Florida Law Review

Volume 71 | Issue 5 Article 2

November 2020

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REVISITING BACKGROUND PRINCIPLES IN TAKINGS LITIGATION

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Abstract

Libertarian property rights enthusiasts celebrated the United States Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council* as a landmark decision that would revolutionize interpretation of the Constitution's takings clause and finally fulfill its potential as a vehicle for deregulation. Over a quarter-century later, the *Lucas* decision has failed to meet those expectations. A major reason is that Justice Antonin Scalia's opinion created an exception that effectively swallowed the rule that *Lucas* established.

Lucas held that land use regulations whose effect on landowners' property produced a total loss of economic value were per se categorical takings. However, Justice Scalia qualified the categorical rule by creating an exception if the regulation merely replicated "background principles" of property or nuisance law. His *Lucas* opinion explained that an examination of background principles was a "logically antecedent inquiry" in takings cases because it defined the nature of the alleged "private property" taken by the regulation. Over the years, courts have interpreted the background principles rule expansively, while the per se takings rule has rarely applied.

Background principles, as an inquiry antecedent to takings claims, demand analysis of applicable property and nuisance law because they determine the nature of the "private property" alleged to have been taken. Consequently, this examination is step one of any claim for compensation—regardless of whether it is an alleged physical occupation or appropriation, an economic wipeout, or a regulatory taking subject to judicial balancing. Step two—determining whether there has been a taking requiring government compensation—cannot proceed until a court conducts the initial inquiry into the alleged property right.

This Article surveys recent background principles cases and builds on earlier studies. The survey reveals that courts have continued to recognize common law background principles such as the public trust doctrine, the navigation servitude, customary rights, and even burial rights. In addition to common law background principles, courts have found numerous statutory background principles—including public ownership of wildlife and water, zoning, and federal mining regulations. Other cases have rejected the categorization of some statutes as background principles,

including wetland regulations, environmental impact statement requirements, and flood control operations.

Background principles are likely to continue to be a dynamic area of property and constitutional takings law for the foreseeable future because the issue will be raised early in nearly every takings case, and the results may be as varied as the states' interpretation of their property and nuisance laws. Background principles should thus prove a fruitful source of state court modern interpretations of vintage doctrines like the public trust doctrine, customary rights, and public ownership of wildlife and water, and even burial rights. These cases will likely make takings law a vibrant area of property law for years to come.

INTRODUCTION

The U.S. Constitution forbids the governmental taking of "private property" for public use without paying just compensation.[1] A prerequisite to constitutionally-owed compensation is therefore a "taking" of "private property." Since 1922, takings have included not merely physical occupations or appropriations, but also regulatory takings.[2] Most of the commentary on the so-called "takings issue" has concerned the nature of regulations restricting private property sufficient to amount to a taking.[3] But the initial judicial inquiry in takings litigation involves defining the "private property" at issue, because without a

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1. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); *see* Chi., Burlington & Quincy R.R. v. Chicago, 166 U.S. 226, 241 (1897) (incorporating the takings clause, the first provision of the Bill of Rights to be applicable to the states, through the Fourteenth Amendment); STEVEN J. EAGLE, REGULATORY TAKINGS 1-1 (5th ed. 2012); Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 310 (2007) ("Takings law flows from eminent domain: the inherent power of the sovereign to take private property . . . ."); Edward J. Sullivan, *A Brief History of the Takings Clause*, WASH. U. L. (1995), http://landuselaw.wustl.edu/articles/brief_hx_taking.htm [https://perma.cc/6JYV-L29W] ("[I]n the last quarter century, [the Takings] clause has taken on a prominent role in constitutional jurisprudence, particularly with respect to the limits of state and local regulatory power."); Joseph Y. Whealdon, *A Primer in Eminent Domain and Takings Law Under the U.S. Constitution*, A.B.A. (Aug. 27, 2013), https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/primer_eminent_domain_takings_law_under_us_constitution/ [https://perma.cc/XA6M-9EZH] ("This 'Takings Clause' provides that if the government seizes private property, that property's owner must receive fair compensation.").

2. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("[I]f regulation goes too far it will be recognized as a taking.").

3. *See, e.g.*, Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1165 (1967) ("We shall be dealing here with matters which, were they to find their way into a treatise on the law of eminent domain, would appear in the chapter on 'What Constitutes a Taking: General Principles.'"); Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1395 (1991) ("Intense interest stems partly from the Supreme Court's professed inability to provide a general solution to the takings problem . . . .").

sufficient private property interest there can be no taking. The private property inquiry, in turn, requires judicial interpretation of "background principles" that shape the nature of property interests at issue.[4] This Article explores recent case law interpreting the meaning of those background principles of property law.

In 1992, the Supreme Court initiated what was widely thought to be an unprecedented era in property law jurisprudence when *Lucas v. South Carolina Coastal Council*[5] established a new categorical rule for regulatory takings law.[6] According to *Lucas*, regulations that deprived landowners of all economic value in their land amounted to per se takings,[7] an exception to the generally applicable judicial balancing rule the Court established in its 1978 decision, *Penn Central Transportation Co. v. New York City*.[8] Commentators who were critical of takings law and who believed that *Penn Central* failed to impose meaningful restraints on government regulation heralded the new per se rule as a welcome sea change that would usher in a new era of judicial oversight of regulations affecting land use.[9]

That sea change never happened.

Justice Scalia's opinion equated oppressive regulations with permanent physical occupations that seize virtually all of a landowner's

4. *See infra* note 26 and accompanying text.

5. 505 U.S. 1003 (1992).

6. *Id.* at 1004.

7. *Id.* at 1030 ("When . . . a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.").

8. 438 U.S. 104 (1978) (holding that courts must consider multiple factors when considering regulatory takings claims, including: (1) the character of the government action; (2) the regulation's economic effect on the landowner; and (3) the regulation's interference with the landowner's reasonable investment-backed expectations). *See generally* John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983) (discussing the judicial balancing test and advocating for a different approach); John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171 (2005) (discussing the *Penn Central* factors).

9. *See, e.g.*, Richard A. Epstein, Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1369 (1993) (describing the *Lucas* decision as "anticlimactic"); James L. Huffman, Lucas*: A Small Step in the Right Direction*, 23 ENVTL. L. 901, 901–02 (1993) ("*Lucas* . . . has promise from the point of view of those interested in maintaining a coherent system of property rights, not to mention those interested in complying with the Constitution."); *see also* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 625 (2014) ("Given that the categorical rule of *Lucas* permits *no* remaining viable use . . . almost all property owners who might claim a regulatory taking would have to do so under the *Penn Central* standard." (footnote omitted)).

rights and therefore categorically demand governmental compensation.[10] But this new per se rule contained an exception that has become a categorical governmental defense to takings claims, undermining the revolutionary potential of the *Lucas* per se rule. Justice Scalia announced that there was no categorical taking for economic wipeouts if a government regulation merely replicated a restriction that the common law imposed on landowners through background principles of nuisance or property law.[11] This background principles defense—largely, although not exclusively,[12] a function of state law—has swallowed the categorical per se takings rule *Lucas* established, simply because there are many more background principles than economic wipeouts.[13]

What constitutes a valid background principles defense has proved to be a contentious and unsettled question over a quarter-century later. But as this Article shows, lower courts interpreting the background principles defense have successfully charted its outlines, and it is now a prominent feature of takings jurisprudence.[14]

The evolution of the background principles defense is evident in recent cases extending the defense to statutory and regulatory

10. *See Lucas*, 505 U.S. at 1019 ("[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.").

11. *Id.* at 1027 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.").

12. *See infra* note 52 and accompanying text (discussing private property created by federal law).

13. This submerging of the categorical rule beneath the background principles defense was evident within a decade of the decision. *See, e.g.*, Michael C. Blumm & Lucus Ritchie, Lucas's *Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 325–26 (2005) (describing the narrow range of categorical takings due to complete economic wipeouts; contrasting it with the expansive scope of the background principles defense); Michael C. Blumm & J.B. Ruhl, *Background Principles, Takings, and Libertarian Property*, 37 ECOLOGY L.Q. 805, 805 (2010) (explaining the continuing importance of the background principles defense and responding to the errors of a libertarian colleague); Echeverria, *supra* note 8, at 173 ("[T]his approach had the potential benefit of identifying actions that would be safely immune from takings liability – assuming these *per se* tests came to define not only the grounds, but also the outer limits, of takings liability."); John D. Echeverria & Julie Lurman, *"Perfectly Astounding" Public Rights: Wildlife Protection and the Takings Clause*, 16 TUL. ENVTL. L.J. 331, 376–81 (2003) (discussing the background principles defense in relation to wildlife protection). The inapplicability of the takings clause to public property like oysters was reinforced by Supreme Court's decision in *Horne v. Department of Agriculture* (*Horne II*), 135 S. Ct. 2419 (2015); *see infra* notes 66–72 and accompanying text.

14. At the outset, we should acknowledge that we consider background principles cases to be all those in which the reviewing court considers the nature of the alleged property interest as an inquiry antecedent to the takings analysis, even if the court did not expressly mention the terms "background principles."

restrictions—as anticipated by Justice Anthony Kennedy's concurrence in *Lucas*[15]—as well as in decisions applying it to all takings claims, not just those alleging a categorical, per se taking.[16] The latter extension seems justified, seeing as all takings claims are premised on the alleged governmental taking of private property, and background principles define the nature of a landowner's legitimate property interests. The nature of a landowner's property interest is thus a foundational issue in all takings cases.

Extending the background principles defense to all takings claims has occurred despite the Supreme Court's 2001 decision in *Palazzolo v. Rhode Island*,[17] in which the Court rejected a background principles defense for all land development inconsistent with existing regulations.[18] *Palazzolo* reduced the effect of a pre-existing regulation to a pertinent factor that courts must account for in deciding the secondary issue of whether there has been a taking.[19] Thus, not all pre-existing regulations are background principles—although some may be—and pre-existing regulations that are not background principles may still be important factors weighing against takings claims.[20] One inquiry this Article investigates is when a pre-existing statute or regulation becomes a background principle, as opposed to merely a factor in determining when a taking has occurred.[21]

One complication to the application of a background principles defense concerns the alleged takings of water rights for the benefit of species listed under the Endangered Species Act of 1973 (ESA).[22] The venue for such takings by the federal government lies in the Court of

15. *See Lucas*, 505 U.S. at 1032 (Kennedy, J., concurring in the judgment).

16. *See infra* Part V.

17. 533 U.S. 606 (2001).

18. *Id.* at 629–30 ("It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."). The Court instead reduced the effect of a pre-existing regulation to a pertinent factor in *Penn Central* balancing. *Id.* at 634 (O'Connor, J., concurring) ("Investment-backed expectations, though important, are not talismanic under *Penn Central*. Evaluation of the degree of interference with investment-backed expectations instead is *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'").

19. *See id.* at 629–30 (majority opinion).

20. *See id.* at 633 (O'Connor, J., concurring) ("Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance.").

21. *See infra* text accompanying notes 83–89.

22. Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–44 (2012)).

Federal Claims (CFC) and the Federal Circuit.[23] After some initial confusion,[24] the CFC now considers alleged takings of water rights to be physical rather than regulatory takings.[25] That interpretation may remove alleged takings of water rights from *Penn Central* balancing, but background principles remain the "logically antecedent inquiry" concerning the nature of the allegedly taken "property" interest in physical takings cases, even alleged water rights takings.[26]

This Article assesses the background principles defense. Part I discusses its resurrection in Justice Scalia's *Lucas* opinion. Part II considers subsequent Supreme Court statements about background principles over the last couple of decades. Part III evaluates recent lower court decisions in both state and federal jurisdictions concerning common law background principles, considering both nuisance and property law cases. Part IV turns to statutory background principles, where the defense has had its greatest effect. Part V shows that background principles are

23. *See* 28 U.S.C. § 1346(a)(2) (2012); *id.* § 1491(a)(1); *see also* ROBERT MELTZ, CONG. RESEARCH SERV., THE ENDANGERED SPECIES ACT (ESA) AND CLAIMS OF PROPERTY RIGHTS "TAKINGS" 5 (2013) ("[A] taking claim against the United States . . . must be filed in the U.S. Court of Federal Claims, if plaintiff seeks more than $10,000."); *see also id.* at 5 n.33 ("On the rare occasion that an ESA taking claim seeks $10,000 or less, the claim may be filed either in the Court of Federal Claims or in district court.").

24. *See, e.g.*, Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1291–92 (Fed. Cir. 2008) (concluding that "the government physically appropriated water that Casitas held a usufructuary right in" because "the government did not merely require some water to remain in stream, but instead actively caused the physical diversion of water"); Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 477 (2011) ("[I]t is difficult, conceptually, to think of a right to beneficial use as being physically taken . . . ."), *aff'd*, 708 F.3d 1340 (Fed. Cir. 2013); Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 106 (2007) (explaining the Supreme Court's *Tahoe-Sierra* decision compelled the CFC to categorize water diversion restrictions as regulatory takings because they involve restraints on beneficial use, rather than government takeovers of property), *rev'd*, 543 F.3d 1276 (Fed. Cir. 2008); Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 319 (2001) ("In the context of water rights, a mere restriction on use—the hallmark of a regulatory action—completely eviscerates the right itself . . . .").

25. *Casitas*, 102 Fed. Cl. at 472 ("While the government has interfered with plaintiff's ability to divert water . . . it remains to be seen whether the government's actions will subsequently interfere with Casitas's beneficial use of its water."); *Tulare Lake*, 49 Fed. Cl. at 319*; see infra* notes 181–191 and accompanying text.

26. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992); *see* Baley v. United States, 134 Fed. Cl. 619, 679–80 (2017) (declining to find a taking due to government restrictions imposed on diversions diminishing the flow into Klamath Lake to preserve habitat for endangered fish species because of senior reserved water rights possessed by the Klamath tribes); *infra* notes 200–201 and accompanying text. The usufructuary nature of a water right makes it an especially unlikely vehicle for takings claims, since a water right is only a temporary-use right, whose scope is limited by state-imposed restrictions like beneficial use and public interest factors. *See infra* Part V. In some water rights takings cases, the CFC has unnecessarily complicated the application of background principles by assigning a high burden of proof to the federal government regarding the existence of a background principle of state law. *See infra* Part V.

not confined to *Lucas*-type economic wipeouts but also extend to *Penn Central*-type takings and physical takings. Finally, this Article concludes that the background principles defense, as the first issue for resolution in takings cases, will remain a vibrant area of takings jurisprudence because it represents an essential governmental defense against landowner compensation claims.

I. THE ORIGINS OF THE MODERN BACKGROUND PRINCIPLES DEFENSE

Today's background principles defense was brought into focus by Justice Scalia's majority opinion in *Lucas v. South Carolina Coastal Council*, which initially appeared to be a groundbreaking advance for landowners' rights.[27] Although that promise has since evaporated, the background principles defense has endured because it serves an important purpose: protecting federal, state, and local governments from compensation duties that would surely chill vital land use and environmental regulation.[28] The rise of the background principles defense transformed takings cases by interjecting a threshold examination of the nature of the property rights that a landowner actually possesses before inquiring whether that right has been taken by government action—an inquiry not previously emphasized in takings case law.[29]

The *Lucas* controversy is well known and need not be retraced in detail here.[30] David Lucas purchased two oceanfront lots in 1986, with the intention of developing them for vacation-home sales.[31] His plans were subverted in 1988 when South Carolina enacted the Beachfront

27. Justice Scalia cited *Scranton v. Wheeler*, 179 U.S. 141 (1900), which found no taking where a government pier blocked access of a riparian landowner to Lake Superior, *id.* at 163, as a background principles precedent. *Lucas*, 505 U.S. at 1029. Other vintage background principles cases not cited by Justice Scalia in *Lucas* include: *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 353, 356 (1908) (rejecting a water rights taking claim on the ground that such rights are subject to the government's valid exercise of its police power); *United States v. Willow River Power Co.*, 324 U.S. 499, 510 (1945) (rejecting an alleged taking on navigation servitude grounds).

28. *See* Timothy M. Mulvaney, *Legislative Exactions and Progressive Property*, 40 HARV. ENVTL. L. REV. 137, 156 (2016) ("If . . . eminent domain law and regulatory takings law begin to subject ordinary administrative acts to a more stringent level of judicial scrutiny . . . the state's willingness to take any administrative measures affecting property interests likely will be chilled.").

29. *See* Blumm & Ritchie, *supra* note 13, at 367.

30. *See, e.g.*, Vicki Been, Lucas *v. the Green Machine: Using the Takings Clause to Promote More Efficient Regulation*, in PROPERTY STORIES 299, 302–18 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009); *see also, e.g.*, Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1434–46 (1993) (summarizing *Lucas's* factual and legal background).

31. *Lucas*, 505 U.S. at 1006–07.

Management Act,[32] which prohibited new building on beaches to protect public safety and prevent erosion.[33] Lucas filed suit challenging the application of the statute to his lots and claiming he was owed compensation for a taking of his property rights.[34] The trial court agreed with Lucas, awarding him approximately $1.2 million.[35] The South Carolina Supreme Court reversed on the ground that the statutory prohibition of building on the beach was tantamount to avoiding a nuisance, and no landowner had a right to maintain a nuisance.[36] Aided by numerous amici, Lucas appealed the decision to the United States Supreme Court.[37]

The Supreme Court granted certiorari and announced that if the effect of the Beachfront Management Act to Lucas's tracts deprived him of all economic use, he was in fact entitled to just compensation under the Fifth Amendment.[38] Property rights and development enthusiasts celebrated the Court's 6–3 decision[39] as a major victory in their efforts to advance property rights at the expense of governmental regulation.[40] But Justice Scalia's opinion was more nuanced: it read takings jurisprudence as providing the government with a defense—even against the complete economic wipeouts that he declared otherwise warranted categorical

32. 1988 S.C. Acts 634; *Lucas*, 505 U.S. at 1006–07 (1992).

33. *Lucas*, 505 U.S. at 1007. The Beachfront Management Act was enacted to prevent the building of nuisances on coastal dunes, which function as a storm barrier to protect life and property. S.C. CODE ANN. § 48-39-250 (1990).

34. Lucas was never denied a building permit—instead, he claimed that the statute precluded the Coastal Division of the South Carolina Department of Health and Environmental Control from issuing a building permit, even though South Carolina amended the Beachfront Management Act to allow the Council to issue a special permit at variance with the Act's general limitations. *Lucas*, 505 U.S. at 1010–12; *see* S.C. CODE ANN. § 48-39-290(D)(1).

35. *See* Lucas v. S.C. Coastal Council, 404 S.E.2d 895, 896 (S.C. 1991), *rev'd*, 505 U.S. 1003 (1992)).

36. *Id.* at 899–900.

37. *See Lucas*, 505 U.S. at 1005 n.*.

38. Lucas v. S.C. Coastal Council, 502 U.S. 966 (1991) (accepting certiorari); *Lucas*, 505 U.S. at 1031–32.

39. Justice Scalia delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices White, O'Connor, and Thomas. *Lucas*, 505 U.S. at 1005, 1006. Justice Kennedy filed an opinion concurring in the judgment, but disagreeing that background principles were limited to common law. *Id.* at 1035 (Kennedy, J., concurring in the judgment) ("The common law of nuisance is too narrow a confine for the exercise of regulatory power . . . ."). Justice Blackmun filed a dissenting opinion, *id.* at 1036 (Blackmun, J., dissenting), as did Justice Stevens, *id.* at 1061 (Stevens, J., dissenting). Justice Souter filed a separate statement, alleging that certiorari was improvidently granted. *Id.* at 1076 (Souter, J.).

40. *See, e.g.*, *supra* note 9 and accompanying text.

compensation—if governmental regulations merely replicate common law restrictions.[41]

The background principles exception proved to be much more important than the per se takings rule it established.[42] This Article explores the legacy of background principles below.

II. THE SUPREME COURT'S POST-*LUCAS* CONSIDERATION OF BACKGROUND PRINCIPLES

One of the Supreme Court's first post-*Lucas* mentions of the background principles defense was in the well-known *Bush v. Gore*[43] decision, in which the Court stopped vote recounts in the presidential election of 2000, allowing George W. Bush to assume the presidency.[44] In a footnote, Chief Justice Rehnquist stated that background principles of property law determine whether there was an unconstitutional taking, but also averred,

> our jurisprudence requires us to analyze the "background principles" of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court, holding that state property law accorded the plaintiff no rights.[45]

41. *See Lucas*, 505 U.S. at 1029 ("A law or decree with such an effect must, in other words, do no more than duplicate the result . . . [of] the courts . . . under the State's law of private nuisance . . . ."); *id.* at 1035 (Kennedy, J., concurring in the judgment) ("The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source.").

42. *See* Blumm & Ritchie, *supra* note 13, at 367.

43. 531 U.S. 98 (2000). Explaining that the Supreme Court generally defers to state court interpretations of state law, the Court cited takings law as one of a few "areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law." *Id.* at 114; *see also* R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496, 501 (1941) (holding that federal courts ought not decide federal constitutional issues if a definitive ruling on a state law would terminate the controversy, establishing the so-called *Pullman* abstention doctrine).

44. *Bush*, 531 U.S. at 115 (Rehnquist, C.J., concurring); *see also* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001) ("[T]he case decided the outcome of a presidential election . . . .").

45. *Bush*, 531 U.S. at 115 n.1 (Rehnquist, C.J., concurring).

The Court thus reaffirmed its intention to oversee assertions of the state law background principles defense established by *Lucas*.[46] This announcement promised some federalism tension in takings cases.[47]

In 2001, nine years after *Lucas*, the Supreme Court issued a divided decision in *Palazzolo v. Rhode Island*, in which a six-justice majority ruled that land use regulations in existence at the time a claimant acquired title were not inherently background principles.[48] Justice Kennedy's majority opinion announced that if all pre-existing regulations were background principles defeating takings claims, the result would put too "potent a Hobbesian stick into the Lockean bundle" of property rights, absolving the state "of its obligation to defend any action restricting land use, no matter how extreme or unreasonable," effectively putting an

46. The *Lucas* opinion signaled that the Court was prepared to oversee assertions by state courts of background principles: "We stress that an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found." *Lucas*, 505 U.S. at 1032 n.18. Presumably, ensuring the "objectively reasonable" application of state law by state courts would be the responsibility of reviewing federal courts.

47. *See, e.g.*, WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 101 (1995) ("Judicial supervision of local governments facilitates federalism in the same way that enforcement of promises permits governments to confer benefits on future generations. A larger license for judges to change what they regard as inefficient laws adopted by higher levels of government is unwarranted, however."); Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 473 (2000) ("[W]hen the Takings Clause is applied to local land use regulation, it must be tempered with a concern for federalism.").

Federalism tensions will be exacerbated due to the Supreme Court's decision in *Knick v. Township of Scott*, No. 17-647, 2019 WL 2552486 (June 21, 2019), decided while this Article was in press. In *Knick*, a 5–4 majority overruled *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, which held that a property owner must exhaust state remedies before bringing a takings claim in federal court, effectively meaning that the only federal review of state takings claims is through Supreme Court review of state supreme court decisions. 473 U.S. 172, 195 (1985). *Knick* involved a local law that (1) allowed public officials to enter private property to determine whether a cemetery exists, and (2) required all cemeteries to be open to the public during daylight hours, even burial plots in the backyard of a private house. *Id.* at 314. Knick, a landowner with burial plots, claimed that these requirements amounted to a denial of her right to exclude and therefore required compensation, but the state courts denied compensation. The Supreme Court's reversal will allow the landowner to pursue her claim in federal court, but her chances of obtaining compensation are remote. *See infra* notes 128–35 and accompanying text.

48. Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001). In *Palazzolo*, a landowner attempted to develop a twenty-acre tract bordering on Long Island Sound, eighteen acres of which were wetlands and submerged lands. *Id.* at 613–15. The Rhode Island Coastal Resource Management Council denied the landowner development permits because building on the site would have a significant adverse effect on nearby waters and wetlands, and the Rhode Island courts upheld the Council. *Id.* at 614–16 (majority opinion).

expiration date on restrictions that might otherwise warrant compensation.[49]

The Court majority acknowledged that legislation could amount to a background principle but declined to state when a statute would earn this status. The opinion did explain, however, that an otherwise unconstitutional regulation "is not transformed into a background principle of the State's law by mere virtue of the passage of title."[50] Recognizing a kind of equal protection implicit in the takings clause, [51] Justice Kennedy announced that "[a] regulation or common-law rule cannot be a background principle for some owners and not for others."[52]

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49. *Id.* at 627; *see also id.* at 628 ("A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken. . . . It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.").

50. *See id.* at 629–30.

51. *See Palazzolo*, 533 U.S. at 630. A similar equal protection rationale was evident in Justice Brennan's decision in *Penn Central*. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 133–34 n.30 (1978) ("These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and *applicable to all similarly situated property*." (emphasis added)). Courts could conclude that a landowner who purchased with notice of a regulatory restriction might not be "similarly situated" to one without notice. *See* Sean B. Hecht, *Taking Background Principles Seriously in the Context of Sea-Level Rise*, 39 VT. L. REV. 781, 786 (2015) (advocating that background principles be applied "evenhandedly").

52. *Id.* at 630. Justice O'Connor concurred in the result, agreeing that not all pre-existing regulations were background principles. *Id.* at 632. But she emphasized that notice of such a regulation was an important factor in deciding whether there was a takings under the balancing authorized by *Penn Central*. *Id.* at 632–33 (O'Connor, J., concurring) ("Today's holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis. Indeed, it would be just as much error to expunge this consideration from the takings inquiry as it would be to accord it exclusive significance. . . . [I]nterference with investment-back expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations."). The Court majority in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* approvingly cited Justice O'Connor's concurrence. 535 U.S. 302, 335 (2002) ("[F]or reasons set out at some length by Justice O'Connor in her concurring opinion in *Palazzolo v. Rhode Island* we are persuaded that the better approach to claims that a regulation has effected a temporary taking 'requires careful examination and weighing of all the relevant circumstances.'" (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring))).

The notice requirement has proved an important, perhaps critical factor in several cases. *See, e.g.*, E. Enters. v. Apfel, 524 U.S. 498, 527 (1998) ("Nor did the MPPAA interfere with employers' reasonable investment-backed expectations, for, by the time of the MPPAA's enactment, '[p]rudent employers . . . had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations.'" (alterations in original) (quoting Connolly v. Pension Benefit Guar. Corp., 475 U.S.

On remand, the Rhode Island Superior Court decided *Palazzolo* on the basis of background principles. The court ruled that the state's public trust doctrine and its public nuisance law foreclosed Palazzolo's takings claim.[53] The Rhode Island Supreme Court decided not to review the case again after remand, ending Palazzolo's decades-long effort to fill shorelands for development.[54]

In 2002, a year after *Palazzolo*, the Supreme Court in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* rejected a physical takings claim concerning a moratorium on land development adjacent to Lake Tahoe.[55] In reaffirming that takings claims require judicial consideration of the whole property, the Court majority, per Justice John Paul Stevens, decided that the whole property included not just metes and bounds but also time. The court also ruled that it should not give a temporary land-use restriction "exclusive significance," but instead that restriction should be merely a factor to account for under the *Penn Central* balancing rule.[56] The *Tahoe-Sierra* majority clarified that

211, 227 (1986))); *see also, e.g.*, Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508 U.S. 602, 645–46 (1993) ("At the time Concrete Pipe purchased Cen-Vi-Ro and began its contributions to the Plan, pension plans had long been subject to federal regulation . . . . Concrete Pipe's reliance on ERISA's original limitation of contingent liability to 30% of net worth is misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted." (footnote omitted)); United States v. Locke, 471 U.S. 84, 104–05 (1985) (observing that public mining claimants take their "fully recognized possessory interests in . . . a 'unique form of property'" with notice of the federal government's underlying fee title and its "substantial regulatory power over those interests" (quoting Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963)).

53. Palazzolo v. State, No. WM 88-0297, 2005 WL 1645974, at *3–6 (R.I. Super. Ct. July 5, 2005) (determining that the public trust doctrine foreclosed the claim of lands above the lower water mark, and that public nuisance doctrine foreclosed the claim of lands above the high water mark).

54. Palazzolo v. State, 785 A.2d 561, 561 (R.I. 2001).

55. *Tahoe-Sierra*, 535 U.S. at 337–38. Justice Stevens wrote for a six-member majority; Chief Justice Rehnquist wrote for the three-member dissent. *Id.* at 305. Future Chief Justice John Roberts represented the interstate planning agency. *See* Brief for Respondents at 1, *Tahoe-Sierra*, 535 U.S. 302 (2002) (No. 00-1167), 2001 WL 1480565.

56. *Tahoe-Sierra*, 535 U.S. at 331, 337. The Court specifically rejected a rule requiring compensation for every delay in "routine" permitting because that would either make government considerations "prohibitively expensive or encourage hasty decisionmaking." *Id.* at 335. This admonition would seem to weigh against the type of temporary judicial takings alleged in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 704 (2010), and *Northern Natural Gas Co. v. Approximately 9117 Acres*, No. 10-1232-DWB-MLB, 2013 WL 3328773, at *9 (D. Kan. July 2, 2013). *See infra* notes 77–78 and accompanying text. Chief Justice Rehnquist's dissent in *Tahoe-Sierra* characterized the development moratorium as extending to six years (rather than the thirty-two months the majority employed), claiming that a moratorium of this length could not be a background principle of state property law. *See Tahoe-Sierra*, 535 U.S. at 351–52 (Rehnquist, C.J., dissenting) ("[A] moratorium prohibiting all

the *Lucas* categorical per se rule was a narrow exception to the general *Penn Central* balancing rule.[57]

The next Supreme Court brush with background principles occurred in 2010 in the curious case of *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[58] where the Court unanimously rejected a takings claim involving a beach restoration project in the wake of several hurricanes.[59] Adjacent landowners objected to a state-imposed condition requiring new sand provided by the state to be shared by the public, but the Court agreed that the state court's rejection of the landowners' takings claims was fully justified.[60] The unanimous Court agreed that the result was consistent with background principles of Florida law, which makes clear that landowners lack any compensable property rights as a result of avulsive changes to beaches, such a beach-restoration project.[61]

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economic use for a period of six years is not one of the longstanding, implied limitations of state property law.").

57. *Tahoe-Sierra*, 535 U.S. at 332 ("[T]hese cases make clear that the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry.").

58. 560 U.S. 702 (2010).

59. *Id.* at 707, 713, 733.

60. *Id.* at 710–11, 729–31. All nine members of the Court agreed that there was no takings, but four members of the Court used the case to announce the view that judicial takings were a possibility (presumably when a state court's interpretation of state law was unexpected, perhaps unsettling reasonable expectations). *Id.* at 707, 728; *see* Hughes v. Washington, 389 U.S. 290, 296 (1967) (Stewart, J., concurring) ("To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive.").

61. *See Stop the Beach*, 560 U.S. at 731–32. Avulsion is the process by which land is covered or uncovered by a sudden or violent change in shoreline, *see Avulsion*, BLACK'S LAW DICTIONARY (10th ed. 2014), whereas accretion is the process by which land is covered or uncovered gradually and imperceptibly, *see Accretion*, BLACK'S LAW DICTIONARY (10th ed. 2014). When avulsions occur, private property boundaries remain the same, whereas when accretions occur, property boundaries move along with the shoreline. *See, e.g.*, Joseph W. Dellapenna, *Boundaries Along a Waterbody*, *in* 1 WATERS AND WATER RIGHTS § 6.03(b)(2) (Amy K. Kelley ed., 3d ed. 2019) (examining the legal consequences of accretion and avulsion for property owners); Hecht, *supra* note 51, at 789 (maintaining that the doctrines of avulsion and accretion constitute background principles); Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENVTL. L.J. 305, 306 (2010) (explaining avulsion and accretion). The Court suggested that the state might reconsider the role of state-created avulsions like beach-restoration projections. *Stop the Beach*, 560 U.S. at 732. Justice Kennedy's concurrence stated, "the Court should consider with care the decision to extend the Takings Clause in a manner that might be inconsistent with historical practice." *Id.* at 739 (Kennedy, J., concurring); *see also Hughes*, 389 U.S. at 294–96 (Stewart, J., concurring) (suggesting that the Court should have evaluated whether the Washington Supreme Court's interpretation of the state constitution to deprive landowners of the right to future accretions of oceanfront property was a

Soon thereafter, in 2012, in *Arkansas Game & Fish Commission v. United States*,[62] a unanimous Supreme Court decided that temporary flooding of state lands due to federal dam operations could constitute a taking under the *Penn Central* balancing rule.[63] The Court suggested that the result could have been different, however, had the government asserted background principles as a categorical defense to takings liability.[64] Justice Ruth Bader Ginsburg announced that "government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection," although she acknowledged that the Court was "not equipped to address the bearing, if any, of Arkansas water rights law on this case" because the Federal Circuit did not examine the issue, implying that state water law could function as a background principle.[65]

A potentially overlooked Supreme Court decision occurred in 2015 when the Court reversed the Ninth Circuit in *Horne v. United States Department of Agriculture*, ruling that a federal "raisin reserve"—which employed marketing orders and agreements to withhold a portion of harvests in reserve to inflate prices for raisin producers[66]—worked as an

takings). A four-member plurality of the Court in *Stop the Beach* built on the Stewart concurrence in *Hughes* and stated that while the state's public access condition took no property, a court decision could in fact take property, raising a multitude of questions that have yet to be resolved. *Stop the Beach*, 560 U.S. at 707, 730 ("There is no taking *unless* petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land." (emphasis added)). Justice Breyer cautioned against the plurality's endorsement of judicial takings, worrying that the losing party in state courts would routinely pursue a collateral attack in federal court. *Id.* at 744–45 (Breyer, J., concurring) ("[T]he approach the plurality would take today threatens to open the federal-court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges. . . . creat[ing] the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law."); *see* Michael C. Blumm & Elizabeth B. Dawson, *The Florida Beach Case and the Road to Judicial Takings*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 713, 757–58 (2011) (noting that Justice Kennedy, troubled both by procedural and remedial questions concerning judicial takings, observed that the due process clause provided an appropriate and adequate remedy limiting judicial authority concerning property rights); Mary Doyle & Stephen J. Schnably, *Going Rogue:* Stop the Beach Renourishment *as an Object of Morbid Fascination*, 64 HASTINGS L.J. 83, 114 (2012) ("Any time a federal court answers the question whether an established right was eliminated, it will of necessity engage in an act of judgment—or rather, of second-guessing states' judgments—about how property should be regulated.").

62. 568 U.S. 23 (2012).

63. *Id.* at 26, 34, 37–38.

64. *Id.* at 38.

65. *Id.*; *see infra* Section IV.D (discussing public ownership of water).

66. Horne v. U.S. Dep't of Agric., 750 F.3d 1128, 1132 (9th Cir. 2014), *rev'd*, 135 S. Ct. 2419 (2015). The raisin reserve, established during the Great Depression of the 1930s, authorized a committee of raisin industry representatives appointed by the Secretary of Agriculture to withhold a percentage of raisins from the market to maintain high prices for growers like Horne.

unconstitutional taking of a grower's raisins.[67] A five-justice majority overturned the lower court's decision, which held that personal property, like raisins, was not subject to the same level of scrutiny as real property.[68] Chief Justice John Roberts rejected the dichotomy, maintaining that for some 800 years, personal property had been given virtually the same protection as realty, and therefore the physical appropriation of federal raisin reserves amounted to a per se taking.[69]

Yet, in response to an eighty-year-old precedent upholding a similar scheme imposed by the state of Maryland concerning oysters,[70] the Chief Justice distinguished oysters from raisins. The former were wildlife belonging to the state under state law (*ferae naturae*), while the latter were private property: "the fruit of the growers' labor—not 'public things subject to the absolute control of the state.'"[71] Without expressly mentioning background principles, the case turned on the distinction between the private property character of raisins and the background principle of state ownership of wildlife.[72]

The most recent Supreme Court case involving background principles, *Murr v. Wisconsin*,[73] involved determining the proper parcel for judicial evaluation in a takings claim, the so-called "denominator" of the takings fraction.[74] In 1975, in an effort to protect the adjacent St.

Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419, 2421 (2015). Earlier, the Supreme Court had reversed the Ninth Circuit on jurisdictional grounds. Horne v. Dep't of Agric. (*Horne I*), 133 S. Ct. 2053, 2063–64 (2013), *rev'g* 673 F.3d 1071 (9th Cir. 2012).

67. *Horne II*, 135 S. Ct. at 2437 (explaining that a governmental mandate to relinquish property interests as a condition to engage in interstate commerce constitutes a per se takings in this case) (Sotomayor, J., dissenting).

68. *Horne*, 750 F.3d at 1144 ("[G]overnmental regulation of personal property is more foreseeable, and thus less intrusive, than is the taking of real property.").

69. *Horne II*, 135 S. Ct. at 2426.

70. In *Leonard v. Earle*, the Court approved a state requirement that oyster packers remit 10% of their marketable oyster shells as a condition of the privilege of harvesting oysters in state waters. 279 U.S. 392, 396 (1929).

71. *Horne II*, 135 S. Ct. at 2431 (quoting Leonard v. Earle, 141 A. 714, 716 (Md. 1928)).

72. *See* John D. Echeverria & Michael C. Blumm, Horne v. Department of Agriculture*: Expanding Per Se Takings While Endorsing State Sovereign Ownership of Wildlife*, 75 MD. L. REV. 657, 688–96 (2016).

73. 137 S. Ct. 1933 (2017).

74. *Id.* at 1945 ("[N]o single consideration can supply the exclusive test for determining the denominator."); *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) ("Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.'" (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967))); Eagle, *supra* note 9, at 631 (noting that the answer to the denominator question may be outcome determinative).

Croix River, a federally designated wild and scenic river, the state of Wisconsin and St. Croix County forbade the sale or development of communally owned, contiguous lots as separate lots smaller than one acre of developable land.[75] The Murrs, who wanted to sell one of their adjacent lots to finance the redevelopment of the other, claimed that the required merger of the lots constituted a taking, alleging a complete deprivation of all economic use of one of the merged lots.[76]

A five-justice majority, in an opinion by Justice Kennedy, invoked the Court's whole-property jurisprudence[77] to conclude that the relevant parcel for the denominator of the takings fraction was the sum of the two contiguous lots, which together retained considerable economic value.[78] Justice Kennedy indicated that the Court would not consider the state's definition of property rights to be "coextensive" with the takings clause[79] because no one consideration would supply a litmus for the denominator. Instead, a number of factors—such as state and local law, the physical characteristics of the land, and the land's prospective value—were relevant.[80] But the result of the case seemed to turn on the role of longstanding state law, the 1975 merger provision. The merger provision, according to the Court, was "a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago."[81] If this characterization

75. *Murr*, 137 S. Ct. at 1940.

76. *Id.* at 1941.

77. *Id.* at 1950; *see also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 332 (2002) ("[A] permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole.'"); Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001) ("Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole . . . ."); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978) ("In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .").

78. *Murr*, 137 S. Ct. at 1944. Justice Kennedy observed that the combined value of the two lots, estimated at $698,300, was "far greater than the summed value of the separate regulated lots." *Id.* at 1949 (noting that the summed value of the separate lots was just $413,000).

79. *Id.*

80. *Id.* at 1945. Justice Kennedy emphasized that "[i]n particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation." *Id.* at 1945–46. Kennedy also noted that the relevant denominator (the size of the property) was not the product of "a bright-line rule," *id.* at 1949, or a "simple test," *id.* at 1950. Kennedy's reliance on multi-factor balancing was quite typical. *See* Michael C. Blumm & Sherry L. Bosse, *Justice Kennedy and the Environment: Property, States' Rights, and a Persistent Search for Nexus*, 82 WASH. L. REV. 667, 722 (2007).

81. *See Murr*, 137 S. Ct. at 1947. The Court noted that "[t]he land's location along the river is also significant," explaining that the Murrs "could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal, state, and local law before [they] possessed the land." *Id.* at 1948.

was not the Court recognizing the merger provision as a background principle of state law, it was quite close.[82]

This brief review of recent Supreme Court takings decisions indicates that background principles clearly include statutes as well as common law principles. The Court has yet to indicate how old a statute must be to become a background principle, although not all regulations pre-dating a claimant's property acquisition qualify.[83] There is some evidence that six-year-old police powers are not old enough, but those of forty years may be.[84] Without expressly so declaring, the Court has assumed that normal delays in permitting,[85] state rules on avulsive changes in shoreline lands,[86] state ownership of wildlife,[87] and land-use merger provisions[88] can all be background principles. At least one of these state-law rules originated as recently as 1975.[89] Perhaps not surprisingly, the Court has considered only cases involving state property law background principles as opposed to nuisance cases requiring the Court to review a lower court's judicial balancing on a largely ad hoc basis.[90]

82. The underlying regulation in the Supreme Court's recent *Knick v. Township of Scott* decision, concerning burial rights, may be a background principle. *See* discussion *infra* notes 128–35 and accompanying text.

83. *See supra* notes 48–52 and accompanying text (discussing *Palazzolo*'s rejection of a categorical rule that all regulations predating acquisition of title qualify as background principles).

84. *Compare* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 352 (2002) (Rehnquist, C.J., dissenting) ("[A] moratorium prohibiting all economic use for a period of six years is not one of the longstanding, implied limitations of state property law."), *with Murr*, 137 S. Ct. at 1940 (forty-year-old merger provisions).

85. *See Tahoe-Sierra*, 535 U.S. at 352 (Rehnquist, C.J., dissenting) ("[D]elays attendant to zoning and permit regimes are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations.").

86. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 730–31 (2010) ("[I]f an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water. . . . The Florida Supreme Court decision . . . [was] consistent with the[] background principles of state property law.").

87. *See* Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419, 2431 (2015) ("[T]he fruit of the growers' labor—'not public things subject to the absolute control of the state.'" (quoting Leonard v. Earle, 141 A. 714, 716 (Md. 1928))).

88. *See Murr*, 137 S. Ct. at 1947 ("The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago.").

89. *See supra* text accompanying notes 81–82 (discussing the lot-merger provision in *Murr*).

90. The lack of contested background nuisance cases may also reflect the fact that nuisance liability seldom leaves affected property without value.

III. COMMON LAW BACKGROUND PRINCIPLES IN THE LOWER COURTS

In *Lucas*, Justice Scalia emphasized that the "antecedent inquiry" into the nature of a claimant's property rights was an examination of background principles of either property or nuisance law.[91] Justice Scalia's opinion gave examples of nuisance-like activities that would be background principles, such as flooding or siting a nuclear power plant on an earthquake fault.[92] Earlier analyses confirmed that lower courts invoked background principles of property and nuisance law with some frequency.[93] This Article considers the most recent cases involving each in turn.

A. *Property*

According to recent case law, common law property rules that restrict the viability of a takings claimant's case include the public trust doctrine, the navigation servitude, customary rights, and public rights to access cemeteries.

1. The Public Trust Doctrine (PTD)

Although there are a number of decisions recognizing the public trust doctrine (PTD) as a background principle,[94] only one case of prominence

91. *Lucas*, 505 U.S. at 1003, 1027 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." (footnote omitted)).

92. *See id.* at 1029 ("[T]he owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.").

93. *See* Blumm & Ritchie, *supra* note 13, at 325–26 (asserting that "the background principles defense to takings liability is expansive," as evidenced from application by "[c]ourts in multiple jurisdictions"); Blumm & Ruhl, *supra* note 13, at 806 ("Over the last two decades, many courts have employed the 'background principles' defense to uphold government regulations accused of working unconstitutional losses of property rights."); John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 944–50 (2012) (explaining that some background principles preclude takings claims without barring the activity, while some ban the activity altogether).

94. *See, e.g.*, Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002) (using PTD as a background principle to reject a landowner's takings claim); Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 458 (2011), *aff'd*, 708 F.3d 1340 (Fed. Cir. 2013); McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119–20 (S.C. 2003) (using PTD to deny

recently did so. In *Nies v. Town of Emerald Isle*, the dispute involved two North Carolina oceanfront property owners who claimed that a town ordinance allowing the public to drive across their beachfront property worked as a physical taking.[95] But the North Carolina Court of Appeals affirmed a lower court's conclusion that the "antecedent inquiry" into the landowners' property rights revealed that they lacked the right to exclude the public from the beach—a trust resource under state law.[96] Relying on "the long-standing customary right of access of the public to the dry sand beaches of North Carolina," the court concluded that the public had the right since "time immemorial" to access dry sand beaches in the state.[97] Thus, the adjacent landowners could not exclude the public from the beach.[98]

Casitas Municipal Water District v. United States, the 2011 CFC decision that imposed this high burden, held that the government failed to prove that water use restrictions imposed pursuant to the Endangered Species Act could have been duplicated under background principles of California water law but nevertheless held that the plaintiff's claim was unripe.[99] A municipal water district claimed that the interruptions amounted to physical takings[100] and sought compensation from the federal government.[101] The government claimed that background

compensation for denial of bulkhead construction permits in tidelands); Blumm & Ritchie, *supra* note 13, at 341–44; Blumm & Ruhl, *supra* note 13, at 833–34; Echeverria, *supra* note 93, at 956–70 (discussing the public trust doctrine in the context of alleged takings of water rights); discussion *infra* Part IV (discussing *Casitas*); *see also* Hecht, *supra* note 51, at 784 (explaining the broad agreement that the PTD is a background principle).

95. Nies v. Town of Emerald Isle, 780 S.E.2d 187, 190, 192–93 (N.C. Ct. App. 2015).

96. *Id.* at 197.

97. *Id.* at 195–96 (quoting N.C. GEN. STAT. § 77-20(d) (2013) ("[P]ublic right of access to dry sand beaches in North Carolina is so firmly rooted in the custom and history of North Carolina that it has become a part of the public consciousness."); *see* N.C. GEN. STAT. § 77-20(d) (2018) ("The public having made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial, this section shall not be construed to impair the right of the people to the customary free use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the common law and are a part of the common heritage of the State recognized by Article XIV, Section 5 of the Constitution of North Carolina. These public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State.").

98. *See Nies*, 780 S.E.2d at 201 ("[P]ublic access is permitted, and in fact guaranteed, pursuant to the associated public trust rights.").

99. *See Casitas*, 102 Fed. Cl. at 445, 477–78.

100. An earlier case so held. *See* Tulare Lake Basin Storage Dist. v. United States, 49 Fed. Cl. 313, 314 (2001); *see also* Echeverria, *supra* note 94, at 956–62 (analyzing *Tulare Lake*).

101. *Casitas*, 102 Fed. Cl. at 445; *see* Echeverria, *supra* note 94, at 963–70 (analyzing *Casitas*); *see also* discussion *infra* Part VI (discussing *Casitas*). Water is a public trust resource under California law, eliminating any vested rights to continued water diversions, and requiring the state to exercise continuous supervision over the water resource and its allocation between

principles of state law, including the PTD, "inhere[d] in the [district's] title" and shielded the government from takings liability.[102] Although the CFC acknowledged that the listed species were public trust resources under California law,[103] it decided that the federal restrictions on water deliveries did not "merely parallel and make explicit the restrictions that background principles of California water law already [have in] place."[104] This suggested to the court that the restrictions were not justified as background principles.

The court proceeded to impose a high burden of proof on the government, deciding that the government failed to demonstrate that the public's interest in serving the needs of the listed fish was more compelling than the public interest as a whole, and therefore rejected the PTD-based background principles defense.[105] The assumption that a federal court may decide that the PTD is inapplicable absent a separate public interest determination is one that no California court has endorsed. The curious result and reasoning of the case might have been a function of the fact that the federal government was asserting the background principles defense based on state, not federal, law.[106] The result suggested that the defense could be subject to competing public interest balancing tests, seemingly inconsistent with the "logically antecedent" inquiry into

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consumptive and non-consumptive uses. *See* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 712 (Cal. 1983) ("[T]he core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters.").

102. *Casitas*, 102 Fed. Cl. at 452 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992)).

103. *Id.* at 459 ("Defendant has convincingly shown that the steelhead trout are a public trust resource and that the state of California is concerned with their preservation.").

104. *Id.* at 455–56.

105. *See id.* at 460–61. The court also rejected a statutory background principles defense, based on section 5937 of the state's Fish and Game Code, which read:

> The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dam.

Id. at 455 n.15, 460–61 (quoting CAL. FISH & GAME CODE § 5937). In doing so, the court reasoned that "Section 5937 provides no quantifiable standard that would allow this court to determine whether requirements of the biological opinion and Section 5937 are one and the same." *Casitas*, 102 Fed. Cl. at 462; *see* Karrigan S. Börk et al., *The Rebirth of California Fish & Game Code Section 5937: Water for Fish*, 45 U.C. DAVIS L. REV. 809, 813 (2012).

106. Although not a party to the case, the state did submit an amicus brief in support of the federal position when the case went before the Federal Circuit. Amicus Curiae Brief of California State Water Resources Control Board in Support of the United States, Casitas Mun. Water Dist. v. United States, 708 F.3d 1340 (Fed. Cir. 2013) (No. 2012-5033).

the nature of the claimant's property interest, involving a narrower focus.[107]

2. The Navigation Servitude

The navigation servitude, which Justice Scalia's *Lucas* opinion expressly recognized as a background principle,[108] is a somewhat mysterious doctrine as it provides an exemption from takings liability for damage below the low water mark in connection with federal navigation projects.[109] In 2013, the CFC rejected a takings claim concerning a riverfront property owner's loss of deep-draft vessel access to its commercial shipping terminal, due to the Army Corps of Engineers' authority to revoke access to the property based on an environmental impact statement (EIS) submitted to Congress.[110] The court reasoned that whatever property interest the claimant had was "subsumed by the federal navigational servitude," and decided that "[t]he economic value attributable to a strategic riparian location is not a compensable property interest when diminished or destroyed by the United States in aid of navigation."[111]

Just a year earlier, a judge of the same court obtained a contrasting result. In *Mehaffy v. United States*, that judge considered federal claims that the navigation servitude precluded a takings claim in a case in which the Army Corps of Engineers denied a fill permit application under section 404 of the Clean Water Act.[112] Although the landowner held a forty-year-old easement reserving the right to dredge and fill wetlands on

107. *See Lucas*, 505 U.S. at 1027.

108. *See id.* at 1029.

109. *See* Amy K. Kelley, *The Commerce Clause and Navigability*, *in* 2 WATERS AND WATER RIGHTS § 35.02(c) (Amy K. Kelley ed., 3d ed. 2019) ("The navigation servitude . . . coexists with no other enumerated power of the federal government. With regard to most navigable waters, when the public exercises its traditional right of access, or the government exercises the navigation power itself, an impact upon private property rights that might be compensable between private parties, or against the government under other circumstances, will not be constitutionally compensable under the navigation servitude." (footnotes omitted)). The navigation servitude is best understood as a reflection of the essential public of navigable waters, resisting attempts to claim private rights in these waters, an antimonopolistic impulse. For an analysis of the antimonopoly sentiments behind the related public trust doctrine, see generally Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENVTL. AFF. L. REV. 1 (2017).

110. Lone Star Indus., Inc. v. United States, 109 Fed. Cl. 746, 750–51, 759 (2013).

111. *Id.* at 756–57.

112. Pub. L. No. 92-500, § 404, 86 Stat. 816, 884 (1972) (amending Federal Water Pollution Control Act, ch. 758, 62 Stat. 1151 (1948)); *see* Mehaffy v. United States, 102 Fed. Cl. 755, 757, 769 (2012), *aff'd*, 499 F. App'x 18 (Fed. Cir. 2012).

his property,[113] the government argued that its "special rights in the navigable waters of the United States curtail the scope of takings claims that can be asserted against the United States in cases such as this."[114] The court curiously announced that "an inquiry into a compensable property interest is not an analytical prerequisite" to a takings claim, apparently rejecting Justice Scalia's "logically antecedent inquiry," and proceeded to address the takings issue using the *Penn Central* factors.[115] While dismissing the background principles defense, the CFC nonetheless rejected the takings claim after determining that the landowner's right to dredge and fill his property did not inhere in his title under the reasonable investment-backed expectations prong of the *Penn Central* analysis, as he had both constructive and actual notice of the twenty-year-old Clean Water Act permit requirements.[116] In rejecting the categorical background principles defense of the navigation servitude, the court denied the takings claim under *Penn Central* balancing where the existence of the servitude was nonetheless a primary factor.[117]

Two years earlier, the CFC considered the navigation servitude to be an inherent limit on claimed riparian rights in a case involving the government's continuous discharge of polluted fresh water from a lake into rivers since the 1930s, which damaged the environment of the river in front of the riparian landowners' home.[118] The court held that the claimants had failed to prove they held the riparian rights of which they were allegedly deprived by the government's action.[119] Even if the

113. *Mehaffy*, 102 Fed. Cl. at 757–58. The court determined that rights reserved in the easement were "not immune from being subjected to more recent regulation." *Id.* at 767. The Corps denied the permit for filling forty-eight acres of wetlands adjacent to the Arkansas River because a lack of a disclosed purpose that made it impossible to determine that the use of the fill would be for a water-dependent purpose, a failure to comply with local ordinances, a failure to produce a requested hydraulic study, and the Corps' obligations under the navigation servitude. *Id.* at 759, 761, 763.

114. *Id.* at 763–64.

115. *Id.* at 764 ("Without commenting on the merits of the parties' arguments, and despite the effort spent by the parties in briefing these issues, an inquiry into a compensable property interest is not an analytical prerequisite to ruling on defendant's motion.").

116. *See id.* at 767. The court noted that "'although a takings claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction, it is particularly difficult to establish a reasonable investment-backed expectation' in those situations where the party had constructive or actual knowledge of the restriction." *Id.* at 765 (quoting Norman v. United States, 429 F.3d 1081, 1092–93 (Fed. Cir. 2005)).

117. *Id.* at 764–65.

118. Mildenberger v. United States, 91 Fed. Cl. 217, 217, 224–25, 247 (2010), *aff'd in part*, 643 F.3d 938 (Fed. Cir. 2011).

119. *Id.* at 241 ("Although the state may convey legal title to submerged lands to private owners, any rights thus conveyed are always subject to the state's overriding obligation to protect the public rights of swimming, bathing, fishing and navigation."); *see id.* at 248 ("[T]he servitude applies only to those governmental actions and projects that are related to the improvement of

claimants could prove they held such rights, the court ruled that the navigation servitude would bar a takings claim.[120]

Although the CFC has yet to establish a consistent approach to background principles grounded on the navigation servitude, no takings claims have succeeded in cases in which the government has defended on that basis.

3. Customary Rights

Over thirty years ago in a decision later questioned by Justice Scalia in a dissent from denial of certiorari,[121] the Oregon Supreme Court in *Stevens v. City of Cannon Beach* recognized the public's customary right to access Oregon beaches as a background principle.[122] Texas law also recognizes public customary rights to use its beaches,[123] but hurricanes and their aftermath have complicated these public usufructuary rights. In 2012, the Texas Supreme Court ruled that even where the state has proven a customary right to use a beach, public rights do not extend to a newly created, post-hurricane beach if the new beach was created on previously unencumbered private lands.[124] Thus, a landowner could successfully maintain a takings claim when the state attempted to assert public access rights to a post-hurricane upland beach on land that previously had not been subject to public customary rights.[125]

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navigation. . . . If a public project is wholly unrelated to navigation, the government is not shielded from compensation liability by the federal navigational servitude."). The court also noted that the navigation servitude does not protect the federal government from liability for property damages above the ordinary high water mark or from riparian damages on a non-navigable waterway. *Id.* at 249.

120. *Id.* at 263.

121. Stevens v. City of Cannon Beach, 510 U.S. 1207, 1211–12 (1994) (Scalia, J., dissenting to denial of certiorari).

122. Stevens v. City of Cannon Beach, 854 P.2d 449, 456 (Or. 1993) (en banc), *cert. denied*, 510 U.S. 1207 (1994); *see* Blumm & Ritchie, *supra* note 13, at 347–49 (discussing *Stevens*). *Stevens* reaffirmed the Oregon Supreme Court's landmark decision in *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), which recognized the public's customary rights to use ocean beaches. *See Stevens*, 854 P.2d at 456; *Thornton*, 462 P.2d at 676–78.

123. City of Galveston v. Menard, 23 Tex. 349, 349 (1859) (explaining that the public has a right to use private property on seashores).

124. Severance v. Patterson, 370 S.W.3d 705, 708 (Tex. 2012) (concluding that the public's customary right to access the beach did not "roll" upland with the new beach if rolling onto previously unencumbered land). The *Severance* court acknowledged that Texas law recognized the public trust nature of tidelands, and that changes in tidewater can cause public trust property to shrink or grow, but decided that landward property at issue in the case was without "historic custom or inherent title limitations," and thus was not subject to public use due to post-hurricane adjustment of beaches. *Id.* at 708, 721, 732. The court also made clear that the state's obligation to prove customary use existed was a prerequisite to defending against takings claims as a background principle. *Id.* at 729.

125. *See id.* at 732.

Customary rights influenced the North Carolina Court of Appeals to reject a takings claim from landowners challenging public access to ocean beaches adjacent to their properties.[126] In denying their trespass claims, the court explained that the landowners never had the right to exclude the public from privately owned beaches because in North Carolina, the public had a right to access dry-sand beaches "from time immemorial."[127]

4. Burial Rights

An overlooked background principle was raised in a case recently before the Supreme Court, in which the Court reconsidered the ripeness rule from *Williamson County Regional Planning Commission v. Hamilton Bank*.[128] *Williamson County* foreclosed takings claims in federal court until a state has refused compensation,[129] meaning that most takings cases had to be filed first in state courts. In *Knick v. Township of Scott*,[130] a landowner challenged the requirement that she had to file her claim first in state court, but the lower federal courts ruled against her on ripeness grounds.[131] The Supreme Court reversed on the ripeness issue, apparently enabling takings claimants to forum shop between federal and state reviewing courts[132] But Knick's underlying claim that her right to exclude was taken by a Pennsylvania statute granting the public a right to access cemeteries located on private land during daylight hours[133] has almost no chance to succeed, regardless of the forum court.

The Pennsylvania statute at issue in *Knick* is a commonplace statute mirroring a longstanding common law requirement that restricted private landowners' ability to exclude others from accessing burial grounds.[134] The common law has long recognized rights in the dead, which the living must protect, including the right to undisturbed repose and the right of

126. *See* Nies v. Town of Emerald Isle, 780 S.E.2d 187, 197 (N.C. Ct. App. 2015).

127. *Id.* at 195 (quoting N.C. GEN. STAT. § 77-20(d) (2013)). Thus, the court concluded that the state's public trust doctrine protected the public's right to drive on dry sand beaches. *Id.* at 198.

128. *See* Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985) (describing the ripeness rule).

129. *Williamson*, 473 U.S. at 195 ("[I]f a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.").

130. Knick v. Township of Scott, 862 F.3d 310 (3d Cir. 2017), *cert. granted*, 138 S. Ct. 1262 (2018).

131. *Id.* at 314, 323.

132. *See* Knick v. Township of Scott, No. 17-647, 2019 WL 2552486 (June 21, 2019).

133. *Knick*, 862 F.3d at 314–15.

134. The common law rule and its statutory overlays are discussed in detail in a Supreme Court amicus brief filed by cemetery law scholars in the *Knick* case. *See* Brief of Cemetery Law Scholars as Amici Curiae in Support of Respondents at 6–14, *Knick*, 138 S. Ct. 1262 (2018) (No. 17-647), 2018 WL 3740592, at *6–14.

the public to access their graves for purposes of visitation and maintenance.[135] In short, the right to access graveyards is a classic background principle imposing an implied easement on applicable land titles.

5. Public Necessity

A longstanding exception to compensation requirements for governmental takings is the public necessity doctrine, which is the idea that public rights trump private rights, without compensation, in emergencies.[136] The Supreme Court has stated that "the common law had long recognized" the government's authority to respond to "imminent peril—such as when fire threatened a whole community," even if the response involved "destroy[ing] the property of a few" to save lives and the property of the many.[137] Justice Scalia recognized public necessity as a background principle in *Lucas*.[138]

Although the public necessity defense has broader application,[139] one court recently applied it in a public nuisance abatement action for a property owner's failure to remove junk vehicles from his yard, noting that under settled doctrine, a state "may take, damage, or destroy private property without compensation, when the public necessity, the public health, or the public safety require it to be done."[140] The sparse, recent case law should not be interpreted as a harbinger of the invocation of the public necessity defense, especially in a future where climate change is likely to bring increased risks of flood and fire.

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135. *See, e.g.*, *id.* at 12–17, 2018 WL 3740592, at *12–17 (discussing rights of repose and access). *See generally* Alfred L. Brophy, *Grave Matters: The Ancient Rights of the Graveyard*, 2006 BYU L. REV. 1469 (2006) (exploring ancient rights associated with graveyards).

136. *See* Joseph W. Dellapenna, *The Move Away from the Absolute Dominion Rule*, *in* 2 WATERS AND WATER RIGHTS § 20.06 (Amy K. Kelley ed., 3d ed. 2019) ("The emergency doctrine basically is that where a situation ensures that some private property must be destroyed regardless of the decisions the government makes, it can choose which forms of property should be destroyed without having to pay compensation.").

137. United States v. Caltex (Philippines), Inc., 344 U.S. 149, 154 (1952).

138. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 n.16 ("The principal 'otherwise' that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of 'real and personal property, in cases of actual necessity, to prevent the spreading of a fire' to forestall other grave threats to the lives and property of others." (quoting Bowditch v. City of Boston, 101 U.S. 16, 18–19 (1880))).

139. *See, e.g.*, Robin Kundis Craig, *Drought and Public Necessity: Can a Common-Law "Stick" Increase Flexibility in Western Water Law?*, 6 TEX. A&M L. REV. 77, 92–99 (2018) (discussing the public necessity doctrine and its potential application to drought).

140. Ashe v. City of Montgomery, 754 F. Supp. 2d 1311, 1313, 1315 (M.D. Ala. 2010) (quoting Hulen v. City of Corsicana, 65 F.2d 969, 970 (5th Cir. 1933)).

B. *Nuisance*

Justice Scalia's *Lucas* opinion rejected statutory nuisances as categorical, per se defenses to takings claims, but it nonetheless provided examples of nuisances that would equip the government with viable nuisance defenses. The opinion stated that denying a permit for a fill to prevent flooding of nearby land or an order to remove a nuclear plant upon discovery of earthquake fault would not result in a taking.[141] This suggested that new regulations, such as common law nuisance,[142] could respond to new circumstances or "new knowledge" without paying compensation.[143] Presumably, Justice Scalia was satisfied that these situations were remediable under common law nuisance principles long recognized to have sufficient elasticity to respond to new information.[144]

In 2018, a lower New York court concluded that the state's nuisance law did not forbid wetland fills. From the early nineteenth century until the 1970s, it was "longstanding practice and part of the common history of the City of New York" to fill wetlands for development, and thus state wetland regulations restricting fills could not be background principles.[145] However, a 2016 New York appeals court decision rejected a landowner's contention that a background principles nuisance had to be

141. *See Lucas*, 505 U.S. at 1029 ("[T]he owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.").

142. There is a long history of common law nuisance responding to changed circumstances and new information. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 74 (1st ed. 1977) (suggesting that American courts became willing to "accommodate the law of nuisance to the demands of a developing society" around the time of the Civil War); Daniel R. Coquillette, *Mosses From an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 821 (1979) ("In 1894, Professor John T. Dillon of Yale predicted that American property law would see 'important changes of substance and form' as it adapted to the new values in American society. Appropriately, the *res communes* doctrine, one of property law's oldest elements, may assist in this change." (footnote omitted) (quoting J. DILLON, THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA 385 (1894))).

143. *See Lucas*, 505 U.S. at 1031.

144. *See, e.g.*, Andrea L. Peterson, *The False Dichotomy Between Physical and Regulatory Takings Analysis: A Critique of* Tahoe-Sierra*'s Distinction Between Physical and Regulatory Takings*, 34 ECOLOGY L.Q. 381, 435–36 n.210 (2007) (explaining that in *Tahoe-Sierra*, "new information" learned about the potential environmental harm of developing near Lake Tahoe allowed the government to exercise its police power to prevent that alleged nuisance from occurring); Joseph L. Sax, *Reflections on Western Water Law*, 34 ECOLOGY L.Q. 299, 303 (2007) (suggesting takings claimants may be victims of changing circumstances as new information is learned that authorizes the government to abate nuisances without incurring takings liability).

145. *In re* City of New York, No. (CY) 4018/07, 2018 N.Y. Misc. LEXIS 51, at *11 (Sup. Ct. Jan. 12, 2018); *see infra* note 157 and accompanying text.

recognized as a nuisance when a regulation was promulgated, observing that nuisance law was not static.[146]

According to the CFC, operating a landfill is not a nuisance in the state of Washington because a Washington statute specifically authorizes landfills; this in turn makes the background principles defense inapplicable.[147] The same court ruled that a federal order to dispose of uninfected breeder chickens, as part of a disease-eradication program, was not justified as nuisance-prevention because California law considered only infected chickens to be nuisances.[148] The CFC determined that denial of wetland permits in connection with a sewer project in Minnesota insulated both the state and federal governments from takings liability on nuisance-prevention grounds.[149] It simultaneously suggested, however, that alternative proposed sewer projects might not.[150]

In 2014, a federal district court decided that a North Carolina town order prohibiting the repair of a beachfront cottage and requiring its removal after a hurricane was not a physical taking.[151] Nonetheless, the court refused to dismiss the landowner's regulatory takings claim, suggesting that the record did not indicate that a house in need of repair would constitute a nuisance under North Carolina law, since thousands of similar houses in the state are located on dry-sand beaches.[152]

These cases suggest that if the government exercises its police power to abate or prevent nuisances, courts will likely find that takings claimants never held a property interest in an allegedly taken land use under background principles of state nuisance law.

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146. Monroe Equities, LLC v. State, 43 N.Y.S.3d 103, 106 (App. Div. 2016) ("Resolution of the instant claim does not rely upon application of a blanket rule. As discussed above, the record establishes that the right to install a septic system was never part of the bundle of rights acquired by the claimant.").

147. *See* Res. Invs., Inc. v. United States, 85 Fed. Cl. 447, 479 (2009).

148. Cebe Farms, Inc. v. United States, 116 Fed. Cl. 179, 201–02 (2014). In another CFC decision, the court decided that controlled burns by the U.S. Forest Service were not a physical taking of private reality because of the agency's power to prevent nuisances, like measures to prevent large-scale wildfires. TrinCo Inv. Co. v. United States, 106 Fed. Cl. 98, 102 (2012), *rev'd*, 722 F.3d 1375 (Fed. Cir. 2013). But the Federal Circuit reversed without addressing the nuisance issue or background principles. *See* Trinco Inv. Co. v. United States, 722 F.3d 1375, 1380 (Fed. Cir. 2013).

149. Bailey v. United States, 116 Fed. Cl. 310, 312–13, 321 (2014) (involving revocation of a state water quality certification and denial of a federal permit under § 404 of the Clean Water Act to develop property for residences).

150. *Id.*

151. Town of Nags Head v. Toloczko, No. 2:11-CV-1-D, 2014 WL 4219516, at *3, *5 (E.D. N.C. Aug. 18, 2014).

152. *Id.* at *16.

IV. STATUTORY BACKGROUND PRINCIPLES IN THE LOWER COURTS

As indicated above, Justice Kennedy's concurrence in *Lucas* maintained that background principles could include statutes,[153] something Justice Scalia's majority opinion did not acknowledge.[154] Over the last quarter-century, both the Supreme Court and lower courts have largely embraced Justice Kennedy's perspective, although they have not agreed with how long a statute must exist for it to become a background principle.[155]

A wide variety of recent case law has recognized statutes as background principles. These decisions have considered whether wetland regulations, setback requirements, public ownership of wildlife and water, homestead exemptions, flood control limits, state environmental impact assessment requirements, public mining rights, and zoning restrictions qualify as background principles. Some of these measures have proved not to be background principles because of their relatively recent vintage.[156] This Part surveys recent cases concerning statutory background principles.

A. *Wetland Regulations*

In 2018, a New York trial court rejected a claim that state wetland regulations, dating from 1975, were background principles of state law, reasoning that that "prohibitions on filling and developing wetlands were never a traditional part of New York property law"; instead, the court

153. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring in the judgment) ("The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions.").

154. *See id.* at 1029 (majority opinion).

155. *See, e.g.*, Vandevere v. Lloyd, 644 F.3d 957, 966 (9th Cir. 2011); Monroe Equities, LLC v. State, 43 N.Y.S.3d 103, 106 (App. Div. 2016).

156. Arguably, the age of a regulation should not be the exclusive determinative of its status as a background principle. Justice Scalia's *Lucas* opinion suggested that new information, like knowledge of an earthquake fault, could be the basis of a background principle. *See Lucas*, 505 U.S. at 1029, 1031 ("[C]hanged circumstances or new knowledge may make what was previously permissible no longer so." (citation omitted)); *see also* Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001) (rejecting a "blanket rule that purchasers with notice have no compensation right" because such a rule would suggest that new information may require compensation in some circumstances and not in others); *id.* at 633–34 (O'Connor, J., concurring) (explaining that "the regulatory regime in place at the time the claimant acquires the property at issue" shapes the reasonableness of expectations, suggesting that both the age of a regulation and the public purpose it serves are relevant factors in deciding whether it is a background principle for takings purposes).

claimed it was "longstanding practice and part of the common history of the City of New York" to fill wetlands, as they were viewed as impediments to development.[157] Thus, the court concluded, "it is clear the New York State wetlands regulations did not simply make explicit a prohibition on activity that 'was always unlawful', [sic] and therefore the wetland regulations are not background principles of New York property law."[158] The insufficient 1975 vintage of the New York wetlands regulation seems inconsistent with the 1975 merger regulation on which the Supreme Court relied in *Murr*.[159]

B. *Shoreline Setback Requirements*

Wetland regulations may not be background principles in New York, but setback regulations from lakebeds are—at least those that are eighty-five years old at the time of property acquisition.[160] The New York Appellate Division rejected a property owner's allegation that to constitute a background principle, a state setback requirement had to prohibit an activity that New York courts recognized as a nuisance at the time the requirement was promulgated in 1920.[161] Although the Court of Claims of New York acknowledged that a takings claimant "bears a heavy burden of proving each and every element of the claim[,] including the basic, 'antecedent inquiry into the nature of the owner's estate,'" the court ruled that a background principles nuisance defense was not static and not measured by the nuisance doctrine at the time a regulation was promulgated.[162] Consequently, the court decided that the setback requirement was a background principle and took no recognized compensable property right.[163]

157. *In re* City of New York, No. (CY) 4018/07, 2018 N.Y. Misc. LEXIS 51, at *11 (Sup. Ct. Jan. 12, 2018). The court decided that the 1975 regulations, recognizing the environmental importance of wetlands and restricting their development, marked "an abrupt reversal in the treatment of wetlands and constituted a distinct change in the legal rights of owners of wetlands." *Id.* at *12–13.

158. *Id.* at *13.

159. *See supra* notes 81–84 and accompanying text.

160. *See, e.g.*, *Monroe Equities*, 43 N.Y.S.3d at 106.

161. *See id.* The claimant in this case purchased the property at issue in 2005. *Id.* at 104.

162. Monroe Equities LLC v. State, 4 N.Y.S.3d 816, 825 (Ct. Cl. 2014), *aff'd*, 43 N.Y.S.3d 103 (App. Div. 2016).

163. *Id.* at 822 ("[N]othing was taken from claimant to which he had an 'of right' entitlement at the time of purchase.").

C. *Public Ownership of Wildlife*

Nearly all states declare they own the wildlife within their borders.[164] This public ownership enables state agencies to permit or license activities without conferring property rights.[165] In short, wildlife harvests are conducted subject to revocable state conditions, which are in effect background principles.[166] For example, permittees and lessees of commercial salmon harvesting rights in Alaska have no cognizable claim against the state for shortening the season or limiting the catch, according to a recent Ninth Circuit interpretation of Alaska statutes.[167] Describing permits as licenses, and leases as use privileges on submerged lands that the state may revoke or modify without compensation, the Ninth Circuit seemed to imply that the fishing statutes are background principles that inhere in the holder's usufructuary interests and consequently categorically bar takings claims.[168] The result was quite consistent with a decision of the Federal Circuit several years earlier, which decided that federal fishing restrictions in the exclusive economic zone were background principles inhering in a fishing vessel's title, and therefore denied a regulatory takings claim.[169]

The Supreme Court's discussion of oysters as public property in *Horne*, discussed above,[170] recognized public wildlife ownership as sufficient to defeat a takings claim; thus, the Alaska result is hardly unusual. A recent Oregon case is typical. In upholding a criminal conviction for shooting deer, the Oregon Supreme Court confirmed that the state owns wildlife in a sovereign capacity in trust for the public.[171]

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164. *See* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1488–1504 (2013) (listing state constitutional, statutory, and case law as sources of public ownership of wildlife).

165. *See* Vandevere v. Lloyd, 644 F.3d 957, 966–67 (9th Cir. 2011) (explaining such state action in Alaska).

166. *See* Hecht, *supra* note 51, at 785 ("[A] background limitation on property rights can coexist with a license or other mechanism that allows particular conduct provisionally, but does not confer a property right to continue it. . . . '[T]he only essential element of a background principle for takings purposes is that it excludes a claim of entitlement.'" (quoting Echeverria, *supra* note 943, at 950)).

167. *See Vandevere*, 644 F.3d at 966–67 (9th Cir. 2011).

168. *See id.* at 961, 966 (rejecting the First Circuit's approach in *Hoffman v. City of Warwick*, 909 F.2d 608 (1st Cir. 1990), which suggested that federal takings law, not state property law, defines the nature of a property right).

169. *See* Am. Pelagic Fishing Co., LP v. United States, 379 F.3d 1363, 1379 (Fed. Cir. 2004) (noting that at the time the owner purchased the vessel, the Magunsen Fishery Conservation and Management Act was a background principle of federal law that inhered in the vessel's title, precluding any harvester from possessing a property right to fish on the ocean).

170. *See supra* notes 66–72 and accompanying text.

171. State v. Dickerson, 345 P.3d 447, 448, 453–54 (Or. 2015) (relying on *State v. Hume*, 95 P. 808 (Or. 1908), among other cases).

The court's reasoning reinforced the background principle of public ownership of wildlife precluding a private landowner's takings claim.[172]

D. *Public Ownership of Water*

As in the case of wildlife, most states—especially in the West—claim to own the water within their borders.[173] This public ownership should operate as a barrier to successful takings claims against regulatory restrictions on the water use of rights holders. But the case law, especially from the CFC, is more complicated.

In *Hill v. State*, surface water rights holders in Nebraska claimed that state-imposed restrictions on their diversions beginning in 2013 to fulfill the obligations under a 1943 interstate compact between Nebraska, Kansas, and Colorado amounted to a taking of their vested prior appropriation rights.[174] The Nebraska Supreme Court decided otherwise, concluding that there was no taking because the scope of a property right in water is only for a "beneficial use" and that such a use is subject to the

172. *See id.* at 455 ("[N]o person has an absolute property right in game or fish while in a state of nature and at large . . . the taking of them is not a right, but is a privilege, which may be restricted, prohibited, or conditioned, as the law-making power may see fit." (alterations in original) (quoting State v. Pulos, 129 P. 128 (Or. 1913))). Federal wildlife regulations produce similar results. Although the decisions do not explicitly reference background principles, their reasoning is consistent with the background principles defense. For example, in *Mountain States Legal Found. v. Hodel*, the court rejected ranchers' claims that wild horse herds, protected by federal law, took their property when the horses consumed grasslands on checkerboarded federal and private lands in Wyoming. 799 F.2d 1423, 1430–31 (10th Cir. 1986). The ranchers' alleged that the effect of government protection of the horses amounted to a permanent government occupation of private grasslands, on the basis of "an unbroken line of cases" in which the Supreme Court has sustained government regulation of wildlife like wild horses despite reductions, sometimes severe, in the value of affected private property. *Id.* at 1429–30; *see also* Colvin Cattle Co. v. United States, 468 F.3d 803, 808–09 (Fed. Cir. 2006) (finding no takings due to federal government's failure to prevent wild horses from interfering with a rancher's state water rights); Christy v. Hodel, 857 F.2d 1324, 1334–35 (9th Cir. 1988) (finding no takings due to federal protection of grizzly bears that preyed on a rancher's livestock); Chittenden v. United States, 126 Fed. Cl. 251, 264 (2016) (reasoning that the installation of "bat gates" by the U.S. Forest Service was not a takings of mining rights because of the agency's statutory authority to protect wildlife and public safety).

173. Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 57 (2010) ("[I]n almost all prior appropriation states, state water law includes a declaration, constitutional or statutory, that the state or the public owns the fresh water itself. . . . For public trust purposes, therefore, such declarations leave western states free to impress waters with public trust protections entirely independently of state ownership of the beds and banks of navigable waters, extending many state public trust doctrines to non-navigable waters.").

174. Hill v. State, 894 N.W.2d 208, 211–12, 215 (Neb. 2017).

state's obligations under the Republican River Compact.[175] The court declared that "[n]o compensation is owed in a takings claim if the State's affirmative decree simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[176] Consequently, the state-imposed condition of "beneficial use" on water rights holders, combined with the state's obligation to comply with interstate compacts, amount to background principles—even if the compact is later in time than the affected water rights.[177]

The Nebraska Supreme Court rejected a similar takings claim in an ensuing case concerning the same compact. After recognizing that "a takings analysis begins with an examination of the nature of the owner's property interest," the court observed in *Cappel v. State Department of Natural Resources* that water is a public resource in the state.[178] Consequently, irrigation water rights are limited by the state's requirement that the water be used for a "beneficial use" and subject to reasonable subsequent regulations.[179] The court therefore concluded that the water rights holders "have not pled a physical or regulatory taking of private property."[180]

Takings claims against the federal government for over $10,000 lie in the CFC.[181] In recent years, the CFC has staked out a unique position concerning takings claims involving water rights and background principles. Nearly two decades ago, in *Tulare Lake Basin Water Storage District v. United States*, the court, per Judge Paul Wiese, announced that temporary restrictions imposed by the Bureau of Reclamation to carry out its obligations under the Endangered Species Act (ESA) to protect endangered delta smelt and winter chinook salmon during a drought amounted to a physical, per se taking.[182] The court decided that the ESA restrictions amounted to a permanent physical occupation of the state

175. 1943 Neb. Laws 377 (codified as amended at NEB. REV. STAT. § 1-106 (2018)); *Hill*, 894 N.W.2d at 217–19, 221.

176. *Hill*, 894 N.W.2d at 215.

177. *See id.* at 215–16 ("[T]he apportionment made by the [c]ompact cannot have taken . . . any vested right. . . . [T]he apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact" (second and third alteration in original) (footnote omitted) (quoting Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106, 108 (1938))).

178. Cappel v. State Dep't of Nat. Res., 905 N.W.2d 38, 46, 48 (Neb. 2017) ("Water in Nebraska is a public resource dedicated for certain uses.").

179. *Id.* at 48–49.

180. *Id.*

181. 28 U.S.C. § 1491 (2012). CFC decisions are appealable to the Federal Circuit. *See, e.g.*, Stearns Co. v. United States, 396 F.3d 1354, 1357 (Fed. Cir. 2005).

182. Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 314, 319 (2001).

water rights of irrigation districts with federal water delivery contracts.[183] *Tulare Lake* also rejected federal arguments that the state's PTD was a background principle that barred the claim.[184]

Although Judge Wiese recognized that under California law the PTD was in fact a background principle that could prohibit inconsistent water diversions,[185] he decided that any implementation of the doctrine against a diverter as a background principle had to come from the state water board or a state court, not from a CFC judge.[186] Why a federal court could not interpret state law was left unclear, although Judge Wiese cited the PTD's "complex balancing of interests."[187] Yet in an earlier decision, Judge Wiese invoked nuisance balancing in applying background principles to deny a regulatory takings claim of a mining company.[188]

The *Tulare Lake* decision earned some withering criticism,[189] and Judge Wiese later decided he had erred in concluding that water diversion restrictions were physical, per se takings after the Supreme Court's decision in the *Tahoe-Sierra* case,[190] in which the Court described per se takings as narrow exceptions to the generic balancing paradigm established in *Penn Central*.[191] Somewhat astonishingly, rather than appeal the decision to the Federal Circuit, the Bush Administration chose

183. *Id.* at 319 ("To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical taking.").

184. *Id.* at 320–24.

185. *Id.* at 321 ("[P]laintiffs have no right to use or divert water . . . in a way that violates the public trust."). The California Supreme Court made clear that the PTD applied to state water rights in its *Mono Lake* decision. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 712 (Cal. 1983) (en banc).

186. *Tulare Lake*, 49 Fed. Cl. at 323–24 (stating that enforcement of PTD is "committed to" the state agency and courts, while the CFC "is not suited and with which it is not charged" to implement the state's PTD). Judge Wiese claimed that the CFC could apply the PTD as a background principle only when the doctrine functioned as a "single, discrete resolution." *Id.* at 323.

187. *Id.* at 323.

188. *See* Rith Energy v. United States, 44 Fed. Cl. 108, 115 (1999), *aff'd*, 247 F.3d 1355 (Fed. Cir. 2001).

189. *See, e.g.*, Melinda Harm Benson, *The* Tulare *Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 ENVTL. L. 551, 551 (2002); John D. Echeverria, *Is Regulation of Water a Constitutional Taking?*, 11 VT. J. ENVTL. L. 579, 594–98 (2010).

190. Casitas Mun. Water Dist. v. United States, 76 Fed. Cl. 100, 105–06 (2007), *rev'd*, Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (2008).

191. Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 323–27 (2002). The Court justified the categorical, per se rule for physical takings on the ground that they were "relatively rare, easily identified, and usually represent a greater affront to individual property rights." *Id.* at 324. The Court also instructed lower courts that the "temptation to adopt what amount to *per se* rules . . . must be resisted." *Id.* at 342 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

to pay some $26 million in compensation.[192] One CFC judge later suggested that the *Tulare Lake* diverters obtained compensation "for the taking of interests that may well not exist under state law."[193]

In a subsequent decision, the Federal Circuit declined to embrace Judge Wiese's revised view that the alleged takings of the right to beneficial use should be evaluated as regulatory takings. On the peculiar facts of *Casitas Municipal Water District v. United States*,[194] which involved more than a governmental restriction on water diversions—specifically, a physical diversion of water from the district's irrigation canal into a fish ladder to protect endangered steelhead trout—the Federal Circuit said that a physical takings analysis did apply.[195] The court reached this conclusion in part due to the arguably mistaken notion that the district owned the water in the irrigation canal.[196] The case's distinctive facts and the decision's misunderstanding of California water law make *Casitas* an unreliable precedent. Indeed, the Federal Circuit has repeatedly refused to apply it in other water rights takings cases.[197]

Neither the *Tulare Lake* nor *Casitas* court prefaced its consideration of whether water rights restrictions for species preservation were takings

192. *See* Echeverria, *supra* note 189, at 581 n.14.

193. Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504, 538 (2005) (explaining that *Tulare Lake* "appears to be wrong on some counts, incomplete in others and, distinguishable, at all events"); *see also* Allegretti & Co. v. County of Imperial, 42 Cal. Rptr. 3d 122, 132 (Ct. App. 2006) ("The [decision's] reasoning is flawed because in that case the government's passive restriction, which required the water users to leave water in the stream, did not constitute a physical invasion or appropriation . . . . *Tulare Lake*'s reasoning disregards the hallmarks of a categorical physical taking . . . ." (citations omitted)).

194. 543 F.3d 1276 (Fed. Cir. 2008).

195. *See supra* note 24 and accompanying text. The fish ladder was a requirement imposed upon the district by the federal biological consultation process of the ESA. *Casitas*, 543 F.3d at 1301.

196. *See Casitas*, 543 F.3d at 1286–87. Water in California is publicly owned. CAL. WATER CODE § 102 (West 2018) ("All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law."). Water rights holders have only a usufruct, a use right in the water, one that is quite conditional: requiring consistency with the requirements of both the beneficial use and public trust doctrines. CAL. WATER CODE § 100 (West 2018) ("The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.").

197. *See, e.g.*, *Klamath Irrigation Dist.*, 67 Fed. Cl. at 538; *see also, e.g.*, Estate of Hage v. United States, 685 F. App'x 927, 932 (Fed. Cir. 2012) (noting that where the government restricts use of property, instead of occupying it, no physical taking occurs), *cert. denied*, 138 S. Ct. 479 (2017); Mildenberger v. United States, 643 F.3d 938, 949 (Fed. Cir. 2011) (rejecting a physical takings claim involving water quality concerns); CRV Enters. v. United States, 626 F.3d 1241, 1247 (Fed. Cir. 2010) (explaining that there is no Supreme Court "hold[ing] that a physical taking of water rights occurs merely when a particular use of the water is restricted").

on the "logically antecedent inquiry" of whether state law foreclosed the takings claims. The *Tulare Lake* decision did, however, suggest that resolving this issue was a matter for state officials.[198] The Federal Circuit clarified the role of background principles in water rights takings claims in a pending case also involving restrictions imposed on water diverters to preserve endangered species. In *Baley v. United States*,[199] the CFC decided that there was no taking concerning Bureau of Reclamation-imposed restrictions to preserve three endangered species of fish due to the background principle of the prior federal reserved water rights of the Klamath Tribes.[200] If the Federal Circuit affirms the CFC, it will clarify that antecedent to any takings evaluation—whether based on physical or regulatory takings principles—is an analysis of the nature of the property right in water the claimant actually possesses: a background principles inquiry.[201]

E. *Flood Control Requirements*

In the wake of Hurricane Harvey in 2017, a number of Texas property owners claimed that federal dams operated by the U.S. Army Corps of Engineers caused flooding, which in turn effected an alleged taking of their property.[202] The CFC agreed. The court in *In re Upstream Addicks & Barker (Texas) Flood-Control Reservoirs* rejected the federal government's background principles defenses and concluded that neither the Texas Water Code[203] nor the federal Flood Control Act of 1928[204] was a background principle foreclosing the takings claims.[205] However, the court's reasoning was thin; it decided that the mere passage of a statute prior to a government action does not inherently become a background principle precluding a property owner of a judicial remedy.

198. *See supra* note 185–86 and accompanying text.

199. 134 Fed. Cl. 619 (2017).

200. *Id.* at 625, 668, 679–80 (deciding that the challenged water rights restrictions did not constitute a taking because Baley's water rights were subject to more senior water rights held by the Klamath Tribes).

201. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027, 1046–47 (1992) (explaining that even categorical takings were subject to the antecedent background principles inquiry). In *Baley*, commercial fishermen argued that a background principle—public ownership of fish and wildlife in Oregon—prevented any takings of water rights. Brief of Defendant-Appellee Pacific Coast Federation of Fishermen's Associations at 27–29, *Baley*, 134 Fed. Cl. 619 (2017) (Nos. 18–1323, 18–1325) (arguing that the background principle of public ownership should preclude a takings claim).

202. *In re* Upstream Addicks & Barker (Texas) Flood-Control Reservoirs, 138 Fed. Cl. 658, 661–62 (2018).

203. TEX. WATER CODE ANN. § 11.086 (West 2017).

204. 33 U.S.C. § 702(c) (2012).

205. *In re Upstream Addicks & Barker*, 138 Fed. Cl. at 668.

Moreover, the court made no effort to distinguish other decisions suggesting just that.[206]

F. *Homestead Exemptions*

In 2014, the United States Court of Appeals for the Second Circuit ruled that a 150-year-old New York homestead exemption, as applied to a creditor's judgment lien against a debtor, qualified as a background principle of New York property law, inhering in the creditor's property interest in the lien.[207] The same decision ruled that a federal lien-avoidance provision, entitling individual debtors to avoid liens on certain types of property, was not a background principle, as it was only enacted in the 1970s.[208] On the other hand, an Ohio court recently concluded that a state homestead exemption was a background principle of state law, as it was over 160 years old.[209]

G. *Public Land Mining Rights*

In 2012, the federal Bureau of Land Management (BLM) withdrew over a million acres of public lands from entry and exploration under the federal mining law for twenty years to protect the Grand Canyon watershed.[210] Vane Minerals had over 600 mining claims within the withdrawn area that, due to the withdrawal, it could not enter or explore absent a federal BLM determination of prior "valid existing rights" (VER).[211] The company filed suit, claiming that the withdrawal was a taking of its mining rights. But the CFC ruled that Vane's federal property right depended on a finding that it had discovered a valuable mineral, which in turn required a VER determination at the time of the withdrawal.[212] Because the company lacked such a determination, it

206. *Id.*; *see supra* note 52 and accompanying text.

207. 1256 Hertel Ave. Assocs. v. Calloway, 761 F.3d 252, 266–67 (2d Cir. 2014).

208. *See id.* at 266. The rejection of the lien-avoidance provision reinforced the notion that wetland regulations promulgated in the 1970s were not background principles, at least in New York. *See* H.R. DOC. NO. 93-137, at 169–74 (1973); *supra* note 145 and accompanying text.

209. *In re* Davis, 539 B.R. 334, 349 (Bankr. S.D. Ohio 2015) (noting that a homestead exemption defines the scope of a lienholder's property interest in investment-backed expectations).

210. Public Land Order No. 7787, 77 Fed. Reg. 2563, 2563 (Jan. 18, 2012). The Federal Land Policy and Management Act authorizes such withdrawals, subject to specified procedures, including sending to Congress a report explaining the reasons for the withdrawal, its environmental and economic effects, alternatives evaluated, the extent to which the public and other agencies were consulted, and detailed information on the geology and future mineral potential of the area. 43 U.S.C. § 1714(c)(2) (2012).

211. Vane Minerals (US), LLC v. United States, 116 Fed. Cl. 48, 52–53 (2014).

212. *Id.* at 61–62.

could not show a property interest sufficient to prevail in a takings suit.[213] As a result, the ruling effectively treated the requirements of the federal mining law as a background principle of federal law.[214]

H. *State Environmental Impact Statement Requirements*

In 2016, the United States District Court for the District of Hawaii decided that the state's EIS requirement prior to large land developments was not a background principle of state law.[215] The court rejected the state land use commission's position that a landowner's failure to obtain an EIS precluded a takings claim. The court instead decided that the requirement "is not a prohibition on land use based on principles of nuisance or property law," as it "merely requires that an owner seek an assessment of the proposed use's potential environmental impact."[216] As a result, the court concluded that the failure to obtain an EIS did not preclude a landowner's takings claim for the reclassification of urban use of land to agricultural use.[217]

I. *Zoning Restrictions*

An ocean-bordering county's 2014 imposition of a 150-foot marine buffer zone restricting shoreline developments to mitigate environmental damage associated with coastal flooding was not a taking, according to the Washington Court of Appeals in *Olympic Stewardship Foundation v. Washington Environment & Land Use Hearings Office*.[218] The court decided that even though single-family homes are a priority use under state law, the county had the authority to restrict development to further ecological goals and, "[i]n fact," development was permissible "only if [it would] result in no net loss of shoreline ecological functions and systems."[219]

Although the Washington court did not explicitly mention background principles, it seemed to reject a takings claim under that premise when it

213. *Id.* at 63.

214. The Supreme Court has described federal mining rights as a "unique form of property," which puts miners on notice of both the federal government's land ownership and its substantial regulatory authority. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335 (1963); *see* United States v. Locke, 471 U.S. 84, 104 (1985).

215. *See* Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n, No. 11-00414 SOM-BMK, 2016 WL 797567, at *9 (D. Haw. Feb. 29, 2016).

216. *Id.*

217. *Id.*

218. Olympic Stewardship Found. v. Wash. Envtl. & Land Use Hearings Office, 399 P.3d 562, 567, 572, 574–76, 585–86, 599 (Wash. Ct. App. 2017). The buffer zone was to fulfill the requirements of the state Shoreline Management Act of 1971. *Id.* at 567–69.

219. *Id.* at 572 (interpreting the state's Shoreline Management Act of 1971, WASH. REV. CODE §§ 90.58.010–.920 (2018)).

stated, "the responsibilities of each generation as trustee of the environment for succeeding generations . . . ha[ve] a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."[220] This result was completely contrary to the federal court's interpretation of Hawaii's EIS requirement.[221]

A more direct invocation of background principles occurred in a case involving a re-zoning of residential property back to commercial property located in Thibodaux, Louisiana.[222] The applicants seeking the rezoning challenged its denial, but the state court of appeals decided that, because the rezoning took place in 1979 and was not for a malicious or improper purpose, "it is a background principle that is a defense to recovery of damages under Louisiana's takings law."[223] Louisiana courts thus appear more willing to consider statutes or regulations to be background principles that are less than a half-century old than are New York courts.[224] The twenty-five-year period recognized in this decision is similar to the Wisconsin merger provision that the United States Supreme Court upheld in *Murr*.[225]

This survey of recent case law reveals that background principles remain a critical first inquiry that takings claimants must successfully hurdle to succeed in takings cases. This is true regardless of whether the challenge is to state wetland, water, shoreline, or zoning restrictions, as well as to wildlife regulations, homestead exemptions, or federal mining limitations.

V. APPLYING BACKGROUND PRINCIPLES TO *PENN CENTRAL* AND PHYSICAL TAKINGS CASES

The *Lucas* case established the government's background principles defense in the context of a regulation depriving a landowner of all economic value.[226] There remained some question as to whether background principles could be a defense in cases not involving economic wipeouts; that is, in *Penn Central*-type takings and governmental physical appropriations or occupations. The early results indicated that the background principles defense was not limited to

220. *See id.* at 571–72 (quoting WASH. REV. CODE. § 43.21C.020).

221. *See Bridge Aina Le'a*, 2016 WL 797567, at *9 (concluding an EIS is not a background principle).

222. *See* E. First St., LLC v. Bd. of Adjustments, No. 2007 CA 0664, 2008 WL 2567080, at *1 (La. Ct. App. June 6, 2008).

223. *Id.* at *5.

224. *See supra* notes 145–46 and accompanying text.

225. *See supra* note 81 and accompanying text.

226. *See supra* note 38 and accompanying text.

economic wipeouts.[227] These results were only logical, as Justice Scalia described the background principles defense as the "logically antecedent inquiry" into any claimant's alleged property rights.[228] There seems to be no good reason why such a prerequisite inquiry into property rights should be limited to regulations alleging complete economic wipeouts. Recent cases confirm this admonition, although not without revealing some complications.

A. Penn Central *Takings*

As indicated above, at least one CFC judge rejected a categorical background principles defense and proceeded to engage in contextual *Penn Central* balancing, deciding that an antecedent inquiry into the claimant's property interest was unnecessary.[229] That was an exceptional result, as most courts considering the issue assumed that *Lucas*'s "antecedent inquiry" is a prerequisite to any successful takings claim. For example, the Ninth Circuit interpreted an Alaska limit on fishing leases and permits to amount to a background principle that foreclosed a takings claim.[230] Similarly, federal mining law proved to be a background principle concerning mining on public lands: Without complying with the prerequisites of a federal property right to mine, the claimant had no viable takings case concerning the government's withdrawal of permissible mining entry on lands adjacent to the Grand Canyon.[231]

B. *Physical Takings*

The Supreme Court has issued several decisions finding takings for permanent physical occupations, beginning with a small TV cable wire

227. *See* Blumm & Ritchie, *supra* note 13, at 326 nn.27–28 (citing physical occupation and *Penn Central*-type takings cases decided prior to 2005).

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

229. *See* Mehaffy v. United States, 102 Fed. Cl. 755, 764 (2012), *aff'd*, 499 F. App'x 18 (2012). For discussion of this case, see *supra* notes 112–17 and accompanying text. Judge Miller explained that wetland fill permit denial cases are "almost always one of a regulatory taking," and consequently maintained that "courts should proceed directly to the *Penn Central* factor analysis unless there has been . . . a categorical (regulatory) taking such as that present in *Lucas*." *Id.* at 764. The implication was that the court would engage in *Penn Central* balancing without inquiry into the nature of the property interest of the claimant, in apparent contradiction to Justice Scalia's admonition. There were no other recent examples of this reluctance to treat background principles as an antecedent inquiry.

230. *See* Vandevere v. Lloyd, 644 F.3d 957, 969 (9th Cir. 2011). For discussion of this case, see *supra* notes 167–68 and accompanying text.

231. *See* Vane Minerals (US), LLC v. United States, 116 Fed. Cl. 48, 58–59 (2014).

in Manhattan several decades ago.[232] Recently, the Court found a physical taking of personal property in connection with a government "raisin reserve" program aimed at maintaining market prices.[233] Lower courts have applied background principles in physical takings cases, although the CFC has again created some confusion, particularly in the context of alleged water rights takings.

Both the North Carolina Court of Appeals and the Texas Supreme Court have employed the background principles analysis in beach access cases, despite claims that public access amounted to physical takings.[234] Likewise, the Nebraska Supreme Court thought that an interstate compact was a background principle, despite a claimed physical taking of prior appropriation water rights.[235] Similarly, the CFC determined that government-induced flooding of riparian land and degradation of waterways in Florida, which occurred when the government discharged water from Lake Okeechobee into the St. Lucie River to avoid flooding, was not a taking due the background principle of the federal navigation servitude.[236]

All of these decisions involved applications of background principles to alleged physical takings, which is no surprise given the reasoning of *Lucas*.[237] Yet, the CFC decided that a restriction imposed on water rights to protect endangered species did not qualify as a background principle, after discounting the effects of state limitations on the scope of water use imposed by the PTD and the concept of beneficial use—two background

232. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 430 (1982) ("[P]ermanent occupations of land . . . are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.").

233. Horne v. Dep't of Agric. (*Horne II*), 135 S. Ct. 2419, 2424, 2426–27, 2431 (2015) (discounting any distinction between personal and real property in takings jurisprudence); *see also supra* notes 66–72 and accompanying text.

234. *See generally* Nies v. Town of Emerald Isle, 780 S.E.2d 187 (N.C. Ct. App. 2015) (finding no taking due to ordinance recognizing public access); Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012) (refusing to recognize a "rolling" public easement in the wake of a hurricane); *supra* notes 96–98, 124–25, 126–27 and accompanying text.

235. *See* Hill v. State, 894 N.W.2d 208, 214, 218–19 (Neb. 2017) (suggesting that compact-imposed restrictions were background principles, affecting even senior water rights); *supra* notes 175–77 and accompanying text.

236. *See* Mildenberger v. United States, 91 Fed. Cl. 217, 255 (2010), *aff'd in part*, 643 F.3d 938 (2011). A federal decision to install a sand cap and log boom as part of a Superfund remediation project to prevent navigation and dredging from stirring up sediment that contained hazardous chemicals, including carcinogens, did not, according to the Federal Circuit, amount to a physical taking. CRV Enters. v. United States, 626 F.3d 1241, 1244, 1246, 1248 (Fed. Cir. 2010). The court reasoned that the claimants had never held the property rights that were allegedly taken because the government action predated the acquisition of those rights. *Id.* at 1250.

237. *See supra* note 10 and accompanying text (explaining how Justice Scalia equated economic wipeouts with physical occupations).

principles.[238] A subsequent CFC water rights decision turned on the background principle of prior Indian water rights, with the court concluding that these rights foreclosed the takings claim.[239]

This review of recent case law confirms that an inquiry into background principles is the antecedent inquiry concerning alleged physical invasions, just as it is for *Penn Central* regulatory takings.

CONCLUSION

Background principles of property and nuisance law are bedrock principles of Anglo-American law. No takings claimant has a right to government compensation absent a showing that its claimed property right is in fact a verifiable and vested one.[240] This is the "logically antecedent inquiry" that Justice Scalia sketched in *Lucas*,[241] although the defense was recognized by Justice Oliver Wendell Holmes over a century earlier.[242] The defense requires an evaluation of relevant state and federal law bearing on the claimant's asserted property interest.

The background principles defense resembles the old categorical government nuisance-prevention defense, which the *Lucas* majority rejected.[243] The effect of replacing the noxious use defense with the background principles defense was, however, hardly revolutionary: simply obligating government defendants to do more than merely claim that an activity was harmful and requiring that a regulation be anchored in common law or longstanding statutory law. The result was not insignificant to litigators, since it imposed a burden of proof on the government's defense of regulations. Because most of these laws will be state laws, there could be some tension between state court interpretations of state background principles and federal court interpretations of the

238. *See* Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 443, 455–58, 461 (2011), *aff'd*, 708 F.3d 1340 (Fed. Cir. 2013); *see supra* notes 99–106 and accompanying text.

239. *See* Baley v. United States, 134 Fed. Cl. 619, 680 (2017); *supra* notes 26, 200–201 and accompanying text.

240. *See* Echeverria, *supra* note 93, at 944 (explaining that although the Court had recognized that a vested right was a precondition for a successful takings claim in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160–61 (1980), the *Lucas* decision caused the Court to define with greater particularity the nature of a vested, and therefore compensable, property interest).

241. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027 (1992).

242. *See* Hudson Cty. Water Co. v. McCarter, 209 U.S. 349, 356 (1908).

243. *See Lucas*, 505 U.S. at 1029; *supra* notes 153–54 and accompanying text. The origins of the "noxious use" defense are traceable to Justice Brandeis's dissent in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting) ("But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use.").

Fifth Amendment.[244] But there should be little federal court intervention, since states usually determine the nature of the private property rights protected by the compensation promise of the Constitution, and federal courts are not experts in state laws.

This Article's review of recent case law has uncovered many more statutory background principles than common law principles. Justice Kennedy's concurrence in *Lucas* has apparently triumphed. The cases do not reveal how old a statutory provision must be to qualify as a background principle, but there is evidence to suggest that forty years is sufficient.[245] The vintage of the statute, however, was only one variable of the government defense that Justice Scalia recognized in *Lucas*, as Justice Scalia also acknowledged the severity of adverse effects on public resources.[246] So, future cases may emphasize not merely the age of the statute but also its public importance and perhaps its relationship to longstanding common law principles.

Background principles are likely to lead to a vibrant takings law jurisprudence in the years ahead. Because the property rights determined by the background principles of law are the antecedent inquiry to whether a regulation has taken private property, government defendants will assuredly raise the background principles defense at the outset of litigation. And since background principles underlie all takings claims, including permanent physical occupations and appropriations, economic wipeouts, and regulatory takings, courts will have ample opportunities to consider the issue. Although the government must show the regulation is grounded in property or nuisance principles, takings claimants must shoulder the ultimate burden of demonstrating that their private property has been taken.[247] Because the issue will usually be a question of state law, there will be no uniformity of background principles jurisprudence among the jurisdictions, with the possible exception of federal takings claims in the CFC and Federal Circuit.[248]

244. *See* Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 473 (2000) ("[W]hen the Takings Clause is applied to local land use regulation, it must be tempered with a concern for federalism."); Andrew W. Schwartz, *No Competing Theory of Constitutional Interpretation Justifies Regulatory Takings Ideology*, 34 STAN. ENVTL. L.J. 247, 294 (2015) ("Federal court review of local and state regulation of property use . . . is inconsistent with principles of federalism embodied in the federal Constitution.").

245. *See supra* text accompanying note 84.

246. *See Lucas*, 505 U.S. at 1030–31.

247. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 730 (2010) ("There is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land.").

248. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 115 n.1 (2000).

We are probably only at an early stage of background principles jurisprudence. Given the government's incentive to raise a background principles defense early in all takings cases, and given the multiplicity of jurisdictions interpreting the "private property" that is a prerequisite to a takings determination, background principles are likely to continue to be a dynamic area of property law in the years ahead.[249]

249. Government defendants could contribute to the dynamism of background principles law by linking statutes to other longstanding statutes or common law rules. *See supra* text accompanying note 47 (observing that state statute recognizing access to burial sites was consistent with longstanding other statutes and common law); *supra* text accompanying note 81 (discussing the *Murr* court decision to uphold the statutory merger provision, referring its consistency "with a long history of state and local merger regulations that originated nearly a century ago," *Murr v. Wisconsin*, 137 S. Ct. 1933, 1947 (2017)).