October 2, 2007

Background principles and the rule of law: fifteen years after Lucas

James L. Huffman

Available at: https://works.bepress.com/james_huffman/4/
Background Principles and the Rule of Law: Fifteen Years after *Lucas*

James L. Huffman *

Abstract

The Supreme Court’s 1992 decision in *Lucas v. South Carolina Coastal Council* was welcomed by property right advocates. Justice Scalia’s opinion for the Court established a categorical taking where all economic value is lost as a result of regulation. Not surprisingly, advocates of unconstrained environmental and land use regulation were dismayed, although many were quick to suggest (hopefully) that *Lucas*’s impacts would be minimal since most regulations do not destroy all economic value.

Fifteen years later some who saw only dark clouds on the regulatory horizon as a consequence of *Lucas* now see a rainbow with a pot of gold at its end. The source of this newly optimistic understanding of *Lucas* is Justice Scalia’s reference to “background principles” of common law nuisance and property. In a nutshell the argument is that background principles serve not only as an exception in categorical takings where all economic value is lost, but also as an affirmative defense that immunizes government from virtually all takings claims.

In this article I argue that there is nothing extraordinary in Justice Scalia’s statement that background principles of the common law are relevant to the definition of property rights. What is extraordinary is the claim that, consistent with the historic evolution of the common law, these principles are almost infinitely malleable in the hands of courts and legislatures. It is this claim that creates a pot of gold at the end of the *Lucas* rainbow, but it reflects a misunderstanding of the common law process, a clear distortion of Justice Scalia’s meaning in *Lucas*, and a blatant disregard for the requirements of the 5th amendment takings clause.

Table of Contents

I. The *Lucas* Opinion ................................................................. 2

II. Breathing New Life (and less protection of property) into Background Principles . . 5

III. The Anti-Takings Project ....................................................... 13

IV. Evolution of the Common Law ................................................. 20

V. The Constitution and the Common Law ................................... 26

VI. Conclusion ................................................................. 28

*Erskine Wood Sr. Professor of Law, Lewis & Clark Law School.*
After many decades of disparaging the common law as inadequate to the imperatives of environmental protection, if not a cause of environmental harm, some environmentalists are now embracing the common law as an important tool in the struggle to protect the environment. With the exception of those who call themselves free market environmentalists (and thereby draw the disdain of most orthodox, command and control environmentalists), this new found interest in the common law is not rooted in a belief that the common law institutions of property, contract and tort provide the essential infrastructure for the efficient allocation of scarce (including environmental) resources. Rather, they have discovered that the common law might serve as a shield against takings claims that threaten to disrupt governments’ efforts to protect the environment – a possibly impenetrable defense of governmental limits on private discretion and market exchange. This 180 degree reorientation is firmly rooted in the claim that the common law is, and always has been, subject to judicial and legislative adaptation in the public interest as perceived by the judge or a legislative majority. It is a claim that turns the common law on its head, and Justice Scalia, of all people, gets the credit based on his 1993 opinion in *Lucas v. South Carolina Coastal Council*.  

I. The *Lucas* Opinion

The muddle that was takings law in 1993 generally left property owners to bear the costs of government regulation, even where “some people alone [are forced] to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” The exception was physical invasions which constituted a categorical taking without regard for the magnitude of the economic harm to the property owner or the anticipated benefit to the public. But as a general matter property owners seldom prevailed where the measure of an unconstitutional taking was a judicial determination of whether a particular regulation goes “too far” in constraining the use of private property. The outcome in *Lucas* was, therefore, something of a surprise – and a rare boost to property rights advocates.

Writing for the majority, Justice Scalia held that when “a regulation that declares ‘off-limits’ all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.” The Court thus


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


5. *Id.* at 1030.
established a second categorical taking where regulation results in a total loss of economic value. Prior case law had not held to the contrary, but in several cases the Supreme Court had found that nearly total loss of economic value did not constitute an unconstitutional taking. In fact, this was, at best, only a small victory for plaintiffs in regulatory takings cases since most regulations do not prohibit all economic uses of property. But where constitutional protections appear illusory, even small victories can seem momentous.

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

In his dissent Justice Blackmun found “perplexing . . . the Court's reliance on common-law principles of nuisance in its quest for a value-free takings jurisprudence.” A court looking to the background principles of common law nuisance would be weighing public and private harm and benefit and making “exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today.” “Once one abandons the level of generality of sic utere tuo ut alienum non laedas,” said Blackmun, “one searches in vain . . . for anything resembling a principle in the common law of nuisance.” Commentators picked up on

---

6 An exception is Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972), in which the Wisconsin court stated: “While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.” The court concluded that the Justs still had the “natural use” of the land as an undeveloped swamp.

7 See, e.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915) in which the court found no taking where prohibitions on mining reduced a property’s value from $800,000 to $60,000.


9 As I will demonstrate infra at discussion accompanying notes 56 to 72, background principles are not really an exception under the no remaining economic value per se rule. Rather background principles may establish that a claimant has no property right to be taken. But where there is a property right with no remaining economic value as a consequence of regulation, there is no exception to the categorical taking rule established in Lucas.

10 Id. at 1054.

11 Id. at 1055.
Blackmun’s theme in arguing that Scalia had achieved no greater certainty by substituting the traditional balancing test of nuisance law for the balancing test of constitutional takings law.

In essence, this critique of Scalia’s holding in *Lucas* was that it complicated existing takings doctrine without accomplishing any greater certainty for property owners or regulators, while giving courts license to preempt the legitimate discretion of state and local legislatures.\textsuperscript{12} The latter was not unimportant to separation of powers but, assuming courts and legislatures would reach similar assessments of harm and benefit,\textsuperscript{13} it was suggested that the *Lucas* majority made no substantive change to takings jurisprudence. The background principles exception to a per se rule that loss of all economic value results in an unconstitutional taking, said Blackmun and some commentators,\textsuperscript{14} left courts to balance public and private harm and benefit as they have always done at least since Holmes’ decision in *Mahon*.\textsuperscript{15}

Many analysts had for some time taken the position that there was an immunity from takings liability where government regulated to prevent nuisances,\textsuperscript{16} although the term “nuisance

\begin{footnotesize}
\textsuperscript{12} See e.g., John A. Humbach, Evolving Thresholds of Nuisance and the Takings Clause, 18 COLUM. J. ENVTL. L. 1, 3 (1993) (“Historically, it was ‘the great office of statutes ... to remedy defects in the common law,’ adapting the common law ‘to the changes of time and circumstances.’ After *Lucas*, however, remedial statutes to improve the common law will now be subject to preemption by the common law.” Quoting from Munn v. Illinois, 94 U.S. 113, 134 (1876).

\textsuperscript{13} While the *Lucas* majority thought it “unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land,” *Lucas*, 505 U.S. at 1031, they did not say the South Carolina legislature was wrong in its weighing of harm and benefit. But by remanding to the South Carolina courts the majority did make clear that the courts, not the legislature, have the final say.

