REQUIEM FOR A HEAVYWEIGHT: THE DECLINE AND FALL OF *LUCAS V. SOUTH CAROLINA COASTAL COUNCIL*

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Property rights advocates hailed *Lucas v. South Carolina Coastal Council*.[1] They hoped Justice Antonin Scalia's opinion for the Supreme Court would "revolutionize interpretation of the Constitution's takings clause and finally fulfill its potential as a vehicle for deregulation."[2] On its face, the ruling seemed to dramatically expand the scope of constitutional protections against "takings" of private property. But as Professor Michael Blumm and Ms. Rachel Wolfard have shown, *Lucas* indirectly caused a reduction in protection for property rights.[3] Justice Scalia's opinion in *Lucas* allowed state regulations based on "background principles of [state] nuisance and property law" which made property unusable.[4] What Justice Scalia intended as a limited exception for a prohibition on "total takings" has become a major carve-out in all takings cases.

That development may seem like a betrayal of *Lucas*. It almost certainly deviates from Justice Scalia's intentions. But the *Lucas* opinion itself contains the seeds of the lower court's approach and Justice Anthony Kennedy's concurring opinion was an invitation to expand the *Lucas* background principle exception.

Part I of this comment reviews *Lucas* and its use of the concept of background principles as an exception to takings liability. Part II will discuss Professor Blumm and Ms. Wolfard's important contribution to our understanding of the *Lucas* opinion's impact. Professor Blumm and Ms. Wolfard demonstrate that the concept of background principles has taken on a life of its own, significantly limiting the reach of takings law. In Part III, I show how the impact of *Lucas* has been limited in other ways. While it sought to create a sharply defined area of constitutional protection for property rights, on close reading the opinion displays crucial ambiguities. To paraphrase an old joke, Justice Scalia's *Lucas* doctrine is not what it used to be, and it never was.

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1. 505 U.S. 1003 (1992); *see* Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 775 (2006). As Lazarus recounts, the ruling "seemed to many to be the blockbuster for which the property rights movement had long hoped." *Id.* at 798.

2. Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1165 (2019).

3. *Id.*

4. *Lucas*, 505 U.S. at 1029–30.

I. THE *LUCAS* CASE

During his time on the Court, Justice Scalia consistently championed the cause of property owners. As Professor Peter Byrne puts it, Justice Scalia advocated rules to protect property owners "with characteristic rhetorical vigor that encouraged property rights advocates, terrified regulators and environmentalists, and enriched scholarly debate about constitutional property."[5] In describing government land use decisions, Justice Scalia was apt to use terms such as "extortion" and "larcenous."[6] *Lucas* was the high-water mark of Justice Scalia giving property owners a shield against government regulation.

The facts of *Lucas* were simple. A real estate developer, David H. Lucas, purchased two residential lots on an island in 1986.[7] Two years later, the state had passed the Beachfront Management Act, which prohibited new construction on the island because it was in a high erosion zone.[8] The developer claimed that the application of the Beachfront Management Act to his property rendered it completely worthless.[9] Relying primarily on dicta in preceding cases, the Supreme Court adopted a new rule for "total taking[s]" cases in which a regulation made property valueless.[10] The rule held that "when 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]

Announcing the total takings rule did not, however, completely dispose of the case, given that earlier cases had upheld the power of the government to severely regulate property to protect the public.[12] Those earlier cases distinguished between affirmative mandates to provide public benefits and negative restrictions on harmful conduct, a distinction Justice Scalia rejected as too vague and subject to manipulation.[13] Instead, Justice Scalia argued that regulations eliminating all economic uses are constitutional only when a background principle of state law already prohibited any use of the property.[14] More precisely, regulations that completely eliminate the use of property are valid only if they "do no more than duplicate the result that could have been achieved in the courts

5. J. Peter Byrne, *A Hobbesian Bundle of Lockean Sticks: The Property Rights Legacy of Justice Scalia*, 41 VT. L. REV. 733, 741 (2017) (footnote omitted).

6. *Id.* at 744, 749, 756.

7. *Lucas*, 505 U.S. at 1006.

8. *Id.* at 1008 n.1.

9. *Id.* at 1009.

10. *Id.* at 1015–19, 1030; *see id.* at 1066 n.4 (Stevens, J., dissenting).

11. *Id.* at 1019.

12. *Id.* at 1022.

13. *Id.* at 1022–24.

14. *Id.* at 1029–30.

—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."[15] The government cannot "take" something that the landowner never had in the first place, such as the right to commit a nuisance. Justice Scalia gave as examples the denial of a permit to engage in landfilling that would flood the lands of neighbors or an order to remove a nuclear plant that is discovered to sit on an earthquake fault.[16]

In a concurring opinion, Justice Kennedy argued that Justice Scalia was wrong to limit the background principles to common law doctrines rather than allowing consideration of how statutes might shape reasonable expectations.[17] In a later takings case, *Murr v. Wisconsin*,[18] Justice Kennedy's majority opinion cited his own *Lucas* concurrence, quoting a statement that "[c]oastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."[19] As we will see, Justice Kennedy's more flexible approach to the concept of background principles has won out in the lower courts.

