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## Making a Nuisance of Takings Law

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# Making a Nuisance of Takings Law

Robert L. Glicksman\*

It has become commonplace, if not hackneyed, to portray the law of regulatory takings as a hopelessly confused welter of conflicting precedents.<sup>1</sup> Despite his persistent efforts to shed light on the doctrine in this area, in 1984 Dan Mandelker and the other authors of the famous *White River Junction Manifesto* asserted that “[t]here has never been a readily ascertainable way to tell when a regulation is or will be a ‘taking,’ and none is in prospect.”<sup>2</sup> To the extent that this unfortunate characterization remains accurate today, it is appropriate to absolve Professor Mandelker entirely of the blame. Indeed, the situation would undoubtedly be even worse if not for Dan Mandelker’s labors. A considerable portion of his voluminous body of scholarship has been devoted to dispelling the miasma that surrounds takings law. Among other things, Professor Mandelker has postulated a regulatory risk theory to explain when landowners

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1. See, e.g., *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting from denial of certiorari) (bemoaning “the confused nature of some of our takings case law”); *Tampa-Hillsborough County Expressway Auth. v. A.G.W.S. Corp.*, 640 So.2d 54, 57 (Fla. 1994) (noting the “apparent incoherence of taking[s] law”) (quoting *Department of Transp. v. Weisenfeld*, 617 So.2d 1071, 1080 (Fla. Dist. Ct. App. 1993) (Griffin, J., concurring)); *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 641 So.2d 1377, 1384 (Fla. Dist. Ct. App. 1994) (stating that “‘takings’ law is one of the most confused areas in American jurisprudence”); *Sintra, Inc. v. City of Seattle*, 935 P.2d 555, 578 (Wash. 1997) (“The formerly well-established jurisprudence of eminent domain has been pushed into the background by claims of inverse condemnation, regulatory taking, and substantive due process, creating an utterly confusing mish mash.”). See also Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078 (1993) (stating that the takings clause has become “engulfed in confusion”).

2. Norman Williams et al., *The White River Junction Manifesto*, 9 VT. L. REV. 193, 225 (1984). See also Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 249 (1995) [hereinafter *Investment-Backed Expectations*] (“No problem is more intractable in land-use law than defining the boundaries of regulation protected from attack under the Taking Clause.”).

should be entitled to claim that regulatory interference with investment-backed expectations gives rise to a taking.<sup>3</sup> Further, Professor Mandelker has tackled the “conceptual muddle” of the segmentation principle that is meant to define the property interest subject to regulation,<sup>4</sup> considered the appropriate level of scrutiny courts should apply in resolving takings challenges,<sup>5</sup> and challenged the propriety of an inverse condemnation remedy.<sup>6</sup>

In addition to describing the present state of the law of regulatory takings, Professor Mandelker has pulled no punches in providing normative prescriptions for the future state of the law. In an article published in response to the Supreme Court’s landmark decision in the 1992 *Lucas* case,<sup>7</sup> he savaged the Court for “repeal[ing] a century of land use law.”<sup>8</sup> As part I below explains, for years the Court took the position that regulation of land use activity that amounted to a nuisance could not result in a taking because the owner of the land lacked the authority to engage in nuisance-like conduct. *Lucas* denied that a per se rule shielding regulation of a nuisance-like use from taking liability ever existed. However, the Court then created an exception to a different per se rule (one that deems any regulation resulting in a complete destruction of the economically viable use of a regulated parcel to be a taking) for regulations that replicate limitations on land use that inhere in background principles of state common law. According to Mandelker, the *Lucas* decision promised to “cripple legislative oversight” of potentially excessive land use regulation by shifting from the legislature to the courts the authority

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3. *Investment-Backed Expectations*, supra note 2, passim; Daniel R. Mandelker, *Investment-Backed Expectations: Is There A Taking?*, 31 J. URB. & CONTEMP. L. 3 (1987).

4. Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 MARQ. L. REV. 9, 10 (1997).

5. Daniel R. Mandelker & A. Dan Tarlock, *Two Cheers for Shifting the Presumption of Validity: A Reply to Professor Hopperton*, 24 B.C. ENVTL. AFF. L. REV. 103 (1996); Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1 (1992); Daniel R. Mandelker, *Reversing the Presumption of Constitutionality in Land Use Litigation: Is Legislative Action Necessary?*, 30 J. URB. & CONTEMP. L. 5 (1986).

6. Williams et al., supra note 2, passim; Daniel R. Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981).

7. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

8. Daniel R. Mandelker, *Of Mice and Missiles: A True Account of Lucas v. South Carolina Coastal Council*, 8 J. LAND USE & ENVTL. L. 285, 301 (1993) [hereinafter *Of Mice and Missiles*].

to determine whether the purpose of regulation is legitimate.<sup>9</sup> He predicted that the “radical break with tradition in taking law” reflected in *Lucas* would prompt commentators to assess “how far the nuisance exception extends”<sup>10</sup> and that, by “improperly enhanc[ing] the protection of property rights under the taking clause,” it would leave considerable destruction in its wake.<sup>11</sup>

The purpose of this essay is two-fold. First, by assessing how lower federal courts and state courts have interpreted and applied the nuisance exception to takings liability staked out in *Lucas*, it bears out Professor Mandelker’s 1993 prognostication<sup>12</sup> that commentators would subsequently explore the parameters of that exception. As this piece makes abundantly clear, Mandelker hardly needed me to write an essay such as this one to validate him as a prescient evaluator of the future course of regulatory takings law.

Second, by analyzing the post-*Lucas* decisions,<sup>13</sup> it assesses whether *Lucas*’s treatment of the nuisance exception has turned out to be the radical and destructive break with tradition that Mandelker feared. The short answer is that it has not, largely because courts have accepted his attacks on the case as valid. After briefly describing the historical role of the harm-benefit distinction in regulatory takings jurisprudence, I devote the rest of part I to a description of *Lucas* and Dan Mandelker’s critical response to it. Mandelker seemed concerned, among other things, that the nuisance exception to the

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9. *Id.*

10. *Id.* at 292.

11. *Id.* at 306.

12. Professor Mandelker has not been alone in his efforts to read the tea leaves of *Lucas*. Richard Lazarus predicted within a year of the *Lucas* decision, correctly, as it now appears, that “the majority’s intimations that the background principles [that form the basis for the exception to the *Lucas* per se taking rule] must be supplied by judge-made common law, rather than by legislative or regulatory enactment, will probably not survive review in the future.” Richard J. Lazarus, *Putting the Correct “Spin” on Lucas*, 45 STAN. L. REV. 1411, 1426 (1993). See *infra* Part II.B.

13. Professor Mandelker engaged in a similar task when he surveyed post-1987 lower federal court and state court decisions applying the investment-backed expectations factor that is part of the ad hoc balancing approach to takings law enunciated in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). See *Investment-Backed Expectations*, *supra* note 2. Mandelker selected 1987 as his benchmark because it was the year in which the Supreme Court decided three important takings cases. *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

categorical rule announced in *Lucas* amounted to an unwarranted shift of authority from the legislatures to the courts as agents for accommodating conflicting land uses. Part II begins by addressing whether it makes sense to limit the nuisance exception to judicially created limitations on title, and then surveys post-*Lucas* federal and state court applications of the nuisance exception. The survey reveals that, for the most part, courts are as uneasy about the shift in the allocation of land use conflict resolution authority as Professor Mandelker.

