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TAKINGS LAW IN THE AFTERMATH OF LUCAS V. SOUTH CAROLINA COASTAL COUNCIL: DOES THE BACKGROUND PRINCIPLES EXCEPTION CLARIFY OR COMPLICATE REGULATORY TAKINGS LAW?

Christie Olsson*

I. INTRODUCTION

The Fifth Amendment Takings Clause of the United States Constitution protects private individuals from having their property taken by the government without compensation.\(^1\) However, the constitutional proclamation "nor shall private property be taken for public use, without just compensation,"\(^2\) raises two questions: what qualifies as a "taking,"\(^3\) and what is required for just compensation. It is how the Supreme Court has dealt with these two questions that leads to the ultimate issue of whether the Court's decisions have clarified or complicated regulatory takings law.

Originally, the Takings Clause was only implicated when the government physically occupied private property.\(^4\) Then, in 1922, the Supreme Court noted that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."\(^5\) Unfortunately, the Court did

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2. Id.
not provide a formula to determine when a regulation goes too far.\(^6\) This lack of guidance has “initiated years of judicial struggling to produce a workable formula to answer that question.”\(^7\)

In an attempt to clarify when a regulation goes too far and thus requires compensation, the Court initially introduced a framework consisting of three factors.\(^8\) Later, in *Lucas v. South Carolina Coastal Council*,\(^9\) the Court examined the narrow situation in which a regulation deprived a property owner of all the economic value of the land.\(^10\) In *Lucas*, the Court held that compensation for a regulatory taking is not required if the property use in question could have been prohibited by background principles of land ownership, such as those found in property and nuisance law.\(^11\) This notion will be referred to throughout this comment as the “background principles exception.”

The current lack of clarity in takings law, in deciding both when a regulation goes too far and what constitutes a background principle to land ownership, has led to uncertainty for owners and governments, federal, state, and local. Whether a regulation goes too far or a use equates to a nuisance is a determination made after the fact.\(^12\) From a private perspective, these determinations are not always predictable.\(^13\) This unpredictability prevents the government from effectively regulating harmful actions and also creates uncertainty for landowners in their interest in their property.

Part II of this comment traces the history of regulatory

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6. The Court stated that it was a “question of degree” and thus could not furnish a general proposition. *Pa. Coal*, 260 U.S. at 416.


10. *Id.* at 1007.

11. *Id.* at 1031-32.

12. DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 13 (4th ed. 1999). For example, the government will not know whether a regulation effectively “takes” a private landowner's property until after the regulation has passed and the court proceedings are completed. Likewise, a property owner will not know prior to the start of the intended use whether neighbors or the government will consider it a nuisance, as that is a determination made by the court after the use has begun.

13. *Id.*
takings, examines the seminal case of *Lucas*, and discusses the cases explaining and applying the background principles exception. Part III identifies the legal problem posed by the *Lucas* background principles exception, namely the uncertainty created by the case law. Part IV of this comment analyzes how the background principles exception has been applied and explains why the exception is not a useful mechanism for determining when just compensation for a taking is due. Finally, in Part V, the comment presents an alternative framework for addressing the issue aimed at increasing the predictability and certainty in the area of takings law.

II. BACKGROUND

A. Takings Law Prior to Lucas

The Takings Clause was officially incorporated against the states in 1897. Its purpose is to ensure that the public, rather than private landowners, pay for the benefits of land control. One of the first Supreme Court cases addressing

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14. See discussion infra Part II.A.
15. See discussion infra Part II.B.
16. See discussion infra Part II.C.
17. See discussion infra Part III.
18. See discussion infra Part IV.
19. See id.
20. See discussion infra Part V.
21. Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897). Initially, the Supreme Court concluded that the Bill of Rights only applied to the federal government. See Barron v. Mayor and City Council of Baltimore, 32 U.S. 243, 250-51 (1833) ("We are of opinion that the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states."). In *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, the Court held that the Due Process Clause of the Fourteenth Amendment prevents states from taking property without just compensation. See generally *Chi., Burlington & Quincy R.R.*, 166 U.S. at 226.
22. Pa. Coal, 260 U.S. at 416 (1922). The Mahons brought suit to prevent Pennsylvania Coal Company from mining under their property in a way that would remove the sub-surface support of the land and cause a subsidence of the surface and their house. Id. at 412. Although the coal company had a deed granting it the right to all the coal under the surface of the land, the Mahons contended that such mining was prevented by state law. Id. The Court found that the state law did effect a taking of the coal company's right to mine. Id. at 415-16.
the Takings Clause was Pennsylvania Coal Company v. Mahon, which recognized that there may be regulatory takings in addition to physical takings. Justice Holmes, in his now famous opinion, wrote that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

Following Pennsylvania Coal, the Supreme Court, in Village of Euclid v. Ambler Realty Company, upheld a local zoning regulation that diminished the value of a landowner's property. The Court decided that zoning laws are justified by the state's police powers. As long as the provisions of zoning laws are not arbitrary and unreasonable and have a "substantial relation to the public health, safety, morals, or general welfare," the regulations will not be considered a taking in violation of the Takings Clause. The Court guided the states in defining their police powers by directing the lower courts to "the maxim sic utere tuo ut alienum non laedas, which lies at the foundation of so much of the common law of nuisances."

Returning to the problem of regulatory takings in Penn Central Transportation Company v. New York City, the Court examined the question of whether a city desiring to protect historical buildings may go beyond its zoning laws to place restrictions on the development of individual historic landmarks without effecting a taking requiring the payment of just compensation. The majority recognized that there was no set formula for determining when the government must compensate for the economic injuries caused by public

23. Id. at 393.
24. The Court has traditionally considered a permanent physical occupation of real property to be a taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427-28 (1982). This physical taking is different from a regulation that diminishes the economic value of private property.
27. Id. at 397.
28. Id. at 387.
29. Id. at 395 (citing Cusack Co. v. City of Chicago, 242 U.S. 526, 530-31 (1917), Jacobson v. Massachusetts, 197 U.S. 11, 30-31 (1905)).
30. Id.
31. So use your own as not to injure another's property. BLACK'S LAW DICTIONARY 1690 (7th ed. 1999).
32. Ambler Realty, 272 U.S. at 387.
34. Id. at 107.
action rather than leave the burden disproportionately concentrated on a few people.\textsuperscript{35} The Court established three main factors for the lower courts to consider when determining whether compensation is required: (1) the economic impact of the regulation on the claimant,\textsuperscript{36} (2) the extent to which the regulation has interfered with distinct investment-backed expectations,\textsuperscript{37} and (3) the character of the government action.\textsuperscript{38}