\textsuperscript{14} See, e.g., Jed Rubenfeld, Usings, 102 YALE L.J. 1077, 1093 (1993) (“This result is astonishing, not only because it makes takings analysis turn on the various common-law precedents of the fifty states, and not only because the ‘common-law principles’ of nuisance that judges must now consult are themselves an ‘impenetrable jungle, . . .’); Joseph L. Sax, Property Rights and the Economy of Nature: Understanding *Lucas* v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1438 (1993) (“The case is not as far reaching as its rhetoric suggests. . . . Regulation that would be sustained under established common law “principles” of nuisance and property law is not affected. Presumably, states will have substantial latitude in determining the extent to which their existing legal principles limit property rights.”); Paula C. Murray, Private Takings of Endangered Species as Public Nuisance: *Lucas* v. South Carolina Coastal Council and the Endangered Species Act, 12 UCLA J. ENVTL. & POL’Y 119, 156 (1993) (“Unfortunately, as Justice Blackmun in his dissent aptly points out, the law of nuisance is not exactly the picture of clarity.”)

\textsuperscript{15} In *Pennsylvania Coal*, 260 U.S. at 415, Justice Holmes stated “[t]he general rule . . . that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” If “too far” is the test, only balancing will provide the answer.

\textsuperscript{16} See, e.g., Jan G. Laitos, Water Rights, Clean Water Act Section 404 Permitting, and the Takings Clause, 60 U. COLO. L. REV. 901, 921 (1989); Frank Michelman, The Jurisprudence of Takings, 88 COLUM. L. REV. 1600, 1602-03 (1988); Douglas W. Kmiec, The Original Understanding of the Takings Clause is Neither Weak nor Obtuse, 88 COLUM. L. REV. 1630, 1633 (1988). Ironically, the nuisance exception arose not as an exception to government liability but rather as an exception to government immunity. Where a government invasion of private property would be considered a nuisance if the result of private action, there was an inverse condemnation for which government
“exception” was not used in a Supreme Court opinion until Justice Rehnquist urged in dissent in *Penn Central* that “[t]he nuisance exception to the taking guarantee is not coterminous with the police power itself.” While Scalia acknowledged in *Lucas* that not every legitimate exercise of the police power is exempt from the takings clause, he also recognized that government can regulate to confer benefits as well as prevent noxious uses without incurring takings liability. He thus abandoned whatever had existed of a nuisance exception, while clarifying the relevance of common law nuisance to the definition of property rights. Common law principles of both nuisance and property law help to define the scope and content of property rights and thereby create what Blackmun and most commentators described as an exception to the newly articulated categorical taking where all economic value is lost. In addition to his suggestion that the nuisance exception risked making takings law less rather than more certain, Justice Blackmun urged that Scalia’s immediate recognition of an exception to his new per se rule evidenced a lack of confidence in the rule’s viability. For the most part, that was the extent of the contemporary commentary on the background principles concept.

II. Breathing New Life (and less protection of property) into Background Principles

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

---

17 438 U.S. at 146.
18 505 U.S. at 1022-1023.
19 505 U.S. at 1052.
20 *Lucas*, 505 U.S. at 1029.
21 *Id.* at 1031.
22 *Id.* at 1032, n 18.
Shortly after the *Lucas* decision John Ecchevirria and Sharon Dennis suggested that the background principles exception might more than consume the per se takings rule. More recently, pro regulation forces have rediscovered that possibility in Justice Scalia’s background principles. Justice Scalia, we are reminded, did not limit his reliance on background principles of common law to the vagaries of nuisance. He also referenced the background principles of property law. Here, some have argued, is a treasure trove of exceptions to the categorical taking rule of *Lucas*, particularly when one takes into account the evolutionary nature of the common law.

In a nutshell, the argument goes like this:

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

Because the common law is always evolving to serve contemporary needs, background principles can be understood to include virtually any present day notion of public interest-serving limitations on property use.

And so it turns out that Justice Scalia has unwittingly provided governments with an array of categorical defenses to takings claims while greatly narrowing the range of cases in which

---


24 In *Penn Central*, 438 U.S. at 124, the court held that, in the absence of a physical occupation of a plaintiff’s property, a judicial finding of an unconstitutional taking would depend upon “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . . and the character of the governmental action.”

25 *Loretto*, 458 U.S. 419.
property claimants will succeed. The work of three thoughtful scholars will illustrate this newly positive perspective on *Lucas* among environmentalists.

J.B. Ruhl, who fairly places himself in the “radical middle” among environmental law scholars, argues that the background principles of public nuisance law can be used by courts and legislatures to circumvent takings claims in the context of governmental ecosystem services preservation schemes. There are two keys to Ruhl’s claim that nuisance law can serve to insulate ecological services protection (and perhaps other environmental programs) from takings claims. One is the “discipline of ecological economics [which] . . . has focused on putting an economic price tag on degradation of ecological integrity.” The other is the recognition by Justice Scalia in *Lucas* that “[c]hanged circumstances or new knowledge may make what was previously permissible no longer so.” Ruhl’s argument is that because we now know much more about the economic benefits of ecosystem services than we did during the earlier development of nuisance law, courts and legislatures can constrain ecosystem services destruction consistent with historic principles of nuisance law and, thus, without running afoul of the takings clause.

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

---

28 *Id.* at 7, quoting from *Lucas*, 505 U.S. at 1031.
29 *Id.*
30 *Id.*
31 *Id.* at 21.
32 *Id.* at 27.
Where Ruhl looks exclusively to the background principles of nuisance law for a silver lining to Scalia’s *Lucas* opinion, my colleague Michael Blumm and former Lewis & Clark student Lucas Ritchie focus more on the background principles of property law. In the immediate aftermath of the *Lucas* decision, Professor Blumm concluded that “from a property lawyer’s perspective, *Lucas* is a flawed decision because it assumes that property rights amount to development rights.” But nearly fifteen years later he and Ritchie see great promise in Justice Scalia’s background principles, although less so nuisance than property. Because nuisance involves “case-specific factual balancing, which is the antithesis of categorical decision making . . . [and is, therefore,] not unlike the multi-factor balancing required by the *Penn Central* takings test,” they suggest, the categorical principles of property law have received more attention by the courts.

Blumm and Ritchie’s laundry list of background property principles is long. It includes public trust, natural use, navigational servitude, customary rights (including native gathering

33  Blumm, supra note 8. It may be that Professor Blumm’s dim view of the case reflected the fact that he was responding to comments by someone who “do[es]n’t understand property law.” At 907.


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

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

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


rights),\(^{38}\) various doctrines of water rights law,\(^{39}\) wildlife trust,\(^{40}\) Indian treaty rights\(^{41}\) and preexisting state and federal statutes and constitutions.\(^{42}\) Blumm and Ritchie include in their laundry list additional doctrines acknowledged not to be background principles but thought, nonetheless, to be relevant to Justice Scalia’s holding in \textit{Lucas}; namely destruction by

\begin{itemize}
  \item \textit{Id.} at 347-50. As Blumm and Ritchie acknowledge, it is not plausible to suggest that the doctrine of custom as interpreted by the Oregon Supreme Court in the case of Thornton v. Hay, 462 P.2d 671 (Or. 1969), and as applied in Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), falls within what Justice Scalia meant by background principles. Scalia’s forceful dissent to the denial of certiorari in Stevens makes that clear.

