

LUCAS'S UNLIKELY LEGACY: THE RISE OF BACKGROUND PRINCIPLES AS CATEGORICAL TAKINGS DEFENSES

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*Advocates for expanded property rights heralded the Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Commission* as the dawn of a new era in which landowners would obtain increased constitutional compensation for the burdens of regulation, and which would in turn discourage regulatory initiatives. The post-Lucas era has been a considerable disappointment to property rights advocates, however. Ensuing decisions have confined the categorical takings rule to regulations that result in complete economic wipe-outs, a rare phenomenon. On the other hand, courts have expansively interpreted the decision's exemption from compensation for regulations that merely forbid uses prohibited by "background principles" of property and nuisance law. In fact, a dozen or more categorical defenses have evolved under the Lucas decision's background principles inquiry. Thus, surprisingly enough, Lucas's chief effect has been to make the nature of a claimant's property interest a threshold issue in all takings cases. Instead of increasing the likelihood of either landowner compensation or deregulation, Lucas's principal legacy lies in affording government defendants numerous effective categorical defenses with which to defeat takings claims.*

I. INTRODUCTION

The Supreme Court's decision in *Lucas v. South Carolina Coastal Council*¹ is one of the most celebrated cases of the Rehnquist Court's property jurisprudence. Justice Scalia's opinion for a 6-3 Court declared that a regulation depriving a landowner of all economic value was a categorical constitutional taking of private property for public use requiring government compensation regardless of the public purpose served by the regulation.² This new categorical rule was welcomed by private property advocates³ but denounced by defenders of government regulations.⁴

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¹ 505 U.S. 1003 (1992).

² *Id.* at 1019.

³ See, e.g., James L. Huffman, *Lucas: A Small Step in the Right Direction*, 23 ENVTL. L. 901, 901-02 (1993) (commenting that *Lucas* "has 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"); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1369 (1993) (arguing that *Lucas* "represents something of a high water mark in takings jurisprudence" because a six justice majority of the Court "allowed that some restrictions on land use might . . . be caught by the Takings Clause").

⁴ Michael C. Blumm, *Property Myths, Judicial Activism, and the Lucas Case*, 23 ENVTL. L. 907, 916 (1993) (*Lucas* is a "flawed decision because it assumes that property rights amount to development rights"); see, e.g., Joseph L. Sax, *Property Rights and the*

But now, over a dozen years later, the legacy of the *Lucas* decision seems neither as revolutionary as its advocates hoped, nor as dire as its detractors feared. In fact, the *Lucas* legacy represents one of the starkest recent examples of the law of unintended consequences. For rather than heralding in a new era of landowner compensation or government deregulation, *Lucas* instead spawned a surprising rise of categorical defenses to takings claims in which governments can defeat compensation suits without case-specific inquiries into the economic effects and public purposes of regulations. *Lucas* accomplished this by establishing the prerequisite that a claimant must first demonstrate that its property interest was unrestrained by prior restrictions.⁵ The decision suggested that those restrictions had to be imposed by common law courts interpreting state nuisance and property law,⁶ but *Lucas* has not been interpreted by either the lower courts or the Supreme Court so narrowly.⁷

Adding to the unanticipated consequences of the *Lucas* opinion was the fact that the categorical takings rule concerning economic wipeouts it established turned out to apply only to a very narrow class of takings cases, while the categorical defenses authorized by the decision are quite expansive in scope.⁸ In effect, the *Lucas* decision fundamentally revised all takings analysis by making the nature of the landowner's property rights a threshold issue in every takings case. Thus, although *Lucas* has proved to revolutionize takings jurisprudence, it did so in ways that hardly were anticipated, and which have proved to be much more protective of government defendants than anyone imagined at the time of the decision.

The task of this Article is to examine how this unlikely result came to be, and why categorical takings defenses are now probably a permanent part of the takings jurisprudence landscape. In brief, categorical defenses are attractive to government defendants because they can defeat takings claims at early stages of litigation. They also seem to be favored by courts, perhaps because they involve interpretations of law instead of case-specific factual determinations and difficult balancing based on context.⁹ Whatever the reasons for the popularity of categorical takings defenses, their proliferation in the wake of *Lucas* shows no sign of subsiding and may be practicably beyond the ability of the Supreme Court to curtail,

Economy of Nature: Understanding Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1455 (1993) (arguing that the *Lucas* Court's "outdated view of property . . . is not satisfactory in an age of ecological awareness").

⁵ *Lucas*, 505 U.S. at 1029; see *infra* notes 22–31 and accompanying text (introducing *Lucas*'s background principles defense).

⁶ *Lucas*, 505 U.S. at 1029.

⁷ See *infra* Parts V.A–B.

⁸ See *infra* notes 27–28 and accompanying text.

⁹ But see *infra* note 75 (noting the conceptual disconnect between the *Lucas* categorical background principles defense and the nuisance branch of that defense, which functions as a balancing test).

since so many of these claims are a function of state courts interpreting state law.

This Article examines *Lucas*'s surprising legacy. Part II explains the decision's authorization of background principles as a defense to takings claims, whether based on state or federal law. Part III considers nuisance law as a background principle, a takings defense which presents some conceptual difficulty since a nuisance is a function of a detailed factual inquiry that a categorical rule aims to eliminate. Part IV turns to background principles of property law, which have proven to be much more numerous than takings defenses grounded on nuisance, perhaps because the property rules are not as contextual as nuisance law. Part V examines statutory and state constitutional provisions as background principles, while Part VI discusses other threshold takings defenses, including the doctrine of destruction by necessity, forfeiture statutes, and revocable grants of public resources. Part VII ventures some predictions about the future of the background principles defense to takings claims. The Article concludes that by raising the "logically antecedent inquiry" about the nature of a claimant's development rights to a prominent, even preeminent position in takings analysis, the background principles defense has changed and will continue to change takings law in fundamental and perhaps unanticipated ways.

II. *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL* AND THE BACKGROUND PRINCIPLES DEFENSE

In 1986, David Lucas purchased two coastal lots in Charleston County, South Carolina with the intention to build single-family homes on each lot.¹⁰ In 1988, however, the South Carolina legislature enacted the Beachfront Management Act, which effectively precluded him from constructing any habitable structure on his property.¹¹ Lucas then filed suit against the South Carolina Coastal Council, the state agency in charge of implementing South Carolina's coastal zone management laws, claiming that the statute's application to him worked a constitutional taking, and therefore he was owed compensation. The state trial court agreed that the law produced a compensable taking by making Lucas's land "valueless" and ordered the state to pay Lucas more than \$1 million.¹² The South Carolina Supreme Court reversed, ruling that the Beachfront Management Act's objective of preventing public harm as a result of beach erosion fell within a long-recognized nuisance exception to takings liability.¹³ Thus, the is-

¹⁰ *Lucas*, 505 U.S. at 1006.

¹¹ *Id.*

¹² *Id.*

¹³ *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 899 (S.C. 1991); see *infra* Part III.A (discussing the pre-*Lucas* nuisance exception to takings liability).

sue on appeal to the U.S. Supreme Court was whether the South Carolina law effected a taking on Lucas's property that required compensation.

In its 1992 *Lucas* opinion, the Court expressly rejected the nuisance exception employed by the South Carolina high court, determining that judicial deference to legislatively decreed nuisance-prevention objectives was unwarranted because it could eviscerate all regulatory takings claims.¹⁴ Having eliminated the traditional nuisance defense to takings liability, Justice Scalia, the author of the *Lucas* majority opinion, then announced a new *per se* rule that expanded the idea of a categorical taking to require compensation for regulations that deny "all economically beneficial or productive use of land."¹⁵ Previously, categorical takings had been limited to permanent physical occupations.¹⁶ This limitation left the vast majority of takings claims for resolution under the reasoning of *Penn Central Transportation Co. v. City of New York*.¹⁷

In *Penn Central*, the Court announced that regulatory takings claims were subject to a multi-factor balancing test that considered: (1) the character of the government action, (2) the regulation's economic effect on the landowner, and (3) the regulation's interference with the landowner's reasonable investment-backed expectations.¹⁸ This case-specific, fact-based balancing made it difficult for takings claimants to successfully argue for compensation, as the public benefits of a regulation usually outweighed the adverse effects on the claimant.¹⁹

¹⁴ *Lucas*, 505 U.S. at 1026 (declaring that a state legislature's "noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation").

¹⁵ *Id.* at 1015. The *Lucas* majority opinion did not find that the South Carolina zoning law worked a compensable taking, but instead remanded the case to the South Carolina Supreme Court for a determination on whether the Beachfront Management Act effected a taking by precluding all effective use of Lucas's property. *Id.* at 1031–32. Due to the procedural posture of the case, Justice Scalia's opinion assumed, but did not hold, that the trial court was correct that the zoning statute deprived the plaintiff of all viable use of his land. *Id.* at 1020 n.9 (noting that the trial court's finding that the statute made Lucas's land "valueless" was "the premise for the petition for certiorari").

¹⁶ See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434–35 (1982) (determining that an ordinance requiring installation of cable television boxes in apartment buildings worked a categorical taking and distinguishing limited regulatory property restrictions from permanent physical occupations: "[W]hen the 'character of the government action' . . . is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.>").

¹⁷ 438 U.S. 104 (1978).

¹⁸ *Id.* at 124.

¹⁹ See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); 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); and Susan Rose-Ackerman, *Against Ad-Hockery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988) (Epstein, Huffman, and Rose-Ackerman all detail property owners' lack of success in regulatory takings cases under a *Penn Central* analysis and argue that the balancing test announced in *Penn Central* is unfair because it does not instruct individual property owners, *ex ante*, about just what they own and what

Lucas was heralded by some as carving out a significant exception to *Penn Central* balancing because it ruled that statutes or regulations that “deny all economically beneficial or productive use of land” require compensation without case-specific inquiry.²⁰ But those predictions have turned out to be considerable exaggerations; it is now clear that the *Lucas* categorical rule applies only to a narrow class of actions.²¹ Moreover, although not widely recognized at the time, the *Lucas* opinion did more than merely introduce the categorical “wipeout” rule for regulatory takings. The decision also introduced a threshold defense to the new categorical rule: Justice Scalia announced a defense to a constitutional taking if a regulation was merely forbidding uses that would be prohibited by “background principles of the state’s law of property and nuisance.”²² According to the *Lucas* decision, this background principles analysis was “the logically antecedent inquiry”²³ in a takings challenge. Consequently, if background principles restricted the use of a claimant’s property at the time of purchase, a regulatory prohibition of that use could not produce a constitutional taking. *Lucas* thus elevated the task of defining the relevant property interest—what some have referred to as the “denominator” question²⁴—to the role of a threshold inquiry.

The *Lucas* categorical takings rule applies only when a regulation effectuates total elimination of property’s value and use.²⁵ Thus, its practical application is quite narrow.²⁶ In contrast, the background principles

the rules are for use and exclusion).

²⁰ *Lucas*, 505 U.S. at 1015, *see also supra* note 3 (noting scholarly support for the *Lucas* decision from property rights advocates).

²¹ *See infra* notes 26, 32, and accompanying text.

²² *Lucas*, 505 U.S. at 1029.

²³ *Id.* at 1027.

²⁴ “The term ‘denominator,’ coined by Professor Frank Michelman in 1967, refers to the total property rights owned by the landowner against which the regulated parcel is compared” in takings analysis. Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENVTL. L. 175, 176 n.3 (2004) (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1192 (1967)). While *Lucas* established that identifying the denominator (also referred to as defining the relevant parcel) is a threshold inquiry, it did not make the task of determining the relevant parcel any easier. Indeed, identifying the denominator “has been a conceptual difficulty since the birth of regulatory takings in 1922 and has remained intractable through the [Supreme] Court’s most recent decisions in *Palazzolo* and *Tahoe-Sierra*.” *Id.* at 190; *see also* Michael C. Blumm, *Palazzolo and the Decline of Justice Scalia’s Categorical Takings Doctrine*, 30 B.C. ENVTL. AFF. L. REV. 137, 147 (2002) (“The size of the property under consideration, also known as the ‘denominator issue,’ is the key remaining unresolved issue in takings jurisprudence.”).

²⁵ *Lucas*, 505 U.S. at 1015.

²⁶ Subsequent Supreme Court decisions have identified just how narrow the *Lucas* category of takings liability is. In *Palazzolo v. Rhode Island*, the value of the claimant’s land allegedly dropped from \$3.15 million to \$200,000 due to the state’s regulation. 533 U.S. 606, 616 (2001). The Court held that this 93.7% decrease in property value was not sufficient to trigger *Lucas*’s categorical rule. *Id.* at 631. More recently, the Court reaffirmed in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* [hereinafter “*Tahoe-Sierra*”] that “our holding [in *Lucas*] was limited to ‘the extraordinary circumstance when

defense to takings liability is expansive. Courts in multiple jurisdictions have determined that *Lucas*'s threshold inquiry applies not only to *Lucas*-style complete economic wipeout takings, but also to physical occupation cases²⁷ and, more importantly, to *Penn Central*-type regulatory cases where less than total economic deprivation has occurred.²⁸ Consequently, the first question a court must address in any takings case (whether a *Lucas*, *Penn Central*, or physical occupation scenario) is whether the property use at issue was in fact one of the sticks in the bundle of rights acquired by the owner. If the contested use was not authorized by the claimant's title at purchase, a court should reject the takings claim at the threshold level.

Courts evaluate background principles as of the date of acquisition of the relevant property,²⁹ and their effectiveness as a defense does not depend on the landowner's knowledge of the background limitation. For instance, a landowner has no right to maintain a nuisance, regardless of whether or not the owner knew the contested use amounted to a nuisance.³⁰ Background principles arguments are attractive to government defendants because they raise issues that can resolve cases at early stages of litigation. Note, however, that the *Lucas* holding makes clear that background principles serve as an affirmative defense to takings liability for which the government bears the burden of proof.³¹ This makes sense because it would

no productive or economically beneficial use of land is permitted.' . . . Anything less than a 'complete elimination of value,' or a 'total loss,' the [Lucas] Court acknowledged, would require the kind of analysis applied in Penn Central." 535 U.S. 302, 330 (2002) (quoting *Lucas*, 505 U.S. at 1017, 1019–20 n.8).

²⁷ The *Lucas* opinion itself noted the federal navigational servitude may function as a background principle which would defeat an alleged physical occupation taking, 505 U.S. at 1028–29 (citing *Scranton v. Wheeler*, 179 U.S. 141 (1900)); see also *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 235 (2004) (ruling that the background principles defense to liability discussed in *Lucas* applies to both regulatory and physical takings cases); *Kim v. City of New York*, 681 N.E.2d 312, 314 (N.Y. 1997) ("A threshold inquiry into an owner's title is generally necessary to the proper analysis of a takings case, whether of a regulatory or physical nature.").

²⁸ See, e.g., *Appollo Fuels, Inc. v. United States*, 381 F.3d 1338, 1347 (Fed. Cir. 2004) ("It is a settled principle of federal takings law that under the *Penn Central* analytic framework, the government may defend against liability by claiming that the regulated activity constituted a state law nuisance without regard to the other *Penn Central* factors."); *Coalition for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 481 (6th Cir. 2004) (stating that the first step in a *Penn Central* takings inquiry is to determine whether claimant has a cognizable property interest as defined by *Lucas*); *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153 (Fed. Cir. 1995) (determining that "the *Lucas* formulation is useful for analyzing takings claims involving land use restrictions even when deprivation is not complete; specifically, there can be no compensable interference if such land use was not permitted at the time the owner took title to the property."); see also DOUGLAS T. KENDALL ET AL., *TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS* 117 (2000) (recognizing that the background principles defense applies to all inverse condemnation claims).

²⁹ *Lucas*, 505 U.S. at 1029 (explaining that background principles must "inhere in the title" of the property at issue).

³⁰ KENDALL ET AL., *supra* note 28, at 117.

³¹ The *Lucas* Court determined that for South Carolina to avoid compensation on remand, the state "must identify background principles of nuisance and property law that pro-

be intellectually awkward, perhaps impossible, for the claimant to prove the absence of use-limiting background principles.

A. *Background Principles as Categorical Takings Defenses*

The background principles inquiry authorized by *Lucas* is an absolute defense to any takings claim.³² This “logically antecedent inquiry” thus equates to a categorical rule against takings: if the contested use was not one acquired by the owner at purchase, the takings claim must be rejected at the outset due to lack of a protected property interest.

Categorical rules, characteristic of nineteenth-century legal thinking, promote distinct, bright-line classifications.³³ Such thinking declined in the twentieth century, as courts focused on balancing tests rather than categorical distinctions.³⁴ But the Rehnquist Court has been attracted to cate-

hibit the [contested] uses.” 505 U.S. at 1031.

³² See, e.g., Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENVTL. L.J. 439, 458 (1993) (arguing that “the only categorical rule in the *Lucas* majority opinion is a *negative* one: If a property restriction repeats limitations inherent in the title to property, as defined by property and nuisance law . . . the restriction *never* effects a taking”) (emphasis in original); David Coursen, *Lucas v. South Carolina Coastal Council: Indirection in the Evolution of Takings Law*, 22 ENVTL. L. RPT. (ENVTL. L. INST.) 10,778, 10,784 (1992).

In the guise of articulating one categorical rule—a denial of all use works a taking—the Court has implicitly established another principle that state-imposed limitations on property use always defeat a takings claim. Moreover, while the articulated rule applies in only a narrow range of circumstances, the implicit rule applies in every case. Finally when the two rules collide, the implicit rule controls: if [the landowner’s] property rights are subject to a state property or nuisance-law restriction, his taking claim will be defeated.

