. at 627 (discussed in Blumm & Ritchie, *supra* note 3, at 356). Huffman erroneously claims that *Palazzolo* rejected the idea of statutory background principles. Huffman, *Background Principles*, *supra* note 7, at 10 n.46. In fact the Court held only that statutes that existed prior to a landowner’s acquisition were not categorically exempted from takings claims by virtue of the so-called “notice rule.” *See* Michael C. Blumm, *Palazzolo and the Decline of Justice Scalia’s Categorical Takings Doctrine*, 30 B.C. ENVTL. AFF. L. REV. 137, 143–47 (2002).

their dissent in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.<sup>64</sup> Thus, there is widespread agreement among the current justices that at least some statutes and regulations are background principles. Huffman pretended this agreement did not exist.

Following the Supreme Court's lead, lower courts have found numerous statutes and regulations to be background principles, including provisions of the Federal Land Policy and Management Act and the Magnuson-Stevens Fishery Conservation and Management Act.<sup>65</sup> Recent decisions have concluded that several local zoning ordinances,<sup>66</sup> as well as federal reinsurance requirements,<sup>67</sup> were background principles that defeated takings claims. Similarly, the Hawaiian Court of Appeals upheld a statute denying landowners rights to future accretions, on the ground that the landowners had no right to future accretions at common law.<sup>68</sup> And the Texas Court of Appeals rejected landowners' claims that the state took their property by ordered removal of their beach houses under the Open Beaches Act because the public easement the statute recognized provided merely "a method of enforcing [the] easement" that the public had acquired under the common law doctrine of implied dedication.<sup>69</sup> The boundaries of the statutory background principles defense may not be entirely clear,<sup>70</sup> but to suggest, as Huffman does, that

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64. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting). Chief Justice Rehnquist explained that "zoning and permit regimes are a longstanding feature of state property law," specifically referencing the New York City zoning ordinance of 1916. *Id.* We earlier observed that statutes antedating the 1916 zoning ordinance included statutes and regulations protecting wetlands and wildlife conservation. *See Blumm & Ritchie, supra* note 3, at 358.

65. *See Reeves v. United States*, 54 Fed. Cl. 652, 671–72 (2002); *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1377–78 (Fed. Cir. 2004). Both cases were discussed in *Blumm & Ritchie, supra* note 3, at 356–57.

66. *See Wiebbecke v. Benton County Bd. of Supervisors*, No. 06-1672, 2008 WL 2746342, at \*4 (Iowa Ct. App. July 16, 2008) (upholding a zoning ordinance in effect when the landowner purchased the property as a background principle); *E. First St. v. Bd. of Adjustments*, 2008 WL 2567080, at \*5 (La. Ct. App. 2008) (concluding that a 1979 zoning ordinance was a background principle); *Mutschler v. City of Phoenix*, 129 P.3d 71, 77 (Ariz. Ct. App. 2006) (concluding that conduct prohibited by a city ordinance—operation of live sex clubs—could have been prohibited as a common-law nuisance).

67. *See Acceptance Ins. Co. v. United States*, 583 F.3d 849, 857 (Fed. Cir. 2009) (holding that the federal regulatory regime governing the Department of Agriculture's reinsurance of private crop insurance companies constituted background principles sufficient to defeat a takings claim).

68. *See Maunalua Bay Beach Ohana 28 v. State*, 2009 WL 5127980, at \*20 (Haw. Ct. App. 2009). The court did rule that the statute's effect on existing accretions worked a taking. *Id.* at \*22.

69. *Brannan v. Texas*, 2010 WL 375921, at \*21 (Tex. App. 2010).

70. It may be, for example, that apart from the zoning and land-use regulations mentioned by Justice Kennedy in his *Palazzolo* opinion, 533 U.S. at 627, discussed *supra* text accompanying note 62, statutory background principles only prohibit conduct that could have been prohibited by common law. *See supra* notes 66–67 (noting several recent decisions relying on statutory and regulatory background principles).

background principles are exclusively common law-derived is clearly erroneous.

#### IV. NUISANCE AND WETLANDS—A CONUNDRUM FOR LIBERTARIAN PROPERTY

Wetlands and the common law of nuisance provide an apt case study for applying the foregoing to Huffman's conception of background principles and the historical details of common law. In *Making Nuisance Ecological*, we argued that public and private nuisance law could integrate injury to flows of "ecosystem services" as a harm in some cases remediable through nuisance claims. Ecosystem services are the economic benefits humans derive from ecosystem structures and processes that form what might be thought of as natural capital.<sup>71</sup> Building on work dating back to the 1970s,<sup>72</sup> ecologists and economists have been forging the theory and application of the ecosystem services

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71. Ecosystem services are economically valuable benefits humans derive from ecological resources either directly, such as storm surge mitigation provided by coastal dunes and marshes, or indirectly, such as nutrient cycling that supports crop production. Natural capital consists of the ecological resources that produce these service values, such as forests, riparian habitat, and wetlands. Ecosystem services flow from natural capital to human communities in four streams: (1) provisioning services are commodities such as food, wood, fiber, and water; (2) regulating services moderate or control environmental conditions, such as flood control by wetlands, water purification by aquifers, and carbon sequestration by forests; (3) cultural services include recreation, education, and aesthetics; and (4) supporting services, such as nutrient cycling, soil formation, and primary production, make the other three service streams possible. For comprehensive descriptions of these concepts, see MILLENNIUM ECOSYSTEM ASSESSMENT, ECOSYSTEMS AND HUMAN WELL-BEING: SYNTHESIS (2005), available at <http://www.millenniumassessment.org/documents/document.356.aspx.pdf>; NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS (Gretchen C. Daily ed., 1997) [hereinafter NATURE'S SERVICES]; Robert Costanza et al., *The Value of the World's Ecosystem Services and Natural Capital*, 387 NATURE 253 (1997). For coverage of the emergence of the ecosystem services concept in law and policy, see J.B. RUHL, STEVEN E. KRAFT & CHRISTOPHER L. LANT, THE LAW AND POLICY OF ECOSYSTEM SERVICES (2007) [hereinafter LAW AND POLICY]; J.B. Ruhl & James Salzman, *The Law and Policy Beginnings of Ecosystem Services*, 22 J. LAND USE & ENVTL. L. 157 (2007) [hereinafter Ruhl & Salzman, *Law and Policy Beginnings*]; James Salzman, *A Field of Green? The Past and Future of Ecosystem Services*, 21 J. LAND USE & ENVTL. L. 133 (2006).

72. Mooney and Ehrlich trace references to "services" in connection with ecosystems as far back as 1970. See Harold A. Mooney & Paul R. Ehrlich, *Ecosystem Services: A Fragmentary History*, in NATURE'S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 11, 14 (Gretchen C. Daily ed., 1997). Walter Westman was the first to attempt to assign numbers to the values of what he called "nature's services," relying on the postulated technology costs of replacing or repairing impaired ecosystem functions. See Walter E. Westman, *How Much Are Nature's Services Worth?*, 197 SCIENCE 960 (1977). Soon thereafter, in a little-noticed article, Edward Farnsworth et al. outlined one of the earliest comprehensive frameworks for considering the value of services provided by natural ecosystems. See Edward G Farnsworth et al., *The Value of Natural Ecosystems: An Economic and Ecological Framework*, 8 ENVTL. CONSERVATION 275 (1981).

concept since the early 1990s,<sup>73</sup> but only in the past few years has the concept begun to register explicitly in any meaningful way in law.<sup>74</sup>

