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THE CATEGORICAL (*LUCAS*) RULE: “BACKGROUND PRINCIPLES,” PER SE REGULATORY TAKINGS, AND THE STATE OF EXCEPTIONS

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I. INTRODUCTION: THE CATEGORICAL OR PER SE TOTAL REGULATORY TAKE—*LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

A land use regulation totally takes property by regulation when it leaves the landowner without “economically beneficial use” of land. The land may have value. Indeed, it may even have some limited “salvage” uses, such as for walking or picnicking. But if it has no economically beneficial use, then the government must pay for the land as if it had condemned it, or lift the offending regulation and potentially pay for the time during which the unconstitutional regulation affected the use of the relevant land. These are the rules of *Lucas v. South Carolina Coastal Council*,¹ and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.²

In *Lucas*, a state coastal zone protection statute prevented David Lucas from constructing two beachfront houses on two separate lots.³ The statute prevented development forward of a beach line in order to protect coastal habitat, plant, animal and marine species, the natural environment, and tourism.⁴ Remaining legal uses included walking, limited camping, and picnicking. The United States Su-

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¹ 505 U.S. 1003 (1992).

² 482 U.S. 304 (1987).

³ *Lucas*, 505 U.S. at 1006-07.

⁴ *Id.* at 1007; S.C. CODE ANN. § 48-39-250 (1990).

preme Court reversed the Supreme Court of South Carolina, holding that a regulation that removes all productive or economically beneficial use from a parcel of land is a regulatory taking requiring compensation under the Fifth Amendment.⁵ The Court emphasized use, not value, in holding that the remaining permitted uses were not economically beneficial.⁶ The court imposed no limitations on this per se, categorical rule except for two exceptions briefly noted below. Observing that too often land use regulations having as their principal purpose the preservation of the environment have forced a single landowner to bear the burden of such public benefits, the Court said:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.⁷

II. *LUCAS* APPLIED

Closely following this reasoning in *Lucas*, a Maryland court held that an open space zoning category effectively foreclosed all economically viable use when applied to private property, resulting in a total taking:

While a strong argument can be made that the statutory scheme here at issue . . . is for the common good, that argument, if resolved favorably to the County, does not, under *Lucas*, resolve the matter. Even if it were for the common good, it still may cause an unconstitutional taking if it, as it does in the case *sub judice*, results in the loss of all viable economic uses.⁸

On the other hand, a Florida appeals court held that a recreational use was sufficiently economically beneficial to take a case out of the per se takings category of regulatory takings because that was one of the uses being made of the subject parcel and there was some

⁵ *Lucas*, 505 U.S. at 1030, 1032.

⁶ *Id.* at 1027.

⁷ *Id.*

⁸ *Steel v. Cape Corp.*, 677 A.2d 634, 645 (Md. Ct. Spec. App. 1996).

evidence that this was one of the reasons the landowner had acquired the parcel.⁹ Similarly, an Ohio appeals court held that the denial of a conditional use permit for mineral extraction was not a total regulatory taking because the owner was not denied all economically viable use; the property was zoned for many other uses and could be sold to a developer who could use the property in a manner consistent with zoning laws.¹⁰

Whether and how to apply the *Lucas* rule has remained an issue in more recent state and federal court opinions. Some plaintiffs have applied *Lucas* to leasehold interests,¹¹ personal property,¹² and water rights,¹³ while others have presented facts requiring courts to distinguish carefully *Lucas* claims from other types of takings,¹⁴ to explain what constitutes deprivation of “all economically beneficial

⁹ Fla. Dep’t of Envtl. Prot. v. Burgess, 772 So. 2d 540, 542-43 (Fla. Dist. Ct. App. 2000).

¹⁰ State ex rel. Shelly Materials, Inc. v. Clark Cnty. Bd. of Comm’rs, No. 2003-CA-72, 2005 WL 3454751, at *5 (Ohio Ct. App. Dec. 12, 2005).

¹¹ See Love Terminal Partners v. United States, 97 Fed. Cl. 355, 391, 424-25 (2011) (holding that plaintiff, lessee of airport terminal space to be demolished under contract incorporated into federal law, had stated valid claims for “categorical” regulatory and physical takings, and granting plaintiff’s motion for partial summary judgment on the physical takings claim); McGuire v. United States, 97 Fed. Cl. 425, 428 (2011) (alleging *Lucas* taking when Bureau of Indian Affairs demolished bridge providing access to portion of property plaintiff, a farmer, leased from the Colorado River Indian Tribes).

¹² See Kafka v. Mont. Dep’t of Fish, Wildlife & Parks, 201 P.3d 8, 32 (Mont. 2009) (stating that alternative livestock raised as game were not subject to any variety of regulatory taking when voter initiative made it illegal to charge a fee to shoot them because plaintiffs could make other economically viable use of the animals); Buhmann v. State, 201 P.3d 70, 90 (Mont. 2009) (avoiding decision on whether alternative livestock raised as game could be categorically taken by finding that animals retained obvious value); Wawrzynski v. City of San Diego, D059336, 2012 WL 1201902, at *8 (Cal. Ct. App. Apr. 11, 2012) (holding that claim of regulatory taking of pedicabs could proceed because putative dictum in *Lucas* excluded only personal property for sale or used to manufacture for sale).

¹³ Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001) (granting plaintiffs’ motion for summary judgment for physical, not regulatory taking); Tulare Lake Basin Water Storage Dist. v. United States, 59 Fed. Cl. 246 (2003) (determining damages); Tulare Lake Basin Water Storage Dist. v. United States, 61 Fed. Cl. 624 (2004) (amending damages on reconsideration); Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443 (2011), *aff’d*, 708 F.3d 1340 (Fed. Cir. 2013) (holding that plaintiff had alleged a physical, not a regulatory taking and that same was unripe). At least one commentator has argued vigorously for water rights to be treated under regulatory, not physical takings standards such that the public trust doctrine would apply as a defense. John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 933 (2012).

¹⁴ Dos Picos Land Ltd. P’ship v. Pima Cnty., 240 P.3d 853 (Ariz. Ct. App. 2010); *Love Terminal Partners*, 97 Fed. Cl. 355; Brenner v. New Richmond Reg’l Airport Comm’n, 816 N.W.2d 291 (Wis. 2012).

use” in various contexts,¹⁵ and to define a sub-category of regulatory takings covering “temporary but categorical” takings.¹⁶

A. The Categorical Rule Distinguished from Physical and Partial Takings

Some courts go to considerable lengths to explain why an alleged per se categorical taking did or did not constitute a valid claim under *Lucas*. In the process, a few appeared slightly confused in distinguishing *Lucas* from the takings tests set out in *Loretto v. Teleprompter Manhattan CATV Corp.*¹⁷ and *Penn Central Transportation Co. v. City of New York*.¹⁸ Recall that in *Loretto* the court affirmed the traditional rule that “regulations that compel the property owner to suffer a physical ‘invasion’ of his property” are a taking “no matter how minute the intrusion,”¹⁹ while in *Penn Central* the court established a multi-factor balancing test for partial regulatory takings that considers the character of the government regulation or action in light of “[t]he economic impact of the regulation on the claimant[,]” especially “the extent to which the regulation has interfered with distinct investment-backed expectations.”²⁰ More than one court concluded that multiple takings theories applied to the same facts.

In *Dos Picos Land Ltd. Partnership v. Pima County*,²¹ an Arizona appellate court vacated an award of litigation expenses and interest on a successful inverse condemnation claim because the trial court erroneously held that the taking was physical not regulatory. The court said the state statute allowing such fees applied only in physical takings cases.²² After devoting significant space to distinguishing regulatory from physical takings, the court suggested that the facts could justify either a categorical taking under *Lucas* or a partial regulatory taking under *Penn Central*, although *Penn Central*

¹⁵ *Collins v. Monroe Cnty.*, 999 So. 2d 709, 711 (Fla. Dist. Ct. App. 2008); *Shands v. City of Marathon*, 999 So. 2d 718, 723 (Fla. Dist. Ct. App. 2008); *Cummins v. Robinson Twp.*, 770 N.W.2d 421 (Mich. Ct. App. 2009); *McGuire*, 97 Fed. Cl. 425; *Walton v. City of Midland*, 409, S.W.3d 926 (2013).

¹⁶ *Res. Inv., Inc. v. United States*, 85 Fed. Cl. 447 (2009).

¹⁷ 458 U.S. 419 (1982) (regarding physical occupation).

¹⁸ 438 U.S. 104 (1978) (regarding partial regulatory taking).

¹⁹ *Lucas*, 505 U.S. at 1015; *Loretto*, 458 U.S. at 441.

²⁰ *Penn Cent.*, 438 U.S. at 124.

²¹ 240 P.3d 853 (Ariz. Ct. App. 2010).