The Court refined the takings analysis in \textit{Agins v. City of Tiburon}.\textsuperscript{39} In that case, the Court found that a general zoning law effected a taking if the ordinance did not substantially advance a legitimate state interest or denied an owner economically viable use of the land.\textsuperscript{40} The decision stated that “[t]he determination that governmental action constitutes a takings is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.”\textsuperscript{41}

The Court relied on \textit{Agins} in \textit{Hodel v. Virginia Surface Mining & Reclamation Ass’n},\textsuperscript{42} when it determined that the mere enactment of the Surface Mining Act\textsuperscript{43} did not constitute a taking.\textsuperscript{44} The takings claim arose in the context of a facial challenge to the law,\textsuperscript{45} as the provisions of the Act had not yet

\textsuperscript{35} Id. at 124.
\textsuperscript{36} Id.
\textsuperscript{37} Id. Investment-backed expectations are interests sufficiently bound up with the reasonable expectations of the plaintiff to constitute “property” for Fifth Amendment purposes. See generally id. at 125.
\textsuperscript{38} \textit{Penn Cent. Transp.}, 438 U.S. at 124.
\textsuperscript{39} 447 U.S. 255 (1980).
\textsuperscript{40} Id. at 260. As an example of a zoning ordinance that did substantially advance legitimate state interests, yet did not deny an owner the economically viable use of the land, the Court offered the “seminal” decision of \textit{Village of Euclid v. Ambler Realty Co.}: “Despite alleged diminution in value of the owner’s land, the Court [in \textit{Ambler Realty}] held that the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner.” Id. at 261 (citing \textit{Ambler Realty}, 272 U.S. at 395-97).
\textsuperscript{41} Id. at 260.
\textsuperscript{43} “The Surface Mining Act is a comprehensive statute designed to ‘establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations.’” Id. at 265 (citing Surface Mining Control and Reclamation Act of 1977 § 102(a), 30 U.S.C. § 1202(a) (Supp. III 1976)).
\textsuperscript{44} See id. at 295-96.
\textsuperscript{45} Id. at 295. The Virginia Surface Mining and Reclamation Association brought a pre-enforcement action against the Surface Mining Control and Rec-
been applied to any private landowners in Virginia.\textsuperscript{46} Since there was no evidence that the Act itself denied owners economically viable use of their land, it survived scrutiny.\textsuperscript{47}

Returning to regulatory takings just five years later, the Court again referenced nuisance law in \textit{Keystone Bituminous Coal Ass'n v. DeBenedictis}.\textsuperscript{48} According to the Court, landowners' right to control their property is limited by the obligation that the use of the property shall not injure the community.\textsuperscript{49} The Takings Clause thus does not require compensation when the State asserts its power to protect the
community. The Court reasoned that "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."^{51}

The Court explored the distinction between regulatory and physical takings in *Nollan v. California Coastal Commission.*^{52} Prior to *Nollan*, the Court had determined that there is a "distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property."^{53} In *Nollan*, the Court hypothesized that if California had required the Nollans to make a permanent easement across their beachfront property available to the public in order to increase access to the beach,^{54} that would have been a permanent physical occupation, requiring compensation.^{55} Instead, California conditioned the Nollans' permit to rebuild their house on their agreement to make such an easement.^{56} By applying principles of takings law, the Court determined that the lack of a nexus^{57} between the condition, the easement, and the original purpose of the building restriction, a clear view of the ocean, made the condition an unconstitutional taking of the Nollans' property.^{58}

**B. Lucas v. South Carolina Coastal Council**

Before *Lucas*, the Supreme Court established one *per se* rule for physical takings,^{59} created several factors to consider when determining whether a regulation causes a taking requiring compensation,^{60} and acknowledged the power of the

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50. *Id.* at 492 (citations omitted).
51. *Id.* at 491 n.20.
54. *Nollan*, 483 U.S. at 831.
55. *Id.*
56. *Id.*
57. Takings law requires an essential connection between the prohibition and the ends advanced as the justification for the prohibition. *See id.* at 837.
58. *Id.* at 838.
59. All physical takings must be compensated. *Loretto*, 458 U.S. at 441.
60. The court will consider the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. *Penn Cent. Transp.*, 438 U.S. at 124.
states to enjoin nuisance-like activity. In its 1992 decision in *Lucas*, the Court formulated the second *per se* rule of takings.

In 1986, David Lucas paid $975,000 for two residential lots on the beach in Charleston County, South Carolina. He intended to build single-family homes on the parcels. However, two years after he purchased the property, the South Carolina legislature passed the Beachfront Management Act, which effectively barred him from building any permanent habitable structures on the two lots. The state trial court found that the Act rendered his property valueless.

*Lucas* represented the first occasion where a court found that a legislative regulation had completely deprived the landowner of all the economic value from a property. Therefore, the Supreme Court had to determine whether this dramatic effect amounted to a taking of private property requiring the payment of just compensation. The Court decided that, where a regulation deprives land of all economic value, the state does not need to compensate the landowner if the nature of the property shows that the proscribed use interests were never a part of the land title.

While property owners generally expect to control their property, the Court recognized that the property owner should also expect the uses of his property to be restricted by new regulations enacted by the state through its police powers. However, to avoid the requirement of just compensation, "regulations that prohibit all economically beneficial use of land . . . must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." Furthermore, the Court clarified its position, holding that a law or regulation that deprives land of all its economic value cannot

63. *Id.* at 1006-07.
64. *Id.* at 1007.
65. *Id.*
66. *Id.*
67. *Id.*
69. *Id.* at 1027.
70. *Id.*
71. *Id.* at 1029.
achieve more than what adjacent landowners or the state itself could have achieved in the courts. The Court limited the extent of a law or regulation to the result obtainable by private parties through nuisance law or other background principles of property law. Examples of the application of background principles include the right of states to destroy real and personal property in cases of actual necessity or other grave threats to the lives and properties of others.

In determining whether state nuisance law applies, the Supreme Court suggested several factors for lower courts to examine:

[T]he 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.

This nuisance analysis is inherent in most state property laws. The analysis requires more than a conclusory statement that the law violates common-law maxims such as *sic utere tuo ut alienum non laedas.* In *Lucas*, South Carolina could prevail over Lucas’ private rights if the state could identify background principles of nuisance and property law that prohibited Lucas’ intended development.