One such example, however, is found in *Palazzolo v. State*,<sup>75</sup> in which a Rhode Island trial court considered the regulatory takings claim the United States Supreme Court left dangling in *Palazzolo v. Rhode Island*.<sup>76</sup> The Supreme Court had rejected the claim that state agency denial of a permit to fill and develop a marsh area adjacent to a pond constituted a categorical taking of property under *Lucas*, on the ground that the agency allowed Palazzolo to develop some of his parcel, leaving it to the state courts initially to decide whether the permit denial was a regulatory taking. On remand, the state trial court dismissed the action, reasoning that *Lucas* “establish[ed] public nuisance as a preclusive defense to takings claims,”<sup>77</sup> and finding that “clear and convincing evidence demonstrates that Palazzolo’s development would constitute a public nuisance.”<sup>78</sup> As the court explained:

Palazzolo’s proposed development has been shown to have significant and predictable negative effects on Winnapaug Pond and the adjacent salt water marsh. The State has presented evidence as to various effects that the development will have including increasing nitrogen levels in the pond, both by reason of the nitrogen produced by the attendant residential septic systems, and by the reduced marsh area *which actually filters and cleans runoff*. This Court finds that the effects of increased nitrogen levels constitute a predictable (anticipatory) nuisance which would almost certainly result in an ecological disaster to the pond.<sup>79</sup>

In our prior work, we pointed to *Palazzolo* as a reasonable, logical application of Justice Scalia’s background principles doctrine, one which demonstrates that courts may account for injury to ecosystem services in public nuisance law without violating, or even stretching, any of its doctrinal integrity.<sup>80</sup> We also showed how the same logic of the common law could be mapped onto the doctrine of private nuisance as well.<sup>81</sup>

In *Beware of Greens*, Huffman launches a barrage of salvos at *Making Nuisance Ecological*, none of which hit the mark, and several of which backfire on Huffman’s claims. His response advances on three

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73. See Ruhl & Salzman, *Law and Policy Beginnings*, *supra* note 71, at 158–61 (2007); Harold A Mooney and Paul R. Erlich, *Ecosystem Services: A Fragmentary History*, in *NATURE’S SERVICES*, *supra* note 71, at 11.

74. See *LAW AND POLICY*, *supra* note 71, at 127–57; Ruhl & Salzman, *Law and Policy Beginnings*, *supra* note 71, at 163–64.

75. *Palazzolo v. State*, No. WM 88–0297, 2005 WL 1645974 (R.I. Super. Ct. July 5, 2005).

76. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

77. *Palazzolo v. State*, 2005 WL 1645974, at \*5.

78. *Id.*

79. *Id.* (emphasis added).

80. See Ruhl, *Making Nuisance Ecological*, *supra* note 9, at 762–63.

81. *Id.* at 765–75.

fronts. First, he casts us as “reborn common law faithful”<sup>82</sup> whose underlying purpose is one of “blatant and cynical opportunism.”<sup>83</sup> Our crime? Huffman alleges that we are hijacking the common law in order to roll a Trojan horse filled with background principles into the fortress of libertarian property.<sup>84</sup> As he puts it, our purported “renewed interest in the common law . . . is driven by a desire to insulate environmental regulation from the takings clause.”<sup>85</sup> This argument seems designed to provide evidence of our cynicism, perhaps even to suggest our interest in the common law is not genuine. Of course, when we became interested in the common law has nothing to do with the merits of how we describe the common law. In any event, well before *Background Principles* and *Making Nuisance Ecological* we had expressed broad interest in many of the attributes of the common law. We did not just recently discover it to aggravate libertarian property’s conception of the common law’s role in society.<sup>86</sup>

Second, putting motives aside, he suggests that we “evidenc[e] very little appreciation for the common law as an institution for the allocation of scarce resources.”<sup>87</sup> Although he does not connect the dots so clearly, presumably he must believe that accounting for the economic value of ecosystem services in legal regimes, including the common law, would not improve resource allocation decisions. We know of no economic analysis of ecosystem services consistent with that view.<sup>88</sup>

Third, even if accounting for ecosystem services would effectuate wise allocation of scarce resources, Huffman argues that our position, and implicitly also the court’s ruling in *Palazzolo*, should be rejected as a “radical disruption of the settled expectations that the common law exists to protect.”<sup>89</sup> In his view, we represent not “just another logical step in the long history of common law evolution [but] an unjustifiable break with the reasonable expectations created by the common law itself.”<sup>90</sup> According to Huffman, decisions like *Palazzolo* commit the sin of what he refers to as “supply side” legal change,<sup>91</sup> change based on the court’s own preferences and imposed “top down”<sup>92</sup> through judicial “direct

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82. Huffman, *Beware of Greens*, *supra* note 7, at 816.

83. *Id.* at 859.

84. *See id.* at 836–40.

85. *Id.* at 814.

86. *See, e.g.*, J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1469–72 (1996) (describing the common law as a complex adaptive system).

87. Huffman, *Beware of Greens*, *supra* note 7, at 814.

88. *See* RUHL ET AL., *THE LAW AND POLICY OF ECOSYSTEM SERVICES*, *supra* note 71, at 57–83 (surveying the economic literature on ecosystem services).

89. Huffman, *Beware of Greens*, *supra* note 7, at 814.

90. *Id.* at 839–40.

91. *Id.* at 842.

92. *Id.* at 851.

expansion of public nuisance law,”<sup>93</sup> thus jarringly upsetting property owner expectations reflected in “accepted practice and custom”<sup>94</sup> and long settled through the slow “bottom up”<sup>95</sup> evolution of the common law driven by the so-called “demand side”<sup>96</sup> goal of efficiency.<sup>97</sup>

The trouble with Huffman’s trilogy of objections is that he launches the assault through a purely normative and entirely ahistorical account of the record of the common law of nuisance and of wetlands practice and custom. He observes that American common law began with English common law,<sup>98</sup> that American courts have adapted the common law through “acceptance and confirmation of established practices and customs,”<sup>99</sup> and that in this adaptation process “the common law follows, not leads, . . . [as] it is for the legislature and the executive, not the courts, to try their hands at leading society.”<sup>100</sup> We couldn’t agree more. Huffman, however, never puts his three objections to *Making Nuisance Ecological* under the microscope of these truths by examining the record of the common law of nuisance and the practices and customs surrounding wetlands.

Because the record on both matters is rather well documented, we did not recount its expansive and rich context in *Making Nuisance Ecological*. But now presented with Huffman’s normative revisionist account, we feel compelled to explain, with the aid of work from three other legal scholars, that: (1) English common law recognized and protected what today we call the ecosystem service values of wetlands; (2) nineteenth-century American common law courts adapted the English common law of nuisance to the demands of American agricultural settlement policy by recasting wetlands as nuisances precisely to roll the first Trojan horse of background principles into the libertarian

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93. *Id.* at 830.

94. *Id.* at 837.

95. *Id.* at 848.

96. *Id.* at 842. Huffman borrows the “supply side” versus “demand side” model of the common law from Douglas G. Whitman, *Evolution of the Common Law and the Emergence of Compromise*, 29 J. LEGAL STUD. 753, 775–76 (2000). Huffman does not acknowledge in *Beware of Greens* that *Making Nuisance Ecological* rejects, as inconsistent with the evolutionary norms of the common law, normative “supply side” arguments other scholars have made for broadening nuisance law to encompass a litany of ecological harms. See Ruhl, *Making Nuisance Ecological*, *supra* note 9, at 783–84.

97. Huffman includes a fourth objection of sorts in asserting that, even if the common law has legitimately evolved as suggested in *Making Nuisance Ecological*, the courts would be committing “judicial takings” by applying the evolved law of nuisance to actual land use disputes. See Huffman, *Beware of Greens*, *supra* note 7, at 852–58. As it is not directly related to the proper conception of the scope of the background principles doctrine, but rather with the consequences of the doctrine’s implementation by courts, we deal with this challenge *infra* in Part IV.E.

98. *See id.* at 860.

99. *Id.* at 837.

100. *Id.* at 847.

property fortress; (3) the reformed view of wetlands and their ecosystem services has been percolating “bottom up” from new knowledge, public perception, legislative initiative, and community practice and custom for at least the past half-century; and (4) modern American courts are beginning to incorporate the reformed and now fully entrenched customs and practices of wetlands protection into the common law of nuisance.