³³ See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 17 (1992) (“Nineteenth-century legal thought was overwhelmingly dominated by categorical thinking—by clear, distinct, bright-line classifications of legal phenomena. Late-nineteenth-century legal reasoning brought categorical modes of thought to their highest fulfillment.”).

³⁴ See *id.* (“[I]n the twentieth century, the dominant conception of the arrangement of legal phenomena has been that of a continuum between contradictory policies or doctrines. Contemporary thinkers typically have been engaged in balancing conflicting policies and ‘drawing lines’ somewhere between them.”).

An example of the Supreme Court’s rejection of categorical thinking in favor of balancing is its Commerce Clause jurisprudence beginning in 1937. Until then, the Court limited the federal commerce power through categorical rules that restricted federal regulation to direct effects on commerce (e.g., exchange and distribution). *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 546 (1935) (explaining that there is a “necessary and well-established distinction between direct and indirect effects” under the Commerce Clause; where “the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power”); see, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (concluding that manufacturing could not be regulated under the Commerce Clause because production did not directly affect interstate commerce). By the late 1930s, the Court realized that “the distinction between direct and indirect effects on commerce was inherently arbitrary.” ERWIN CHERMERIN-

gorical thinking,³⁵ possibly signaling a revival of nineteenth-century formalism in the twenty-first century.

The rise of categorical background principles defenses seems to have appealed to lower courts, perhaps because it allows judges to resolve cases without having to employ detailed factual analysis. Adopting the threshold inquiry enables courts to avoid *Penn Central* balancing—regarded by many legal observers as a “bewildering mess”³⁶—and reduce the amount of information that they must process. Judicial use of the background principles framework is also of obvious benefit to government defendants by dismissing takings claims at an early stage of litigation.

B. Federal or State Restrictions as Background Principles

Background principles restrictions on property rights may originate in either state or federal law. While the *Lucas* decision only expressly ruled

SKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 251 (2d ed. 2002). Consequently, after 1937, the Court rejected its formalistic approach to the Commerce Clause, discarding its direct/indirect effect distinction and adopting the view that Congress could regulate any activity that, when considered cumulatively with other similarly situated activities, had an effect on interstate commerce. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (concluding that “questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as ‘production’ and ‘indirect’ and foreclose consideration of the actual effects of the activity in question upon interstate commerce”); *United States v. Darby*, 312 U.S. 100, 113 (1941) (adopting a more flexible approach to the Commerce Clause inquiry and extending Congress’s power to include regulation of manufacturing).

³⁵ *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989) (advocating, in his Holmes Lecture at Harvard Law School, “clear and definite rules” over “standards” whose meanings vary with the predilections of those who interpret them).

The Rehnquist Court’s Commerce Clause decisions reflect a revival of formalistic thought, emphasizing differences in kind over differences in degree. *See, e.g., United States v. Morrison*, 529 U.S. 598 (2000) (declaring the Violence Against Women Act unconstitutional because, at least in areas that the Court regards as traditionally regulated by the states, Congress cannot regulate non-economic activity based on cumulative substantial effects on interstate commerce); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act of 1990 because gun possession is not a commercial activity). Although the Court’s recent Commerce Clause jurisprudence reflects judicial activism—striking down federal laws based on principles only lately articulated—the Court’s reasoning is formalistic, deciding cases based on categories without balancing. For example, *Lopez*’s distinction between non-economic and economic activity was similar to the 1935 *Schechter Poultry* Court’s distinction between direct and indirect economic effects. *See supra* note 34.

³⁶ James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1143 (1997); *see also* Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council*, 26 LOY. L.A. L. REV. 955, 966 (1993) (claiming that *Penn Central* balancing is “so amorphous as to defy description”); Carol M. Rose, Mahon *Reconstructed: Why the Takings Doctrine Is Still a Muddle*, 57 S. CAL. L. REV. 561, 566 (1984) (arguing that the analysis for regulatory takings is “deeply flawed”); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1081 (1993) (claiming that the takings test is the exemplar for “doctrine-in-most-desperate-need-of-a-principle”). *But see* Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 93 (2002) (arguing that vagueness in takings doctrine is “quite functional and entirely appropriate”).

that states may employ state-centered property restrictions as an affirmative defense to a takings claim,³⁷ Justice Scalia's majority opinion suggested that the United States could assert preexisting federal limitations on land as a defense to takings challenges. The opinion specifically mentioned the federal navigational servitude in this context, stating, "we assuredly would permit the government to assert a permanent easement [over submerged lands] that was a pre-existing limitation upon the [riparian owner's] title."³⁸ Consequently, most lower court decisions have recognized that background principles include the navigational servitude as well as other federal law limitations on property rights.³⁹

Although it is beyond any real doubt that the federal government can employ federally created property limitations to defeat a takings challenge, some questions remain as to whether the federal government can rely on state-created property restrictions to do the same. For example, in *Tulare Lake Basin Storage District v. United States*, a Court of Federal Claims judge rejected the United States' argument that it was entitled to defend a takings claim based on the federal Endangered Species Act⁴⁰ with state property restrictions.⁴¹ The court recognized that various California legal rules potentially represented "background principles" under *Lucas*, but determined that since the state of California failed to invoke available state rules imposing limits on water use (for example, the public trust doctrine and "reasonable use" requirements), the federal government could not rely on them to defend its species regulation.⁴²

Some commentators have maintained, however, that "there is substantial reason to think [*Tulare Lake's*] novel ruling was mistaken."⁴³ This

³⁷ 505 U.S. at 1029.

³⁸ *Id.* at 1028–29 (citing *Scranton v. Wheeler*, 179 U.S. 141 (1900)).

³⁹ *See, e.g.*, *Palm Beach Isles Assoc. v. United States*, 208 F.3d 1374, 1384 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000) ("In light of our understanding of *Lucas*, we hold that the navigational servitude may constitute part of the 'background principles' to which a property owner's rights are subject."); *M & J Coal Co.*, 47 F.3d 1148, 1155 (Fed. Cir. 1995) (ruling that the federal Surface Mining Control and Reclamation Act was a pre-existing limitation that defeated landowner's takings claim). *But see* *Preseault v. United States*, 100 F.3d 1525, 1538 (Fed. Cir. 1996) (en banc) (plurality opinion) (concluding that *Lucas* limited the background principles defense to state common law nuisance concepts).

⁴⁰ Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. §§ 1531–1544 (2000)).

⁴¹ 49 Fed. Cl. 313, 324 (2001) (Wiese, J.).

⁴² *Id.*

⁴³ John D. Echeverria & Julie Lurman, "Perfectly Astounding" *Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENVTL. L.J. 331, 376–81 (2003) (attacking *Tulare Lake's* determinations that wildlife protection effects a *per se* physical occupation taking and that the public "ownership" of wildlife is not an argument available to the federal government in takings cases); *see also* Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551 (2002) (arguing that the *Tulare Lake* Court erred by (1) finding that claimants' water contracts constituted protectable property interests given the limited, contextual nature of such rights under California water law, and (2) applying a physical—as opposed to regulatory—takings analysis).

contention is supported by *Rith Energy, Inc. v. United States*,⁴⁴ a case antedating *Tulare Lake* in which (surprisingly) the same Court of Federal Claims judge denied a takings challenge because a federal ban on a mining permit prevented a nuisance under state law. In *Rith Energy*, Judge Wiese observed:

[W]hether the enforcement of these restrictions is accomplished by the state regulatory body or by federal officials acting under the authority of [a federal statute] is not an issue relevant to the takings analysis. Under the holding of *Lucas* . . . the test is whether the property use that is proscribed is based on “restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” Where that condition is met, no compensation is owed.⁴⁵

The *Rith Energy* decision seems to be a more faithful interpretation of *Lucas* than *Tulare Lake*, since the *Lucas* decision approved both federal and state laws as background principles.

At least one state court has allowed a state to employ a federal property limitation to defeat a takings claim. In *Kinross Copper Corp. v. Oregon*,⁴⁶ the Oregon Court of Appeals relied on the federal Desert Land Act⁴⁷ to reject a mining company’s challenge to the state’s denial of a permit to discharge mining wastes into waters of the state.⁴⁸ The court described the issue as whether “the proscribed use interests were . . . part of [the landowner’s] title to begin with,”⁴⁹ and determined that the Desert Land Act effectively severed water rights from all unpatented mining claims granted after 1877.⁵⁰ Since the plaintiff mining company did not acquire the relevant mining claims until almost 100 years after the passage of the federal act, the court held that the mining company’s claim failed because it was “predicated on the loss of a right it never possessed.”⁵¹

Under *Lucas*’s test for regulatory takings, the initial question is whether the claimant had a protected property interest.⁵² If the claimant lacked a property interest because of “background principles” inherent in his title, the challenged regulation cannot have effectuated a taking.⁵³ Because the

⁴⁴ 44 Fed. Cl. 366 (1999) (Wiese, J.), *aff’d on other grounds*, 247 F.3d 1355 (Fed. Cir. 2001).

⁴⁵ *Id.* at 366–67.

⁴⁶ 981 P.2d 833 (Or. Ct. App. 1999), *aff’d on reconsideration*, 988 P.2d 400 (Or. Ct. App. 1999).

⁴⁷ Ch. 107, 19 Stat. 377 (1877) (codified as amended at 43 U.S.C. §§ 321–339 (2000)).

⁴⁸ *Kinross Copper*, 981 P.2d at 840.

⁴⁹ *Id.* at 837 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992)).

⁵⁰ *Id.* at 840.

⁵¹ *Id.*

⁵² 505 U.S. at 1029.

⁵³ *Id.*

threshold inquiry is antecedent to examining the purpose or effect of the regulation, there is no good reason to distinguish between whether the source of the inherent limit is state or federal law.

III. BACKGROUND PRINCIPLES OF NUISANCE LAW

A. *The Pre-Lucas Nuisance Exception*

The Supreme Court recognized a “nuisance exception” to takings liability long before its *Lucas* decision. In its 1887 decision in *Mugler v. Kansas*,⁵⁴ the Court denied a takings challenge to a state ban on the manufacture and sale of alcoholic beverages.⁵⁵ Rejecting the claim, the Court stated: “A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of the property for the public benefit.”⁵⁶ *Mugler* thus established the nuisance exception as a categorical bar to takings liability where the contested regulation aimed to eliminate a nuisance. Importantly, *Mugler* and its progeny instructed that this nuisance exception was not limited to common law nuisances, but also applied to statutorily declared nuisances.⁵⁷

Exactly one hundred years after *Mugler*, the Supreme Court set forth in *Keystone Bituminous Coal Association v. DeBenedictis*⁵⁸ what is arguably the broadest articulation of the traditional nuisance exception. While denying a takings challenge to certain mining restrictions that protected against subsidence, the *Keystone* majority announced that government action designed to prevent serious harm does not effect a taking, even where it destroys property value.⁵⁹ The Court concluded that regulations designed to prevent public harms were immune from Fifth Amendment liability because “no individual has a right to use his property to create a nuisance or otherwise harm others.”⁶⁰ The sweeping language of *Keystone*, insulating harm-preventing regulations from takings liability, was the apex of the traditional nuisance exception, but the moment was short-lived.

⁵⁴ 123 U.S. 623 (1887).

⁵⁵ *Id.* at 668.

⁵⁶ *Id.* at 668–69.

⁵⁷ *See, e.g.*, *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962) (emphasizing that application of the nuisance exception does not turn on whether the prohibited use is a common law nuisance); *Miller v. Shoene*, 276 U.S. 272, 280 (1928) (upholding a legislative determination that infected cedar trees were a nuisance and stating “[w]e need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law”).

⁵⁸ 480 U.S. 470 (1987).

⁵⁹ *Id.* at 491–92.

⁶⁰ *Id.* at 491 n.20.

B. From the Nuisance Exception to the Background Principles Defense

Five years after *Keystone*, the *Lucas* majority rejected the notion, established in *Mugler* and reaffirmed in *Keystone*, that harm-preventing regulations are immune from takings liability. The Court ruled that if the South Carolina Beachfront Management Act's effect was to eliminate all value from David Lucas's lots, the regulation worked a compensable taking unless the state could demonstrate on remand that the regulation did no more than ban what state courts would have concluded was a common law nuisance.⁶¹ The *Lucas* Court determined, however, that for South Carolina to defend its regulation on remand, it needed to "do more than proffer . . . the conclusory assertion that [the prohibited uses] violate a common-law maxim such as *sic utere tuo ut alienum non laedas* ('use what is yours so as not to harm what is others')";⁶² instead, the government must "identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found."⁶³ The Court grounded this determination on its assertion that "the distinction between a regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective value-free basis,"⁶⁴ and that the "ecological, economic, and esthetic concerns" that inspired the South Carolina Legislature to pass the Beachfront Management Act could be classified as either "benefit-conferring" or "harm-preventing."⁶⁵

Despite his skepticism of statutory nuisances,⁶⁶ Justice Scalia's *Lucas* opinion did not foreclose the role of nuisance law in defeating takings claims. Instead, the Court shifted judicial focus from the traditional

⁶¹ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992).

⁶² *Id.*; see also *id.* at 1026 (emphasizing that "the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated").

⁶³ *Id.* at 1031.

⁶⁴ *Id.* at 1026; see also *id.* at 1024 (noting that the "distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder"). In his *Penn Central* majority opinion, Justice Brennan had also expressed dissatisfaction with the public harm versus public benefit distinction, recasting the historic preservation ordinance at issue there as not an attempt to prevent a noxious use but a policy producing widespread benefit and applicable to all similarly situated properties. 438 U.S. 104, 134–35, 135 n.32 (1978).

⁶⁵ *Lucas*, 505 U.S. at 1024.

⁶⁶ *Lucas* announced that background principles "cannot be newly legislated or decreed," suggesting they must be more than merely "the legislature's declaration that the uses [the property owner] desires are inconsistent with the public interest." *Id.* at 1028, 1031. Several members of the Court, however, faulted this reasoning. Justices Blackmun and Stevens peppered their dissents with concerns about the majority's attempt to foreclose the legislative role in defining background principles. See *id.* at 1055–60 (Blackmun, J., dissenting); 1068–71 (Stevens, J., dissenting). Justice Kennedy's concurrence also expressed unease on this point, arguing that "the State should not be prevented from enacting new regulatory initiatives in response to changing conditions." *Id.* at 1035 (Kennedy, J., concurring).

nuisance exception to a background principles inquiry. Announcing the background principles nuisance defense, *Lucas* ruled that a taking could not occur if a regulation's effect merely duplicated the relief which "could have been achieved in the courts by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complimentary power to abate nuisances that affect the public generally."⁶⁷

Although similar to the traditional nuisance exception, *Lucas* strengthened the lessons of *Mugler* and *Keystone* in at least two important ways. First, *Lucas* instructed that the background principles inquiry is the "logically antecedent" question in a takings claim.⁶⁸ Consequently, the *Lucas* bar to takings liability is an affirmative defense, not an exception to compensation, as described in *Mugler* and its progeny.⁶⁹ Second, unlike the traditional exception, the *Lucas* defense is not limited to harm-preventing nuisance restrictions. Instead, the background principles defense potentially applies to any use-limiting regulation, regardless of whether or not it prevents a statutory or common law nuisance.⁷⁰

C. What Is a "Background Principles" Nuisance?

The *Lucas* majority ruled that background principles nuisances included both public and private nuisances.⁷¹ Justice Scalia also suggested that courts should look to the Restatement (Second) of Torts for guidance in their nuisance inquiries.⁷² In particular, the Court instructed lower courts to analyze

[1] the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, [2] the social value of the claimant's activities and their suitability to the locality in question, and [3] the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent landowners) alike.⁷³

The Restatement is hardly determinative of a court's background principles inquiry, however. *Lucas* established only that the threshold analysis must be based on an application of "relevant precedents."⁷⁴ The Court did not expressly require local case law on point to declare a use to be a nuisance. Instead, the nuisance determination needs only to be an "objectively

⁶⁷ *Id.* at 1029.

⁶⁸ *Id.* at 1027.

⁶⁹ KENDALL ET AL., *supra* note 28, at 124.

⁷⁰ *Id.* at 123.

⁷¹ *Lucas*, 505 U.S. at 1029.

⁷² *Id.* at 1030–31.

⁷³ *Id.* (citing several provisions of the RESTATEMENT (SECOND) OF TORTS (1979)).

⁷⁴ *Id.* at 1032 n.18.

reasonable application of relevant precedents,” an inquiry which, according to Justice Scalia, allows “some leeway in a court’s interpretation of what existing state law permits.”⁷⁵

Lucas also announced that background principles “cannot be newly legislated or decreed,”⁷⁶ instructing courts that a longstanding use by similarly situated landowners signals an absence of a background principles nuisance.⁷⁷ However, Justice Kennedy’s concurrence disagreed, stating: “the common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and independent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their sources.”⁷⁸ Some lower courts seem to have taken Justice Kennedy’s concurrence to heart, ruling that “background principles” nuisances include more than just the common law variety.⁷⁹

⁷⁵ *Id.* There exists a conceptual disconnect between the *Lucas* majority’s creation of a categorical background principles defense to takings liability and its subsequent definition of the nuisance branch of that defense as a balancing test focusing on the Restatement and a reasonable application of precedent. *Id.* at 1030–31, 1032 n.18. Unlike the general application of a categorical rule, which operates without fact-specific inquiry, this framework requires weighing the facts of individual cases, and therefore is arguably as difficult for courts to apply as *Penn Central* balancing. The balancing inherent in *Lucas*’s nuisance defense test, which is not present in the property law defenses discussed *infra*, may help to explain why only a handful of cases have been decided under the background principles nuisance analysis. See William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1407 (1993) (“[W]hat is most striking about the holding of *Lucas* is that it embeds in the already muddy law of takings . . . the even muddier law of nuisance.”).

