The Enduring (Muted) Legacy of *Lucas v. South Carolina Coastal Council*: A Quarter Century Retrospective

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Introduction

"Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government's ability to act in the public interest."[1] Nonetheless, the Court has consistently rebuffed calls for "blanket exemptions from the Fifth Amendment" in the face of these 'Chicken Little' arguments.[2] As Justice Ginsberg recently observed, the "sky" has never fallen.[3] Yet one would have thought the sky was about to fall from much of the literature published in the wake of the Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council*.[4]

Today, courts and commentators unflinchingly recite *Lucas's* essential holding, as axiomatically restated by Justice O'Connor in 2005: "Regulatory actions [ ] will be deemed [a] per se taking[ ] . . . where regulations [ ] deprive an owner of 'all economically beneficial us[e]' of her property."[5] But at the time, this rule was highly controversial precisely because it pronounced a bright-line standard of liability. Indeed, even the *Lucas* majority admitted, the Court had—until that point—consistently "eschewed any 'set

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1 Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 36 (2012).

2 *Id.* at 37.

3 *Id.* ("The sky did not fall after *Causby*, and today's modest decision augurs no deluge of takings liability.").

4 505 U.S. 1003 (1992).

5 Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005).

formula'" for determining how far regulation must go before it should be viewed as a taking.[6]

The Court had reaffirmed *Penn Central Transportation Co. v. City of New York* as setting forth an "essentially ad hoc" balancing test governing regulatory takings claims as recently as the 1987 term.[7] Specifically, *Penn Central* requires consideration of (1) the "economic impact" of the restriction; (2) the owner's (reasonable) "investment backed expectations," and; (3) the character of the government's conduct.[8] But, as numerous commentators have explained elsewhere, this ad hoc balancing test provides little guidance to anyone, and lends itself to unpredictable and inconsistent results.[9] And, of course, Justice Scalia, the author of the *Lucas* opinion, was never keen on such balancing tests.[10]

Scalia called for judges to divine bright-line judicially manageable standards.[11] And that is exactly what the Court did in *Lucas*.[12] Still, the question remains—even a quarter century later—as to whether the Court's hardline rule of takings liability for restrictions that elimi-

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6 *Lucas*, 505 U.S. at 1015 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1962)).

7 Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 495 (1987) (affirming *Penn Central*, 438 U.S. 104 (1978) and arguably rejecting more concrete rules set forth in Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

8 *Penn Central*, 438 U.S. at 124-27.

9 Commentators of all ideological stripes have called for the Supreme Court to provide further clarity as to how precisely to weigh the *Penn Central* factors. *See, e.g.*, J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)Reasonable in State Courts?*, 38 URB. LAW. 81, 82 (2006); Eric R. Claeys, *The* Penn Central *Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 339 (2006); John D. Echeverria, *The "Character" Factor in Regulatory Takings Analysis*, SK081 A.L.I.-A.B.A. 143, 143 (June 9-10, 2005); John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & Pol'y 171, 171-72 (2005); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 679 (2005); William W. Wade, *"Sophistical and Abstruse Formulas" Made Simple: Advances in Measurement of* Penn Central's *Economic Prongs and Estimation of Economic Damages in Federal Claims and Federal Circuit Courts*, 38 URB. LAW. 337, 339-40 (2006).

10 Scalia believed that "law pronounced by the courts must be principled, rational, and based on reasoned distinctions." Vieth v. Jubelirer, 541 U.S. 267, 278 (2004).

11 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

12 One might even go so far as to argue that without firm guidance from the Supreme Court, as to how precisely to weigh the *Penn Central* factors, *Penn Central* fails to offer any judicially manageable standard at all. *See* R.S. Radford, Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 ECOLOGY L.Q. 731, 732, 735-36 (2011) (arguing that *Penn Central* provides no meaningful guidance and amounts to a high stakes game of craps).

nate all prospective use or value should be understood as effecting a meaningful change in takings law.

This Article seeks to both explain the implications of the *Lucas* decision and to contextualize its impact on takings law, as a whole, in light of subsequent developments over the past twenty-five years. Section I will briefly cover essential background on the *Lucas* case. Then, Section II aims to put the *Lucas* decision in context, considering takings law as it stood in 1992 and—importantly—unpacking the seminal regulatory takings cases on which *Lucas* relied. This approach helps to put in prospective *Lucas's* per se rule in light of other potential outcomes—which in turn leads to deeper questions about the lasting impact of *Lucas* on takings law. Section III examines early reactions to *Lucas* in legal scholarship with the aim of synthesizing those contemporary views, but with the benefit of retrospective knowledge. Finally, this Article will outline still lingering questions in Section IV—while discussing judicial trends that have largely favored governmental defendants. Perhaps controversially, this Article concludes that *Lucas* would have had a more significant impact on the development of takings law if it had been decided under *Penn Central*. Further, Section IV suggests that takings law will remain "mired in doctrinal fog" until the Court revisits *Penn Central* to give a more definitive standard of review, or—at the very least—to provide an example of what a winning *Penn Central* case might look like.

I. *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

A. *Facts and Procedural History*

In 1988, South Carolina enacted legislation—the S.C. Beachfront Management Act—prohibiting development seaward of a demarcated line established by the South Carolina Coastal Council.[13] The purpose of the statute was both to advance the environmental goal of reducing beachfront erosion and the State's interest in preserving coastal communities for the promotion of tourism.[14] Additionally, the statute served an ostensible public health and safety purpose on the view that

[13] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007-08 (1992).

[14] *Id.* at 1021 n.10 (setting forth South Carolina's legislative findings).

beachfront homes seaward of this demarcation line may be more vulnerable to destruction in major climactic events.[15]

Notwithstanding these legitimate public goals, David Lucas filed an inverse condemnation lawsuit alleging a taking of his property after he was denied the right to build even a modest home under this regime.[16] As a developer in the area, Lucas had acquired two distinct parcels—both located seaward of the Coastal Council's demarcation line on Isle of Palms outside of Charleston—two years prior to enactment of the Beachfront Management Act.[17] Crucially, he managed to convince the South Carolina courts that these lots had been rendered entirely valueless as a result of the Act's development restrictions.[18] This was enough to secure a judgment in the Common Pleas Court that the State had taken his property; however, the South Carolina Supreme Court reversed—emphatically rejecting Lucas's contention that he was entitled to compensation on the mere fact that his property had been supped of value.[19]

B. *The* Lucas *Decision*

Environmental advocates feared the worst when the U.S. Supreme Court granted certiorari in *Lucas*. To be sure, Mr. Lucas's case was rather sympathetic. The Beachfront Management Act appeared draconian in completely prohibiting even modest development plans. But the concern was not just that Lucas might win—it was that he might prevail under a new sweeping rule favoring private property rights over the "public interest." Indeed, Lucas continued the controversial line of argument that he had pressed below, calling for a blanket rule that a categorical taking occurs at the time an imposed regulation deprives a landowner of all value, notwithstanding any state interest, however compelling.[20]

Yet, going into oral arguments, the Coastal Council thought that it could avoid a sweeping decision.[21] The Council correctly assumed that Justices Rehnquist, Thomas, and Scalia would side with the land-

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15 *Id.*

16 Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 895–96 (S.C. 1991).

17 *Lucas*, 505 U.S. at 1006-07.

18 *Lucas*, 404 S.E.2d at 896.

19 *Id.* at 896, 901-02.

20 *See* Richard J. Lazarus, Lucas *Unspun*, 16 SOUTHEASTERN ENVTL. L.J. 13, 21 n.46 (2007).

21 *Id.* at 20-21.

owner.[22] But, the Council also anticipated that Justices Stevens and Blackmun would reject Lucas's theory because, if embraced, it would have severely limited the power of the State to regulate in the public interest.[23] As such, the State sought to emphasize concerns over public health and safety as a justification that should be considered in the takings analysis, in the hope of convincing at least three of the four anticipated swing votes—Justices White, O'Connor, Kennedy, and Souter—to reject the owner's hardline position.[24] Nonetheless, the Coastal Council failed to peel-off the votes it needed. Justice O'Connor joined the majority in reversing the South Carolina Supreme Court, and Kennedy wrote separately—concurring in judgment.

Still, not one member of the Court was willing to endorse Lucas's theory in full. Even Scalia balked at the suggestion that the Takings Clause should be wholly unconcerned with the nature of the regulatory restriction at issue and the harm it may be calibrated to address. Perhaps in a compromise to hold together a majority, Scalia's categorical rule was pronounced subject to an express reservation: a taking cannot occur where the contested restrictions merely preclude a use that would have been prohibited by background principles of state property law.[25] This caveat has guided the way courts and commentators have conceptualized takings theory ever since because it instructs that we must evaluate a takings claim with reference to those rights enuring in the title to the subject parcel. Accordingly, the question in the wake of *Lucas* was whether this newly minted test would augur a deluge of takings liability.

II. SCALIA'S CATEGORICAL RULE IN CONTEXT

A. *The State of Takings Law From 1922-1992*

Seventeen years after famously dissenting in *Lochner v. New York*, Justice Oliver Wendell Holmes authored an opinion holding

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22 *Id.* at 16-21.

23 *Id.* at 21.

24 Incidentally Hurricane Hugo helpfully underscored those public safety concerns, in hammering the Charleston area in the fall of 1991—leaving a trail of destruction from the beach all the way to Charlotte, North Carolina. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1037 n.1 (1992).

25 *Lucas*, 505 U.S. at 1029-32.

invalid a regulatory restriction under the Takings Clause.[26] This opinion, *Pennsylvania Coal Co. v. Mahon*, is widely regarded as the seminal regulatory takings case because the Holmes majority ruled that it was beyond the police power of the State to "abolish . . . an estate in land . . . ."[27] But the opinion failed to set forth any clear standard as to when a regulatory taking occurs—positing only that takings liability arises when regulation "goes too far," and suggesting that the "extent of the diminution" of value was a significant consideration in this analysis.[28]

This was a marked departure from the Court's prior holding in *Mugler v. Kansas*, in which the Court rejected a regulatory takings claim seeking invalidation of a state law prohibiting the manufacture of alcohol that rendered a brewery inoperable.[29] *Mugler* never expressly rejected the notion that a regulation could amount to a taking, but instead held that a restriction falling within the state's police powers—which included the power to abate a noxious use of property—could not amount to a taking.[30] In this sense, regulatory takings doctrine was muddled from the very beginning with the question of the legitimate reach of state police powers and therein seemingly coextensive with the analysis courts would apply under the Due Process Clause. But in *Pennsylvania Coal Co.*, the Court held that the police powers of the state were, in some unspecified manner, limited by the Takings Clause when regulatory restrictions prove too burdensome.[31] Ever since, courts, commentators, and practicing attorneys have struggled to make sense of this "I know it when I see it" standard.[32]

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[26] *Compare* Lochner v. New York, 198 US 45, 75 (1905) (Holmes, J., dissenting) ("I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law."), *with* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (finding a regulation amounted to a taking, notwithstanding the assumption that it advanced the public interest).