In other words, all three legs of Huffman’s assault on *Making Nuisance Ecological* have fallen off the libertarian property stool. What he says is supposed to happen under the common law has in fact happened, and what he says in fact happened amounts to no more than the fantasy of libertarian property. At bottom, Huffman has nothing to stand on but his normative conception of what the common law should be, not what it is or has been. His complaint, therefore, is not with us and our positivist, historically accurate, economically efficient application of the background principles doctrine; it is with Justice Scalia, the background principles doctrine’s modern-day inventor, despite being a champion of libertarian property. The following subparts expound on the historical chain of case law underlying modern courts’ background principles analysis of wetlands.

#### A. *Wetlands in the English Common Law*

Huffman claims that “the default rule for most of American and English history has favored resource development, often in the name of natural use of land and resources.”<sup>101</sup> As we show in Part IV.B, this orientation was unquestionably true of nineteenth-century American common law with respect to wetlands. But the English common law is a much more complex story, one which puts the first chink in Huffman’s libertarian property armor.

As Professor Fred Bosselman has meticulously detailed, the importance of common wetlands, known as the great fens, to the social and economic life of England through the seventeenth century had a profound impact on the development of the common law.<sup>102</sup> Through the sixteenth century, “the modern idea of land development—the changing of a land’s use to something other than the uses associated with an agricultural economy—was uncommon.”<sup>103</sup> To the extent there was development, it was associated with roads and waterways for transportation, which was completely under the control of the Crown.<sup>104</sup>

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101. *Id.* at 839.

102. See Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L.J. 247 (1996). Our brief summary of Bosselman’s work hardly does justice to its sweeping historical scope and probing detail.

103. *Id.* at 288.

104. See *id.* at 288–94.

Villagers generally had individual rights to use some land adjoining marshes and common rights in larger tracts of peatlands.<sup>105</sup> To be sure, the fens were used for commercial activity, but “only . . . for those economic activities which could be practiced perpetually without depleting the resource—activities which we would now call ‘sustainable.’”<sup>106</sup> The sustained ecological integrity of the marshes, particularly of water levels, was of vital economic importance,<sup>107</sup> and disputes arose routinely between villages and individuals over the obligation to protect wetlands from flooding or drying out.<sup>108</sup>

Over time, the “fen people” developed informal codes “that governed economic activities in the wetlands.”<sup>109</sup> According to Bosselman,

The common law courts validated these wetland codes because they codified local customs exercised continuously since before 1189, and because they were sufficiently consistent with other customs, certain and compulsory, to justify their enforcement. Local customs meeting these tests were enforceable in the courts, and the codes served merely to memorialize such customs.<sup>110</sup>

The writ of *ad quod damnum* thus emerged as a way for the Crown, through the common law courts, to approve or prohibit proposed significant changes to the wetland landscape. Through this writ procedure, “the common law provided a means for evaluating proposed development activities in wetlands in terms of their effects on the fens and the fen people, and for allocating the costs and benefits of such development in an equitable manner.”<sup>111</sup> Bosselman concludes that the “English common law contributed to the maintenance of a sustainable wetland economy,” principally by enforcing “a pattern of interrelated ownership interests promoting continuation of existing patterns of wetland ownership and use . . . [and] by using the doctrine of custom to enforce regulatory codes developed and endorsed by the wetland users themselves.”<sup>112</sup>

The English common law of wetlands and the fen culture remained intact until the seventeenth century, “when new technology and a new

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105. *See id.* at 279.

106. *Id.* at 280. “Examples of such activities included grazing, gathering, fowling and fishing.” *Id.* Taking of wood for fire was allowed as a right of pasture, but there was no right to take wood for construction purposes. *See id.*

107. *See id.* at 281.

108. *See id.* at 281–82.

109. *See id.* at 283.

110. *Id.* These customary rules focused primarily on who could exploit the wetland, when, and to what extent. *See id.* A major concern in this regard went to water levels in wetlands and obligations to avoid flooding and drying out. *See id.* at 281–82.

111. *Id.* at 337.

112. *Id.*

political climate combined to increase the amount of wetland drainage dramatically.”<sup>113</sup> With the growth of the enclosure movement and the emergence of the landed class in control of Parliament, the fens were drained and the fen culture dismantled, leading to much social turmoil through the 1600s.<sup>114</sup> As Bosselman sums up:

For a thousand years, the English wetlands were a commons in which small-scale flood protection was combined with sustainable use of natural wetland products. Parliament then extinguished the rights of wetland users and redistributed those rights to the landed magnates in conjunction with large scale drainage projects. As a result of the gradual enclosure and drainage of wetlands, the common law of wetlands fell into disuse. Fewer and fewer wetlands existed, and those that remained often became part of the fee simple estate of a large land owner.<sup>115</sup>

So we can now revisit Huffman’s claim that “the default rule for most of . . . *English* history has favored resource development, often in the name of natural use of land and resources.”<sup>116</sup> He is accurate only if one begins the history of English common law in 1600, lopping off the prior 1000 years of uninterrupted social use and, eventually, common law protection of intact, ecologically functional wetlands. It is ironic that Huffman, who chastises us for failing to give due respect to settled expectations of property owners, seems to care little about the relatively rapid and massive social dislocation of the fen people and their millennium-scale settled expectations at the hands of the land magnates using their control of Parliament to transform the common law. We discuss below other examples of Huffman’s selective concern for whose ox is being gored.

True enough, however, is that American courts inherited the common law of England as it stood at the close of the eighteenth century, not as it existed during the time of the great fens. But as the next section shows, nineteenth-century American courts were quick to “adapt” the English common law in a “supply side” manner to accomplish what Huffman fears most about *Making Nuisance Ecological*, except that their Trojan horse worked to a different end.

### *B. The First Trojan Horse—American Nineteenth-Century Common Law in Pursuit of Drainage*

We now turn to Huffman’s claim that “the default rule for most of *American* . . . history has favored resource development, often in the

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113. *Id.* at 297.

114. *See id.* at 297–303.

115. *Id.* at 303.

116. Huffman, *Beware of Greens*, *supra* note 7, at 839 (emphasis added).

name of natural use of land and resources.”<sup>117</sup> Certainly if one were to examine in isolation the nineteenth-century American common law courts, one would have to agree. American judges made the English courts look like relative lightweights by systematically building into the common law what Professor John Sprankling describes as an “antiwilderness bias.”<sup>118</sup> As Bosselman did for the English common law, Sprankling’s research comprehensively traces the development of American jurisprudence on basic property doctrine, including nuisance. There are some chapters of that history which Huffman has overlooked.

Sprankling’s thesis is that “the abundance of wilderness land in the young United States substantially affected the nineteenth-century evolution of American property law . . . [and] that an instrumentalist judiciary modified English property law to encourage agrarian development, and thus promote the destruction, of privately-owned American wilderness.”<sup>119</sup> Nuisance is among the six property law doctrines Sprankling advances for evidence of this judicial transformation of the common law. For example, American courts gradually replaced the English harm-based test for nuisance with “a more flexible approach . . . under which only an unreasonable land use was deemed a nuisance,” and they also “increasingly considered the nature of the locality.”<sup>120</sup> Under this approach, combined with the relentless national pursuit of agrarian development, the courts treated wilderness as having little value, meaning “conduct was less likely to be enjoined as a nuisance if it occurred in a wilderness area than another, more developed, locality.”<sup>121</sup> Moreover, as American courts relaxed the English rule of enjoining nuisances by allowing compensatory damages as a remedy, “nuisance proved a useless doctrine to owners of wilderness land . . . [b]ecause the market values wilderness land solely in terms of its potential for future exploitative use.”<sup>122</sup> The alteration of wilderness thus had no significant negative impact on value, resulting in no meaningful damages remedy.<sup>123</sup>

Sprankling offered many cases from the nineteenth century as examples of this judicial evolution of the common law of nuisance, but the most revealing set of examples for our purposes is found in Professor John Nagle’s history of the status of wetlands in the American common law.<sup>124</sup> Nagle examines numerous examples of judicial opinions from the

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117. *Id.* at 839 (emphasis added).