While the Court created a second *per se* rule in takings law, it was not unanimous in its declaration that nuisance should be the touchstone for determining whether the regulation effected a taking. Justice Scalia wrote the majority

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72. *Id.*
73. One example of actual necessity would be the case of a forest fire, where the local government must destroy a private landowner’s property to prevent the progress of the fire and eventual destruction of further property. *Id.* at 1029 n.16.
74. *Lucas*, 505 U.S. at 1029. For example, the owner of a lakebed would not be entitled to compensation if he wanted to engage in a landfill that would cause flooding on others’ lands. *Id.* Nor would the owner of a nuclear plant have any recourse if it was later discovered that the plant was built on top of an earthquake fault. *Id.*
75. *Id.* at 1030-31 (citations omitted).
76. *Id.* at 1031. *See also supra* note 31.
78. *Id.* at 1036.
opinion, which Chief Justice Rehnquist and Justices White, O'Connor, and Thomas joined. However, Justice Kennedy believed that the majority's use of the common law of nuisance was "too narrow a confine for the exercise of regulatory power in a complex and interdependent society."

After the case was remanded to the South Carolina Supreme Court in order to apply the Court's analysis to the facts of *Lucas*, the state court determined that Lucas' proposed building plans could not have been prevented by the common law nuisance principles in that jurisdiction.

C. Takings Law after Lucas

*Lucas* fundamentally changed the way courts look at regulatory taking cases by creating a *per se* rule: if a regulation causes the complete loss of economic value in private property, the government must pay for the taking unless it can present a background principle of property law that would have allowed the same result. Since *Lucas*, the Supreme Court has returned twice to the issue of regulatory takings, and both times, the Court limited *Lucas*. In addition, several lower courts have interpreted *Lucas*, with vastly different results. Most of these cases have held that the regulation at issue in the particular case did not cause a complete loss of value. Even when there was a *Lucas* taking, resulting in a complete loss of value, many courts found that the government had a valid defense of a background principle of property law. A few cases have found a taking that required

79. *Id.* at 1005.
80. *Id.*
81. *Id.* at 1035 (Kennedy, J., concurring).
86. *See* Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 986-87 (9th Cir. 2002) *cert. denied*, 539 U.S. 926 (2003) (using the public trust doctrine to find that compensation was not needed); Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1384 (Fed. Cir. 2000) *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000) (rellying on a navigational servitude); Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 694 (8th Cir. 1996) (finding that the contested right
compensation. One case even extended *Lucas* beyond real property issues.

The Supreme Court first visited *Lucas* in *Palazzolo v. Rhode Island.* Anthony Palazzolo owned a waterfront parcel in Rhode Island, but could not develop it because of Rhode Island's resource management council's wetlands regulations. The regulations prohibited any infill of the wetland, which prevented development on the wetland portion of Palazzolo's property. The Court established the general principle that "a State may not evade the duty to compensate on the premise that the landowner is left with a token interest." However, the Court did note that an upland site on the property could be developed and would have an estimated value of $200,000. Because part of the property still retained value, and thus there was not a complete taking, the Court found *Lucas* to be inapplicable.

Although *Lucas* did not apply, the Court still referenced the case and its requirement that the regulation's limitation inheres in the title itself, in the restrictions of the state's background principles of property and nuisance. The Court emphasized that a legislative regulation is not transformed into a background principle merely by passage into law.

The following year, *Lucas* was again revisited, this time to determine whether a temporary taking was nevertheless a

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87. See Preseault v. United States, 100 F.3d 1525, 1552 (Fed. Cir. 1996) (holding that there was a taking and that the regulation was not justified under nuisance law); Pascoag Reservoir & Dam v. Rhode Island, 217 F. Supp. 2d 206, 209 (D.R.I. 2002) aff'd, 337 F.3d 87 (1st Cir. 2003) (holding that there was a taking, but the claim was time-barred).
88. Abrahim-Youri v. United States, 139 F.3d 1462, 1468 (Fed. Cir. 1997) (extending the theory behind *Lucas* to personal property, not just real property).
90. *Id.* at 611.
91. *See id.* at 621.
92. *Id.* at 631.
93. *Id.* at 621.
94. "A regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'" *Id.* at 631 (citations omitted).
95. *Palazzolo,* 533 U.S. at 629 (quoting *Lucas,* 505 U.S. at 1029). *See also* discussion supra Part II.B.
taking requiring compensation. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Court had to decide whether "a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation." Similar to *Palazzolo*, this regulation differed from the one in *Lucas* in that it imposed only a temporary restriction that caused a diminution in value. The regulation did not cause a permanent deprivation of the owner's use of the entire area. Since the regulation was temporary, once the Regional Planning Agency lifted the restriction, the property would recover its economic value.

Holding that claims of a temporary taking require a weighing of all relevant circumstances, the Court determined that a *per se* rule such as the one in *Lucas* was inappropriate.

With guidance from *Palazollo* and *Tahoe-Sierra Preservation Council*, lower courts began to apply *Lucas*. The decisions fall into three general categories: cases that distinguish *Lucas* because there was not a complete loss of value, cases that find no taking as the regulation was based on a background principle, and cases that find a taking requiring compensation.

1. Cases that Distinguish Lucas

In the first category of cases, the lower courts found *Lucas* inapplicable because there was not a complete loss of economic value. As the Court noted in *Tahoe-Sierra*, "*Lucas* carved out a narrow exception to the rules governing regula-

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98. *Id.* at 302.
99. *Id.* at 306.
100. *Id.* at 332.
101. *Id.*
102. *Id.*
105. See *Esplanade Props.*, 307 F.3d at 986-87; *Palm Beach Isles*, 208 F.3d at 1384; *Outdoor Graphics*, 103 F.3d at 694; *M & J Coal*, 47 F.3d at 1154; *Stevens*, 854 P.2d at 456-57.
106. See *Preseault*, 100 F.3d at 1552; *Pascoag Reservoir & Dam*, 217 F. Supp. 2d at 209.
107. See, e.g., *Rith Energy*, 247 F.3d at 1363; *Florida Rock Indus.*, 18 F.3d at 1572-73; *Appolo Fuels*, 54 Fed. Cl. at 737.
tory takings for the ‘extraordinary circumstance’ of a permanent deprivation of all beneficial use.”

Finding a complete and permanent deprivation of all economic or beneficial use in property is a difficult standard to meet. Furthermore, this determination also raises issues concerning how the court determines the loss of value.