Part III focuses on a recent decision by the Supreme Court of Iowa<sup>14</sup> holding that a statute immunizing agricultural activities from tort liability amounted to a taking of an easement across neighboring property owners' land. The decision does more than effectuate a policy objective endorsed by Mandelker and his *White River Junction Manifesto* cohorts—strengthening the role of the neighbors in the resolution of land use conflicts. It is also fully consistent with Mandelker's criticism of the *Lucas* nuisance exception as insufficiently solicitous of legislative prerogatives in resolving the same kinds of conflicts. Finally, part IV concludes by assessing the role of Mandelker himself in takings jurisprudence.

## I. THE DERIVATIONS OF THE *LUCAS* NUISANCE EXCEPTION

### A. *Pre-Lucas Development of the Harm-Benefit Distinction*

The notion that regulations restricting uses of property that generate harm to other property or to the public interest do not trigger an obligation to compensate the regulated property owner regardless of the economic impact of the regulation on the property has deep roots in the Supreme Court's takings jurisprudence. In 1887 the Court declared that “[a] prohibition simply upon the use of property for purposes that are declared, *by valid legislation*, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public

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14. *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998), *cert. denied sub nom. Girres v. Bormann*, 119 S. Ct. 1096 (1999).

benefit.”<sup>15</sup> The Court subsequently upheld the constitutionality of use classification zoning ordinances that segregated low density uses (such as single family or two-family residential uses) from higher density uses (including industrial and commercial uses and even apartment houses) by analogizing the placement of higher density uses in close proximity to the low density uses to a nuisance.<sup>16</sup> Eventually, some commentators derived from these cases a distinction that became known as the harm-benefit test: a regulation designed to extract benefits for the public from regulated property owners required compensation. Alternatively, a regulation designed to prevent a regulated property owner from imposing harm on adjacent land or the public did not require compensation.<sup>17</sup>

The harm-benefit test generated considerable criticism, much of it along the lines that there was no value-free way to distinguish between a harm-prevention and a benefit-extraction measure.<sup>18</sup> For example, when the government enacts a regulatory scheme that restricts development in an ecologically vulnerable area such as wetlands or coastal zones, it is possible to view the scheme as one

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15. *Mugler v. Kansas*, 123 U.S. 623, 668 (1887) (emphasis added). See also *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). *Hadacheck* is discussed *infra* part III.B.

16. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926) (“[i]n solving doubts, the maxim *sic utere tuo ut alienum non laedas*, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the [police] power.”).

17. “The idea is that compensation is required when the public helps itself to good at private expense, but not when the public simply requires one of its members to stop making a nuisance of himself.” Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1196 (1967). See also ERNST FREUND, *THE POLICE POWER* § 511 (1904) (explaining that when the government properly exercises the police power, as opposed to the power of eminent domain, property rights are impaired “not because they become useful or necessary to the public . . . but because their free exercise is believed to be detrimental to public interests; . . . the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful”). Cf. Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) (arguing that the government should not be required to compensate when it acts to control spillover effects).

18. See, e.g., Michelman, *supra* note 17, at 1197 (arguing that the test will not work “unless we can establish a benchmark of ‘neutral’ conduct which enables us to say where refusal to confer benefits (not reversible without just compensation) slips over into readiness to inflict harms (reversible without compensation)”). See generally Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 FORDHAM ENVTL. L.J. 433 (1995).

that extracts benefits for the public in preserving the vulnerable resource or as one that prevents the imposition of harm in destroying a resource through development.<sup>19</sup> Moreover, in 1978 the Supreme Court threw into question the status of the harm-benefit test as a determinant of takings liability when it issued its decision in the *Penn Central* case.<sup>20</sup> The Court enunciated a series of factors deemed to have “particular significance”<sup>21</sup> in takings cases: the economic impact of the regulation on the property owner, the extent to which the regulation has interfered with “distinct investment-backed expectations,” and “the character of the governmental action.”<sup>22</sup> Under this ad hoc balancing test, it would be relatively difficult to prove a taking as a result of an interference with property rights that “arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>23</sup> The Court acknowledged that it had upheld land use regulations that either destroyed or adversely affected recognized real property interests as long as the governmental entity adopting them had reasonably concluded that the health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land.<sup>24</sup> The owner of the regulated historic landmark sought to distinguish these and similar cases on the ground that each involved prohibition of a “noxious” use, whereas construction of a renovated railroad terminal “would be beneficial.”<sup>25</sup> The Court dismissed the distinction, however, asserting that the cases in question were “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

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19. *Compare* *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972) (holding that ordinance restricting wetlands development was not a taking because it sought to control harm) with *State v. Johnson*, 265 A.2d 711 (Me. 1970) (reaching the opposite result). Professor Sax regards *Lucas* as a “long-delayed” repudiation of *Just*. See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1438 (1993) [hereinafter *Economy of Nature*].

20. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

21. *Id.* at 124.

22. *Id.*

23. *Id.*

24. *Id.* at 125. Among other cases, the Court cited *Mugler*, *Hadacheck*, and *Euclid*. *Id.* at 125-26.

25. 438 U.S. 104, at 133-34 n.30.

preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.”<sup>26</sup> Thus, regulations directed at harm-producing activities are not entitled to uniquely protected status when attacked as compensable takings. Regulations that seek to benefit the public are subject to the same analysis as measures directed at activities that generate harm, if the regulations are applied in a non-discriminatory manner and are otherwise within the scope of the police power.

*Penn Central* seemed to sound the death knell to the principle that the analytical framework for assessing a takings claim turns largely on whether a regulation is directed at a harm-producing activity. However, the Court appeared to resuscitate the relevance of the distinction between harm-producing and benefit-extracting measures less than a decade later. In a case that presented a virtual replay of the factual situation in the Court’s landmark decision in *Pennsylvania Coal v. Mahon*,<sup>27</sup> the Court in the *Keystone* case<sup>28</sup> explained its “hesitance” to find a taking “when the State merely restrains uses of property that are tantamount to public nuisances.”<sup>29</sup> This kind of regulatory action was entitled to “special status” because “no individual has a right to use his property so as to create a nuisance or otherwise harm others.”<sup>30</sup> Accordingly, “the State has not ‘taken’ anything when it asserts its power to enjoin the nuisance-like activity.”<sup>31</sup> Even if characterizing a regulated activity as nuisance-like does not in all cases preclude the possibility of a taking, “the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation.”<sup>32</sup> The Court’s references to activities that “otherwise”

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26. *Id.* The Court added that the destruction of a historic landmark could fairly be described as a harm-producing activity in any event. *Id.*

27. 260 U.S. 393 (1922). The Court held in *Pennsylvania Coal* that a statute that made it commercially impractical to mine coal without causing subsidence of the surface in a manner prohibited by the statute was a taking.

28. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

29. *Id.* at 491.

30. *Id.* at 491 n.20.

31. *Id.*

32. *Id.* at 492. For further discussion of the impact of *Keystone* on the nuisance-like use exception, see Michael J. Davis & Robert L. Glicksman, *To the Promised Land: A Century of Wandering and A Final Homeland for the Due Process and Takings Clauses*, 68 OR. L. REV. 393, 433-35 (1989).

caused harm and to “activities similar to public nuisances” seemed to indicate that the government could demand a halt to a harm-producing activity without subjecting itself to an obligation to compensate the affected property owner, even if the activity did not amount to a common law nuisance.

Justice, subsequently Chief Justice, Rehnquist dissented in both *Penn Central* and *Keystone*. In *Penn Central*, he acknowledged that nearly a century of precedent supported the existence of what he called the “nuisance exception,” but that the exception had been interpreted narrowly.<sup>33</sup> He claimed that its scope was not coterminous with that of the police power; rather, the exception could shield government action from the obligation to compensate only if the targeted activity is “dangerous to the safety, health, or welfare of others.”<sup>34</sup> In *Keystone*, he again confirmed that the Court had “recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use.”<sup>35</sup> He insisted again, however, that the exception was a “narrow” one, confined to circumstances in which the government sought to prevent “a misuse or illegal use.”<sup>36</sup> In addition, he asserted that the issue of the legitimacy of a regulation’s purpose is a question of federal, not state, law “subject to independent scrutiny by this Court.”<sup>37</sup>

By the time the Court decided *Lucas* in 1992, some version of a rule immunizing from takings liability a regulation directed at a harm-producing activity seemed well entrenched, even if the scope of that immunity was the subject of ongoing debate. The *Penn Central* opinion contained a single cryptic footnote in which the majority cast doubt on the viability of the distinction between a regulation that seeks to prevent harm and one that seeks to extract public benefits.

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33. *Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting).

34. *Id.*

35. *Keystone*, 480 U.S. at 511 (Rehnquist, C.J., dissenting). Justice Scalia, who subsequently denied the existence of a noxious-like use exception as a shield in *Lucas*, joined in Chief Justice Rehnquist’s dissent.

36. *Id.* at 512 (Rehnquist, C.J., dissenting) (quoting *Curtis v. Benson*, 222 U.S. 78, 86 (1911)).

37. *Id.*

The point was not critical to the majority's analysis,<sup>38</sup> however, and in any event it only served to expand, not contract, the scope of government regulation that may escape takings liability by recognizing that a harm-prevention rationale is not a prerequisite to the ability to regulate without compensation. Moreover, all reservations seemed to have been cast aside by the time the Court decided *Keystone*, a case in which all nine Justices signed onto some form of the principle that harm-producing activity is the appropriate target of non-compensable police power regulation.

*B. The Impact of Lucas on the Status of the Harm-Prevention Principle*

The Supreme Court confronted the role of a harm-prevention rationale for regulation directly in the *Lucas* decision.<sup>39</sup> In 1986 Lucas purchased two residential lots on the Isle of Palms, South Carolina, for a price of nearly one million dollars. Two years later, as an erosion control measure, the state adopted the Beachfront Management Act, which prevented Lucas from building homes on either lot. The trial court found that the application of the statute to Lucas's land rendered it valueless.<sup>40</sup> The state Supreme Court accepted as determinative the legislature's finding that new construction on the coastal zone threatened public resources and concluded that no compensation was due when a regulation of private property is designed to prevent serious public harm, regardless of the degree of the economic impact on the regulated property.<sup>41</sup>

The Supreme Court, Justice Scalia writing for a five-member majority, enunciated a categorical rule pursuant to which a regulation that denies all economically beneficial or productive use of land is a

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38. After denying the relevance of the "noxious" quality of the uses in cases like *Hadacheck*, for example, the Court added that destruction of a historic landmark could be regarded as a harmful activity. See *supra* note 26. Thus, even if the majority meant to deny the existence of a nuisance exception, its effort to do so can be regarded as dictum. Moreover, the majority's explanation of the significance of cases like *Mugler* and *Hadacheck* may have been intended to amplify, not constrict, the scope of state authority to regulate without compensation. See Davis & Glicksman, *supra* note 32, at 433.

39. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

40. *Id.* at 1007.

41. *Id.* at 1010. The state supreme court cited *Mugler*, among other cases.

per se taking.<sup>42</sup> Responding to the state court's reliance on the harm-preventing character of the regulation that restricted Lucas's development, the Court cited the *Penn Central* footnote described above. It discounted the significance of prior suggestions that "harmful or noxious uses" of property could be prevented without triggering a Fourteenth Amendment (in the case of state or local regulation) obligation to compensate. The "harmful or noxious use" principle was simply an "early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power."<sup>43</sup> Thus, "harmful or noxious use" analysis was "simply the progenitor of our more contemporary statements that land use regulation does not effect a taking if it substantially advances legitimate state interests."<sup>44</sup> According to the *Lucas* majority, the Court moved away from reliance on a noxious use characterization precisely because "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."<sup>45</sup> Indeed, the concerns that prompted enactment of the Beachfront Management Act could fit comfortably under either rubric: the state may have been trying to prevent Lucas from using his land to harm the state's ecological resources, or it may have been trying to procure the benefits of an ecological preserve.<sup>46</sup> The choice of characterization depends largely on "one's evaluation of the worth of competing uses of real estate."<sup>47</sup> These considerations led ineluctably to the conclusion that "noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation."<sup>48</sup> The state's

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42. *Id.* at 1015.

43. *Id.* at 1022-23.

44. *Lucas*, 505 U.S. at 1023-24. That statement is part of a two-part test for regulatory takings enunciated in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), where the Court indicated that a taking occurs if regulation "does not substantially advance legitimate state interests or denies an owner economically viable use of his land."

45. *Lucas*, 505 U.S. at 1024.

46. *Id.*

47. *Id.* at 1025.

48. *Id.* at 1026.

recitation of a noxious-use justification could not, therefore, provide a basis for a departure from the per se rule that a regulation that causes a complete deprivation of economic value is a taking.<sup>49</sup>

Apparently dispensing once and for all<sup>50</sup> with a nuisance exception from takings liability, the majority nevertheless, in virtually the same breath, reinjected the nuisance-like character of the regulated property back into the takings equation.<sup>51</sup> The state could avoid the per se rule “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.”<sup>52</sup> The Court had already recognized that a permanent physical occupation gives rise to a per se taking, without regard to the strength of the governmental interest in such an occupation.<sup>53</sup> A confiscatory regulation—one that results in a complete denial of economically beneficial use—has the same practical effect as such an occupation:

Any limitation so severe cannot be newly legislated or decreed (without compensation), but 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. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.<sup>54</sup>

If regulation is directed at a use already restricted by these “background principles,” it cannot be a taking because the regulated property owner never had a right to engage in the particular use. “The

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49. *Id.*

50. This is so until the next takings case with a reconfigured Supreme Court majority.

51. In Justice Stevens’ words, “the categorical rule established in this case is only ‘categorical’ for a page or two in the U.S. Reports.” *Id.* at 1067 (Stevens, J., dissenting). Justice Scalia declared that a noxious-use justification could not be the basis for departing from the categorical rule. *Id.* at 1026. On the very next page of the opinion, he enunciated the “logically antecedent inquiry” described immediately below. *Id.* at 1027.