²² *Dos Picos Land Ltd. P'ship*, 240 P.3d at 855.

was referenced only obliquely via *Lingle v. Chevron*.²³ In the end, the court declared that a regulatory taking of some variety had occurred, but declined to specify further.²⁴

In *Love Terminal Partners v. United States*,²⁵ the U.S. Court of Claims denied the government's motion to dismiss takings claims and granted partial summary judgment for the plaintiff, a lessee of terminal space in a municipal airport that, under a contract incorporated into a federal statute, was to be demolished and rendered unusable for commercial aviation purposes, the only permitted use in the lease.²⁶ After reviewing takings jurisprudence in depth, the court held that the plaintiff had stated a valid claim for a physical taking under *Loretto* as well as a per se regulatory taking.²⁷ The court granted plaintiff's motion on the physical taking claim, but appeared nonetheless favorable toward plaintiff's prospects under *Lucas*.²⁸ In the context of personal property, an appellate court in California was similarly persuaded in *Wawrzynski v. City of San Diego*²⁹ that the plaintiff had sufficiently alleged taking claims under multiple theories: in this case, *Lucas* and *Penn Central*.³⁰ With little explanation, however, the court ultimately suggested that *Penn Central* was the more appropriate test.³¹

Choosing a proper taking standard was the central issue in *Brenner v. New Richmond Regional Airport*.³² In *Brenner*, several plaintiffs living near a newly expanded airport filed an inverse condemnation action alleging that the longer runway and resulting overflights had effectively taken an easement through their airspace.³³ Following a bench trial, the trial court erroneously adopted a regulatory takings standard and dismissed the action because the plaintiffs had not demonstrated deprivation of all or part of the beneficial use of their properties.³⁴ An appellate court reversed, and the Wisconsin

²³ *Id.* at 857-58; 544 U.S. 528 (2005).

²⁴ *Dos Picos Land Ltd. P'ship*, 240 P.3d at 859.

²⁵ 97 Fed. Cl. 355 (2011).

²⁶ *Id.* at 424-25.

²⁷ *Id.*

²⁸ *Id.*

²⁹ D059336, 2012 WL 1201902 (Cal. Ct. App. Apr. 11, 2012).

³⁰ *Id.* at *2.

³¹ *Id.* at *6.

³² 816 N.W.2d 291 (Wis. 2012).

³³ *Id.* at 294.

³⁴ *Id.* at 298.

Supreme Court affirmed, citing *United States v. Causby*³⁵ and holding that the case involved a physical not a regulatory taking:

The standard for a taking in an airplane overflight case is whether the overflights have been low enough—that is, invasions of a person’s block of superadjacent airspace—and frequent enough to have a direct and immediate effect on the use and enjoyment of the person’s property. If this standard can be satisfied, the government has “taken” an easement without paying compensation for it. Because the circuit court applied the much more stringent standard of a regulatory taking, the circuit court erred.³⁶

The case was remanded for application of the correct test.³⁷

B. “All Economically Beneficial Use”

In addition to resolving when to apply the per se total takings rule, courts have attempted to clarify exactly what constitutes deprivation of “all economically beneficial or productive use of land”³⁸ under *Lucas*. Recall that Justice Scalia’s majority opinion repeatedly stressed land use, not land value, as the measure of a categorical taking, expressly equating the “sacrifice [of] all economically beneficial uses” to “leav[ing the] property economically idle.”³⁹ That the land retains some market value or that non-economic “salvage” uses still exist is extraneous to the analysis.⁴⁰

In *Collins v. Monroe County*,⁴¹ a Florida appellate court reversed a trial court decision that found multiple “facial” takings under *Lucas* when property owners subject to the county’s new Compre-

³⁵ 328 U.S. 256 (1946).

³⁶ *Brenner*, 816 N.W.2d at 304.

³⁷ *Id.*

³⁸ *Lucas*, 505 U.S. at 1015.

³⁹ *Id.* at 1019 (emphasis in original).

⁴⁰ David L. Callies, *Takings: An Introduction and Overview*, 24 U. HAW. L. REV. 441, 446 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 34 F. Supp. 2d 1226, 1243 (D. Nev. 1999), *aff’d in part, rev’d in part*, 216 F.3d 764 (2000), *aff’d*, 535 U.S. 302 (2002) (stating that “the fact that someone, such as the government or an environmental group, may be willing to pay for land that can only be ‘used’ in its natural state does not necessarily mean that the ‘use’ of leaving the property in its natural state is an ‘economically viable’ one.”).

⁴¹ 999 So. 2d 709 (Fla. Dist. Ct. App. 2008).

hensive Plan successfully obtained Beneficial Use Determinations (BUDs) from the Board of County Commissioner's which declared their properties unbuildable.⁴² After declaring the taking claim at issue to be an "as-applied" challenge under *Penn Central*, the court held that, while the BUDs functioned as final determinations from the County to satisfy ripeness requirements under *Williamson County Regional Planning Commission v. Hamilton Bank*,⁴³ it did not suffice to determine whether the properties were actually deprived of all economically beneficial use, which the court suggested was far from apparent.⁴⁴ Instead, the case was remanded for application of the *Penn Central* test.⁴⁵

Distinguishing "facial" from "as-applied" regulatory taking claims was likewise an issue in *Shands v. City of Marathon*,⁴⁶ where the same Florida appellate court again reversed a trial court's choice of *Lucas* over *Penn Central*, which had had the effect of moving the claim outside the statutory four-year limitations period.⁴⁷ Beyond holding that plaintiff's claims were both ripe and within the statute of limitations, the court noted that the transferrable development rights available under the City's Comprehensive Plan, as well as the opportunity to apply for a variance for a single-family home, defeated any claim that designation of the plaintiff's 7.9 acres in the Florida Keys within a conservation zone had deprived the property of all economically beneficial use.⁴⁸

In *Cummins v. Robinson Township*,⁴⁹ an appellate court in Michigan reversed the decision below because the trial court had incorrectly applied *Lucas* instead of *Penn Central* when the Township required property owners to employ flood-resistant construction to rebuild several homes destroyed by a flood in a flood zone.⁵⁰ Plaintiffs argued that they suffered a categorical taking under *Lucas* because the Township required them "to either abandon their home or rebuild it at costs far exceeding its value, which essentially deprived

⁴² *Id.* at 713 (explaining that *Lucas* applied to "facial" takings, whereas *Penn Central* applied to "as applied" challenges).

⁴³ 473 U.S. 172 (1985).

⁴⁴ *Collins*, 999 So. 2d at 715-16.

⁴⁵ *Id.* at 718.

⁴⁶ 999 So. 2d 718 (Fla. Dist. Ct. App. 2008).

⁴⁷ *Id.* at 720.

⁴⁸ *Id.* at 724, 726.

⁴⁹ 770 N.W.2d 421 (Mich. Ct. App. 2009).

⁵⁰ *Id.* at 439, 441-42.

them of all its economically beneficial use.”⁵¹ The court disagreed, holding that “ ‘[t]he Taking[s] Clause does not guarantee property owners an economic profit from the use of their land.’ ”⁵²

Using the same basic rationale, the Court of Federal Claims in *McGuire v. United States*⁵³ found the application of a total regulatory taking test inappropriate and remanded for the case to proceed under *Penn Central* after the Bureau of Indian Affairs demolished a bridge linking two portions of property leased by a farmer from the Colorado River Indian Tribes.⁵⁴ The plaintiff claimed inverse condemnation, alleging that the “removal of the bridge caused his lease to have a ‘negative market value’ because ‘the southern portion was destined to fail to generate enough crop and resulting income to make the lease payment.’ ”⁵⁵ Strictly applying the *Lucas* rule, the court asserted that “[a] total deprivation of ‘all economically beneficial or productive use[s]’ . . . must occur.”⁵⁶ That the plaintiff might be upside-down on his lease was insufficient.⁵⁷

A Texas appellate court in *Walton v. City of Midland*⁵⁸ affirmed the trial court’s rejection of a categorical per se taking when the City granted a drilling permit to the lessee of the oil and gas rights beneath the plaintiff’s property.⁵⁹ In addition to holding that Midland merely gave the lessee permission to do what the title allowed, the court—arguably in conflict with *Lucas*’s emphasis on use over value—concluded that the plaintiff had not stated a viable claim because his “evidence indicate[d] that his property had a value of at least \$3,000 per acre after [the lessee] drilled the well.”⁶⁰ The court further stated “[a]ccordingly, the granting of the permit did not deprive him of all economically beneficial use of the property to the extent that he was only left with a token interest.”⁶¹

⁵¹ *Id.* at 442-43.

⁵² *Id.* at 443 (quoting *Paragon Props. Co. v. City of Novi*, 550 N.W.2d 772, 782 n.13 (Mich. 1996)).

⁵³ 97 Fed. Cl. 425 (2011).

⁵⁴ *Id.* at 429, 440-41.

⁵⁵ *Id.* at 440.

⁵⁶ *Id.* (quoting *Lucas*, 505 U.S. at 1015).