⁷⁶ *Lucas*, 505 U.S. at 1029.

⁷⁷ *Id.* at 1031.

⁷⁸ *Id.* at 1035 (Kennedy, J., concurring) (citations omitted). Justice Kennedy’s concurrence may be determinative in future cases. As Professor Lazarus has noted, “Justice White, who supplied the necessary fifth vote in *Lucas*, resigned from the Court less than one year later and was replaced by Justice Ginsberg, whose views on the takings issue have proven much closer to those of Justice Stevens than to those of Justice Scalia.” Richard J. Lazarus, *Celebrating Tahoe-Sierra*, 33 ENVTL. L. 1, 12 (2003) [hereinafter Lazarus, *Celebrating Tahoe-Sierra*]; see also Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 733 (2000) [hereinafter Lazarus, *Restoring What’s Environmental*] (referring to Justice Kennedy as “the Court’s current bellwether Justice” in environmental cases); Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court’s Takings Cases*, 38 WM. & MARY L. REV. 1099, 1133 (1992) [hereinafter *Counting Votes*] (suggesting that Kennedy “is the most likely instigator of a new majority” in takings cases).

⁷⁹ See, e.g., *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 417–18 (Va. 1998) (determining that because claimants did not acquire title to the land at issue until after passage of a law requiring a permit to alter sand dune areas, they never possessed the right to develop their land); *Kim v. City of New York*, 681 N.E.2d 312, 315–16 (N.Y. 1997) (rejecting a claimant’s takings challenge and stressing that “in identifying the background rules of State property law that inhere in an owner’s title, a court should look to the law in force, whatever its source, when the owner acquired the property”); *Hunziker v. Iowa*, 519 N.W.2d 367, 370–71 (Iowa 1994) (holding that a preexisting state statute authorizing protection of important archaeological burial sites was a *Lucas* background principle). See also *infra* notes 224–253 and accompanying text (analyzing post-*Lucas* preexisting regulation takings cases). These decisions seem to be in step with post-*Lucas* Supreme Court takings jurisprudence that has held that background principles are not confined to the common law. See *infra* notes 224–253 and accompanying text (explaining the Court’s con-

1. *The Nuisance Defense in Practice*

Several post-*Lucas* decisions have embraced the background principles defense, rejecting takings claims because they were precluded by state common law nuisance doctrine.⁸⁰ For example, in *Colorado Department of Health v. The Mill*,⁸¹ the Colorado Supreme Court concluded that use restrictions on a uranium disposal site failed to amount to a taking because “relevant Colorado common law [nuisance] principles would not permit” a landowner to engage in activities that spread radioactive contamination.⁸²

Other courts have also denied takings challenges when the claimant’s land use violated a public nuisance statute. For instance, in *Hendler v. United States*,⁸³ the Court of Federal Claims ruled that the government’s installation of monitoring wells to address groundwater contamination was not compensable because the contamination was a public nuisance under California code provisions.⁸⁴ Similarly, the Supreme Court of Florida determined that a city-mandated closure of a hotel under a municipal statute required no compensation since drug and nuisance activity had become “inextricably intertwined” with the hotel’s operation.⁸⁵ One court even employed state water quality statutes to define the parameters of the state’s common law concerning nuisance, thereby defeating plaintiff’s takings challenge.⁸⁶

clusion that at least some statutes function as background principles). At least one court, however, thought that these decisions were at odds with the language in *Lucas*. See *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994) (adopting the narrow view that *Lucas* limited background principles to common law nuisance).

⁸⁰ See *Brown v. Thompson*, 979 P.2d 586, 595, 598 (Haw. 1999) (concluding that state impoundment of a sinking vessel effected a due process violation, but did not result in a taking because the vessel was a public nuisance under state’s common law); *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025, 1032 (Colo. Ct. App. 1996) (determining that state environmental agency did not engage in a taking when it entered a mine site to help a federal agency move a rock waste pile because, under Colorado principles of nuisance law, plaintiffs had no property right to use the site in a way that created significant environmental problems).

⁸¹ 887 P.2d 993 (Colo. 1994).

⁸² *Id.* at 1002.

⁸³ 38 Fed. Cl. 611 (1997), *aff’d*, 175 F.3d 1374 (Fed. Cir. 1999).

⁸⁴ *Id.* at 615–17.

⁸⁵ *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864, 876 (Fla. 2001); see also *John R. Sand & Gravel Co. v. United States*, 62 Fed. Cl. 556, 589 (2004) (finding no physical taking because claimant’s right to mine in area of remediated landfill was precluded by Michigan nuisance statute).

⁸⁶ *Rith Energy, Inc. v. United States*, 44 Fed. Cl. 108, 115 (1999) (using Tennessee Water Quality Control Act, TENN. CODE ANN. § 69-3-103(22)(A), to clarify that state’s definition of nuisance), *aff’d on other grounds*, 247 F.3d 1355 (Fed. Cir. 2001).

2. *The Evolving Nuisance Defense*

The *Lucas* majority expressly acknowledged that background principles nuisances have the potential to evolve beyond their present scope.⁸⁷ The Court stated that “changed circumstances may make what was previously permissible no longer so.”⁸⁸ To illustrate this point, the Court explained that no Fifth Amendment compensation would be due to “the corporate owner of a nuclear generating plant, if it were directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.”⁸⁹ Because nuisance law is continuously expanding, new knowledge concerning the value of particular resources may bar liability for acts which have not historically been considered to be common law nuisances.⁹⁰

A nuisance defense is particularly appropriate in the case of wetlands protection. The *Lucas* decision expressly determined that the Takings Clause did not require compensation for a lakebed owner “denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others’ land”⁹¹ because the denial did not “proscribe a productive use that was previously permissible under relevant property and nuisance principles.”⁹² Some post-*Lucas* courts, however, have ruled in favor of takings claimants in the wetlands context when the denied fill activity did not seem to threaten another’s property, often without considering the potential hydrological effects of the proposed fill.⁹³ Other courts have expressly determined that the effects of dredging and filling submerged

⁸⁷ 505 U.S. 1003, 1031 (1992); see also Richard J. Lazarus, *Putting the Correct “Spin” on Lucas*, 45 STAN. L. REV. 1411, 1419 (1993) (explaining that application of background principles is a “dynamic rather than static exercise”); Glenn P. Sugameli, *Lucas v. South Carolina Coastal Council: The Categorical and Other “Exceptions” to Liability for Fifth Amendment Takings of Private Property Far Outweigh the “Rule,”* 29 ENVTL. L. 939, 971 (1999) (describing the evolution of background property and nuisance principles). But see David L. Callies & J. David Breemer, *Background Principles: Custom, Public Trust, and Preexisting Statutes As Exceptions to Takings Liability*, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 145 (Thomas E. Roberts ed., 2002) (arguing that background principles must be frozen in the common law to maintain the “original thrust of *Lucas*”).

⁸⁸ *Lucas*, 505 U.S. at 1031. See also *supra* note 78 and accompanying text (examining Justice Kennedy’s concurrence, which argued that state should be allowed to enact new property limitations to meet changing conditions).

⁸⁹ *Id.* at 1029.

⁹⁰ KENDALL ET AL., *supra* note 28, at 127 (detailing the flexibility of the nuisance defense).

⁹¹ 505 U.S. at 1029.

⁹² *Id.* at 1029–30.

⁹³ See, e.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1183 (Fed. Cir. 1994) (upholding trial court’s finding that a taking occurred when the Corps of Engineers denied a permit to fill a 12.5 acre parcel of New Jersey wetland because the federal government failed to prove that nuisance law could have been invoked to prevent the fill); *Bowles v. United States*, 31 Fed. Cl. 37, 52 (1994) (concluding, with no significant discussion of hydrological evidence, that “the development of a residential lot does not constitute a nuisance”).

lands to facilitate development do not amount to an affirmative defense nuisance.⁹⁴

Cases concluding that the denial of a permit to dredge and fill a wetland worked a compensable taking do not seem consistent with *Lucas*'s definition of nuisance as any harm "to public lands and resources, or adjacent private property, posed by the claimant's proposed activities."⁹⁵ In almost all situations, the filling of a wetland produces harm to public and private lands adjacent to the filled site and beyond. Healthy wetlands are valuable resources that prevent public harms by maintaining water supply and quality, mitigating the effects of flooding and erosion, and providing habitat for hundreds of species.⁹⁶ The Supreme Court has acknowledged the importance of wetlands,⁹⁷ and the Fifth Circuit has noted that continued destruction of wetlands could produce an "environmental catastrophe."⁹⁸ Consequently, all denials of dredge and fill permits under section

⁹⁴ See, e.g., *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1366 (Fed. Cir. 1999) (rejecting a takings claim, but concluding that trial court was correct in finding that the dredging and filling of a California lake "to permit its use for building would not constitute a nuisance under California law"); see also David S. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 837 (1999) (observing that "*Lucas*-type defenses have had limited success in defense of wetlands takings claims").

⁹⁵ *Lucas*, 505 U.S. at 1030–31.

⁹⁶ See 2 D. D. HOOK, *THE ECOLOGY AND MANAGEMENT OF WETLANDS* 52–53 (1988) (explaining that wetlands help maintain the integrity of watersheds by mitigating the effect of floods and controlling erosion); Linda A. Malone, *The Coastal Zone Management Act and the Takings Clause in the 1990s: Making the Case for Federal Land Use to Preserve Coastal Areas*, 62 U. COLO. L. REV. 711, 712 (1991) (explaining that seventy percent of the nation's fisheries are dependent on estuaries for part of their life cycle); Mary M. McCurdy, *Application of the Public Trust: Public Trust Protection for Wetlands*, 19 ENVTL. L. 683, 696 (1989) (explaining that mammals and reptiles require wetlands for feeding and habitat); S. Wesley Woolf & James E. Kundell, *Georgia's Wetlands: Values, Trends, and Legal Status*, 41 MERCER L. REV. 791, 793 (1990) (commenting that wetlands contribute to water quality by filtering nutrients, wastes and sediment from upland runoff); Bhavani P. Nerikar, Comment, *This Wetland Is Your Land, This Wetland Is My Land: Section 404 of the Clean Water Act and Its Impact on the Private Development of Wetlands*, 4 ADMIN. L.J. 197, 203 (1990) (noting that almost all freshwater fish are dependent on wetlands).

⁹⁷ See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134–35 (1985) (endorsing regulatory findings on the importance of wetlands and citing Corps of Engineers' regulations discussing how wetlands protect water quality, prevent flooding and erosion, and "serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species," (citing 33 C.F.R. §§ 320.4(b)(2)(i),(iv)–(v),(vii))).

⁹⁸ *Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 672 (5th Cir. 1992) (noting that wetlands are "critical to flood control, water supply, water quality, and, of course, wildlife"); see also *Zealy v. City of Waukesha*, 548 N.W.2d 528, 535 (Wis. 1996) (stating that "swamps and wetlands serve a vital role in nature and are essential to the purity of the water in our lakes and streams") (quoting *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972); see also Richard C. Ausness, *Regulatory Takings and Wetland Protection in the Post-Lucas Era*, 30 LAND & WATER L. REV. 349, 358 (1995) ("[T]he destruction of wetland areas imposes a number of economic and environmental costs on society."); see generally NAT'L AUDUBON SOC'Y, *VALUING WETLANDS: THE COST OF DESTROYING AMERICA'S WETLANDS* (Deanne Kloefer ed., 1994).

404 of the Clean Water Act⁹⁹ and similar regulatory schemes¹⁰⁰ ought not to be subject to takings liability because such denials simply prevent the equivalent of nuisances.¹⁰¹

The nuisance defense to takings should also pertain to the conservation of endangered and other protected species. As Justice Stevens stated in his *Lucas* dissent, “[n]ew appreciation of the significance of endangered species . . . shapes our evolving understanding of property rights.”¹⁰² In the D.C. Circuit’s decision in *National Ass’n of Homebuilders v. Babbitt*,¹⁰³ Judge Wald’s opinion for the court noted that the genetic make-up of certain species could hold the cure to cancer and other ailments.¹⁰⁴ Judge Henderson’s concurrence concluded that “loss of biodiversity has a substantial effect on our ecosystem,” and acknowledged that “the effect of a species’ continued existence on the health of other species within the ecosystem seems to be generally recognized among scientists.”¹⁰⁵

The potential pharmaceutical value of both endangered and non-endangered species is an accepted concept. The endangered rosy periwinkle of Madagascar, for example, has yielded remedies for both lymphocytic leukemia and Hodgkin’s disease.¹⁰⁶ Similarly, empirical studies

⁹⁹ 33 U.S.C. § 1344 (2000). See generally Michael C. Blumm, *The Clinton Wetlands Plan: No Net Gain in Wetlands Protection*, 9 J. LAND USE & ENVTL. L. 203 (1994); Alyson C. Flournoy, *Section 404 at Thirty-Something: A Program in Search of a Policy*, 55 ALA. L. REV. 607 (2004).

¹⁰⁰ Most states regulate development of wetlands, though the requirements and types of wetlands regulated vary by jurisdiction. See, e.g., MASS. GEN. LAWS ch. 131 §§ 40–40A (2004) (restricting development in coastal wetlands and floodplains); ME. REV. STAT. tit. 38 §§ 480-A through 480-Z (2004) (mandating state approval for certain alterations to coastal, freshwater, floodplain, and forested wetlands, as well as sensitive mountain areas); N.C. GEN. STAT. §§ 113–229 through 113–230 (2004) (requiring permits for excavation or filling of tidelands and marshlands). For extensive commentary on state wetlands protection statutes, see WILLIAM L. WANT, LAW OF WETLANDS REGULATION § 13 (2004) (providing all state wetlands laws and state laws implementing the federal Coastal Zone Management Act); 3 ZONING AND LAND USE CONTROLS § 19.03 (Patrick J. Rohan & Eric Damian Kelly eds., 2004) (discussing specific wetlands conservation statutes, as well as comprehensive state land-use schemes that protect wetlands); and Ausness, *supra* note 98, at 359 nn.74–79 (listing several states’ wetlands regulations by regulatory scope and purpose).

¹⁰¹ See Sugameli, *supra* note 87, at 967 (arguing that wetlands protection statutes should be immune from takings liability under a nuisance analysis).

¹⁰² *Lucas*, 505 U.S. at 1069–70 (Stevens, J., dissenting); see also *Missouri v. Holland*, 252 U.S. 416, 432–33 (1920) (recognizing that continued protection of wildlife is a “matter[] of the sharpest exigency for national well being”).

¹⁰³ 130 F.3d 1041 (D.C. Cir. 1997); See generally Michael C. Blumm & George Kimbrell, *Flies, Spiders, Toads, Wolves, and the Constitutionality of the Endangered Species Act’s Take Provisions*, 34 ENVTL. L. 309 (2004) (discussing the *National Association of Homebuilders* case and other decisions interpreting the constitutionality of the Endangered Species Act under the Commerce Clause).

¹⁰⁴ 130 F.3d at 1051 (Wald, J.) (citing various Senate and House Reports on the Endangered Species Act).

¹⁰⁵ *Id.* at 1058 (Henderson, J., concurring) (citing scholarly articles focusing on protection of ecosystems and legislative history concerning the Marine Mammal Protection Act of 1972).

¹⁰⁶ See Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for*

show that species promote healthy ecosystems through “detoxification and decomposition of wastes, purification of air and water, generation and renewal of soil and soil fertility, pollination of crops and natural vegetation, control of harmful agricultural pests, mitigation of floods, partial stabilization of climate, support of various cultural activities, and provision of aesthetic beauty.”¹⁰⁷ Activities that may destroy potential medicinal cures or threaten a balanced ecosystem could easily be classified as public nuisances under a nuisance framework that allows for flexibility.¹⁰⁸ For this reason, the evolving background principles bar to takings liability announced by *Lucas* should include regulations that protect endangered and other species.¹⁰⁹

3. *The Likelihood of Harm Issue*

An unresolved issue in the jurisprudence of the nuisance defense concerns the likelihood of harm the defendant must prove in order to defeat a takings claim at the threshold level. In *Machipongo Land & Coal Company, Inc. v. Pennsylvania*,¹¹⁰ the Pennsylvania Supreme Court ruled that there was no reason to require the government defendant to prove that the

Optimal Biodiversity, 51 STAN. L. REV. 1127, 1136 (1999). For a detailed discussion reviewing the “manifold contributions of biodiversity and its genetic resources to modern agriculture, medicine, and industry,” see Norman Myers, *Biodiversity’s Genetic Library*, in NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS 255 (Gretchen C. Daily ed., 1997) [hereinafter NATURE’S SERVICES].

¹⁰⁷ Thompson, Jr., *supra* note 106, at 1136–37. See generally Gretchen C. Daily, *Introduction: What Are Ecosystem Services?*, in NATURE’S SERVICES, *supra* note 106, at 1; Gary Paul Nabhan & Stephen L. Buchmann, *Services Provided by Pollinators*, in NATURE’S SERVICES, *supra* note 106, at 133; Rosamond L. Naylor & Paul R. Ehrlich, *Natural Pest Control Services and Agriculture*, in NATURE’S SERVICES, *supra* note 106, at 151; David Tilman, *Biodiversity and Ecosystem Functioning*, in NATURE’S SERVICES, *supra* note 106, at 93 (all demonstrating the value of ecosystem services to human society).