II. BURGEONING BACKGROUND PRINCIPLES

Justice Scalia may have intended that the concept of background principles remain narrow, but within fifteen years of *Lucas*, a study by Professor Blumm and Lucus Ritchie found that the decision had an unexpected effect of expanding lower courts' reliance on background norms to eliminate takings claims.[20] In addition to the nuisance exception articulated in *Lucas*, lower courts identified several other state and federal background principles. Perhaps the most obvious additional principle was the public trust doctrine, which traditionally limits private rights relating to navigable waters and adjoining land.[21] Some states applied the public trust doctrine more broadly to include tributaries of navigable waters and dry beach.[22] The federal government has its own protection from takings

15. *Id.* at 1029 (footnote omitted). Note the "or otherwise" at the end of this sentence. Professors Blumm & Wolfard's study shows just how capacious that category has turned out to be. *See infra* text accompanying notes 26–41.

16. *Lucas*, 505 U.S. at 1029. Lazarus suggests that the lengthy discussion of nuisance law, including the nuclear reactor example, was intended to cement Justice O'Connor's vote. Lazarus, *supra* note 1, at 803.

17. *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring).

18. 137 S. Ct. 1933 (2017).

19. *Id.* at 1946 (quoting *Lucas*, 505 U.S. at 1035).

20. Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENV'T L. REV. 321, 322 (2005).

21. *Id.* at 341.

22. *Id.* at 343.

claims under a similar background principle: the navigable servitude, which gives the federal government paramount authority over tidal and navigable waters.[23] Courts also invoked less familiar background principles, including customary rights of beach access;[24] native Hawaiian food gathering rights (a decision invoking the "Aloha spirit");[25] laws protecting instream water flows;[26] state ownership of all wildlife under the common law;[27] and treaty rights of American Indians predating private land ownership.[28]

Writing nearly thirty years after *Lucas*, Professor Blumm and Ms. Wolfard have confirmed that lower courts have taken a broad view of background principles in takings cases, with the possible exception of the Federal Circuit.[29] Professor Blumm and Ms. Wolfard conclude that the exception for background principles "has swallowed the categorical per se takings rule *Lucas* established, simply because there are many more background principles than economic wipeouts."[30] Among the common law doctrines Professor Blumm and Ms. Wolfard identify in recent lower courts' decisions are customary rights;[31] access to burial sites;[32] destruction of property due to public necessity;[33] and nuisance law.[34] Professor Blumm and Ms. Wolfard also find that courts have viewed many statutes as establishing background principles, including long-standing wetland regulations;[35] shoreline setback requirements;[36] public ownership of wildlife;[37] public ownership of water (with some exceptions);[38] flood control requirements;[39] homestead exemptions;[40] preconditions for mining rights;[41] and zoning restrictions.[42] As Professor Blumm and Ms. Wolfard point out, these background principles do more

23. *Id.* at 346–47.
24. *Id.* at 347–48.
25. *Id.* at 349 (footnote omitted).
26. *Id.* at 351.
27. *Id.* at 353.
28. *Id.* at 354.
29. Regarding the unsteady approach within the Federal Circuit, *see* Blumm & Wolfard, *supra* note 2, at 1183–88.
30. *Id.* at 1169 (footnote omitted).
31. *Id.* at 1188.
32. *Id.* at 1189.
33. *Id*. at 1190.
34. *Id.* at 1191–92.
35. *Id.* at 1193–94.
36. *Id.* at 1194.
37. *Id.* 1195–96.
38. *Id.* at 1196–1200.
39. *Id.* at 1200.
40. *Id.* at 1201.
41. *Id.* at 1201–02.
42. *Id.* at 1202–03.

than simply restrict the *Lucas* total takings rule. They also act as a carve-out from other taking rules.[43]

Professor Blumm and Ms. Wolfard observe that their "review of recent case law has uncovered many more statutory background principles than common law principles."[44] "Justice Kennedy's concurrence in *Lucas* has apparently triumphed."[45] Professor Blumm and Ms. Wolfard predict that background principles are "likely to lead to a vibrant takings law jurisprudence in the years ahead."[46] As Professor Blumm and Ms. Wolfard explain:

> 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.[47]

Given that background principles stem from the law of each of the fifty states (and sometimes federal law), Professor Blumm and Ms. Wolfard predict that the development of these principles is "likely to continue to be a dynamic area of property law in the years ahead."[48]

The studies by Professor Blumm and his successive coauthors have contributed greatly to our understanding of *Lucas*. It seems clear that *Lucas* has had repercussions outside the domain of the "total takings" rule. In essence, *Lucas* has created a new "Step One" in takings doctrine, allowing cases to be dismissed whenever a background principle applies. Surely Justice Scalia neither foresaw nor desired that development.