⁵⁷ *Id.*

⁵⁸ 409 S.W.3d 926 (Tex. App. 2013).

⁵⁹ *Id.* at 928.

⁶⁰ *Id.* at 932.

⁶¹ *Id.*

Finally, in *Resource Investments, Inc. v. United States*,⁶² the Court of Federal Claims confronted the issue of “whether applying *Lucas* to plaintiffs’ temporary regulatory takings claim would violate *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* . . . and the ‘parcel as a whole’ rule.”⁶³ The plaintiffs owned and leased a large parcel that, due to its hydrogeology, was well-suited to landfill use and little else, but the U.S. Army Corps of Engineers (COE) denied a dredge and fill permit allegedly required because wetlands had been discovered on the property.⁶⁴ Distinguishing *Tahoe-Sierra*, the court noted that the regulation here was not expressly temporally limited but prospectively permanent; therefore, there was no severance of the parcel into temporal slices.⁶⁵ Moreover, unlike in *First English*, the resolution of the temporary taking in this case was the result of a Ninth Circuit decision that found the COE exercised improper jurisdiction over the site, not because the government had withdrawn the regulations.⁶⁶ As the court put it:

[T]hat plaintiffs eventually regained economically viable use of their property is not *ipso facto* fatal to their categorical takings claim. But in order to determine whether the denial effected a categorical taking as a matter of law, this court must now inquire whether plaintiffs lacked any economically viable use of their property after the Corps denied plaintiffs’ permit.⁶⁷

Ultimately, the court denied plaintiffs’ motion for summary judgment on their *Lucas* claim, but only for lack of proof of causation, which the court suggested could be demonstrated in further proceedings.⁶⁸

III. THE EXCEPTIONS

The U.S. Supreme Court set out two exceptions to its categorical rule—situations in which the proscribed use interests would not

⁶² 85 Fed. Cl. 447 (2009).

⁶³ *Id.* at 469 (citing *Tahoe-Sierra*, 535 U.S. at 303). In *Tahoe-Sierra*, the Court held that temporary regulations that deprive property of all economically viable use are to be analyzed under *Penn Central*, not *Lucas*, because the deprivation is only to a temporal segment of the parcel. *Tahoe-Sierra*, 535 U.S. at 331.

⁶⁴ *Res. Invs. Inc.*, 85 Fed. Cl. at 455, 461.

⁶⁵ *Id.* at 481.

⁶⁶ *Id.* at 461.

⁶⁷ *Id.* at 485.

⁶⁸ *Id.* at 493, 523.

be a part of the owner's title to begin with: nuisance and background principles of a state's law of property.⁶⁹ The exceptions provide the only safe haven for state and local government when a land use regulation takes all economically beneficial use from a parcel of land. Although recent appellate opinions have addressed relatively few takings cases that have turned primarily on nuisance abatement as a defense, background principles—chiefly, variations of the public trust doctrine and, to a lesser extent, customary law—have seen increasing action and, in some jurisdictions, considerable extension.⁷⁰ Ironically, whereas *Lucas* has generally been viewed as a victory for property rights, the courts have tended to construe the denial-of-economically-beneficial-use test very narrowly, while deployment of “the background principles defense has proved to be a fertile ground for government defendants.”⁷¹

A. The Nuisance Exception

If the law of the jurisdiction would allow neighbors or the state to prohibit the proposed uses of land because they would constitute either public or private nuisances, then government could prohibit them without providing compensation.⁷² This is because such nuisances are always unlawful and are never part of a landowner's title to begin with, so prohibiting them would not deprive a landowner of a property right.⁷³ The Court gave as examples laws that would prevent the construction of a nuclear power plant on an earthquake fault line, or the filling of lakefront land so as to raise the water level and

⁶⁹ See David L. Callies, *Nuisance and Background Principles: The Lucas Exceptions*, SJ052 ALI-ABA 473 (2004) (providing an earlier look at the two exceptions).

⁷⁰ The growing importance and application of the public trust doctrine is reflected by the recent publication of the first casebook dedicated to it. MICHAEL C. BLUMM & MARY C. WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCE LAW* (2013). Because of the public trust doctrine's “remarkable” evolution and recent development as a “burgeoning area of the law,” Professor Blumm notes that it “remains . . . largely mysterious.” Michael C. Blumm, *The Public Trust Doctrine—A Twenty-First Century Concept*, 16 HASTINGS W.-NW.J. ENVTL. L. & POL'Y 105, 107, 109 (2010). For a thorough investigation of the nuisance exception, see Professor Carol Necole Brown's excellent and thought-provoking analysis in this symposium at 30 TOURO L. REV. 349 (2014).

⁷¹ Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 341 (2005).

⁷² *Id.* at 335.

⁷³ *Lucas*, 505 U.S. at 1030.

flood neighboring land.⁷⁴

While most nuisance exceptions have generally been applied to mining cases,⁷⁵ at least one (sharply divided) court has upheld the denial of a permit to construct a marina even if the owner were left with no economically beneficial use, on the ground that the additional traffic generated would constitute a nuisance and therefore constitute an exception to the categorical rule.⁷⁶ An Arizona appellate court affirmed summary judgment in favor of the City of Phoenix when the City closed a “swingers’ club” featuring live sex acts because the “business clearly fell within the type of conduct that could have been abated at common law as a public health hazard[,]” although it corrected the trial court’s erroneous use of *Penn Central* instead of *Lucas* as the relevant takings test.⁷⁷ The Florida Supreme Court has also extended “nuisance exception” status to the closing of a motel used for prostitution and drug dealing, though not to an apartment used occasionally for drug transactions, which the City of Miami also closed, in *Keshbro, Inc. v. City of Miami*.⁷⁸ To the same effect, *State v. Rezcallah*,⁷⁹ held the padlocking of property for one year, as a result of drug activity, not to be a nuisance exception and not substantially advancing a legitimate state interest in curtailing the use and sales of drugs.⁸⁰

On remand from the United States Supreme Court⁸¹ and the Supreme Court of Rhode Island,⁸² the trial court in *Palazzolo v. Rhode Island*⁸³ undertook the *Penn Central* analysis it had originally

⁷⁴ *Id.* at 1029.

⁷⁵ *See, e.g.*, *Rith Energy, Inc. v. United States*, 44 Fed. Cl. 366, 367 (1999); *Kinross Copper Corp. v. State*, 981 P.2d 833, 840 (Or. Ct. App. 2001); *Machipongo Land & Coal Co. v. Commonwealth*, 799 A.2d 751, 774-75 (Pa. 2002) (holding that the danger to public waterways from mining pollution constituted a public nuisance); *but see* *Placer Mining Co. v. United States*, 98 Fed. Cl. 681, 685 (2011) (discussing the rule that “a landowner has no right to maintain a nuisance on his property—is based on a rule derived from regulatory takings cases, particularly *Lucas*” while “the rule’s applicability to physical takings is far from settled.”).

⁷⁶ *Windward Marina, L.L.C. v. City of Destin*, 743 So. 2d 635, 640 (Fla. Dist. Ct. App. 1999).

⁷⁷ *Mutschler v. City of Phoenix*, 129 P.3d 71, 77 (Ariz. Ct. App. 2006).

⁷⁸ 801 So. 2d 864, 877 (Fla. 2001).

⁷⁹ 702 N.E.2d 81 (Ohio 1998).

⁸⁰ *Id.* at 85.

⁸¹ *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

⁸² *Palazzolo v. State ex rel. Tavares*, 785 A.2d 561 (R.I. 2001).

⁸³ *Palazzolo v. State ex rel. Tavares*, 746 A.2d 707 (R.I. 2000).

neglected in favor of *Lucas*.⁸⁴ Palazzolo owned eighteen acres of wetland adjacent to a tidal salt-water pond and brought an inverse condemnation action when the state refused permits to fill the land and construct a beach club.⁸⁵ The second trial judge, agreeing with the first, held that Palazzolo had failed to prove a partial regulatory taking and, even if he had, “Plaintiff’s proposed residential development of the site would constitute a public nuisance under Rhode Island law. Plaintiff’s proposed use of the property was, accordingly, not a part of the ‘bundle of rights’ acquired when he . . . obtained title to the subject parcel.”⁸⁶ Moreover, said the court, roughly one-half of the land was undevelopable because it was subject to the public trust doctrine.⁸⁷

In *Monks v. City of Rancho Palos Verdes*,⁸⁸ an appellate court in California rejected the City’s argument that regulatory takings claims were nullified by the nuisance exception to *Lucas* where a moratorium prevented construction on land subject to landslides. Declaring that the City had failed to meet its burden to show that construction on the land posed “a reasonable probability of personal injury or property damage other than the possibility of damage to plaintiffs’ desired homes in the distant future,”⁸⁹ the court held that the moratorium ordinance had taken all economically beneficial use from the effected lots.⁹⁰ In a subsequent appeal of the same case, however, the court rejected the plaintiff’s claim for compensation for decline in the market value of the property when the City relented and allowed residential development of the lots.⁹¹ “The City did not have to pay compensation to plaintiffs for the permanent taking because it provided a constitutionally acceptable alternative remedy.”⁹²

The nuisance abatement defense to inverse condemnation failed again in *Department of Agriculture & Consumer Services v.*

⁸⁴ *Palazzo v. State*, No. WM 88-0297, 2005 WL 1645974, at *5 (R.I. Super. Ct. July 5, 2005).