¹⁰⁸ A “public nuisance” is defined as “an unreasonable interference with a right common to the general public.” RESTATEMENT (SECOND) OF TORTS § 821B (1979); see also PROSSER AND KEETON ON TORTS 645 (W. Page Keeton ed., 5th ed. 1984) (“To be considered public, the nuisance must affect an interest common to the general public.”). Use of land in a way that destroys a species and its pharmacological and ecosystem values can be classified as an interference with a right common to the public, especially considering that all states support state “ownership” of wildlife in trust for their citizens, either statutorily or through the common law. See *infra* notes 205–206 and accompanying text (detailing the American history of public ownership of wildlife).

¹⁰⁹ See, e.g., Lynn Graham Cook, Comment, *Lucas and Endangered Species Protections, When “Take” and “Takings” Collide*, 27 U.C. DAVIS L. REV. 185, 212–14 (1993) (arguing that courts should reject takings claims based on endangered species protections under a public nuisance analysis); Paula C. Murray, *Private Takings of Endangered Species as Public Nuisance: Lucas v. South Carolina Coastal Council and the Endangered Species Act*, 12 UCLA J. ENVTL. L & POL’Y 119, 157 (1993) (maintaining that regulations limiting the taking of endangered species are immune from liability under a nuisance defense, and further noting that many environmental hazards should be included in the definition of public nuisance); Sugameli, *supra* note 87, at 971 (contending that the nuisance doctrine should encompass the destruction of certain species).

¹¹⁰ See 799 A.2d 751 (Pa. 2002).

alleged water pollution was practically certain to occur in order to defeat the plaintiff's claim at the threshold stage.¹¹¹ Instead, it was sufficient that a state study concluded that continued mining had the potential to cause increases in dissolved metals in the water or to disrupt wild trout spawning.¹¹² On the other hand, the district court in *Tahoe-Sierra* considered the nuisance exception unavailable as an affirmative defense, in part because the government could not prove actual damage to an adjacent fishery.¹¹³ The court asserted that "the fact that fish might be threatened in Lake Tahoe as a result of increased sediment runoff, which was suggested by some of the evidence at trial, does not appear to be enough to prove an existing nuisance. It appears that actual damages may be necessary before a nuisance can be enjoined."¹¹⁴

The *Machipongo* decision seems more consistent with nuisance jurisprudence than the *Tahoe-Sierra* district court because actual harm is not generally required to abate or enjoin a public nuisance such as damage to a public waterway or fishery.¹¹⁵ The Restatement (Second) of Torts provides that "a public or a private nuisance may be enjoined because harm is threatened that would be significant if it occurred . . . although no harm has yet resulted."¹¹⁶ *Lucas* certainly did not alter this general rule;¹¹⁷ in

¹¹¹ *Id.* at 775.

¹¹² *Id.*; see also *John R. Sand & Gravel Co. v. United States*, 62 Fed. Cl. 556, 585 (2004) (denying plaintiff's takings claim under a statutory nuisance analysis because "the disturbance [caused by proposed mining activities] could create new pathways for pollution to spread" into an adjacent aquifer).

¹¹³ 34 F. Supp. 2d 1226, 1251–55 (D. Nev. 1999), *rev'd on other grounds*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002). Neither the Ninth Circuit nor the Supreme Court addressed the district court's ruling on this issue. See also *John R. Sand & Gravel Co.*, 60 Fed. Cl. at 242–50 (declining to grant government summary judgment based on a nuisance defense in light of disputed issues of fact concerning harm); *E. Minerals Int'l, Inc. v. United States*, 36 Fed. Cl. 541, 551 (Fed. Cl. 1996) (determining that state's denial of a mining permit due to potential environmental harm resulted in a taking because the alleged harm was never proved and thus did not rise to the level of nuisance), *rev'd on other grounds*, 271 F.3d 1090 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002).

¹¹⁴ *Tahoe-Sierra*, 34 F. Supp. 2d at 1254. The district court also concluded that "the fact that the lake may turn green and opaque, and be reduced to a pale copy of its current self, is abhorrent to think on—yet not, unfortunately, a 'nuisance.'" *Id.* at 1253.

¹¹⁵ See Glenn P. Sugameli, *The Supreme Court Confirms That Threshold Statutory and Common Law Background Principles of Property and Nuisance Law Define If There Is A Protected Property Interest*, in *TAKING SIDES ON TAKINGS ISSUES: THE IMPACT OF TAHOE-SIERRA* 52 (Thomas E. Roberts ed., 2003) (noting that the *Machipongo* decision is more in line with general understandings of nuisance law than the *Tahoe-Sierra* district court opinion).

¹¹⁶ RESTATEMENT (SECOND) OF TORTS § 821F cmt. b (1979); see also PROSSER AND KEETON ON TORTS, *supra* note 108, at 640 (explaining that situations exist where abatement of public nuisance is warranted absent actual harm). Unlike a motion to enjoin or an action in abatement, recovery of damages under a nuisance action or criminal prosecution for maintaining a public nuisance requires that actual harm be proved. See RESTATEMENT (SECOND) OF TORTS § 821F cmt. b. Whether an injunction is warranted for an anticipatory nuisance is determined by balancing the factors listed in sections 936–50 of the Restatement.

¹¹⁷ *Lucas* stipulated that a background principle nuisance must be a nuisance which "could have been achieved in the courts by adjacent landowners (or other uniquely affected

fact, the *Lucas* majority encouraged courts to employ the Restatement to decide background principle nuisance claims.¹¹⁸ The likelihood of harm issue, however, will continue to be litigated, and questions of proof of harm may hamper reliance on the nuisance defense.¹¹⁹

IV. BACKGROUND PRINCIPLES OF PROPERTY LAW

Lucas announced that a takings claim could also be defeated at the threshold stage if the government proved that an owner's use of land was restricted by a background principle of property law inherent in the owner's title at purchase.¹²⁰ Somewhat surprisingly, the property branch of the background principles defense has proved to be a fertile ground for government defendants. Lower courts have upheld several doctrines of property law as background principles to defeat takings challenges at the threshold level. In addition, there are other viable property law principles that courts have yet to fully adopt or develop as affirmative bars to compensation that are discussed below.

A. *The Public Trust Doctrine*

*Illinois Central Railroad Co. v. Illinois*¹²¹ is the lodestar for the American public trust doctrine. In that 1892 case, Justice Field applied the doctrine to void the state's grant of a 1000-acre portion of Lake Michigan's bed to private interests, declaring "[s]uch abdication is not consistent with the exercise of that trust which requires the government of the State to preserve [navigable waters and the lands under them] for the use of the public."¹²² Despite the wisdom of Justice Field's opinion,¹²³ modern interest in the public trust did not arise until Professor Sax's seminal article on the doctrine went to press in 1970.¹²⁴ Influenced by Professor Sax's

persons) under the State's law of private nuisance, or by the State under its complimentary power to abate nuisances that affect the public generally." 505 U.S. 1003, 1029 (1992).

¹¹⁸ *Id.* at 1030–31. See also *supra* notes 72–73 and accompanying text (discussing the Court's reliance on the Restatement).

¹¹⁹ The Supreme Court has acknowledged the vague nature of nuisance law. For example, in his *Lucas* dissent, Justice Blackmun referred to Anglo-American nuisance jurisprudence as an "impenetrable jungle" that "straddles the legal universe, virtually defies synthesis, and generates case law to suit every taste." *Id.* at 1055 n.19 (Blackmun, J., dissenting) (citations omitted). Similarly, in *City of Milwaukee v. Illinois and Michigan*, now Chief Justice Rehnquist commented that "nuisance concepts" are "often vague and indeterminate." 451 U.S. 304 317 (1981).

¹²⁰ See *Lucas*, 505 U.S. at 1029.

¹²¹ 146 U.S. 387 (1892).

¹²² *Id.* at 453.

¹²³ See Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 450 (1989) ("Justice Stephen J. Fields' opinion [in *Illinois Central*] . . . belongs on any short list of great natural resource opinions.").

¹²⁴ Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judi-*

scholarship, judges have increasingly found footholds for public trust arguments in state constitutions, state statutes, and in the common law.¹²⁵ Many post-*Lucas* courts have jumped on that legal bandwagon, employing the public trust to defeat takings claims dealing with coastal areas and other submerged lands.¹²⁶

In 2002, the Ninth Circuit decided, in *Esplanade Properties, LLC v. City of Seattle*,¹²⁷ that a Washington landowner had no compensable interest in a proposal to construct structures in the navigable tidelands of Elliot Bay, an area regularly used by the public for various recreational activities, because the purpose “was inconsistent with the public trust that [the state] is obligated to protect.”¹²⁸ Similarly, the Wisconsin Supreme Court recently upheld the denial of a state fill permit to complete the last phase of a marina on the bed and in the waters of Lake Superior, concluding that the public trust doctrine prevented the fill.¹²⁹ The developers were left with riparian rights of use and access only, which are “qualified, subordinate, and subject to the paramount interest of the state and the paramount rights of the public in navigable waters.”¹³⁰ And in *Wilson v. Massachusetts*,¹³¹ a Massachusetts Court of Appeals ruled that the claimants’ coastal landholdings were “impressed with a public trust,” leaving them only limited rights to their beachfront property.¹³²

All of the above cited cases concerned lands submerged beneath navigable waters, but a public trust-based takings defense is not necessarily limited to that context.¹³³ In *Phillips Petroleum Company v. Missis-*

cial Intervention, 68 MICH. L. REV. 471 (1970); see also Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 574 (1989) (noting that Professor Sax’s scholarship revitalized the once dormant public trust doctrine)

¹²⁵ In 1989, Professor Blumm noted that Professor Sax’s 1970 article concerning the public trust had been cited in at least thirty-three judicial opinions. Blumm, *supra* note 124, at 574 n.1; see also *id.* at 576 (arguing that state constitutional provisions reflected the public trust doctrine). In the last fifteen years, six additional courts have cited Professor Sax’s seminal article. Westlaw Search (Apr. 15, 2005) (searching “all cases” database).

¹²⁶ See, e.g., *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119–20 (S.C. 2003) (rejecting takings claim because landowner’s property rights did not include the right to backfill tidelands subject to the public trust); *Coastal Petroleum v. Chiles*, 701 So. 2d 619, 624 (Fla. Dist. Ct. App. 1997) (denying a takings challenge to prohibitions on offshore drilling because the public trust doctrine permitted the legislature to exercise without compensation its “authority to protect the lands held in trust for all people”).

¹²⁷ 307 F.3d 978 (9th Cir. 2002).

¹²⁸ *Id.* at 987.

¹²⁹ See *R.W. Docks & Slips v. Wisconsin*, 628 N.W.2d 781 (Wis. 2001).

¹³⁰ *Id.* at 788.

¹³¹ 583 N.E.2d 894 (Mass. App. Ct. 1992), *aff’d*, 597 N.E.2d 43 (Mass. 1992).

¹³² *Id.* at 901.

¹³³ See, e.g., Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Importance of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1 (1995) (contending that the public trust doctrine is a defense to takings claims in most beach and wetland areas); Blumm, *supra* note 124, at 579 (arguing that the public trust is actually “more androgynous than amphibious; it is chameleon-like, its character depending on the

sippi,¹³⁴ the Supreme Court noted that “[s]tates have the authority to define the limits of lands held in public trust and to recognize private rights in such lands as they see fit.”¹³⁵ Accordingly, the California Supreme Court extended the reach of that state’s public trust to nonnavigable tributaries of navigable waters,¹³⁶ and the New Jersey Supreme Court recognized public trust-based access and use rights to dry sand beach areas.¹³⁷

Some commentators have argued that an expanded, non-tidal application of the public trust as a defense to takings claims is inconsistent and irreconcilable with *Lucas* because it exceeds common law understandings of the doctrine.¹³⁸ But this argument seems inconsistent with the *Lucas* Court’s suggestion that background principles may have the potential to evolve beyond their historical scope.¹³⁹ The public trust doctrine is surely no exception to that acknowledgement. Therefore, in states that have

context of the dispute at hand”); Katherine E. Stone, *Sand Rights: A Legal System to Protect the “Shores of the Sea,”* 29 STETSON L. REV. 709 (2000) (arguing for an expansive view of the public trust doctrine that shields restrictions on development in non-tidal lands from Fifth Amendment liability).

¹³⁴ 484 U.S. 469 (1988).

¹³⁵ *Id.* at 475.

¹³⁶ See Nat’l Audubon Soc’y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983) (upholding the protection of fish habitat in Mono Lake and its tributaries to the potential detriment of vested water rights).

¹³⁷ See *Mathews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984) (determining that the public trust doctrine extends to dry sand beach areas for both access to and limited use of the ocean and foreshore); Nat’l Ass’n of Home Builders of the U.S. v. N.J. Dep’t of Env’tl. Prot., 64 F. Supp. 2d 354, 358 (D. N.J. 1999) (applying *Mathews* to review of takings claim); *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club*, 370 N.J. Super. 171 (App. Div. 2004) (holding that the public trust doctrine guarantees recreational use of dry sand areas in private ownership).

¹³⁸ See, e.g., Callies & Breemer, *supra* note 87, at 148 (“[T]he fit between the public trust and the background principles exception fades as the doctrine drifts from its historical moorings. . . .”); David J. Callies, *Custom and Public Trust: Background Principles of State Property Law*, 30 Env’tl. L. Rptr. (Env’tl. L. Inst.) 10,003 (2000) (opining that many post-*Lucas* judicial applications of the public trust in the takings context violate the *Lucas* rule because they deviate from the common law); James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) (arguing that an evolving public trust doctrine cannot be justified in a constitutional democracy because it usurps the legislative power by granting courts flexibility to “convert clearly defined easements into vast public rights”).

¹³⁹ Justice Scalia’s majority opinion emphasized the value of longstanding concepts of nuisance and property law in the background principles analysis, but also acknowledged that “changed circumstances may make what was previously permissible [for a landowner] no longer so” under *Lucas*’s threshold inquiry. 505 U.S. 1003, 1031 (1992). Justice Scalia also ruled that the background principles determination must be an “objectively reasonable application of relevant precedents,” an inquiry which allows “some leeway in a court’s interpretation of what existing state law permits.” *Id.* at 1032 n.18. In addition, Justice Kennedy’s concurrence in *Lucas* suggested that background principles have the ability to evolve, noting that “[t]he common law . . . is too narrow a confine for the exercise of regulatory power in a complex and independent society.” *Id.* at 1035 (Kennedy, J., concurring). As stated *supra* in note 78, Kennedy’s concurrence may prove determinative in future cases, considering the change in the Court’s composition since the 1992 *Lucas* decision.

adopted an expansive view of public rights, the public trust doctrine can be effectively used as a defense to takings claims in a variety of situations.¹⁴⁰

B. *The Natural Use Doctrine*

Closely related to the public trust doctrine are state common law natural use restrictions. The “natural use” doctrine maintains that landowners have no inherent property right to transform lands from their existing state. The leading case justifying application of natural use limits as part of the background principles of property law is *Just v. Marinette County*.¹⁴¹ In *Just*, the Wisconsin Supreme Court rejected a takings challenge to the denial of a county permit required to fill a wetland, stating:

An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others. . . . It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp.¹⁴²

Once mislabeled as a “phantom doctrine,”¹⁴³ *Just*’s natural use rationale was reaffirmed and expanded in scope by the Wisconsin Supreme Court fifteen years later in a case involving county-imposed wetland conservancy restrictions that precluded the claimant from developing ninety percent of its land.¹⁴⁴ The court ruled that the natural use principle applies regardless of “whether the regulated land is a wetland within a shoreland area, or land within a primary environmental corridor, or an isolated swamp.”¹⁴⁵

¹⁴⁰ Not all states have employed a liberal interpretation of the public trust doctrine. See, e.g., *Purdie v. Attorney Gen.*, 732 A.2d 442, 447 (N.H. 1999) (holding that a legislative extension of the public trust to areas above the mean high water mark would effectuate a taking); *Douglaston Manor, Inc. v. Bahrakis*, 678 N.E.2d 201, 204 (N.Y. 1997) (refusing to extend the public trust doctrine to rivers not navigable in fact because it “would precipitate serious destabilizing effects on property ownership principles and precedents”).

¹⁴¹ 201 N.W.2d 761 (Wis. 1972); see also James M. McElfish, Jr., *Property Rights, Property Roots*, 24 *Envtl. L. Rptr. (Envtl. L. Inst.)* 10,231, 10,244 (1994) (discussing *Just* and its relevance as a background principle).

¹⁴² 201 N.W.2d at 768–70.

¹⁴³ See David P. Bryden, *A Phantom Doctrine: The Origins and Effects of Just v. Marinette County*, 1978 *AM. B. FOUND. RES. J.* 397 (1978).

¹⁴⁴ See *M & I Marshall & Isley Bank v. Town of Somers*, 414 N.W.2d 824, 825 (Wis. 1987).

¹⁴⁵ *Id.* at 830. The court elaborated:

[A] parcel of land which consists of continuing wetland which is partly within and partly outside a shoreland area should be treated as if the entire wetland was located within a shoreland area. There would be little value to the wetland within the shoreland if the part of the wetland outside the shoreland area was allowed to be altered.