Plaintiffs seeking a per se taking under Lucas frequently raise the question of what is an appropriate denominator. For example, in Appolo Fuels, Inc. v. United States, the Court of Federal Claims was asked to determine what denominator for determining property value was acceptable. The plaintiff, Appolo Fuels, possessed certain mining leases, including a lease to mine in a Tennessee county watershed. Upon re-

109. For example, state courts have recognized that even land that cannot be built upon retains some economic value, as the landowner can use the property for recreation or camping. Lucas, 505 U.S. at 1044 (Blackmun, J., dissenting).
110. Justice Blackmun stated that the threshold determination of whether a property has been deprived of all its economically valuable use cannot be determined objectively. Id. at 1054. The answer to the question depends on how “property” is defined, which in turn relies on the “composition of the denominator in [the] ‘deprivation’ fraction.” Id. (citation omitted). A land use regulation can be characterized as a deprivation of a specific entitlement, or it can be viewed as a partial withdrawal from unencumbered ownership. Id.
111. There is some conflict in the Supreme Court precedent. In Tahoe-Sierra, the Court held that “[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.” Tahoe-Sierra Pres. Council, 535 U.S. at 322 (citation omitted). This seems to conflict with the Palazzolo holding, where the Supreme Court decided that since an upland site on Palazzolo’s property could be developed and retain its economic value, there was not a complete taking. Palazzolo, 533 U.S. at 631. Property owners have attempted to apply the Tahoe-Sierra holding to regulatory takings, with little success.
112. Appolo Fuels, 54 Fed. Cl. at 723. For example, consider a local or state government that passes a regulation affecting part of the plaintiff’s property. In determining whether there was a complete loss of value, the court must decide whether to examine only the economic value of the regulated portion of the property, or the economic value of the entire property. While the regulated portion of the property might have lost all of its economic value because of the regulation, the property as a whole might still have significant value. If the court were to only look at the regulation portion, it might find a taking requiring compensation, whereas if the court looked at the entire property, there might not be a taking. This scenario was first seen in Palazzolo, where the Supreme Court decided that since an upland site on Palazzolo’s property could be developed and retained its economic value, there was not a complete taking and Lucas did not apply. Palazzolo, 533 U.S. at 631.
113. Appolo Fuels, 54 Fed. Cl. at 719.
quest by the local city, the Office of Surface Mining Reclamation and Enforcement designated the affected watershed area unsuitable for all surface coal mining operations. Looking at the parcel as a whole, instead of only the coal reserves within the regulated portion of the land, the court decided that the plaintiff's proposed denominator limited to the regulated area of land was unsupportable.

The United States Court of Appeals for the Federal Circuit faced the same question in *Rith Energy, Inc. v. United States.* Rith Energy Incorporated ("Rith") applied for a permit to mine all of the coal within a leased eighty-nine-acre area. The court held that the regulation must be measured by its effect on the entire coal reserves covered by the permit, not merely the portion remaining at the time Rith was forced to stop mining. Although the regulatory agency significantly limited Rith's rights to mine, the company was still permitted to mine enough coal to earn a substantial profit on its investment in the leases. Even though this did not match Rith's investment-backed expectations, the court held that the restraint was not a prohibition of all economically viable use of Rith's property.

The court must also determine whose judgment to rely upon in assessing the remaining economic value of a property after the impact of a regulation. In *Florida Rock Industries v. United States,* the plaintiff claimed that a denial of a permit to mine for limestone underneath a wetland constituted a taking of all economic value of the property. The government presented two assessors who testified as to the market value of the property; however, the plaintiff argued that potential buyers were not fully aware of the restrictions on the land and their consequences. Therefore, as the buyers were not fully informed, they could not be considered willing buy-

114. *Id.* at 719-20.
115. *Id.* at 720.
116. *Id.* at 727.
117. *Id.*
118. *Rith Energy,* 247 F.3d at 1355.
119. *Id.* at 1363.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Florida Rock Indus.*, 18 F.3d at 1560.
124. *Id.* at 1562.
125. *Id.* at 1563.
Nevertheless, the court held that there was an active real estate market, and a fair market value could be established. The court determined it would be inappropriate for a court to substitute its own judgment of value for that of the market. Essentially, if there is a willing buyer for the land, the land must have economic value, and the court will not second-guess the buyer's judgment.

2. Cases that Apply the Background Principles Exception

The second category of Lucas cases consists of situations where the court held that there would have been a Fifth Amendment taking but for some background principle of property law that provided the government with a defense. Common law principles that courts have relied upon include public health and safety, zoning, nuisance, a navigational servitude, custom and the public trust doctrine.

In M & J Coal Company v. United States, the court used the Lucas framework to analyze regulatory takings claims, even though a complete deprivation was not at issue. The Office of Surface Mining and Reclamation Enforcement had ordered the plaintiff to cease mining as its practices had caused an imminent danger to the health and safety of the public. M & J Coal Company claimed that the

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126. Id. at 1566 n.12.
127. Id. at 1567.
128. Id.
129. M & J Coal, 47 F.3d at 1154.
130. Outdoor Graphics, 103 F.3d at 694-95.
131. Appolo Fuels, 54 Fed. Cl. at 735. Even though the court did not reach the issue of a government defense, as the court had already decided that there was not a total economic loss of value, the court did state that water pollution is an abatable nuisance. Id. This indicates that if the court had found a total economic taking, the government still would have been justified in denying the mining petition pursuant to the state's police powers. Id.
132. Palm Beach Isles, 208 F.3d at 1384. See infra note 148.
133. Stevens, 854 P.2d at 456-57. See infra note 156.
135. M & J Coal, 47 F.3d at 1148.
136. Id. at 1153.
137. Id. at 1151. One resident described extensive damage to his property. The resident reported that the needle on his gas meter was "spinning wildly," that a section of the gas line adjacent to the gas meter had been severed, and that his water line to the public water supply was broken. In addition, the electric wires leading to his house were stretched "as tight as a fiddle string."
agency's action deprived the company of approximately 100,000 tons of coal, or $580,000.00 in lost profits. Even so, the company still made a profit on the mining, and thus this was not a case of a complete economic loss of value. Although a Lucas analysis was unnecessary, the court nonetheless applied the Lucas framework that even if "a governmental action . . . allegedly interferes with an owner's land use, there can be no compensable interference if such land use was not permitted at the time the owner took title to the property."

The court stated that the Lucas framework required looking at the nature of the landowner's estate to assess whether the land use interest was contained in the bundle of property rights. Then, if the owner could prove the existence of such an interest, the court would determine whether the governmental action constituted a compensable taking. Applying this principle to M & J Coal Company, the court held that the plaintiff's rights did not include the right to mine in such a way as to endanger the environment, as the plaintiff knew or should have known that mining in such a way as to endanger public health or safety would be prohibited.

Outdoor Graphics, Inc. v. City of Burlington involved Outdoor's purchase of billboards subject to a non-conforming use, however, the company failed to renew the certificates.

The resident expressed concern about the possibility of a gas explosion and its effects on the safety of his family and neighbors. Mining operations had caused large cracks to develop in the surface of his property and a neighbor's dog had fallen into a crack to its death. The resident believed that neighborhood children were at risk of similar harm.

Id. The regulatory agency agreed that "the public was at risk of injury from large cracks in the ground, collapsing structures, and breaks in gas, water, and electrical lines." Id. at 1152.