⁸⁵ *Id.* at *1.

⁸⁶ *Id.* at *14.

⁸⁷ *Id.*

⁸⁸ 84 Cal. Rptr. 3d 75 (Ct. App. 2008).

⁸⁹ *Id.* at 80.

⁹⁰ *Id.* at 110.

⁹¹ *Monks v. City of Rancho Palos Verdes*, B237221, 2013 WL 1248251, at *16 (Cal. Ct. App. Mar. 28, 2013)

⁹² *Id.* at *1.

Bogorff.⁹³ In *Bogorff*, a class-action involving roughly 50,000 plaintiffs, a Florida appellate court affirmed the trial court's holding that the Department had taken over 100,000 healthy citrus trees when it destroyed them as part of a citrus canker eradication program. The state agency claimed that the trees, likely already exposed to the disease, would have eventually fallen victim to the canker, and thus were valueless. The only way to stop the canker, argued the Department, was to destroy the trees. The court found those contentions both pretextual and illogical:

It is apparent . . . that [the Department] destroyed these privately owned healthy trees not because they were really “imminently dangerous” to anybody but instead to benefit the citrus industry in Florida. . . . To be a public nuisance, property must cause “inconvenience or damage to the public generally.” If trees are destroyed not to prevent harm but instead to benefit an industry, it is difficult to understand how [the Department] can argue on appeal that the trees legally constituted a nuisance without any value. Property with any value cannot be deemed a nuisance, the nature of which perforce lacks that redeeming quality.⁹⁴

In response to the Department's claim that the trial court had employed the wrong standard for regulatory takings, the court declined to specify the proper standard: “The facts of this case require no application of multi-part, recondite *tests* to decide whether the state regulation has gone too far and must pay just compensation. Cutting down and destroying healthy non-commercial trees of private citizens could hardly be more definitively a taking.”⁹⁵

B. The Background Principles Exception

As with nuisance, if a regulation is consistent with a background principle of a state's law of property, again there would be no deprivation of a cognizable right in property.⁹⁶ While the Court in *Lucas* gave no examples of such a background principle, customary

⁹³ 35 So. 3d 84 (Fla. Dist. Ct. App. 2010).

⁹⁴ *Id.* at 89.

⁹⁵ *Id.* at 90.

⁹⁶ Blumm & Ritchie, *supra* note 71, at 325 (quoting *Lucas*, 505 U.S. at 1029).

rights and land held subject to public trust are emerging as such background principles in several jurisdictions.⁹⁷

1. The Public Trust Doctrine as a Background Principle

Broadly stated, the public trust doctrine provides that a state holds public trust lands, waters and living resources in trust for the benefit of its citizens, establishing the right of the public to fully enjoy them for a variety of public uses and purposes.⁹⁸ Implied in this definition are limitations on the private use of such waters and land, which are impressed with the public trust, as well as limitations on how the state may transfer interests in such land and water, particularly if such transfer will prevent public use.⁹⁹ Such definitions and duties analytically flow from the dual nature of title in public trust lands and water.¹⁰⁰ On the one hand, the public has the right to use and enjoy the land and water—the *res* of the public trust—for such activities as commerce, navigation, fishing, bathing, and related public purposes.¹⁰¹ This is the so-called *jus publicum*.¹⁰² On the other hand, since fully one-third of public trust property is reportedly in private hands rather than public,¹⁰³ private property rights coexist with public rights in much land and water subject to the public trust doctrine. This is the so-called *jus privatum*.¹⁰⁴

The issue, of course, is the extent to which the public trust doctrine can legally eliminate private property rights without com-

⁹⁷ David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust “Exceptions” and the (Mis)Use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339, 361 (2002).

⁹⁸ DAVID SLADE, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 5 (Coastal States Organization, 2d ed., 1990); see generally, George P. Smith & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within A Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307 (2006); see also Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN ST. ENVTL. L. REV. 1 (2007) (detailing the states’ many manifestations of the public trust doctrine); Robin Kundis Craig, *A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53 (2010).

⁹⁹ Slade, *supra* note 98, at 5-6.

¹⁰⁰ *Id.* at 6.

¹⁰¹ *Id.*

¹⁰² Smith & Sweeney, *supra* note 98, at 311.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

pensation required by the United States Constitution's Fifth Amendment. To the extent that such rights are recognized, they would constitute a diminution of the fee simple much like the recognized private limitations on fee simple such as leaseholds, easements, and the burdens of covenants running with the land.¹⁰⁵ These are interests held by strangers to the basic title of the landowner, and are therefore "not part of his title to begin with."¹⁰⁶ In the same fashion, if public trust rights are valid, then these also represent interests in private land which are "not part of [the owner's] title to begin with"—a valid, background principle of property law which provides an exception to the per se categorical regulatory takings rule of the *Lucas* case.¹⁰⁷

The issue of regulatory taking in connection with public trust arises most frequently when a state court or legislature "reaffirms" the public's trust "rights" on private property.¹⁰⁸ This occurs when a state: (1) imposes restrictions on privately-held trust lands; (2) requires public access across private land or access to trust lands or water; or (3) expands the scope of public activities permitted under the guise of public trust rights.¹⁰⁹ Most public trust lands are submerged, tidal, or water-flowed.¹¹⁰ However, some courts expand the application of public trust doctrine to "dry-sand" and other more useable and developable areas.¹¹¹

Many courts find the public trust doctrine applies at least to submerged and tide-flowed lands. Thus, in the landmark case of *Illinois Central Railroad Co. v. Illinois*,¹¹² the United States Supreme Court held that the Illinois legislature could not transfer in fee simple land under Lake Michigan because that land was held in public trust for the people of the state.¹¹³ However, the state could sell small parcels of public trust land, the use of which would promote the public

¹⁰⁵ See, e.g., Slade, *supra* note 98.

¹⁰⁶ *Lucas*, 505 U.S. at 1027.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1028-29.

¹⁰⁹ Callies & Breemer, *supra* note 97, at 372-73.

¹¹⁰ Bertram C. Frey & Andrew Mutz, *The Public Trust in Surface Waterways and Submerged Lands of the Great Lakes States*, 40 U. MICH. J.L. REFORM 907, 923 (2007).

¹¹¹ E.g., Craig, *A Comparative Guide to the Eastern Public Trust Doctrines*, *supra* note 98, at 18 (noting that New Jersey has recognized "public trust rights to use the dry sand (above the high tide line) portions of both public and private beaches.").

¹¹² 146 U.S. 387 (1892).

¹¹³ *Id.* at 444-45.

interest (docks, piers, wharves) so long as this did not impair the public interest in the lake and the remaining submerged land.¹¹⁴ In *Phillips Petroleum Co. v. Mississippi*,¹¹⁵ the Court extended the public trust to all lands under “waters [influenced by] the ebb and flow of the tides.”¹¹⁶

Courts have also rejected takings claims brought by landowners whose plans for development are thwarted by the application of the public trust doctrine. In *Orion Corp. v. State*,¹¹⁷ the court held that a landowner could have no investment-backed expectations in its land development plans, frustrated after purchase by a series of coastal and tideland protective statutes, because all of Washington’s shoreline was impressed with a public trust which, of course, could not be alienated.¹¹⁸ However, the court noted that the statutes and regulations were more restrictive than would result from a reasonable application of the public trust doctrine alone, and that to the extent they left the landowner without any economically viable use of the land, a regulatory taking would occur.¹¹⁹ A federal court in *Madison v. Graham*¹²⁰ upheld what it considered to be a “narrow” use by the public of streams and streambeds for recreational uses against a claim of takings by a landowner brought on a “right to exclude” theory.¹²¹ Also, the court in *National Audubon Society v. Superior Court of Alpine County*,¹²² rejected a private takings claim on public trust grounds.¹²³

Perhaps the biggest extension of the public trust doctrine is represented by *Matthews v. Bay Head Improvement Ass’n*,¹²⁴ extending the public trust doctrine to private dry sand beach areas for both access to and limited use of the ocean and foreshore.¹²⁵ The court held that the public rights to the water would be meaningless unless the public were guaranteed both access and a place to rest intermit-

¹¹⁴ *Id.* at 452-54.

¹¹⁵ 484 U.S. 469 (1988).

¹¹⁶ *Id.* at 476.

¹¹⁷ 747 P.2d 1062 (Wash. 1987).

¹¹⁸ *Id.* at 1086.

¹¹⁹ *Id.* at 1078.