52. *Id.* at 1027.

53. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

54. 505 U.S. at 1029.

use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.”<sup>55</sup> But when regulation proscribes uses consistent with these background principles “compensation must be paid to sustain it.”<sup>56</sup> The Court remanded the case to the state court to determine whether any background principles of nuisance and property law already proscribed the uses prohibited by the Beachfront Management Act.<sup>57</sup>

The *Lucas* majority purported to rely on the footnote in *Penn Central* that seemed to cast aside the harm-benefit distinction. The effect of the Court’s rejection of the distinction in *Lucas*, however, contrasts markedly with the impact of the renunciation of a harm-benefit dichotomy in *Penn Central*. In the earlier case, the majority indicated that the presence of a harm-prevention rationale provides no stronger reason to reject a takings claim than the presence of a benefit-extraction rationale. In either situation the enacting governmental entity may withstand a takings challenge by showing that it employed a non-discriminatory approach and relied on an appropriately weighty police power justification. Under *Penn Central*’s three-part balancing test, if the police power justification is strong enough, the government can impose regulation without having to provide compensation, even if the effect of the regulation is to cause significant diminution in value. Under *Lucas* the character of the regulation is relevant to the threshold task of defining the regulated property interest. If the regulated activity is tantamount to a nuisance, the regulated entity never possessed the right to engage in the activity in the first place. But only harm-prevention measures, not other kinds of police power enactments, “inhere” in title in this manner. Furthermore, a government adopting a non-harm prevention measure that results in denial of all economically beneficial use may

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55. *Id.* at 1030.

56. *Id.*

57. *Id.* at 1031-32. The state supreme court determined that they did not and ordered the trial court to award damages for a temporary taking. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (1992).

never avoid the categorical taking rule announced in *Lucas* on the basis of the strength of the public interest behind the enactment.

A close analysis of the *Lucas* “nuisance exception” reveals that the majority indicated compensation is required for restrictions that extend beyond the relevant background principles that are “newly legislated.” Although the majority did not define what it meant by “new legislation,” one possibility is that it meant legislation adopted after the property owner alleging the taking acquired an interest in the property.<sup>58</sup> The implication is that legislative restrictions that pre-date the acquired interest may be used to define the parameters of the property interest that was allegedly taken. The background principles that inhere in title are those of the state’s property and nuisance law.

Must those principles emanate from the common law, or may they have a statutory or regulatory derivation? Justice Blackmun, in dissent, understood the majority to confine the relevant background principles to those derived from common law. He complained that the majority swept aside venerable precedents dating back more than a century in ruling that “the government’s power to act without paying compensation turns on whether the prohibited activity is a common-law nuisance.”<sup>59</sup> Blackmun added that one cannot make a judgment on whether a use amounts to a common law nuisance without engaging in the same kinds of value-laden judgments that make the distinction between a harm-preventing and a benefit-conferring measure depend on the eye of the beholder.<sup>60</sup> But the majority’s reference to “newly legislated” restrictions appears to leave room, as indicated above, for consideration of pre-existing regulatory measures in defining the relevant property interest. Further, the majority did not actually require that a use must have been decreed a nuisance by a common law court to be free from the categorical rule. It is enough that a regulatory measure “duplicate the result that could have been achieved in the courts.”<sup>61</sup> Who decides whether a regulation achieves such duplication? Legislative

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58. See William W. Fisher III, *The Trouble with Lucas*, 45 STAN. L. REV. 1393, 1408 (1993).

59. 505 U.S. at 1052 (Blackmun, J., dissenting).

60. *Id.* at 1053 (Blackmun, J., dissenting).

61. *Id.* at 1029.

declaration that the regulated activity is nuisance-like will not necessarily suffice. In *Lucas* the Court lent no credence to the South Carolina legislature's determination that the statute was necessary to avoid harm to important public resources.<sup>62</sup> Thus, independent judicial scrutiny is appropriate under the *Lucas* approach.<sup>63</sup>

### *C. Mandelker's Take on Lucas*

Dan Mandelker's reaction to *Lucas*, which appeared less than a year after the decision, was less than charitable. Although he applauded Justice Scalia's rejection of the harm-benefit test,<sup>64</sup> he regarded the decision as a whole to be insufficiently solicitous of government's "legitimate interest in regulation."<sup>65</sup> Professor Mandelker took particular issue with the presumption of constitutionality of land use regulation that it effected:

Before *Lucas*, the legislature had the authority to declare what is and what is not in the public interest, and this declaration was presumptively constitutional. Now, as Justice Scalia made plain in *Lucas*, the courts will determine whether a total deprivation is defensible under the taking clause by applying nuisance law. The presumption is reversed, if not discarded, because legislative declarations of governmental purpose have no standing in the decision on a taking claim.<sup>66</sup>

*Lucas*, therefore, shifted the authority to determine what is a legitimate governmental purpose from the legislature to the courts, crippling the legislative role in defining the limits of governmental

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62. "A *fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed." *Id.* at 1026.

63. See *Keystone*, 480 U.S. at 512 (stating that the issue of the legitimacy of a regulation's purpose is a question of federal, not state law, "subject to independent scrutiny by this Court").

64. *Of Mice and Missiles*, *supra* note 8, at 293. Mandelker also found Justice Scalia's rejection of the test "puzzling," however, because it is a rule that "favors landowners in their taking clause battles." According to Mandelker, the demise of the rule allows courts to conclude that regulations that do not deprive a landowner of all economically beneficial use do not amount to a taking based on a pragmatic balancing process, even if they confer a public benefit. *Id.* at 295.

65. *Id.* at 287.

66. *Id.* at 300 (footnotes omitted).

intervention in the private land use market.<sup>67</sup> Mandelker, like Justice Blackmun,<sup>68</sup> found Justice Scalia's endorsement of the nuisance exception to the categorical rule for total economic deprivations to be inconsistent with his rationale for jettisoning the harm-benefit rule because both are equally subject to the criticism that it is impossible to construct a neutral baseline from which they can operate. Similarly, although Justice Scalia "was adamant on the need for a per se taking rule" to dispose of total deprivation cases, "he adopted a nuisance exception that invokes an equity regime in which balancing of interests is the hallmark of decision making."<sup>69</sup> In the final analysis, Mandelker charged that *Lucas* presages further doctrinal revision that "substantially and improperly enhances the protection of property under the taking clause" by vitiating a presumption of constitutionality and undercutting judicial deference to legislative judgments that served to protect government from assault under the taking clause.<sup>70</sup>

Professor Mandelker's greatest concern with *Lucas* appears to be its shifting of the power to determine when a regulation of private property requires the payment of just compensation from legislative and administrative regulatory bodies to the judiciary. One means by which this shift is accomplished is the limitation placed on the nuisance exception such that only regulatory restrictions that duplicate limitations that already existed at common law, or that a court declares to be the equivalent of those that existed at common law, can shield the government from a taking claim in a case otherwise subject to the per se rule for total economic deprivations. The next part of this essay analyzes the cases that have been decided since *Lucas* to see how the courts have interpreted the scope of the nuisance exception to the categorical rule. In particular, the focus is on assessing whether *Lucas* has become the "destructive missile" that Professor Mandelker feared by prompting a significant reallocation of

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67. *Id.* at 302.