139. Id. at 1152 n.5.

140. Id. at 1153.

141. M & J Coal, 47 F.3d at 1154. The term "property" as used in the Takings Clause includes the bundle of rights inherent in the citizen's ownership. Id.

142. Id.

143. Id.

144. 103 F.3d at 690.

145. Id. at 694. "A nonconforming use is one that lawfully existed prior to the effective date of a zoning restriction and that is allowed to continue to exist in nonconformity with the restriction." Id. Here, the area had been zoned residential and permission was required to erect any structure other than a residence, school, church, or similar building, but the city had issued certificates of
for the non-conforming use.\textsuperscript{146} The court never reached the issue of whether there was a total taking because it decided that the right to erect a billboard was not part of Outdoor's title.\textsuperscript{147}

In \textit{Palm Beach Isles Associates v. United States},\textsuperscript{148} the Army Corps of Engineers refused to grant Palm Beach Isles Associates a permit to dredge and fill the Associates' property.\textsuperscript{149} Holding that a navigational servitude\textsuperscript{150} may constitute a background principle affecting a property owner's rights, which would then provide the Government with a defense to a takings claim,\textsuperscript{151} the court applied Lucas in lieu of using the \textit{Penn Central} factors.\textsuperscript{152} According to the \textit{Palm Beach} court, when the regulation results in a denial of all the economically viable use of the property, the only remaining issue is whether the government has a defense that, under a background principle of property law, the interest was never vested in the owner.\textsuperscript{153} The court decided that the Associate's property was subject to a navigational servitude,\textsuperscript{154} which is a "pre-existing limitation on the landowner's title."\textsuperscript{155} Thus, the court provided the government with a defense to the alleged taking as long as the government also showed "that the regulatory imposition was for a purpose related to navigation."\textsuperscript{156}

In \textit{Stevens v. City of Cannon Beach},\textsuperscript{157} the court affirmed the use of custom\textsuperscript{158} as a background principle of property law.

\begin{itemize}
\item \textsuperscript{146} \textit{Id.} at 692-93.
\item \textsuperscript{147} \textit{Id.} at 694.
\item \textsuperscript{148} 208 F.3d at 1374.
\item \textsuperscript{149} \textit{Id.} at 1337.
\item \textsuperscript{150} The navigational servitude, derived from the Commerce Clause of the United States Constitution, gives the federal government the right to regulate and control the waters of the United States. \textit{Id.} at 1382.
\item \textsuperscript{151} \textit{Id.} at 1384.
\item \textsuperscript{152} \textit{Id.} The \textit{Penn Central} factors include the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. \textit{Penn Cent. Transp.}, 438 U.S. at 124.
\item \textsuperscript{153} \textit{Palm Beach Isles}, 208 F.3d at 1379.
\item \textsuperscript{154} \textit{Id.} at 1382.
\item \textsuperscript{155} \textit{Id.} at 1384 (quoting United States v. 30.54 Acres of Land, 90 F.3d 790, 796 (3d Cir. 1996)).
\item \textsuperscript{156} \textit{Id.} at 1384-85.
\item \textsuperscript{157} \textit{Stevens}, 854 P.2d at 449.
\item \textsuperscript{158} The common law doctrine of custom includes the following elements: (1) the land has been used in this manner so long "that the memory of man runneth not to the contrary"; (2) without interruption; (3) peace-
There, the city had denied the land owners permission to build a seawall on their property.\textsuperscript{159} Applying and interpreting \textit{Lucas}, the Supreme Court of Oregon held that the common-law doctrine of custom is part of the background principles of the state's property law.\textsuperscript{160}

The last notable decision that relied upon a background principle of property law is \textit{Esplanade Properties, LLC v. City of Seattle}.\textsuperscript{161} In \textit{Esplanade}, the city of Seattle denied the plaintiff's application to develop certain shoreline property.\textsuperscript{162} The plaintiff's property was navigable for the purpose of public recreation and thus subject to the public trust doctrine.\textsuperscript{163} Development of Esplanade's tideland property would have interfered with recreational uses,\textsuperscript{164} justifying the government's efforts to protect the public trust at the expense of the plaintiff's investment.\textsuperscript{165}

\textbf{3. Cases Finding a Taking}

Two additional cases are important in examining judicial interpretation of regulatory takings: \textit{Pascoag Reservoir & Dam, LLC v. Rhode Island}\textsuperscript{166} and \textit{Preseault v. United States}.\textsuperscript{167} In both cases, the courts found that there had been a taking under the Fifth Amendment. In \textit{Pascoag}, the state
attempted to seize property using the theories of adverse possession and prescriptive easement. The question the court addressed was whether the state could acquire property through adverse possession or a prescriptive easement without being subject to the Takings Clause. Although there was a potential physical takings claim, the court applied a Lucas analysis, as the state had precluded all of plaintiff's economically beneficial use of the property. The court noted that the state may not simply recast its action as a background principle of state law. The basis for the action must be more than a pre-existing regulation. Ultimately, the court found that there was a taking; however, the plaintiff's claim was time-barred by the statute of limitations. 

Preseault was another case in which the court held that there had been a taking under the Takings Clause requiring compensation. The issue in the case was whether the conversion of a railroad right of way to a public recreational hiking trail was a taking. Similar to the Pascoag court, the Preseault court noted that the background principles referred to by the Court in Lucas were state-defined nuisance rules. First, the court stated that the applicable state law did not support the suggestion that the scope of an easement limited to railroad purposes could be read to include public recreational hiking and biking trails. The court then eliminated

168. Pascoag Reservoir & Dam, 217 F. Supp. 2d at 209. Adverse possession is a method of obtaining title to property without purchasing it. The claimant's possession must be (1) actual, (2) open, (3) notorious, (4) hostile, (5) under claim of right, (6) continuous, and (7) exclusive. Id. at 211. A prescriptive easement is a method of obtaining the right to use another's property through open, adverse, and continuous use similar to that of adverse possession. Id. See also BLACK'S LAW DICTIONARY 528 (7th ed. 1999).
170. Although adverse possession and prescription are background principles of state law, in addition to eliminating plaintiff's economically beneficial use of the property, the state also effected a permanent physical taking. Id. at 226. The court determined that a background principle analysis is only required for regulatory takings, and as this also constituted a permanent physical taking, the situation could require an eminent domain analysis. Id.
171. Id. at 222.
172. Id. at 221.
173. Id.
174. Id. at 209.
175. Preseault, 100 F.3d at 1529.
176. Id.
177. Id. at 1538.
178. Id. at 1530.
the suggestion that background principles of state property law should include federal regulatory legislation. Finally, the Court concluded that the Preseault family's use of its property was not a public nuisance.