¹²⁰ 126 F. Supp. 2d 1320 (D. Mont. 2001), *aff’d* 316 F.3d 867 (9th Cir. 2002).

¹²¹ *Madison*, 126 F. Supp. 2d at 1324.

¹²² 658 P.2d 709 (Cal. 1983).

¹²³ *Id.* at 732.

¹²⁴ 471 A.2d 355 (N.J. 1984).

¹²⁵ *Id.* at 369-70.

tently.¹²⁶ The Supreme Court of Wisconsin even extended the public trust doctrine to a wetland (which became a bird sanctuary) created by the property owner in the course of development in *R. W. Docks & Slips v. Wisconsin*.¹²⁷

Building upon the growing body of law finding that private land impressed with a public trust may be regulated with impunity specifically as a “background principles” exception is *McQueen v. South Carolina Coastal Council*.¹²⁸ McQueen purchased two non-contiguous lots adjacent to man-made canals in the early 1960’s, but left them unimproved until the early 1990’s, by which time neighboring lots were improved with bulkheads and retaining walls, while McQueen’s had “reverted” to tidelands.¹²⁹ When McQueen applied to the appropriate state authority for permission to backfill his lots and build his own bulkhead, the state denied the requisite permit on the ground that it would destroy the “critical environment” on those lots. Both a special master and the court of appeals¹³⁰ agreed that the denial left the lots without any economically beneficial use and so resulted in a total taking under *Lucas*. Initially, the state supreme court denied relief because it found “confusion” over whether the “investment-backed expectations” standard—a “partial takings” standard as appears below—applied to total takings.¹³¹ After the U.S. Supreme Court vacated and remanded¹³² for further consideration in light of *Palazzolo v. Rhode Island*,¹³³ the state supreme court denied compensation on the ground that “[South Carolina] holds presumptive title to land below the high water mark”¹³⁴ and “wetlands created by the en-

¹²⁶ *Id.* at 364.

¹²⁷ 628 N.W.2d 781, 784 (Wis. 2001).

¹²⁸ 580 S.E.2d 116, 119 (S.C. 2003).

¹²⁹ *Id.* at 120.

¹³⁰ *McQueen v. S. C. Coastal Council*, 496 S.E.2d 643, 650 (S.C. Ct. App. 1998).

¹³¹ *McQueen v. S. C. Coastal Council*, 530 S.E.2d 628, 634-35 (S.C. 2000).

¹³² *McQueen v. S. C. Dep’t of Health & Env’tl. Control*, 533 U.S. 943 (2001).

¹³³ 533 U.S. 606 (2001) (explaining that in *Palazzolo*, an owner of coastal wetlands that was denied fill permits for the construction of a private beach club successfully appealed, in part, a Rhode Island Supreme Court decision that his takings claims were unripe, that his title never included the right to fill the wetlands because he acquired the property after the regulations preventing same had been adopted, and that he had not met the tests of either *Lucas* or *Penn Central*); see also *id.* at 616-17. The United States Supreme Court held that the claims were ripe, that regulations could not “put an expiration date on the Takings Clause,” and that the remaining use value in the uplands portion of the property for a single-family residence foreclosed a *Lucas* claim, but the court remanded for consideration under *Penn Central*. *Id.* at 626-27, 630-31.

¹³⁴ *McQueen*, 580 S.E.2d at 119.

croachment of navigable tidal water belong to the State.”¹³⁵ Moreover, the state also has “exclusive right to control land below the high water mark for the public benefit . . . and cannot permit activity that substantially impairs the public interest in marine life, water quality, or public access.”¹³⁶ The court then held that so much of McQueen’s lots that had “rever[ted] to tidelands” were “public trust property subject to control of the State.”¹³⁷

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environment Protection*,¹³⁸ a group of coastal property owners claimed a taking of their littoral rights after the state, under a shore protection statute, fixed their seaward boundaries with an erosion-control line and sea wall that followed the mean high-water line.¹³⁹ The state then restored seventy-five feet of beach and pronounced the new land to be state property, thus depriving the formerly-littoral owners of that status as well as any future addition to the beach by accretion.¹⁴⁰ The landowners’ rights of access to the ocean, however, were preserved.¹⁴¹ The U.S. Supreme Court affirmed the state supreme court, holding that the statute did not deprive the owners of property rights because the land reclaimed by the state was in the public trust area and, at common law, land created by avulsion—even purposefully by the state—goes to the state.¹⁴² Because “[t]wo core principles of Florida property law intersect[ed] in this case” in favor of the state, the court held that “[t]he Florida Supreme Court decision before us is consistent with . . . background principles of state property law[,]” and therefore no taking had occurred.¹⁴³

¹³⁵ *Id.* at 120.

¹³⁶ *Id.* at 119-20.

¹³⁷ *Id.* at 120.

¹³⁸ 560 U.S. 702 (2010), *aff’g* Walton Cnty. v. Stop the Beach Renourishment, 998 So. 2d 1102 (Fla. 2008).

¹³⁹ *Stop the Beach*, 560 U.S. at 711.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 733.

¹⁴³ *Id.* at 730-31. Some commentators have viewed the decision primarily in the context of a broader debate about “judicial takings.” See, e.g., Richard A. Epstein, *Littoral Rights Under the Takings Doctrine: The Clash Between the Ius Naturale and Stop the Beach Renourishment*, 6 DUKE J. CONST. L. & PUB. POL’Y 37 (2011) (contending *inter alia* that avulsion does not allow for man-made changes, that littoral common-law property rights are derived from natural law and thus have constitutional status, and that arguably the Florida Supreme Court had judicially “taken” those rights); Trevor Burrus, *Black Robes and Grabby Hands: Judicial Takings and the Due Process Clause*, 21 WIDENER L.J. 719, 722 (2012) (stating “Scalia and his three colleagues [in the plurality opinion] found merit in the idea of

Not all courts have been quick to accept extensions of the public trust doctrine, and even those that accept it within its traditional limits often permit limited private use of public trust resources. Thus, in *Kootenai Environmental Alliance, Inc. v. State Board of Land Commissioners*,¹⁴⁴ the court approved the leasing of state lands impressed with a public trust to a private club for the construction, maintenance and use of private docking facilities on a bay in a navigable lake, on the grounds that such lease and use was “not incompatible” with the public trust imposed on the property.¹⁴⁵ Moving to applying the public trust doctrine to private land, the court in *Bell v. Town of Wells Beach*,¹⁴⁶ held that attempts to cross private land to reach public land for recreational purposes in accordance with the state’s “Public Trust and Intertidal Land Act” resulted in a taking of private property without compensation.¹⁴⁷ Another court refused to expand statutory declarations of public trust to permit access across private land to reach inter-tidal lands in *Opinion of the Justices*:¹⁴⁸

The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase possible under the Constitutions of the Commonwealth and of the United States. . . . The interference with private property here involves a wholesale denial of an owner’s right to exclude the public.¹⁴⁹

To the same effect is *Opinion of the Justices (Public Use of Coastal Beaches)*,¹⁵⁰ in which the court held that a new statute providing for access to tide-flowed public trust shoreline across abutting private land was a taking:

When the government unilaterally authorizes a permanent, public easement across private lands, this constitutes a taking requiring just compensation. . . . Be-

judicial takings being protected by the Takings Clause; they just did not believe a judicial taking had occurred in *Stop the Beach*.”).

¹⁴⁴ 671 P.2d 1085 (Idaho 1983).

¹⁴⁵ *Id.* at 1096.

¹⁴⁶ 557 A.2d 168 (Me. 1989).

¹⁴⁷ *Id.* at 169.

¹⁴⁸ 313 N.E.2d 561 (Mass. 1974).

¹⁴⁹ *Id.* at 568.

¹⁵⁰ 649 A.2d 604 (N.H. 1994).

cause the bill provides no compensation for the landowners whose property may be burdened by the general recreational easement established for public use, it violates the prohibition contained in our State and Federal Constitutions against the taking of private property for public use without just compensation. Although the State has the power to permit a comprehensive beach access and use program by using its eminent domain power and compensating private property owners, it may not take property rights without compensation through legislative decree.¹⁵¹

The same court drove home these advisory points when five years later it considered an actual case and controversy¹⁵² in which forty beachfront property owners sued the state on regulatory taking grounds when the state moved a public trust lands boundary line inland from the mean high water mark:

Having determined that New Hampshire common law limits public ownership of the shorelands to the mean high water mark, we conclude that the legislature went beyond these common law limits by extending public trust rights to the highest high water mark. . . . Because [the statute] unilaterally authorizes the taking of private shoreland for public use and provides no compensation for landowners whose property has been appropriated, it violates the prohibition in Part I, Article 12 of the State Constitution and the Fifth Amendment of the Federal Constitution against the taking of property for public use without just compensation. . . . Although it may be desirable for the State to expand public beaches to cope with increasing crowds, the State may not do so without compensating affected landowners.¹⁵³

More recently, in *Severance v. Patterson*,¹⁵⁴ the Supreme Court of Texas answered questions certified from the federal court of

¹⁵¹ *Id.* at 611.