68. *See supra* note 60 and accompanying text.

69. *Of Mice and Missiles*, *supra* note 8, at 302.

70. *Id.* at 306.

authority to accommodate conflicting land uses from the legislatures to the courts.<sup>71</sup>

## II. THE FATE OF THE NUISANCE EXCEPTION

### A. Which Background Principles of Property and Nuisance Law are “Relevant”?

The majority opinion in *Lucas* interpreted the Constitution to provide protection against a taking challenge for a regulation that eliminates all economically productive use, as long as the regulation only proscribes productive uses “previously permissible under relevant property and nuisance law principles.”<sup>72</sup> Compensation is not required for the imposition of such restrictions because “[t]he use of these properties for what are now expressly prohibited purposes was *always* unlawful, and . . . it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit.”<sup>73</sup>

The obvious question is how to define the body of background law that is “relevant” to the definition of the baseline property rights held by the regulated property owner. Justice Scalia’s answer in *Lucas* seems to be that the only relevant body of law is state common law. He asserted that this result is consistent with the Court’s tradition of resolving takings questions by reference to “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.”<sup>74</sup> In particular, the Court has traditionally resorted to “‘existing rules or understandings that stem from an independent source such as state law’ to define the range of interests that qualify for protection as ‘property’ under the Fifth and Fourteenth Amendments.”<sup>75</sup>

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71. *Id.*

72. *Lucas*, 505 U.S. at 1029-30.

73. *Id.* at 1030.

74. *Id.* at 1027. According to one critic of *Lucas*, this justification amounts to little more than saying that “whatever the Court wants the result to be can always be accommodated.” Edward J. Sullivan, *Lucas and Creative Constitutional Interpretation*, 23 ENVTL. L. 919, 922 (1993).

75. *Lucas*, 505 U.S. at 1030 (citing, *inter alia*, Board of Regents v. Roth, 408 U.S. 564,

State regulatory legislation is arguably just as “independent” of federal constitutional doctrines restricting government power as common law. The position that only common law rights are “relevant” to the task of defining the realm of interests that qualify for protection as property must be based on the view that the common law creates a body of inviolate, baseline rights<sup>76</sup> in a way that statutory or regulatory law does not, even if the latter already existed at the time the regulated property owner acquired the interest. But, as Professor Richard Levy has argued, the notion that the common law functions as a constitutional baseline is undercut by the Supreme Court’s recognition that “the common law itself was merely a regulatory regime in which the government chose to prefer some interests over others.”<sup>77</sup> Levy asserts that the Court’s rejection<sup>78</sup> of *Lochner v. New York*<sup>79</sup> constituted an implicit renunciation of the view that “property rights are natural rights that exist independently of government action in favor of the recognition that property rights are created by the common law, which is merely one of many possible regulatory system regimes.”<sup>80</sup> In short, “there is no

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577 (1972)).

76. See, e.g., Sax, *Economy of Nature*, *supra* note 19, at 1441 (describing *Lucas* as consistent with the view that property ownership entails “some irreducible right of use by the private landowner”).

77. Richard E. Levy, *Escaping Lochner’s Shadow: Toward A Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 391 (1995).

78. Indeed, even in the midst of the ascendancy of *Lochner* and its progeny, the Court concluded that a brickyard that did not amount to a nuisance *per se* could not assert a “vested interest” against the exercise of the police power as the basis for a claim for just compensation. The court explicitly rejected the contention that “a necessary and lawful occupation that is not a nuisance *per se* cannot be made so by legislative declaration.” *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915).

79. 198 U.S. 45 (1905).

80. Levy, *supra* note 77, at 391. The courts have recognized in other contexts that common law assignments of rights are tantamount to regulatory requirements adopted by legislative or administrative bodies. See, e.g., *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (holding that the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (1994), preempted common law tort claims based on inadequate packaging or labeling because damage awards based on such claims amount to “requirements” within the meaning of statutory preemption provision). See also *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) (holding that common law breach of implied warranty claim was preempted by the same statute). Justice Scalia’s efforts to shield common law assignments of rights from legislative alteration are not limited to his takings jurisprudence. See, e.g., Michael C. Blumm, *Property Myths, Judicial Activism, and the Lucas Case*, 23 ENVTL. L. 907, 915 (1993) (noting that Justice Scalia’s “assault on legislative attempts to change the common law model of public and

constitutional reason to prefer the common law over any other regulatory regime.”<sup>81</sup> The position that common law property rights form an inviolate baseline for assessing the validity of takings challenges is also undercut by the Court’s own recognition that common law property rights change over time.<sup>82</sup> More specifically, the “Blackstonian expectation” that common law property rights vest in their holders an expectation of unrestricted development has eroded over time.<sup>83</sup>

Land use regulation serves as a means of accommodating potentially conflicting uses of land. For example, a zoning ordinance that designates an area for exclusive residential use reflects a legislative judgment that the public interest is best served by preventing commercial and industrial uses from imposing adverse impacts on residential uses in that locality, and vice versa.<sup>84</sup> When a real property owner attacks the imposition of regulatory restrictions as a compensable taking, the owner is challenging the right of the government to resolve the conflict against the owner without paying for that right. If the Supreme Court in *Lucas* intended to limit the

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private rights with respect to land and environmental regulation” is reflected in his approach to principles of standing to sue under Article III of the Constitution). See also FREDERICK R. ANDERSON ET AL., ENVIRONMENTAL PROTECTION: LAW AND POLICY 118-19 (3d ed. 1999).

81. Levy, *supra* note 77, at 392. See also *id.* at 391 n.257 (“Put simply, if property rights are created by society through the governmental establishment of a legal regime to protect them, there can be no natural right to any particular property regime.”). Levy attacks the viability of the harm-benefit distinction as a basis for resolving takings claims on the same grounds, arguing that determining whether a regulation prevents a harm or confers a benefit depends upon the baseline from which the impact is measured. *Id.* at 392 n.259.

82. *Lucas*, 505 U.S. at 1031 (explaining that “changed circumstances or new knowledge may make what was previously permissible no longer so”).

83. A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 U. CHI. L. REV. 555, 589 (1993). See also Sax, *Economy of Nature*, *supra* note 19, at 1446-49 (describing how definitions of property have “continuously adjusted to reflect new economic and social structures, often to the disadvantage of existing owners”). Accordingly, Sax characterizes the view of property reflected in *Lucas* as outdated and the case’s ultimate resolution as “inept.” *Id.* at 1455.