[27] *Pa. Coal Co.*, 260 U.S. at 413 ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.").

[28] *Id*. at 415.

[29] 8 S. Ct. 273 (1887).

[30] *Id.* at 287.

[31] *Mahon*, 260 U.S. at 413-415.

[32] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

Yet in 1926, on the heels of *Pennsylvania Coal Co.*, the Court almost immediately back-peddled from its suggestion that state police powers are subject to meaningful substantive limitations. In *Village of Euclid v. Ambler Realty Co.*, the Court held that land use restrictions must be upheld if they bear a "relation" to the public interest and that the courts would not second guess legislative determinations as to what constitutes the public interest.[33] Though the Supreme Court would eventually clarify that *Euclid* was decided under the Due Process Clause, at the time *Lucas* was decided in 1992 it was still common for courts to discuss *Euclid* when assessing regulatory takings claims.[34] Indeed, *Euclid* was viewed as part of a line of cases—dating back to *Mugler*—that seemingly supported the assertion that restrictions imposed to curb noxious uses of private property must be upheld.[35]

Yet the Supreme Court never quite embraced this hardline defense. Instead, in *Penn Central* the Court outlined various factors to be considered including (1) the economic impact of the restriction; (2) the investment-backed expectations of the owner; and (3) the character of the government's regulatory conduct.[36] Although styled as a test sounding in equity under which a landowner might conceivably win, the reality is that government-defendants almost invariably prevail under *Penn Central*.[37] Accordingly, the *Lucas* Court's decision to pronounce a per se rule of liability was widely viewed as a potentially important victory for property rights advocates—though there were reasons to doubt its practical significance.

B. *"Extreme" Arguments on Both Sides of the Ledger*

Mr. Lucas had a strong *Penn Central* argument. Yet, instead he focused exclusively on Justice Powell's statement in *Agins*, that "[t]he application of a general zoning law to particular property effects a

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[33] 272 U.S. 365, 391 (1926).

[34] *Compare* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124-125 (1962). (citing *Euclid* within its takings analysis), *and* Keystone Bituminous Coal Ass'n. v. DeBenedictis, 480 U.S. 470, 487 (1987) (same), *with* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 531-32 (2005) (expelling the substantial advancement test from our regulatory takings jurisprudence).

[35] *See* Todd D. Brody, *Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations After Lucas?*, 4 FORDHAM ENVTL. L. REP. 287, 294-96 (1993) (discussing the supposed "nuisance exception to all valid applications of the police power").

[36] *Penn Central*, 438 U.S. at 124–25.

[37] *See* Adam R. Pomeroy, Penn Central *After 35 Years: A Three-Part Balancing Test or a One-Strike Rule?*, 22 FED. CIR. B.J. 677, 696 (2012) (surveying *Penn Central* cases).

taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."[38] Lucas maintained that *Agins* had pronounced two independent tests for takings liability, such that he should prevail on the singular fact that the South Carolina Beachfront Management Act precluded all development opportunities. But, that portion of the *Agins* opinion cited directly to *Penn Central*, which had expressly disavowed any concrete rule for assessing takings claims.[39] Accordingly, there was a legitimate argument to be made that the denial of economically viable uses of a property should merely be understood as factor in the takings analysis.

Nonetheless, Lucas proceeded with his novel theory by objecting to any evidence concerning the state's interest in the regulatory regime as irrelevant.[40] In fact, he conceded the state's interest because the Court had recently clarified, in *First English Evangelical Lutheran Church v. County of Los Angeles*, that the Takings Clause merely imposes a condition on the legitimate exercise of police powers—meaning that a restriction would not be invalidated, but that payment of just compensation would be required if a restriction were deemed a taking.[41] Thus, in the proceedings below, the South Carolina Supreme Court was faced with a stark choice. To uphold the lower court's holding it would have had to endorse a theory that even Professor Richard Epstein—the renowned libertarian scholar—characterized as extreme because it would wholly deny any consideration of the public interest.[42]

But the Coastal Council took a hardline position as well.[43] The State initially set out to challenge the entire doctrine of regulatory

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[38] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (citations omitted) (citing Nectow v. Cambridge, 277 U.S. 183, 188 (1928) and *Penn Central*, 438 U.S. at 138 n.36 (1978).

[39] *Agins*, 447 U.S. at 260.

[40] Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991) ("[Lucas] concedes that the preservation of this existing public resource from harm is a 'laudable goal.'").

[41] *See* 482 U.S. 304, 316 (1987).

[42] *See* Richard A. Epstein, *Ruminations on* Lucas v. South Carolina Coastal Council: *An Introduction to Amicus Curia Brief*, 25 LOY. L.A. L. REV. 1225, 1226 (1992) ("I do not believe that any Justice of the Supreme Court will adopt Lucas's theory with respect to total wipeouts; nor do I think any Supreme Court Justice *should* adopt a theory which has such extreme consequences that it leaves the State powerless to impose restrictions against conduct so obviously wrongful in both intention and consequence.").

[43] *Id.* at 1226-27 ("But the position offered on the environmental side is every bit as extreme in the opposite direction. As developed, it takes the view that any occurrence of 'serious public harm' is sufficient to impose any restriction on land use, however severe and com-

takings in the Supreme Court; however, Professor Richard Lazarus counseled against this approach—presciently foreseeing that the Court would be unreceptive to a frontal attack on *Pennsylvania Coal Co*.[44] Ultimately the State sought to emphasize its interests in controlling erosion and other public health and safety concerns that might be implicated in a *Lucas*-style takings case—on the view that those factors must be considered pragmatically within the *Penn Central* framework. Yet, even couched within a balancing test, the State's theory was extreme, as it was advocating an effective categorical exemption, from takings liability, for any enactment restricting a use deemed noxious by the Legislature.[45]

C. *Scalia the Moderate: Threading a Needle with a Per Se Rule*

When pressed by Justice O'Connor at oral argument, the State said that "no compensation" would be owed even for an order to remove an existing home if the legislative judgment holds that the existing structure constitutes a nuisance.[46] This came only reluctantly after several attempts to deflect O'Connor's line of questioning. Initially, the State suggested that the owner's economic expectations would be stronger in that sort of case because one expects to continue with an existing use, and that the physical character of the land might counsel against a policy of removing existing structures.[47] But ultimately, the State conceded that, under its theory, no liability should attach even then, so long as there were facts in the record supporting a legislative judgment that existing structures should be removed—notwithstanding the economic expectations of the owner.[48]

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plete. In practice this position allows for far more extensive regulation than might be apparent at first blush because of the very broad definition given to the phrase 'serious public harm.'").

44 Lazarus, *supra* note 20, at 14.

45 *See* Epstein, *supra* note 42, at 1226-27.

46 Oral Argument at 42:25, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (No. 91-453), https://www.oyez.org/cases/1991/91-453 [hereinafter *Oral Argument*].

47 This suggestion was met with skepticism, as some on the bench observed that Lucas had paid more for his property than his neighbors and that he presumably had a greater expectation of development given that the surrounding lots were already developed.

48 *Oral Argument*, *supra* note 46, at 40:38 ("[I]f there is a great threat to public health and safety, as there is at least from the legislators' point of view in this case, I think that there is insulation [from takings liability] given the activity of the State[,]" and that the power of the state to compel removal of existing structures or to prohibit development all together depends "on the circumstances . . . .").

This colloquy is revealing both because it highlights the full breadth of the State's proffered nuisance exception and because it touched upon the delicate reality that, in some instances, the State truly will have a legitimate and compelling interest in foreclosing even modest development, in consideration of the physical character of the land. Interestingly, the full Court recognized the need for a nuisance exception. To be sure, the major substantive disagreement between the *Lucas* majority and dissent boiled down to a question as to whether the scope of the nuisance exception should be defined by the courts or by deference to legislative bodies.[49]

The dissent took great issue with Justice Scalia's approach because—in limiting the nuisance exception to proscribed "background principles" rooted in the common law—the *Lucas* Court upended what the Court had taken to be a cardinal rule of democratic process. Yet for Scalia this approach was essential because of the reality that legislative bodies respond to political pressures that may endanger historically protected rights.[50] Indeed, the alternative view would have enabled the State to evade takings liability by merely declaring—*ispo facto*—that a restriction is necessary to abate a nuisance.[51] Thus, in appealing to ostensibly objective and relatively static background principles of state law, Scalia's per se analytical model was intended to ensure that the State could continue to abate truly noxious activities, but without the risk that the nuisance exception would swallow the rule.[52]

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[49] *See Lucas*, 505 U.S. at 1039–41 (Blackmun, J., dissenting).

[50] *See id.* at 1018 (noting the "heightened risk that private property [may be] pressed into some form of public service under the guise of mitigating serious public harm" in certain cases); *see also id.* at 1031 ("[The legislature may not] by ipse dixit . . . transform private property into public property without compensation") (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)).

[51] *Id.* at 1059-60 (Blackmun, J., dissenting).

[52] *Lucas* affirms that the State cannot decide—through its own legislative proscriptions—the force of the Takings Clause. This comports with the maxim that no party shall be judge in his own case. *Cf.* Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 446 (1989) (observing that in Anglo-American law, those limited by law are generally not empowered to decide on the meaning of the limitation).

D. *The Counter-Factual: What Other Options Were Available?*

1. What if the Court Had Held Lucas's Claim Unripe?

It is possible to imagine alternative outcomes. One distinct possibility was that the Court could have held Lucas's takings claim unripe. Only eight years earlier, the Court had accepted review in another substantive takings case, *Williamson County Regional Planning Agency v. Hamilton City Bank*, only to do just that.[53] *Williamson County* held that a takings claim only ripens once the owner has obtained a final decision making clear the extent of permitted uses.[54] Accordingly, the Coastal Council pressed to dismiss Lucas's claim from the beginning on the ground that he had not pursued administrative remedies to change or move the setback restriction that prevented development, nor sought authorization to make any use of the subject property.[55] But, Lucas proceeded on the theory that his claim was ripe because there was no ground for which he might have sought to challenge the State's decision as to the placement of the contested setback restriction under the Act, and no provision for any variance from the blanket prohibition on construction seaward of that line.[56] Arguably Lucas should have at least applied for a development permit before filing suit; however, that would have proven an entirely futile act since the Council had no discretion, under then existing law, to allow an exception.[57]

But, in 1990, the State Legislature amended the Beachfront Management Act to allow beachfront landowners the opportunity to seek a special permit for development, which was, in effect, a variance.[58] Thus, by the time the case reached the U.S. Supreme Court, it was at least a possibility that Lucas might obtain a development permit. Nonetheless, the majority brushed back any prudential ripeness concerns because the South Carolina Supreme Court had reached the merits and because it was plain that Lucas had been prohibited from developing his property between 1988-1990.[59] Indeed, the majority

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53 473 U.S. 172 (1985).

54 *Id.* at 186.

55 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1042 (1992) (Blackmun, J., dissenting).