  \item \textit{Id.} at 350-52. The various doctrines of state water law referenced by Blumm and Ritchie will help to answer the first question that should be addressed in every takings case: to wit, what are the property rights of the claimant? Although Blumm and Ritchie suggest that the posing of this question is an innovation of the \textit{Lucas} decision, it will be explained at discussion accompanying notes 56-72, that Scalia was merely affirming what should have been the obvious and necessary first question in every takings case. Two aspects of Blumm’s and Ritchie’s brief discussion of water rights warrant comment. First, the widespread, often constitutional, assertion by western states of state ownership of water does not necessarily preempt a usufructuary right in water granted by the state. Indeed the claim of state ownership might better be understood as a declaration of the public’s special and significant interests in water; in the same sense as state declarations of wildlife ownership evidence a strong public interest, but do not mean states own wildlife in a proprietary sense. See Hughes v. Oklahoma, 441 U.S. 322, 335 (1979). Second, the reference to “a water-based version of the . . . public trust doctrine,” at 351, is odd, since under the common law the public trust doctrine is exclusively water-based.

  \item \textit{Id.} at 352-353. There is little in the common law to support the idea of a wildlife trust. Blumm and Ritchie dismiss Hughes and other Supreme Court decisions declaring state ownership of wildlife to be a fiction as having application only in relation to conflicting federal laws. Of course state courts and legislatures can declare what they will, but property rights are protected under the federal constitution making such declarations of no consequence where vested private rights are thereby taken. It is said by some that the doctrine of state (public) ownership of wildlife has deep roots in the common law, see \textit{e.g.} Oliver A. Houck, Why Do We Protect Endangered Species, And What Does That Say About Whether Restrictions on Private Property to Protect Them Consti\textit{tute “Takings”?}, 80 IOWA L. REV. 297, 311 n.77 (1995), but persuasive evidence suggests that in both Roman law and English common law wildlife was held by the public only in the sense that it was owned by no one (and therefore everyone) until it was reduced to possession. The capturer of wildlife acquired an exclusive proprietary interest without any reserved or superior interest in the state or public. See, \textit{e.g.} James L. Huffman, Speaking of Inconvenient Truths: A History of the Public Trust Doctrine, DUKE ENVIRONMENTAL LAW AND POLICY JOURNAL (forthcoming).

  \item \textit{Id.} at 354. Treaty rights have nothing to do with the common law, but may be relevant to determining the property rights of the plaintiff in a takings case. See \textit{infra} note 47 on the impact on water rights of treaties between tribes and the United States.

  \item \textit{Id.} at 354-61. Although Blumm and Ritchie acknowledge that Justice Scalia expressly rejected the notion that preexisting statutory provisions are a bar to takings claims (\textit{Lucas}, 505 U.S. at 1029) and that the Supreme Court expressly rejected the same notion in a later case (Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001)), they make a protracted argument for why such legislative and constitutional provisions might nonetheless function as a “threshold bar to takings challenges.” There are persuasive economic reasons to reject the “notice rule” – namely that someone in a chain of title (if not the plaintiff) will have suffered the economic losses resulting from restrictive regulation adopted sometime after first possession. But the merits of a taking claim aside, while statutory and constitutional law may be relevant to determining the property rights of a plaintiff they have nothing to do with background principles referenced by Justice Scalia.
necessity, criminal forfeitures, and revocable grants to public resources. There are several levels on which one might question Blumm’s and Ritchie’s summary discussions on these topics. Have they accurately described the scope and content of acknowledged common law doctrines? For example their expansive account of the public trust is at odds with the historical roots of that doctrine. Does every topic on their laundry list really qualify as a common law principle? For example the reserved rights doctrine in water law purports to be nothing more than an interpretation of various treaties between the United States government and Indian tribes. And how is it that statutes and constitutions, whether preexisting or not, qualify as background principles of the common law in a legal system that has long distinguished the common law from statutory and constitutional law?

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

44 Id. at 362. Though irrelevant to the holding in Lucas, certainly there can be no taking claim for property legitimately seized pursuant to criminal forfeiture statutes. The criminal forfeiture cases cited by Blumm and Ritchie suggest that in acquiring property people should take care to assure that the law will permit their use or transportation of the property and should be careful in their selection of co-owners.

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

46 See, Huffman, supra 40.

47 While not a principle of the common law, Indian reserved water rights are relevant to a takings claim involving water rights in the same way as common law principles are relevant to any takings claim. Both may be part of the definition of a property interest claimed to have been taken. As indicated below, infra at discussion accompanying notes 56 to 59, the determination that a takings claimant actually possesses the right said to be taken should be the first query in every takings case. That is the point of Justice Scalia’s reference to background principles. It might also be noted that while fairness and good public policy may have supported the Supreme Court’s decision in Winters v. United States, 207 U.S. 564 (1908), the claim that these rights had existed from the time of various treaties that made no mention of such rights is as implausible as Professor Ruhl’s claim that the common law of nuisance extends to ecosystem services protection or Blumm’s and Ritchie’s claim that a common law wildlife trust justifies endangered species protection on private property. The point of the takings clause in all of these cases, including Indian water rights, is that government should have (and could) compensate affected property owners.

48 It might be suggested that some statutory provisions are principles of the common law to the extent they modify or serve similar purposes as the common law. State statutes govern the property and tort regimes that were once exclusively the concern of the common law courts. The state police power is said to be the source of authority for much of what legislatures do. Often it is said that the police power has been employed to regulate what would be considered nuisances under the common law. But the fact that a state legislature has the authority to declare and
regulate nuisances and to alter the property and tort regimes does not make the laws it enacts a part of the common law. Indeed, if everything the state does pursuant to the police power is considered a part of the common law, then there can be no such thing as a regulatory taking if common law limits on property are exempt. Although Justice Scalia insisted background principles “cannot be newly legislated or decreed,” 505 U.S. 1029, Justice Kennedy said, in a concurrence cited by Blumm and Ritchie and other anti-takings theorists, supra note 34 at 334, “the common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and independent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, . . . .” 505 U.S. at 1035. By “prevented,” Justice Kennedy clearly meant required to pay for impacts on private property. As indicated infra at discussion accompanying note 110-111, this is a standard, though inaccurate, way of describing the effect of the takings clause.
III. The Anti-Takings Project

In the interest of space and time I will leave these and other questions largely aside in this paper, but one overriding theme of the Blumm and Ritchie property discussion, as well as of Ruhl’s nuisance argument, makes such doctrinal considerations seem like mere quibbles. Central to the newfound interest in Justice Scalia’s background principles as illustrated by Ruhl and Blumm and Ritchie is that they are said to evolve consistent with the traditions of the common law. After acknowledging that “nuisance doctrine . . . has never been considered as having much at all to do with management of ecological concerns,” Ruhl presses ahead because “nuisance law evolves with changed circumstances and new knowledge.”49 Blumm and Ritchie recognize that while “Justice Scalia's majority opinion emphasized the value of longstanding concepts of nuisance and property law in the background principles analysis, [he] . . . also acknowledged that “changed circumstances may make what was previously permissible [for a landowner] no longer so . . . .”50

If we accept that the common law evolves as these scholars suggest and that Justice Scalia’s holding in Lucas can fairly be understood to embrace the notion that the common law is almost infinitely malleable at the discretion of any court or legislature, then the ambitions of those who would read the takings clause out of the constitution are finally and fully realized. But the common law cannot be so pliable at the hands of adjudicators and law makers or it no longer serves its core purpose: the rule of law. To be sure, legislators (but not judges) have power to amend or repeal the common law, but they (and judges) cannot, consistent with the rule of law, have power to declare the common law something it is not. Nor is it plausible to contend that Justice Scalia intended for background principles to include ex post declarations that the law is (and therefore was) what it was not. Justice Scalia is as much a formalist as any Supreme Court

49 Supra note 27 at 1.

50 Supra note 34 at 343 n 139, quoting from Lucas, 505 U.S. at 1031.
justice in the last half century, yet what Ruhl and Blumm and Ritchie claim for background
principles is the antithesis of formalism.