118. See John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519 (1996).

119. *Id.* at 521.

120. *Id.* at 554.

121. *Id.*

122. *Id.* at 556.

123. See *id.*

124. See John Copeland Nagle, *From Swamp Drainage to Wetlands Regulation to Ecological Nuisances to Environmental Ethics*, 58 CASE W. RES. L. REV. 787 (2008).

nineteenth century in which courts describe wetlands in terms that would strike any American today as laughable—were the courts not so deadly serious. After recounting numerous examples in which state courts pronounced an unfettered property right to drain and fill wetlands at will,<sup>125</sup> Nagle adds that “[m]ost famously, the United States Supreme Court said that ‘if there is any fact which may be supposed to be known by everybody, and therefore by courts, it is that swamps and stagnant waters are the cause of malarial and malignant fevers, and that the police power is never more legitimately exercised than in removing such nuisances.’”<sup>126</sup> The nineteenth-century American courts thus had taken the English common law they inherited and “adapted” it to the point of casting wetlands as stark nuisances.

To his credit, Huffman does not go so far as to endorse the view that wetlands are, as a matter of judicial notice, nuisances. Yet he praises the nineteenth-century judicial common law experience as an example of the “bottom up” evolution of common law in which the legislature leads the courts, claiming that “the 19th century common law courts were not top down policy makers.”<sup>127</sup> Indeed, the Swamp Act of 1849, by which Congress transferred to Louisiana “the whole of those swamp and overflowed lands, which may be found unfit for cultivation,”<sup>128</sup> is one example of Congress leading on the theme of wetlands as nuisances. While Nagle points to this legislation and a series of federal and state laws like it to illustrate the uninformed view of wetlands in that era,<sup>129</sup> Huffman might have used them as evidence that the courts were following the legislative lead.

Fair enough, but Huffman does not mention those legislative initiatives in *Beware of Greens*, perhaps because if he did he would have to account for the fact that beginning a century later Congress reversed its prior policy and began legislating a long lineage of environmental protection laws, including wetland conservation laws. That legislative lead began well before the *Palazzolo* opinion we applauded in *Making Nuisance Ecological*, and which Huffman condemned in *Beware of Greens*. If the nineteenth-century courts were “bottom up,” Professor Huffman, why not also the *Palazzolo* court and others that might follow in its footsteps? More on that nagging detail below, for the story about the nineteenth century only gets more interesting, and doubly problematic for Huffman.

Another historical event Huffman leaves out of his version of the nineteenth century is that the courts were not content to call wetlands

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125. See *id.* at 790–91.

126. *Id.* at 791–92 (quoting *Leovy v. United States*, 177 U.S. 621, 636 (1900)).

127. See Huffman, *Beware of Greens*, *supra* note 7, at 848.

128. Swamp Act, § 1, 9 Stat. 352, 352 (1849).

129. Nagle, *supra* note 124, at 792–94.

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nuisances and leave it at that. As Nagle explains, the nineteenth-century courts “relied upon nuisance law to avoid the Fifth Amendment’s duty to pay just compensation to landowners whose property was subjected to legislatively mandated swamp drainage activities.”<sup>130</sup> As the Swamp Act and its progeny moved forward across the landscape,

landowners sought compensation from the government for various harms associated with the draining of their lands. Those takings claims failed. The courts also upheld statutes requiring the adjacent property owners to pay the costs of draining the swamps because those owners would become the greatest beneficiaries of the reclaimed lands. According to the Wisconsin Supreme Court, “to protect the public health and prevent public nuisances, this legislative interference with private property may be justified, and the assessment to cover the cost of such work may properly be made on the lands proportionately benefitted and improved thereby.”<sup>131</sup>

Can it be that Huffman’s “bottom up” nineteenth-century courts, which he holds out as the exemplar of common law evolution, not only altered the law of nuisance but then precluded takings claims on the ground of none other than the newly defined background principles? The practice sounds familiar to us: that is precisely what the *Palazzolo* court did. Yet we find no explanation from Huffman in *Beware of Greens* for why the nineteenth-century courts are to be applauded for such practices, but when we applaud the modern courts for doing the same, we are being radical, top down, cynical, and opportunistic.

If Huffman was aware of what Nagle reveals about the nineteenth-century courts, he didn’t say so in *Beware of Greens*. Perhaps he attempts to dodge this inherent inconsistency indirectly through his suggestion that *Palazzolo* and *Making Nuisance Ecological* rest on a “relatively newfound concern for ecosystem services coming at roughly the same time as Justice Scalia’s *Lucas* opinion.”<sup>132</sup> We turn to that fiction in the next section.

### C. *The American Reformation of Wetland Practices and Customs*

We trust that Huffman does not expect any modern court to adhere to the notion that wetlands should be drained because they are public nuisances. Yet rejecting that nineteenth-century wisdom does not require the common law of the twenty-first century to characterize draining of a wetland as a nuisance. For Huffman, that switch would necessitate the common law evolving from the “bottom up” with social customs and

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130. *Id.* at 796.

131. *Id.* at 795–96 (quoting *Donnelly v. Decker*, 17 N.W. 389, 393 (1883), and providing additional examples).

132. Huffman, *Beware of Greens*, *supra* note 7, at 817.

practices and legislative initiatives in the lead. Huffman insists that this has not happened, that *Palazzolo* and *Making Nuisance Ecological* represent some out of the blue, wild-eyed idea that wetlands are in fact economically valuable and that their destruction can in fact injure private property owners and the public at large.

What, exactly, does Huffman make of the last sixty years of our nation's social and policy history of environmental conservation? How does he incorporate the *factual* record into his model of properly paced and framed evolution of the common law? If he is asking for "bottom up" evolution led by social customs and practices and legislative initiatives, we don't have to work very hard to spell it out for him. As Professors Douglas Williams and Kim Connolly explain:

[D]uring the early decades of the twentieth century, concern about the effects of wetland losses, particularly on migratory waterfowl, began to brew and eventually gained national prominence. With the Migratory Bird Treaty Act of 1918, the Migratory Bird Conservation Act of 1929, and the Migratory Bird Hunting Stamp Act of 1934, the concern evolved into a national policy somewhat at odds with other federal policies, particularly the USDA's promotion of wetlands drainage and conversion to agricultural production.<sup>133</sup>

From there, Williams and Connolly walk readers step by step through the building history of federal administrative and legislative wetland conservation initiatives leading to the passage of the Clean Water Act in 1972, from which federal wetlands conservation and regulation policy emanates to this day.<sup>134</sup> In 1988, then-presidential candidate George H.W. Bush adopted the "no net loss" of wetlands policy, which has remained the cornerstone of executive wetlands policy in every administration since.<sup>135</sup> Congress and the executive were acting in sync with the social times.

Likewise, the science and economics of ecosystem services are not newfound wisdom. As explained above, they began in nascent form in 1970 and have progressed quickly to produce a vast literature and research agenda.<sup>136</sup> Wetlands, indeed, are the leading star of the cast of ecosystem services given their prodigious output of values for humans, including protection and enhancement of human property through flood mitigation, groundwater recharge, water filtration, and sediment

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133. Douglas R. Williams & Kim Dana Connolly, *Federal Wetlands Regulation: An Overview*, in *WETLANDS LAW AND POLICY: UNDERSTANDING SECTION 404*, at 3-4 (Kim Dana Connolly et al. eds., 2005).

134. *See id.* at 4-5.