56 Brief for Petitioner at 8, 26 n.5, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (No. 91-453), 1991 WL 626699.

57 *See Lucas*, 505 U.S. at 1010-13.

58 *Id*.

59 *Id*. at 1041 (Blackmun, J., dissenting); *id.* at 1062 (Stevens, J., dissenting).

did not foreclose the possibility that, on remand, South Carolina state courts might still require Lucas to pursue a variance to ripen his permanent takings claim; however, his temporary takings claim was deemed ripe for adjudication.[60] With regard to the temporary takings claim, it is difficult to characterize the dissenter's ripeness objections as sound in any doctrinal rule. Had the Court dismissed the suit on ripeness grounds because of the possibility that Lucas might have had some development options under the amended Act, that would not have resolved the temporary takings question, but would simply have dodged the difficult issue presented on the merits.

2. What if the Court Had Dismissed the Petition as Improvident?

An alternative prudential ground for the Court to avoid the merits question would have been to dismiss Lucas's petition as improvidently granted.[61] As Justice Souter argued in dissent, the case was granted on a premise that seemed improbable on closer examination.[62] Specifically, several members of the Court took issue with the assumption that the contested restrictions had entirely deprived Lucas's property of all value.[63] Notwithstanding the lower court's conclusion on this point, the dissenters thought it inconceivable to think that the property was truly without value; surely someone would have paid even a nominal value for an undeveloped beachfront property.[64]

One potential inference that one might draw from the Court's decision to find a taking under these circumstances is that the majority was more concerned with the prohibition on meaningful economic uses of property than with the finding that it had been rendered wholly without value. To be sure, if the *Lucas* rule only applies when a property is rendered entirely valueless, then it would seem to be

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60 *Id*. at 1011-13.

61 The Court did just that in another case that term. *See* PFZ Props., Inc. v. Rodriguez, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed*, 503 U.S. 257 (1992).

62 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1076 (1992).

63 *See, e.g.*, *id*. at 1034 (Kennedy, J., concurring) ("This is a curious finding, and I share the reservations of some of my colleagues about a finding that a beach-front lot loses all value because of a development restriction.").

64 *Id.* at 1043-44 (Blackmun, J., dissenting).

more a rule in theory than a pragmatic doctrine.[65] Yet, the majority opinion emphasized both the loss of value and elimination of economically beneficial uses in a manner that has prompted tremendous confusion among courts and commentators.[66]

Considering that Justice Kennedy's concurring opinion sided with the dissenters on this point, it would likely have taken only one additional vote for the Court to have dodged the merits question. Had that happened, it is possible that we would have no per se *Lucas* rule. Yet that might well have resulted in the Court taking another *Lucas*-style case—but with an emphasis focused more specifically on the loss of economically beneficial uses, rather than on a total economic wipeout.

3. What if Blackmun and Stevens had Commanded the Majority?

Justice Blackmun's dissent was nearly vitriolic on the merits question.[67] There was no question in his mind that the South Carolina Supreme Court had been right to defer to the legislature's judgment that the restriction in question served the public good.[68] And he

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[65] *See* Patrick Hubbard, Palazzolo, Lucas, *and* Penn Central: *The Need for Pragmatism, Symbolism and Ad Hoc Balancing*, 80 NEB. L. REV. 465, 480 (2001) (arguing that *Lucas* was more valuable as symbolic reprisal of theories that would effectively eliminate regulatory takings than as a decision of practical import).

[66] *See* William Funk, *Revolution or Restatement? Awaiting Answers to* Lucas's *Unanswered Questions*, 23 ENVTL. L. 891, 893-94 (1993) ("It refers to the denial of 'all economically beneficial or productive use of land,' of 'economically viable use of [the owner's] land,' of 'all economically feasible use,' of 'all economically valuable use,' and of the 'only economically productive use.' It refers to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted,' to the situation where the owner is left 'without economically beneficial or productive options,' where the owner must 'sacrifice *all* economically beneficial uses . . . , to leave his property economically idle,' where the regulation 'wholly eliminated the value of the claimant's land.' Sometimes the opinion suggests that prohibition on *development* is the touchstone, describing the regulation in *Lucas* as 'requiring land to be left substantially in its natural state' and stating that preventing 'the erection of any habitable or productive improvements prohibits an 'essential use' of land.") (citations omitted).

[67] *Lucas*, 505 U.S. at 1036-37 (Blackmun, J., dissenting) ("My fear is that the Court's new policies will spread beyond the narrow confines of the present case. For that reason, I, like the Court, will give far greater attention to this case than its narrow scope suggests—not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage.").

[68] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1045 (Blackmun, J., dissenting) (quoting United States v. Carolene Prod. Co., 304 U.S. 144, 152 (1938)) ("The South Carolina Court's decision to defer to legislative judgments in the absence of a challenge from petitioner comports

thought it inconceivable that the Takings Clause should elevate the private interest of a landowner above the public interest so declared.[69] Whereas the majority opinion affirmed the anti-utilitarian principle that the public may not take an individual's property without paying for the change it seeks, whatever good that might entail—Blackmun argued emphatically that, where a use is deemed noxious to the public interest, there can be no takings liability under *Penn Central*.[70] As such, a Blackmun opinion would have weighed the public's interest as paramount in any balancing equation. Such an approach would defeat essentially any takings claim.

Justice Stevens's dissenting opinion signaled that he would likewise have accepted the Legislature's determination—so long as it was supported by evidence in the record—as to the necessity of the restriction in question.[71] He was especially critical of the majority's suggestion that a restriction must be rooted in common law principles to avoid takings liability, even in the extreme case of a total diminution in value.[72] Yet, Stevens was more moderated in his opinion than Blackmun. He stressed a balancing approach that would, at least theoretically, hold out the possibility of a successful takings claim in an extreme case.[73]

For Stevens, the ultimate inquiry was whether the owner had been singled out for special legal obligations not shared by similarly situated landowners.[74] Thus, even though the adjoining lots were fully developed, Stevens would have found no takings liability in *Lucas* because "the South Carolina Act impose[d] substantial burdens on owners of developed and undeveloped land alike."[75] In this manner, he would have conflated the takings inquiry with the sort of analysis that we now employ under the class-of-one doctrine in Equal Protec-

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with one of this Court's oldest maxims: '[T]he existence of facts supporting the legislative judgments is to be presumed.'").

69 *Lucas*, 505 U.S. at 1039-40, 1050-51 (1992).

70 *Id*. at 1040 ("The Court has consistently upheld regulations imposed to arrest a significant threat to the common welfare, whatever their economic effect on the owner.").

71 *Id*. at 1075-76 (Stevens, J., dissenting).

72 *Id*. at 1068-71.

73 *Id*. at 1063-64 (stressing that "economic injury" is "merely one factor to be weighed").

74 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1074-75. (1992).

75 *Id.*

tion Clause cases.[76] The result would have winnowed the field of independently viable regulatory takings claims to the point of near extinction.

4. What if Kennedy's Concurrence Were Controlling?

Kennedy's concurrence was immaterial to the ultimate result in *Lucas*. To be sure, Scalia's majority opinion was supported by five Justices. Nonetheless, many courts and commentators have chosen to view *Lucas* through the lens of Kennedy's concurrence—which both stressed the importance of considering the owner's reasonable investment-backed expectations, and suggested that legislative enactments may shape background principles in the takings inquiry.[77]

It is obvious that a Kennedy majority would have stopped short of declaring a categorical rule. His concurrence suggests that he was inclined to side with those dissenters who thought precedent compelled a balancing test. Yet, Kennedy was plainly of the view that Lucas's investment-backed expectations weighed heavily in the equation.[78] Accordingly, it is likely that a Kennedy majority would have held that the Beachfront Management Act effected a temporary taking under *Penn Central*—a result that would at least offer an example of what a successful *Penn Central* claim might look like.

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[76] *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (holding that the Equal Protection Clause prohibits land use authorities from arbitrarily singling-out an individual for special legal obligations or restrictions not applicable to similarly situated parties).

[77] *See* R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 478-79 (2001) ("Justice Kennedy's treatment of investment-backed expectations in his concurrence has been cited in both law reviews and case decisions as the holding of the Court, and in fact *Lucas* has been characterized in the legal literature as an exceptions case.").

[78] *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring) (citing *Penn Central* in stressing the importance of considering "reasonable investment-backed expectations").

III. AN ENVIRONMENTAL TRAGEDY OR MUCH ADO ABOUT NOTHING?

A. *Early Reaction to* Lucas *Was Splintered*

Early scholarship demonstrates wide-ranging reactions to *Lucas*.[79] Although an informal survey of articles suggests that most in the legal academy were critical of the Court's newly minted categorical rule, commentators were largely divided as to the likely impact the decision would have on takings law. Not surprisingly, some commentators hailed *Lucas* as an important win for property rights, while others expressed grave concern that the decision would hamstring the government's capacity to enforce existing environmental regimes and or to enact more aggressive reforms in the future.[80] But, even among those squarely in the environmentalist camp, the reaction was splintered.

For example, Richard Lazarus said that successful *Lucas* claims would be exceedingly rare and that the decision would likely have the unintended effect of undercutting the viability of takings claims where some residual value remains in the property.[81] Indeed, savvy attorneys were already counseling land use authorities and legislative bodies to allow at least some modest development opportunity to defeat

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[79] *Compare* Karen R. Palmersheim, Lucas v. S.C. Coastal Council: *How* Lucas's *Effect on Regulatory Takings Will Change California Coastal and Endangered Regulation*, 23 SW. U. L. REV. 177, 203 (1993) (concluding that "[p]ractically [speaking] . . . *Lucas* is not much a victory for property owners[,]" and that "[v]ery little regulation will be affected"), *with* Jonathan Federman, Lucas: *A Flawed Attempt to Redefine the* Mahon *Analysis*, 57 ALB. L. REV. 213, 233 (1993) (lamenting that "the Court's myopic view of the legislature and its regressive belief in the primacy of property rights only serves to take us into the past[,]" and suggesting that this may result in ecological harms), *and* Funk, *supra* note 66, at 898 (concluding that the impact of *Lucas* would depend on several factors, but that it could have a significant effect on environmental regimes).

[80] *Compare* Cotton Harness, Lucas *and the Rebirth of* Lochner, 2 S.C. ENVTL. L.J. 57, 68 (1992) ("[*Lucas*] dramatically shifts the focus of Fifth Amendment analysis from public harm to the expectation interests of the landowner by requiring reviewing courts to ignore legislature's conclusions about significant threats to life, property and welfare . . . ."), *with* Richard C. Ausness, *Wild Dunes and Serbonian Bogs: The Impact of the* Lucas *Decision on Shoreline Protection Programs*, 70 DENV. U. L. REV. 437, 468 (1993) (suggesting that *Lucas* is "reassuring" for property owners in its repudiation of "certain radical notions about private property that ha[d] been espoused by a segment of the environmental movement").