No doubt those who find a cornucopia of defenses to takings challenges in Justice
Scalia’s reference to background principles take pleasure in hanging their hats on a Scalia
opinion, but they cannot seriously believe or contend that the author of those words intended that
result. Anyone who has read Justice Scalia on judicial interpretation will know that he has a
narrow view of the scope of judicial discretion. But one does not have to go beyond his Lucas
opinion itself to get the message. In speculating that “[i]t seems unlikely that common-law
principles would have prevented the erection of any habitable or productive improvements on
petitioner’s land,” Scalia cited a 1911 case for the common law principle that prohibition of the
“essential use” of land is rarely allowed. Essential use implied economic development
consistent with local patterns of use, a concept that would appall most environmentalists and be
unfamiliar to many a modern judge. That Scalia had in mind the common law as it was and not
as we might like it to be was recognized by a dissenting Justice Blackmun who wrote that “[t]he
Court’s references to ‘common-law’ background principles . . . indicate that legislative
determinations do not constitute ‘state nuisance and property law’ for the Court.” Scalia would
later make abundantly clear what he meant in Lucas. In his dissent to the denial of certiorari in
Stevens v. City of Cannon Beach, Scalia emphasized that “[o]ur opinion in Lucas . . . would be a
nullity if anything that a state court chooses to denominate ‘background law’ – regardless of
whether it is really such – could eliminate property rights.” More recently, in defense of the
Court’s overruling of a state courts interpretation of state law, Justice Scalia concurred in Chief
Justice Rehnquist’s opinion drawing an analogy to the takings clause that “would . . . afford no
protection against state power if our inquiry could be concluded by a state supreme court holding
that state property law accorded the plaintiff no rights.”

Blumm and Ritchie are clever to describe background principles as “categorical defenses”
to takings claims. They thus seek to co-opt categorical takings law and reframe the traditional
takings analysis to allow government an early exit without having to defend the imposition of the
costs of public benefits on isolated individuals. Where the court intended to create a second
categorical taking that would shift the burden to government to justify impositions on private
property owners in particularly egregious cases, the categorical defenses concept is meant to shift


52 505 U.S. at 1031, citing Curtin v. Benson, 222 U.S. 78, 86 (1911).

53 In Curtin the plaintiff was forbidden to drive cattle across public lands to and from his in holdings in
Yosemite National Park. In finding for the plaintiff, the court stated: “The right of appellant to pasture his cattle
upon his land, and the right of access to it, are of the very essence of his proprietorship.” id.

54 510 U.S. 1207, ____ (1994). To emphasize his point, Scalia quotes from Hughes, 389 U.S. at 296-97:
“[A] state cannot be permitted to defeat the constitutional prohibition against taking property without due process by
the simple device of asserting retroactively that the property it has taken never existed at all.”

the burden back to property owners and thus short circuit established takings analysis, such as it is. For governments, advocates of regulation unconstrained by property interests, and judges inclined to discount the importance of property rights the idea of ever changing categorical defenses has great appeal. But as advanced by Blumm and Ritchie (and more modestly by Ruhl), it distorts the *Lucas* holding and might provide the last few nails in the coffin of constitutionally protected property rights.

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

While it is not unfair to suggest that most who have embraced the concept of background principles as an ever adapting and therefore impenetrable defense against takings claims are motivated by policy goals more than legal reason, they might be excused for suggesting a new era has arrived in light of the confused state of takings jurisprudence. Pursuant to *Penn Central’s* generally accepted restatement of takings doctrine, whether or not a taking has occurred depends upon the economic impact on the claimant, the extent to which the claimant has investment backed expectations and the character of the challenged government action. This is only a

---

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

57 Blumm & Ritchie, supra note 34 at 367. Earlier they summarize the impact of *Lucas* as follows: “In effect, the *Lucas* decision fundamentally revised all takings analysis by making the nature of the landowner’s property rights a threshold issue in every takings case.” *Id.* at 322.

58 *Id.* at 365.

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

60 438 U.S. at 124.
slightly more refined way of asking whether a regulation has gone “too far.” It requires a court to balance the impact on the property owner against the benefits to the public – a balance that will almost invariably go against the property owner who stands alone against a diffuse and numerous public. Justice Scalia’s modest assertion that in every takings case, whether subjected to *Penn Central* balancing or categorical analysis, a preliminary question is whether or not a property right exists, ought to come as news to no one.

Had the Court and others with an interest in clarifying takings doctrine paid more heed to Richard Epstein’s 1987 book on takings, Scalia’s background principles observation would have been redundant and therefore unnecessary. By a simple reading of the language of the 5th amendment, Epstein concludes that there are three distinct questions to be asked in a takings case: 1) is there a taking?, 2) if so, is there a public use?, and 3) if the first two questions are answered in the affirmative, has just compensation been paid? Background principles are relevant to answering only the first question. They are relevant to determining whether a takings claimant actually possesses the right said to be taken, not an exception to the requirement of compensation where a taking has in fact occurred. But in light of the Court’s jumbling of these questions into a balancing test as it has done at least since *Mahon*, it is not surprising that some might fail to ask whether or not the claimant even has a property right to be taken.

Illustrative of this failing in recent takings jurisprudence are two decisions of the South Carolina Supreme Court finding no taking where a permit to construct bulkheads and backfill was denied to the owner of a coastal lot on filled, but eroding tidal lands. In its first opinion the court held that a history of regulation dating back to the Rivers and Harbors Act of 1899 established that there were no investment backed expectations, and therefore no taking. After granting certiorari, the U.S. Supreme Court vacated and remanded for further consideration in light of *Palazzolo v. Rhode Island* in which the Supreme Court held that pre-existing regulation

---


62 260 U.S. 393.

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


does not necessarily preempt a taking claim. On remand the South Carolina court reaffirmed its no taking conclusion, this time on the basis that the public trust doctrine precluded the plaintiff from constructing a bulkhead and backfilling. The court got the right answer, but for the wrong reason. Having failed to protect the lot against erosion over a period of thirty years, plaintiff had simply lost title pursuant to the common law principles of accretion and deliction. The public trust doctrine had nothing to do with it.

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

---


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

70 The public trust doctrine protects certain public uses of submerged and tidal waters. It does not establish state title nor does the existence of the trust depend upon state title. See Huffman, supra note 40 at ___.