84. The problem is a reciprocal one because if two uses, A and B, are truly incompatible, then a governmental entity seeking to resolve the conflict must either allow A to inflict harm on B or preclude A from doing so, thereby inflicting harm (in the form of the inability to pursue the desired use) on A. Thus, according to Michael Blumm, the recognition, hinted at in *Lucas*, that there is a fundamental right to develop property “would be a curious result because if there is a fundamental right to develop property, and there are two landowners whose developments conflict, whose right is more fundamental?” Blumm, *supra* note 80, at 913. See generally Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

nuisance exception to background principles of the common law of property, it afforded the state judiciary the authority to resolve such conflicts through total deprivation of economically beneficial use without triggering constitutional damage liability, but precluded the legislature (or an administrative body) from doing so.

Prior to *Lucas*, however, the Supreme Court had reached the conclusion that all regulatory means of resolving land use conflicts, including common law means, stood on equal footing. *Miller v. Schoene*, a 1928 decision, illustrates the point.<sup>85</sup> Acting under the authority of a Virginia statute, the state entomologist ordered the owners of ornamental red cedar trees to cut them down in order to prevent a rust with which the trees were infected from spreading to nearby apple orchards, even though the rust had no effect on the host trees. The statute required the destruction as a public nuisance of any red cedar trees infected with fungal rust if the trees were located within a defined proximity to apple orchards. At the time of the dispute, “[a]pple growing [was] one of the principal agricultural pursuits in Virginia.”<sup>86</sup> The owners of the cedar trees claimed a right to compensation. The Supreme Court upheld the state Supreme Court’s refusal to find a taking. The Court recognized that “the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity.”<sup>87</sup> The state could have chosen not to require destruction of the rust-ridden cedars, but by doing so it would have permitted serious injury to the nearby apple orchards to go unchecked.

When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, *in the judgment of the legislature*, is of greater value to the public. It will not do to say that the case is merely one of a conflict between two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the

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85. 276 U.S. 272 (1928).

86. *Id.* at 279.

87. *Id.*

destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of the one interest over the other. And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.<sup>88</sup>

The Court explicitly declined to assess “whether the infected cedars constitute a nuisance according to the common law.”<sup>89</sup> Such an assessment was not “relevant” to the determination of whether the mandated destruction of the cedar trees triggered an obligation to compensate. The state had to make a choice between two conflicting property interests, and the legislature’s decision to favor the apple orchards over the cedar trees was determinative. The Court did not consider the possibility that the statutory declaration of a public nuisance simply duplicated pre-existing common law nuisance restrictions on an externality-generating land use because a finding of such duplication was not a prerequisite to denial of the taking claim.

*Miller* is consistent with the view that the state may act as an arbiter of disputes among potentially conflicting land uses without being forced to compensate the loser.<sup>90</sup> Despite the fact that it did not overrule *Miller*, or even cast doubt on its continuing validity, *Lucas* appears to restrict the dispute resolution mechanisms that are capable of avoiding an obligation to compensate to those that derive from pre-acquisition common law principles of nuisance and property law. Professor Mandelker, as well as other legal commentators<sup>91</sup> and the majority of the lower federal court and state judges that have addressed the scope of *Lucas*’s nuisance exception, have sensed an insufficient explanation for this restriction.

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88. *Id.* at 279-80 (emphasis added) (citations omitted).

89. *Id.* at 280.

90. See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 69-70 (1964).

91. See, e.g., Blumm, *supra* note 80; Fisher, *supra* note 58, at 1405-08; William Funk, *Revolution or Restatement? Awaiting Answers to Lucas’ Unanswered Questions*, 23 ENVTL. L. 891, 897-900 (1993); Donald Large, *Lucas: A Flawed Attempt to Redefine the Mahon Analysis*, 23 ENVTL. L. 883 (1993); Lazarus, *supra* note 12, at 1418-21, 1426 (characterizing the portion of the *Lucas* opinion that rejected the harm-benefit distinction but adopted the nuisance exception as “a shell game”).

### *B. The Expansion of the Lucas Nuisance Exception*

#### 1. Post-*Lucas* Judicial Interpretation of the Nuisance Exception

Instances of land use and environmental regulation that result in total denials of economically beneficial use are relatively rare.<sup>92</sup> As a result, the impact of the categorical taking rule announced in *Lucas* is likely to be less dramatic than an overhaul of the *Penn Central* ad hoc balancing test that applies to regulations having an adverse economic impact on the regulated property that is less substantial than a complete deprivation of such use. Within the realm of cases to which the *Lucas* analytical framework applies, the impact of that framework obviously would be relatively greater if the nuisance exception were interpreted narrowly rather than broadly. One way for the lower federal courts and state courts to confine the scope of the nuisance exception would be to limit the “background principles” of state nuisance and property law that inhere in title (and thus provide a shield against taking liability) to those that existed under the common law in effect at the time the landowner asserting a taking purchased the regulated property.

By and large courts have not adopted this kind of approach, although the lack of uniformity reflected in the cases is indicative of the confusion that *Lucas* has spawned and, perhaps, of the less than convincing explanation provided by the Court for its treatment of the nuisance exception to the categorical rule. My less than systematic survey of the cases revealed only a few post-*Lucas* decisions in which courts refused to consider a restriction that was not based in common law as a limiting background principle. In one of those cases, *K & K Construction, Inc., J.F.K. v. Department of Natural Resources*, the state denied a permit that would have allowed the plaintiff to build a restaurant on a portion of its land that contained wetlands protected by state statute.<sup>93</sup> When the plaintiff claimed a compensable taking, the state responded that construction was barred by the state constitution, which amounted to a “fundamental principle” of state property law. The state constitution declared the

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92. See Lazarus, *supra* note 12, at 1427.

93. 551 N.W.2d 413 (Mich. App. 1996).

conservation and development of the state's natural resources to be of paramount public concern and authorized the legislature to provide for their protection.<sup>94</sup> The Michigan appellate court held that the constitutional provision was not a principle of nuisance and property law for purposes of the *Lucas* exception. The decision to build a restaurant on wetlands did not constitute an abatable nuisance and the court was not aware of any "common-law principle" preventing the construction.<sup>95</sup> According to the court's conclusory reasoning, "the generalized invocation of public interests in the state constitution and the Legislature's declarations in the [W]etlands Protection Statute] . . . do not constitute background principles of nuisance and property law sufficient to prohibit the use of plaintiffs' land without just compensation."<sup>96</sup> The court's decision lost all precedential value, however, when the Supreme Court of Michigan reversed on the ground that the permit denial did not result in a denial of all economically viable use and, therefore, no categorical taking had occurred.<sup>97</sup>

In *Preseault v. United States* the Court of Appeals for the Federal Circuit adopted the same approach.<sup>98</sup> In *Preseault*, the United States sought to avoid taking liability for deferring abandonment of a railroad easement through operation of the Rails-to-Trails Act.<sup>99</sup> The government argued that background principles of federal law reflected in federal transportation regulatory statutes precluded the owners of the reversion from insisting on immediate abandonment. The court disagreed, insisting that "[t]he background principles referred to by the Court in *Lucas* were state-defined nuisance

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94. *Id.* at 417.