[81] Lazarus argued that *Lucas* would ironically lead courts to treat takings claimants more harshly under *Penn Central*. *See* Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411, 1427-28 (1993).

takings claims.[82] And most commentators recognized that Scalia's discussion of the background principles of state law[83] provided a formidable line of defense, even in those exceptional cases where an owner may be denied any development opportunity.[84] This is because the background principles concept assumes an exception to the general rule in *Lucas*, where it may be demonstrated that the owner never held the right to develop in the first place—as with the nuisance doctrine's rule that one may not use his property to the detriment of another.

B. *It's the End of the World as We Know It (And I Feel Fine?)*

Memorably, Justice Blackmun said that the *Lucas* majority had fired a "missile" that was sure to cause "collateral damage."[85] This was nothing short of a "sky is falling" argument. But why was the pronouncement of a per se rule, in such an exceptional case, so disconcerting?

1. The Harbinger of a Takings Revolution?

One likely explanation is that the dissenters, and likeminded commentators, feared that the Court was on the brink of pronouncing an even more sweeping rule.[86] One must recall that *Lucas* was the latest in a string of significant advancements for the property rights movement. First, the Court had seemingly pronounced new standards for assessing takings claims in *Agins*, wherein the Court said that a taking occurs where a regulatory restriction fails to substantially advance the cited government interest, or when the owner is denied all economically beneficial uses of the land in question.[87] *Lucas* plainly endorsed the later as a legitimate test; however, in citing *Agins*

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[82] *See, e.g.*, Gerald M. Finkle & Gilbert Scott Bagnell, *The Coast is Clear:* Lucas *Court Sheds Light on Regulatory Takings*, 2 S.C. ENVTL. L.J. 28, 47-50 (1992) (counseling planners to be more careful in tailoring land use restrictions).

[83] *See supra* Part II.C.

[84] *E.g.*, Palmersheim, *supra* note 79, at 203.

[85] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1036-37 (1992) (Blackmun, J., dissenting).

[86] Ausness, *supra* note 80, at 471 ("The Lucas holding was a narrow one, covering only situations where a regulation completely destroys the economic value of a landowner's property. However, *Lucas*, when read together with other recent decisions, indicates that the Court shifted its takings doctrine in favor of landowners.").

[87] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

as controlling authority, Justice Scalia also inferentially endorsed the substantial advancement test.

Moreover, Scalia had recently authored a highly controversial decision in *Nollan v. California Coastal Commission*, holding that regulatory conditions imposed on a development permit may amount to a taking if they lack a nexus to a public concern that might have justified a denial of the permit.[88] That same term, the Court also seemingly endorsed the theory that a temporarily imposed restriction may amount to a taking and, more significantly, held that the remedy for a taking is not invalidation of the restriction, but payment of the fair market value of the property in question.[89] Together, these cases were beginning to bring a degree of clarity and focus to takings law, which may have given progressives reason to fear the direction that the new conservative-leaning majority was bringing the Court on taking issues.[90] Especially with the pronouncement of a categorical rule in *Lucas*, there was palpable concern that the Court might ultimately shift away from *Penn Central's* standardless ad hoc approach—under which the government almost invariably wins—in favor of more concrete analytical rules. Although the *Lucas* majority endorsed *Penn Central* as the governing standard in partial takings claims, there was a sense that the Court might soon endeavor either to extend its per se rules further, or that the Court might seek to tilt the *Penn Central* scales more in favor of takings claimants.

2. Worst Fears for Environmentalists and Land Use Planners?

a. *Did* Lucas *Revive the Ghost of* Lochner*?*

The most controversial aspect of the *Lucas* decision was that it called into question the police powers of the state—albeit only in those exceptional cases where regulation denies the owner all economically beneficial uses, or where the property is rendered valueless. To be sure, for some commentators, it was inconceivable that the police powers of the state could be limited where a legislative body has spoken on the need to eradicate or avoid a nuisance.[91] Some

88 483 U.S. 825, 835-42 (1987).

89 First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 322 (1987).

90 *See* Lazurus, *supra* note 81, at 1415-16.

91 *See, e.g.*, Harness, *supra* note 80, at 68.

voiced concern about the impact that the *Lucas* rule would have on the power of local, state, and federal government to address public concerns, with the most apocalyptic commentators lamenting that the Court had revived the ghost of *Lochner*.[92] But, although the Court had imposed a meaningful limitation on state power, these doomsday prophecies have proven false.[93]

Under *Lucas*, the State remains free to impose heavy-handed restrictions; however, it must pay for a taking in the most extreme cases.[94] And even in the case of a total deprivation of economically beneficial uses, the State may still exercise its police powers unencumbered by the dictates of the Takings Clause if it may be said—with reference to background principles of state property law—that the owner never held the right to make productive use of the property in the first place.[95] But this is a far cry from *Lochner*, under which courts had once imposed the burden on the government to justify *all* regulatory restrictions with substantial evidence that they were necessary to avert affirmative harm to others.[96]

The background principles exception is rooted in common law principles, which "can be traced back to Glanville's admonition in 1187, that a person may not use his property to the detriment of another."[97] For that matter, early conceptions of the States' police powers were closely tethered to this natural law axiom—that the purpose of positive law is to prevent affirmative injury to the rights of

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92 *Cf*. Jerry Mitchell, Lucas v. South Carolina Coastal Council: *The Remaking of Takings Law and the Re-Emergence of Lochner*, 9 J. NAT. RESOURCES & ENVTL. L. 105, 121 (1993) ("If a regulation deprives an owner of all economically-beneficial use, it may only be justified by common law concepts of public nuisance. In this sense at least, the ghost of *Lochner* has been revived."); *see also* Regina McMahon, *The* Lucas *Dissenters Saw Katrina Coming: Why Environmental Regulation of Coastal Development Should Not be Categorized as a "Taking"*, 15 PENN ST. ENVTL. L. REV. 373, 389-91 (2007).

93 *See* Palmersheim, *supra* note 79, at 203 (addressing and assuaging these concerns).

94 Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005) (emphasizing that restrictions that do not fall within Lucas "relatively narrow" categorical rule are reviewed under *Penn Central*'s more deferential standard).

95 Lucas v. S.C. Coastal Council, 505 U.S. 1003,1029-30 (1992).

96 *See* Lochner v. New York, 198 US 45, 57–58 (1905) ("The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid . . . ."); *abrogated by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) ("Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.").

97 STEVEN J. EAGLE, REGULATORY TAKINGS § 2-1 (3d ed. 2005).

others.[98] But of course, *Euclid* marked a watershed moment in expanding our modern conception of the police power, which more broadly approved of any land use restriction bearing a "substantial relation" to almost any legislatively declared public interest.[99] And, nothing in *Lucas* undermines or reverses *Euclid's* general presumption in favor of legislative judgments—except where they go so far as to amount to a taking of long recognized common law rights to make at least some reasonable use of one's property. To be sure, in rare instances *Lucas* requires that the State justify its restrictions with reference to common law standards; however, the *Lucas* Court's dismissal of legislative judgments in these extreme cases is unremarkable if we accept the premise that the Takings Clause operates as an explicit constraint on government.

Probably more significant, in practical terms, was the implication that the *Lucas* majority had endorsed the substantial advancement test as an affirmative limitation on the States' police powers.[100] Under that test, first pronounced in *Agins*, the courts could find that any regulatory restriction might amount to a taking—arguably without regard to the economic impact—if it failed to affirmatively advance the government's stated goals for the restriction in question.[101] But, in any event, the Supreme Court later repudiated the substantial advancement test in *Lingle v. Chevron U.S.A.*[102] Although there is an argument that the substantial advancement test remains a legitimate due process test, *Lingle* made clear that it is not a takings test.[103] Accord-

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98 *See* Luke A. Wake & Jarod M. Bona, *Legislative Exactions After* Koontz v. St. Johns River Management District, 27 GEO. INT'L ENVTL. L. REV. 539, 543-45 (2015) (observing that the nuisance doctrine is "predicated upon a tenet of natural law theory—the idea that no man has the right to inflict affirmative harm upon another").

99 *Id.* at 546-48 (discussing the expansion police powers and the birth of modern land use planning).

100 *See* Ann T. Kadlecek, *The Effect of* Lucas v. South Carolina Coastal Council *on the Law of Regulatory Takings*, 68 WASH L. REV. 415, 427 (1993) (explaining that at the time *Lucas* was decided, "[m]ost courts [ ] decide[d] takings challenges using the *Agins* two-part test, either exclusively or in combination with the *Penn Central* balancing test . . . [and these courts had largely construed *Agins* as effecting little change in takings law]").

101 *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests.").

102 Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 531-32 (2005).

103 *See* Brief for Nat'l Federation of Indep. Bus. Small Bus. Legal Ctr. Et al. as Amicia Curiae Supporting Petitioner, Kentner v. City of Sanibel, 135 S. Ct. 950 (2015) (No. 14-404), 2014 WL 6967820, at *20 (arguing that the substantial advancement rule survives as a Due Process test).

ingly, *Lucas's* actual impact on the police powers of the state was minimal—even if the background principles concept is limited to common law principles as suggested by the majority.

b. *Did* Lucas *Invite Conceptual Severance?*

The most serious concern for land use planners was the possibility that the lower courts might give broad effect to the *Lucas* Rule by defining the property subject to regulation narrowly. If limited strictly to its facts, *Lucas* would apply only in the most extreme cases where regulation effectively renders a property entirely valueless. But, at the time of the decision, some believed that there was a risk landowners might bring *Lucas* claims against much less draconian regimes and find success by defining the parameters of the subject property on their own terms.[104] Such an approach would certainly make it easier for a landowner to prevail under *Lucas*. But was it a likely outcome?

More tempered commentators downplayed the potential impact of *Lucas* in light of *Penn Central*, where the Court had firmly rejected the notion of conceptual severance—meaning that the Court had already made clear that an owner cannot assert a "taking" of a portion of his or her property interests.[105] In *Penn Central*, the owner had claimed a taking when denied the right to build in the airspace above an existing structure.[106] If embraced, such a theory would enable an owner to bring a taking claim if denied the right to build on any given subsection of an existing parcel of land. For this reason, *Penn Central* set forth what remains a cardinal rule of regulatory takings law; a takings analysis must focus on the "parcel as a whole."[107]

Unfortunately, the *Penn Central* Court failed to offer any concrete guidance on how to determine what constitutes the "parcel as a whole" in any given case, and the lower courts have struggled with that issue ever since. By the time *Lucas* was decided, there were at least several strands of case law offering different analytical approaches; however, there was broad consensus on the point that there must be some objective standard for assessing the relevant par-

104 *See* Mitchell, *supra* note 92, at 119 ("If the Court breaks the parcel into parts, then any regulation can become a compensable taking through some ingenuity of the landowner.").

105 *E.g.*, Palmersheim, *supra* note 79, at 189-90 ("[T]aking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.").

106 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130 (1978).