135. *See* Department of Defense and Environmental Protection Agency, *Compensatory Mitigation for Losses of Aquatic Resources*, 73 Fed. Reg. 19594, 19594 (Apr. 10, 2008) (describing "no net loss" of wetlands as a longstanding national goal guiding federal policy).

136. *See supra* notes 71-73. For a more in-depth survey of the science and economics of ecosystem services, see *LAW AND POLICY*, *supra* note 71, at 15-83.

capture.<sup>137</sup> The knowledge amassed in the past forty years now composes an irrefutable body of evidence regarding the values wetlands provide to humans.

*D. The Modern Courts Follow the Lead*

So where does this history of custom, social norms, legislation, science, and economics leave Huffman in his assault on decisions like *Palazzolo* and analyses of common law evolution like *Making Nuisance Ecological*? Huffman must concede that judges did not write *Silent Spring*, the Clean Water Act, or the no net loss policy. *Palazzolo* and *Making Nuisance Ecological*, written ninety years after the Migratory Bird Treaty Act, twenty-five years after the Clean Water Act, and twenty years after the no net loss policy, are simply putting the common law in line with well-entrenched social custom and practices, legislative initiatives, scientific knowledge, and economic theory. Are we and the courts acting too fast for Huffman? No faster, it seems, than his heroes the nineteenth-century courts acted to tilt American common law toward the anti-wilderness bias. Must tilting back in favor of the environment move more slowly? And what would Huffman have today's courts do if not to incorporate the new knowledge of ecosystem services and changed circumstances of society and legislation? Surely he does not expect the courts to cling to patently false ideas about what wetlands are. Short of that, does he expect the courts to close their eyes and ears to the factual record, pretending wetlands and their ecosystem services don't exist? Is that what Huffman's version of the common law demands?

Huffman does not go there, for that would be a preposterous constraint to place on the courts. Instead, his entire assault on *Making Nuisance Ecological* depends on convincing others that courts like the Rhode Island court in *Palazzolo* are jumping the gun and engaging in "top-down" legislating of new policy, when in fact no such conception of history can be put together from the factual record.

Nuisance law is never simple, nor should it be. It is inconsistent with the history of nuisance doctrine, therefore, for Huffman to argue that the thesis of *Making Nuisance Ecological* "is a nonstarter because the idea of private rights in ecosystem services is unworkable."<sup>138</sup> If fear of complexity and indeterminacy were enough to shut the door on the evolution of nuisance doctrine, there would be no nuisance doctrine. The modern courts finally get it, plain and simple, and it is high time that they did. It is up to them to work out the details.

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137. See Sandra Postel & Stephen Carpenter, *Freshwater Ecosystem Services*, in NATURE'S SERVICES, *supra* note 71, at 195-211.

138. Huffman, *Beware of Greens*, *supra* note 7, at 833.

*E. Huffman's Last Stand*

At the end of *Beware of Greens*, Huffman offers his Plan B—the specter of “judicial takings.”<sup>139</sup> His idea is that the courts would commit a taking when declaring filling of wetlands a nuisance if they have not consistently declared as much in the past, by which we assume he means time immemorial. We concede, as the historical record requires, that the nineteenth-century courts would have scoffed at our proposal as uproariously as almost everyone today dismisses their views on wetlands. Notably, however, Huffman does not suggest that nineteenth-century courts were committing “judicial takings” when they denied takings claims by landowners injured as a result of wetland draining, despite the injuries inflicted on neighboring landowners and the public. Nor does Huffman suggest that the fen people could have claimed “judicial taking” when the courts and Parliament dismantled their wetlands and way of life.

Even Huffman must concede that the academic theory of judicial takings remains just that—a theory.<sup>140</sup> Its currency in jurisprudence is also limited, beginning with Justice Stewart’s suggestion, in a concurring opinion, that when a state court imposes a “sudden change in state law” of property it could expose the state to a takings claim,<sup>141</sup> a concept recently endorsed by four Justices in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*.<sup>142</sup> Yet, even assuming the Supreme Court someday were to adopt that view as the law of the land, as explained above, it would not apply to the ecological nuisance claim proposed in *Making Nuisance Ecological* and enforced in *Palazzolo*, because there was no sudden change in the law. As shown above, the courts have arrived at this point through precisely the evolutionary process Huffman demands. Unless Huffman is suggesting that all evolutionary steps in the common law process are exposed to judicial takings claims, he needs to explain why today’s evolution should be so exposed but the nineteenth century’s evolution is not.

That observation leads us to our final response to Huffman’s assault on *Making Nuisance Ecological*. The only way we can reconcile all of the

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139. *See id.* at 852–58.

140. *See id.* at 857.

141. *See id.* at 856 (quoting *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967)).

142. No. 08-1151 (U.S. June 17, 2010). The case arose out of the Florida Supreme Court’s decision in *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So.2d 1102 (Fla. 2008), *cert. granted*, 129 S. Ct. 2792 (2009) (No. 08-1151), in which the court found a state beach renourishment statute that fixed property boundaries for littoral property owners did not constitute a taking of property without just compensation. *Id.* at 1121. For an in-depth discussion of the case, which is outside the scope of this Article, see Donna R. Christie, *Of Beaches, Boundaries and SOB’s*, 25 J. LAND USE & ENVTL. L. (forthcoming 2010), available at <http://ssrn.com/abstract=1483348> (follow “One-Click Download” hyperlink).

inconsistencies and omissions in Huffman's account—including his failure to account for the English common law of the fens, the nineteenth-century American courts' transformation of the common law, and the same courts' invention of the first Trojan horse—is to infer that he believes the evolution of the common law of nuisance is a one-way ratchet. It is well oiled and works without any libertarian property objection when it evolves to favor more unfettered rights to exploit property at the expense of the environment, but it locks against any evolutionary step in the other direction. If that is Huffman's view of the common law, his theory of common law's evolution flows from an entirely normative perspective and runs at odds with what he purports in *Beware of Greens* to be an historically based model. History holds relevance for Huffman only, it seems, if it is consistent with the world as seen through the lens of libertarian property.

By contrast, for these purposes we make absolutely no normative claim about the common law. We accept that the nineteenth-century courts, given their time, were acting within the bounds of common law evolution. We merely suggest that when courts in modern times realize their counterparts from the past were *factually* wrong—and in this case not merely a little wrong, but indisputably, absolutely wrong—it is within the power, even the duty, of the common law to correct course, particularly when the correction is made decades after every other institution in society has already corrected course. If Huffman, as a representative of libertarian property and free market environmentalism, believes that our position “evidences not a scintilla of confidence in the common law process” and “rather . . . is blatant and cynical opportunism,”<sup>143</sup> then he has shown his true colors. As the next Part shows, he has repeatedly done so by discussing areas well beyond the boundaries of nuisance law.

#### V. THE PUBLIC TRUST DOCTRINE, STATE OWNERSHIP OF WILDLIFE, AND CUSTOM AS BACKGROUND PRINCIPLES

Although nuisance law is just one source of the background principles of American property law, Huffman questions whether our list of other background principles derived from the case law we surveyed was accurate. In this section we examine three of the more venerable background principles: the public trust doctrine, state ownership of wildlife, and customary rights. As we demonstrated with respect to his assault on our description of nuisance law as a background principle, we show that Huffman again considered neither the history nor the case law of these doctrines closely.

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143. Huffman, *Beware of Greens*, *supra* note 7, at 859.

*A. The Public Trust Doctrine*

Huffman's examination of the history of the public trust doctrine claims that the doctrine, as understood today, did not exist in either Roman or English law.<sup>144</sup> Given his propensity to overlook case law that does not support his ideology,<sup>145</sup> one might question the accuracy of this claim, particularly since Huffman's study was not based on original historical research.<sup>146</sup> Moreover, although Huffman contends that the nineteenth-century evolution of the scope of the doctrine from tidelands to all navigable waters was a salutary judicial development, he maintains that the doctrine's evolution in the twentieth century to protect environmental resources represented unwarranted judicial activism.<sup>147</sup> This dichotomy is less a principled distinction than a policy preference for economic development over environmental protection.