¹⁵² *Purdie v. Attorney General*, 732 A.2d 442 (N.H. 1999).

¹⁵³ *Id.* at 447.

¹⁵⁴ 370 S.W.3d 705 (Tex. 2012), *answering questions certified from Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009).

appeals and reversed a line of state appellate court decisions dating from 1979¹⁵⁵ on so-called “rolling easements,” holding that

when a beachfront vegetation line is suddenly and dramatically pushed landward by acts of nature, an existing public easement on the public beach does not “roll” inland to other parts of the parcel or onto a new parcel of land. . . . In those situations, when changes occur suddenly and perceptibly to materially alter littoral boundaries, the land encumbered by the easement is lost *to the public trust*, along with the easement attached to that land.¹⁵⁶

Interpreting the state’s Open Beaches Act (OBA), the court distinguished between “wet” beach (land between the mean low and high tides) held by the state in public trust and “dry” beach (land between the mean high tide and the vegetation line) that could be publicly or privately owned.¹⁵⁷ Under the OBA, the “public beach” is composed of the wet beach and those areas of the dry beach that are either publicly owned or private land over which a public easement has been established by prescription, dedication, or custom.¹⁵⁸ The court stated that neither violent weather nor the OBA could create public easements on private land; rather, the state had to demonstrate “proof of the normal means of creating an easement.”¹⁵⁹ Interestingly, while the federal circuit court found Carol Severance’s takings claim unripe under *Williamson County*,¹⁶⁰ it nonetheless remanded, allowing the plaintiff to proceed with her claims of illegal seizure under the Fourth Amendment.¹⁶¹

In *Casitas Municipal Water District v. United States*,¹⁶² the federal government raised the public trust doctrine, the beneficial use doctrine, and a section of the California Fish and Game Code as background principles in defense of a regulatory takings claim

¹⁵⁵ *Moody v. White*, 593 S.W.2d 372 (Tex. Civ. App. 1979); *Matcha v. Mattox*, 711 S.W.2d 95 (Tex. App. 1986); *Arrington v. Mattox*, 767 S.W.2d 957 (Tex. App. 1989).

¹⁵⁶ *Severance*, 370 S.W.3d at 708, 724 (emphasis added).

¹⁵⁷ *Id.* at 714-15.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 721; *see also* *Brannan v. Texas*, 390 S.W.3d 301 (Tex. 2013) (vacating and remanding in light of *Severance*).

¹⁶⁰ *Severance*, 566 F.3d at 496-97 (citing *Williamson Cnty.*, 473 U.S. 172).

¹⁶¹ *Severance v. Patterson*, 682 F.3d 360 (5th Cir. 2012).

¹⁶² 102 Fed. Cl. 443 (2011).

brought by the Water District after the National Marine Fisheries Service required installation of a fish ladder and associated diversion of water.¹⁶³ Ironically, the Court of Federal Claims held that California's appropriative water rights system and beneficial use doctrine defined the plaintiff's property right so that a taking was conceivable though unripe.¹⁶⁴ The public trust doctrine, said the court, did not have primacy over the state's system of appropriative rights; rather, the state had sought to balance and integrate the two systems.¹⁶⁵ "Because the relevant property interest is plaintiff's right to beneficial use, that right cannot be taken until defendant's action encroaches on plaintiff's ability to deliver water to its customers."¹⁶⁶ In the end, the court held that the proper claim was for a physical, not a regulatory taking and dismissed the case on ripeness grounds. The Federal Circuit affirmed.¹⁶⁷

2. Customary Law as a Background Principle

Customary rights in land usually arise when a particular group or class of persons can show a right to do a particular thing or practice upon land which they neither own nor otherwise possess the right to do, based upon past and unchallenged practice extending back over some time.¹⁶⁸ The claimant to the custom would, in other words, be a trespasser on the land of another, but for the custom.¹⁶⁹ The reception of customary law in the United States was originally chilly despite its common, though restricted, use in England.¹⁷⁰ The reasons had much to do with the restrictions on use resulting from the application of the doctrine, and the difficulties in terminating a custom, once found or declared.¹⁷¹ The latter issue was of particular concern to the legendary John Chipman Gray, of future interests and the rule against perpetuities fame, whose concern was the establishment of yet another collocation of perpetual interests in property: "Especially it should be

¹⁶³ *Id.* at 451-52.

¹⁶⁴ *Id.* at 477-78.

¹⁶⁵ *Id.* at 458.

¹⁶⁶ *Id.* at 471.

¹⁶⁷ *Casitas Mun. Water Dist. v. United States*, 708 F.3d 1340, 1343 (Fed. Cir. 2013).

¹⁶⁸ Callies & Breemer, *supra* note 97, at 344-46.

¹⁶⁹ *Id.*

¹⁷⁰ David L. Callies, *Custom and the Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. RPTR. 10003, 10004 (2000).

¹⁷¹ *See generally id.*

remembered that they cannot be released, for no inhabitant, or body of inhabitants, is entitled to speak for future inhabitants. Such rights form perpetuities of the most objectionable character.”¹⁷²

An early nineteenth-century court put it well in *Ackerman v. Shelp*,¹⁷³ in which a custom was alleged to permit inhabitants of a town an easement to reach a riverbank:

[I]f [this] custom . . . is to prevail according to the common law notion of it, these lots must lie open forever to the surprise of unsuspecting owners, and to the curtailing [of] commerce, in its more advanced state, of the accommodation of docks and wharves, when perhaps a tenth part of the lots now open would be all sufficient as watering places; a principle of such extensive operation ought not to be strained beyond the limits assigned to it in law. If [the] public convenience requires [highways] to church, school, mill, market or water, they are obtainable in a much more direct and rational manner under the statute than by way of immemorial usage and custom.¹⁷⁴

Despite this cautionary background concerning the problems associated with custom, modern courts in the United States have declared public rights or rights of a huge class of strangers to cross private land based exclusively on some version of customary law. Perhaps the most famous of these is *State ex rel. Thornton v. Hay*,¹⁷⁵ in which the plaintiffs sought to prevent the Hays from constructing improvements on the dry-sand beach portion of their lot between the high water line and the upland vegetation line.¹⁷⁶ Rejecting the proffered bases of prescriptive rights and easements, the court decided in favor of the plaintiffs, *sua sponte*, extending customary rights to virtually the entire population of Oregon along its entire coastline:

Because many elements of prescription are present in

¹⁷² JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 586 (1886); see David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996) (providing for a fuller treatment of customary law); Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawaii*, 20 U. HAW. L. REV. 99 (1998); see also Callies, *supra* note 170.

¹⁷³ 8 N.J.L. 125 (1825).

¹⁷⁴ *Id.* at 130-31.

¹⁷⁵ 462 P.2d 671 (Or. 1969).

¹⁷⁶ *Id.* at 672.

this case, the state has relied upon the doctrine in support of the decree below. We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern [boundary] of the state ought to be treated uniformly.¹⁷⁷

Lest the reach of custom be misunderstood in a per se, total regulatory takings context under *Lucas*, the same court, in *Stevens v. City of Cannon Beach*,¹⁷⁸ responded to a takings claim over the refusal of local government to grant a seawall permit on customary rights interference grounds, that the customary law of Oregon preventing such construction was a background principle of state property law and therefore an exception to the categorical total takings rule when a property owner was left with no economically beneficial use of his land.¹⁷⁹

In two landmark cases,¹⁸⁰ the Hawai'i Supreme Court expanded previous rulings to provide that native Hawaiians—which number about 300,000 out of a state population of about 1.2 million—are entitled to exercise their state-constitutionally-protected traditional and customary rights on land which is “not fully developed,” whether or not such native Hawaiians actually own property or reside on their land, provided they can show they have traditionally done so.¹⁸¹ The two cases deal specifically with access rights and gathering rights, but the supreme court indicated it did not mean to restrict the definition of traditional and customary rights to these two categories.¹⁸² However, in a subsequent decision,¹⁸³ the supreme

¹⁷⁷ *Id.* at 676.

¹⁷⁸ 854 P.2d 449 (Or. 1993).

¹⁷⁹ *Id.* at 456.

¹⁸⁰ *Pele Def. Fund v. Paty*, 837 P.2d 1247 (Haw. 1992); *Pub. Access Shoreline Hawaii v. Hawaii Cnty. Planning Comm'n*, 903 P.2d 1246 (Haw. 1995).

¹⁸¹ *Pub. Access Shoreline Haw.*, 903 P.2d at 1271-72.

¹⁸² *Id.* at 1269-70; *Pele Defense Fund*, 837 P.2d at 1271-72.