107 *Id.* at 130-31.

cel, otherwise landowners might engineer takings through calculated segmentation.[108] For that matter, most courts recognized the need to avoid gamesmanship on either side of the takings equation.[109]

Still there were lingering questions about how the "parcel as a whole" should be defined, which became all the more significant with the pronouncement of *Lucas's* categorical rule.[110] For this very reason, Justice Stevens suggested that the Court should have waited to pronounce its rule until presented with an opportunity to provide more concrete guidance on the antecedent question—in what is commonly referred to as the "denominator problem."[111] Moreover, in the wake of *Lucas*, some commentators drew attention to footnote seven, in which Justice Scalia had suggested conceptual severance might be appropriate under certain conditions.[112]

Although many questions remained open, the *Lucas* opinion tells us something about how the Court conceptualized the "parcel as a whole" doctrine in its treatment of past precedent. In dissent, Justice Stevens argued that there was no support for the Court's newly minted categorical rule, in part because he thought that such a rule would have altered the outcome in several cases where the Court had denied takings liability.[113] For example, he argued that under the *Lucas* rule, the Court would have found a taking had occurred in *Goldblatt v. Hempstead*, where a municipal ordinance prohibited further excavation of a lake because that was the only asserted economically beneficial use of the property.[114] But, the facts of that case suggest that the property might have been converted to other poten-

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108 Kadlecek, *supra* note 100, at 423 ("These [lower] courts have held that the appropriate unit of land for a takings analysis is all contiguous land with a common owner.").

109 *See, e.g.*, *id.* at 422-24.

110 *Id*. at 432-33 ("If a court 'piecemeals' property into narrowly defined interests, it is more likely to find a taking. For example, a regulation could deny an owner economically viable use of two acres out of a ten-acre plot . . . . However, if the court looks at the entire plot, and 80% of the value and use remains, then the 'economically viable use' test would not indicate a taking.").

111 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1067 (1992) (Stevens, J., dissenting).

112 *Id.* at 1016 n.7 ("Regrettably, the rhetorical force of our deprivation of all economically feasible use rule is greater than its precision, since the rule does not make clear the property interest against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave ninety percent of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.").

113 *Id.* at 1065 (Stevens, J., dissenting).

114 *Id*. (citing Goldblatt v. Hempstead, 369 U.S. 590 (1962)).

tial uses.[115] There was no suggestion that Goldblatt's property interest was confined exclusively to the lake. Accordingly, it is unlikely that a restriction prohibiting excavation of the lakebed would amount to a complete denial of all economically beneficial uses on the parcel as a whole. *Lucas* suggests that to prevail under its standard, the owner would have had to plead facts sufficient to show that it had been denied all commercial uses on the land portion of its property as well.

By contrast, the *Lucas* majority clearly thought its rule was consistent with *Pennsylvania Coal Co.*, wherein a coal company succeeded in a takings claim challenging a restriction abrogating its rights to mine below the surface of another party's estate.[116] Whereas there were other conceivable economically beneficial uses for the Goldblatt property—including potential development opportunities—there were no permitted uses with regard to the Pennsylvania Coal Company's limited ownership interests.[117] Since the company's property interest was confined to subsurface rights, the extinguishment of those rights could be viewed as a total taking of the company's entire property.[118]

Viewed in this light, the *Lucas* opinion was threading a needle, while avoiding the problem of conceptual severance. One implication may have been that a landowner might legitimately sever an existing parcel into separate estates, through arms-length transactions under background principles of state property law, prior to the implementation of a newly imposed restriction; however, that did not necessarily invite owners to engineer takings claims.[119] Indeed, in defining the parcel as a whole it would have seemed that the inquiry should focus primarily on whether the segmentation of property was lawful under state law, while allowing room for courts to consider the owner's motives in subdividing an existing parcel where the evidence might suggest gamesmanship.[120]

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115 *See* Penn Cent. Trans. Co. v. City of New York, 438 U.S. 104, 130 (1978) (addressing *Goldblatt* within its parcel as a whole discussion).

116 Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

117 *Id.* at 412.

118 *Id.* at 413.

119 *Id.* ("It is our opinion that the act cannot be sustained as an exercise of the police power, so far as it affects the mining of coal under streets or cities in places where the right to mine such coal has been reserved.").

120 *See, e.g.*, Forest Props., Inc. v. United States, 177 F.3d 1360, 1367 (Fed. Cir. 1999); Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993); Naegele Outdoor Advert. v. City

Yet in *Murr v. Wisconsin*, the U.S. Supreme Court recently disavowed the notion that courts should give presumptive weight to lawfully segmented lot-lines.[121] Rather than offering greater clarification as to how courts should approach the parcel as a whole question, Justice Kennedy's 5-3 majority opinion holds that there is no concrete analytical rule beyond the suggestion that courts should apply a (*Penn Central*-like) balancing test—with the touchstone inquiry looking ultimately to the owner's reasonable expectations.[122] But, whereas one might think that an owner should have a reasonable expectation of some economically beneficial use, per *Lucas*, for any lawfully-divided parcel, *Murr* suggests that the recognized metes and bounds of a given lot are only part of an amorphous equation, which considers (1) "the treatment of the land under state and local law;" (2) "the physical characteristics of the land;" and (3) "the prospective value of the land."[123]

Under Kennedy's formulation, the fact that a property is lawfully divided should cut in favor of a finding that it represents a separate parcel; however, state law may also factor against any reasonable expectation of a right to put such a parcel to independent economically beneficial use if existing restrictions apply at the time the owner acquires title.[124] Yet if Kennedy had stopped there we might have had a workable standard, whereby we could determine the propriety of treating a lawfully divided lot as a separate economic unit simply by reference to the objective question of what state and local law allowed at the time of conveyance. But, in directing courts to consider other, more nebulous, factors, Kennedy's approach injects greater uncertainty than ever into the predicate "parcel as a whole" inquiry.

As with *Penn Central*, the *Murr* balancing test will predictably work to the benefit of governmental defendants. Specifically, the directive to "look to the physical characteristics of the landowner's property" stands as an open invitation for courts to disregard an

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of Durham, 803 F. Supp. 1068, 1078-80 (M.D.N.C. 1992); State Dep't of Envtl. Regulation v. Schindler, 604 So. 2d 565, 567-68 (Fla. Dist. Ct. App. 1992).

121 137 S. Ct. 1933, 1947-48 (2017).

122 *Id*. at 1945 ("[N]o single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors.").

123 *Id*.

124 *Id.* ("The reasonable expectations of an acquirer of land must acknowledge legitimate restrictions affecting his or her subsequent use and dispensation of the property . . . . In a similar manner, a use restriction which is triggered only after, or because of, a change in ownership should also guide a court's assessment of reasonable private expectations.").

owner's objective expectations as to what uses may be permissible under an existing regulatory regime.[125] Kennedy even suggests that those expectations may be deemed unreasonable if "the property is located in an area that is . . . likely to become subject to, environmental or other regulation."[126] But in suggesting that an owner's reasonable expectations should be informed in part by speculation over the ever-shifting direction and momentum of political winds, Kennedy has inserted an inherently subjective "factor" into the equation—one that governmental defendants will exploit in any case where an owner contests subsequently enacted restrictions.[127]

Perhaps equally problematic for takings claimants is the suggestion that courts should give "special attention to the effect of burdened land on the value of other holdings."[128] More specifically, Kennedy suggests that this factor should consider the potential reciprocity of advantage, or counter-vailing benefits, accruing to Parcel A as a result of contested restrictions imposed on Parcel B.[129] The upside for takings claimants is that they may argue that this factor dispositively cuts in favor of viewing Parcel A as separate and independent from Parcel B in the absence of a demonstrable "special relationship" between the two tracts. But, the converse proposition is that the lower courts will likely weigh this factor against takings claimants, so as to count Parcels A and B as part of a larger "whole," if the government can demonstrate that regulation of one affects valuation of the other.[130]

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125 *Id*.

126 *Id*. (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring) ("Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.")).

127 This inquiry will likely prove relativistic. The authorities will inevitably argue that one should recognize that any portion of land is potentially subject to "reasonable regulation" as deemed appropriate by the community. On the other side of the equation the landowner can argue, in most every case, that if regulatory changes could have been reasonably foreseen, they would not have invested in the property in question, or would have paid much less. Thus, the question devolves into whether one should give relative weight to the owner's actual expectations or whether we can apply *post hoc* rationalization to the subsequently enacted restriction. Either way, Kennedy's formulation invites a subjective assessment.

128 Murr v. Wisconsin, 137 S. Ct. 1933, 1946 (2017).

129 *See id*. ("Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty.").

130 Kennedy emphasizes that "[t]he absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel . . . ." *Id*. Illustrating the

In any event, although *Murr* did little to provide concrete guidance to regulators, landowners, or the courts on the question of whether they may safely assume that a parcel will be treated as separate property for the purpose of takings analysis, the decision plainly extinguishes any lingering concern that landowners might strategically engineer *Lucas* claims through calculated segmentation. If anything, *Murr* seems to increase the likelihood that courts will apply *Penn Central* rather than *Lucas* where a claimant owns properties, otherwise recognized as separate and lawfully divided, within some indefinite proximity.[131] So the question, at this juncture, is whether *Murr's* balancing test will truly respect the reasonable expectations of landowners, or whether it will be invoked to undercut those expectations in practice.[132]

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point, Kennedy offers a hypothetical: "[I]f the landowner's other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if the development restraints for one part of the parcel protect the unobstructed skyline views of another part." But one might well argue that consideration of countervailing benefits should be appropriate only within the *Penn Central* test (*i.e.*, after concluding that two parcels represent a single economic unit), or during the valuation phase if the properties are recognized as separate economic units. *Id.*; Bauman v. Ross, 167 U.S. 548, 591-92 (1897); *see also* Steven J. Eagle, *"Economic Impact" in Regulatory Takings Law*, 19 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 407, 417-19 (2013). In any event, by folding this consideration into the parcel as a whole inquiry, Kennedy's formulation further complicates the antecedent question and further insulates governmental defendants from takings liability.

131 As with *Penn Central*, the *Murr* balancing test offers little guidance as to how courts should specifically weigh the factors in question and or whether any one factor may be given dispositive weight. *See* Ilya Somin, *A loss for property rights in Murr v. Wisconsin*, WASH. POST: VOLOKH CONSPIRACY, June 23, 2017, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/a-loss-for-property-rights-in-murr-v-wisconsin/?utm_term=.8580df84ec32 ("All of the factors in the test are complicated and difficult to measure. Often, which way they cut is in the eye of the beholder . . . . In addition, the Court provides little if any guidance on what to do if some of the factors cut in favor of the government, and others in support of the property owners. Judges can hardly avoid deciding these kinds of issues at least in part based on their personal and ideological preferences.").