71 Blumm and Ritchie anticipate not only that there will be fewer successful takings claims in the face of the categorical defenses they say arise from Lucas, but also that the defense of takings claims will be less costly and time consuming for governments. “[C]ategorical defenses are attractive to government defendants because they can defeat takings claims at early stages of litigation,” without presenting detailed evidence about the public purposes served by the contested law or regulation. Blumm & Ritchie, supra note 34 at 322 & 367.

72 Lucas, 505 U.S. at 1027.
Blumm and Ritchie suggest that courts prefer formalism “because [it] . . . involve[s] interpretations of law instead of case-specific factual determinations and difficult balancing based on context,”73 as courts dedicated to the rule of law well should. But later Blumm and Ritchie celebrate the “[f]ormalistic decision making” they perceive flowing from their litany of categorical defenses as “allow[ing] . . . judges to decide cases without detailed inquiries into the merits or fairness of the context.”74 So formalistic adjudication is independent from the merits and unconcerned with fairness, but a good thing when it results in successful government defense of takings claims. This peculiar, if not perverse, defense of formalism only makes sense if one takes the view that property rights are contingent and therefore hardly rights at all. And that seems to be the position of Blumm and Ritchie along with the many other critics of the so-called “takings project.”75

Revealing of their understanding of property rights as contingent is Blumm’s and Ritchie’s suggestion that Justice Scalia’s “antecedent inquiry” into the property rights of takings claimants is part of the “denominator problem.”76 Heretofore the denominator problem has been the determination of the relevant geographic scope of a property right.77 For example, if regulation precludes all use of 10 acres in a 100 acre parcel, has the property owner lost the use of 100% of 10 acres or 10% of 100 acres – is the denominator 10 or 100? This becomes a particularly important query under a per se rule making total loss of economic value a taking. For example, does the fact that the regulated portion of a property has no economically viable use make it a per se taking of that portion?78 But as Blumm and Ritchie apply the concept, it suggests that property rights provide varying levels of exclusivity in relation to the state. So by this view a property right might signify, for example, a 30% or a 70% probability that it can be used and that others, including the state, may be excluded. It is perfectly plausible for a state to recognize private rights of use in particular resources subject to the state’s unbounded discretion to revoke such rights – such property systems have been all too commonplace in other countries, but it is surely not the property rights system of Anglo-American history nor is it consistent with

73 Blumm & Ritchie, supra note 34 at 322.
74 Id. at 368.
76 Blumm & Ritchie, supra note 34 at 325.
77 See, e.g., Loveladies Harbor v. United States, 28 F.3d 1171, 1180 (Fed. Cir. 1994).
78 Although Judge Plager in Loveladies, 28 F.3d at 1181-82, provided a persuasive argument for finding a partial taking where regulation resulted in a severable portion of a single property having no economic value, the Supreme Court has continued to rely on the Penn Central analysis in partial takings cases. The only exception is where property is physically occupied, thus bringing the occupied portion within the per se rule of Loretto.
the rule of law.\textsuperscript{79} While Blumm and Ritchie will likely claim that regulatory limits on property rights are based on established principles of common law nuisance and property rather than unconstrained government discretion, it must give any rule of law adherent pause when they insist that unlike the broad nuisance exception of \textit{Keystone} and \textit{Mugler},\textsuperscript{80} “the \textit{Lucas} defense is not limited to harm-preventing nuisance restrictions. Instead, the background principles defense potentially applies to any use-limiting regulation, regardless of whether or not it prevents a statutory or common law nuisance.”\textsuperscript{81} But aren’t the background principles supposed to derive from the common law?

What Justice Scalia actually said about background principles is this:

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

In the broad context of takings jurisprudence Justice Scalia was recognizing a second categorical taking in addition to that applying to physical occupation of private property. As a good lawyer he was also acknowledging the possibility that private property might have been acquired, and therefor might be held, subject to limitations that in some cases could preclude all economically beneficial use.\textsuperscript{82} In such cases the property owner has no legal complaint since the limitation

\begin{footnotesize}
\footnote{Blumm and Ritchie effectively contend that this is, in fact, the American system. In discussing constitutional provisions as background principles they reference several constitutional declarations of specific and general public interests in resources as background principles that can serve as defenses to takings claims. \textit{Supra} note 34 at 359-60. For example they cite Article IX of the Hawaii constitution that provides:

\begin{quote}
[F]or the benefit of present and future generations, the State and its political subdivisions shall protect and conserve Hawaiian's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. Haw. Const. art. XI, § 1.
\end{quote}

There is no limit on property rights that could not be said to come within this broad declaration and thereby immunize a takings claim.


\footnote{Blumm & Ritchie, \textit{supra} note 34 at 324.}

\footnote{It is not improbable that one would purchase property for value knowing that a court might later declare that common law principle precludes any economic use. The purchaser could value the property for its non-revenue generating values like exclusion, scenic beauty or solitude. Or the purchaser might take a calculated risk that an economic use will be permitted, presumably having discounted the purchase price based on the probability of use. As an example of the latter, Scalia suggests the case of a nuclear power plant prohibited from operating when found to be located on an earthquake fault. \textit{Lucas}, 505 U.S. at 1029.}
\end{footnotesize}
inheres in the title. When property is acquired, the purchaser is well advised to do a title search to confirm any existing easements or other encumbrances. If no title search is conducted and one purchases without knowledge of a neighbor’s or a public easement, there is no legal remedy for the resulting disappointment when the easement is used. Scalia’s point about background principles was nothing more than a reminder that private title is also limited by long established nuisance and property rules that help define and protect correlative private and public rights. Just as a prospective purchaser of property will want to confirm that he is acquiring rights the seller claims to be selling, Justice Scalia would have the courts confirm that takings plaintiffs have the rights they claim have been taken by government regulation. In eminent domain proceedings every responsible government will confirm that claimants actually own the property taken. Justice Scalia merely states the obvious – that the same should be true in regulatory takings cases.

IV. Evolution of the Common Law

So there is nothing revolutionary or surprising about Justice Scalia’s reference to background principles of common law nuisance and property. What is revolutionary is the suggestion by Ruhl, Blumm and Ritchie and many others that these background principles are almost infinitely malleable at the discretion of courts and legislatures. Two statements in Scalia’s opinion, one in a footnote and the other parenthetical, are the inspiration for the claim that common law evolution can establish virtually every legislative and judicial innovation as a background principle of the common law. While stating that “[t]he fact that a particular use has long been engaged in by similarly situated owners” and “the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant” “ordinarily imports a lack of any common-law prohibition,” Scalia acknowledges parenthetically that “changed circumstances or new knowledge may make what was previously permissible no longer so.” 83 In a footnote Justice Scalia states that “an affirmative decree eliminating all economically beneficial uses may be defended only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found.” 84 These two narrow caveats to the general assumption that property rights will be what they appeared to be when property was acquired have been relied upon to justify virtually all regulation as not inconsistent with the takings clause. 85 It is surely not what Justice Scalia intended nor it is consistent with the historic understanding of common law evolution.