95. *Id.*

96. *Id.* Why doesn't a state constitutional provision authorizing legislative action to protect important public natural resources reflect "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"? *Lucas*, 505 U.S. at 1027.

97. *K & K Constr., Inc. v. Department of Natural Resources*, 575 N.W.2d 531 (Mich. 1998). The court remanded so that the trial court could make the factual findings necessary to permit application of the three-part *Penn Central* balancing test for non-categorical takings. *Id.* at 539-40.

98. *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996). For further discussion of *Preseault*, see GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 17.05[4] (1990).

99. 16 U.S.C. § 1247(d) (1994).

rules.”<sup>100</sup> *Lucas* did not support the position that these background principles include “the sweep of a century of federal regulatory legislation.” Moreover, the landowners’ use of their property did not amount to a public nuisance under “traditional nuisance concepts” so as to justify immunizing regulation from operation of *Lucas*’s categorical rule.<sup>101</sup> The court limited the impact of its ruling, however, by confining its analysis to physical occupation cases, not regulatory takings cases involving questions concerning the scope of the owner’s reasonable investment-backed expectations.<sup>102</sup>

The Court of Federal Claims subsequently reached a similar result in *Maritrans Inc. v. United States*, a case involving federal regulation of personal property.<sup>103</sup> The issue in *Maritrans* was whether the Oil Pollution Act of 1990<sup>104</sup> and its implementing regulations effectuated a taking of the plaintiffs’ non-self-propelled tank vessels by requiring that single-hulled vessels be retrofitted to double hulls. The United States claimed that the plaintiffs possessed no property rights to be taken in light of the history of extensive regulation of the industry. The court stated, however, that “[t]he inquiry into limitations inhering in an owner’s title is made by referencing state property or nuisance law and federal law.”<sup>105</sup> The government cited a string of statutes, dating back to the 1800s, that regulated shipping activities, but the court found those laws irrelevant to the takings issue. Long-standing Coast Guard regulation of oil tankers did not establish a common law prohibition against using the vessels without double hulls.<sup>106</sup> Because the government could not show that operation of the vessels would have amounted to a common law nuisance, it failed to address the rights that attached to ownership of vessels independently of the applicable regulatory framework. The plaintiffs, therefore, held

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

101. *Id.* at 1539.

102. *Id.* at 1540. *Compare* *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025 (Colo. App. 1996) (concluding that state environmental agency did not engage in a taking when it entered mine site to assist EPA in moving waste rock pile and plugging tunnels and shafts because use of the site in a way that created significant environmental problems amounted to a nuisance under principles of state property law).

103. 40 Fed. Cl. 790 (1998).

104. Pub. L. No. 101-380, 104 Stat. 484.

105. 40 Fed. Cl. at 793 n.7.

106. *Id.* at 799.

a Fifth Amendment property interest in their vessels.<sup>107</sup>

In another recent decision, *Florida Rock Indus., Inc. v. United States*,<sup>108</sup> the Court of Federal Claims concluded that the application of the Clean Water Act's (CWA) section 404 dredge and fill permit program<sup>109</sup> worked a taking of a developer's land, but in so holding, the court recognized that pre-acquisition statutory programs are just as relevant as common law principles of nuisance and property law. *Florida Rock* addressed the constitutionality of the Corps of Engineers' denial of the plaintiff's application to mine limestone on a property that was composed largely of wetlands. The plaintiff acquired the property in September 1972, one month before Congress adopted the CWA. The landowner acquired all necessary state and local permits, but because of a slump in the mining industry delayed efforts to mine until 1978. Later that year, the Corps issued a cease and desist order to halt mining, stating that a section 404 permit was necessary. After the Corps denied the plaintiff's application, the plaintiff filed suit alleging a taking.<sup>110</sup> The government argued that it need not compensate Florida Rock because it established that the mining would have been injurious to the public health and safety, as defined by Congress. The court responded that, for purposes of the takings clause, nuisance law "is not simply defined by Congress, whenever it declares that a use should not occur. The government's argument would enable Congress to pass laws which eliminate property rights retroactively as if those rights never existed in the first place."<sup>111</sup> Instead, the government must show a limit on plaintiff's property rights which inhered in the title at the time of the plaintiff's acquisition of the property in order to avoid compensating the plaintiff.

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107. *Id.* at 801. The court refused to dismiss the plaintiff's taking claim. In a subsequent phase of the case, the court held that the mere passage of the double hull provisions of the Oil Pollution Act did not amount to a taking. *Maritrans Inc. v. United States*, 43 Fed. Cl. 86 (1999).

108. 45 Fed. Cl. 21 (1999). For an earlier phase of the case, see *Florida Rock Indus., Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994).

109. 33 U.S.C. § 1344 (1994).

110. *Florida Rock*, 45 Fed. Cl. at 25-26.

111. *Id.* at 28-29. Nor could "the artful recitation of a harm-preventing or benefit-conferring justification transform compensable government action into that which is not compensable." *Id.* at 29.

Unlike the courts in *K & K Construction*, *Preseault*, and *Maritrans*, the *Florida Rock* court concluded that statutory restrictions were just as relevant as those originating at common law. The enactment of a federal statute restricting the landowner's use rights before its acquisition of the property allegedly taken would affect the owner's expectations.<sup>112</sup> In this case, however, the CWA was not enacted until after *Florida Rock* acquired its land. Similarly, the court considered whether the regulated activities amounted to a nuisance under state law and held that they did not. In so holding, the court analyzed not only state common law doctrine, but also a "relevant" public nuisance statute.<sup>113</sup> The court held that the plaintiff had a compensable right to mine limestone,<sup>114</sup> but it explicitly acknowledged the relevance of federal and state statutory law in determining what limitations "inherited" in the landowner's title.

The same court that decided *Florida Rock* also considered state legislation relevant to the task of defining the scope of the owner's property in *Rith Energy, Inc. v. United States*, in which a takings claim was soundly rejected.<sup>115</sup> The plaintiff in *Rith Energy* applied for a surface mining permit under the Federal Surface Mining Control and Reclamation Act.<sup>116</sup> The Office of Surface Mining (OSM) denied the permit because of the applicant's inability to formulate an acceptable plan for managing acidic overburden. Rith claimed that the denial was a taking. The issue, in the court's view, was whether the denial paralleled a result that could have been achieved under the state's nuisance law. "To put it most simply, would Tennessee nuisance law sanction the issuance of an injunction restraining Rith from proceeding with a surface mining operation given an adjudicated finding that, because of an inadequate handling plan, 'there would [be] a high probability [of] acid mine drainage into [the aquifer]?'"<sup>117</sup>

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112. *Id.* at 29 (citing *M & J Coal Co. v. United States*, 47 F.3d 1148 (Fed. Cir. 1995)).

113. The court added that the plaintiff's proposed activity was not alleged to violate any other Florida laws either. "Thus, the court finds that plaintiff's activity was, except for the Corps' denial, permissible under relevant property and nuisance principles." *Id.* at 30.

114. *Id.* at 31.