132 If the ultimate touchstone of the parcel as a whole inquiry goes to the reasonableness of the owner's expectations at the time of acquisition, one might argue that it constitutes a question of mixed fact-and-law, which should be submitted to a jury. That might be appropriate, especially given that the *Murr* factors boil-down to an assessment as to what development options a reasonable buyer would have thought available at the time of purchase. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708-09 (1999) (holding that the Seventh Amendment right to a jury attaches in any suit raising claims analogous to actions that would have been heard in a court of law in 1791, and that "a § 1983 suit seeking legal relief [for vindication of constitutional rights] is an action at law within the meaning of the Seventh Amendment") (citing Curtis v. Loether, 415 U.S. 189, 195-96 (1974) (concluding that the Seventh Amendment's guarantee extends to any claim "sound[ing] basically in tort")). Indeed, it would be reasonable to conclude that general members of the public are best suited to make this sort of determina-

IV. THE TAMING OF THE *LUCAS* RULE

A. *Emphasis on Residual Value v. Economically Beneficial Uses*

In the *Lucas* decision, Justice Kennedy and the dissenters took issue with the notion that beachfront property could truly be valueless.[133] But, the majority left unquestioned the lower court's findings on this point.[134] In doing so, the *Lucas* Court injected a degree of ambiguity into its categorical rule. Commentators and courts were left questioning whether a total taking occurs only with the complete elimination of all residual value in a parcel, or whether the test focuses more specifically on the elimination of economically beneficial uses.

The *Lucas* Court articulated its rule in different ways throughout the opinion, in a manner that suggested that the majority viewed the denial of economically beneficial uses and the elimination of value as conceptually coextensive.[135] One potential interpretation was that the Court had emphasized the loss of economically beneficial uses—especially with its explanation that a total regulatory taking may be analogized to a physical taking.[136] Under this approach, a landowner might then state a *Lucas* claim whenever a regulatory restriction denies all development opportunities, or other meaningful economic uses of the property, on the assumption that the property has necessarily suffered a sufficient diminution in value under those circumstances.[137] In the same manner as the *Lucas* Court was willing to assume that the property had been rendered valueless, this approach would award just

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tion, especially given that jurors were historically presumed to have special local knowledge, which was vital in resolving land disputes. *See* Renée Lettow Lerner, *The Uncivil Jury, Part 2: The Unromantic Origins and Continuous Need for an Alternative*, WASH. POST: VOLOKH CONSPIRACY, May 27, 2015, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/27/the-uncivil-jury-part-2-the-unromantic-origins-of-the-jury-and-the-continuous-need-for-an-alternative/?utm_term=.f2e1a6e4df8b; *see also* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF COMMON LAW 1130 (5th Ed. 1956) (summarizing the early history of juries, including use in "trial of right to real property").

133 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1044-45 (1992).

134 *Id.* at 1007.

135 Some commentators construed *Lucas* as requiring consideration of both factors in a two-step inquiry. *See, e.g.*, Kadlecek, *supra* note 100, at 427.

136 *See Lucas*, 505 U.S. at 1016-18 (1992).

137 *See, e.g.,* Gil v. Inland Wetlands and Watercourses Agency of Greenwich, 593 A.2d 1368, 1373-74 (Conn. 1991) (suggesting that economically beneficial use entails at least some development potential); Vatalaro v. Dep't of Envtl. Regulation, 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App. 1992) (same).

compensation even where there may be some insignificant residual value.

This might seem most appropriate considering the majority's emphasis on the common law right to make reasonable use of one's land, especially in its discussion of background principles of property law.[138] To be sure, *Lucas* seemingly places the right to make economically beneficial use of one's land on par with the fundamental right to exclude the public from private property.[139] Yet there was no escaping the fact that the Court had stated, in various portions of the opinion, that a total taking occurs with the elimination of all value.[140] This has proven helpful for those seeking to limit *Lucas's* "footprint" in takings law. Indeed, some lower courts have held that a finding of any residual value is enough to defeat a *Lucas* claim.[141]

But, this interpretation results in a strangely arbitrary rule. Whereas a restriction devaluing a property by 100 percent is categorically deemed a taking, any de minimis remaining value is enough to trigger review under *Penn Central's* much more flexible balancing test.[142] For that matter, in the wake of *Lucas*, some courts have held that a finding of any residual value cuts against the landowner under the *Penn Central* balancing test.[143]

Another bi-product of requiring a showing of total elimination of residual value is that the lower courts have encouraged "regulatory pioneering" with inventive regimes that may prohibit development altogether, while theoretically preserving some residual value for the

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138 This should be all the more true given that the lower courts had by and large already construed the *Agins* test as requiring compensation where regulation has "forced the land to remain in [a] natural state[ ]" to extent they had given *Agins* independent force. Kadlecek, *supra* note 100, at 421-22.

139 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992) (quoting 1 E. COKE, INSTITUTES, ch. 1, § 1 (1st Am. Ed. 1812)) ("[F]or what is the land but the profits thereof[?]").

140 *E.g.*, *id.* at 1007 ("This case requires us to decide whether the Act's dramatic effect on the economic value of Lucas's lots accomplished a taking of private property . . . .").

141 *See, e.g.*, Jafay v. Board of Cty. Comm'rs, 848 P.2d 892, 900-03 (Colo. 1993); *c.f.* Animas Valley Sand & Gravel, Inc. v. Bd. Of Cty. Comm'rs, 38 P.3d 59, 65 (Colo. 2001) ("While much of our precedent implies that a regulation does not effect a taking unless there is a nearly complete loss of economic value . . . [in one case] we noted, '[r]egulation which does not prevent all economic may also constitute a taking if it goes "too far."'").

142 *See Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting) ("[T]he Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished by 100% recovers the land's full value.").

143 *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 700 (1999) (reciting jury instructions calling for Takings Clause liability if regulations failed to substantially advance legitimate interests or deprived the property of all economically viable use).

owner.[144] For example, some jurisdictions award "transferable development rights" (TDRs) to owners who are otherwise denied the right to build as a means of avoiding liability under *Lucas*—with the idea being that these development credits may theoretically be sold in a market akin to a cap-and-trade program, whereby another owner might obtain a variance authorizing more intense development by purchasing a TDR.[145] But, these regimes remain controversial because they are transparently designed to immunize government from takings liability.[146] For this very reason, a challenge to this sort of TDR regime might very well provide a compelling vehicle for the Supreme Court to bring clarity as to whether a finding of residual value should defeat a *Lucas* claim.[147]

B. *Background Principles as an Affirmative Defense*

Governmental defendants have also succeeded in limiting the effect of *Lucas* by invoking the background principles exception as an affirmative defense.[148] This background principles exception stands as a peculiar doctrine in that it subverts the federal constitutional standard to an objective state-based limitation. But, in explaining the necessity of looking to the background principles of state law, *Lucas*

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144 *See* Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 577 (2003) (arguing that *Tahoe-Sierra* further encourages this approach).

145 *See, e.g.*, Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 728-35 (1998).

146 If the proper inquiry focuses on the denial of economically beneficial uses—as opposed to the extinguishment of all residual value—it would follow that such a regime would amount to a total taking under Lucas, which would mean that value preserved by the TDR regime would be relevant only in determining the amount of compensation owed in the same manner as courts consider offsetting benefits in valuation cases.

147 This is not the only ground on which TDRs are constitutionally suspect. In the wake of *Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586 (2013), it is clear that the government bears a heightened burden under the Takings Clause to justify conditions requiring payment of money as a term of obtaining a discretionary land use approval. In other words, a developer might also challenge a requirement to purchase a TDR under *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 838 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994), which adds even further reason to doubt the viability of a functioning market for TDR sales, which is of course a premise of the entire TDR regime.

148 *See, e.g.*, Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 55-56 (1995); Michael C. Blumm & Lucas Ritchie, Lucas's U*nlikely Legacy: The Rise of Background Principles as Categorical Defenses*, 29 HARV. ENVTL. L. REV. 321, 367 (2005).

was helpful in elucidating the doctrinal foundations of our regulatory jurisprudence more broadly.

Lucas directs that courts must consider the antecedent question as to what rights enured in the title to the land in question.[149] If it cannot be shown that the owner retained a right to engage in a specific use, then it cannot be said that anything has been "taken" with an enactment imposing restrictions on that use. But, by the same token, *Lucas* made clear the presumption that a landowner enjoys the common law right to make reasonable use of his or her land.[150] Accordingly, the burden is on the authority to point to a background principle that would go so far as to deny all economically beneficial uses.

1. Common Law Limitations

a. *An Objective Standard?*

The *Lucas* majority emphasized that the common law provides an objective standard for assessing what rights enure in the title of land.[151] For example, each state has a body of case law defining the scope and applicability of the nuisance doctrine, which prohibits a landowner from engaging in uses of land that unreasonably interferes with the right of another owner to use and enjoy his or her land. Yet, in dissent, Justice Blackmun argued that the common-law standard essentially comes down to a question of reasonableness, which a judge is no better suited to answer than a legislature speaking on behalf of the entire community.[152] The suggestion was that the judicial branch is equally prone to subjective judgments in determining what is or is not reasonable conduct; however, this view plainly discounts the political pressures that may influence an elected representative's decision to vote for or against a restriction.

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

150 *Id*. at 1027-31 (observing that landowners typically acquire title with the expectation that they may put it some economically beneficial use and that "[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition. . .").

151 *Id.* at 1029 ("A law or decree with such an effect must, in other words, do no more than duplicate the result that 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 complementary power to abate nuisances that affect the public generally, or otherwise.").

152 *Id*. at 1054-55.

Moreover, although the nuisance doctrine entails some degree of elasticity, it is rooted in an objective preexisting standard that requires an affirmative showing of concrete facts demonstrating that government intervention is necessary to avert an anticipated harm.[153] This is necessarily a more demanding standard than *Euclid's* rational relation test, which presumes the legitimacy of regulatory action if there is evidence demonstrating that the restriction advances the legislature's conception of the public good.[154] Whereas *Euclid* would allow the Legislature to make subjective declarations of the public good, the common law of nuisance requires more than recitation of platitudes.[155]

Not surprisingly, the states have developed different approaches for identifying a nuisance. But, in its historical formulation, the nuisance doctrine is not particularly helpful for a governmental defendant seeking to avoid liability under *Lucas*.[156] At times, various courts have oscillated between emphasizing the defendant's right to use the subject property and the plaintiff's right to be free from unreasonable interference in his or her own right to use and enjoy private property.[157] In other words, all of these formulations emphasize the common law right to make reasonable use of one's property. As one would expect, *Lucas* defendants seek to emphasize those cases that more liberally recognize harmful conduct to another property; however, the very requirement to demonstrate direct and individualized harm to another property is a significant limitation.[158]

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153 *Id.* at 1031 ("We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim . . . . Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.").

154 *Id*.

155 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 391 (1926).

156 *See* Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 196 (1990) (explaining that "[t]he leading pre-Revolutionary nuisance decision was *William Aldred's Case* in 1611[,]" and that the court had established that a nuisance must either invade the property of a neighbor or "interfere[ ] with [an] essential use of [that] property").

157 *Id*. at 196-206; *see also* Wake & Bona, *supra* note 98, at 544 ("This standard assumes that each landowner can put his property to any economically beneficial use, or to whatever purpose serves the owner's individual conception of happiness—provided that he or she is not invading the right of another to do the same.").