Other state courts have explicitly relied on *Just* to clarify that compensation is not due for restrictions placed on land that, in its natural and existing condition, is unsuitable for development. Jurisdictions approving the *Just* rationale include Florida,¹⁴⁶ New Hampshire,¹⁴⁷ South Dakota,¹⁴⁸ South Carolina,¹⁴⁹ Georgia,¹⁵⁰ and New Jersey.¹⁵¹

The natural use doctrine, at least as it concerns wetlands, seems to be well supported by English common law.¹⁵² Professor Bosselman has noted that English law has always maintained that ownership of property “does not carry with it an absolute right to build anything in any place, even in the absence of any legislatively imposed regulations.”¹⁵³ In fact, England’s common law consistently upheld natural use-like limitations by promoting the “continuation of existing patterns of wetland ownership and use.”¹⁵⁴ Because American courts frequently look to English common law as authority for their decisions,¹⁵⁵ government defendants may rely on relevant English common law analogues when making natural use arguments in state courts.

In a novel 2000 decision, *McQueen v. South Carolina Coastal Council*,¹⁵⁶ the South Carolina Supreme Court determined that the *Lucas* Court had *sub silentio* repudiated the reasoning of *Just* by stating that regula-

Id. at 831.

¹⁴⁶ See *Graham v. Estuary Prop., Inc.*, 399 So. 2d 1374, 1382 (Fla. 1981) (denying tidal land takings challenge and agreeing with the *Just* Court that a landowner has no absolute right to change the natural character of his land).

¹⁴⁷ See *Rowe v. Town of North Hampton*, 553 A.2d 1331, 1335 (N.H. 1989) (citing *Just* and rejecting a takings claim when the landowner’s actions would substantially change the essential character of a wetland).

¹⁴⁸ See *Chokecherry Hills Estates, Inc. v. Deuel County*, 294 N.W.2d 654, 657 (S.D. 1980) (employing *Just* to defeat a takings challenge focusing on development restrictions imposed on lake frontage).

¹⁴⁹ See *Carter v. S.C. Coastal Council*, 314 S.E.2d 327, 329 (S.C. 1984) (quoting *Just* in denying a wetland takings claim).

¹⁵⁰ See *Pope v. City of Atlanta*, 249 S.E.2d 16, 20 (Ga. 1978) (rejecting a Fifth Amendment claim concerning riverside property (“stream corridor”) and commenting that the *Just* analysis “buttresses our conclusion in this case”).

¹⁵¹ See *Usdin v. State Dep’t of Env’tl. Prot.*, 414 A.2d 280, 288–90 (N.J. Super. Ct. Law Div. 1980) (quoting *Just* and finding that a regulation precluding development of land designated a “floodway” was “a proper exercise of police power to prevent a misuse of nature [and not a] compensable taking”).

¹⁵² See, e.g., Michael C. Blumm, *The End of Environmental Law?: Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171, 176 n.37 (1995) (“[B]ackground principles’ may insulate all wetlands regulation from just compensation claims if courts scrutinize English common law wetland cases.”). For a comprehensive and illuminating work detailing the development of wetlands protection in common law England and its continuing relevance in a post-*Lucas* world, see Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L.J. 247 (1996).

¹⁵³ Bosselman, *supra* note 152, at 331–32.

¹⁵⁴ *Id.* at 337.

¹⁵⁵ *Id.* at 256 n.34 (providing several recent state court decisions that cite English common law nuisance cases for support).

¹⁵⁶ 530 S.E.2d 628 (S.C. 2000).

tions “requiring land to be left in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”¹⁵⁷ No other court has agreed with the *McQueen* Court that *Lucas* overruled the *Just* analysis. Instead, some courts have expressly noted the continued relevance of *Just* post-*Lucas*.¹⁵⁸ Moreover, the U.S. Supreme Court vacated and remanded the *McQueen* decision for further consideration in light of the then recent *Palazzolo v. Rhode Island* decision.¹⁵⁹ On remand, the South Carolina Supreme Court did not mention the natural use issue; instead, it rejected the takings claim on public trust grounds.¹⁶⁰ Thus, at least in the jurisdictions where reliance on the *Just* principle is well established, the natural use doctrine appears to remain a viable arrow in the quiver of takings defendants.¹⁶¹

C. The Navigational Servitude

The navigational servitude is the federal common law power to protect the navigable capacity of rivers and lakes by regulating the use of the beds of navigable waters and prohibiting structures or activities that threaten commercial navigation.¹⁶² As described above,¹⁶³ the *Lucas* Court discussed the federal navigational servitude as an example of a background principle that would defeat a takings challenge.¹⁶⁴ In 1996, the Third Cir-

¹⁵⁷ *Id.* at 633 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992)) (emphasis added by *McQueen* Court); see also Sax, *supra* note 4, at 1440 (conceding that *Lucas* may have repudiated the natural use defense to takings claims announced by *Just*).

¹⁵⁸ See, e.g., *Zealy v. City of Waukesha*, 548 N.W.2d 528, 534 (Wis. 1996) (denying takings challenge on other grounds, but specifically noting that “[n]othing in this opinion limits our holding in *Just*”); *City of Riviera Beach v. Shillingburg*, 659 So. 2d 1174, 1183 (Fla. Dist. Ct. App. 1995) (dismissing takings claim on ripeness grounds, but citing the *Just* principle post-*Lucas*). In the only other post-*Lucas* decision interpreting *Just*, Judge Merow of the Federal Court of Claims noted that whether or not the *Just* line of cases amount to a background principle of state law is unclear. *Good v. United States*, 39 Fed Cl. 81, 98 n.30 (1997), *aff’d*, 189 F.3d 1355 (Fed. Cir. 1999).

¹⁵⁹ *McQueen v. S.C. Dep’t of Health & Envtl. Control*, 533 U.S. 943 (2001).

¹⁶⁰ *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119–20 (S.C. 2003) (determining that plaintiff did not have a compensable right to backfill tidelands that were subject to the public trust).

¹⁶¹ See ROBERT MELTZ ET AL., *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION* 377 (1999) (explaining that “[a]t least in those states in which the [natural use] doctrine is well-established, it would seem to qualify” as a background principle).

¹⁶² See 4 *WATERS AND WATER RIGHTS* § 35.02 (Robert E. Beck ed., 2004 rep. Vol. to 1991 ed.); A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 9:13 (2004).

¹⁶³ See *supra* note 39 and accompanying text.

¹⁶⁴ 505 U.S. 1003, 1028–29 (1992) (stating that the court “assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner’s title,” and citing the holding in *Scranton v. Wheeler*, 179 U.S. 141 (1900), that interests of “riparian owner in the submerged lands . . . bordering on a public navigable

cuit applied this aspect of *Lucas*, concluding that the navigational servitude precluded a takings claim that stemmed from a ban on the development of a riverside coal loading facility.¹⁶⁵ Similarly, in *Donnell v. United States*,¹⁶⁶ a Maine district court determined that no taking resulted from a federal order to remove a wharf because the wharf owner's property rights to the submerged land under the structure remained subject to "the federal government's control for purposes of navigation and commerce."¹⁶⁷ Several other courts have similarly upheld the validity of the navigational servitude as a background principle.¹⁶⁸

Interestingly, a recent Court of Federal Claims decision, *Air Pegasus of D.C., Inc. v. United States*,¹⁶⁹ extended the servitude doctrine from navigable waters to navigable airspace.¹⁷⁰ The court denied a takings claim brought by a leaseholder whose heliport operation near the U.S. Capitol was closed by federal order following the terrorist attacks of September 11, 2001.¹⁷¹ Because the lease specified that the property could be used only for a heliport, the plaintiff alleged that shutting down his operation resulted in a *Lucas*-type taking.¹⁷² The claims court rejected this argument on the ground that navigable airspace is analogous to navigable waters, and no owner can claim a vested right to use navigable airspace.¹⁷³ It remains to be seen whether courts will extend the federal interest in navigation beyond navigable waters on a consistent basis.

D. Customary Rights, Including Native Gathering Rights

The doctrine of custom, especially as related to indigenous gathering rights and recreational beach access, provides another useful threshold takings defense. Oregon has the most fully developed common law of custom. In 1993, in *Stevens v. City of Cannon Beach*,¹⁷⁴ landowners with property adjacent to the Oregon beach filed a takings claim against an Oregon coastal town due to its refusal to issue a seawall permit. The town

water" were "subject to Government navigational servitude").

¹⁶⁵ See *United States v. 30.54 Acres of Land*, 90 F.3d 790, 795 (3d Cir. 1996).

¹⁶⁶ 834 F. Supp. 19 (D. Me. 1993).

¹⁶⁷ *Id.* at 26.

¹⁶⁸ See, e.g., *Palm Beach Isles Assoc. v. United States*, 208 F.3d 1374, 1384 (Fed. Cir. 2000) ("[N]avigational servitude may constitute part of the 'background principles' to which a property owner's rights are subject, and thus may provide the Government with a defense to a takings claim."), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000); *Marks v. United States*, 34 Fed. Cl. 387, 403 (1995) (holding that background principles bar takings claims for property below the high water line).

¹⁶⁹ 60 Fed. Cl. 448 (2004).

¹⁷⁰ *Id.* at 459.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ 854 P.2d 449 (Or. 1993).

denied the permit because it would block public access to a dry sand beach. The Oregon Supreme Court rejected the challenge, stating:

When plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not a part of the “bundle of rights” that they acquired, because public use of dry sand areas “is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed.”¹⁷⁵

Oregon’s “custom” of ensuring public access to dry sand areas, first articulated in the 1969 decision of *Thornton v. Hay*,¹⁷⁶ was thus “one of the . . . background principles of the State’s law of property” sufficient to defeat plaintiffs’ takings challenge at the threshold stage.¹⁷⁷

The U.S. Supreme Court refused to review *Stevens*,¹⁷⁸ but Justice Scalia, author of the *Lucas* decision, wrote a scathing dissent from the denial of *certiorari*, questioning the Oregon court’s reliance on the doctrine of custom to defeat the landowner’s takings claim:

[A] State may not deny rights protected under the Federal Constitution . . . by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate “background law”—regardless of whether it really is such—could eliminate property rights. A State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation [I]f it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncom-

¹⁷⁵ *Id.* at 456 (quoting *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969)). To reach this conclusion, the court determined that public beach access in Oregon met the Blackstonian elements of custom, which require that:

- (1) The land has been used in this manner so long “that the memory of man runneth not to the contrary”;
- (2) without interruption;
- (3) peaceably;
- (4) the public use has been appropriate to the land and the usages of the community;
- (5) the boundary is certain;
- (6) the custom is obligatory, i.e. it is not up to the individual landowners as to whether they will recognize the public’s right to access; and
- (7) the custom is not repugnant or inconsistent with other customs or laws.

Id. at 454 (citing 1 WILLIAM BLACKSTONE COMMENTARIES 76–78 (1778)).

¹⁷⁶ 462 P.2d 671 (Or. 1969).

¹⁷⁷ *Stevens*, 854 P.2d at 456.

¹⁷⁸ 510 U.S. 1207 (1994) (denying *certiorari*).

pensated taking. To say that this case raises a serious Fifth Amendment issue is an understatement.¹⁷⁹

One commentator has suggested that this dissent was a warning against judicial attempts to manipulate a state's background principles in order to avoid a taking.¹⁸⁰

Despite Justice Scalia's skepticism, custom remains a viable threshold defense. For example, in *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*,¹⁸¹ the Hawaii Supreme Court cited *Stevens* in holding that preexisting Native Hawaiian gathering rights could defeat a takings challenge to restrictions imposed on the development of a private resort to ensure the preservation of traditional gathering and access rights.¹⁸² The court specifically determined that land ownership in Hawaii is qualified by a Native Hawaiian right to gather natural resources according to native custom on undeveloped lands, even if the land is owned in fee by others.¹⁸³ The U.S. Supreme Court subsequently denied certiorari,¹⁸⁴ despite the Hawaii court's acknowledgement that it "refuse[d] the temptation to place undue emphasis on non-Hawaiian principles on land ownership," relying instead on the "Aloha spirit."¹⁸⁵

¹⁷⁹ *Id.* at 1209 (Scalia, J., dissenting from denial of certiorari). Justice O'Connor joined Scalia's dissenting opinion. See also David Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996) (criticizing the *Stevens* Court's interpretation of custom); Callies & Breemer, *supra* note 87, at 145 (arguing that the Oregon Supreme Court severely misapplied the Blackstonian criteria for custom in *Stevens*). For more Supreme Court commentary concerning background principles, see *Bush v. Gore*, 531 U.S. 98, 115 n.1 (2001):

Similarly, our jurisprudence requires us to analyze the "background principles" of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights.

¹⁸⁰ James Burling, *The Latest Take on Background Principles and the States' Law of Property After Lucas and Palazzolo*, 24 U. HAW. L. REV. 497, 501 (2002). Mr. Burling's assessment that the Supreme Court wishes to curtail lower courts from liberally applying longstanding doctrines of property and nuisance law in takings analysis is not widely shared. See, e.g., Sugameli, *supra* note 87, at 958-60 (arguing that the Supreme Court has given great deference to lower courts in determining background principles of state and federal nuisance and property doctrine, and noting that the Court has rejected every petition for certiorari that has attempted to challenge decisions that denied takings claims based on background principles); Sax, *supra* note 4, at 1438 (contending that *Lucas* provided states with wide latitude in determining the extent to which their "background principles" limit property rights).

¹⁸¹ 903 P.2d 1246 (Haw. 1995).

¹⁸² *Id.* at 1268.

¹⁸³ *Id.*

¹⁸⁴ 517 U.S. 1163 (1996).

¹⁸⁵ *Public Access Shoreline Hawaii*, 903 P.2d at 1268, 1272.

The scope of acceptance of the doctrine of custom varies from jurisdiction to jurisdiction. Oregon,¹⁸⁶ Hawaii,¹⁸⁷ and Texas¹⁸⁸ have employed custom to create recreational easements in beach property. The Florida Supreme Court also recognized a public recreational easement on a beach based on custom, although it concluded that the construction of an observation tower on the beach did not interfere with public usage.¹⁸⁹ The Idaho Supreme Court ruled that the doctrine of custom existed in that state, but it declined to apply the doctrine to find public recreational rights to a lakefront beach.¹⁹⁰ And some courts have flatly rejected the doctrine.¹⁹¹ Although the doctrine of custom is not endorsed by every state, in those jurisdictions recognizing customary rights, custom functions as a viable background principle limiting an owner's use of land.

E. Water Rights

A variety of established water law principles may also serve to limit a claimant's title, and thus defeat a takings challenge at the threshold level.¹⁹² These restrictions include, but are not limited to, state ownership of water in trust for its citizens,¹⁹³ the "no harm" rule concerning water

¹⁸⁶ See *State ex rel. Thornton v. Hay*, 462 P.2d 671, 676 (Or. 1969) (determining that the English doctrine of custom granted a public recreational easement to Oregon's beaches).

¹⁸⁷ See, e.g., *Hawaii County v. Sotomura*, 517 P.2d 57, 61 (Haw. 1973) (observing that "long-standing public use of Hawaii's beaches . . . has ripened into a customary right"); *Application of Ashford*, 440 P.2d 76, 77 (Haw. 1968) ("Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage.").

¹⁸⁸ See, e.g., *Arrington v. Mattox*, 767 S.W.2d 957, 958 (Tex. App. 1989) (denying compensation because statutory requirement for landowner to remove obstacles to provide public access to beach merely enforced easements previously acquired in part by custom); *Matcha v. Mattox*, 711 S.W.2d 95, 98-99 (Tex. App. 1986) (public acquired easement over Galveston's West Beach by doctrine of custom).

¹⁸⁹ *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So. 2d 73, 78 (Fla. 1974).

¹⁹⁰ *State ex rel. Haman v. Fox*, 594 P.2d 1093, 1101 (Idaho 1979) (determining that public usage that started in 1912 did not meet the requirement of use "from time immemorial" and that public usage had been interrupted by the landowner).

¹⁹¹ See, e.g., *Smith v. Bruce*, 244 S.E.2d 559, 569 (Ga. 1978) ("The theory of custom has been adopted in very few jurisdictions, has never been recognized in Georgia and will not be adopted as the law of this state in this case."); *Dep't of Natural Res. v. Mayor and Council of Ocean City*, 332 A.2d 630, 636-38 (Md. 1975) (refusing to adopt right of public use based solely on custom); see also *Bell v. Town of Wells*, 557 A.2d 168, 179 (Me. 1989) (declining to determine whether or not Maine recognized the doctrine of custom, but noting that there is a "serious question whether application of the local custom doctrine to conditions prevailing in Maine near the end of the 20th Century is necessarily consistent with the desired stability and certainty of real estate titles").

¹⁹² See generally John D. Leshy, *A Conversation About Takings and Water Rights*, 83 TEX. L. REV. (forthcoming 2005) (providing analysis on a variety of state-created property restrictions on water use that can defeat a takings claim at the threshold level); Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 269-71 (1990) (arguing that water rights can be altered or reduced in the public interest without the payment of just compensation).