III. REAPPRAISING *LUCAS* AND ITS LEGACY

Even apart from the lower court opinions discussed by Professor Blumm and Ms. Wolfard, Justice Scalia's effort to create a robust categorical approach to takings fell flat in other ways. Professor Byrne notes that Justice Scalia "consistently adopted or argued for clear rules without any balancing of interests in his regulatory takings opinions," making sure that any rule "favors private property owners over public

43. *Id.* at 1203–06.
44. *Id.* at 1207.
45. *Id.* at 1207.
46. *Id.*
47. *Id.*
48. *Id.* at 1208.

regulations."[49] But as Professor Richard Lazarus observes, Justice Scalia's "penchant for bright line per se tests favorable to takings plaintiffs ultimately had no legs within the Court."[50] Both the majority and the dissenters in *Murr*, the Supreme Court's most recent takings case, seemed quite contented with the ad hoc nature of takings jurisprudence.[51] Writing for the majority, Justice Kennedy observed that the Supreme Court "for the most part has refrained from . . . definitive rules" and instead has been prone to "ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances."[52] Thus, Justice Kennedy says, "[a] central dynamic of the Court's regulatory takings jurisprudence, then, is its flexibility" as a way of balancing property rights with the public interest in regulating.[53] Chief Justice John Roberts's dissent stated that "[d]eciding whether a regulation has gone so far as to constitute a 'taking' of one of those property rights is, properly enough, a fact-intensive task that relies 'as much on the exercise of judgment as on the application of logic.'"[54] No one on the Supreme Court spoke in favor of bright-line rules of the kind favored by Justice Scalia.

Lucas has been eroded in other ways as well. Justice Scalia failed to win majorities in a series of follow-up cases involving the *Lucas* total takings rule. That line of cases involved a different loophole in Justice Scalia's opinion. *Lucas* held that a taking occurs when a regulation eliminates a property's value,[55] but it does not say how to define the property in question. Property rights advocates sought to define the property narrowly—for example, so that a three-year moratorium on building equaled a total taking of the property for those three years.[56] Over Justice Scalia's protests, the Supreme Court consistently rebuffed those claims, dramatically narrowing the category of cases covered by *Lucas*.[57]

In retrospect, the *Lucas* opinion contained some of the seeds of its own undoing. As Justice Scalia stated the "nuisance" exemption, it required a

49. Byrne, *supra* note *5*, at 743.

50. Lazarus, *supra* note 2, at 761 (footnotes omitted).

51. Murr v. Wisconsin, 137 S. Ct. 1933, 1954 (2017).

52. *Id.* at 1942 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 322 (2002)).

53. *Id.* at 1943.

54. *Id.* at 1957 (Roberts, C.J., dissenting) (citation omitted).

55. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, 1030–31 (1992).

56. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 306, 341–43 (2002).

57. These developments are traced in Daniel A. Farber, *Murr v. Wisconsin and the Future of Takings Law*, 2017 SUP. CT. REV. 115, 142–49 (2017).

flexible analysis of the costs and benefits of the landowner's activities,[58] hardly the stuff that categorical rules are made of. Even the reference to background "principles," as opposed to background "rules," signaled that courts would have flexibility in applying the concept. At one point, Justice Scalia paraphrased "background principles" as "existing rules or understandings,"[59] again indicating the possible breadth of the exception. Justice Scalia also said that the state court must engage in a reasonable application of prior precedents, which also suggests some flexibility.[60] After all, a "reasonable" interpretation of state law might not be one that the Supreme Court itself would regard as correct. Even the nuisance exception had blurry boundaries epitomized by the Supreme Court's reference in a prior case to the "often vague and indeterminate nuisance concepts and maxims of equity jurisprudence."[61]

Putting all this together, *Lucas* indicated that no taking would exist if the government was relying on a reasonable interpretation of preexisting "understanding" or "principle," which might involve a balance between private and public interests or the vague doctrines of nuisance law. Justice Scalia insisted that his test was clearer than the old distinction between harms and benefits. That may have been true only to the extent that *Lucas* requires that a regulation have some foothold in prior law or practice in situations where it completely destroys the value of an owner's property.[62]

Justice Scalia conceded that the *Lucas* principle was also unclear in another dimension: when the regulation falls short of permanently prohibiting all use of an entire parcel of land, it may be difficult to determine whether complete prohibitions on lesser property interests should be considered total takings. In that regard, Justice Scalia said, "[r]egrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision."[63]

In retrospect, Justice Scalia's rueful observation applied to all of the *Lucas* holding, whose "rhetorical force" was "greater than its

58. According to Justice Scalia, the relevant factors were "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike." *Lucas*, 505 U.S. at 1030–31 (citations omitted).

59. *Id.*

60. *Id.* at 1032 n.18.

61. City of Milwaukee v. Illinois, 451 U.S. 304, 317 (1981).

62. In a case involving a total taking, that requirement could well have been found in the general balancing test that the Supreme Court had already adopted to protect the reasonable investment-backed expectations of the property owner. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978).

63. *Lucas*, 505 U.S. at 1016 n.7.

precision."[64] Justice Scalia may have hoped that his rhetoric would caution courts against applying the concept of background principles much beyond nuisance law. As Professor Blumm and Ms. Wolfard have shown, any such hopes have been disappointed. Rather, lower courts have created numerous safe harbors for government regulation. In an odd way, that development actually has furthered Justice Scalia's goal of making takings doctrine clearer and more predictable—though not at all in the way he expected.

64. *Id.*