¹⁸³ *Hawai'i v. Hanapi*, 970 P.2d 485 (Haw. 1998).

court modified its earlier decisions by holding that in order to exercise such traditional and customary rights, a native Hawaiian needed to prove that such a right existed geographically where claimed, and that such native Hawaiian was specifically entitled to exercise that right.¹⁸⁴ In other words, such traditional and customary rights as are protected by the Hawai'i state constitution do not extend to every native Hawaiian and to every parcel of land in the state. The last decision further specifically held that such rights can only be exercised on undeveloped or less than fully developed land, specifically holding that on land which is residentially-zoned with existing dwellings, improvements and infrastructure, it is "always inconsistent" to permit the practice of such rights.¹⁸⁵ The subject parcel in the case consisted of several acres with but one dwelling.¹⁸⁶

More recently, the Hawai'i Supreme Court in *State v. Pratt*¹⁸⁷ revisited native Hawaiian customary and traditional rights as a defense to criminal trespass, clarifying the judicial analysis last addressed more than a decade earlier.¹⁸⁸ Pratt, a native Hawaiian healer, had been camping in an area of a state park closed to protect natural resources and a fragile ecosystem.¹⁸⁹ Claiming the valley in question to be family property, Pratt had been conducting rituals to heal the land, removing invasive species of flora, and acting as a caretaker for indigenous archaeological sites.¹⁹⁰ He had also cleared land for subsistence agriculture and essentially taken up long-term residence.¹⁹¹ Affirming the intermediate appellate court, the supreme court upheld Pratt's conviction, decreeing that once a defendant has met the burden for establishing traditional and customary Hawaiian rights under the state constitution and case law—as Pratt did here—a court must apply a "totality of the circumstances" test to weigh the defendant's customary rights against the state's right to regulate them:

While Pratt has a strong interest in visiting Kalalau Valley, he did not attempt to visit in accordance with

¹⁸⁴ *Id.* at 493-94.

¹⁸⁵ *Id.* at 494.

¹⁸⁶ *Id.* at 486.

¹⁸⁷ 277 P.3d 300 (Haw. 2012).

¹⁸⁸ *Id.* at 301.

¹⁸⁹ *Id.* at 302-04, 312.

¹⁹⁰ *Id.* at 302-03.

¹⁹¹ *Id.* at 303.

the laws of the State. Those laws serve important purposes, including maintaining the park for public use and preserving the environment of the park. The outcome of this case should not be seen as preventing Pratt from going to the Kalalau Valley; Pratt may go and stay overnight whenever he obtains the proper permit. . . . The trial court did not err in determining that Pratt's interest in conducting his activities without a permit did not outweigh the State's interest in limiting the number of visitors to Kalalau Valley; Pratt's activities, therefore, do not fall under constitutional protection.¹⁹²

Less than three weeks later, however, the court granted Pratt's motion for reconsideration, and the opinion remains in limbo.¹⁹³

Shortly after the state supreme court agreed to reconsider the *Pratt* decision, a Hawai'i appellate court considered claims by a native Hawaiian citizen that the State Historic Preservation Division had improperly failed to require an archaeological inventory survey for additions and renovations to an historic church which had resulted in the disturbance of sixty-nine unrecorded burials, some of Native Hawaiians.¹⁹⁴ The plaintiff alleged violations of the public trust doctrine and constitutional and statutory provisions protecting the exercise of Native Hawaiian customary and traditional rights.¹⁹⁵ Noting that the plaintiff had cited no authority for the former claim and that the latter provisions did not "establish[] a basis for relief" distinct from other law designed to protect historic burials, the court affirmed dismissal of those two counts.¹⁹⁶ The court also suggested that Native Hawaiian rights would not apply in this case because the church property was fully developed.¹⁹⁷ The state supreme court, however, has granted certiorari.¹⁹⁸

The two jurisdictions—Oregon and Hawai'i—share a further commonality: both have cited Blackstone and his Commentaries on

¹⁹² *Pratt*, 277 P.3d at 312.

¹⁹³ *Id.* at 327.

¹⁹⁴ *Hall v. Dep't of Land & Nat. Res.*, 290 P.3d 525, 530 (Haw. Ct. App. 2012).

¹⁹⁵ *Id.* at 531.

¹⁹⁶ *Id.* at 543.

¹⁹⁷ *Id.* (citing *Hanapi*, 970 P.2d at 485, 494-95).

¹⁹⁸ *Hall v. Dep't of Land & Nat. Res.*, No. SCWC-12-0000061, 2013 WL 3064928 (Haw. June 17, 2013).

the Laws of England (“Commentaries”)¹⁹⁹ as the basis for their decisions. Blackstone wrote his Commentaries—summaries of lectures given at Oxford—just prior to the American Revolution. The Commentaries were generally regarded as an accurate summary of the common law of England, most of which was practiced in the colonies while subject to the Crown and “received” in the new United States via so-called reception statutes in the new individual states.²⁰⁰ Blackstone’s view of customary law was cautious. He correctly perceived the tension between customary rights and the common law rights associated with the holding of land.²⁰¹ He therefore suggested that for a custom to be good, it must satisfy seven criteria. “[A] custom had to be immemorial, continuous, peaceable, reasonable, certain, compulsory and consistent.”²⁰² According to the Commentaries (and English case law during, before, and since), to be “certain” and “reasonable” meant that the custom was to be exercised only within a relatively small geographic area—a village, a town, perhaps a small county—and by a distinct and relatively small group of people—residents of such villages and towns, for example.²⁰³ It also had to have been practiced—or at least the right to practice must have existed—continuously, without interruption, and for a long time.²⁰⁴ It is not altogether clear that either the customs declared in Hawai’i or in Oregon come close to meeting these criteria.²⁰⁵ Nevertheless, they are, as presently defined by the courts of these two states, almost certainly “background principles of a state’s law of property” and, once proven, defenses to claims of regulatory taking based on their exercise.²⁰⁶

Beaches, custom, and the public trust doctrine intersected in Florida in *Trepanier v. County of Volusia*,²⁰⁷ an inverse condemnation action where a state appellate court clarified the standard for es-

¹⁹⁹ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (William Carey Jones ed., Bancroft-Whitney Co. 1915).

²⁰⁰ Callies, *supra* note 170, at 10006.

²⁰¹ Bederman, *supra* note 172, at 1427, 1441.

²⁰² Callies, *supra* note 170, at 10006.

²⁰³ BLACKSTONE, *supra* note 199, at 75.

²⁰⁴ Gregory M. Duhl, *Property and Custom: Allocating Space in Public Places*, 79 TEMP. L. REV. 199, 206-08 (2006).

²⁰⁵ *See id.* at 225 (stating in pertinent part: “Even in states in which courts have recognized customary rights, such as Oregon and Hawai’i, the courts have not held fast to the seven elements of Blackstonian custom. Courts have relaxed the elements of reasonableness and certainty to give the public broad access to private land . . .”).

²⁰⁶ *E.g.*, Callies & Breemer, *supra* note 97, at 364.

²⁰⁷ 965 So. 2d 276 (Fla. Dist. Ct. App. 2007).

establishing a customary right and rejected any Oregon-style creation of state-wide rights as in *State ex rel. Thornton v. Hay*.²⁰⁸ The plaintiffs owned littoral parcels which, under Florida's public trust doctrine, included fee title to the mean high tide line in an area of New Smyrna Beach where the public, as regulated by the county, regularly drove and parked on the beach.²⁰⁹ Between the roadway and the sand dunes, the County maintained a thirty-foot habitat conservation zone (HCZ) for the protection of endangered sea turtles.²¹⁰ Before 1999, the roadway and the marked HCZ were in the public trust area outside plaintiffs' platted lots, but a series of avulsive events (i.e., hurricanes and other storms) moved the mean high water line to within a few feet of plaintiffs' sea walls.²¹¹ The county gradually moved the roadway and HCZ inland along with it to occupy plaintiffs' dry sand beach.²¹² The trial court initially granted summary judgment to the county, holding that the public had a "superior claim to possession and use" of the dry sand beach by virtue of custom, prescription, and dedication and proclaimed that such applied to all beaches in the county.²¹³

The appellate court, however, reversed and remanded.²¹⁴ After distinguishing custom from the public trust doctrine—the public trust area migrates with the changing shoreline but the same is not necessarily true of privately-owned areas subject to customary right²¹⁵—the court held that the county not only needed to prove the elements of custom for the specific area subject to the alleged customary right but also that the right customarily migrated with the high tide line.²¹⁶ While the court found clear proof that there had never been any intent to dedicate the land, it concluded that genuine issues of material fact existed with respect to the county's counterclaims of prescription and custom, with the court characterizing the latter as the county's best argument.²¹⁷ According to the court,

[i]n addition to the temporal requirement of "ancient"

²⁰⁸ 462 P.2d 671 (Or. 1969).

²⁰⁹ *Trepanier*, 965 So. 2d at 278, 280.

²¹⁰ *Id.* at 278-79.

²¹¹ *Id.* at 278.

²¹² *Id.* at 279.

²¹³ *Id.* at 280.

²¹⁴ *Trepanier*, 965 So. 2d at 278.

²¹⁵ *Id.* at 290.

²¹⁶ *Id.* at 293.

²¹⁷ *Id.*

use, three other key elements must be proven: peaceableness, certainty and consistency. Finally, the customary use must be shown to be “reasonable.” While some may find it preferable that proof of these elements of custom be established for the entire state by judicial fiat in order to protect the right of public access to Florida’s beaches, it appears to us that the acquisition of a right to use private property by custom is intensely local and anything but theoretical.²¹⁸

Sidestepping the awkward notion that any use of an automobile could be considered “ancient,” the court remanded for presentation of specific evidence.²¹⁹ After redefining “ancient” to be “historic” and asserting that one hundred years of substantially uninterrupted use qualified as such, the trial court ultimately held the custom proved and that the customary right had migrated inland after avulsive events.²²⁰ Although concluding that the plaintiff had not proved the elements of inverse condemnation, the court made it clear that any takings claim would have been defeated by the customary right.²²¹

3. *Statutes as Background Principles*

More troubling is the occasional case finding background principles in preexisting statutes, which would broaden the exception considerably and likely contrary to the implications of *Lucas* which, after all, did involve the application of a statute. Thus, for example, the Supreme Court of New Hampshire held that a “positive law” could be construed as a background principle if it were passed prior to the landowner’s acquisition of the subject parcel.²²² Finally, in a strange twist on the law of background principles exceptions, a court of appeals in Arizona denied a takings claim by a landowner over whose property flowed (by state permit) water for another landowner whose use of property (underground water storage) depended upon flowing water via his private stream.²²³ The court held that the doc-

²¹⁸ *Id.* at 289.

²¹⁹ *Trepanier*, 965 So. 2d at 282, 293.

²²⁰ *Id.* at 282.

²²¹ *Id.* at 283, 293.

²²² *Sanderson v. Town of Candia*, 787 A.2d 167, 169 (N.H. 2001).

²²³ *W. Maricopa Combine, Inc. v. Ariz. Dep’t of Water Res.*, 26 P.3d 1171, 1173 (Ariz. Ct. App. 2001).

trine of prior appropriation, upon which the permit was based, was a background principle of Arizona's water law, rendering such a takings claim impossible under a *Lucas* exception.²²⁴

IV. CONCLUSION

The factual context for a *Lucas* categorical total taking of all economically beneficial use will, as the Court acknowledged, happen rarely.²²⁵ Vastly more common will be circumstances in which a landowner may allege and prove frustration of investment-backed expectations—reasonable or distinct, the Court has used both adjectives—resulting in a partial taking under *Penn Central*,²²⁶ always provided the barrier raised by overzealous application of its “prudential” ripeness doctrine can be surmounted.²²⁷ However, rare as a total or categorical taking by regulation may be, the effects of such a taking can be breathtaking. Thus, for example, in Hawai'i, where nearly half the state has been placed in a state conservation district by the state's appointed Land Use Commission (LUC), virtually no economically beneficial use is permitted in 3 of the 4 subzones into which

²²⁴ *Id.* at 1180.

²²⁵ *Lucas*, 505 U.S. at 1015-18.

²²⁶ *Id.* at 1019-20; *see also Tahoe-Sierra*, 535 U.S. at 330-31 (stating “[a]nything less than a ‘complete elimination of value,’ or a ‘total loss,’ the [*Lucas*] Court acknowledged, would require the kind of analysis applied in *Penn Central*. . . . The starting point for the [district] court’s analysis should have been to ask whether there was a total taking of the entire parcel; if not, then *Penn Central* was the proper framework.”).

²²⁷ *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 536 (4th Cir. 2013) (reversing the district court summary judgment that Town’s removal of action to Federal Court rendered plaintiffs’ takings claim unripe for failure to seek compensation from the state first); but see a more rational perspective on ripeness: *Town of Nags Head v. Toloczko*, 728 F.3d 391, 399 (4th Cir. 2013) (reversing the district court’s decision to decline jurisdiction in takings claim when plaintiffs removed case to federal court);

Where a plaintiff’s failure to satisfy *Williamson County*’s ripeness requirements] results from their own litigation strategy, rather than the defendant’s ‘procedural gamesmanship’ or forum manipulation, *Sansotta*’s waiver principle does not apply. But ‘[b]ecause *Williamson County* is a prudential rather than a jurisdictional rule, we may determine that in some instances, the rule should not apply and we still have the power to decide the case.’ Exercise of such discretion may be particularly appropriate to avoid ‘piecemeal litigation or otherwise unfair procedures.’ This is a proper case to exercise our discretion to suspend the state-litigation requirement of *Williamson County*. In the interests of fairness and judicial economy, we will not impose further rounds of litigation on the Toloczkos [internal citations omitted].

Id. (alteration in original) (quoting *Sansotta*, 724 F.3d at 543).

that classification is divided.²²⁸ Moreover, since the state Department of Land and Natural Resources is bound by its regulatory authority to petition the LUC for Conservation District reclassification with respect to any land for which critical habitat for endangered species is designated, coupled with the fact that Hawai'i has more such species than any other state,²²⁹ one can easily visualize thousands upon thousands of acres of private land placed in a classification where no economically beneficial use is permitted.²³⁰

This state of affairs renders the definitions of nuisance, public trust, and custom—the only exceptions which allow government to take by regulation all economically beneficial use from private land without paying compensation as if the land were condemned—of critical importance. Clearly the concept of fee simple—which, as the Court notes, has a long and distinguished history and place in American jurisprudence²³¹—does not include rights of use which were “not part of the landowner’s title to begin with.” But the Court inveighed at length against courts making up such exceptions, particularly in the customary law and public trust areas, as they go along.²³² It is difficult to characterize such decisions as those of the Oregon Supreme

²²⁸ ST. OF HAW. LAND USE COMM’N, <http://luc.hawaii.gov/about/state-land-use-districts/> (last visited Mar. 31, 2014).

²²⁹ *Hawaii, Meet Your 15 New Endangered Species*, BigIslandNews.com, <http://www.bigislandvideonews.com/2013/10/28/hawaii-meet-your-newly-designated-endangered-species/> (Oct. 28, 2013) (stating in pertinent part that Hawaii has 526 species on the Endangered Species Act list, with California a distant second at 315 listings. The species added included a picture-wing fly, the anchialine pool shrimp, and 13 plant species, most of which have no common names).

²³⁰ Anthony Sommer, *U.S. cuts critical habitat for 2 tiny Kauai critters*, HONOLULU STAR-BULLETIN, Apr. 10, 2003, available at <http://archives.starbulletin.com/2003/04/10/news/index16.html> (stating that at one point a few years ago, fully a quarter of the island of Kauai was temporarily so designated, including all of the thousands-of-acres private Grove Farm, presently the site of a planned master-planned community of mixed commercial and residential uses. The “critters” were a cave spider and a cave amphipod, both blind).

²³¹ *Lucas*, 505 U.S. at 1016.

²³²

[T]he legislature’s recitation of a noxious-use justification cannot be the basis for departing from our categorical rule If it were, departure would virtually always be allowed. . . . [The government] must do more than proffer the legislature’s declaration that the uses [the property owner] desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim. . . . Instead . . . [the government] must identify background principles of nuisance and property law that prohibit the uses [the property owner] now intends in the circumstances in which the property is presently found.

Id. at 1026, 1031.

Court in the customary law arena and the New Jersey courts in the public trust arena as anything but just such judicial behavior. Just as John Chipman Gray warned about creating a new class of perpetuities,²³³ Blackstone, whose treatise on the common law was so immensely influential among lawyers and judges in Eighteenth-Century America, worried publicly about the potential for customary law to swallow up common law rights in property.²³⁴ Hence his seven limitations on the finding of a custom in derogation of such common law rights, most of which were twisted and violated by the Oregon courts in their seminal customary law decisions even though they purported to follow such Blackstonian custom.²³⁵ In sum, the protections afforded private property from wholesale regulatory confiscation by government are fragile enough without their evisceration by courts and legislatures seeking to protect their version of public rights by short cuts without paying compensation.²³⁶ As the late Chief Justice Rehnquist observed in *Dolan v. City of Tigard*²³⁷, the takings clause of the United States Constitution deserves the same treatment and respect as civil rights guaranteeing free speech or protecting against unreasonable search and seizure.²³⁸ In an America where the judiciary protects penumbras and emanations derived from written language in our Bill of Rights, rights which are clearly spelled out in the Constitution's Fifth Amendment demand no less.

²³³ Bederman, *supra* note 172, at 1407.

²³⁴ Duhl, *supra* note 204, at 208.

²³⁵ *Thornton*, 462 P.2d 671; *Stevens*, 854 P.2d 449.

²³⁶ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (stating “[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”).

²³⁷ 512 U.S. 374 (1994).

²³⁸ *Id.* at 392 (stating that “[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.”).