¹⁹³ Virtually every western state has claimed that ownership of water within the state vests in the public or the state itself in trust for its citizens. See, e.g., MONT. CONST. art IX, § 3 (vesting ownership of surface, underground, flood, and atmospheric waters in "the state

rights transfers,¹⁹⁴ beneficial use restrictions,¹⁹⁵ and a water-based version of the previously described public trust doctrine.¹⁹⁶

Western courts have recently begun to employ water law limitations to defeat takings claims under *Lucas's* background principles analysis. For example, in *West Maricopa Combine, Inc. v. Arizona Department of Water Resources*,¹⁹⁷ an Arizona Court of Appeals applied the *Lucas* background principles concept to reject a water supplier's challenge to the state's rescission of a permit to divert water over private property via riverbed. The court determined that the claimant "took its title subject to the inherent limits arising from the state's reservation of the natural channels to move and store water,"¹⁹⁸ and thus did not have a protected property interest. The Hawaii Supreme Court reached a similar conclusion, denying a takings claim concerning groundwater restrictions and concluding that Hawaii property law requires protection of natural instream flows before the state may authorize diversionary out-of-stream uses of water.¹⁹⁹

Not all efforts to employ threshold defenses based in state water law have been successful. In *Tulare Lake Basin Water Storage District v. United*

for the use of its people"); N.M. CONST. art. VI, § 2 (unappropriated water of natural streams "belongs to the public"); WYO. CONST. art. VIII, § 1 (water of all natural streams, springs, lakes, or other collections of still water is the property of the state). *See also* Blumm, *supra* note 124, at 576 n.12 (providing an extensive list of western states that have either statutorily or constitutionally codified state ownership of water).

¹⁹⁴ All prior appropriation states provide that a reallocation of water rights will be allowed only if other appropriators are not injured. *See* 2 WATERS AND WATER RIGHTS § 14.04(c) (Robert E. Beck ed., 2001 repl. vol. to 1991 ed.) (recounting the history of the longstanding "no injury" rule, now codified by statute in almost all western states). A majority of prior appropriation states also require an express form of public interest review prior to conveyance of water rights. *Id.* § 14.04(d) (noting also that in states without an express public interest requirement, a court might require consideration of the public interest in a reallocation proceeding by implication).

¹⁹⁵ These restrictions stipulate that water can only be appropriated for a *beneficial* purpose. Accordingly, beneficial use restrictions may limit the quantity, time, place, and manner of an appropriator's water right. Tarlock, *supra* note 162, at § 5:66 (2004); *see also* Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919 (1998) (explaining the history of the beneficial use doctrine and how it has been used, often unsuccessfully, to prevent waste in western water consumption).

¹⁹⁶ *See, e.g., Nat'l Audubon Soc'y v. Superior Court of Alpine County (Mono Lake)*, 658 P.2d 709 (Cal. 1983) (holding that the public trust doctrine applies to nonnavigable tributaries affecting navigable waters). *See also* Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust Doctrine in Western Water*, 37 ARIZ. L. REV. 701 (1995) (detailing application of a water-based public trust doctrine in California, North Dakota, Idaho, Washington, Montana, and Alaska); Jan S. Stevens, *The Public Trust and In-Stream Use*, 19 ENVTL. L. 605 (1989) (providing an historical overview of the public trust as it applies to navigable and nonnavigable waters).

¹⁹⁷ 26 P.3d 1171 (Ariz. Ct. App. 2001).

¹⁹⁸ *Id.* at 1180.

¹⁹⁹ *In re Water Use Permit Applications*, 9 P.3d 409, 493 (Haw. 2000). *See also* *People v. Murrison*, 124 Cal. Rptr. 2d 68, 78 (Cal. Ct. App. 2002) (rejecting takings challenge on other grounds, but indicating that the plaintiff's failure to adequately document the nature and quantity of its alleged appropriation right under relevant California water law would have been fatal to its claim).

States,²⁰⁰ the Court of Federal Claims rejected the government's argument that a takings claim was barred by the California "reasonable use" and public trust doctrines.²⁰¹ The court instead determined that water restrictions imposed under the federal Endangered Species Act²⁰² resulted in a *per se*, physical occupation taking of plaintiffs' contractually conferred right to use water.²⁰³ Although as noted above in Part II, there was substantial reason to believe that the *Tulare Lake* decision would not have survived an appeal, the Bush Administration recently agreed to compensate the water users in a settlement.²⁰⁴

F. The Wildlife Trust

States have a significant public interest in protecting wildlife. In fact, public "ownership" of animals is a longstanding common law principle.²⁰⁵ As observed by the Oregon Supreme Court, "ownership [of wild animals], so far as a property right can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common."²⁰⁶ Under this time-honored tenet of state property

²⁰⁰ 49 Fed. Cl. 313 (2001).

²⁰¹ *Id.* at 321–24.

²⁰² 16 U.S.C. §§ 1531–1544 (2000).

²⁰³ *Tulare Lake*, 49 Fed. Cl. at 321–24.

²⁰⁴ See *supra* notes 43–45 and accompanying text (suggesting why *Tulare Lake* was incorrectly decided). The settlement awarded the *Tulare Lake* plaintiffs—several California farmers and irrigation districts—\$16.7 million, a figure which included compensation for the market value of the water diverted by the federal government in the years 1992, 1993, and 1994, as well as legal costs and interest. Bettina Boxall, *U.S. to Pay \$16 Million in Water Rights Case*, L.A. TIMES, Dec. 22, 2004, at B1.

²⁰⁵ While some U.S. Supreme Court decisions seemed to dismiss the state ownership doctrine, the holdings of those cases are narrow, overriding states' proprietary interest in wildlife only when it conflicts with federal law. See, e.g., *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (declaring that the state's proprietary interest in wildlife was preempted by the restraints imposed by the Commerce Clause), *Toomer v. Witsell*, 34 U.S. 385 (1948) (rejecting the argument that state ownership of wild animals prevented application of the federal Migratory Bird Treaty and its implementing legislation). As Professor Houck has argued, the Supreme Court "did not, and could not, overrule principles dating back to Roman law that wild animals are the common property of the state." Oliver A. Houck, *Why Do We Protect Endangered Species, And What Does That Say About Whether Restrictions on Private Property to Protect Them Constitute "Takings"?*, 80 IOWA L. REV. 297, 311 n.77 (1995). In fact, the *Hughes* opinion took care to explain "the general rule we adopt in this case makes ample allowance for preserving, in ways not inconsistent with the Commerce Clause, the legitimate state concerns for conservation and protection of wild animals." 441 U.S. at 335–36. Thus, all states continue to support a public "ownership" of wildlife, either statutorily or through court decisions. See DALE GOBLE & ERIC T. FREYFOGLE, *WILDLIFE LAW: CASES AND MATERIALS* 381 (2002) (recognizing that the state ownership doctrine "remains vitally relevant because it continues to undergird [modern] wildlife law"); Houck, *supra*, at 311 n.76 (providing statutory codification of the state ownership doctrine for more than thirty states).

²⁰⁶ *Fields v. Wilson*, 207 P.2d 153, 156 (Or. 1949) (quoting *Monroe v. Withycombe*, 165 P. 227, 229 (Or. 1917)); see also *Missouri v. Ward*, 40 S.W.2d 1074, 1077 (Mo. 1931). For an extensive list of modern cases holding that state governments have a trust duty to protect the wildlife residing within their borders, see Mary Christina Wood, *Protecting the Wildlife Trust*:

law, takings claims based on statutes and regulations protecting endangered and other species for the benefit of a state's citizens should be denied at the threshold level.²⁰⁷

At least two post-*Lucas* courts have endorsed state ownership of wildlife as a defense to takings challenges. In *New York v. Sour Mountain Realty, Inc.*,²⁰⁸ New York's intermediate appellate court addressed a takings claim based on a county court injunction seeking removal of a landowner's fence, which precluded threatened snakes from important forage habitat.²⁰⁹ The court affirmed the injunction and denied claimant's takings challenge, determining that:

The State, through the exercise of its police power, is safeguarding the welfare of an indigenous species that has been found to be threatened with extinction. . . . The State's interest in protecting its wild animals is a venerable principle that can properly serve as a legitimate basis for the exercise of its police power.²¹⁰

The California Court of Appeals has also employed wildlife protections as a background principle to reject a takings challenge concerning the denial of a timber harvest permit in order to prevent threats to endangered species, including the marbled murrelet.²¹¹ Importantly, the Court of Appeals observed that "wildlife regulation of some sort has been historically a part of the preexisting law of property."²¹²

These courts' observations that state wildlife protection can be a background principle of property law appear to be a reasonable application of *Lucas*.²¹³ The full extent of the usefulness of this doctrine, however, will be determined as more courts encounter the issue.

A Reinterpretation of Section 7 of the Endangered Species Act, 34 ENVTL. L. 605, 609 n.18 (2004) (citing cases from Alaska, Arkansas, California, Colorado, Michigan, Montana, New Jersey, Ohio, Oregon, Texas, Washington, and Wyoming, among other jurisdictions).

²⁰⁷ See generally Echeverria & Lurman, *supra* note 43 (providing in-depth analysis of the public ownership argument as a defense to takings claims).

²⁰⁸ 714 N.Y.S.2d 78 (2000).

²⁰⁹ *Id.* at 81.

²¹⁰ *Id.* at 84.

²¹¹ See *Sierra Club v. Dep't of Forestry & Fire Prot.*, 26 Cal. Rptr. 2d 338, 347 (Cal. Ct. App. 1993). The California Supreme Court denied review of this case without opinion on March 18, 1994, thereby upholding the appellate court's decision. However, in denying review, the Supreme Court also determined, pursuant to California Court Rules 976, 977, and 979, that the lower court decision would not be officially published (even though it was previously published). Consequently, the *Sierra Club* decision cannot be cited in documents submitted to California courts.

²¹² *Id.*

²¹³ Hope M. Babcock, *Should 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, 889 (2000) ("The continued vitality of [the state wildlife "ownership" theory] and supportive common law maxims would appear to make them background principles of state common law that arguably *inhere* in title to property.").

G. Indian Treaty Rights

Under *Lucas*, background principles of property law should include Native American treaty rights.²¹⁴ At least two aspects of treaty rights may defeat a takings claim. First, certain treaties retain federal ownership of submerged and other lands in trust for tribes.²¹⁵ Second, many treaties include the right to hunt and fish on off-reservation lands, even if those lands have been transferred by the federal government to states or private landowners.²¹⁶ Because treaty rights antedate virtually all private land titles, landowners subject to treaty limitations do not hold a property interest that allows unfettered use of their land. Instead, treaty rights could impose limits to protect, for example, Indian hunting or fishing on ceded lands without encountering Fifth Amendment liability. To date, no courts have addressed the viability of preexisting treaty limitations as a bar to takings challenges.

V. PREEXISTING STATUTORY AND CONSTITUTIONAL LAW AS BACKGROUND PRINCIPLES

Although Justice Scalia's *Lucas* majority opinion cautioned against employing legislatively decreed background principles,²¹⁷ many post-*Lucas* courts have sided with Justice Kennedy's *Lucas* concurrence to hold that state and federal statutes may function as a threshold bar to takings challenges.²¹⁸ Following a rationale commonly referred to as the "notice rule,"²¹⁹ these courts have reasoned that a takings claim brought by a landowner who purchased property subject to an existing regulatory prescription and subsequently had his or her use restricted by that regulation

²¹⁴ See Sugameli, *supra* note 87, at 965 (arguing for inclusion of Indian treaty rights within *Lucas*'s background principles of property law).

²¹⁵ See *Idaho v. United States*, 533 U.S. 262, 280–81 (2001) (determining that the bed of Coeur d'Alene Lake was reserved in trust for the Coeur d'Alene Tribe by Congress via treaty and congressional negotiations); *Confederated Salish & Kootenai Tribes of Flathead Reservation v. Namen*, 665 F.2d 951, 962 (9th Cir. 1982) (ruling that under the Hell's Gate Treaty, ownership of the lakebed was in the federal government, in trust for tribes).

²¹⁶ See, e.g., *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (determining that the title acquired by the United States and subsequently transferred to the state and private owners did not include the right to exclude Chippewas exercising treaty hunting, fishing, or gathering rights). See generally Michael C. Blumm & Brett M. Swift, *The Indian Treaty Piscary Profit and Habitat Protection in the Pacific Northwest*, 69 U. COLO. L. REV. 407 (1998) (arguing that Indian treaty rights to take fish include vested property rights to access historical fishing grounds, to obtain a fair harvest share sufficient to maintain a fishing livelihood, and to protect fish habitat).

²¹⁷ 505 U.S. 2003, 1029 (1992) (announcing that background principles "cannot be newly legislated or decreed").

²¹⁸ See *supra* note 80 and accompanying text (discussing Justice Kennedy's *Lucas* concurrence).

²¹⁹ As Professor Wright has observed, "the 'notice rule' posits that acquisition of land after a regulation precludes compensation and symmetrically assumes that preregulation acquisition of land is equally worthy of compensation if it is not excluded for some other reason." Wright, *supra* note 24, at 176 n.4.

must necessarily fail for lack of a protected property interest; the use limited by preexisting law was never part of the claimant's title and thus is not compensable.²²⁰ While the notice rule was eventually struck down as a categorical bar to takings claims by the Supreme Court,²²¹ statutes and constitutional provisions restricting land use may still function as background principles in certain circumstances.²²² Moreover, even if a court determines that a preexisting law is not a background principle, that law continues to be relevant at the balancing stage for less-than-total takings.²²³ The discussion below explains the role of preexisting statutory and constitutional use restrictions in the takings context.

A. *Statutes and Regulations*

Many courts have declared environmental and land use statutes to be background principles. In fact, virtually every state court case addressing this issue prior to the Supreme Court's 2001 decision in *Palazzolo v. Rhode Island*²²⁴ held that *Lucas* background principles included preexisting statutes that were in effect when the claimant acquired the relevant property.²²⁵ For example, in *Gazza v. New York State Department of Environmental Conservation*,²²⁶ New York's highest court concluded that a wetlands protection statute, enacted prior to the claimant's purchase of an oceanfront lot, was sufficient to defeat a taking, even in the absence of implementing regulations.²²⁷ Federal courts also followed this path, frequently concluding that enactment of a restrictive statutory or regulatory scheme prior to an owner's purchase of land prohibited a successful takings challenge by giving the landowner notice that its development rights were curtailed.²²⁸

²²⁰ See *infra* note 225 and accompanying text (listing court decisions employing the notice rule to defeat takings claims at the threshold stage).

²²¹ *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001).

²²² See *infra* notes 230–263 and accompanying text.

²²³ See *infra* Part V.C.

²²⁴ 533 U.S. 606 (2001).

²²⁵ See, e.g., *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 417–18 (Va. 1998) (holding that because claimants' did not acquire title to the land at issue until after passage of a law requiring a permit to alter sand dune areas, they never possessed the right to develop their land); *Kim v. City of New York*, 681 N.E.2d 312, 315–16 (N.Y. 1997); *Hunziker v. State*, 519 N.W.2d 367, 370–71 (Iowa 1994) (ruling that a preexisting state statute authorizing protection of important archaeological burial sites was a *Lucas* background principle). For more discussion on state law cases defeating takings claims under a preexisting statute analysis, see Robert L. Glicksman, *Making A Nuisance of Takings Law*, 3 WASH. U. J. L. & POL'Y 149, 169–82 (2000).

²²⁶ 679 N.E.2d 1035 (N.Y. 1997).

²²⁷ *Id.* at 1036, 1040–41.

²²⁸ See, e.g., *Outdoor Graphics v. City of Burlington*, 103 F.3d 690, 694 (8th Cir. 1996) (denying a takings claim because city signage ordinance antedated claimant's acquisition of nonconforming billboards); *Hoeck v. City of Portland*, 57 F.3d 781, 789 (9th Cir. 1995) (rejecting a takings claim on the grounds that the proscribed use violated a municipal regulation regarding vacant buildings); *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154

In *Palazzolo*, however, Justice Kennedy's majority opinion precluded the categorical approach adopted in lower courts which held that the enactment of a statute prior to an owner's acquisition of property defeated a takings challenge *per se*. Specifically, the Court ruled that a takings claim "is not barred by the mere fact that . . . title was acquired after the effective date of the state-imposed restriction."²²⁹ But the majority opinion did not state that statutes and regulations could never amount to a background principle. Instead, it recognized that at least some statutes are background principles sufficient to defeat a takings claim at the threshold stage.

Justice Kennedy's *Palazzolo* opinion declared that "[t]he right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions."²³⁰ Further, Chief Justice Rehnquist's dissent in *Tahoe-Sierra*, joined by Justices Thomas and Scalia, cited this passage from *Palazzolo*, thereby demonstrating widespread agreement among the Court's members that at least some valid zoning and land use regulations are background principles that bar any takings claim.²³¹ Although the *Palazzolo* decision declined to decide when legislation can be considered to be a background principle of state law, the Court made clear that "[t]he determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of land use proscribed."²³²

To date, lower courts have followed the suggestion in *Palazzolo* that certain statutes form background principles that categorically preclude takings claims. For example, in *Reeves v. United States*,²³³ the Court of Federal Claims determined that the non-impairment standard in Section 603(c) of the Federal Land Policy and Management Act of 1976 ("FLPMA")²³⁴ was a background principle of property law.²³⁵ The court then ruled that because the plaintiffs acquired their mining claims after the land had been designated as a wilderness study area under FLPMA's provisions, their property interest enabled them to mine only "in a manner which would not

(Fed. Cir. 1995) (determining that the federal coal mining statute was a preexisting limitation that defeated landowner's takings claim). *But see* *Preseault v. United States*, 100 F.3d 1525, 1538–39 (Fed. Cir. 1996) (en banc) (plurality opinion) ("The background principles referred to by the Court in *Lucas* were state-defined nuisance rules," and further determining that *Lucas* did not support the position that background principles include "the sweep of a century of federal regulatory legislation.").