III. IDENTIFICATION OF THE LEGAL PROBLEM

Regulatory takings law has several objectives. First, it allows the government to regulate harmful actions. The rationale for this goal provides:

As a general rule, an owner is at liberty to use his property as he sees fit . . . . There is, however, a limitation to this rule; one made necessary by the intricate, complex, and changing life of today. The old and familiar maxim that one must so use his property as not to injure that of another (sic utere tuo alienum non laedas) is deeply imbedded in our law.

These harmful actions may include the infill of wetlands, the destruction caused by sub-surface coal mining, and the blocking of public access to the seashore.

A second goal of regulatory takings law is to protect the property owner's interest. For example, the property owner in *Penn Central* had investment-backed expectations that needed to be protected. While regulations protecting the public are necessary, the costs of such regulation should be borne by the public as a whole, rather than by the individual property owners being regulated. To protect the property

179. *Id.* at 1539. The government had argued, unsuccessfully, that the Preseaults' title incorporated federal transportation regulatory statutes. *Id.*
180. *Id.*
186. "To the Framers [of the Constitution], identifying property with freedom meant that if you could own property, you were free. Ownership of property was protected." Norman Karlin, *Back to the Future: From Nollan to Lochner*, 17 Sw. U. L. Rev. 627, 638 (1988).
188. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (This guarantee in the Fifth Amendment was "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be
owner’s interest and foster economic security, it is important for a potential property owner to have a clear idea of the possible uses of his or her property, as well as the limitations on those uses.

The current state of takings law attempts to balance the landowner’s interests against the government’s regulatory objectives. However, this approach has produced a “jurisprudential mess.” For example, whether a regulation goes too far, or whether a use constitutes a nuisance, is a determination made after the fact. The government will not know until after litigation whether a new regulation constitutes an unconstitutional taking of a landowner’s property. In addition, a landowner will not know whether his or her intended use of property is prohibited by a background principle of property law until after litigation.

The third goal of takings law should be to prevent the necessity of litigation. Takings law should provide the government and the public a clear indication of what rights are inherent in the owner’s property, when a regulation goes too far, and where an intended use of land is prohibited by a background principle of property law.

The per se rule of Lucas does not provide sufficient clarity to takings law to prevent the necessity of litigation. Since Lucas, lower courts have interpreted the decision and the “background principles exception” in several different ways, providing no reliable indication of when the regulation would be considered a taking and when compensation would be required.

borne by the public as a whole.”). See also Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893) (The Fifth Amendment “prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.”).

190. Id. at 1006.
191. CALLIES, supra note 12, at 13.
192. In Lucas, the Supreme Court determined that a regulation resulting in the complete loss of economic value to a property required compensation unless the property use in question could have been prohibited by a background principle of property law. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031-32 (1992).
IV. ANALYSIS

In determining whether *Lucas* fulfills the three goals of regulatory takings law, it is necessary to examine how the lower courts have applied *Lucas*. As demonstrated above, the cases may be easily divided, with a few exceptions, into three categories: those that found *Lucas* inapplicable because there was not a total loss of economic value to the regulated property, those that found no taking because of some background principle of property law, and those that found a taking requiring compensation.

A. Cases that Distinguish Lucas

In many circumstances, the lower courts have declined to apply *Lucas* because there was not a complete loss of economic value. *Lucas* applies to a limited and unusual excep-

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193. See discussion supra Part III.

194. For example, in *Abraham-Youi v. United States*, the court held:

   [I]t does not strain *Lucas* beyond its intended purpose to recognize that a similar principle may apply to “property” that arises through consensual international transactions as it does to property interests created by domestic law. Certain sticks in the bundle of rights that are property are subject to constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government enforcement of property rights.


195. See *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1566 (Fed. Cir. 1994) (weighing which expert's estimate of value should be used in determining whether there was a taking); *Appolo Fuels, Inc. v. United States*, 54 Fed. Cl. 717, 723 (2002) *aff'd*, 381 F.3d 1338 (Fed. Cir. 2004) (discussing the proper denominator to be used in determining whether the property had lost all of its value).

196. See *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 986-87 (9th Cir. 2002) *cert. denied*, 539 U.S. 926 (2003) (using the public trust doctrine to find that compensation was not needed); *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1384 (Fed. Cir. 2000) *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000) (relying on a navigational servitude); *Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690, 694 (8th Cir. 1996) (finding that the contested right was never in Outdoor's title); *M & J Coal Co. v. United States*, 47 F.3d 1148, 1154 (Fed. Cir. 1995) (upholding the regulation for reasons of public safety); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456-57 (Or. 1993) (relying on custom).

197. See *Preseault v. United States*, 100 F.3d 1525, 1552 (Fed. Cir. 1996) (holding that there was a taking, and that the regulation was not justified under nuisance law); *Pascoag Reservoir & Dam, LLC v. Rhode Island*, 217 F. Supp. 2d 206, 209 (D. R.I. 2002) *aff'd by* 337 F.3d 87 (1st Cir. 2003) (holding that there was a taking, but the claim was time-barred).

198. See, e.g., *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1363 (Fed. Cir. 2001); *Florida Rock Indus.*, 18 F.3d at 1572-73; *Appolo Fuels*, 54 Fed. Cl. at
tion; where the government's action causes a permanent deprivation of all beneficial use.199

In Appolo Fuels, the court determined that Lucas did not apply, since the plaintiff did not lose the total economic value of the property.200 The court reached the same determination in Rith Energy.201 Although the regulatory agency significantly limited Rith's rights to mine, the company was still permitted to mine enough coal to earn a substantial profit on its investment in the leases.202 Finally, in Florida Rock,203 the court held that although the miner was denied a permit to mine limestone underneath a tract of wetlands,204 the land had not lost all of its economic value as the owners had received actual purchase offers for the land.205

These decisions seem to follow Palazzolo,206 which examines the value of the property as a whole, as opposed to limiting the takings consideration to the regulated section of the land. However, there is some conflict in the Supreme Court precedent. In Tahoe-Sierra, the Court held that "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."207 This conflict creates an incentive for litigation, since a property owner might seek a determination of a regulatory taking based on Tahoe-Sierra, even if the loss of value would not constitute a taking through the application of the Palazzolo denominator.

B. Cases that Apply the Background Principles Exception

The second category of post-Lucas cases involve situations where there was a complete loss of economic value, yet a

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200. See discussion supra Part II.C.1.
201. Rith Energy, 247 F.3d at 1363. See also discussion supra Part II.C.1.
203. Florida Rock Indus., 18 F.3d at 1560. See also discussion supra Part II.C.1.
204. Florida Rock Indus., 18 F.3d at 1562.
205. Id. at 1563.
background principle of property law permits the regulation. The common law background principles courts have relied on include public health and safety, zoning, nuisance, a navigational servitude, the public trust doctrine, and custom.

The court in *M & J Coal Company* used the *Lucas* formulation to analyze regulatory takings claims, even though a total deprivation of economic value was not at issue. The court held that M & J's rights did not include the right to mine in such a way as to endanger the environment, because the company "knew or should have known that it could not mine in such a way as to endanger public health or safety.”

In *Outdoor Graphics*, Outdoor purchased property at a bargain price, subject to a non-conforming use, but did not renew the certificates for the non-conforming use. In applying *Lucas* to zoning regulations, the court approved the background principles exception, acknowledging that even though "[s]uch regulatory action may well have the effect of eliminating the land’s only productive use ... it does not proscribe a productive use that was previously permissible." *Appolo Fuels*, like *M & J Coal Company*, did not involve a total deprivation of economic value. However, the court stated that water pollution is an abatable nuisance under both common law and statutory law. By preventing the mining, the Office of Surface Mining Reclamation and Enforcement exercised its police power to protect the local citi-

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208. See *M & J Coal*, 47 F.3d at 1154.
209. See *Outdoor Graphics*, 103 F.3d at 695.
210. See *Appolo Fuels*, 54 Fed. Cl. at 735.
211. See *Palm Beach Isles*, 208 F.3d at 1384.
212. See *Esplanade Props.*, 307 F.3d at 986-87.
213. See *Stevens*, 854 P.2d at 456-57.
216. Id. at 1154.
218. *Outdoor Graphics*, 103 F.3d at 694. “A nonconforming use is one that lawfully existed prior to the effective date of a zoning restriction and that is allowed to continue to exist in nonconformity with the restriction.” Id.
219. Id. at 692-93.
220. Id. at 694.
221. *Appolo Fuels*, 54 Fed. Cl. at 717.
222. See discussion *supra* Part II.C.2.
zens from a nuisance. This reaffirms the Supreme Court's use of nuisance as a background principle of property law.

The court in *Palm Beach Isles* found that the navigational servitude may be a part of the background principles to property law. Since a property owner's rights are subject to the background principles of property law, a navigational servitude may provide the government with a defense to a takings claim.

In *Stevens*, where the land owners had requested permission to build a seawall on their property, the court affirmed the use of custom as a background principle of property law. The Supreme Court of Oregon, in applying and interpreting *Lucas*, held that "the common-law doctrine of custom... 'inhere[s] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership.'"

The last notable decision that relied upon a background principle of property law is *Esplanade Properties*. In *Esplanade Properties*, the court held that some background principles placing restrictions on property ownership may be found in the public trust doctrine. The court's opinion indicates that *Lucas* effectively recognizes the public trust doctrine in its exception for background principles of property law; therefore, it is suited to cases such as *Esplanade Properties*.

It is difficult to discern from these various cases how *Lucas* might limit regulatory takings. Examining the above cases more closely, the courts determined that the regulations at issue were merely codifications of the common law principles that permitted the government's actions. If most states have similar background principles, it is difficult to predict

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224. *Id*.
225. 208 F.3d 1374. See discussion *supra* Part II.C.2.
226. *Palm Beach Isles*, 208 F.3d at 1384.
227. *Id*.
227. *Id* at 456-57.
231. *Stevens v. City of Cannon Beach* was decided by the Oregon Supreme Court. *Id* at 499.
232. *Id* at 456 (citations omitted).
234. *Id* at 986-87. See discussion *supra* Part II.C.2.
when a regulation enforcing that principle would be deemed a taking. The inquiry will entail, at the very least, a case-by-case state nuisance analysis. This does not provide the sufficient clarity to takings law necessary to prevent litigation.

C. Cases Where There Was a Taking

Two other cases are important in examining judicial interpretation of regulatory takings following Lucas. In both *Pascoag Reservoir & Dam v. Rhode Island* and *Preseault v. United States*, the courts found that there had been a taking. In *Pascoag*, the court noted that the state may not simply recast its action as a background principle of state law to qualify under *Lucas*. Instead, the state action must be more than a pre-existing regulation. Furthermore, the court placed the burden of proof on the state to show that the claimed background principle allowed the regulation. In *Preseault*, the court noted, as the *Pascoag* court did, that the background principles referred to by the Supreme Court in *Lucas* were state-defined nuisance rules and declined to include federal regulatory legislation as part of those background principles.

Both *Pascoag* and *Preseault* highlight limitations that courts may consider when applying a *Lucas* analysis. Impor-

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236. *Lucas*, 505 U.S. at 1030-31. As factors in a nuisance analysis, the Court listed:

- 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 . . . 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, [t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, [and] the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

*Id.* (citations omitted).


238. 100 F.3d at 1525. See discussion *supra* Part II.C.3.

239. In *Pascoag*, the court found that there was a taking, but that the plaintiff’s claim was time-barred. *Pascoag Reservoir & Dam*, 217 F. Supp. 2d at 209.

240. *Id.* at 221.

241. *Id.*

242. *Id.*

243. *Preseault*, 100 F.3d at 1538.

244. *Id.* at 1539.
tantly, a federal or state regulation is not automatically part of a state's background principles of property law.\textsuperscript{245} This strict interpretation of background principles exception, limiting the background principles to state-defined nuisance rules,\textsuperscript{246} contrasts with the lower court cases finding several different background principles that prevent the government from compensating for a taking under the Takings Clause.\textsuperscript{247} Furthermore, the limitations create confusion as to how expansively the courts will interpret \textit{Lucas}. This confusion illustrates how \textit{Lucas} does not meet the ultimate goal of takings law—preventing the necessity of litigation. The cases do not give the government and the public a clear indication of what rights are inherent in the owner's property, when a regulation will go too far, and where an intended use of the land is prohibited by a background principle of property law.

\textbf{D. The Effect of Lucas}

After examining the lower court cases distinguishing or utilizing the \textit{Lucas} decision, a more complete picture of \textit{Lucas}' effect is discernible. According to the Court, "\textit{Lucas} carved out a narrow exception to the rules governing regulatory takings for the 'extraordinary circumstance' of a permanent deprivation of all beneficial use."\textsuperscript{248} The Court intended \textit{Lucas} to apply only in the most extreme circumstances: when a regulation results in a total taking of all economic value of a regulated property.\textsuperscript{249} However, its effect has been much greater.