Our earlier study discussed several examples of courts employing the public trust doctrine as a background principle to defeat taking claims.<sup>148</sup> This case law has continued to mature into the present. For example, a Florida trial court rejected oceanfront landowners' claims that the county took their property by posting signs on the dry sand beach to regulate public vehicular access, on the ground that the dry sand was burdened by public rights of access and use arising under the public trust, among other doctrines.<sup>149</sup> Moreover, the Hawaiian Court of Appeals ruled that the Hawaiian Constitution "adopts the public trust doctrine as a fundamental principle of constitutional law in Hawai'i" that "clearly diminishes any expectation that oceanfront owners in Hawai'i had and may have in future accretions to their property."<sup>150</sup>

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144. James L. Huffman, *Speaking of Inconvenient Truths: A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POLY. F. 1 (2007) [hereinafter Huffman, *Inconvenient Truths*].

145. See *supra* notes 16–18 and accompanying text.

146. See Huffman, *Inconvenient Truths*, *supra* note 144, *passim* (relying heavily on Patrick Devaney, *Title, Jus Publicum and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13 (1976); Glen J. MacGrady, *The Navigability Concept in Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water*, 3 FLA. ST. U. L. REV. 511 (1975)).

147. Huffman, *Inconvenient Truths*, *supra* note 144, at 96–103.

148. See Blumm & Ritchie, *supra* note 3, at 342 (discussing *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119–20 (S.C. 2003); *Coastal Petroleum v. Chiles*, 701 So.2d 619, 624 (Fla. Dist. Ct. App. 1997); *Esplande Properties, LLC v. City of Seattle*, 307 F.3d 978, 987 (9th Cir. 2002); *R.W. Docks & Slips v. Wisconsin*, 628 N.W.2d 781, 788 (Wis. 2001); *Wilson v. Massachusetts*, 583 N.E.2d 894, 901 (Mass. App. Ct. 1992), *aff'd*, 597 N.E.2d 43 (Mass. 1992)).

149. See *Trepanier v. County of Volusia*, 2005 WL 6273786 (Fla. Cir. Ct. 2005) (relying also on custom, dedication, and prescription), *aff'd*, 965 So. 2d 276 (Fla. Dist. Ct. App. 2007) (affirming the lower court's takings analysis, remanding for a factual determination on the issue of custom, and reversing the lower court's determination that the land was publicly dedicated).

150. *Maunalua Bay Beach Ohana 28 v. State*, 2009 WL 5127980, at \*21 (Haw. Ct. App. 2009) (citation omitted) (internal quotation marks omitted).

Even if the public trust doctrine in England and Rome did not resemble the modern doctrine, the ancient doctrine did recognize the vulnerability of publicly valuable resources to monopolization.<sup>151</sup> Differences in the details of the doctrine over time are less significant than the fact that three vastly different societies recognized the need to protect public rights in certain natural resources.

### B. State Ownership of Wildlife

Another object of Huffman's criticism is the wildlife trust, a consequence of state sovereign ownership of wildlife in trust for the people.<sup>152</sup> This doctrine, as ancient as either the public trust or customary rights doctrine, requires the state trustee to manage wildlife for the benefit of the people,<sup>153</sup> not unlike the public trust doctrine. A number of courts have recognized the wildlife trust as a background principle,<sup>154</sup> but Huffman charged that its alleged "deep roots in the common law" were suspect, based on his study of Roman and English law.<sup>155</sup> Yet, virtually all states claim ownership of the wildlife within their borders,<sup>156</sup> and many do so on the basis of common law interpretations.<sup>157</sup> There are no reported takings concerning harvest management, which suggests that the wildlife trust is a viable background principle. Future cases will likely inquire whether the wildlife trust is a background principle sufficient to defeat takings claims concerning habitat protection.<sup>158</sup>

### C. Custom

Finally, Huffman objects to custom as a background principle on the basis of Justice Scalia's dissent from a denial of certiorari in the *Stevens v. City of Cannon Beach* case,<sup>159</sup> which claimed that "if it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property

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151. See Harrison C. Dunning, *Antiquity of the Public Right*, 2 WATERS AND WATER RIGHTS ch. 29 (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009).

152. See Thomas A. Lund, AMERICAN WILDLIFE LAW 28–29 (1980); ERIC T. FREYFOGLE & DALE D. GOBLE, WILDLIFE LAW: A PRIMER 21–35 (2009).

153. See FREYFOGLE & GOBLE, *supra* note 152, at 22–23.

154. See Blumm & Ritchie, *supra* note 3, at 353 (discussing *New York v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78, 84 (2000); *Sierra Club v. Dep't of Forestry & Fire Prot.*, 26 Cal. Rptr. 2d 338, 347 (Cal. Ct. App. 1993)).

155. Huffman, *Background Principles*, *supra* note 7, at 9 n.44, (citing Huffman, *Inconvenient Truths*, *supra* note 144).

156. See, e.g., Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 707–10 (2005).

157. See *id.* at 708.

158. See *id.* at 713–19 (suggesting also that the wildlife trust may impose duties as well as power on states and contending that it may authorize the imposition of damages for injuries to wildlife and wildlife habitat).

159. Huffman, *Background Principles*, *supra* note 7, at 9 n.42.

owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.”<sup>160</sup> Presumably, such a taking would result if the state failed to provide an “objectively reasonable” interpretation of its common law.<sup>161</sup> Overruling a state supreme court on its interpretation of its common law would be quite an enhancement of the power of federal courts to interpret state law, conflicting with the received vision of what Justice Kennedy has called “our federalism.”<sup>162</sup> Huffman himself has railed against federal overreaching of state prerogatives in other contexts.<sup>163</sup>

Moreover, it is more than a little odd that Huffman would object to customary rights given his commitment to custom as a central force of common law reasoning. He claimed that the judicial function of filling in gaps in statutes was justified only by invocation of “contemporary custom and behavior” and that there is no support for common-law judging based on utilitarian instrumentalist reasoning “not reflected in custom and precedent.”<sup>164</sup> In fact, Huffman has characterized the common law as merely “a formalization of custom, meant to evolve as custom evolves.”<sup>165</sup> Yet apparently the Oregon Supreme Court’s recognition of the persistent use of Oregon beaches for over a century was not a justification for concluding that customary use of the beach was a background principle defeating a takings claim.<sup>166</sup> Like his one-way ratchet of nuisance law,

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160. 510 U.S. 1207, 1212 (1994) (Scalia, J., dissenting).

161. *Lucas v. S.C. Coastal Comm’n*, 505 U.S. 1003, 1032 n.18 (1992).

162. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (“[O]ur federalism” allows the states, independent from federal direction, “to devise various solutions where the best solution is far from clear.”). The modern understanding of “our federalism” originated in *Younger v. Harris*, 401 U.S. 37, 44 (1971) (instructing that the concept represents “a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government . . . always endeavors to [act] in ways that will not unduly interfere with the legitimate activities of the States.”). For other uses of the phrase, see *Alden v. Maine*, 527 U.S. 706, 748 (1999) (“Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”); *Printz v. United States*, 521 U.S. 898, 921 (1997) (observing that separation between state and national government “is one of the Constitution’s structural protections of liberty”). See also Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court’s Takings Cases*, 38 WM. & MARY L. REV. 1099, 1123 (1997) (discussing the Rehnquist Court’s understanding of federalism in the takings context).

163. See, e.g., James L. Huffman, *The Impact of Regulation on Small and Emerging Businesses*, 4 J. SMALL & EMERGING BUS. L. 307, 316–17 (2000) (arguing for less federal regulation and more local and state regulation of small businesses); James L. Huffman, *Environmental Perspectives: Moving toward a Market-Oriented Middle Ground*, 28 HARV. J.L. & PUB. POL’Y 61, 66–67 (2004) (advocating a greater role for state and local regulation in environmental law).