158 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992) (suggesting that the state must show direct harm as would be necessary for a private party to obtain an injunction against a neighbor).

b. *The Proliferation and Expansion of Background Principles*

Whereas legislative enactments had largely displaced the common-law doctrine of nuisance as the most direct means for addressing allegedly noxious activities, *Lucas* has prompted renewed interest in nuisance law, and other, more arcane, doctrines. For that matter, defendants have sometimes found surprising success in urging expansive conceptions and novel applications of historically rooted doctrines.[159] Perhaps this gives a degree of credence to Justice Blackmun's cynicism as to the subjectivity of courts.

In support of evolving common law doctrines, commentators often point to the *Lucas* majority's suggestion that "changed circumstances may make what was previously permissible no longer so."[160] To illustrate his point, Scalia used the example of a government order to remove a nuclear facility "upon discovery that the plant sits astride an earthquake fault."[161] Yet this merely affirms the unremarkable proposition that the application of legal principles hinges upon concrete facts. The discovery of new facts may well change the outcome of a nuisance suit—as opposed to the objective standard on which the case should be decided.

But if the *Lucas* majority intended an entirely static conception of common law doctrines, one might question why the opinion suggests that courts should look to the Restatement (Second) of Torts—which arguably departs in significant ways from the approach most states took in nuisance cases at the time of ratification of the Fourteenth Amendment.[162] That might conceivably invite courts to incorporate subsequent restatements that might work more substantial changes in common law, or may potentially be viewed as affirmation that common law standards evolve with time. Without doubt, we have

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159 Babcock, *supra* note 148, at 67 (concluding that *Lucas's* impact on takings law has been minimal and that "[i]ronically[,] the Lucas [*sic*] decision may make it more difficult for takings claimants . . . [in light of various common law doctrines that may be invoked by defendants]"); *see also* Glenn P. Sugameli, Lucas v. South Carolina Coastal Council*: The Categorical and Other "Exceptions" to Liability for Fith Amendment Takings of Private Property Far Outweigh the Rule*, 29 ENVTL. L. 939, 971-73 (1999) (arguing for evolving conceptions of common law doctrine); *see also* Blumm & Ritchie, *supra* note 148.

160 *Lucas*, 505 U.S. at 1031.

161 *Id*. at 1029.

162 If the background principles exception is rooted in originalist theory of the sort espoused by Justice Scalia, one might think that the appropriate baseline is the common law as of the time the Takings Clause of the Fifth Amendment was made applicable to the states in 1868. *But see Lucas*, 505 U.S. at 1031.

seen many courts embrace new, and arguably evolving, applications of common law doctrines in the wake of *Lucas*:

(I) *Nuisance Doctrine*—The *Lucas* majority said that no compensation would be required for a lakebed owner if "denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land" because such an invasion would amount to a nuisance at common law.[163] Yet, some post-*Lucas* courts have held that much more attenuated impacts on the general public may suffice for the government to invoke the nuisance defense.[164]

(II) *Navigable Servitudes*—Federal common law has long recognized that the bed of navigable rivers and lakes are held subject to a servitude, which encumbers any private rights one might have in these submerged lands. But, in the wake of *Lucas* some courts have recognized limited expansions of this concept to include, for example, a servitude in navigable airspace.[165]

(III) *Public Trust Theories*—While courts have long recognized that the states hold title to tidelands in trust up to the mean high water mark, and that this common law doctrine extends to the bed of the Great Lakes, some states have recognized limited expansions of the public trust doctrine so as to encumber dry portions of beaches and even the shoreline of inland lakes.[166]

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163 *Lucas*, 505 U.S. at 1029-30.

164 *Compare* Loveladies Harbor Inc. v. United States, 28 F.3d 1171, 1183 (Fed. Cir. 1994) (holding fill activity does not constitute a nuisance absent direct impact on neighboring property), Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1251-55 (D. Nev. 1999) (holding that the nuisance exception could not apply without affirmative proof of actual damage to an adjacent property) , *rev'd on other grounds*, 216 F.3d 764 (9th Cir. 2000), *aff'd*, 535 U.S. 302 (2002), John R. Sand & Gravel Co., 60 Fed. Cl. 230, 242-50 (2004) (same), *rev'd on other grounds*, 271 F.3d 1090 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1077 (2002), *with* Machipongo Land & Coal Co., Inc. v. Commonwealth, 799 A.2d 751 (Pa. 2002) (holding that a study finding that there was potential for mining activity to cause water pollution is enough for the government to invoke the nuisance defense, notwithstanding questions as to the likelihood of harm).

165 *Compare* Donnell v. United States, 834 F. Supp. 19, 27 (D. Me. 1993) (finding no taking where an owner was required to remove a wharf from submerged lands), *with* Air Pegasus of D.C., Inc. v. United States, 60 Fed. Cl. 448, 459 (2004) (denying takings claim in challenge to restrictions shutting-down a heliport operation).

166 *Compare* State ex rel. Merrill v. Ohio Dep't of Nat. Res., 955 N.E.2d 935, 949 (Ohio 2011) (holding that the public trust extends no further than the natural shoreline of Lake Erie), *with* State v. Superior Court (*Fogerty*), 625 P.2d 256, 261 (Cal. 1981) (recognizing public trust doctrine extends to the shores of Lake Tahoe), *and* Matthews v. Bay Head Improvements Ass'n, 471 A.2d 355, 365 (N.J. 1984) (holding the public has a right to use and access dry sand beach above the median high tide line).

(IV) *Natural Use Doctrine*—In *Just v. Marinette*, the Wisconsin Supreme Court rejected a takings challenge on the view that common law principles prohibited development of a property deemed inherently unsuitable for development.[167] Although *Lucas* arguably repudiated *Just*, some courts and commentators have suggested that the natural use doctrine might immunize government from takings liability for restrictions imposed within ecologically sensitive areas.[168]

(V) *Wildlife Trust*—Most states recognize public ownership of wildlife at common law, which has prompted at least some state courts to suggest that government may avoid takings liability if its restrictions are framed as protecting wildlife within critical habitat.[169]

(VI) *Customary Rights*—Similar to the public trust doctrine, several states recognize customary public rights in certain lands, including native gathering rights in some jurisdictions; however, in the wake of *Lucas*, several states have expanded customary rights as a basis for precluding development, so as to confer public rights to access public trust lands through private properties.[170]

(VII) *Water Rights*—The states have developed multifarious common law doctrines pertaining to the proper use of water resources and the scope of rights landowners may have in diverting water; not surprisingly, courts in several western states have incorporated these common law doctrines into the background principles exception.[171]

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167 201 N.W.2d 761, 767-69, 771 (Wis. 1972).

168 *Id.*; *see also* Good v. United States, 39 Fed. Cl. 81, 98 n.30 (1997) (stating that it is unclear whether the *Just* line of cases may be incorporated within *Lucas's* background principle exception), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999); Zealy v. City of Waukesha, 548 N.W.2d 528, 534 (Wis. 1996) ("Nothing in this opinion limits our holding in *Just*. . . ."); City of Riviera Beach v. Shillinburg, 659 So. 2d 1174, 1183 (Fla. Dist. Ct. App. 1995) (citing *Just*).

169 *See, e.g.*, State v. Sour Mountain Realty, Inc., 276 A.D.2d 8, 10 (N.Y. 2000) ("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."); Sierra Club v. Dep't of Forestry & Fire Prot., 26 Cal. Rptr. 2d 338, 347 (Cal. Ct. App. 1993) (rejecting a takings claim challenging denial of a permit to harvest timber within the habitat of an endangered species).

170 *See, e.g.*, Pub. Access Shoreline Haw. v. Haw. Cty. Planning Comm'n, 903 P.2d 1246, 1268 (Haw. 1995) (holding that preexisting Native Hawaiian gathering rights formed a background principle sufficient to immunize government from takings liability under *Lucas*); Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993) (holding that the customary rights doctrine forecloses development within the dry sands of beaches).

171 *See, e.g.*, W. Maricopa Combine, Inc. v. Ariz. Dep't of Water Res., 26 P.3d 1171, 1180 (Ariz. Ct. App. 2001) (denying takings liability for recession of a permit to divert water); *In re* Water Use Permit Applications, 9 P.3d 409, 493 (Haw. 2000).

c. Stop the Beach Renourishment *as a Backstop*

While it is conceivable that common law principles may evolve with time, *Lucas* makes plain that new applications of existing doctrines must be rooted in historic precedent. Just as Lord Coke proclaimed that "out of the old fields must come the new corne[,]" it remains true today that we may find new applications of ancient principles of law.[172] For that matter, *Lucas* and *Pennsylvania Coal Co.* were themselves pronouncements of previously unrecognized principles divined from our takings jurisprudence. But how far can common-law principles be stretched or reworked?

The Supreme Court's decision in *Stop the Beach Renourishment v. Florida Dept. of Environmental Protection* affirms that there are meaningful limitations on the judicial branches' prerogative to shape background principles of state law.[173] *Stop the Beach Renourishment* concerned a takings claim seeking compensation for a state administered plan to control erosion by adding sand to a beach, seaward of the public trust line.[174] Beachfront landowners objected, arguing that this took away their common law littoral rights to directly access and use of the water, to have unobstructed views, and to the attain the accretion of incrementally deposited sands.[175] Specifically, the beachfront owners argued that Florida's beach restoration program effected a taking in cutting off these common law rights; however, the Supreme Court of Florida ruled otherwise—holding that the takings claimants did not own the property supposedly taken.[176] Thereafter the landowners reframed their takings theory, alleging that the Florida Supreme Court had taken their property in "declaring that [their littoral property] rights did not exist."[177] But the U.S. Supreme Court affirmed, holding that the Florida Supreme Court was right because, under Florida's common law, landowners lose their littoral rights where a sudden avulsion of sand or other deposits of earth cut-off direct access to the water.[178]

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172 *See* THEODORE PUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 51 (5th ed. 2001) (explaining Lord Coke's jurisprudence).

173 560 U.S. 702 (2010).

174 *Id.* at 709-10.

175 *Id.* at 711.

176 *Id.* at 712.

177 *Id*. at 729

178 PUCKNETT, *supra* note 172, at 730-32.

Although the Court found no takings problem, the decision made clear that state courts cannot simply redefine the contours of private property without violating the Takings Clause. In other words, the only reason Florida prevailed was because it correctly applied preexisting common law standards. Accordingly, this decision should serve as a backstop against calls to expansively interpret public trust and other such doctrines, at least if newly pronounced principles would abrogate previously recognized rights.