According to the court in \textit{Moore},\textsuperscript{250} The effect, then, of \textit{Lucas} was to dramatically change the third criterion [i.e. the character of the governmental action], from one in which the courts, including federal courts, were called upon to make ad hoc balancing decisions, balancing private property rights against state regulatory policy, to one in which state property law, in-

\begin{footnotesize}
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246. & \textit{Preseault}, 100 F.3d at 1538.
247. & Courts have relied on public health and safety, zoning, navigational servitudes, the public trust doctrine, and custom, in addition to nuisance law as background principles of property law. \textit{See} discussion \textit{supra} Part IV.B.
249. & \textit{See} \textit{Lucas}, 505 U.S. at 1017.
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\end{footnotesize}
corporating common law nuisance doctrine, controls.251

Before Lucas, courts weighed the three Penn Central factors252 to determine if there had been a taking and if compensation was required. As the court in Philip Morris, Inc. v. Reilly253 observed, Lucas has created one stark difference in takings law:254 "once a per se rule has been announced, future courts do not have the luxury to consider the public interest, reasonable investment-backed expectations, or economic impact."255 Now, the third factor can be a complete defense to a per se regulatory taking; therefore the weight of the third factor in a Penn Central balancing has expanded. Arguably, one could claim that this third factor is now a complete defense for all takings, total or not.

As Lucas has fundamentally changed the Penn Central balancing equation, courts must now examine state common law, specifically property law. Requiring courts to examine the states' background principles of property law can have both positive and negative effects. For example, the common law of nuisance is extremely malleable, especially at the state court level.256 If courts continue to apply the background principles exception, such as the nuisance doctrine, expansively, its utility and appeal to state regulators will increase as well.257 This could be considered a benefit, especially to environmentalists, but also a cost to the private landowners.

For all its problems and limitations, it is important to note that Lucas still allows the government to regulate potentially harmful actions. Various courts have relied upon different common law principles to permit the government to prevent harmful activity. Furthermore, it is also possible to argue that Lucas protects the property owners' interests by ensuring that any owner will receive compensation in the

251. Id. at 610 (citing Loveladies Harbor v. United States, 28 F.3d 1171, 1179 (Fed. Cir. 1994)).
252. The Penn Central factors include the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. Penn Cent. Transp., 438 U.S. at 124.
253. 312 F.3d 24 (1st Cir. 2002).
254. Id. at 36.
255. Id.
256. Babcock, supra note 7, at 19.
257. Id. at 25.
case of a complete taking. Nonetheless, if courts do decide to apply the background principles exception expansively, Lucas might not be sufficient to ensure that the public will bear the costs of the regulations. Additionally, such a reliance upon background principles will not give the government and the public a clear indication of what rights are inherent in the owner's property and thus will not diminish the necessity of litigation.

V. PROPOSAL

The three primary goals of regulatory takings law are to (1) ensure that governments have the power to control and prevent potentially harmful actions, (2) protect the property owner's rights and investments in the land, and (3) prevent litigation by balancing the government's interest with the landowner's interest in such a way as to provide a clear test for when a regulation will cause a taking and require compensation. To achieve these goals, regulatory takings law must undergo certain modifications.

Currently, regulatory takings law requires a state or local government first to pass a law regulating property. Then, if the property owners feel this regulation goes too far, they may sue the government for effecting a "taking" of their property under the Fifth Amendment. However, the Supreme Court has "generally eschewed any 'set formula' for determining how far is too far, preferring to 'engage in . . . essentially ad hoc, factual inquiries.'" As a result, "[o]ur takings doctrine is both lacking in theory and unpredictable in application."

Instead of relying upon courts to make these after-the-fact, case-by-case determinations, federal and state legislative bodies should preemptively reform the regulatory process to ensure more consistency in the law. Increased knowledge regarding the regulations prior to their enactment will lead to greater clarity in property law and thus less litigation. The legislative bodies should explicitly enumerate the basis, costs,

258. See Preseault, 100 F.3d at 1525; Pascoag Reservoir & Dam, 217 F. Supp. 2d at 206.
259. See discussion supra Part III.
261. Fee, supra note 189, at 1006.
and benefits of the regulations.

First, the legislative bodies should include the basis for each new regulation in the statute. If the government could specify what principles the legislature was relying upon and where those principles would be found in the background principles of the state’s property law, the government would have greater confidence that the new law would not effect a taking. Additionally, property owners would have a better indication of their property rights, including what they can use their property for and when they will be compensated for restrictions imposed upon it.

Second, if each governing body at the local, state, and federal level was required to undergo a thorough cost-benefit analysis before passing new regulations, the economic ramifications of each proposed regulation would be clearer to both private property owners and the public. Under this method, regulatory agencies would have a better estimate of the new regulations’ impact on the economic value of private property and the assessed benefits to the public. Therefore, governments would be able to weigh these costs and benefits with the potential compensation costs for the owners. Full knowledge of the costs would in turn promote more meaningful public scrutiny of the action, thereby ensuring public participation, knowledge, and approval of the proposed action.

VI. CONCLUSION

Taking law is constantly evolving. One of the most recent changes came with the *Lucas* decision, which added the second per se rule to the takings law. In *Lucas*, the Supreme Court held that compensation for a regulatory taking under the Fifth Amendment is not required if the property use in question could have been prohibited by “the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”

The Supreme Court has returned twice to *Lucas*, and

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262. *Lucas*, 505 U.S. at 1003. The first per se rule of takings law was advanced in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). There, the Court held that “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.” *Id.* at 426.


264. See discussion *supra* Part II.C.
lower courts have added their own interpretations of Lucas to the current case law. 265 Most of the cases have held that the regulation at issue did not cause a total loss of value. 266 Even when the courts did conclude that there had been a total taking, many courts found that the government had a valid defense of a background principle of property law. 267 Finally, some courts have decided cases to find a regulatory taking requiring compensation. 268 This uncertainty introduced by the per se rule of Lucas does little to advance the goal of preventing the necessity of litigation.

To provide the certainty in takings law necessary to prevent further litigation, the legislature should change its practices regarding takings law. Instead of the court answering the question of whether the action is prohibited by a background principle of property law after enactment of the regulation, the legislature should construct the regulation in such a way as to avoid confusion in the first place. The government should undergo an in-depth cost-benefit analysis for each proposed regulation and should also include the basis for the regulations in the statutes. By including the background principles upon which the regulations rely upon, property owners would have a clear sense of the rights inherent in the title of their property and the restrictions they face. Without these reforms, it is likely that the regulatory takings law will continue to be made on an ad hoc, case-by-case factual basis.

It is acknowledged that private landowners are subject to some limitations as to the uses of their property: "[c]ertain sticks in the bundle of rights that are property are subject to constraint by government, as part of the bargain through which the citizen otherwise has the benefit of government en-

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265. See discussion supra Part II.C; Part IV.
The goal of regulatory takings law is to ensure that the government has the power to protect the environment and the public without placing the burden on a few property owners. Taking law must continue to evolve until it meets that goal.