164. Huffman, *Background Principles*, *supra* note 7, at 21 & n.100; see *supra* note 39 (explaining Huffman as a successor to James Coolidge Carter).

165. Huffman, *Background Principles*, *supra* note 7, at 23.

166. *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993) (explaining that when the ocean-front landowners purchased, “they were on notice that the exclusive use of the dry

custom is apparently a centerpiece of common law reasoning for Huffman except when it ensures public access to common property resources.

#### VI. HUFFMAN'S "RULE OF LAW"

Huffman's principal project has been to show that the judicial evolution of the "background principles" defense to takings in the years since the *Lucas* decision is inconsistent with his vision of the rule of law. He employs the "rule of law" phrase no fewer than twenty-six times in his articles criticizing our work.<sup>167</sup> Examining what he means is revealing, for we think it illustrates what may be a mainstream libertarian view of property.

For Huffman, just as the common law is a formalization of custom,<sup>168</sup> the rule of law "affirms the existing allocation of resources and distribution of property rights."<sup>169</sup> This anti-redistributive philosophy accounts for legal change grudgingly, if at all. Huffman suggests that changes are exclusively the consequence of contractual agreements, although he cites no documentation other than a law review article.<sup>170</sup> From this rule of law perspective, the takings clause forbids any uncompensated changes either by the courts or the legislatures not consistent with Huffman's version of custom.<sup>171</sup>

Huffman justifies this static vision of property on the basis of protecting settled expectations, although he does not attempt to explain either whose expectations need protection or the benefits of erecting a

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sand areas was not a part of the 'bundle of rights' that they acquired, because public use of the dry sand areas 'is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed'), *cert. denied*, 510 U.S. 1207 (1994); *accord* State *ex rel.* Thorton v. Hay, 462 P.2d 671, 678 (Or. 1969).

167. See Huffman, *Background Principles*, *supra* note 7, at 1 (title), 12, 16, 18, 21 & n.102, 22, 23 & n.112, 24, 25, 29 (a total of seventeen references); Huffman, *Beware of Greens*, *supra* note 7, at 820 n.20, 839, 843, 844 n.99, 847, 855, 858 (a total of nine references).

168. See *supra* notes 37-40 and accompanying text.

169. Huffman, *Background Principles*, *supra* note 7, at 24.

170. *Id.* ("Where changed values or new understandings lead one party to desire that ongoing impacts from the use of property of others be curtailed, the parties may alter the allocation of resources by contractual agreement. As suggested by Zywicki, only when such contractual or informal adjustments become the norm would the underlying assignment of rights be properly shifted by a common law court.") (citing 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)).

171. Huffman, *Background Principles*, *supra* note 7, at 25-26 (suggesting that acts of "judicial change that have no grounding in custom or practice" interfere with the common law process, and that change "that is otherwise part of the common law process may be prohibited by constitutional limitations" like the takings clause and its state constitutional equivalents). This perspective on the takings clause was rejected by the Oregon electorate in 2007. See *supra* note 23.

property regime around such protection.<sup>172</sup> He does suggest that without a commitment to the status quo, property jurisprudence will descend into a “jurisprudence of politics,” again with no case-law documentation.<sup>173</sup> The evolution of background principles over the last two decades is apparently just such an example of straying from “foundational and unchanging” principles in pursuit of “political progressivism,” a “distortion of the common law process,” and an unconstitutional one at that.<sup>174</sup>

Among the difficulties with this vision of the rule of law is that, as even Huffman recognized, the common law never resisted all change.<sup>175</sup> Thus, the issue is: how much change is tolerable? Surprisingly, under Huffman’s vision of constitutional property, this is not a question that courts can address, given his categorical requirement of absolute protection of landowners’ settled expectations.<sup>176</sup> As Huffman maintains:

Changing circumstances and new knowledge may require a reconsideration of what adherence to particular principles requires, or 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.<sup>177</sup>

Huffman’s paradigmatic vision of libertarian property emphasizes the liberties of the landed over all others, favors intensive uses to

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172. Huffman, *Background Principles*, *supra* note 7, at 24 (“[I]f precedent is disregarded without respect for settled expectations, the [unspecified] social and private benefits of custom and the rule of law will be lost.”).

173. *Id.* at 26–27 (discussing Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 316–17 (1993), and claiming that Michelman’s “jurisprudence of principles” will only be recognized by judicial liberals.”). Huffman apparently dismisses the case law we discussed in detail with the comment that it was the result of “presumably liberal” state courts and proceeds to suggest, perhaps tongue-in-cheek, that “conservative” judges will not recognize principles such as public trust and social responsibility because they either “know little” about such matters or are “blinded by a bias for free markets and private profit.” Huffman, *Background Principles*, *supra* note 7, at 26. Huffman’s political diatribe continued with a suggestion that the government could afford to pay the compensation costs of his static view of property because “government does find money for a multitude of other projects, including billions in political pork.” *Id.* at 28. This confidence in the ability to compensate has no empirical basis. The results of recent property rights initiatives in Oregon, *see supra* note 23, and Florida have produced nearly no examples of compensation paid to landowners but have instead induced a large-scale deregulatory effect. *See* John D. Echeverria & Thelka Hansen-Young, *The Track Record on Takings Legislation: Lessons from Democracies’ Laboratories* (June 6, 2008) (Georgetown Public Law Research Paper No. 1138017), available at SSRN: <http://ssrn.com/abstract=1138017>.

174. Huffman, *Background Principles*, *supra* note 7, at 27 (endorsing the notion of judicial takings at 27 n.126).

175. *Id.* at 23–25. At other times, however, Huffman suggests that any judge-made changes in property are constitutionally impermissible. *See infra* notes 176–177 and accompanying text.

176. *See* Huffman, *Background Principles*, *supra* note 7, at 29 (alleging that background principles “never imagined by owners of private property [are] not in the common law tradition.”).

177. Huffman, *Background Principles*, *supra* note 7, at 27.

sensitive uses, ignores ecological interconnections and responsibilities for future generations, and denies that there is a public interest beyond the maintenance of autonomous individuals and their voluntary actions.<sup>178</sup> Huffman's property also endorses the theory of natural rights, embracing the notion that property principles are universal, applicable everywhere and at all times.<sup>179</sup> This abstract vision of property held sway throughout the late nineteenth and early twentieth century only to be exposed by the legal realists for its political motivations and discarded by the Supreme Court by the late 1930s.<sup>180</sup> Huffman's interest in reviving the property concepts of over a century ago apparently lies in his attempt to restrain judicial discretion where it conflicts with his vision of separation of powers<sup>181</sup> and his version of the rule of law. The irony lies in that his expansive vision of the takings clause requires judges to exercise an enormous amount of discretion to reestablish a late nineteenth-century vision of property.

#### VII. THE INEVITABILITY OF BACKGROUND PRINCIPLES

Justice Scalia's invocation of background principles as the "logically antecedent inquiry" in regulatory takings cases is a common-sense rule whose utility is evidenced by the proliferation of background principles defenses.<sup>182</sup> As Professor Huffman acknowledges, the first question that courts must address in takings cases is the nature of the claimant's property interest.<sup>183</sup> Without such an interest, a regulatory takings claim fails at the outset, since the takings clause states that "nor shall private property be taken without just compensation."<sup>184</sup> Application of background principles of property and nuisance law amounts to a threshold inquiry into the character of an allegedly protected property interest. Thus, the "background principles defense" should be one of the first issues litigated in takings cases, for to proceed without an initial consideration of background principles would risk awarding

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178. See Freyfogle, *supra* note 50, at 102.