²²⁹ 533 U.S. 606, 632 (2001).

²³⁰ *Id.* at 627 (2001) (citing *Pennsylvania Coal Co.*, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law")).

²³¹ 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting); *see also* Sugameli, *supra* note 115, at 51–56 (discussing Chief Justice Rehnquist's dissent in *Tahoe-Sierra*).

²³² 533 U.S. at 630.

²³³ 54 Fed. Cl. 652 (2002).

²³⁴ Pub. L. No. 94-579, 90 Stat. 2743 (1976) (codified at 43 U.S.C. § 1782(c) (2000)).

²³⁵ 54 Fed. Cl. at 671–72.

impair the surface of the public lands pending congressional decision” concerning the future of the designated area.²³⁶ The plaintiffs therefore did not have a property interest compensable under the Fifth Amendment.²³⁷

Similarly, in *American Pelagic Fishing Co. v. United States*,²³⁸ the Federal Circuit determined that the Magnuson-Stevens Fishery Conservation and Management Act (“MSFA”)²³⁹ was “an ‘existing rule’ or ‘background principle’ of federal law” sufficient to defeat a takings claim at the threshold level.²⁴⁰ The plaintiffs in *American Pelagic* claimed that several appropriation riders that cancelled certain coastal fishing permits worked a taking of their property interests in a fishing vessel,²⁴¹ but the court disagreed, holding that the MSFA, enacted prior to claimants’ purchase of the relevant vessel, served as a background restriction that inhered in the vessel’s title, thereby precluding takings liability for any ensuing regulations.²⁴²

In ruling that both the MSFA and FLMPA were background principles limiting a landowner’s development rights, the *Reeves* and *American Pelagic* courts stressed the fact that the restrictions at issue were traditional in scope. *American Pelagic* determined that the MSFA “is consistent with the historical role played by the sovereign, state or federal, with respect to its waters,”²⁴³ while the *Reeves* Court observed that although owners of unpatented mining claims hold full possessory interests in their claims, the federal government has always maintained “broad powers over the terms and conditions upon which the public lands can be used, leased, and acquired.”²⁴⁴ The results of these cases demonstrate that when takings plaintiffs bring challenges based on property uses that have traditionally been subject to regulation, those claims can be summarily rejected at the threshold level, albeit with recognition of the *Palazzolo* principle that “a law does not become a background principle . . . by enactment itself.”²⁴⁵

²³⁶ *Id.* at 674.

²³⁷ *Id.*

²³⁸ 379 F.3d 1363 (Fed. Cir. 2004).

²³⁹ Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified at 16 U.S.C. §§ 1801–1883 (2000)).

²⁴⁰ 379 F.3d at 1379.

²⁴¹ *Id.* at 1376.

²⁴² *Id.* at 1379.

²⁴³ *Id.*

²⁴⁴ 54 Fed. Cl. 652, 673 (2002).

²⁴⁵ *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001); *American Pelagic*, 379 F.3d at 1379 (declaring the MSFA a background principle not merely because of its enactment, but because its provisions mirror “traditional sovereign regulation of navigable waters and fisheries”); *Reeves*, 54 Fed. Cl. at 671–72 (acknowledging *Palazzolo*’s holding that not all statutes function as background principles); see also Glenn P. Sugameli, *Threshold Statutory and Common Law Background Principles of Property and Nuisance Law Defines If There Is a Protected Property Interest*, in *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES*, *supra* note 115, at 178 (commenting that the “nature of the statutes at issue [in many of the pre-*Palazzolo* cases] and the concerns that many of these courts expressed should lead to a reaffirmation of these decisions on the facts presented,” even under a *Palazzolo* analysis).

Chief Justice Rehnquist's dissent in *Tahoe-Sierra* helps identify the types of regulations that are sufficiently traditional in scope to be background principles of property law. As previously noted, the Chief Justice conceded that at least some "valid zoning and land-use" regulations are insulated from takings liability under *Lucas*'s background principles framework.²⁴⁶ The Chief Justice explained that "zoning and permit regimes are a longstanding feature of state property law"²⁴⁷ and observed that "[z]oning regulations existed as far back as colonial Boston . . . and New York City enacted its first comprehensive zoning ordinance in 1916."²⁴⁸

Application of the rationale of the Rehnquist dissent would counsel that a *Lucas* background principles analysis insulates from takings liability any legislatively decreed use restriction with a lineage antedating 1916.²⁴⁹ Statutes and regulations ensuring wetlands protection and wildlife conservation are two examples that clearly qualify for immunity under Chief Justice Rehnquist's reasoning. English law sought to prevent, through a regulatory scheme based on customary duties, the destruction of wetlands long before colonial Boston enacted zoning regulations.²⁵⁰ In addition, the wetland protection provisions in section 10 of the Rivers and Harbors Act of 1899²⁵¹ predate by seventeen years the 1916 New York City zoning ordinance cited by the Chief Justice. Statutes prohibiting destruction of wildlife have a similar vintage.²⁵² By the mid-1800s, many states had begun "regulating the use of fishing grounds, restricting hunting by seasons and outright prohibitions, and terminating certain commerce in wildlife altogether."²⁵³ These precursors of modern wildlife protection would clearly seem to qualify as "longstanding" features of state property law, sufficient to allow a similar, modern statute to be considered to be a background principle.

²⁴⁶ See *supra* note 231 and accompanying text.

²⁴⁷ *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 352 (2002).

²⁴⁸ *Id.*

²⁴⁹ See Sugameli, *supra* note 115, at 54 (noting that wetlands protections "have a similar or longer 'lineage' than the common law and the statutory bases for zoning that Chief Justice Rehnquist cited").

²⁵⁰ See Bosselman, *supra* note 152, at 282–88 (explaining that enforceable wetlands protection rules have been in place in parts of England since at least 1100).

²⁵¹ Ch. 425, 30 Stat. 1151 (1899) (codified as amended at 33 U.S.C. § 403 (2000)).

²⁵² See, e.g., GOBLE & FREYFOGLE, *supra* note 205, at 762–68 (analyzing English and early American regulation of the taking of wildlife); JAMES A. TAYLOR, WHO OWNS THE WILDLIFE: THE POLITICAL ECONOMY OF CONSERVATION IN NINETEENTH CENTURY AMERICA 139–78 (1981) (providing a broad history of game laws in nineteenth-century America).

²⁵³ Houck, *supra* note 205, at 309; see also WILLIAM T. HORNADAY, OUR VANISHING WILD LIFE: ITS EXTERMINATION AND PRESERVATION 265–303 (1913) (presenting a state-by-state status report on wildlife legislation); Babcock, *supra* note 213, at 883 (commenting that "wildlife management in this country has been a prerogative of the government since colonial times").

B. Constitutional Provisions

Constitutional provisions can also be background principles of property or nuisance law. One prominent example is article XI, section I of the Hawaii Constitution, which the Hawaii Supreme Court interpreted to be a background principle limiting private owners' use of land.²⁵⁴ That provision states:

[F]or the benefit of present and future generations, the State and its political subdivisions shall protect and conserve Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.²⁵⁵

Article XI further proclaims that "all public resources are held in trust for the benefit of the people."²⁵⁶ The Hawaii Supreme Court interpreted article XI to adopt the public trust doctrine as a fundamental principle of constitutional law in Hawaii.²⁵⁷ As a result, the Hawaiian Constitution requires protection of instream flows before the state may authorize diversionary uses of water.²⁵⁸ The court declined to define the full extent of article XI's reference to "all public resources,"²⁵⁹ suggesting that the provision might be used to defeat future takings claims other than those focused on water rights.

Hawaii is not the only state with private land use restrictions in its constitution. For example, the Montana Constitution grants the state's citizens the right to a "clean and healthful environment" and directs the legislature to "prevent unreasonable depletion and degradation of natural resources."²⁶⁰ Alaska's Constitution provides that wherever fish, wildlife, and

²⁵⁴ See *In re Water Use Permit Applications*, 9 P.3d 409, 493 (Haw. 2000).

²⁵⁵ HAW. CONST. art. XI, § 1.

²⁵⁶ *Id.*

²⁵⁷ *In re Water Use Permit Applications*, 9 P.3d at 444.

²⁵⁸ *Id.* at 492.

²⁵⁹ *Id.* at 445:

We need not define the full extent of article XI, section 1's reference to "all public resources" at this juncture. For purposes of this case, however, we reaffirm that, under article XI, sections 1 and 7 and the sovereign reservation, the public trust doctrine applies to all water resources without exception or distinction.

²⁶⁰ MONT. CONST. art. IX, § 1. The Supreme Court of Montana has concluded that this provision is a fundamental right and that state or private action that implicates article IX, section 1 is subject to strict scrutiny. *Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 988 P.2d 1236, 1249 (Mont. 1999). See generally Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157 (2003).

waters occur in their natural state, they are reserved “to the people for common use.”²⁶¹ California expressly protects public access to tidelands and navigable waters, while Louisiana proclaims that the state’s natural resources “shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.”²⁶² Environmentally protective provisions exist in many other state constitutions,²⁶³ and may be of utility to government defendants, even if they have not yet been judicially interpreted.

C. The Continuing Importance of Preexisting Laws That Are Not Background Principles

If a court determines that a statute, regulation, or constitutional provision is not a background principle of property or nuisance law, those laws remain relevant at the balancing stage for less-than-total takings. The Supreme Court’s *Palazzolo* opinion avoided addressing the effect of the regulations existing at the time of land acquisition on the reasonable investment-backed expectations prong of the *Penn Central* inquiry. But as Justice O’Connor explained in her influential concurrence, the *Palazzolo* “holding [that enactment of a statute or regulation prior to purchase does not categorically defeat a takings claim] does not mean that the timing of the regulation’s enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis.”²⁶⁴ On the contrary, she affirmed that “the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.”²⁶⁵

Thus, for Justice O’Connor, who with Justice Kennedy, remains a key vote in Supreme Court takings decisions,²⁶⁶ courts may appropriately “consider the effect of existing regulations under the rubric of investment-

²⁶¹ ALASKA CONST. art. VIII, § 3; *see also id.* § 4 (declaring a sustained-yield principle for all replenishable resources belonging to the state, including fish, forests, and wildlife), *id.* § 14 (guaranteeing public access to waters within the state).

²⁶² LA. CONST. art. IX, § 4. This provision further commands that “[t]he legislature shall enact laws to implement this policy.” *Id.*

²⁶³ *See* Blumm, *supra* note 124, at 576 n.12 (listing various state constitutional grants for public use and enjoyment of natural resources). Not all courts have been persuaded that constitutional provisions amount to background principles. *See* K & K Constr., Inc. v. Dep’t of Natural Res., 551 N.W.2d 413, 417 (Mich. Ct. App. 1996) (determining that “the generalized invocation of public interests in the state constitution and the Legislature’s declarations in the [Wetlands Protection Statute] . . . do not constitute background principles of nuisance and property law sufficient to prohibit the use of plaintiff’s land without just compensation”), *rev’d on other grounds*, 575 N.W.2d 531 (Mich. 1998).

²⁶⁴ 533 U.S. 606, 633 (2001) (O’Connor, J., concurring). Justice O’Connor’s concurring opinion was cited favorably throughout the *Tahoe-Sierra* majority opinion. *See, e.g.*, 535 U.S. 302, 326 n.23 (2002) (citing O’Connor’s concurrence reaffirming the role of investment-backed expectations in takings analysis); *id.* at 335–36 (quoting O’Connor to the effect that all three *Penn Central* factors weigh on a takings decision).

²⁶⁵ 533 U.S. at 633.

²⁶⁶ *See supra* notes 78 and 264 (explaining the importance of Justices Kennedy and O’Connor’s votes in Supreme Court takings cases).

backed expectations in determining whether a compensable taking has occurred.”²⁶⁷ In practice, advance notice of a regulatory constraint has remained a serious and often fatal obstacle to a successful takings challenge in lower courts.²⁶⁸

VI. OTHER THRESHOLD DEFENSES

Background principles inquiries are not the only defenses that can defeat takings challenges at an early stage of litigation. *Lucas*’s endorsement of defining the relevant property interest at the threshold stage has revitalized at least three additional affirmative defenses to takings claims.

A. *Destruction By Necessity*

Courts recognize the government’s power to destroy property for the purpose of defending against an impending public peril independent from the background principles of immunity from takings liability. The classic case is *Miller v. Schoene*,²⁶⁹ in which the Supreme Court determined that destruction of cedar trees by Virginia officials to save adjacent apple orchards from disease did not effectuate a taking.²⁷⁰ *Lucas* specifically reaffirmed this longstanding rule “absolving the State (or private parties) of liability for the destruction of ‘real and personal property, in cases of actual necessity, to prevent the spreading of fire’ or to forestall other grave threats to the lives and property of others.”²⁷¹

Post-*Lucas* decisions have followed suit. For example, a Washington Court of Appeals, relying on *Miller v. Schoene*, recently determined that no taking occurred when the government destroyed potential host trees near a site where agricultural pests had escaped quarantine.²⁷² Similarly, the Louisiana Supreme Court ruled against a takings claim concerning the

²⁶⁷ *Palazzolo*, 533 U.S. at 635.

²⁶⁸ See, e.g., *Appolo Fuels, Inc. v. United States*, 381 F.3d 1338, 1348–49 (Fed. Cir. 2004) (rejecting a takings claim because of regulations in place when the property was purchased); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1350 n.22 (Fed. Cir. 2001) (determining that the government cannot defeat takings liability by simply showing that regulatory restrictions were in place at the time of purchase, but recognizing O’Connor’s concurrence in *Palazzolo* and stating, “the regulatory environment at the time of the acquisition of the property remains both relevant and important in judging reasonable expectations”); *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1366 (Fed. Cir. 2001) (concluding, post-*Palazzolo*, that the “absence of a reasonable investment-backed expectation on [plaintiff’s] part . . . defeats its takings claim”); *LaSalle Nat’l Bank v. City of Highland Park*, 799 N.E.2d 781, 797 (Ill. App. Ct. 2003) (ruling that claimants’ reasonable investment-backed expectations, determined by examination of the regulations in place as of the date of purchase, are an “especially important consideration in the takings analysis”).

²⁶⁹ 276 U.S. 272 (1928).

²⁷⁰ *Id.* at 277.

²⁷¹ 505 U.S. 1003, 1029 n.16 (1992).

²⁷² *In re Property Located at 14255 53rd Avenue*, 86 P.3d 222, 229 (Wash. Ct. App. 2004).

state's dispersal of freshwater from the Mississippi River over saltwater marshes, reducing the salinity in the marshes and rendering several of the claimant's oyster cultivation leases worthless.²⁷³ The court concluded that the diversion of water was "an actual necessity" in order to prevent coastal erosion.²⁷⁴ And the California Supreme Court rejected a takings claim on the ground of destruction by necessity because the damage done to a convenience store by police was in pursuit of a fleeing suspect.²⁷⁵

B. Criminal Forfeitures

Many federal and state laws provide for forfeiture of contraband materials or instrumentalities used in the commission of a crime. According to the Supreme Court, the federal takings clause has no application in situations where title to property is transferred pursuant to a valid civil or criminal forfeiture proceeding. In *Michigan v. Bennis*,²⁷⁶ the Court upheld a forfeiture of an automobile as a public nuisance despite the fact that the claimant, the co-owner of the car, had no knowledge that it had been used to promote illegal activity.²⁷⁷ The Court concluded that "the government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain," provided that the government allowed for a post-seizure hearing complying with due process standards.²⁷⁸

The Supreme Court's reasoning that there is no compensation for forfeitures imposed on property connected with a crime—even when there is an innocent owner—has been extended by lower courts to a variety of settings. For example, a New York federal district court determined that religious artifacts shipped to the United States in violation of custom laws, seized by federal officials, and sold at auction pursuant to statute were not compensable property, despite the fact that the owner of the artifacts was not the party who shipped them illegally.²⁷⁹ And an Illinois appellate court concluded that weapons confiscated in relation to a crime were not compensable, even though they were jointly owned by a party not involved with the crime requiring the forfeiture.²⁸⁰ These cases teach that any takings claims based on a valid seizure of property should be summarily dismissed at the threshold stage because they do not implicate the federal takings clause.

²⁷³ *Avenal v. State*, 886 So. 2d 1085 (La. 2004).

²⁷⁴ *Id.* at 1108 n.28 (citing *Miller v. Schoene*, 276 U.S. 272 (1928)).

²⁷⁵ *Customer Co. v. City of Sacramento*, 895 P.2d 900, 916 (Cal. 1995).

²⁷⁶ 516 U.S. 442 (1996).

²⁷⁷ *Id.* at 452–53. The husband of the claimant had engaged in sexual activity with a prostitute in the car. *Id.*

²⁷⁸ *Id.*

²⁷⁹ *United States v. Various Ukrainian Artifacts*, No. 96-3285, 1997 WL 793093 (E.D.N.Y. Nov. 21, 1997).

²⁸⁰ *People v. DeLuca*, 706 N.E.2d 927, 931 (Ill. App. Ct. 1998).