83 Lucas, 505 U.S. at 1031. In this statement Scalia has reference to RESTATEMENT OF TORTS (SECOND) § 827 (1979).

84 Id. at 1032, n18.

85 Blumm and Ritchie contend, for example, that virtually all wetlands regulations are exempt under Lucas’s background principles. “Cases concluding that denial of a permit to dredge and fill a wetland worked a compensable taking do not seem consistent with Lucas’s definition of nuisance as any harm ‘to public lands a resources, or adjacent private property, posed by the claimant’s proposed activities.’” In almost all situations, the
An aspect of the argument for flexible and expansive background principles is the idea that the common law is a source of public policy. Holmes did emphasize that the common law is rooted in policy as well as precedent, but the policy of the common law is a reflection of customary practices evidenced in precedent, not an independent expression of judicial will. When Holmes wrote of “considerations of what is expedient for the community” that “are the secret root from which the law draws all the juices of life,” he was not suggesting that common law judges independently assess the good of the community and adjust the law to promote that end. Rather he was recognizing that what is expedient for the community is reflected in what people have chosen to do. An understanding of real life on the ground, so to speak, allowed judges to fill gaps in the common law consistent with contemporary custom and behavior. The common law was thus not frozen in time, rather it followed the evolution of social practice and norms, not as imagined or wished for by the judge, but as evidenced by the life of the community. This understanding of legal development is the central insight of James Willard Hurst’s instrumentalist approach to legal history. The historical development of the common law is best understood not by reading the great thinkers and leading judges but through the everyday needs and requirements of people interacting among themselves. It is a grass roots, bottom up, demand driven expression of what is expedient for the community.

The common law is, thus, an expression of public policy in a sort of invisible hand sense of reflecting the rules of social existence a community chooses through the aggregation of private action and interaction, but it is not a source of public policy in the explicit law making way of a legislature. For centuries both individuals and governments (at least those having respect for the rule of law) have looked to judges to discover and articulate the common law. The context of this deference to judges has always been retrospective – that is, judges are expected to say what the law was at a particular point in time, not what it should have been or now should be in light of one or another public purpose. Public policy has always been understood to be the responsibility of the legislative and/or executive authorities of the state.

filling of a wetland produces harm to public and private lands adjacent to the filled site and beyond.” Supra note 34 at 337, citing to 505 U.S. at 1030-31.


87 The view that judges and legislators are free to amend and even repeal common law rules with an eye to purposes not reflected in custom and precedent takes the instrumentalist explanation of legal history to be a justification for prospective instrumentalism by judges in response to their own or a litigant’s notion of good public policy. Although there are certainly examples of judges using their power in this way, in the vast majority of cases common law judges were not themselves the instrumentalists. They were simply responding to, in a sense reporting on, the instrumentalism of the communities they serve. That is why good legal historians of the instrumentalist school spend most of their time in the musty archives of county courthouses and other depositories of grass roots legal record

88 Of course this is not to suggest that the common law is irrelevant to the policy and law making of the legislature. It is an important part of the context in which public policy is formulated and implemented.
This separation of governmental powers is essential to the maintenance of the rule of law. If judges have authority, along with legislators and executives, to make law with an eye to their understanding of good public policy, the rule of law is lost. In this rule of law, separation of powers vision of human society, the courts exist to resolve disputes with reference to existing law, a role that constrains judges as well as those with authority and responsibility for public policy.

The legal realism in almost every lawyer and law professor will lead many to say it is naive to assert that judges discover and articulate the law. We all know that judges are people too; people who cannot divorce themselves from their past, their interests and their associations. But it is precisely this realism that makes respect for the limited role of judges and the constraints of the common law so important to maintenance of the rule of law. Because they are people too, judges must take pains to understand and respect their limited role. Those who invite judges to amend and adapt the common law to satisfy changing perceptions of the public good would have us abandon the rule of law in favor of the rule of generally well motivated but, as the realists remind us, unavoidably self-interested men and women. That is one way to go about the governance of society, but it is not the way of the common law.

The genius of the common law rests in its derivation from the customs and practices of everyday life, not in the creativity of judges. This does not mean that judges have been unimportant to the common law. To the contrary, they have had to be keen observers of society with an ability to extract the truth from evidence provided by interested parties. It has long been out of fashion to say that common law judges discover the law, but in a very real sense that is exactly what they do, or at least aspire to do. Where disputes are meant to be resolved with reference to the law – rather than with an eye to privilege, interest or influence – the judge really does face the challenge of discovering the law. Sometimes that is a straightforward task, in which case there is unlikely to be any disagreement sufficient to involve a court, but sometimes the law or its application to a particular case is not clear. We might say it is fiction in such circumstances to insist that the judge discovers rather than makes the law. But once we have accepted that the judge makes the law, we have abandoned the rule of law. Where the law governing a particular case is unclear, there is a critical difference between the judge who seeks to fill the gap with reference to the law and the judge who resolves the matter with reference to his or her perception of good public policy.

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

90 The discovery of law inherent in the common law process is not the same as the scientific discovery of law imagined by Christopher Columbus Langdell in introducing the case method of instruction to American legal education. The latter lays claim to deductive reason using the scientific method to analyze legal sources and documents. The former requires merely astute observation of human society.
No doubt there is some law making in either case, but in the common law tradition the law making inherent in gap filling requires restraint and humility. The judge’s challenge is to estimate what the law would have been had the matter at hand been anticipated in advance. Those who would have judges adapt the common law to the perceived needs of present day or future society, even where there are no gaps to be filled, would require judges to adopt the attitude of legislators. That is fine for legislators, but not for judges if we care about the rule of law. Not only will the judge have stepped outside the judicial role, but he or she will also have intruded upon the legislative function, thereby circumventing whatever constraints the law (including the constitution) may place on the legislative (law making) process. Individual liberties, including property rights, will be compromised when the rule of law is thus ignored by the courts. But, of course, where it is perceived that claims of private right stand in the way of a desired public policy, that is the point of insisting that courts assume this explicitly law making function.

Illustrative of the view that courts should rely on nuisance doctrine to influence public policy are two recent actions in federal court asserting that global climate change is a nuisance for which power generators and automobile manufacturers should be found liable. In both cases the federal district court held that the cases were non justiciable under the political question doctrine. While these holdings are directly rooted in federal constitutional separation of powers doctrine, they are ultimately grounded in a common law understanding of the legitimate role of the courts relative to the legislative and executive functions of government. In dismissing the most recent of the two cases, the judge stated that “Plaintiff’s claim would require the Court to balance the competing interests of reducing global warming emissions and the interests of advancing and preserving economic and industrial development.” This is precisely what a nuisance claim for loss of ecosystem services would require of a court. Whether pursuant to the political question doctrine of federal constitutional law or an understanding of the legitimate role of the courts in a rule of law system, such claims are not properly justiciable. No amount of frustration with the failure of the legislature to act can alter this conclusion.