179. See *id.* at 104–05 (citing Douglas Kmiec, *The Coherence of the Common Law*, 26 VAL. U. L. REV. 367, 368 (1991)).

180. See, e.g., HORWITZ, *TRANSFORMING AMERICAN LAW, 1870–1960*, *supra* note 26, ch. 7; WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* (1996).

181. Huffman, *Background Principles*, *supra* note 7, at 22 ("Those who would have judges adapt the common law to the perceived need of the 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 judges step outside the judicial role, but they would also intrude on the legislative function . . .").

182. See Blumm & Ritchie, *supra* note 3, at 333–35, 341–54 (listing eight different categories of "background principles" defenses).

183. Huffman, *Background Principles*, *supra* note 7, at 15 (endorsing Professor Epstein's four-part test).

184. U.S. CONST. amend. V.

compensation to a claimant without a showing of the requisite property interest. Government defendants thus have a strong incentive to raise the issue of background principles as a categorical defense early in takings litigation. This strategy has succeeded in convincing courts not only to expand the categories of background principles but also to apply background principles as a threshold inquiry in case law beyond *Lucas*-type economic wipeouts.<sup>185</sup> Courts seem to be willing to decide cases on “background principles” grounds because, by doing so, they can avoid more difficult factual balancing.<sup>186</sup>

Again, herein lies irony. For Huffman, balancing tests and their “abstract notions of reasonableness” are anathema, an invitation to unwanted judicial activism.<sup>187</sup> Instead, he advocates for the categorical decisionmaking characteristic of legal formalism.<sup>188</sup> Yet background principles functioning as takings defenses enable courts to resolve cases on formalistic, categorical grounds, much to Huffman’s chagrin who viewed formalism as an ally in resurrecting a takings clause that would compensate most landowners for the burdens of environmental regulation.<sup>189</sup>

Because they are attractive to both government defendants and courts, background principles are here to stay as the “logically antecedent” inquiry in regulatory takings cases.<sup>190</sup> Moreover, since they often involve matters of state law, the federalism spawned by background principles will be difficult to restrain by the Supreme Court.<sup>191</sup> After all, a

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185. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (announcing that takings claims would turn on a multi-factor balancing test, including (1) the character of the government action, (2) the regulation’s economic effect on the landowner, and (3) the regulation’s interference with investment-backed expectations).

186. That is, the balancing required by *Penn Central*. See Blumm & Ritchie, *supra* note 3, at 326 n.26 (*Lucas* court acknowledging that anything less than total economic loss would require *Penn Central* analysis).

187. See Huffman, *Background Principles*, *supra* note 7, at 21–25 (suggesting that nuisance balancing that accounts for social conditions allows judges to make law based on “privilege, interest, or influence” (at 21), which “intrude[s] upon the legislative function” (at 22), is inconsistent with “the rule of law” (at 24), and is proscribed by the constitution’s takings clause (at 25)).

188. See *id.* at 12, 16.

189. See James L. Huffman, *Lucas: A Small Step in the Right Direction*, 23 ENVTL. L. 901, 901–02 (1993) (celebrating the *Lucas* decision as having “promise from the point of view of those interested in maintaining a coherent system of property rights, not to mention those interested in complying with the Constitution.”); see also *supra* note 23 (concerning Huffman’s advocacy for a statutory expansion of landowner compensation rights in Oregon).

190. Even Huffman seems to agree. See Huffman, *Background Principles*, *supra* note 7, at 14 (“Of course [Blumm and Ritchie] are correct in saying that the antecedent inquiry into a claimant’s property rights is here to stay . . .”).

191. Justice Scalia’s *Lucas* opinion did state that the Court would review state court interpretations of background principles to ensure that they were “objectively reasonable interpretations” of state law. *Lucas v. S.C. Coastal Comm’n*, 505 U.S. 1003, 1032 n.18 (1992) (“We stress that an affirmative decree eliminating all economically beneficial uses may be

Court committed to states-rights federalism would seem unlikely to attempt to police a state court's view of the development of its common law, especially concerning venerable property concepts.

For all of these reasons, *Lucas*' addition of "background principles" as takings defenses appears to be a permanent feature of the takings landscape. Since background principles help define the property rights alleged to have been taken, government defendants will ask courts to consider them early in takings litigation. Therefore, background principles will continue to function as a threshold which claimants must hurdle before evaluating a regulation under a balancing test or deciding whether it worked a *Lucas*-type economic wipeout.

#### CONCLUSION

Professor Huffman's advocacy of libertarian property and free-market environmentalism is well known.<sup>192</sup> So his criticism of our work on background principles is not altogether surprising, to the extent that he interpreted what we wrote as a threat to his vision of a vigorous takings clause requiring compensation for numerous regulatory restrictions on landowners. But we think the nature of his critique is quite flawed: he assumed we were mounting a normative argument calling for courts to create new background principles to defeat takings claims, when in fact we were merely observing what courts were actually doing. His criticism would have been more cogent had it directed attention to the unfolding case law and attempted to explain its alleged shortcomings. Huffman's premise that background principles are only of common law origin overlooks a good deal of case law, including at least one Supreme Court opinion that Justice Scalia himself signed.<sup>193</sup> Similarly, his criticism of nuisance and property background principles lacks a focus on history and the reasoning in the case law.

Moreover, Huffman's complaint that background principles will produce unwarranted judicial activism rings hollow from someone who is committed to reviving the judicial activism of the legal formalists of a century ago in the name of protecting select landowners through an

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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."'). But as Justice Scalia's dissent from certiorari denial in *Stevens v. Cannon Beach* acknowledged, the Supreme Court will often lack a suitable factual record to make a determination of whether there is in fact a regulatory taking. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 (1994) (Scalia, J., dissenting) (noting that thin factual records may often require the Supreme Court to appoint a special master to decide whether a taking has occurred).

192. See, e.g., *supra* notes 23, 189.

193. See *supra* note 64 and accompanying text (discussing Chief Justice Rehnquist's dissent in the *Tahoe-Sierra* case).

unprecedented interpretation of the takings clause.<sup>194</sup> His vision is that judicial activism in the service of certain landowners is warranted, but that state courts interpreting their state law traditions need close federal oversight based on his interpretation of what the takings clause should become.<sup>195</sup> That is no recipe for judicial restraint. Instead, it seems more like a political campaign.<sup>196</sup>

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194. See *supra* notes 23, 44–48, 170–176, 190–191, and accompanying text.

195. Although he has written extensively on the takings clause, Huffman has never explained in any detail where he thinks the boundary lies between regulations that do not require taking and those that do, nor tried to justify such a boundary. Instead, he simply argues that there should be more declarations of takings, and more compensation paid to landowners wishing to pursue intensive land uses. Huffman's aversion to background principles may be due to his unfamiliarity with some basic property law concepts. For example, he suggests that what a landowner needs to know about his property rights can be ascertained through a title search. Huffman, *Background Principles*, *supra* note 7, at 19 (“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.”). But of course any first-year law student would know that title searches will not uncover unwritten implied easements from prior use, easements by necessity, prescriptive easements, or easements by estoppel. Nor will record searches reveal adverse possession. See generally THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 194–220, 979–1101 (2007); JESSE DUKEMINIER ET AL., *PROPERTY* 112–56, 677–701 (6th ed. 2006).

196. See, e.g., Huffman, *Background Principles*, *supra* note 7, at 26 (accusing judges applying background principles of being judicial liberals and suggesting that so-called liberal commentators like Professor Michelman, *supra* note 168, might accuse “conservative courts [of being] blinded by a bias for free markets and private profit”). Perhaps it is no coincidence that Professor Huffman has recently decided to attempt to take his advocacy to the U.S. Senate, winning the Republican nomination to challenge Oregon’s incumbent Senator Ron Wyden (D-OR).

**We welcome responses to this Article. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact [ecologylawcurrents@boalt.org](mailto:ecologylawcurrents@boalt.org). Responses to articles may be viewed at our website, <http://www.boalt.org/elq>.**