C. *Revocable Grants to Public Resources*

Post-*Lucas* courts have also denied takings challenges at the threshold level when the claimant's interest in a public resource is wholly dependent on a federal permit or lease. For example, in *Conti v. United States*,²⁸¹ the Federal Circuit affirmed a rejection of a takings claim based on the theory that the government's prohibition on swordfishing off the Atlantic coast was a taking of a fisherman's boat, nets, and other gear.²⁸² The court ruled that the plaintiff could not claim a compensable property interest in those items, since "Mr. Conti's ability to use his vessel and gear to catch swordfish using drift gillnets in the Atlantic Swordfish Fishery was dependent upon a permit [to conduct fishing] that was revocable at all times."²⁸³ *American Pelagic Fishing Co. v. United States*²⁸⁴ mirrored the result in *Conti*, with the Federal Circuit concluding that the claimant held no compensable property interest in fishing permits because the government retained the right to revoke, suspend, or modify the permits.²⁸⁵

The Tenth Circuit similarly rejected the contention that a cattle company, whose public land grazing permit had lapsed, could claim a compensable right to exercise its water rights on public lands for grazing purposes.²⁸⁶ The court indicated that, absent federal permission to bring cattle onto the public lands, a rancher could not claim an entitlement to use his water rights on the public range.²⁸⁷

²⁸¹ 291 F.3d 1334 (Fed. Cir. 2002).

²⁸² *Id.* at 1345.

²⁸³ *Id.* at 1345 n.8.

²⁸⁴ 379 F.3d 1363 (Fed. Cir. 2004).

²⁸⁵ *Id.* at 1383. The *American Pelagic* court also rejected the plaintiff's takings claims under a statutory background principles analysis. See *supra* notes 238–242 and accompanying text.

²⁸⁶ *Diamond Bar Cattle Co. v. United States*, 168 F.3d 1209, 1217 (10th Cir. 1999). See generally Mark J. Baas, Note, *Diamond Bar Cattle Co. v. United States: Holders of State Water Rights on Federal Lands Do Not Also Hold Property Interests to Graze Those Lands*, 4 GREAT PLAINS NAT. RESOURCES J. 296 (2000).

²⁸⁷ *Diamond Bar Cattle Co.*, 168 F.3d at 1217; see also *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1200 (10th Cir. 1999) (ruling that a government grazing permit does not create a compensable property right); *Alves v. United States*, 133 F.3d 1454, 1457 (Fed. Cir. 1998) (determining that a grazing preference attached to base property owned by a Taylor Grazing Act permit holder is not a compensable property interest); *Kunkes v. United States*, 78 F.3d 1549, 1550 (Fed. Cir. 1996) (ascertaining that plaintiffs had no valid takings claim because they failed to meet the statutory requirements necessary to maintain their public land mining claim), *cert. denied*, 519 U.S. 820 (1996); *Buse Timber & Sales, Inc. v. United States*, 45 Fed. Cl. 258, 263 (1999) (holding that the Forest Service's indefinite suspension of a timber contract was not a taking because the contractor lacked a property interest in the right to perform the contract, where the contract reserved the right to suspend, modify, or cancel the contract); *Kerr-McGee Corp. v. United States*, 32 Fed. Cl. 43, 49–50 (1994) (concluding that an applicant for a lease under the Mineral Leasing Act, asserting that it discovered a valuable deposit, did not hold a vested property right protected by the federal takings clause). See generally Jan G. Laitos & Richard A. Westfall, *Government Interference with Private Interests in Public Resources*, 11 HARV.

These cases indicate that when takings challenges arise from less-than-fee interests in public resources, those claims should not survive the threshold inquiry where access to the public resource is revocable. In short, the private value created by the government's grant of access to public resources is not a compensable interest under the takings clause.²⁸⁸

VII. THE FUTURE OF BACKGROUND PRINCIPLES TAKINGS DEFENSES

Recent Supreme Court decisions have refused to expand categorical takings rules. For example, the *Palazzolo* majority opinion, authored by Justice Kennedy, rejected the "notice rule"—under which the mere enactment of a limiting regulation prior to property acquisition would defeat a takings claim—as a categorical defense to a takings clause challenge.²⁸⁹ As Justice O'Connor explained in her *Palazzolo* concurrence, courts should resist "the temptation to adopt what amount to *per se* rules" and instead conduct "a careful examination and weighing of all the relevant circumstances,"²⁹⁰ thus endorsing the vitality of the *Penn Central* balancing test. Similarly, the *Tahoe-Sierra* majority opinion determined that a development moratorium was not a categorical taking,²⁹¹ expressly suggesting that *Lucas*'s categorical economic wipeout rule was confined to the "extraordinary circumstance."²⁹²

Ironically, as a majority of the Rehnquist Court has turned away from categorical takings tests and embraces *Penn Central* balancing, lower courts have interpreted the *Lucas* opinion to authorize a proliferation of categorical takings defenses. Because many of these defenses are a product of state law, it does not seem likely that the Supreme Court—a Court deeply commit-

ENVTL. L. REV. 1 (1987) (detailing various types of property interests in public lands and resources, and discussing the extent to which private parties may be protected from federal interference with private interests in federal property); Marla E. Mansfield, *When "Private" Rights Meet "Public" Rights: The Problems of Labeling and Regulatory Takings*, 65 U. COLO. L. REV. 193 (1994) (evaluating takings claims involving public lands and resources post-*Lucas*).

²⁸⁸ See *United States v. Fuller*, 409 U.S. 488, 492 (1973) (rejecting a takings claim concerning loss of property value due to the non-renewal of a federal grazing permit, and determining that "the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created").

²⁸⁹ 533 U.S. 606, 630 (2001) (announcing that a takings claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction"). But a landowner's notice of a pre-existing regulatory restriction is a relevant factor in *Penn Central* balancing. See *id.* at 633 (O'Connor, J., concurring).

²⁹⁰ *Id.* at 636 (O'Connor, J., concurring); see also Blumm, *supra* note 24, at 149–55 (suggesting that the *Palazzolo* decision signaled the decline of the categorical takings rule—the so-called economic "wipeout" rule—announced by Justice Scalia in *Lucas*).

²⁹¹ 535 U.S. 302, 332 (2002).

²⁹² *Id.* at 330; see also Lazarus, *Celebrating Tahoe-Sierra*, *supra* note 78, at 13 (arguing that *Tahoe-Sierra* "likely relegated [the *Lucas* wipeout rule] to a mere incidental footnote in takings law and the Court's earlier opinion in *Penn Central* is again the primary judicial text for adjudicating takings claims").

ted to “Our Federalism”²⁹³—could arrest this proliferation, even if it wanted to do so.

Moreover, the *Lucas* Court’s background principles defenses make too much sense to discard. As the Court explained, determining whether or not a claimant has a protected property right is the “logically antecedent inquiry”²⁹⁴ in all takings cases. To abandon this threshold inquiry would imply that a takings claimant could prevail on the merits without a protected property right, an implication at odds with over a century of American takings jurisprudence.²⁹⁵

²⁹³ *Younger v. Harris* introduced the modern understanding of “Our Federalism,” 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.” 401 U.S. 37, 44 (1971). For other uses of the term by the Rehnquist Court, 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) (arguing that separation between state and national government “is one of the Constitution’s structural protections of liberty”); *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.”); *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (declining to extend the concept of comity, which the Court found “critical to *Younger*’s ‘Our Federalism,’” when there was no pending state proceeding); *Deakins v. Monaghan*, 484 U.S. 193, 208–09 (1988) (White, J., concurring) (opining that “Our Federalism” precludes federal courts from adjudicating damage claims when a state criminal case dealing with the same issue is pending). See also Blumm & Kimbrell, *supra* note 103, at 314 n.20 (listing recent Supreme Court decisions concerning the constitutional state-federal balance); Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court’s Takings Cases*, *supra* note 78, at 11–23 (discussing the Rehnquist Court’s understanding of federalism in the takings context).

²⁹⁴ *Lucas*, 505 U.S. at 1027.

²⁹⁵ The Supreme Court has frequently ruled that certain property rights are not constitutionally protected, and thus warrant no compensation under the federal takings clause, even where a claimant has shown a drastic diminishment in property value. As Justice Jackson observed in *United States v. Willow River Power Co.*, “not all economic interests are ‘property rights’; only those economic advantages are ‘rights’ which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.” 324 U.S. 499, 502 (1945); see also *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491–92 (1987) (holding that landowner’s property rights did not include the right to mine in a way that damaged neighboring homes); *United States v. Fuller*, 409 U.S. 488, 492 (1973) (denying a compensable interest in “elements of value that the Government has created,” such as revocable federal permits or leases); *Goldblatt v. Hempstead*, 369 U.S. 590, 592–93 (1962) (holding that plaintiff could not assert a compensable interest in mining activities that posed risks to the common welfare); *Hadacheck v. Sebastian*, 239 U.S. 394, 410–11 (1915) (holding that operating a kiln within city limits is not a protected property right because it posed a threat to the public); *Mugler v. Kansas*, 123 U.S. 623, 668 (1887) (holding that claimant lacked a compensable interest to engage in the manufacture of a product—beer—determined to be “injurious to the health, morals, or safety of the community”). See generally JACQUES B. GELIN & DAVID W. MILLER, *THE FEDERAL LAW OF EMINENT DOMAIN* § 2.3 (1982) (listing examples of losses in property value for which no compensation is required); JAN G. LAITOS, *LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS* § 6 (2005) (detailing limitations on the legal stature of private property rights).

The background principles inquiry does not supplant the *Penn Central* balancing test favored by Justices Kennedy and O'Connor;²⁹⁶ it simply precedes it. As recently explained by the South Carolina Supreme Court, takings claims follow a two-step analysis. The court "must determine whether the proscribed activity is a stick in the plaintiff's bundle of property rights. If the Court finds affirmatively, it then considers the three factors set forth in *Penn Central*."²⁹⁷ The U.S. Supreme Court has continuously supported *Lucas*'s "logically antecedent inquiry," even in the above-mentioned takings decisions that downplay or disfavor other categorical rules.²⁹⁸ In fact, in both *Palazzolo* and *Tahoe-Sierra*, the Court apparently sanctioned an expansion of the background principles defense beyond its definition in *Lucas* to include certain preexisting statutory limitations.²⁹⁹

All of these observations lead to the conclusion that the background principles defense authorized in *Lucas* is alive and well and will continue to function as a useful tool for government defendants to defeat takings claims. Although the Supreme Court has not endorsed all of the many categorical defenses ushered in by the background principles inquiry, its ability to constrict background principles grounded in state law is quite limited,³⁰⁰ and the Court has explicitly approved federal defenses grounded on both common law and statutes.³⁰¹

²⁹⁶ See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001) (Kennedy, J.) (rejecting the "notice rule" as a categorical defense to a takings clause challenge in favor of case-by-case balancing); *id.* at 636 (O'Connor, J., concurring) (arguing that courts should resist adopting *per se* rules and instead employ balancing tests; see also Lazarus, *Celebrating Tahoe-Sierra*, *supra* note 78, at 23 (concluding that Justices Kennedy and O'Connor "have made clear their general support for a *Penn Central* approach").

²⁹⁷ *Rick's Amusement, Inc. v. State*, 570 S.E.2d 155, 158 (S.C. 2001) (internal citations omitted); see also *supra* note 28 (listing other cases determining that the background principles inquiry precedes *Penn Central* balancing in claims involving less-than-total takings).

²⁹⁸ See *supra* note 26 and accompanying text.

²⁹⁹ See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Council, Inc.*, 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting) (citing the above passage from *Palazzolo* favorably, thereby demonstrating widespread agreement among the Court that some statutes and regulations serve as background principles); *Palazzolo*, 533 U.S. at 627 (noting that "[t]he right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions.") (emphasis added).

³⁰⁰ See *Lucas*, 505 U.S. at 1032 n.18 (noting that the U.S. Supreme Court role in takings claims review is to ensure that state courts provide an "objectively reasonable application of relevant precedents," allowing for "some leeway in a court's interpretation of what existing state law permits") (emphasis in original). Justice Scalia once suggested that the Oregon Supreme Court's reaffirmation of the doctrine of custom in public access to ocean beaches may have exceeded that standard, but he could not convince the Court to review the case. *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1209 (1994) (Scalia, J., dissenting from denial of *certiorari*); see *supra* note 174 and accompanying text.

³⁰¹ See *supra* notes 162 (discussing the federal navigation servitude) and 233 (discussing background principles federal statutes).

VIII. CONCLUSION

Lucas's "logically antecedent inquiry" teaches that a takings claim must fail at the threshold if the claimant, due to background principles of property and nuisance law, did not possess the allegedly taken property interest.³⁰² The *Lucas* decision thus announced a new era of categorical takings jurisprudence in which governments can defeat compensation suits without presenting detailed evidence about the public purposes served by the contested law or regulation. Background principles takings defenses are therefore attractive to government defendants because threshold arguments can resolve takings cases at early stages of litigation. Courts, too, have found *Lucas*'s threshold inquiry appealing because it allows a categorical, formalistic approach to takings cases. Indeed, over the past twelve years, nearly a dozen distinct categories of *Lucas*-inspired threshold defenses have been proposed to and subsequently employed by lower courts to reject takings claims. This growth in background principles defenses was almost certainly not anticipated by the *Lucas* Court: Justice Scalia would hardly have envisioned that the categorical takings rule he articulated in *Lucas* would turn out to be much less significant than the categorical defenses the decision authorized.³⁰³

One noticeable result from the development of *Lucas*'s background principles inquiry is that the categorical defense has succeeded with greater frequency as property doctrine than as nuisance doctrine. This may be because the nuisance defense requires case-specific, factual balancing,³⁰⁴ which is the antithesis of categorical decisionmaking. In fact, the factual balancing inherent in nuisance is not unlike the multi-factor balancing required by the *Penn Central* takings test.³⁰⁵ Since avoiding the complexities of *Penn Central* balancing is one of the chief attractions of categorical takings rules, perhaps it is not surprising that property law background principles—which do not involve balancing—have proliferated, while the nuisance defense—dependent on balancing—has not.

The evolution of background principles defenses also illustrates how formalistic thought has benefited defenders of regulatory restrictions.³⁰⁶

³⁰² *Lucas*, 505 U.S. at 1027.

³⁰³ See *supra* note 32 and accompanying text (arguing that the takings defense created by *Lucas* is far more important than the categorical liability rule the case created).

³⁰⁴ See *supra* notes 72–75 and accompanying text.

³⁰⁵ See *supra* note 75.

³⁰⁶ Formalistic reasoning promotes "clear, distinct, bright-line classifications of legal phenomena." HORWITZ, *supra* note 34, at 17. Advocates of a classical liberal theory of property have argued that a formalistic approach to takings would benefit private property owners because the liberal idea of the Rule of Law would instruct owners of the relevant rights and restrictions associated with their property prior to purchase, thereby avoiding the unpredictability of the *Penn Central* balancing test. See also *supra* note 20 and accompanying text (detailing some scholars' opposition to the *Penn Central* test because it favors public benefits over individual property rights); see generally EPSTEIN, *supra* note 19; Huffman, *supra* note 19; Margaret Jane Radin, *The Liberal Conception of Property: Cross*

Formalistic decisionmaking allows judges to decide cases without detailed inquiries into the merits or fairness of the context.³⁰⁷ Thus, formalism can promote efficiency in judicial decisionmaking. Whether it fosters fairness is not clear. But by creating a categorical defense to takings claims at the threshold stage, grounded on background use restrictions inherent in the landowner's title, *Lucas* provided government defendants a powerful new way to defeat takings claims.

To date, courts have accepted several doctrinal and statutory restrictions on land development as *Lucas*-style affirmative defenses to Fifth Amendment compensation claims. This trend shows no signs of slowing down; on the contrary, judicial use of background principles seem likely to expand, as government defendants continue to present various categories of *Lucas* defenses to state and federal courts. Indeed, due to their attractiveness to defendants and courts alike, background principles defenses will probably become institutionalized as an exercise in judicial formalism, rising to a preeminent position in takings analysis. Before long, the prism through which courts analyze takings claims will, as matter of course, begin with a background inquiry into a wide and perhaps expanding array of doctrinal, statutory, and constitutional limitations on land use that will serve to defeat most takings claims—much to Justice Scalia's surprise and probable chagrin.³⁰⁸

Currents in the Jurisprudence of Takings, 88 COLUM. L. REV. 1667 (1988) (summarizing and critiquing liberal property theories).

³⁰⁷ Formalism developed in the nineteenth century as a response to "result-oriented" judicial reasoning, which formalists thought gave judges too much discretion and inexcusably linked law and politics. HORWITZ, *supra* note 33, at 16–17. Formalism employs deduction from general principles and analogical reasoning to decide disputes without resort to the substantive merits of a case. *Id.* at 16. According to Morton Horwitz, formalistic thought introduced an efficient, self-contained system of legal reasoning that "[i]n a world of conflicting ends . . . aspired to create a system of processes and principles that could be shared even in the absence of agreed upon ends." *Id.*; see *supra* notes 33–34 and accompanying text (noting that although categorical rules—a hallmark of formalistic thought—have been discredited historically, they have proved attractive to the Rehnquist Court, especially in the context of the Commerce Clause).

³⁰⁸ The background principles defense is a dynamic area of takings law. For timely updates concerning recent decisions on threshold takings issues, see the Georgetown Environmental Law & Policy Institute's "Snapshots" webpage, at <http://www.law.georgetown.edu/gelpi/takings/courts/snap.htm> (last visited May 23, 2005) (on file with the Harvard Environmental Law Review), which supplies a monthly summary of important takings decisions and case developments. Also, consult the Community Rights Counsel's "Community Rights Report," available at <http://www.communityrights.org/communityrightsreportnewsletter/newsletter.asp>.