There is no doubt that one can cite cases in which courts have explained explicit changes in the common law with reference to public policy. But such examples neither reflect the traditions of the common law nor justify future such breaks with the requirements of the rule of law. What they do represent is what Douglas Whitman has labeled a “supply-side” view of the common law. Supply-siders, like Ruhl and Blumm and Ritchie, see the common law in terms

---

93 Id. slip opinion at 11-12.
94 “Supply-side models . . . explain the evolution of legal rules primarily in terms of the preferences and behavior of the makers of law, judges.” “[D]emand-side models,” on the other hand, “explain the evolution of legal rules primarily in terms of the behavior of potential litigants, whose actions are driven in part by the efficiency and other properties of the legal rules that affect them.” Douglas G. Whitman, Evolution of the Common Law and the Emergence of Compromise, 29 J. LEGAL STUD. 753, 775-76 (2000). On the demand side theory of common law
of the preferences of those who make the law, namely judges, who are in turn influenced by those who petition the courts to amend the law to suit their policy preferences. As Todd Zywicki has stated it, supply-siders believe “the purpose of law is . . . to satisfy articulated social goals, whether economic, social, or moral.” Demand-siders, on the other hand, view the common law as a reflection of the behavior and expectations of potential, as opposed to current, litigants. By this view, the judge’s task is to explicate the law as it would most probably have been understood by the litigants faced with the possibility but not the reality of disagreement. This demand-side view provides a far more accurate account of the long history of the common law.

In the words of Oliver Wendell Holmes, the common law had its beginnings in “[t]he customs, beliefs, or needs of a primitive time.” In other words, it is a bottom up, not a top down, institution. Custom is what people do, partly because it is what their friends and neighbors do, but also because it suits their beliefs and purposes. Custom defines expectations, making social life agreeable and productive. Customs change over time as beliefs and purposes change. It is a process of evolutionary change that meets little resistance because those it affects are the authors of the change. Change in custom is, in other words, driven by demand. Of course it is possible that change in custom might be mandated from on high by someone with the power to make it stick, but even though a mandated change may come to be viewed as custom in the future, at the moment of change and for some time thereafter it will be disruptive of custom and therefore of individual lives. Even Holmes, the father of modern judicial pragmatism, took the view that the life blood of the common law is “considerations of what is expedient for the community concerned.”

Only the members of a community, those who enter into contracts 


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


98 Id. at 35. Holmes did contend that the reason for many customs was often forgotten, leaving the “ingenious minds” of common law judges to recreate justifications, some of which may no longer make sense to the community. Holmes suggests that in such cases judges will propose new rules that better reflect the community’s beliefs and better serve its needs. Id. But judges do not know through superior intelligence or other mysterious powers what rules will better serve the community’s needs. Rather, as Todd Zywicki explains, judges learn that old rules are inadequate by observing the behavior of those affected by the rules. Where old rules no longer comport with community beliefs and needs, there will be widespread private actions and formal and informal agreements that circumvent the old rules and lay the foundation for new rules. Todd J. Zywicki, supra note 96 at 994. By this account, the common law does not lead; it follows.
and possess interests in property, can know what is expedient. It will be reflected in what they choose to do and in the agreements they make.

The common law is a formalization of custom, meant to evolve as custom evolves, not as judges might prefer for custom to be different than it is. Benjamin Cardozo, a pragmatist like Holmes who argued that the rule of precedent “ought to be in some degree relaxed,” nonetheless insisted that precedent should be adhered to where it “may . . . reasonably be supposed to have determined the conduct of the litigants, . . .”99 Cardozo was surely correct in this view. If precedent is followed without exception, the common law will have frozen custom in time. But if precedent is disregarded without respect for settled expectations, the social and private benefits of custom and the rule of law will be lost.

Is it possible for the rule of law to be respected while the common law evolves to provide remedies for injuries not imagined a century or even a decade ago? Absolutely. Few would question that runoff from the impermeable surface of a neighbor’s parking law is as much an injury under common law principles as is the runoff from a neighbor’s diversion of water to create more arable farmland. In both cases both parties reasonably would have understood established common law principles to preclude actions leading to such runoff, even if the former case was the first involving a paved parking lot. In other words, recognizing a common law remedy in the parking lot case affirms the existing allocation of resources and distribution of property rights inherent in the earlier wetlands draining case. But a claim that destruction of ecosystem services constitutes a nuisance makes what was clearly not a legally cognizable impact into an injury for which damages or injunctive relief are available. Unlike the runoff example where the injury of excess water remains actionable though the cause of the injury has changed, the ecosystem services case would change established expectations by providing a remedy for an impact that was clearly not actionable previously. Where changed values or new understandings lead one party to desire that ongoing impacts from the use of the property of others be curtailed, the established allocation of resources can be easily altered by contractual agreement between the parties. As suggested by Zywicki,100 only when such contractual (or informal) adjustments become the norm would the underlying assignment of rights be properly shifted by a common law court.

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


100  Supra note 96.
grant of submerged or tidal lands clearly allowed for the filling of those lands when the grant was made. Indeed the grant would have been worthless without a right to fill and to armor against the ocean’s persistent intrusions.

It is true that the assignment of rights is somewhat less certain in the case of public nuisance law, but even there it is not difficult to recognize when a court has altered settled expectations contrary to the rule of law. Although a public nuisance is said to be “an unreasonable interference with a right common to the general public,”\textsuperscript{101} it is rare to find cases in which public rights are found to be violated by commonplace activities that are important to the local culture and economy. As local circumstances change over time, what constitutes unreasonable interference may change to reflect local custom and practice, but not in response to abstract arguments of reasonableness and good public policy. For example where local economies were dependant upon water power for the operation of mills, it was unreasonable and therefore a public nuisance for the natural flow to be significantly altered. But where local economies are dependant on irrigation during dry months, diversion and retention of natural flows is considered a reasonable use. The same variation in reasonableness can be seen in the appropriation doctrine that recognizes as beneficial those uses important to the local economy. This might change over time, but only in response to changes in the local economy, not because a judge thought the local community would be better off with a different rule.

The common law does evolve, and change is inherent in evolution, but not all change is evolutionary. When statutory enactments repeal or amend the common law, the change is not evolutionary in the sense of being part of the common law process. Nor are judicial changes to the common law that have no grounding in custom and practice an aspect of the common law process. Such legislative and judicial interventions may be legitimate exercises of state power, but describing them as aspects of common law evolution distorts centuries of common law history and tradition. Change does not equate with evolution, and some change that is otherwise authorized may be prohibited by constitutional limitations. Indeed, the federal and state constitutions are interventions in the common law. While embracing the ongoing authority of the common law, they also constrain both its future evolution and some interventions that would alter established common law rights. Among those constitutional constraints on changes to the common law are the 5th Amendment takings clause and parallel state constitutional protections of private property.

V. The Constitution and the Common Law

Shortly after the \textit{Lucas} decision was announced, Frank Michelman published what he suggested should be the opinion of the South Carolina Supreme Court on remand. He concluded his “jurisprudence of principles” opinion with the following:

As Justice Scalia wrote in his opinion in this very case, the law of nuisance contains the principle that “changed circumstances or new knowledge may make what was

\textsuperscript{101} Restatement (Second) of Torts § 821B (1979).
previously permissible no longer so.” This capacity of the common law—the “background” law—to extend itself to new conditions is today, and has long been understood to be, an integral part of this State’s background principles of property law. As such it enters into and inheres in all property titles claiming recognition under our law, including the titles acquired by Mr. Lucas. Case dismissed.102

Michelman thus anticipated the arguments of Ruhl, Blumm and Ritchie and the many others now, finally, getting on the background principles bandwagon. Michelman suggested that Scalia’s opinion in *Lucas* effectively put the matter into the hands of state courts and he observed (with satisfaction) that “[j]udicial conservatives . . . do not control the judiciaries in all of the States.”103 So it seems that the jurisprudence of principles will only be recognized by judicial liberals. Blumm and Ritchie report that some (presumably liberal) state courts have already adopted Michelman’s jurisprudence of principles.104

What are these principles that conservative courts will fail to recognize? They are, says Michelman “adaptive and evolving . . . including principles of public trust and social responsibility.”105 Well, of course, what do conservative judges know of public trust and social responsibility? Self interest and capitalist greed are the guideposts of conservative courts. Oh, and by the way, “some state judiciaries may be spurred . . . by political outlooks . . . hostile to beefed-up constitutional protection for property, or . . . just by desires to help minimize their States’ exposures to regulatory-takings liabilities.”106 And the best news of all, suggests Michelman, is that this jurisprudence of principles “seems deployable by any moderately capable state judge to justify uncompensated imposition of any state regulatory restriction of land use that passes the basic due process test of rational relation to a legitimate state goal – no matter how confiscatory the regulation’s impact and no matter how sharply deviant from past practice some may find it.”107

What Michelman urged in 1993, and Ruhl and Blumm and Ritchie have elaborated on recently, might be called judicial pragmatism or a jurisprudence of political progressivism, but surely not a jurisprudence of principles. What sort of principles adapt and evolve? Principles are, by definition, unchanging. Changing circumstances and new knowledge may require us to

---


103 Id. at 317.

104 Blumm & Ritchie, supra note 34, cite numerous examples of state court decisions relying on asserted background principles of common law nuisance and property.

105 Michelman, supra note 102 at 317.

106 Id.

107 Id. at 317-18.
reconsider what adherence to particular principles requires, or may even lead us to abandon old principles and adopt new ones. As it is described by Michelman, the jurisprudence of principles is indeed deployable by even less than moderately capable judges. A general reference to public trust and social responsibility says nothing about principles of the common law beyond describing broad categories into which certain common law principles might be classified. Principles constrain, but there is only the constraint of arbitrary discretion in such general proclamations. And what is the principle by which one stands hostile to “beefed-up” constitutional protection of property? Is it a principle of anti-property? And if so, what of the inconvenient, pro property statements of principle in the constitution?

But concern for constitutional principles is not really what the newfound interest in background principles is all about. Michelman made it clear from the beginning that the objective is to “minimize . . . States’ exposures to regulatory-takings liabilities.” 108 That is what Ruhl and Blumm and Ritchie seek to accomplish as well. There is probably a better than even chance that this takings avoidance strategy will be successful. Certainly it will succeed in at least some of the states. But it should not be allowed to succeed in the name of an evolving common law. It is accurate to say, as Justice Scalia did in *Lucas*, that the common law of nuisance and property help to define the content and scope of many property rights. However, it is a distortion of the common law process to suggest that state courts and legislatures can modify or abandon established common law principles in the name of present day notions of the public interest and public rights.109

VI. Conclusion

Takings clauses were included in the federal and state constitutions in anticipation of precisely such changes in public policy affecting private property rights. The point was not to prevent policy change. The point was to have the state (on behalf of the beneficiaries of government action) pay the costs to affected individuals.110 It has been a persistent strategy of pro regulation interests to insist that “beefed up” enforcement of the takings clause precludes government from fulfilling its mission. But that is not the case. If government has authority to

---

108 Supra note 102.

109 An unsettled question is to what extent the takings clause applies to the courts. It is widely assumed that the courts are exempt, an assumption that greatly fortifies latter day advocates of background principles defenses in takings cases. But as Barton Thompson has demonstrated, Supreme Court case law does not fully settle the matter, and the case for the courts being exempt is not very persuasive. Barton H. Thompson, Jr., Judicial Takings, 76 Va. L. Rev. 1449, 1529 (1990). If the point of the takings clause is to prevent government from imposing the costs of public benefits on a few property owners, there is no plausible explanation for the prohibition applying only to the legislature and executive. Of course, if one really believes the courts are exempt, there would be no need to insist that judicial declarations of changes in the common law mean that a claimed property right never existed in the first place.

110 This speaks to the purpose of the compensation requirement. The public use requirement has the quite different purpose of assuring that governments’ powers are not used to feather the nests of those who govern or of their friends.
pursue ends that incidentally take private property, enforcement of the takings clause does not prevent the desired government action. Rather it only requires the government to compensate affected property owners. Sometimes that will happen in the form of reciprocal advantages, but where the costs are imposed on one or a few, compensation is due. Governments and their interest group enablers will inevitably plead that compensation cannot be afforded by cash strapped governments, but who can take that claim seriously at a time when tens of billions of dollars are appropriated for pork barrel projects that cannot be accomplished solely by the taking of private property? To be sure many local governments are strapped for revenue, but there is no more reason to accept that they should be allowed to provide environmental amenities by taking private property without compensation than that they should be allowed to build public highways without paying for the asphalt.

At the end of the day, the takings issue is an aspect of a much bigger question, to wit: What kind of society does our Constitution help establish and preserve? The latter day common law advocates who look to background principles as justification for virtually all uncompensated takings of private property envision a purely utilitarian society in which individual rights may be sacrificed to the (always) greater public good. That is a vision often implemented in other countries where constitutional rights are contingent on government discretion to override them in the interests of the state. But it is not a vision consistent with a serious commitment to individual liberty and the rule of law. The common law has long limited the scope of private property rights

111 The concept of reciprocal advantages derives from Justice Holmes’ opinion in Mahon, 260 U.S. at 415, that there would be no taking where there was “reciprocity of advantage” among those regulated. Richard Epstein would later clarify that in such cases there has been a taking but the reciprocal advantages serve as implicit compensation. Epstein, supra note 61. Holmes first used the term in an earlier case the same term: Jackman v. Rosenbaum Co., 260 U.S. 22, 30 (1922).

112 Illustrative of this argument is the response to Oregon’s Measure 37 (ORS 197.352) that requires governments either to compensate for regulation induced losses in property values or to waive the offending regulation. To date only a single case out of over 7500 pending and settled claims has resulted in compensation. In fact, the presumption that government cannot afford to pay is so pervasive and strong that very little attention has been paid to assessing the validity of claims in terms of their alleged dollar value. The unsubstantiated assertion that Measure 37 compensation claims will bankrupt Oregon governments has played a significant role in the legislature’s referring to the voters a measure (Measure 49) that would significantly limit the impact of Measure 37. Measure 49 will be on the November, 2007, ballot.

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

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.
in the name of the public good. Those limits are defined, as they must be for rights to have meaning, in relation to fixed principles. The application of those principles – the rules of common law nuisance and property – has been “forged in the slow fire of the centuries.” An early 21st century bonfire from which will emerge new rules never imagined by owners of private property is not in the common law tradition. And it most assuredly is not what Justice Scalia had in mind when he penned “background principles” into his *Lucas* opinion.

---