Nonetheless, it will likely be necessary for the Supreme Court to grant certiorari in a subsequent case to provide more explicit guidance. To be sure, the question remains whether a judicial decision abrogating previously recognized common law rights should give rise to an independently actionable claim against a state's judiciary, or whether the Takings Clause should more simply be understood—under the canon of avoidance—as foreclosing interpretations that would redefine previously recognized rights out of existence. Relatedly, there are important lingering questions as to when courts may, or should, give force to prospective legislation that significantly changes historic background principles.[179] One question in particular seems to have piqued the interest of Justice Gorsuch, with whom Justice Thomas recently joined in a statement suggesting that the court should "at its next opportunity" take up the question of whether a state may limit compensation owed for a taking "by operation of statute[.]"[180] Such a case, if granted for certiorari, would also allow the Court an opportunity to speak more clearly to the question of whether and when legislative actions may alter background principles.

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[179] *See, e.g.*, Bay Point Props., Inc. v. Miss. Transp. Comm'n, 201 So. 3d 1046, 1052–53 (Miss. 2016) (holding that legislative proscriptions may change background principles—in this case those concerning rules for abandonment of an easement—for purposes of valuation of a condemned property).

[180] Bay Point Props., Inc. v. Miss. Transp. Comm'n, No. 16-1077, 2017 WL 915361, at *1 (U.S. June 26, 2017) ("When a State negotiates an easement limited to one purpose but later uses the land for an entirely different purpose, can the State limit, by operation of statute, the compensation it must pay for that new taking? The Mississippi Supreme Court held that it may do just that. But this decision seems difficult to square with the teachings of this Court's cases holding that legislatures generally cannot limit the compensation due under the Takings Clause of the Constitution.").

2. Positive Law as a Background Principle?

Though the *Lucas* majority seemingly intended to limit its background principles exception to common law doctrines, the lower courts have largely treated Justice Kennedy's concurrence as if it were controlling for the proposition that statutory limitations may likewise be treated as background principles.[181] That approach was further encouraged by Kennedy's majority opinion in *Palazzolo v. Rhode Island*, which affirmed that the right to develop "is subject to reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions."[182] And, incidentally, Justice Rehnquist cited this portion of the *Palazzolo* opinion, that same term, in his dissent in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, for which even Justices Thomas and Scalia joined in arguing that the majority was wrong to conclude that a complete temporary moratorium on development should not be reviewed under *Lucas* as a total taking.[183]

But, although arguably embracing the notion that positive enactments may shape the background principles of state law, these opinions suggest that an enactment must be of a certain vintage before it may be viewed as a background principle. For example, Chief Justice Rehnquist suggested that enacted restrictions in colonial Boston and New York City's first comprehensive zoning ordinance from 1916 would be sufficiently aged to fit within *Lucas's* background principles framework.[184] The necessary implication was that newly enacted restrictions cannot be considered background principles. Plainly, the longer the restriction has remained in place, the more it may be viewed as ossified within the regulatory landscape. This leaves open the question of how old is old enough, though Kennedy's concurrence

181 *See* Radford & Breemer, *supra* note 77, at 478-79; *see also* Sugameli, *supra* note 159, at 972-73 ("Virtually every court that has specifically decided the issue has found that the Lucas inquiry into 'background principles' and limitations inherent in title to property includes 'preexisting' state and federal statutes that were in effect when the claimant acquired the property at issue.").

182 533 U.S. 606, 627 (2001).

183 535 U.S. 302, 352 (2002) (Rehnquist, J., dissenting); *Tahoe-Sierra* held that temporarily imposed restrictions are to be assessed under *Penn Central*, not *Lucas*—regardless of whether they may completely deny development opportunities for a time. 535 U.S. 302. This is because, under the parcel as a whole rule, a temporary moratorium is not viewed as burdening the entire parcel—but only a temporal segment of the full estate. *See* 535 U.S. 302; *see also* supra Part III.

184 *See id*.

in *Lucas* implies that an owner's expectations at the time of purchase are relevant.[185] And, with Kennedy's decision in *Murr,* there is all the more reason now for courts to seriously examine the owner's "reasonable expectations" at the time of purchase.[186]

C. *The Notice Rule Before and After* Palazzolo v. Rhode Island

Justice Kennedy's opinion in *Palazzolo* warrants further attention both because it helpfully elucidates the concept of background principles and because it repudiates a line of cases that have since been resurrected. Relying heavily on Kennedy's concurrence in *Lucas*, numerous courts had proclaimed an effective bar on takings claims for landowners who had acquired title to their property after enactment of a contested restriction because they were said to have "notice" of the restriction at the time of acquisition.[187] Courts justified this notice rule both under the background principles exception to *Lucas*, and by emphasis on the owner's reasonable expectations—

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185 *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1034-35 (1992) (Kennedy, J., concurring).

186 As illustrated by Justice Gorsuch's statement in *Bay Point Properties*, doctrinal confusion over the proper application of the background principles doctrine predates the *Murr* decision. Bay Point Props., Inc., v. Miss. Transp. Comm'n, No 16-1077, 2017 WL 91361 (2017). But *Murr* underscores the need for further guidance on these vexing questions. This is so because Justice Kennedy implies that enactments predating acquisition may potentially be viewed as background principles, Murr v. Wisconsin, 137 S. Ct. 1933, 1945-46 (2017); however, at the same time, Kennedy insists that this approach comports with *Palazzolo*—wherein the Court had previously repudiated the notion that one who acquires with notice of a preexisting restriction should be foreclosed from bringing a takings claim. *Compare Murr*, 137 S. Ct. at 1945 ("A valid takings claim will not evaporate just because a purchaser took title after the law was enacted.") (citing *Palazzolo*), *with* Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) ("Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable."). Even setting aside tension *Palazzolo*, *Murr* opens new questions in so far as it casts doubt on the idea that legislative enactments must be of an older vintage. Further, *Murr* potentially conflicts with the fundamental precept, extolled in *Lucas*, that background principles must be understood a settled and static historic baseline against which modern regulatory changes are assessed. Accordingly, in the wake of *Murr* we may expect the lower courts to take increasingly divergent approaches in defining "legislative background principles."

187 *See, e.g.*, Dist. Intown Prop.'s Ltd. P'ship v. District of Columbia, 198 F.3d 874, 883 (D.C. Cir. 1999) (citing *Lucas* in support of the proposition that "a buyer's reasonable expectations must be put in the context of the underlying regulatory regime[,]" and rejecting a takings claim because the owner "purchased and subdivided its property subject to an existing regulatory regime that establishes that [the owner] could have had no reasonable expectations of development at the time it made its investments").

on the view that one can have no reasonable expectation of using private property in a manner prohibited by law.[188]

However, *Palazzolo* repudiated the notice rule.[189] In the proceedings below, the Rhode Island Supreme Court ruled that Anthony Palazzolo was foreclosed from bringing his takings claim because his title had passed—by operation of law—from his business to his person.[190] But the Supreme Court reversed, holding that government cannot defeat a takings claim simply by demonstrating that the owner acquired title after enactment of the restriction in question.[191] Justice Kennedy explained that the notice rule is predicated upon the errant theory that "[p]roperty rights are created by the State[,]" and the state may, therefore, "shape and define property rights and reasonable investment-backed expectations [through 'prospective legislation']," such that "subsequent owners cannot claim any injury from lost value."[192] But, as *Lucas* recognized and *Palazzolo* affirmed, "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle."[193]

Thus, while fully recognizing that the state may impose reasonable restrictions on land use through its police powers, *Palazzolo* affirmed that when a restriction amounts to a taking, the right to prosecute a takings claim enures in the very title of the land and is not extinguished with the passage of title from one owner to the next.[194] As Kennedy explained, a contrary rule could effectively snuff-out the Takings Clause after a single generation.[195] Moreover, that sort of notice rule would result in serious inequities, especially for elderly or disadvantaged owners who may lack the time, energy, or resources

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188 *See* Radford & Breemer, *supra* note 77, 478-94.

189 *Palazzolo*, 533 U.S. at 626-30 (2001).

190 Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 716-17 (R.I. 2000).

191 *Palazzolo*, 533 U.S. at 626-27.

192 Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001).

193 *Id*. at 626-27.

194 *Id*. at 627 ("The 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. The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title.").

195 *Id*. ("The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation.").

necessary to go through the administrative steps required to ripen a takings claim, much less to litigate a takings case, which would mean that a notice rule would also be arbitrary in its effect.[196]

Still, *Palazzolo* at least suggested that the time of acquisition may be a relevant consideration in the takings equation because it may well effect the owner's investment-backed expectations.[197] That would seem only proper under *Penn Central*; however, with its categorical formulation, *Lucas* left no room for consideration of the owner's expectations. Nonetheless, in recent years we have seen a resurgence of the notice rule, typically with courts treating this consideration as dispositive under *Penn Central*.[198] Still, other opinions have painted with a broader brush, holding that post-enactment purchasers simply lack standing to bring a takings claim—which would defeat even a *Lucas* claim.[199]

CONCLUSION

At best, *Lucas* has proven to be only a modest gain for the property rights movement. Even as originally conceived, the *Lucas* rule would only apply in an extreme case. But, subsequent developments have significantly winnowed the field of viable *Lucas* claims in many jurisdictions—both in narrowly conceiving the test and in applying the background principles exception broadly. Twenty-five years later, we are left essentially where we started. Considering the parcel as a whole, most takings claims are assessed under *Penn Central* where they usually flounder.

Perhaps takings claimants would be better off had *Lucas* been decided under *Penn Central*, as it would provide an example of what a successful *Penn Central* claim might look like. Such a decision would

196 Palazzolo v. Rhode Island, 533 U.S. 606, 627-28 (2001).

197 *Id*. at 628 ("A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken."); *see also* Steven J. Eagle, 24 U. HAW. L. REV. 533, 572 (2002) (observing that although the *Palazzolo* Court was "unequivocal" in repudiating the "positive notice rule[,]" the decision was "less than a full-throated affirmation" of the notion that "so long as the [Authority] could not have deprived the prior owners of the[ir] [property rights] without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot") (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987)).

198 *See, e.g.*, Mehaffy v. United States, 102 Fed. Cl. 755, 766–67, *aff'd*, 499 F. App'x 18 (Fed. Cir. 2012).

199 *See, e.g.*, CRV Enters., Inc. v. United States, 626 F.3d 1241, 1249 (Fed. Cir. 2010).

have served as a model for takings claimants to emulate, without necessarily having to fit squarely within the *Lucas* box. But, the result of such an outcome would likely have been much the same. The courts would have viewed *Lucas* as an outlier case—just as they do today—and would weigh the *Penn Central* equation to deny takings liability in all but the most extreme cases. For that matter, we are not likely to see teeth—much less principled decision-making—in our regulatory takings jurisprudence unless and until the Supreme Court should endeavor to provide more concrete guidance as to how the *Penn Central* test should be assessed in the context of a successful partial takings claim. As Justice Thomas recently suggested in his dissenting opinion in *Murr*, the time may soon come for the Supreme Court to "take a fresh look at our regulatory takings jurisprudence[.]"[200]

[200] Murr v. Wisconsin, 137 S. Ct. 1933, 1957 (2017) (Thomas, J., dissenting) (suggesting that litigants should question whether the modern regulatory takings doctrine is "grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment").