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Foreground Principles

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FOREGROUND PRINCIPLES

*Timothy M. Mulvaney**

INTRODUCTION

The U.S. Supreme Court has declared for decades that, for Takings Clause purposes, property interests are not created by the Constitution but rather are determined by “existing rules or understandings that stem from an independent source such as state law.”¹ However, the Court has exhibited a strong normative preference for a certain *type* of independent source—“background principles” of the common law—over others, namely state statutory and administrative law.² This Article calls this preference into question.³

Part I below outlines how the preference for background principles of the common law in takings jurisprudence gained prominence in the Court’s 1992 decision in *Lucas v. South Carolina Coastal Council*.⁴ *Lucas* set forth what amounted to a categorical governmental defense to allegations that a land-use regulation amounts to an unconstitutional taking: a claimant is never entitled to compensation where the regulation merely reflects a common law restriction that already “inheres” in that claimant’s title.⁵ The

* Associate Professor of Law, Texas Wesleyan University School of Law. Thank you to Jason Gillmer, Howard Katz, Albert Lin, John Martinez, Justin Pidot, Marc Poirier, Jonathan Rosenbloom, Christopher Serkin, Joseph Singer, Kenneth Stahl, and Laura Underkuffler for their insightful comments on earlier drafts or outlines of this manuscript. I also am grateful to have had the opportunity to present this piece at the 2013 AALS Annual Meeting in New Orleans, and I thank my co-panelists and the audience participants for their helpful suggestions. Moreover, this piece greatly benefitted from recommendations provided by many of my colleagues at Texas Wesleyan, including those offered in individual discussions with Stephen Alton, Susan Ayres, Huyen Pham, and Franklin Snyder. In addition, I am grateful for the fine research assistance of Brent Chapell.

¹ *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Roth*, 408 U.S. at 577); see also *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2597 (2010) (citing *Phillips*, 524 U.S. at 164) (“Generally speaking, state law defines property interests . . .”).

² See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

³ In doing so, this Article draws particular inspiration from the most recent works of Peter Byrne, among the many other property scholars noted herein.

⁴ 505 U.S. 1003 (1992).

⁵ Classical liberal theorists historically have supported the alleged efficiency and predictability of bright-line rules as generally more supportive of property rights than balancing inquiries that often necessitate the gathering and processing of a significant amount of information. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 102 (1985); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1700 (1988).

Court's description of the background principles inquiry envisioned just two categories of cases moving forward. Where a regulation objectively mirrors what always has been considered a clear common law restriction, it follows that simple codification of that restriction should be considered constitutionally unremarkable; in the substantial collection of other regulatory actions, courts ordinarily are to apply the balancing analysis set forth in *Penn Central Transportation Co. v. New York City*⁶ so long as the regulation does not completely eliminate a property's economic value.⁷ However, application of the background principles inquiry in many actual takings cases post-*Lucas* offers a more complex account.

Part II develops a model to demonstrate not two but four basic categories, or quadrants, of takings decisions that extensive reliance on the "background principles" inquiry has wrought. The quadrants represent the four potential answer combinations to two questions relevant in applying the background principles inquiry. First, independent of the court's holding, does the use restriction set forth in the challenged regulation reflect an old common law restriction? Second, according to the reviewing court, did a taking occur or is a takings finding at least possible because—in isolation or among other reasons—the court asserts that the new regulation fails to mirror an old common law restriction? This Part focuses on and critically assesses those seemingly counterintuitive cases where the answers to these two questions are "Yes-Yes" or "No-No." In accord with the chart that depicts this model below, these cases fall within Quadrants 1 and 4, respectively.⁸

In the former, the normative preference for the common law seemingly has led to strained judicial construction of common law principles to support regulatory takings challenges.⁹ In the latter, extending normative pref-

(stating that "what takings law needs is a good dose of formalization"). It may seem ironic, then, that elements of *Lucas*'s formalistic nature have benefited *defenders* of governmental land use regulation. See Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 321-22 (2005) (suggesting that *Lucas*, a decision initially "welcomed by private property advocates but denounced by defenders of government regulations" for establishing the rule that regulations depriving landowners of all economic value always amount to takings absent a common law prohibition on the regulated activity, "represents one of the starkest recent examples of the law of unintended consequences" given that the common law exception to that rule has been of greater use to the government in defending takings suits than the rule has been in protecting property owners). Professor Blumm and Mr. Ritchie noted that whether such formalism "fosters fairness is not clear." *Id.* at 368.

⁶ 438 U.S. 104, 124 (1978).

⁷ John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 178 (2005).

⁸ See *infra* Part II.A.

⁹ As a principal example of this type of case, this Article draws on the recent opinion of the U.S. Court of Federal Claims in *Casitas Municipal Water District v. United States*, 102 Fed. Cl. 443 (2011), *aff'd*, No. 2012-5033, 2013 WL 692763 (Fed. Cir. Feb. 27, 2013). See *infra* notes 78-93 and accompanying text. For other examples, see *infra* note 93.

erence to the common law has resulted in strained judicial construction of common law principles to reject regulatory takings challenges at a threshold level;¹⁰ such rulings have animated calls for application of the Takings Clause to judicial changes in common law rules in the same manner the Clause is applied to regulatory acts.¹¹ The existence of Quadrant 1 and Quadrant 4 cases suggests that the superiority of the common law arguably has become even more pronounced in *Lucas*'s wake than in *Lucas* itself.

Part III explains that it is not this Article's principal objective to take issue with the ultimate results in individual cases where these strained judicial constructions have occurred; rather, it aims to question the self-contained nature of the background principles inquiry employed in them. This Part asserts that a focus on connecting or disconnecting challenged regulations to what are, at times, antiquated background common law prin-

¹⁰ This Article draws on the U.S. Supreme Court's recent decision in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010), as a principal example of this type of case. See *infra* notes 94-114 and accompanying text. For other examples, see *infra* note 114.

¹¹ In its 2010 opinion in *Stop the Beach*, the U.S. Supreme Court affirmed a decision by the Florida Supreme Court that no taking occurred. 130 S. Ct. at 2613. However, in a 4-2-2 split (with Justice John Paul Stevens recused), the Justices issued three separate statements that traded barbs on the novel theory that the courts, like the legislature and the executive, can commit takings. See *id.* at 2613-18 (Kennedy, J., concurring); *id.* at 2618-19 (Breyer, J., concurring). Though "judicial takings" theory did not affect the result in the case, debate over the theory has so driven recent takings scholarship to the point where it has allowed the controlling opinion signed by the entire *Stop the Beach* Court to escape critical review. As discussed *infra* Part II.D and accompanying text, this Article, in part, takes up that task, and, in the process, necessarily sets aside many of the questions surrounding judicial takings theory. For a sampling of the judicial takings literature that has followed *Stop the Beach*, see generally Craig Anthony Arnold, *Legal Castles in the Sand: The Evolution of Property Law, Culture, and Ecology in Coastal Lands*, 61 SYRACUSE L. REV. 213 (2011); D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. RICH. L. REV. 903 (2011); Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553 (2012); J. Peter Byrne, *Stop the Beach Plurality!*, 38 ECOLOGY L.Q. 619 (2011); Nestor M. Davidson, *Judicial Takings and State Action: Rereading Shelley After Stop the Beach Renourishment*, 6 DUKE J. CONST. L. & PUB. POL'Y 75 (2011); Stacey L. Dogan & Ernest A. Young, *Judicial Takings and Collateral Attack on State Court Property Decisions*, 6 DUKE J. CONST. L. & PUB. POL'Y 107 (2011); Steven J. Eagle, *Judicial Takings and State Takings*, 21 WIDENER L.J. 811 (2012); John D. Echeverria, *Stop the Beach Renourishment: Why the Judiciary Is Different*, 35 VT. L. REV. 475 (2010); 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); Lee Anne Fennell, *Picturing Takings*, 88 NOTRE DAME L. REV. 57 (2012); Amnon Lehari, *Judicial Review of Judicial Lawmaking*, 96 MINN. L. REV. 520 (2011); William P. Marshall, *Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor*, 6 DUKE J. CONST. L. & PUB. POL'Y 1 (2011); John Martinez, *No More Free Easements: Judicial Takings for Private Necessity*, 40 REAL EST. L.J. 425 (2012); Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247 (2011); Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305 (2012); Shelley Ross Saxer, *Judicial State Action: Shelley v. Kraemer, State Action, and Judicial Takings*, 21 WIDENER L.J. 847 (2012); Stephanie Stern, *Protecting Property Through Politics: A Legislative Process Theory of Judicial Takings*, MINN. L. REV. (forthcoming 2013); Laura S. Underkuffler, *Judicial Takings: A Medley of Misconceptions*, 61 SYRACUSE L. REV. 203 (2011).

ciples can come at the expense of a more direct and transparent consideration of what is in the foreground: the public and private interests implicated by the challenged regulations in the modern context within which they are promulgated. It advocates deemphasizing the background principles inquiry in favor of a contextual analysis that is centered on fairness and recognizes that background principles might not be sufficient to deal with modern problems and serve modern human needs. The Part concludes that such a mode of analysis seems particularly apt in instances where regulations adopt state-of-the-art policies technologically inconceivable when any potentially analogous background common law principle was originally declared or address issues about which modern science has shed significant new light.

I. THE “BACKGROUND PRINCIPLES” INQUIRY

The Takings Clause of the Constitution states “nor shall private *property* be taken for public use, without just compensation.”¹² Yet neither the Constitution’s text nor historical research seeking to glean the Framers’ intent provides persuasive evidence that the Framers favored one approach to defining constitutional “property” over another.¹³ The judiciary, therefore, necessarily has the task of defining “property” for takings purposes, and it can only complete this task by attributing a political theory to the Constitution that the Constitution itself does not articulate.¹⁴ This Part first situates *Lucas* within the larger context of judicial labors to define “property” for takings purposes. Thereafter, it explores the contours of *Lucas*’s “background principles” inquiry.

A. *Situating Lucas*

On a very general level, there are two approaches to identifying what property interests are entitled to takings protections: a “normativist” approach and a “positivist” approach.¹⁵ In its simplest formulation, a norma-

¹² U.S. CONST. amend. V. (emphasis added).

¹³ See James A. Dorn, *Public Choice and the Constitution: A Madisonian Perspective*, in PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 57, 63-69 (James D. Gwartney & Richard E. Wagner eds., 1988); Wayne McCormack, Lochner, *Liberty, Property, and Human Rights*, 1 N.Y.U. J.L. & LIBERTY 432, 451-54 (2005); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1522-24 (1990).

¹⁴ Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1099 (1981).

¹⁵ The Author refers to these approaches as “normativist” and “positivist” only in the sense that these labels have become terms of art employed in takings literature. See, e.g., Bloom & Serkin, *supra* note 11, at 555-57; Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1667 (1988); Thompson, *supra* note 13, at 1523-

tivist vision of property suggests that federal courts are to rely on certain core, universally recognized principles that are elicited without reference to current law and that generally predate the formation of government.¹⁶ In contrast, a positivist vision of property asserts that the Constitution protects only those rights delineated by nonfederal constitutional government sources, most prominently state common law and regulation.¹⁷

Both approaches present challenges. As Professor Margaret Radin once described the normativist approach, it requires believing that “there is

41; Sandra B. Zellmer & Jessica Harder, *Unbundling Property in Water*, 59 ALA. L. REV. 679, 703-04, 716 (2008). Other scholars have chosen different terms to frame the same or similar categories. *See, e.g.*, Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 892-93 (2000) (“natural property” and “positivist”); Michelman, *supra* note 14, at 1099 (“direct” and “derivative”); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1416-19 (1991) (“physicalist” and “positive”). The Author has sought to define “normativism” and “positivism” within this particular context and does not mean to incorporate any further or different meaning that is attributed to either of these words in a variety of other contexts. *See, e.g.*, Merrill, *supra*, at 920 n.144 (suggesting that “[u]se of the word ‘positivism’ is potentially misleading [in discussing the constitutional meaning of property], since positivism is more typically used to distinguish the law of the sovereign—government-created law—from natural law or moral law,” but explaining that the word “positivism” has been employed as a term of art to distinguish nonconstitutional law, including federal and state statutory, administrative, and common law, from law derived directly from the Constitution”).

¹⁶ *See, e.g.*, Richard J. Lazarus, *Putting the Correct “Spin” on Lucas*, 45 STAN. L. REV. 1411, 1429 (1993) (describing a normativist approach); Michelman, *supra* note 14, at 1099 (same). In identifying these core, universally recognized principles, some scholars have pointed to divine providence, *see, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 133-46 (Thomas I. Cook ed., Hafner Publ’g Co. 1947) (1690); others have pointed to natural law, *see, e.g.*, EPSTEIN, *supra* note 5, at 10-12; ELLEN FRANKEL PAUL, PROPERTY RIGHTS AND EMINENT DOMAIN 238-39 (1987); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1568 (2003) (“Property is a ‘natural’—inherent, prepolitical, and prelegal—right because its pursuit secures . . . natural goods[, including] . . . self-preservation, the preservation of one’s family, and the wealth needed to practice other virtues that require some minimum of material support.”); Epstein, *supra* note 11, at 38, 47-48 (suggesting that property rights are those “rights given and defined in accordance with nature,” “basic norms” entrenched long before we even had courts that are rooted in “general reason,” divined by “[c]ognitive skill” and “deductive argument”); Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of Pruneyard v. Robins*, 64 U. CHI. L. REV. 21, 24-27 (1997); James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After Lucas*, 35 ECOLOGY L.Q. 1, 29 (2008) [hereinafter Huffman, *Background Principles*]; James L. Huffman, *Beware of Greens in Praise of the Common Law*, 58 CASE W. RES. L. REV. 813, 839 (2008) [hereinafter Huffman, *Beware of Greens*]; and still others to universally shared customs, *see, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW 243-46 (1991), or criteria, *see, e.g.*, Merrill, *supra* note 15, at 942-43.

¹⁷ *See, e.g.*, Thompson, *supra* note 13, at 1523; Laura S. Underkuffler, *Tahoe’s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727, 739-40 (2004). In certain areas, like patent law, these sources also will include federal legislation and court decisions interpreting it. *See* Dogan & Young, *supra* note 11, at 130-33. For a recent application of a purely positivist approach, *see* Vandever v. Lloyd, 644 F.3d 957, 967 (9th Cir. 2011) (“After [an] exhaustive consideration of state-law sources, the Alaska Supreme Court held [in *Vanek v. State*, 193 P.3d 283 (Alaska 2008)] that, as a matter of state law, an entry permit to fish commercially for salmon in the Cook Inlet is not ‘property’ for the purpose of requiring compensation when its value decreases due to state regulation On this question of state law . . . we must follow *Vanek*.”), *cert. denied*, 132 S. Ct. 850 (2011).

a conception of property that is *the* concept of property.”¹⁸ “*The*” concept of property is hard to pinpoint, and therefore often rests in the eye of the beholder.¹⁹ Thus, this approach necessitates individual federal judges imposing their own values regardless of a given state’s previously made choices concerning property, which presumably are based on that state’s own distinct history, physical landscape, commercial experiences, policy choices, and views of justice.²⁰ And yet, the positivist approach gives rise to what has been dubbed the “positivist trap.”²¹ To the extent state legislatures and state courts can “interpret [property], change it, or eliminate it . . . as they see fit,” there are no—or at least very few—instances where regulation can be considered a taking.²²

¹⁸ Margaret Jane Radin, *The Consequences of Conceptualism*, 41 U. MIAMI L. REV. 239, 239 (1986); see also MARGARET JANE RADIN, REINTERPRETING PROPERTY 161 (1993); LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 20 (2003) (“If the theory that we use is simply that of the ‘traditionally’ or ‘commonly’ recognized right to use . . . we must also ask: what is the ‘traditionally’ or ‘commonly’ recognized right to use?”); Paul, *supra* note 15, at 1417-18 (“The guiding concept of this approach is that there are some features of the external world (so-called facts) that demand certain legal conclusions.”); T. Nicolaus Tideman, *Takings, Moral Evolution, and Justice*, 88 COLUM. L. REV. 1714, 1719-20 (1988) (critiquing the “assumption that for every contested interest . . . there is a person to whom that interest is properly assigned . . . without resort to politics” on the ground that there is no “static perfectibility of knowledge” on which “we can know enough to specify for all time what is a just claim”); Underkuffler, *supra* note 17, at 739-40 (“Belief in a rigidly protective view of takings law depends on belief in the fiction of property’s concreteness.”).

¹⁹ See, e.g., Dogan & Young, *supra* note 11, at 117.

²⁰ On the theme of experimentation at subfederal levels of government in the context of modern takings jurisprudence, see, for example, Marc R. Poirier, *Federalism and Localism in Kelo and San Remo*, in PRIVATE PROPERTY, COMMUNITY DEVELOPMENT, AND EMINENT DOMAIN 101, 127-28 (Robin Paul Malloy ed., 2008).

²¹ E.g., Bloom & Serkin, *supra* note 11, at 572; Merrill, *supra* note 15, at 922; Jonathan Remy Nash, *Packaging Property: The Effect of Paradigmatic Framing of Property Rights*, 83 TUL. L. REV. 691, 702 n.27 (2009); see also, e.g., McCormack, *supra* note 13, at 437-38 (“[I]f the state could redefine property rights without running afoul of the Takings Clause, the Clause would become a nullity.”); Michelman, *supra* note 14, at 1108; Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CALIF. L. REV. 55, 65 (1990); Thompson, *supra* note 13, at 1455.

²² Underkuffler, *supra* note 11, at 206; see also Louise A. Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings*, 8 YALE J.L. & HUMAN. 31, 34 (1996) (asserting that one of the central questions in regulatory takings law is “what lost value is compensable on account of a change in the law” and suggesting that, “[b]ecause property value is created by law, this question and its answer are circular; there is no uncontroverted account of value that avoids this circularity” (emphasis omitted)); Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U. CHI. L. REV. 57, 57-58 (1997) (asserting that if “[p]roperty” . . . consists of nothing but the law’s confirmation of entitlements and prerogatives to possessors or other ‘owners[,]’ . . . then arguably there could be no such constitutionally cognizable event as a ‘regulatory taking,’” absent “formal expropriation[] from private to government ownership”); Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURISPRUDENCE 217, 221 (1993) (“On one hand, owners should expect that all laws are subject to change; however, taken to the extreme, this would mean that no property rights are protected from seizure by the state because all

Many times over, the U.S. Supreme Court at least has purported to support a positivist definition of property for takings purposes.²³ However, as several scholars have noted, the Court's stated treatment of property as derived from nonfederal constitutional sources is "honored more in the breach than in the practice."²⁴ Without reference to state law, the Court has described property in takings cases as reflecting the "fundamental attribute[s] of ownership,"²⁵ "economically viable use[s],"²⁶ "ordinary meaning,"²⁷ and "historically rooted expectation[s],"²⁸ among others.²⁹ And in the

property is held subject to the police power to regulate its use to promote the general welfare."); John G. Sprankling, *The Property Jurisprudence of Justice Kennedy*, 44 MCGEORGE L. REV. 61, 67 (2013) ("[I]f the law determined the claimant's investment-backed expectations, then perhaps a government entity could avoid takings liability simply by redefining what constituted 'property.'"). To the extent a positivist approach is defined more narrowly to the point where state legislatures and state courts *cannot* "interpret [property], change it, or eliminate it . . . as they see fit," the approach encounters the same critique leveled against the normative approach in that it assumes "property" has a definitive content that does not change over time. See Underkuffler, *supra* note 11, at 206.

²³ In the procedural due process case of *Board of Regents v. Roth*, the Court declared that "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. 564, 577 (1972). The Court's support for positivism in *Roth* and its due process progeny has "spilled over" into takings jurisprudence. Merrill, *supra* note 15, at 916. For a selection of examples, see *Georgia v. Randolph*, 547 U.S. 103, 144 (2006) (Scalia, J., dissenting) ("The Fifth Amendment . . . does not purport to define property rights. We have consistently held that 'the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" The same is true of the Fourteenth Amendment Due Process Clause's protection of 'property.'" (citations omitted)); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (explaining that the Fifth Amendment "protects rather than creates property interests"); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (noting the Court's "traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments" (quoting *Roth*, 408 U.S. at 577)); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-01 (1984) ("In deciding this case, we are faced with [the question]: . . . Does Monsanto have a property interest protected by the Fifth Amendment's Taking Clause[?] . . . In answering th[is] question now, we are mindful of the basic axiom that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" (quoting *Roth*, 408 U.S. at 577)); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) ("We, of course, . . . accept the further proposition, pressed upon us by the appellees, that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .'" (quoting *Roth*, 408 U.S. at 577)); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) ("Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define 'property' in the first instance.").

²⁴ Underkuffler, *supra* note 11, at 207; see also, e.g., Merrill, *supra* note 15, at 926-27; Thompson, *supra* note 13, at 1526 ("[T]he Court has explicitly embraced a positivist definition of constitutional property. But what the Court *says* it is doing is not necessarily what it is actually doing.").

²⁵ *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980).

²⁶ *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 496 (1987).

²⁷ *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987).

most prominent decision that *did* define property rights with some reference to state law—*Lucas v. South Carolina Coastal Council*—the Court did so in a rather peculiar way.³⁰

B. *Lucas and “Background Principles”*

In *Lucas*, the complaint alleged that environmental legislation passed after the claimant’s acquisition of two oceanfront parcels barred construction on those parcels, and thus worked a total, permanent taking without just compensation.³¹ The U.S. Supreme Court declared that in the “extraordinary circumstance” where new regulation deprives a landowner of all productive uses of her property, such a regulation requires takings compensation *per se*.³² It seems rather obvious that such a rule can apply only if, at

²⁸ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982).

²⁹ For a more extensive list of examples, see UNDERKUFFLER, *supra* note 18, at 19-20.

³⁰ See generally *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

³¹ See *id.* at 1006-07.

³² See *id.* at 1017, 1019. As Justice Harry Blackmun described the majority’s categorical rule in dissent, “the public interest is irrelevant if total value has been taken.” *Id.* at 1049 n.11 (Blackmun, J., dissenting). *Lucas* immediately prompted an immense body of critical legal scholarship. See, e.g., Louise A. Halper, *Why the Nuisance Knot Can’t Undo the Takings Muddle*, 28 IND. L. REV. 329, 329 (1995); Lazarus, *supra* note 16, at 1432; Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1436 (1993). A decade later, Professor Carol Rose authored a particularly thoughtful synthesis, in which she suggests that *Lucas* serves as an affront to all three of the conventional theories (efficiency, political process failure, and fairness) offered for the Takings Clause’s protection of individuals that are singled out to bear burdens that should be borne by the whole. See Carol M. Rose, *The Story of Lucas: Environmental Land Use Regulation Between Developers and the Deep Blue Sea*, in ENVIRONMENTAL LAW STORIES 237, 268, 274-75 (Richard J. Lazarus & Oliver A. Houck eds., 2005) [hereinafter Rose, *Story of Lucas*].

On the first, Professor Rose argues that, particularly in the context of environmental regulation, government will not necessarily make more efficient decisions when it takes into account the costs of compensating affected property owners because the community benefits are difficult to measure and often get “shortchang[ed]” in the cost-benefit calculation, leading to “inefficient inaction.” See *id.* at 268 (emphasis added) (citing Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, in PROPERTY STORIES 221, 249-51 (Gerald Korngold & Andrew P. Morriss eds., 2004)).

On the second, public choice theorists generally have sought to identify specific instances where rent-seeking propensity within the political branches is particularly high. For instance, William Fischel argues that the size of modern day states are much larger than the “small republics” in which James Madison was so concerned about factional control, such that only small local governments are likely to single out certain groups to bear disproportionate burdens today in the ways that Madison feared. See WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 105 (1995) [hereinafter FISCHEL, *REGULATORY TAKINGS*]; William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?*, 67 CHI.-KENT L. REV. 865, 893 (1991) [hereinafter Fischel, *Exploring*]. Professor Rose is among a collection of scholars that have critiqued political process failure justifications for takings compensation at some length. See Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1132 (1996) [hereinafter Rose, *Takings*] (reviewing FISCHEL,

the outset, the claimant held a property interest capable of being taken; a landowner cannot claim that the government must pay compensation for preventing something that exceeded her rights in the first place.³³ And yet *Lucas* elicited a particularly narrow conception of this takings defense. The Court asserted that there is no property interest at stake only if the regula-

REGULATORY TAKINGS); see also Vicki Been, *The Perils of Paradoxes—Comment on William A. Fischel, “Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?”*, 67 CHI.-KENT L. REV. 913, 920 (1991). But even assuming their validity, she notes that *Lucas* involved state legislation and finds it “hard to imagine that the well-connected David Lucas would have been subject to any political failure at all, or particularly that he would have been unable to have his views heard by sympathetic South Carolina legislators.” See Rose, *Story of Lucas*, *supra*, at 274 (explaining Lucas’s activism within the Republican party). For other leading writings on takings and public choice theory, see, for example, Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279 (1992); Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285 (1990); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333 (1991); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992); Marc R. Poirier, *Takings and Natural Hazards Policy: Public Choice on the Beachfront*, 46 RUTGERS L. REV. 243 (1993); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) [hereinafter Treanor, *Original Understanding*]. Of note, Dean Treanor originally suggested that compensation may be appropriate in instances where majoritarian decision making disparately impacts discrete and insular minorities, such as in “environmental racism” cases, *id.* at 873; however, he recently expressed a shift in this view, concluding that the entire concept of regulatory takings should be disavowed. See William Michael Treanor, *Keynote Address: 14th Annual Conference on Litigating Takings Challenges to Land Use and Environmental Regulations*, 36 VT. L. REV. 503, 504 (2012). On the other end of the spectrum from Dean Treanor, Richard Epstein contends that the legislative process is so dictated by rent-seeking interests that the Takings Clause should provide broad protection against nearly all state redistributions of wealth by requiring the legislature and the executive to make whole those from whom they redistribute. See RICHARD A. EPSTEIN, *SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY* 50 (2008); EPSTEIN, *supra* note 5, at 208–09; Richard A. Epstein, Symposium, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1387 (1993).

On the third, the *Lucas* Court asserted that if landowners who built homes within the vicinity of the claimant prior to the enactment of the regulation at issue are allowed to continue occupying those homes, the “similarly situated” claimant should not be treated any differently. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992). Professor Rose notes the difficulty in understanding how an individual who has not yet acted is “similarly situated” to those who have, and thus how treating these two the same by affording takings compensation to the individual who has not yet acted is “fair.” As she explains, “it can be an invitation to environmental disaster to look around at pre-existing uses, and to say that new users should receive the same old lax treatment.” Rose, *Story of Lucas*, *supra*, at 276; see also Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1, 17–18 [hereinafter Rose, *Property and Expropriation*] (explaining how the environmental damages of the first coal burning are unnoticeable, but by the time the cumulative impacts of multiple coal burners are noticeable, “property owners have often settled into thinking that their property rights include the externality-causing activity[y]. . . . [B]y the time we get around to regulating . . . coal fires, the new regulation upsets people’s expectations about the ways they can use their property.”).

³³ This premise had long drawn support from the Supreme Court. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962); *Miller v. Schoene*, 276 U.S. 272, 279–80 (1928); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Mugler v. Kansas*, 123 U.S. 623, 662–63 (1887).

tion's limitations merely replicate "long recognized" "understandings of our citizens" and do not impede the "'essential use[s]' of land."³⁴

Drawing on the "essential uses of land" seemingly reflects a normative commitment detached from positively determined property rules. On this view, "changing perceptions of the public good" are largely irrelevant to reviewing courts.³⁵ Instead, there are certain "essential uses" to which landowners simply are entitled, regardless of the social consequences of those uses.

But the Court also gave a nod to positive law, if only to a certain type. The majority explained that the "understandings of our citizens" permit regulation without compensation when the regulation reflects "restrictions that background principles of the State's law of property and nuisance already place upon land ownership."³⁶ Those principles, the Court said, "inhere in the [claimant's] title."³⁷

Because all claimants must identify a vested property interest capable of being taken to prevail in a takings suit, the "background principles" inquiry is pertinent in every takings case, regardless of the extent of the diminution in property value occasioned by the challenged regulation.³⁸ Where

³⁴ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027, 1031 (1992) (quoting *Curtin v. Benson*, 222 U.S. 78, 86 (1911)). Concurring in the judgment, Justice Anthony Kennedy similarly suggested that "[t]he expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved." *Id.* at 1035 (Kennedy, J., concurring).

³⁵ Huffman, *Background Principles*, *supra* note 16, at 21.

³⁶ *Lucas*, 505 U.S. at 1027, 1029. This Article does not focus on the justifications for *Lucas*'s normative preference for the common law so much as it explores what application of this preference has wrought. It is worth noting the possibility, however, that the Court saw the common law as a convenient proxy for some naturalistic, idealized conception of "essential uses." See, e.g., Halper, *supra* note 32, at 338 ("[T]he conclusion the . . . majority reaches . . . [reflects] a non-Lochnerian means to limit the legislative role in land use . . ."); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 319 (1993) ("[Justice Antonin Scalia, the author of the majority opinion in *Lucas*,] writes in places as if there is just one American background law of property and nuisance—supportive, as it happens, of *Lucas*' claim—that is common to the national jurisdiction and all the state jurisdictions."). But, as Professor Peter Byrne has argued, that common law courts did not provide comprehensive frameworks to resolve competing interests of occupants, owners, neighbors, the community at large, and the environment does not mean such courts necessarily were insensitive to these competing interests. J. Peter Byrne, *The Public Nature of Property Rights and the Property Nature of Public Law*, in *THE PUBLIC NATURE OF PRIVATE PROPERTY* 1, 9 (Robin Paul Malloy & Michael Diamond eds., 2011). Rather, according to Professor Byrne, the common law "simply lacked the capacity to conceive or implement" a complex and accommodating approach that would afford the possibility of producing more nuanced outcomes than judicial resolution typically can afford. *Id.* at 2.

³⁷ *Lucas*, 505 U.S. at 1028-29. The Court also referred to these background principles as those limitations that "were not part of [the claimant's] title to begin with," *id.* at 1027, a "pre-existing limitation upon the landowner's title," *id.* at 1028-29, and those uses already "proscribed by . . . existing rules or understandings," *id.* at 1030 (internal quotation marks omitted).

³⁸ See, e.g., *John R. Sand & Gravel Co. v. United States*, 60 Fed. Cl. 230, 239 (2004) ("In both physical and regulatory takings cases, just compensation will not be due if the exercise of a 'property

the background principles defense is unavailable to the government, the challenged regulation is subject to one of the takings “tests” set forth by the Court: the rare breed of regulations depriving a landowner of all economic uses are per se takings under *Lucas*,³⁹ while regulations resulting in partial deprivations are assessed under the multifactor balancing analysis first described in *Penn Central*.⁴⁰

For the state to rely on *Lucas*’s narrow version of what Professor Carol Rose refers to as the “no right” defense,⁴¹ regulation must “do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the state’s law of private nuisance, or by the state under its complementary power to abate

right’ asserted by the owner was prohibited by state property law and could have been abated by a private party under the state’s private nuisance law or by the government under its power to abate public nuisances.”); see also John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 945-46 (2012) (“Because the threshold question of whether the claimant can identify a vested property interest is a potential issue in any case brought under the Takings Clause, the *Lucas* background principle applies in every takings lawsuit regardless of whether the case is governed by the *Lucas* per se takings test or some other takings test.”); Michelman, *supra* note 22, at 57 (“[Judicial] [d]ecision requires a method for deriving the antecedent scope and content of a constitutionally safeguarded ‘property’ interest, because if the governmentally discommoded deployment or enjoyment is not within that scope, then, in a constitutional sense, no ‘property’ is taken.”). In a statement suggesting that the petition in *Lucas* should have been dismissed as improvidently granted, Justice David Souter suggested that if a regulation deprives a landowner of all economic uses but that regulation does not amount to a taking because it reflects an old common law nuisance restriction, the property presumably can only be used to create a nuisance. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1076-78 (1992) (Souter, J., statement). The seeming implausibility of this assumption suggests that (1) the tenet that regulations are categorically immune from implicating the Takings Clause if they reflect background restrictions bears little relation to (2) the rule that regulations that deprive landowners of all economic uses categorically are takings. See *id.*

³⁹ See *Lucas*, 505 U.S. at 1028-29.

⁴⁰ *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978) (suggesting that, in reviewing takings claims where regulations result in partial diminutions in property values, courts consider the character of the government regulation, as well as the regulation’s economic impact and interference with the claimant’s investment-backed expectations). For a suggestion that the Supreme Court spoke of the *Penn Central* factors differently in its most recent takings decision, which it handed down in December 2012 in the matter of *Arkansas Game & Fish Commission v. United States*, 133 S. Ct. 511 (2012), than it had in the past, see Timothy M. Mulvaney, *Takings Case Set for Oral Argument at the SCOTUS on January 15th*, ENVTL. LAW PROF BLOG (Jan. 13, 2013), http://lawprofessors.typepad.com/environmental_law/2013/01/takings-case-set-for-oral-argument-at-the-scotus-on-january-15th.html (analyzing *Arkansas Game* and discussing the pending case of *Koontz v. St. John’s River Water Management District*). The Court also has established specific takings tests applicable to (1) regulations that result in permanent physical occupations, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) (physical takings), and (2) certain development permit conditions, see *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994) (permit conditions); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836-37 (1987) (permit conditions). These tests are of lesser relevance here, unless otherwise noted.

⁴¹ See Rose, *Story of Lucas*, *supra* note 32, at 266-67.

nuisances that affect the public.”⁴² Background limitations that “inhere in the title” are distinct, then, from limitations set forth by legislatures or executive agencies (and, as discussed below, potentially even evolutions in the common law), which necessarily are considered external to the title.

It is not altogether clear how static a conception of the common law *Lucas* posits. The Court acknowledged that common law principles can undergo at least some alterations in adapting to new social circumstances.⁴³ However, the Court noted that the “no right” defense is available only upon

⁴² *Lucas*, 505 U.S. at 1029. See also Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 756 (2009) (suggesting that *Lucas*’s “background principles” inquiry “freezes those uses of land that are for constitutional purposes a nuisance—meaning that the owner is responsible to the public for its well-being and may be regulated by the state without compensation—just for those actions that state common law has *never* permitted at any time in its history”).

⁴³ *Id.* at 1031–32 (“The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (*though changed circumstances or new knowledge may make what was previously permissible no longer so*)[.]” (emphasis added) (citing RESTATEMENT (SECOND) OF TORTS § 827 cmt. g)). Justice Kennedy, concurring only in the *Lucas* judgment, acknowledged that the nature of fragile ecosystems may warrant development limitations that go beyond those set forth in background principles of nuisance and property law. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring in the judgment). It would seem that if the current distribution of property impedes acquisition of the resources necessary for human existence—either as the result of prior injustices or changing conditions that make an earlier just distribution no longer so—then individuals expecting a property system to produce fair results will suffer discouragement when takings compensation preserves that status quo. See J. Peter Byrne, *Regulatory Takings and “Judicial Supremacy”*, 51 ALA. L. REV. 949, 949–50 (2000); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 182–83 (2002); Underkuffler, *supra* note 18, at 120. In a now iconic 1967 article, Professor Frank Michelman argued that the public gains of a regulatory program should be compared to the “settlement costs” and “demoralization costs” that result from that program. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214–15 (1967). “Settlement costs” reflect the cost of identifying and compensating the burdened property owners; “demoralization costs” reflect the cost of not compensating burdened property owners (i.e., the impact the lack of compensation has on their investments) as well as the investor dispirit felt by others in the community at the sight of the lack of compensation. *Id.* Professor Michelman suggests that where “settlement costs” and “demoralization costs” both exceed the public gains of a regulatory program, that program should be enjoined. *Id.* at 1215. Otherwise, he contends that where “demoralization costs” exceed “settlement costs,” compensation should be paid, but where “settlement costs” exceed “demoralization costs,” compensation should not be paid. *Id.* The genius of “settlement costs” and “demoralization costs” may lie in their elusiveness, which generally has spared Professor Michelman’s theory from the barrage of critiques that other theories of takings compensation have suffered. However, Marc Poirier aptly has noted that Professor Michelman’s theory works from the premise that the current distribution of wealth is appropriate. See Poirier, *supra*, at 182–83. Relatedly, Nicolaus Tideman explains that “private titles to land nearly everywhere actually originated in a combination of force and rent-seeking,” such that requiring compensation for takings “perpetuates any injustices that exist in the initial distribution of entitlements.” See Tideman, *supra* note 18, at 1714–17, 1725 (suggesting that takings compensation often serves the goal of stability at the expense of equality); see also Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 334 (2006) (suggesting that even assuming no obvious common law rule prohibited construction of a home on *Lucas*’s lot does not assure that construction of a home will never be found to constitute a nuisance down the line).

a court's "objectively reasonable application of relevant precedents."⁴⁴ Indeed, the Court issued a not-so-veiled warning to the South Carolina courts regarding how they might go about interpreting their state's common law on remand, stating: "It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land."⁴⁵ This qualification suggests that *Lucas* largely envisioned two categories of cases arising from this background principles inquiry. A new regulation that restricts one's use of property (either partially or completely) and decidedly mirrors what was always an old common law rule does not take "property" because the definition of that "property" already included this restriction via the common law rule.⁴⁶ But every other new regulation—including those preventing harms, however serious, that

⁴⁴ *Lucas*, 505 U.S. at 1032 n.18 (emphasis omitted). The Court also seemingly placed a temporal limitation on the relevant body of background principles by suggesting that any "understand[ing]" derived from case law prior to the incorporation of the Takings Clause as applicable to the states in 1897 are "entirely irrelevant" to determining "the historical compact recorded in the Takings Clause." See *id.* at 1028 & n.15. This temporal limitation is rather curious, for it would seem difficult to decide the threshold question of whether a property interest that is capable of being taken exists with reference to "long recognized" "understandings" without resort to long-recognized case law. See Halper, *supra* note 32, at 334 n.35, 350-51. Further, the date of incorporation of the Takings Clause as applicable against the states actually is the subject of great debate. See Treanor, *Original Understanding*, *supra* note 32, at 860 n.369 (presenting differing perspectives on when the incorporation of the Takings Clause occurred, ranging from 1894 to 1978).

⁴⁵ *Lucas*, 505 U.S. at 1031. The *Lucas* Court further warned the South Carolina courts that they "must do more than proffer the legislature's declaration that the uses *Lucas* desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas* [so use your own as not to injure another's property]." *Id.* Professor Louise Halper suggests that, in this regard, *Lucas* "ignores the historical role of legislatures in nuisance decision-making." See Halper, *supra* note 32, at 330, 347-51 (reviewing South Carolina common law recognizing that the legislature could authorize uses that would otherwise be considered nuisances under a strict liability standard, such that those authorized uses could only be enjoined if the user acted negligently).

⁴⁶ See Michael C. Blumm & J.B. Ruhl, *Background Principles, Takings, and Libertarian Property: A Reply to Professor Huffman*, 37 *ECOLOGICAL L.Q.* 805, 818-19 (2010); Halper, *supra* note 32, at 337 (according to *Lucas*, "[t]he legislature's role in land use is limited to codifying the common law of private disputes"); *id.* at 352 (suggesting that the *Lucas* majority claims there is a "clear, unequivocal and single-minded common-law doctrinal tradition arising out of private law and denominating the appropriate conditions of land use," and critiquing this claim as historically inaccurate in light of a review of South Carolina precedent). Justice Scalia expressed *some* concern with the possibility that common law principles could be "manipula[ted]"; however, he found those concerns far lesser than affording "leeway . . . [to] legislative crafting of the reasons for its confiscatory regulation." *Lucas*, 505 U.S. at 1032 n.18. But see Michelman, *supra* note 22, at 68-69 ("[*Lucas*] goes too far in the direction of displacing judicial accountability for a fairness judgment onto a 'tradition' that I believe no likelier to be objectively decisive in this field, or impervious to partisanship, than is legal naturalism or a common law baseline."); Michelman, *supra* note 36, at 317-18.

would not be considered nuisances at common law—conceivably might implicate the Takings Clause.⁴⁷

The next Part develops a model demonstrating that application of the background principles inquiry in many actual takings cases offers a more complicated narrative than this simple dichotomy suggests.

II. A FUNCTIONAL PERSPECTIVE ON APPLICATION OF THE “BACKGROUND PRINCIPLES” INQUIRY

This Part suggests that, in *Lucas*’s wake, the background principles inquiry has taken on greater emphasis than was evident in the simple dichotomy envisioned by the *Lucas* Court. To advance this claim, this Part develops four categories, or “quadrants,” within which takings decisions exalting the common law can fall. For each quadrant, it offers a representative case decided within the past two years in the body of the Article, and includes additional examples and analysis in the footnotes.

Quadrants 2 and 3 reflect the categories of cases envisioned in *Lucas*, where the obviousness of the connection to or dis-connection from the common law dictates a rather straightforward decisional process.⁴⁸ Cases falling within Quadrants 1 and 4, however, involve strained judicial constructions of common law principles to support or reject regulatory takings challenges, respectively. The word “strained” is employed, as opposed to words like “engineered,” “manipulated,” or “created,” so as to include more than those occasional judicial decisions that consciously may be reached for what might be considered nefarious purposes; “strained” also encompasses the likely far larger group of decisions in which courts concerned with notions of fairness perhaps understandably, if imprecisely, employ a common law rule in a mechanical way to reach that end.

⁴⁷ As one commentator explained shortly after the Court released its opinion, “[i]ronically, future legislative efforts to remedy deficiencies in the common law of nuisance can now be overturned precisely *because* the common law fails to protect people from the particular harm in question.” John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 3 (1993); see also *id.* at 7 n.34 (“The very existence of extensive legislated land use restrictions is strong evidence of the common law’s inadequacy to meet changing needs.”); Joseph L. Sax, *Rights that “Inhere in the Title Itself”: The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 943 (1993) (“[M]ost controversy over asserted regulatory takings involves conduct that was *not* previously viewed as a nuisance.”).

⁴⁸ On this view, only those cases involving regulations mirroring a common law decision that takes the form of a “virtually self-applying rule-statement, something like ‘building houses in dunelands is forbidden,’” would fall within what is herein identified as Quadrant 2; all other cases, where any arguably related common law decisions take the form of “[m]ore spacious principles of right and wrong,” would fall within Quadrant 3 because such “spacious” principles “would not in such a law-of-rules jurisprudence count as law at all.” See Michelman, *supra* note 36, at 315, 325-27.

A. *An Introduction to the Quadrant Analysis*

The four quadrants represent the four potential answer combinations to two questions relevant in applying the background principles inquiry in takings cases. The *first question* asks: does the use restriction set forth in the challenged regulation mirror an old common law restriction? The *second question* asks: did a taking occur—or is a takings finding at least possible according to the reviewing court—because, in isolation or among other reasons, the new regulation fails to mirror an old common law restriction? The four quadrants are depicted in the following chart:

		#2: Court suggests at least a possible takings finding?	
		YES	NO
#1: Regulation mirrors a common law restriction?	YES	(Quadrant 1)	(Quadrant 2)
	NO	(Quadrant 3)	(Quadrant 4)

While answering the second of the two relevant questions is a purely objective task, answering the first admittedly demands a level of subjectivity. Such subjectivity suggests that there very likely will be disagreement as to the quadrants within which particular cases fall; indeed, what might be an obvious case to one reader could be considered a case that is legitimately decidable either way to someone else.⁴⁹ However, agreement on positioning

⁴⁹ See, e.g., Michelman, *supra* note 22, at 65–67 (suggesting, in a reply to Professor Epstein's contention to the contrary, that the state law at issue in *PruneYard v. Robins*, 447 U.S. 74 (1980)—a law prohibiting private mall owners from ejecting political protestors from mall grounds—could reasonably be determined to mirror a common law prohibition on the depletion of social capital). In a forthcoming article, Professor Joseph Singer explains how defining property based on relevant precedents, as *Lucas* commands, fails to appreciate the difficulty of determining what precedents mean in “hard cases.” See

individual cases into one quadrant instead of another is not essential to accepting this Article’s claim that the normative preference afforded to the common law has resulted in strained judicial construction of common law principles in deciding takings cases. Instead, accepting this claim requires only an acknowledgment that the four quadrants as described herein exist and that within each of these quadrants is more than a *de minimus* number of cases.⁵⁰

B. *Quadrant 2: “Yes-No” Cases*

Theoretically, if the answer to the first of the two relevant questions is “Yes,” there is no property interest that can be taken by a new regulation; therefore, the answer to the second question must be “No.” These rather routine “Yes-No” cases fall within Quadrant 2.

		#2: Court suggests at least a possible takings finding?	
#1: Regulation mirrors a common law restriction?		YES	NO
	YES	(Quadrant 1)	(Quadrant 2)
	NO	(Quadrant 3)	(Quadrant 4)

Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. (forthcoming 2013) (manuscript at 12-15) (claiming that the question in hard cases is whether a particular precedent applies or not). Professor Singer’s claim suggests that the “background principles” approach does not operate in the mechanical, deductive manner *Lucas* foretold. See *supra* Part I.B.

⁵⁰ In this manner, the “quadrant” analysis set forth here minimizes the potential for selective bias criticism, that is, it purposefully lessens the threat of inferential miscalculation due to an asymmetrical influence of nonrepresentative examples. On selective bias in legal scholarship, see, for example, Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 6-9 (2002).

A Texas appellate court's recent decision in *Brannan v. State*⁵¹ seems to be an example of a Quadrant 2 case. In *Brannan*, several landowners challenged the application of the Texas Open Beaches Act ("OBA"), which affords the public a mechanism to enforce collective rights to access beaches as acquired by dedication, prescription, or custom.⁵² The claimants owned homes fronting Pedestrian Beach in the Village of Surfside Beach on the Gulf of Mexico coastline.⁵³ The state, in accord with the OBA, ordered these homes removed after erosion and storm events combined to move the first line of vegetation landward of where those homes were located.⁵⁴ The state sought dismissal of the claimants' takings challenge to the application of the OBA because the beach had been "historically dedicated for the public's use," and the existence of the homes impeded the public's access to that beach.⁵⁵

⁵¹ 365 S.W.3d 1 (Tex. App. 2010), *vacated*, No. 10-0142, 2013 WL 297831 (Tex. Jan. 25, 2013).

⁵² *Id.* at 5-6; TEX. NAT. RES. CODE ANN. § 61.011 (West 2011).

⁵³ *Brannan*, 365 S.W.3d at 5-6.

⁵⁴ *See id.* at 7.

⁵⁵ *Id.* at 10, 26. With the landowners' petition for certiorari pending in *Brannan*, the Texas Supreme Court sided with a Gulf-front landowner in another Open Beaches Act matter. *See Severance v. Patterson*, 370 S.W.3d 705, 724-25 (Tex. 2012). In *Severance*, the Texas Supreme Court concluded, by a 5-3 vote, that even if the public acquired customary or dedicatory rights to access and use a specific beach in the West Galveston region of Texas's Gulf shore, those rights do not continue—that is, they do not "roll"—where avulsive events move those beaches landward. *Id.* at 707-08. The *Severance* decision is peculiar on several grounds. For one, the claimant purchased the Gulf-front lots at issue decades after the Texas legislature's 1959 adoption of the Open Beaches Act. *See id.* at 711; *infra* note 137. In addition, and more relevant here, Texas common law on the location of easements appears to provide significant support for the position that the purpose of the easement would be fulfilled only by a holding directly contrary to the one the *Severance* court reached. *See, e.g., Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 701 (Tex. 2002) (stating that furthering the "purpose" of an easement is of primary concern). Where the purpose of an established easement is facilitating the public's access to and use of the Gulf of Mexico, it is the proximity to the Gulf that seems critical, not the metes and bounds of that easement at the moment it was established. *See, e.g., Matcha v. Mattox ex rel. People*, 711 S.W.2d 95, 100 (Tex. App. 1986) ("A public easement on a beach cannot have been established with reference to a set of static lines on the beach, since the beach itself, and hence the public use of it, surely fluctuated landward and seaward over time. The public easement, if it is to reflect the reality of the public's actual use of the beach, must migrate as did the customary use from which it arose."); *see also* Richard J. McLaughlin, *Rolling Easements as a Response to Sea Level Rise in Coastal Texas: Current Status of the Law After Severance v. Patterson*, 26 J. LAND USE & ENVTL. L. 365, 385 (2011) (noting, prior to the Texas Supreme Court's decision on rehearing in *Severance*, that "it is well established in Texas that 'oil and gas leases convey an implied easement to use the surface as reasonably necessary to fulfill the purpose of the lease.' While '[t]he purpose of the easement cannot expand, . . . under certain circumstances, the geographic location of the easement may.'" (footnote omitted)); Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENVTL. L.J. 305, 353-54 (2010) ("[M]aintaining water adjacency for riparian/littoral landowners and assuring public use of overlying water (and some part of the foreshore) are the central goals of the law relating to migratory waters, and title should therefore follow a moving water boundary without regard to the rate, perceptibility, or suddenness of the movement . . ."). Seen in this light, *Severance* might be considered a Quadrant 1 case. *See infra* notes 78-93 and accompanying text. On the eve of this Article's publication, the Texas

In support of the implicit historical dedication, the state produced affidavits of a former Village building official, who had lived in Surfside since 1989, and a citizen who began visiting the Surfside beaches in the 1960s and continued to do so.⁵⁶ Both attested to the public's longstanding use of Pedestrian Beach for "swimming, fishing, sunbathing, playing, relaxing, beach combing, and . . . surfing."⁵⁷ While the beach gained its name after the Village prohibited driving on it several decades ago, these affidavits demonstrated that the public continued to use that segment of beach—and drive on either side of it—on a regular basis without receiving permission from the Gulf-front landowners.⁵⁸ Moreover, the state offered the deposition testimony of a former Village mayor, who bought his Gulf-front property in Surfside in the 1950s.⁵⁹ The former mayor explained that he had seen members of the public "use the beach seaward of his property . . . 'forever.'"⁶⁰

In response, the claimants contended only that they did not intend to personally dedicate the beach on which, as the result of erosion and multiple storm events, their homes now rested;⁶¹ they did not offer any evidence—nor did they even allege—that, historically, an implied easement from the water's edge to the first line of vegetation at Pedestrian Beach did not exist.⁶² As such, the reviewing court ultimately concluded that the challenged state action (enforcement of a public easement in accord with a statute authorizing the removal of structures resting on and thereby blocking that easement) happened to reflect a common law restriction (a ban on revoking implicit dedication of land by one's predecessors to the public) in a rather straightforward manner.⁶³ Finding such a connection (i.e., answering the first question "Yes"), the court held that no taking occurred (i.e., the court answered the second question "No").⁶⁴

Supreme Court, without hearing oral argument, granted the landowners' petition for certiorari in *Brannan*, and issued a brief *per curiam* order that vacated the appellate court's decision and remanded the case "for further consideration in light of *Severance*." See *Brannan v. State*, No. 10-0142, 2013 WL 297831, at *1 (Tex. Jan. 25, 2013). Given the fact-sensitive nature of the inquiry surrounding implied dedication, customary use, and avulsive-versus-accretive events (as well as allegations surrounding mootness and the potential waiver of certain claims by the *Brannan* plaintiffs), it remains possible that the state ultimately will prevail in *Brannan* despite the holding in *Severance*.

⁵⁶ *Brannan*, 365 S.W.3d at 14-15.

⁵⁷ *Id.* at 15.

⁵⁸ *Id.* at 15-16.

⁵⁹ *Id.* at 15.

⁶⁰ *Id.*

⁶¹ *Id.* at 16. The *Brannan* decision ultimately applied to only three claimants. The other eleven claimants' homes were destroyed by natural tidal surges prior to the court's ruling. *Id.* at 10.

⁶² *Brannan*, 365 S.W.3d at 16.

⁶³ *Id.* at 25-27.

⁶⁴ *Id.* at 26 ("We hold the easement that rolled to the houses located on these properties does not constitute a taking . . . because the public's easement was established by dedication under the common law."). For other recent examples of cases that arguably fall within Quadrant 2, consider *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 987 (9th Cir. 2002) (concluding that a Washington land-

C. *Quadrant 3: “No-Yes” Cases*

Only if the answer to the first of the two relevant questions in the quadrant analysis is “No” does it seem possible that a new regulation could amount to an unconstitutional taking. These readily discernible “No-Yes” cases fall within Quadrant 3.

		#2: Court suggests at least a possible takings finding?	
		YES	NO
#1: Regulation mirrors a common law restriction?	YES	(Quadrant 1)	(Quadrant 2)
	NO	(Quadrant 3)	(Quadrant 4)

A recent decision by the U.S. Court of Federal Claims in *Placer Mining Co. v. United States*⁶⁵ serves as an apt example. The court denied the government’s motion for summary judgment on a claim that the government committed a physical taking in the course of a contamination clean-up at an Idaho zinc mine pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act.⁶⁶

owner did not hold a compensable property interest in his proposal to build private residences on elevated platforms above navigable tidelands because the construction’s purpose “was inconsistent with the public trust that the State . . . is obligated to protect”); *Pub. Access Shoreline Haw. v. Haw. Cnty. Planning Comm’n*, 903 P.2d 1246, 1271 (Haw. 1995) (rejecting a resort developer’s takings challenge to land use restrictions where those restrictions mirrored the limitations imposed by customary Native American gathering rights); *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 120 (S.C. 2003) (holding that the denial of an application to build a levee to facilitate development did not implicate a property interest capable of being taken when the levee would have been constructed on submerged public trust lands).

⁶⁵ 98 Fed. Cl. 681 (2011).

⁶⁶ *Id.* at 682-84.

The court explained that the government's entering the claimant's land to remediate an environmental hazard may be immune from takings liability given that such work abates a common law nuisance.⁶⁷ But in the course of conducting this remediation, the government constructed a concrete channel and a narrow bridge with the intent to allow the claimants continued access to their mine.⁶⁸ According to the claimants, however, this channel and bridge were not sufficient to allow the claimants entry to the mine with their mining equipment.⁶⁹

The government did not allege that the claimant's commercial operation of the mine constituted a nuisance or that the conditions occasioning the remediation work could only be addressed through the construction of the channel and bridge that it actually built.⁷⁰ Therefore, the court found the claimant's commercial operation of the mine distinct from those conditions occasioning the remediation work, such that the takings claim related to the use of the mine for commercial purposes was "not susceptible to the government's nuisance defense."⁷¹ Thus, the challenged state action in *Placer Mining* uncomplicatedly did not reflect a common law restriction (i.e., the court answered the first question "No"), and the court therefore concluded that a takings finding was possible (i.e., the court answered the second question "Yes").⁷²

D. *Beyond Quadrants 2 and 3*

Cases falling within the quadrants discussed above do not involve any apparent strained construction of common law principles. In Quadrant 2, the regulation rather clearly mirrors an uncontroverted common law rule, the rationale for which, at least as applied in these instances, has withstood the test of time; in Quadrant 3, the regulation rather clearly does not. In this sense, cases falling within Quadrants 2 and 3 can be considered straight-

⁶⁷ *Id.* at 685-86. The court raised the possibility, though it did not decide, that the background principles inquiry might not be applicable to physical takings claims. *Id.*; but see *supra* note 38 (citing sources supporting the position that the background principles inquiry is relevant in both physical and regulatory takings cases). For a further discussion of this issue, see, for example, Miles E. Coleman, *Taking on a Nuisance: Applying Lucas to Physical Takings*, 21 FED. CIR. B.J. 747, 756-58 (2012).

⁶⁸ *Placer Mining*, 98 Fed. Cl. at 686.

⁶⁹ *Id.* at 685.

⁷⁰ *Id.* at 686.

⁷¹ *Id.*

⁷² *Id.* at 686-87; see also *Love Terminal Partners v. United States*, 97 Fed. Cl. 355, 363, 398 (2011) (declaring that the claimant's construction and operation of a terminal on leased land at Dallas Love Field Airport did not, by itself, constitute a nuisance, such that background principles inherent in the claimant's title did not preclude a takings finding where federal legislation "intended to protect the economic vitality" of nearby Dallas-Fort Worth International Airport mandated a reduction in the number of airline gates at Love Field).

forward applications of the “background principles” inquiry, seemingly reflecting the two categories of cases envisioned by the *Lucas* Court.

However, two additional categories of cases—those falling within Quadrants 1 and 4—have reared their heads. Quadrant 1 includes instances where courts allege that a new governmental action responsive to a particular problem does not mirror a common law restriction (whereby takings liability is possible), when in reality there are strong arguments to suggest that the new regulation mirrors a common law restriction quite well.⁷³ Quadrant 4 cases represent the converse, whereby courts assert that a new governmental action responsive to a particular problem—most often a complex one that has arisen only in the modern-day—does mirror a common law restriction, when in reality that connection is rather specious. Quadrant 4 cases are of the type that have generated support for the theory that the Takings Clause should apply to judicial alterations of the common law, at least when such a strained reading of the common law serves as an end-run around what otherwise likely would amount to a regulatory taking.⁷⁴ Quadrant 1 cases, then, might be considered to reflect just the opposite—courts are straining the common law to serve as an end-run around what otherwise would *not* amount to a regulatory taking.⁷⁵

The pages that follow offer the recent decisions of *Casitas Municipal Water District v. United States*⁷⁶ and *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*⁷⁷ as representative examples of Quadrant 1 cases and Quadrant 4 cases, respectively. This Article will return to these examples in Part III to discuss how the disputes therein might have been resolved under an alternative mode of analysis that places less emphasis on the common law.

⁷³ These cases arise most commonly in situations where one of the categorical takings tests would apply, such that the decision to disconnect the challenged regulation from the common law effectively is dispositive of the takings result. The examples offered below generally fit this mold.

⁷⁴ See, e.g., *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Envtl. Prot.*, 130 S. Ct. 2592, 2602 (2010) (plurality opinion) (declaring that a state court’s opinion finding that an “established” property right “no longer exists” may amount to an unconstitutional taking); *Order Denying Certiorari, Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1211 (1994) (Scalia, J., dissenting) (“Our 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.”). For scholarship advancing a variety of theories in support of a judicial takings doctrine, see, e.g., Eagle, *supra* note 11; Epstein, *supra* note 11; Huffman, *Background Principles*, *supra* note 16; Martinez, *supra* note 11; Thompson, *supra* note 13. Ironically, the U.S. Supreme Court’s unanimous opinion in *Stop the Beach* itself involved a rather questionable reading of Florida common law. See *infra* notes 94–114 and accompanying text.

⁷⁵ See, e.g., J. Peter Byrne, *Rising Seas and Common Law Baselines: A Comment on Regulatory Takings Discourse Concerning Climate Change*, 11 VT. J. ENVTL. L. 625, 638 (2010); Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 566 (1998).

⁷⁶ 102 Fed. Cl. 443 (2011), *aff’d*, No. 2012-5033, 2013 WL 692763 (Fed. Cir. Feb. 27, 2013).

⁷⁷ 130 S. Ct. 2592 (2010).

1. Quadrant 1: “Yes-Yes” Cases

#1: Regulation mirrors a common law restriction?	#2: Court suggests at least a possible takings finding?	
	YES	NO
YES	(Quadrant 1)	(Quadrant 2)
NO	(Quadrant 3)	(Quadrant 4)

In *Casitas*, the California State Water Resources Control Board (“SWRCB”) issued the Casitas Municipal Water District (“the District”) a license to certain water flows.⁷⁸ The takings dispute involved federal regulatory restrictions imposed on a District-managed irrigation and water supply project.⁷⁹ These restrictions sought to protect endangered steelhead trout in accord with the federal Endangered Species Act (“ESA”).⁸⁰ The restrictions led the District to erect and maintain—and direct water to—a fish passage facility, as well as provide additional water flows downstream to facilitate fish passage.⁸¹ The District alleged that these restrictions amounted to an unconstitutional taking of its water flows.⁸²

⁷⁸ *Casitas*, 102 Fed. Cl. at 446.
⁷⁹ *Id.* at 445.
⁸⁰ *Id.* at 446.
⁸¹ *Id.* at 447.
⁸² *Id.* at 450. The District conceded that it could not meet its burden of proving that a taking occurred under the *Penn Central* test applicable to partial regulatory takings claims. *Id.* The decision by the U.S. Court of Federal Claims to dismiss the takings claim as unripe, which is discussed in the text above, resulted from a hearing on remand. *Casitas*, 102 Fed. Cl. at 445, 472. Prior to this remand, the U.S. Court of Appeals for the Federal Circuit concluded—at least on the specific facts where the restrictions required the District to redirect water (for fish passage purposes) that had already been diverted into the District’s private canals—that the District’s claim should be considered a physical takings claim, rather than a partial regulatory takings claim. *Casitas Mun. Water Dist. v. United States*, 543 F.3d

Though the U.S. Court of Federal Claims recently dismissed the District's takings claim on ripeness grounds,⁸³ it also rejected the federal government's assertion that the common law public trust doctrine serves as a categorical defense to the District's claim.⁸⁴ The court asserted that the public trust doctrine calls for a "balancing" analysis, and it sided with the District on this issue because "the foregone diversions are not necessarily surplus to [the District's] needs" and the United States "failed to show that . . . fish protection . . . is superior to [the District's] use of the water."⁸⁵

The conclusion that the public trust doctrine demands judicial balancing in this context does not appear to be supported under California precedent.⁸⁶ The doctrine requires the SWRCB to consider certain public trust uses in determining whether to permit private action that may adversely affect the public trust, say, by impairing fish habitat.⁸⁷ However, the SWRCB's decision to permit an action that harms fish does not establish an entitlement to continue that action in perpetuity absent compensation;⁸⁸ rather, the public trust doctrine precludes the claim of an entitlement to act in a way that harms a public trust resource.⁸⁹

1276, 1296-97 (Fed. Cir. 2008) (remanding the matter for a determination as to whether background principles of California law immunized the government's action from takings liability).

⁸³ *Casitas*, 102 Fed. Cl. at 470 (concluding that the restrictions had not, at least thus far, interfered with the District's "beneficial use" of the water since the District had not been forced to reduce water deliveries).

⁸⁴ *Id.* at 455, 458.

⁸⁵ *Id.* at 461. The judge in *Casitas*, John P. Wiese, had rejected, on slightly different grounds, the government's contention that the public trust doctrine barred a takings claim related to ESA restrictions on water flows a decade earlier in *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001). While the federal government chose to pay the judgment in lieu of filing an appeal in *Tulare Lake*, Judge Wiese's decision in that case has been roundly criticized by property scholars. See, e.g., Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 556 (2002); John D. Echeverria & Julie Lurman, "Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause, 16 TUL. ENVTL. L.J. 331, 379-81 (2003); Joseph L. Sax, Lecture, *Environment and Its Mortal Enemy: The Rise and Decline of the Property Rights Movement*, 28 U. HAW. L. REV. 7, 12 (2005).

⁸⁶ See, e.g., *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 712 (Cal. 1983) (asserting that the public trust doctrine proscribes "any . . . party from claiming a vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust").

⁸⁷ See Echeverria, *supra* note 38, at 969.

⁸⁸ See *Nat'l Audubon Soc'y*, 658 P.2d at 727 (dismissing the contention that "the recipient of a board license enjoys a vested right in perpetuity to take water without concern for the consequences to the trust"); *Boone v. Kingsbury*, 273 P. 797, 816 (Cal. 1928) ("The state may at any time remove structures from the ocean erected by its citizens, even though they have been erected with its license or consent, if it subsequently determines them to be purprestures or finds that they substantially interfere with navigation or commerce.").

⁸⁹ See Raymond Dake, *Trout of Bounds: The Effects of the Federal Circuit Court of Appeals' Misguided Fifth Amendment Takings Analysis in Casitas Municipal Water District v. United States*, 36 COLUM. J. ENVTL. L. 59, 88 (2011); Echeverria, *supra* note 38, at 962; Patrick A. Parenteau, *Who's*

This understanding of California's public trust doctrine renders the argument for the public trust doctrine's applicability rather undemanding here: fish present in the waters at issue are considered public trust resources, and the District's regulated activities were harming those fish.⁹⁰ It follows that if the action permitted by the SWRCB harms the public trust (permission that presumably is lawful in its own right given the board's authority to facilitate "economic development"⁹¹), a subsequently adopted regulation seeking to prevent that harm cannot trigger a takings claim because the regulation does not restrict a vested entitlement recognized under state law.

Even assuming the public trust doctrine calls for a balancing analysis under these circumstances in California, it is not clear that the court's application of that analysis in *Casitas* offered any reasonable prospect of fishery protection prevailing over the District's diversions in any case. As Professor John Echeverria has contended, "the court's balancing analysis does not involve a genuine balancing at all, but instead functions like a per se test favoring development interests over fish protection in virtually every instance."⁹²

In this sense, the *Casitas* holding reflects a rather strained judicial construction of a common law principle to support a regulatory takings challenge.⁹³ The regulation seemed to bear a strong resemblance to a common

Taking What? Property Rights, Endangered Species, and the Constitution, 6 FORDHAM ENVTL. L.J. 619, 631 (1995).

⁹⁰ Echeverria, *supra* note 38, at 955-56.

⁹¹ *Nat'l Audubon Soc'y*, 658 P.2d at 727; *see also id.* at 712 ("The state must have the power to grant nonvested usufructuary rights to appropriate water even if diversions harm public trust uses.").

⁹² Echeverria, *supra* note 38, at 970; *see also* A. Dan Tarlock, *Takings, Water Rights, and Climate Change*, 36 VT. L. REV. 731, 755 n.146 (2012) (suggesting that the Court of Federal Claims "set an impossible standard to prove a trust violation [by requiring that the] '[the federal government] must . . . show that the balance between [the District's] various uses and the uses identified in the biological opinion weighs in favor of the fish.'" (quoting *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 461 (2011))).

⁹³ For other recent examples of cases that arguably fall within Quadrant 1, consider *Severance v. Patterson*, 370 S.W.3d 705 (Tex. 2012), and *Bowles v. United States*, 31 Fed. Cl. 37 (1994). The possibility of classifying *Severance* as a Quadrant 1 case is discussed *supra* note 55. In *Bowles*, the U.S. Army Corps of Engineers denied a landowner's Clean Water Act permit application to fill wetlands for the construction of a private residence. 31 Fed. Cl. at 43. The U.S. Court of Federal Claims concluded that the permit denial amounted to a taking because "the development of a residential lot does not constitute a nuisance." *Id.* at 52. Yet, as Professor Michael Blumm has noted, the court's opinion did not include any "significant discussion of hydrological evidence." Blumm & Ritchie, *supra* note 5, at 336 n.93. Had it done so, it is quite possible that the loss of ecosystem services provided by the wetlands at issue could have been considered a common law nuisance. *See* ALDO LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* 216 (1949) (asserting that land "is not merely soil; it is a fountain of energy flowing through a circuit of soils, plants, and animals"). *But see* EPSTEIN, *supra* note 5, at 123 (challenging the notion that wetlands regulations fall within the "antinuisance doctrine").

In *Lucas*, the U.S. Supreme Court remanded the case to allow South Carolina's state courts to determine whether the legislation mirrored a background principle of state common law. *Lucas v. S.C.*

law restriction (i.e., the answer to the first question is “Yes”), yet the court concluded nonetheless that a takings finding was possible (i.e., the court answered the second question “Yes”).

2. Quadrant 4: “No-No” Cases

In *Stop the Beach*, it seems that both the Florida Supreme Court and the U.S. Supreme Court did the converse of the *Casitas* court by engaging in a strained judicial construction of common law principles to *reject* a regulatory takings challenge.

		#2: Court suggests at least a possible takings finding?	
		YES	NO
#1: Regulation mirrors a common law restriction?	YES	(Quadrant 1)	(Quadrant 2)
	NO	(Quadrant 3)	(Quadrant 4)

The dispute in *Stop the Beach* emanated from a 1961 Florida statute authorizing publicly funded, artificial beach replenishment.⁹⁴ The statute

Coastal Council, 505 U.S. 1003, 1031 (1992); *but see supra* note 45 and accompanying text (suggesting that the *Lucas* Court issued a strong warning to South Carolina’s state courts regarding how those courts might decide the background principles question). On remand, the South Carolina Supreme Court concluded that the “Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas’s desired use of his land.” *See Lucas v. S.C. Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992). At least one scholar has posited that this conclusion resulted from the failure of the state to argue that the public and wildlife trust doctrines serve as inherent limitations on the claimant’s land. *See Blake Hudson, The Public and Wildlife Trust Doctrines and the Untold Story of the Lucas Remand*, 34 COLUM. J. ENVTL. L. 99, 130-39 (2009). Professor Hudson’s conclusion suggests that the *Lucas* remand fits within Quadrant 1 as well.

⁹⁴ *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl. Prot.*, 130 S. Ct. 2592, 2599 (2010) (plurality opinion). For a description of the rather complex process of engineering new beaches, see

declared that these new beaches, constructed on state-owned submerged lands, would be open to the public.⁹⁵ A select group of waterfront landowners alleged that, while the statute's application did not divest them of any actual acreage, it "took" their alleged property rights (1) to maintain contact with the water and (2) to gain title to future accretions (i.e., slow, imperceptible, natural additions of sand).⁹⁶ In rejecting the landowners' takings claims, both the Florida Supreme Court and the U.S. Supreme Court found a need to parse Florida's common law in search of a common law principle that the beach replenishment statute reflected.

As the source of the alleged rights, the claimants primarily pointed to two decisions of the Florida Supreme Court from 1976 and 1987.⁹⁷ It may seem puzzling that the claimants relied on common law decisions issued well *after* the beach replenishment legislation went into effect. Yet the Florida Supreme Court determined that the legislation took nothing from the landowners only because, despite the landowners' apparent assumption to the contrary, the landowners never had either of the alleged rights under Florida common law.⁹⁸ The Florida Supreme Court described a 1995 hurricane as an "avulsive" event (i.e., one producing a sudden, dramatic shoreline change), and concluded that, through replenishment, the state had the ability to reclaim the land lost in the course of that natural event.⁹⁹ What land the state has to reclaim in such an instance is not entirely clear, given that, pre-avulsion, the state may have owned only lands that already were submerged.¹⁰⁰ Nevertheless, the court held, the beach replenishment legislation—having produced a result that mimicked the common law principle of reclamation—implicated no property rights that could be taken in violation of the Constitution's Takings Clause.¹⁰¹

NORBERT P. PSUTY & DOUGLAS D. OFIARA, COASTAL HAZARD MANAGEMENT: LESSONS AND FUTURE DIRECTIONS FROM NEW JERSEY 174-87 (2002).

⁹⁵ 1961 Fla. Laws 437 (codified as amended at FLA. STAT. ANN. §§ 161.011-161.45 (West 2012)).

⁹⁶ *Stop the Beach*, 130 S. Ct. at 2600; *see also* 78 AM. JUR. 2D *Waters* § 311 (2012) (defining accretion).

⁹⁷ *See* Reply Brief for Petitioner at 15-17, *Stop the Beach*, 130 S. Ct. 2592 (No. 08-1151) (citing Bd. of Trs. of Internal Improvement Trust Fund v. Sand Key Assocs., Ltd., 512 So. 2d 934 (Fla. 1987); State v. Fla. Nat'l Props., Inc., 338 So. 2d 13 (Fla. 1976)).

⁹⁸ *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1112 (Fla. 2008) *aff'd sub nom.* *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010).

⁹⁹ *Id.* at 1116 ("Under Florida common law, hurricanes, such as Hurricane Opal in 1995, are generally considered avulsive events that cause avulsion."); *id.* at 1117 ("[W]hen the shoreline is impacted by an avulsive event, the boundary between public lands and private uplands remains the pre-avulsive event MHWL [i.e., mean high water line]. Consequently, if the shoreline is lost due to an avulsive event, the public has the right to restore its shoreline up to that MHWL.").

¹⁰⁰ *But see* Donna R. Christie, *Of Beaches, Boundaries and SOBs*, 25 J. LAND USE & ENVT'L. L. 19, 49 (2009) (suggesting that the state has "crucially important land to reclaim between the pre-avulsive low and high water lines" (emphasis omitted)).

¹⁰¹ *Walton Cnty.*, 998 So. 2d at 1120-21.

The petitioners recast their challenge in front of the U.S. Supreme Court on the novel theory that the Florida Supreme Court so significantly reinterpreted state law that the Florida court's decision, as a state act in and of itself, constituted a compensable taking.¹⁰² The U.S. Supreme Court upheld the Florida Supreme Court's decision that the beach replenishment statute did not amount to a taking.¹⁰³ However, it did so without reference to reclamation; rather, the decision rested on a rather strained analogy to reasoning related to the principle of avulsion, as that principle was discussed in the 1927 state case of *Martin v. Busch*¹⁰⁴—a case to which the Florida Supreme Court below had not even cited.¹⁰⁵

The U.S. Supreme Court interpreted *Martin* as holding that when the state lowered a lake's water level, and thereby created dry lakefront land, that act constituted an avulsive event; therefore, the property line between the state's interest and the private upland owner's interest remained where it had been prior to the state's act.¹⁰⁶ But it appears that the conclusion attributed to the Florida Supreme Court's decision in *Martin* was not an essential component of that case's holding.¹⁰⁷ More significantly, even if the

¹⁰² See Order Granting Certiorari, *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 129 S. Ct. 2792, 2792-93 (2009); see also Reply Brief for Petitioner at i, *supra* note 97. Judicial takings allegations may arise not only in this context—where courts rely on and, at times, clarify or alter common law rules to determine the fate of legislative or regulatory initiatives—but also in straight common law rulings, most commonly those involving public rights such as access to beaches. See, e.g., Mulvaney, *supra* note 11, at 260-63. This Article largely sets aside the “judicial takings” posture of the landowners’ claim before the U.S. Supreme Court in *Stop the Beach* to focus on the Court’s finding it unnecessary to evaluate the case through the lens of Florida’s common law at all. See *supra* note 11.

¹⁰³ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2613 (2010) (plurality opinion).

¹⁰⁴ 112 So. 274 (Fla. 1927).

¹⁰⁵ *Stop the Beach*, 130 S. Ct. at 2612.

¹⁰⁶ *Id.* at 2611.

¹⁰⁷ Recounting the historical backdrop of the dispute in *Martin*, the Florida Supreme Court explained that the State of Florida, by virtue of its sovereignty following admission into the Union in 1845, became the owner of all lands submerged by navigable waters up to the ordinary high water line, as well as all tidelands within its borders. *Martin*, 112 So. at 283. In 1850, Congress granted to the state certain “swamp and overflowed lands.” *Id.* The Trustees of the Internal Improvement Trust Fund of the State of Florida, as declared by act of the Florida legislature in 1904, had the authority to convey the “swamp and overflowed lands” that Congress had granted to the state in 1850. *Id.* at 286. In 1919, Florida’s legislature also conferred upon the Trustees the authority to convey submerged lands. *Id.*

In *Martin*, the Trustees made a conveyance to the complainant’s predecessors in 1904. *Id.* at 277, 279. In 1923, the complainant alleged the 1904 conveyance included not only “swamp and overflowed lands” but also lands that were submerged at the time of the conveyance but since had become uplands in light of lake-drainage operations by the state. See *id.* at 277. The Florida Supreme Court concluded that not only did the “[T]rustees in 1904 [have] no authority to convey sovereignty lands below [the] high-water mark of the lake,” *id.* at 286, but that the Trustees “*did not attempt or purport or intend to include any sovereignty . . . lands*” in the 1904 conveyance at issue. *Id.* at 287 (emphasis added). Accordingly, the Court noted:

cited principles from *Martin* were not dicta, the U.S. Supreme Court's decision to treat *Martin* as the reason to reject a takings claim to the challenged statute seems suspect in these circumstances.

Avulsions generally are considered sudden, dramatic *natural* changes to shorelines (such as an inlet breach or a hurricane); whether the avulsion leads to a wider beach or a narrower beach, the property boundary remains the pre-avulsion line (here, the line that previously separated land from water).¹⁰⁸ A sudden, dramatic natural change might, in any given instance, result in more or less submerged lands. Yet the U.S. Supreme Court said that an *artificial*, state-created change to the shoreline via beach replenishment was an avulsion as well, under its own interpretation of Florida law,¹⁰⁹ even though this change obviously only affects the amount of sandy beach in one direction (i.e., replenishment always results in more, not less, beach).¹¹⁰

If the artificial beach replenishment is considered an avulsive event (instead of, as the Florida Supreme Court declared below, the hurricane that necessitated it¹¹¹), then the scope of beach replenishment projects moving forward could change significantly.¹¹² But most important here, the U.S.

The power of the state by appropriate legislative action to lower the level of the waters in the lake or by drainage canals, dikes, or otherwise, to contract the boundaries of the navigable lake and to make proper disposition of the lands that had been below [the] high-water mark, is not involved here.

Id. at 286 (emphasis added).

Thus, that the Florida Supreme Court also asserted in *Martin* that if “to serve a public purpose the state . . . lowers the level of navigable waters so as to . . . uncover lands below the original high-water mark, the lands so uncovered . . . continue to belong to the state,” *id.* at 287, apparently did not have any effect on the outcome, and thus bears no primary precedential value.

On an interesting procedural note, it appears that, in light of the disqualification of multiple state Supreme Court Justices in *Martin* (including the Chief Justice), three of the five individuals who decided the case were temporary appointees from the lower courts, sitting only to meet the state's five-Justice quorum. *Id.* at 288.

¹⁰⁸ See Epstein, *supra* note 11, at 56.

¹⁰⁹ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2612 (2010) (plurality opinion).

¹¹⁰ See Sax, *supra* note 55, at 310, 353-55.

¹¹¹ See *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1116 (Fla. 2008), *aff'd sub nom.* *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.* 130 S. Ct. 2592 (2010).

¹¹² The U.S. Supreme Court's interpretation of Florida common law would suggest that *any* filling of submerged lands—no matter how large an area and regardless of whether that area previously became submerged as the result of an avulsive event—does not implicate the Takings Clause under Florida law. Indeed, under the U.S. Supreme Court's approach, the Florida legislation may have afforded rights to waterfront landowners—continued direct water access, prohibitions on the state building structures on the new beach, etc.—that would be unnecessary under a strict application of the common law rule of avulsion. See Christie, *supra* note 100, at 59-62 (suggesting that, in this sense, the Florida statute's approach provides a result “far more fair than simply applying the common law of avulsion and concluding that the now land-locked upland owners have no littoral rights”). Under the Florida Supreme Court's approach, however, it appears that only filling that aims to reclaim land lost via an avulsive

Supreme Court extended not a scintilla of deference to the Florida Supreme Court's rationale within the decision it was reviewing, but extended almost absolute deference to a far earlier, murky decision of that same court, which did not involve a major body of water (and thus implicated different access and exclusion interests)¹¹³ and was decided long before the technological phenomenon of modern beach replenishment.¹¹⁴ The rather strained con-

event is categorically defensible in the face of a takings claim. *Id.* at 58 ("The application of the Act that the Florida Supreme Court finds constitutional is simply the restoring of the beach to the pre-avulsion *status quo* based on a common law right to reclaim land after an avulsive event.").

¹¹³ Indeed, it does not appear that the dispute in *Martin* directly involved submerged lands at all. See *supra* note 107.

¹¹⁴ See generally NAT'L RESEARCH COUNCIL, MARINE BD., BEACH NOURISHMENT AND PROTECTION (1995) (discussing beach replenishment strategies). For other recent examples of cases that arguably fall within Quadrant 4, consider *Shell Island Homeowners Ass'n v. Tomlinson*, 517 S.E.2d 406 (N.C. Ct. App. 1999), *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005), and *Bennis v. Michigan*, 516 U.S. 442 (1996).

In *Shell Island*, North Carolina state legislation prohibited the construction of sea walls, which waterfront landowners challenged as a taking. See *Shell Island Homeowners Ass'n*, 517 S.E.2d at 409-410. The North Carolina Court of Appeals held that the landowners' asserted right to block out the sea had "no support in the law." *Id.* at 414. However, even prominent scholars generally averse to expansive takings protections have acknowledged that "whether waterfront property owners have any common law right to erect hardened structures in statutorily designated areas of environmental concern is not as simple as the court makes it appear." See Joseph J. Kalo, *North Carolina Oceanfront Property and Public Waters and Beaches: The Rights of Littoral Owners in the Twenty-First Century*, 83 N.C. L. REV. 1427, 1432 n.13, 1489 (2005); see also Byrne, *supra* note 77, at 637-38.

In *Air Pegasus*, the U.S. Court of Federal Claims rejected the takings claim of a lessee who asserted that the federal government took his interest in leased property in Washington, D.C. See *Air Pegasus of D.C., Inc. v. United States*, 60 Fed. Cl. 448, 459 (2004) *aff'd*, 424 F.3d 1206 (Fed. Cir. 2005). The claimant's lease stated that the property could be used only as a heliport. *Id.* at 448. The alleged unconstitutional action involved a federal order halting the claimant's (and other) heliport operations in the wake of the September 11, 2001 terrorist attacks. *Id.* at 448-49. The Court of Federal Claims sided with the government on the theory that the common law navigational servitude—traditionally applicable to navigable waters—bears similarities to navigable airways. *Id.* at 458-59. There may well be reasons to reject the takings claim where this type of regulation is advanced following a terrorist attack; however, analogizing this restriction to the common law navigational servitude seems strained. While the U.S. Court of Appeals for the Federal Circuit agreed that no taking occurred, it did so on different reasoning. See *Air Pegasus*, 424 F.3d at 1218-19 ("[O]ur conclusion is not grounded in the government's navigational servitude Rather, our conclusion . . . is that Air Pegasus simply does not have a private property interest in what is public airspace."). Neither the Court of Federal Claims nor the Circuit Court spent any considerable effort discerning whether regulations seeking to protect national security interests that may not be so obviously included within the scope of a common law principle require compensation. Professor Rose includes the case in what she refers to as her "weird takings claims" file. See Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681, 1698 (2007).

Bennis, admittedly, is a nontraditional takings case in that the U.S. Supreme Court concluded that the case involved an "exercise of governmental authority [asset forfeiture] other than the power of eminent domain." *Bennis*, 516 U.S. at 452-53. However, one component of the Court's decision nonetheless represents the type of cases that fall within Quadrant 4. In the face of both takings and due process claims, the Court upheld the forfeiture of an automobile as contributing to the "public nuisance" of

structions of the common law by the Florida Supreme Court and the U.S. Supreme Court gave those courts paths of decision that obviated the need for a more direct and complex analysis of the competing interests at stake.

* * *

In sum, these two lines of cases—those decisions falling within Quadrants 1 and 4—have applied *Lucas*'s originally formalistic background principles inquiry in a rather elastic and opaque way. One might say that Quadrant 1 cases assert that the new regulation represents a square peg that does not fit into the round hole of the old common law, in order to allow for the possibility of a takings finding; meanwhile, Quadrant 4 cases essentially force what is a square regulatory peg into a round common law hole to conclude that no taking occurred. The following Part suggests an alternative course by advocating for a mode of analysis that deemphasizes the common law in favor of a more overt contextual evaluation that recognizes background principles might not be sufficient to confront modern problems and serve modern human needs.

III. AN EMPHASIS ON FOREGROUND PRINCIPLES

The prior Part offers evidence demonstrating that *Lucas*'s normative preference for "background principles" of the common law that "inhere" in a takings claimant's title has resulted in strained judicial construction of common law principles to both reject and support regulatory takings challenges. Such an emphasis on whether a regulation challenged as a taking

a neighborhood with a reputation for illicit activity. *Id.* at 443. The holding came despite the fact that it was the claimant's husband, without the claimant's knowledge, who used the automobile in the commission of the crime of engaging in sexual activity with a prostitute in this particular neighborhood. *Id.* at 444. (The Civil Asset Forfeiture Reform Act superseded *Bennis* in the sense that Congress included an "innocent owner" defense to many civil forfeitures. See 18 U.S.C. § 983(d) (2006)). In dissent, Justice Stevens described the majority's justifying the forfeiture on the grounds that the automobile itself constituted a nuisance as "bizarre." See *Bennis*, 516 U.S. at 464 n.9 (Stevens, J., dissenting). On the majority's view, according to Justice Stevens, "the very same offense, committed in the very same car, would not render the car forfeitable if it were parked in a different part of Detroit." *Id.*

For a particularly colorful pre-*Lucas* example of a Quadrant 4 case, see *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 644-45 (Tex. App. 1981) (holding that private lands submerged by a hurricane inhered in the state's title on the assertion that "the law of the State has been committed to the following test: 'though the witnesses may see, from time to time, that progress has been made, they could not perceive it while the progress was going on.' The application of the quoted test for 'gradual and imperceptible' has resulted in holdings of erosion where the change wrought to the land has been indeed both sudden and perceptible." (internal citation omitted)). As Professor Sax notes, "[i]t is easy enough to poke fun at a court that is prepared to say in so many words that sudden is gradual and perceptible is imperceptible." See Sax, *supra* note 55, at 353. Professor Sax describes such a strained application of the common law as "accretion/avulsion gymnastics." *Id.* at 353 n.272.

reflects an old common law principle seems to come at the expense of a more direct and transparent consideration of the public and private interests implicated by that challenged regulation.¹¹⁵ Admittedly, this Article leaves the specifics of how this more direct and transparent analysis might be accomplished—and which institutions will play what precise roles in that effort—to future works.¹¹⁶ However, it is appropriate to offer here the following guidepost for this project moving forward: what seems essential is the general concept of incorporating a relational analysis that considers the dynamic economic, environmental, social, technological, and political context within which a challenged regulation is adopted.¹¹⁷

¹¹⁵ See, e.g., Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 658, 675 (1986) (suggesting pre-*Lucas* that the public trust doctrine can be “distracting and theoretically inconsistent with new notions of property and sovereignty,” such that querying whether “the government implicitly has reserved certain legal interests” in accord with the ancient underpinnings of that doctrine “misfocus[es] the judicial inquiry”).

¹¹⁶ This Article does not suggest that regulation is or should be the sole source of legal innovation. While the Article focuses on critiquing mechanical application of the background principles approach as limiting regulatory transitions in the face of changing social, economic, scientific, and technological conditions, such an application of the background principles approach, of course, also can serve to limit the dynamism of the common law. See, e.g., Arnold, *supra* note 11; Byrne, *supra* note 11; Mulvaney, *supra* note 11.

¹¹⁷ For a sampling of works advocating context-based analyses in takings cases that generally are consistent with the understanding offered in this Article, see ERIC T. FREYFOGLE, *THE LAND WE SHARE* 259 (2003) (emphasizing the “culture” that property law serves); Arnold, *supra* note 11, at 259-60 (espousing the benefits of “overarching analytical methods that link property principles with both the functions and the context of property institutions and allow property law to evolve in adaptive ways”); Poirier, *supra* note 20, at 130 (expressing support for “open, public resolutions of conflicts between property rights and regulation . . . within specific factual contexts and at an appropriate level of scale”); Underkuffler, *supra* note 17, at 747-52; Laura S. Underkuffler-Freund, *Takings and the Nature of Property*, 9 CAN. J.L. & JURISPRUDENCE 161, 179 (1996) (“Human society is not static. Values will change; scientific discoveries will be made; crises of war, pestilence, and economic development will require collective action. As human conditions and needs change, so will the bases on which prior property regimes were constructed.”). Professor Byrne has authored a collection of articles persuasively suggesting that the legislature bears significant institutional advantages in conducting such a context-based analysis and counseling against anything but substantially deferential judicial oversight. See, e.g., Byrne, *supra* note 36, at 11; Byrne, *supra* note 43, at 949-50; Byrne, *supra* note 75, at 625; J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 72 (2012) [hereinafter Byrne, *Cathedral Engulfed*]; J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 U.C. DAVIS L. REV. 915, 916 (2012) [hereinafter Byrne, *Future Convergence*]. Such an approach, of course, requires a certain faith in the democratic process, see, e.g., Poirier, *supra* note 43, at 180-81; Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 713 (2005); and this faith is not universally held. See, e.g., Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 47 (1992) (“Government is necessary to preserve civil order, but its officials should not be viewed as saviors; they are self-interested persons with imperfect knowledge subject to a universal presumption of distrust.”).

Affording this concept prominence would, in the words of Professor Marc Poirier, “reflect a recognition of the pragmatic situatedness of the regulatory takings problem.”¹¹⁸ That this concept is loosely defined is undeniable. But that reality is not necessarily a negative characteristic; indeed, it may be one of the concept’s most desirable traits.¹¹⁹ The at times swift pace of transformational scientific and technological developments¹²⁰ suggests

¹¹⁸ See Poirier, *supra* note 43, at 115; see also MARGARET JANE RADIN, REINTERPRETING PROPERTY 165 (1993). Some might suggest tracking this concept simply emulates the considerations called for by *Penn Central* and its progeny in that it “invites debate about what obligations we have as citizens in a free and democratic society.” See, e.g., Singer, *supra* note 43, at 336. *Penn Central* called for “essentially ad hoc, factual inquiries” when takings claims surround a “public program adjusting the benefits and burdens of economic life to promote the common good.” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 635 (2001) (O’Connor, J., concurring) (“Courts . . . must attend to those circumstances which are probative of what fairness requires in a given case.”). *Penn Central* represents at least one conception of the oft-cited but difficult-to-pinpoint *Armstrong* principle, which asserts that the Takings Clause seeks to prevent the “government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” See *Penn Cent.*, 438 U.S. at 123-24 (quoting *Armstrong v. United States*, 364 U.S. 40 (1960)); but see *Penn Cent.*, 438 U.S. at 133 (“Legislation designed to protect the public welfare commonly burdens some more than others.”). Among the many scholarly discussions of “fairness” and the *Armstrong* principle, particularly interesting and divergent accounts include William M. Treanor, *The Armstrong Principle, The Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151 (1997); Underkuffler-Freund, *supra* note 117; FISCHER, REGULATORY TAKINGS, *supra* note 32; and Rose, *Takings, Federalism, Norms*, *supra* note 32. Even among those generally favorable to reasonable governmental land use controls, however, *Penn Central* does not enjoy collective praise. See, e.g., John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History’s Dustbin?*, 52 Land Use L. & Zoning Dig. 3, 4 (2000) (describing *Penn Central*’s ad hoc test as vague and susceptible to subjective application). If indeed the *Penn Central* inquiry is considered strictly utilitarian in nature or “may be narrowed to the question of the severity of the impact of the law on appellants’ parcel,” see 438 U.S. at 136, this Article endorses a perspective that is more open to demanding disproportionate sacrifice in some circumstances. See, e.g., Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 143 (2009).

¹¹⁹ See, e.g., Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 34 (1986) (suggesting that formulaic rules do not allow for “future conversations”); Singer, *supra* note 43, at 336 (suggesting that the lack of a “clear methodology” to “consider what kind of property regime we want the law to support” “may be a virtue rather than a defect” (emphasis omitted)); Singer, *supra* note 49, at 4 (“Fuzziness at the edges of rules often prompts better decision making. . . . [P]redictability is only one of [the] various functions of property law; it is not the only thing that matters to us. We care about getting things right and that often requires us to reformulate rules when they lead to untoward results.”); *id.* at 10 (noting “the benefits of ambiguity in promoting attentiveness to the rights of others as well as moral reflection”).

¹²⁰ In addition to the modern technological developments surrounding fish ladders and beach replenishment discussed in the context of the principal example cases raised in the body of this Article, see *supra* notes 109-14 and *infra* notes 129-31 and accompanying text, consider, for instance, the recent emergence of laser-based remote sensing to map coastal erosion, see *Remote Sensing Is the Science of Obtaining Information About Objects or Areas from a Distance, Typically from Aircraft or Satellites*, NAT’L OCEANIC & ATMOSPHERIC ADMIN, <http://oceanservice.noaa.gov/facts/remotesensing.html> (last visited Mar. 8, 2013); and geoengineering schemes aimed at moderating climate change by, for instance, managing solar radiation or removing carbon dioxide from the atmosphere. See J.B. Ruhl, *Climate*

that such an openly flexible approach may prove a fairer and ultimately more prudent course than one that relies heavily on old common law rules as the primary driver of property holders' expectations.¹²¹

Change Adaptation and the Structural Transformation of Environmental Law, 40 ENVTL. L. 363, 369 n.11 (2010) (collecting sources on the "efficacy and risks associated with . . . climate engineering fixes"). On scientific developments, consider the discovery in the 1970s that chlorofluorocarbons contribute significantly to ozone depletion. *The Discovery of Global Warming*, AM. INST. OF PHYSICS (FEB. 2013), <http://www.aip.org/history/climate/othergas.htm>.

¹²¹ See Poirier, *supra* note 43, at 170-71 (citing Russell Korobkin's "chronological heterogeneity" theory, as set forth in Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23 (2000)). To be sure, there is considerable debate on whether compensating landowners for government acts that interfere with their expectations is good or bad for investment. See Bloom & Serkin, *supra* note 11, at 583. On one hand, protecting expectations with a takings compensation remedy incentivizes risk-averse people to commit resources without the fear of the government swooping in mid- or post-course under the illusion that its intervention is costless. See, e.g., FISCHER, REGULATORY TAKINGS, *supra* note 32, at 206; Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 597-99 (1984) (contending that takings compensation operates as a form of public insurance that, in turn, promotes efficient investments); Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 859-60 (1989) (suggesting that "forcing the government to bear the real costs of its actions" is efficient in the sense that it encourages the employment of property in a manner that is the most societally valuable). Yet on the other hand, protecting expectations presents the moral hazard of ignoring risks of legal change, leading to the overstatement of development intentions or overinvestment. FISCHER, REGULATORY TAKINGS, *supra* note 32, at 158-59. On overstating development intentions, see Poirier, *supra* note 43, at 117 ("If property owners can claim that they have been rendered unable to go forward with some potential pie-in-the-sky project as the basis for the value they claim to have lost, then there is no stopping takings claims that seem to be meritless."); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1043 n.5 (1992) (Blackmun, J., dissenting) ("In his complaint, [Lucas] made no allegations that he had any definite plans for using his property. At trial, Lucas testified that he had house plans drawn up, but that he was 'in no hurry' to build 'because the lot was appreciating in value.' The trial court made no findings of fact that Lucas had any plans to use the property from 1988 to 1990. "'Some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.'" (internal citations omitted)); *id.* at 1033 (Kennedy, J., concurring) (suggesting that, on remand, it was important for the state courts to consider "whether petitioner had the intent and capacity to develop the property and failed to do so in the interim period because the State prevented him"). On overinvestment, see Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 529-36 (1986). If expectations are to be protected, it is not clear how significant a role the Takings Clause needs to play in this effort, for there are other existing mechanisms that protect against at least some rapid changes that interfere with expectations (e.g., amortization schemes, grandfather clauses, variances, etc.). See Rose, *Property and Expropriation*, *supra* note 32, at 21-22. And even if the Takings Clause does protect expectations, it seems that at least some of the risk of legal change—and efforts at predicting such change—could be considered part of one's expectations. See, e.g., Paul, *supra* note 15, at 1504 ("The superficial appeal of expectations arguments is that citizens who have made plans based on existing law may claim they are treated unfairly when government alters the legal regime [H]owever, this argument contains the implicit and unfounded assumption that the law will never change."); Rose, *Story of Lucas*, *supra* note 32, at 277 ("[I]t is a part of property law that transitions do occur, and property owners . . . need to adjust their expectations." (emphasis omitted)); Singer, *supra* note 43, at 325 ("[O]ne risk that investors should be forced to internalize is that of foreseeable new

It is possible that deemphasizing background common law rules from the outset and applying this loosely defined concept in lieu thereof may have altered the result in some or even all of the selected examples discussed in both the body and the footnotes of Part II of this Article. Consider first *Casitas*,¹²² offered as an example of the type of cases that fall within Quadrant 1 of the model developed above.

To recount, in these Quadrant 1 cases, courts conclude that a new governmental response to a particular problem does not mirror a common law restriction, when in reality it seems that new regulation arguably mirrors a common law restriction quite well.¹²³ *Casitas* involved a water rights holder's challenge to diversion restrictions aimed at protecting fish in accord with the ESA.¹²⁴ The U.S. Court of Federal Claims rejected the federal government's assertion that these restrictions mirror those imposed by the common law public trust doctrine,¹²⁵ despite the fact that the fish represent public trust resources and that the regulated activity was harming the fish.¹²⁶

Professor Echeverria has asserted that "[t]he fact that the fish at issue in . . . *Casitas* were listed species under the ESA highlights the strong public interest in protecting them, but [the ESA listing] was not by any means essential to bring the public trust doctrine into play."¹²⁷ Yet the converse seems equally if not more plausible: while the public trust doctrine highlights the strong public interest in protecting these fish, the extent to which the ESA mirrors that ancient common law principle does not seem essential to adjudging whether the ESA-based restrictions here produce a constitutionally acceptable result.¹²⁸ The ESA restrictions in *Casitas* necessitated

regulations designed to protect the public from the harms attendant on the cumulative effects of individual acts of ownership."); Singer & Beermann, *supra* note 22, at 227 ("The doctrine of protecting investment-backed expectations is indeterminate in the absence of a substantive theory about the circumstances under which property owners have a right to be protected against . . . subsequent legislative modifications of property rights . . ."); Tideman, *supra* note 18, at 1720 (suggesting that assigning the cost of changes in moral understandings on the holders of claims that are later discredited "puts investors on notice that before investing their wealth in any type of 'property,' they should ask themselves whether their society will discover these claims to be morally unfounded").

¹²² *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (Fed. Cir. 2008).

¹²³ See *supra* Part II.D.1.

¹²⁴ *Casitas*, 543 F.3d at 1282.

¹²⁵ *Casitas Mun. Water Dist. v. United States*, 102 Fed. Cl. 443, 473 n.46, 474 (2011), *aff'd*, No. 2012-5033, 2013 WL 692763 (Fed. Cir. Feb. 27, 2013).

¹²⁶ Echeverria, *supra* note 38, at 955.

¹²⁷ *Id.* at 956.

¹²⁸ At least one scholar has criticized on related grounds the recent initiative to classify the atmosphere as a public trust resource that should trigger judicially imposed "carbon budgets." See Byrne, *Future Convergence*, *supra* note 117, at 927 (suggesting that the initiative relies on the public trust doctrine to "claim[] too much" and offering that "political majorities need to acknowledge the problem[s] [associated with climate change] and authorize their institutions to take the difficult painful measures necessary to address it"). This critique does not suggest that common law doctrines, such as the public trust, have never served to draw attention to important social values. See, e.g., Lazarus, *supra*

engineering fixes such as the construction of fish ladders, a practice foreign to the United States until the turn of the nineteenth century,¹²⁹ and the modern versions of which hardly resemble their forbearers.¹³⁰ In theory, it seems the constitutionality of these restrictions should be assessed in light of the public and private interests implicated by the environmental protections set forth in the contemporary ESA without such an elevated regard for background principles of the common law.¹³¹

Coincidentally, the U.S. Court of Federal Claims actually did engage in a “balancing” analysis of sorts; however, it did so only in light of its apparently erroneous conclusion that considering whether California’s public trust doctrine serves as a “background principle” demands such an analysis.¹³² For the reasons discussed above,¹³³ the application of that analysis was so egregiously weighted in favor of development interests that it bears

note 115, at 715 (“[T]hose legal categories upon which the [public trust] doctrine inexorably relies may have been meaningful once, but they have become arbitrary and wooden with age.”); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 156–57 (2013) (noting that “the public trust doctrine has . . . achieved important progressive results in [some] contexts, . . . [but] the doctrine’s reach and transformative potential [are] inherently limited”).

¹²⁹ See *Casitas*, 102 Fed. Cl. at 447; EA ENG’G, SCI., & TECH., INC. & NARRAGANSETT BAY ESTUARY PROGRAM, PAWTUXET RIVER RESTORATION PROJECT: PAWTUXET RIVER, CRANSTON AND WARWICK, RHODE ISLAND APPLICATION TO ALTER (2010), available at http://www.nbep.org/docs-restoration/Lower%20Pawtuxet%20Dam%20Partial%20Breach_Application%20to%20Alter/Application%20Text.pdf.

¹³⁰ See, e.g., David Hoffman, *PPL Montana Records First Fish Climbing Advanced Fish Ladder at Thompson Falls Dam*, PPL MONTANA NEWS (Apr. 7, 2011), <http://www.pplmontana.com/news/PPL+Montana+records+first+fish+climbing+advanced+fish+ladder+at+Thompson+Falls+Dam+040711.htm> (explaining that the fish ladder at Thompson Falls Dam in Montana is the “first full-length fish ladder in the continental United States specifically designed to accommodate bull trout”).

¹³¹ The very idea of considering the common law as the core component of property seems anathema to the premise of living within a democracy where the majority may regulate corporate and individual behaviors to protect people and promote societal interests. The recent—and controversial—decision by the U.S. Court of Appeals for the Federal Circuit in *Casitas*, which held that the District’s claim should be considered under the rigid, categorical rule applicable to physical takings claims rather than under the ad hoc approach applicable to partial regulatory takings claims, at least for the moment largely (and unfortunately) forecloses consideration of the public interests at stake in that dispute. See *supra* note 82; see also Brian Scaccia, Comment, “Taking” a Different Tack on Just Compensation Claims Arising Out of the Endangered Species Act, 37 ECOLOGY L.Q. 655, 669–70 (2010).

¹³² See *supra* note 85 and accompanying text. Still, the basic inclination to engage in a more flexible approach seems superior to a formalistic search for a common law connection. Cf., e.g., Byrne, *Future Convergence*, *supra* note 117, at 924 (illustrating the “all-or-nothing character” of the public trust); Marc R. Poirier, *Brazilian Regularization of Title in Light of Moradia, Compared to United States Understandings of Homeownership and Homelessness: A Preliminary Framing*, 44 U. MIAMI INTER-AM. L. REV. (forthcoming 2013) (manuscript at 29) (on file with author) (discussing “a preference in United States property theory to see property rules as fixed and stable and universal, even when they may in fact be situation specific and re-negotiated regularly”).

¹³³ See *supra* notes 86–92 and accompanying text.

little relation to the type of balancing advocated here.¹³⁴ That the District has *never* used all of the water that it has been permitted to draw and the ESA restrictions at issue would not require it to reduce service to even one customer played little, if any, substantive role in the court's "balancing."¹³⁵ Applying a more fair-minded balancing analysis that recognizes the actual breadth of any private interests at stake and extends concern for the legislative commitments to the public interest in protecting the endangered steelhead, it seems the diversion restrictions in *Casitas* very likely could be deemed reasonable without compensation.¹³⁶

¹³⁴ In this way, *Casitas* seems to reflect concerns raised by Professor Richard Lazarus in his seminal article on the public trust. See Lazarus, *supra* note 115, at 712 ("[T]he favorable bias toward environmental protection, exhibited by the courts in the 1970's, might not continue. In the past, courts have used the public trust doctrine to support developmental activities they favored. The vagueness of the doctrine's mandate lends to the risk that the doctrine could still further those interests." (footnote omitted)); see also Steven M. Jawetz, *The Public Trust Totem in Public Land Law: Ineffective—and Undesirable—Judicial Intervention*, 10 *ECOLOGY L.Q.* 455 (1982).

¹³⁵ These considerations apparently affected only the court's ripeness determination. See *supra* note 83.

¹³⁶ In an article that pre-dates *Casitas*, Professor Sax suggested it is conceivable that an expectations-based approach would be *more* likely to result in a taking of property interests in water than a definitional approach grounded in background principles of the common law. See Sax, *supra* note 47, at 951-53; see also *supra* note 112 (discussing a similar possibility in the context of the beach replenishment legislation at issue in *Stop the Beach*). *Bowles*, offered as another example of a Quadrant 1 case *supra* note 93, seems a more difficult case than *Casitas*. There, the claimant sought to build one private residence on limited wetland acreage, and the ecosystem services lost to the public via the proposed filling would be small in both qualitative and quantitative terms. See *Bowles v. United States*, 31 Fed. Cl. 37, 41, 51-52 (1994). However, no wetland loss is insignificant; moreover, it is the cumulative nature of small individual harms that has posed many of the modern environmental dangers society now realizes. See Joseph H. Guth, *Cumulative Impacts: Death-Knell for Cost-Benefit Analysis in Environmental Decisions*, 11 *BARRY L. REV.* 23, 23 (2008). Regardless of how these competing interests might be squared, why the constitutionality of action taken in accord with a provision of duly enacted modern legislation—the Clean Water Act—should stand or fall on how well it emulates an old common law principle is not clear. This seems particularly true in this instance, for the claimant purchased the lot at issue after the effective date of the relevant Clean Water Act provision. See 33 U.S.C. § 1344 (2006); *Bowles*, 31 Fed. Cl. at 40. Yet in *Palazzolo v. Rhode Island*, the U.S. Supreme Court rejected a bar on regulatory takings claims by those who purchase property that is already subject to the regulation at issue. See 533 U.S. 606, 608 (2001). Justice Kennedy wrote for the Court that "legislative enactment[s]" do not necessarily reflect "common, shared understandings of permissible limitations derived from a State's legal tradition." *Id.* at 629-30. Juxtaposing *Lucas* and *Palazzolo* suggests that one who acquires land does not have a claim to takings compensation if that title inhered with common law restrictions, but may have a claim to takings compensation if that title inhered with legislative restrictions of the same breadth. See *id.*; see also *Maritrans Inc. v. United States*, 40 Fed. Cl. 790, 799, 801 (1998) ("Common law would not block the use of [shipping] vessels on nuisance grounds. The fact that defendant can catalogue statutes and regulations applicable to the shipping industry does not dispose of our inquiry. The statutes listed by defendant date to the 1800s, but no common law prohibitions are cited."). Why a property owner's expectations based on the common law are considered justified, while expectations based on statutory law may not be, is peculiar.

What of *Stop the Beach*,¹³⁷ offered as an example of a case falling within Quadrant 4? Recall that in this category of cases, courts assert that a new governmental response to a complex modern problem does mirror a common law restriction, when in reality that connection is rather specious.¹³⁸ In *Stop the Beach*, the Florida Supreme Court rejected a takings challenge to a beach replenishment statute on the ground that the state maintained the ability to reclaim land lost via avulsion at common law.¹³⁹ The U.S. Supreme Court agreed that no taking occurred, but only because, on its reading of Florida common law, the replenishment itself constituted an avulsive event.¹⁴⁰

At common law, the pace of the beach's changing shape serves as the dispositive feature in determining whether a boundary change results from either an avulsive or accretive event.¹⁴¹ Yet it is readily evident that the justification behind the public's maintaining access to the replenished beach bears no connection to the pace of constructing that beach. The public maintains a legitimate claim to the replenished beach not because of the state's chosen pace of construction, but largely because, through taxpayer dollars, it paid for a project that involved converting public submerged land to dry land.¹⁴²

Given that the state conceivably can turn submerged lands into dry lands for its own gain, beach replenishment may raise colorable moral hazard concerns.¹⁴³ However, scholars with vastly different views on property rights concur that the Florida legislation seems a fair response to the complications presented by severe erosion on a highly developed coastline.¹⁴⁴ The Act allows the public, who paid to restore the beach, to access that beach.¹⁴⁵ This arguably could infringe on any alleged right to exclude held

¹³⁷ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010) (plurality opinion).

¹³⁸ See *supra* Part II.D.2.

¹³⁹ *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1116 (Fla. 2008), *aff'd sub nom.* *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env'tl. Prot.*, 130 S. Ct. 2592 (2010).

¹⁴⁰ On the potential significance of this reclamation-avulsion distinction for beach replenishment moving forward, see *supra* notes 111-12 and accompanying text.

¹⁴¹ See *Stop the Beach*, 130 S. Ct. at 2598-99.

¹⁴² See Byrne, *supra* note 11, at 635-36; Byrne, *Cathedral Engulfed*, *supra* note 117, at 95.

¹⁴³ See Epstein, *supra* note 11, at 68. The extent to which the state actually "gains" by spending millions of dollars on building a beach that will be destroyed relatively quickly is open for debate. See, e.g., Don Barber, *Beach Nourishment Basics*, BRYN MAWR COLL., <http://www.brynmawr.edu/geology/geomorph/beachnourishmentinfo.html> (last visited Mar. 8, 2013) (noting that "nourished beaches erode two to three times faster than natural beaches" and "[b]each nourishment . . . must be repeated periodically").

¹⁴⁴ Compare Byrne, *supra* note 11, at 634 ("[The Florida statute] seems eminently fair because the public paid to save the beach, which protects the landowner from further erosion, and because the Act safeguards the other valuable legal rights of the upland owners."), with Epstein, *supra* note 11, at 39 (describing the Florida statute as "a surprisingly sensible environmental scheme").

¹⁴⁵ See FLA. STAT. ANN. §§ 161.101-161.141 (West 2012).

by the upland owners; however, the Act also (1) safeguards the upland landowners' ability to view and access the water, (2) offers them protection against erosion and storm damage, and (3) provides a new, wide sandy beach at the foot of their homes.¹⁴⁶ The reciprocal advantages this statute provides to the claimants—even under the narrowest conception of the U.S. Supreme Court's repeated assertion that whether a regulation secures an "average reciprocity of advantage" is relevant in takings analyses—seem quite significant.¹⁴⁷

* * *

In a notable article, Professor Michael Blumm documented what he referred to as a "rise" in the number and breadth of "background principles" of the common law that lower courts, through 2004, had found sufficient to safeguard regulations from takings liability since *Lucas* first enshrined the background principles inquiry into takings jurisprudence in 1992.¹⁴⁸ Yet

¹⁴⁶ See *id.* § 161.201; *cf. Stop the Beach*, 130 S. Ct. at 2601-02.

¹⁴⁷ See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (discussing the relevance of "average reciprocity of advantage" in takings analyses); Christie, *supra* note 100, at 58. Disagreement surrounding the concept of "reciprocity of advantage" occurs on at least two levels. The first is temporal: must the benefits from the challenged regulation occur in concert with the burdens, or is it sufficient for a regulation to impose immediate burdens provided that it is anticipated that that same regulation will generate future benefits? The second is functional: must the benefits of the challenged regulation be reaped directly by the burdened claimant, or is it sufficient that the regulation is part of a larger scheme or system that is justified on the whole? See, e.g., Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 41 (1996) ("If one statute benefits A at the expense of B, and another benefits B to the same extent at the expense of A, can we say that there has been reciprocity of advantage? How many statutes must we examine before we can make such a determination?"); Treanor, *Original Understanding*, *supra* note 32, at 885 ("[I]f affected parties have had a realistic opportunity to enter into political deals on a range of issues, that they lose on one piece of legislation may simply indicate . . . that other issues were more salient. . . . [F]ocus[ing] on one specific governmental act . . . can lead to a remedy where the loss was merely the product of political give and take."). In addition to these conceptual disagreements, the litigation stage at which such reciprocal advantages should be taken into account—the takings liability stage or the compensation stage—is disputed. Compare Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 332-34 (1990) (liability stage), with EPSTEIN, *supra* note 5, at 196-97 (compensation stage). Many governmental entities seemingly would prefer the former, for, among other reasons, the stigma that attaches following a takings finding is unlikely to be offset when, in a later proceeding, a court declares that no compensation is due for that taking. Seemingly more important than the foregoing is determining whether this over-arching principle of reciprocity should play any role at all in allocating property interests. See, e.g., Alexander & Peñalver, *supra* note 118, at 143 ("[T]he obligation that individuals owe to others by virtue of their inherent embeddedness in and dependence upon communities cannot be limited by the notion of reciprocity, at least not in any strict, first-order sense.").

¹⁴⁸ See Blumm & Ritchie, *supra* note 5, at 322-23. But see Huffman, *Background Principles*, *supra* note 16, at 6-7 (criticizing the view espoused by Professor Blumm that *Lucas*'s reference to background principles provides "a treasure trove of exceptions").

Professor Blumm interestingly noted how the background principles that have “proliferated” are those that are the most categorical in nature (like avulsion), not those more malleable common law principles (like nuisance¹⁴⁹) that themselves generally require a case-specific inquiry.¹⁵⁰ Professor Blumm’s careful description of the first decade of lower court responses to *Lucas* only buttresses the claim offered here: unearthing arguably analogous common law principles should not be the driving force in defending new regulations against takings attacks. What may be a fortuitous benefit for, say, strategies related to species or shore protection in certain instances only serves to mask the ways in which the background principles inquiry avoids an open debate surrounding the allocation of resources set forth in regulations aiming to counter difficult or newly discovered challenges.

New principles that do not fit tidily into recognized background common law categories—that is, foreground principles—may be necessary to resolve modern day issues.¹⁵¹ It seems that the further society grows re-

¹⁴⁹ Professor David Callies and Mr. David Breemer have suggested that common law nuisance is “full and comprehensive, as well as comprehensible.” 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, 339-40 (2002). Many others, however, would disagree with the position offered by Professor Callies and Mr. Breemer on this point. See, e.g., Halper, *supra* note 32, at 335-36 (collecting sources describing nuisance doctrine as “intractable to definition,” . . . a ‘mongrel,’ a ‘mystery,’ a ‘garbage can,’ a ‘quagmire,’ and an ‘impenetrable jungle’” (citations omitted)); Poirier, *supra* note 43, at 118 (“There are many ways in which one property use conflicts with another, so even on the narrowest terms one would expect nuisance to be hard to pin down simply because of the heterogeneity of the concept of interference with another’s reasonable use of property”); Singer, *supra* note 49, at 9 (“Nuisance law . . . sacrifices predictability so that neighbors can live together in peace. It is simply not possible to make a list of all the ways people can unreasonably interfere with the use and enjoyment of neighboring property and the interest in the quiet enjoyment of land is important enough to protect despite the ambiguity and unpredictability it engenders.”).

¹⁵⁰ See Blumm & Ritchie, *supra* note 5, at 367. Shortly after *Lucas*, Professor Hope Babcock predicted that “because the common law of nuisance is not static, it provides a growing, not shrinking, opportunity for regulatory authorities to protect the nation’s coastlines and wetland resources.” See Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 25-26 (1995) (footnote omitted). As Professor Byrne recently noted, however, “nuisance law to date has contributed little to taming *Lucas*.” See Byrne, *Cathedral Engulfed*, *supra* note 117, at 99.

¹⁵¹ See Byrne, *Cathedral Engulfed*, *supra* note 117, at 69 (suggesting that the threat of loss from sea-level rise “will call for new approaches to land-use regulation and strain traditional understandings of property rights in land”); Christie, *supra* note 100, at 61 (“New legal principles are necessary to address the public interests and effect on private property rights [related to modern day problems caused by erosion and sea level rise].”); Rose, *Takings, Federalism, Norms*, *supra* note 32, at 1148 (“[T]akings jurisprudence has to take into account communities’ need to deal with shrinking common resources.”); Sax, *supra* note 55, at 355-56 (“[N]ewer public values create something quite foreign to the traditional legal perspective on migratory shorelines. Any effort to characterize today’s rising sea levels as avulsive or accretive is empty of meaning, and can only distract attention from the serious issues that need attention The old categories don’t fit the contemporary reality.”); Singer & Beermann, *supra* note 22, at

moved in time from old common law rules—and the more complex society becomes—the more likely those old rules will be ill-suited templates for devising innovative approaches to counter the increasingly complex challenges that come with an increasingly complex society.¹⁵² Moving the focus away from linking new regulations to old common law rules does not necessarily mean that disagreements in takings cases will be fewer; however, those disagreements will exist as the result of a direct and reasoned analysis of the challenged regulation's objectives and a substantive consideration of the competing interests at stake.¹⁵³ It seems the fairness of a given legal transition can be adjudged without regard for any potential common law foundation for that transition,¹⁵⁴ but instead by focusing on evaluating in a

238 (“[W]e do not see why expectations that property may be used in ways that cause significant, albeit newly discovered, social harm should be protected.”); Tideman, *supra* note 18, at 1723 (“Often in the development of legal doctrine, an unrecognized principle can in retrospect be seen to have determined the outcomes of cases long before it was stated, and sometimes [as in the principle that human beings cannot be considered “property” prior to condemnation of the slave trade] even while it was being denied.”).

¹⁵² See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 446-47 (Blackmun, J., dissenting) (“The 19th-century precedents relied on by the Court [to support the holding that physical invasions amount to per se takings] lack any vitality outside the agrarian context in which they were decided. But if, by chance, they have any lingering vitality, then, in my view, those cases stand for a constitutional rule that is uniquely unsuited to the modern urban age.” (footnote omitted)); Lazarus, *supra* note 151, at 694-95 (“Many [old common law] rules once served important functions; time, however, has since passed them by. . . . These rules . . . are weighed down by historical baggage . . . [often] based on assumptions about the physical characteristics of resources and the limits of technology that advances in science have discredited.”); *id.* at 658 (“[T]he law of standing, tort law, property law, administrative law, and the police power have all evolved in response to increased societal concern for and awareness of environmental and natural resource problems and are weaving a new and unified fabric for natural resources law.”); Singer & Beermann, *supra* note 22, at 235 (“As environmental concerns, and concerns regarding other potential negative effects of over-development become more pressing, property owners should expect ever greater restrictions on rights traditionally thought of as incident to ownership.”); Singer, *supra* note 49, at 60 (“[I]t is a staple of property law theory that strictly adhering to the wishes of our ancestors may not only tie up property and reduce welfare for everyone but deprive both owners and non-owners of justifiable freedoms.”). Of course, considering common law principles as *completely* adaptable and self-correcting would have the effect of allowing foreground principles to develop. However, if common law principles, like nuisance or the public trust doctrine, are considered so open-ended that the legislature is recognized as holding absolute authority to balance property interests with, say, protection of the environment, it would seem redundant to task the judiciary with exploring connections between those common law principles and new legislation.

¹⁵³ See, e.g., Singer & Beermann, *supra* note 22, at 248 (suggesting that “more forthright articulation of the values underlying the Court’s decisions will likely further public debate by clarifying what is at stake”); Singer, *supra* note 43, at 338 (offering a “citizenship model” that does not “erase doubt” but rather “merely frames” the “central question of . . . whether the obligations imposed on an owner by a property law rule are just and fair”); Singer, *supra* note 49, at 52 (“We will be making judgments about fairness and justice and equality and liberty regardless of the form a legal rule takes.”).

¹⁵⁴ For instance, in 1986, Professor Lazarus lamented that while the public’s interest in waters in the present day is “not so much navigability as the critical ecological role of the specific aquatic resource,” the extent of governmental authority over that resource continues to focus on old categories of

forthright manner that transition's ability to serve and enhance deeper human interests within a constitutional democracy.¹⁵⁵

The analysis in this Part leans toward suggesting that a takings finding in *Casitas* would be suspect, while the ultimate result that no taking occurred in *Stop the Beach* was correct.¹⁵⁶ Yet it is the path that courts in Quadrant 1 and Quadrant 4 cases (like *Casitas* and *Stop the Beach*) follow to reach those results that this Article centers on and suggests can be improved. This Article's critique of the normative preference for background principles of the common law in takings jurisprudence aims to encourage a mode of analysis that reaches results that do not exclusively depend on some strained connection to the common law past, but instead centers on a more direct and transparent consideration of the challenged regulation's sensitivity to public and private interests in the likes of property, safety, and the environment for the future.

navigability. See, e.g., Lazarus, *supra* note 115, at 711. Almost three decades later, the U.S. Supreme Court has carried on the trend Professor Lazarus so critiqued. See, e.g., *PPL Montana v. Montana*, 132 S. Ct. 1215 (2012) (concluding, after sifting through the journals of Lewis and Clark, centuries-old newspaper reports, and countless other obscure secondary sources (many of which were not even in the record), that if commercial travelers had to portage around a segment of a river at the time of statehood, title to that segment is not held by the state unless the segment was so short that it lacked commercial value, in accord with a traditional common law understanding of what is considered "navigable").

¹⁵⁵ See, e.g., Gregory S. Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 733, 738 (2003) ("Property rights . . . are not ends in themselves but rather an instrument designed to instantiate and serve deeper substantive values."); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 115-17 (1995) ("[T]he law recognizes as 'property' those interests that promote the ends favored by the lawmakers. . . . The choice of which interests to protect at any one time reflects contemporary social values acting upon received tradition. Evolution in values and needs reshapes the set of interests so protected without casting doubt on the continuing commitment to the *idea of property*."); Singer & Beermann, *supra* note 22, at 228 ("[T]he *social meaning* of a property right depends on its effects in the real world on human relationships."); Laura S. Underkuffler, *Stuart Banner's American Property: A History of How, Why, and What We Own*, 61 J. LEGAL EDUC. 504, 508 (2011) (book review) ("As long as the human need to appropriate and control exists, there will be claims of property, whether made by the affluent or by the homeless. The question is not whether property, as an idea, will reflect this truth; it is, rather, what values we—as a society—will bring to it."); Laura S. Underkuffler-Freund, *Property: A Special Right*, 71 NOTRE DAME L. REV. 1033, 1043-44 (1996) (suggesting that deviations from the "idea" of property—"how people envision it"—should not be seen as "an 'obvious' violation of 'unquestioned' property rights," but instead as "the inevitable adjustment and compromise of conflicting claims necessary for the maintenance of the social and political institution of property").

¹⁵⁶ Matters such as *Bowles* and *Severance* seem, like *Casitas*, vulnerable to being moved from the takings column to the nontakings column. See *supra* notes 55, 93. There are, though, other examples that could trend toward takings findings. See, e.g., *supra* note 114 (suggesting that *Air Pegasus* and *Bennis* seem potentially vulnerable to being moved from the nontakings column to the takings column).