115. 44 Fed. Cl. 108, *reconsideration denied*, 44 Fed. Cl. 366 (1999).

116. 30 U.S.C. §§ 1201-1328 (1994).

117. 44 Fed. Cl. at 114.

The court held that the answer was yes. The court relied primarily on the Tennessee Water Quality Control Act of 1977, a statute that recognized the waters of the state as property of the state held in public trust and subject to a right of the state's people to unpolluted waters. This statute declared certain activities that pollute the state's waters to be a public nuisance.<sup>118</sup> The court found it "virtually self-evident that OSM's denial of a mining permit to plaintiff, because of the high probability of acid mine drainage into [the aquifer], represented an exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject under Tennessee nuisance law."<sup>119</sup> The court thus used state statutes to define the parameters of the state's common law of nuisance. The court hammered the point home in its subsequent denial of reconsideration, maintaining that the statutory restrictions on use of the state's water resources "do not represent a set of newly-proclaimed tenets of public nuisance law. To the contrary, activities that cause the pollution of domestic waters have long been recognized by the courts of Tennessee to be contrary to the public's health and safety and therefore enjoined as a nuisance."<sup>120</sup> It mattered not whether enforcement of these restrictions was accomplished by federal or state officials.

The property use that was denied here, the conduct of a surface mining operation that held out a "high probability" of introducing acid mine drainage into [the aquifer], is not a property use plaintiff could legitimately claim it had a right to pursue in consonance with relevant state property and nuisance principles.<sup>121</sup>

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118. *Id.* at 114-15.

119. *Id.* at 115.

120. 44 Fed. Cl. at 366.

121. *Id.* at 367. The Colorado Supreme Court reached a similar result in *State Department of Health v. The Mill*, 887 P.2d 993 (Colo. 1995). The plaintiff owned a parcel on which uranium milling operations had once been conducted. The property was subsequently used as an uranium mill tailings disposal site. The tailings pile was subject to state regulation, and the state placed restrictions on use of the site. The owner sued, claiming the restrictions amounted to a taking because they did not permit a reasonable economic return on the property, which it had been leasing for coal storage. The court found that a property owner on notice of government regulatory authority cannot reasonably expect to avoid regulation or put property to

In another case, a federal district court held that the “relevant” distinction is the one between pre- and post-acquisition legal restraints, not the one that turns on the identity of the governmental entity adopting the restraints. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*<sup>122</sup> involved the imposition of restrictions on the ability to develop land in the vicinity of Lake Tahoe. An association of Tahoe area property owners alleged that several ordinances enacted by an agency created by the Tahoe Regional Planning Compact took their property.<sup>123</sup> The agency adopted an ordinance that, pending development of a new regional land use plan, temporarily prohibited most residential and commercial development on lands susceptible to environmentally damaging soil erosion into Lake Tahoe. The moratorium lasted about eight months, until a new regional plan was adopted. A version of the moratorium was subsequently extended. The issue was whether the restrictions deprived the plaintiffs of economically viable use of their properties so as to amount to a categorical taking under *Lucas*.<sup>124</sup>

The court found that the regulated property did not retain any economically beneficial or productive use.<sup>125</sup> It accordingly turned to

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a use that constitutes a nuisance, even if that is the only economically viable use for the property. *Id.* at 1001. “Relevant” state common law principles would not permit a landowner to engage in activities that spread radioactive contamination because that body of law places on landowners a duty to prevent conditions on their land from creating an unreasonable risk of harm to others. In particular, Colorado common law rendered land uses that cause pollution nuisance-like. More to the present point, the court reasoned that improperly handled radioactive materials were treated as a public nuisance under Colorado solid waste statutes enacted before The Mill purchased the site:

Under these principles of Colorado nuisance law, the right to make any use of the property that would create a hazard to public health by spreading radioactive contamination was excluded from The Mill’s title at the onset. . . . Accordingly, any use limitations suggested by [the state] to avoid the spreading of radioactive contamination could not have constituted a taking because those uses were never lawfully available to The Mill even in the absence of [state regulatory] action.

*Id.* at 1002.

122. 34 F. Supp.2d 1226 (D. Nev. 1999), *aff’d in part, rev’d in part, and remanded*, 2000 WL 770512 (9th Cir. June 15, 2000).

123. Pub. L. No. 96-551, 94 Stat. 3233 (1980).

124. 34 F. Supp.2d at 1240.

125. *Id.* at 1245. As this article went to press, the Ninth Circuit issued a decision affirming in part and reversing in part the district court’s decision. The Ninth Circuit concluded that the moratorium did not result in a denial of all economically beneficial use, and therefore did not amount to a categorical taking. The court did not address the applicability of the *Lucas* nuisance

the agency's affirmative defense that the harm it intended to prevent (the eutrophication of the lake) constituted a nuisance under pre-existing state law and, thus, fell within the nuisance exception of *Lucas*.<sup>126</sup> The court reasoned that if, at the time the land is purchased, certain uses are restricted or barred, "then the purchaser of that property does not acquire the right to put the land to one of those forbidden uses. Those uses are not part of the 'bundle of rights' which the purchaser received with the land."<sup>127</sup> If the purchaser nevertheless engages in prohibited uses, the government can stop the uses without incurring liability for a taking, even if those uses are the only economically viable ones. The easy case is one in which the use would have amounted to a common law nuisance; in such a case, the state can prohibit the use without effecting a taking. The court added that:

[w]hat the *Lucas* opinion does not make completely clear, but which most courts since appear to have accepted, is that "newly legislated or decreed" restrictions on land use can also constitute "background principles" of state law for this purpose—so long as those restrictions became law *before* the property owner actually purchased the property subject to the restrictions. In such a case, the prior owner of the property may have had a valid takings claim, but subsequent purchasers probably will not.<sup>128</sup>

Thus, an agency seeking to establish that its actions do not require the payment of just compensation under the nuisance exception must demonstrate that the prohibited uses could have been prohibited either by the state common law of nuisance or by "some affirmative state or local ordinance prohibiting such uses, which was enacted

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exception. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 2000 WL 770512 (9th Cir. June 15, 2000).

126. The court recognized that "since *Lucas*, debate has raged over whether the 'exception' . . . should still be referred to as the 'nuisance' exception, or as something else . . . . We find this dispute to be of no moment . . . . For the sake of convenience, we refer to the exception as the 'nuisance exception,' fully aware that the exception, whatever it is called, is not the same post-*Lucas* as it was prior thereto." *Id.* at 1251 n.4.

127. *Id.*

128. *Id.* at 1251-52 (citations omitted).

prior to the plaintiffs' acquisition of their property."<sup>129</sup> The court then turned to California and Nevada statutes for the definition of nuisance. It ultimately concluded that the planned construction did not qualify because, although development would change the color of the lake water, there was no proof that it would create a health hazard or otherwise be indecent or offensive.<sup>130</sup> The court also found that state statutes controlling waste discharges into water, thereby modifying the common law definition of a nuisance, did not apply to the activities in this case.<sup>131</sup> The court concluded by stating that if any plaintiff purchased land after adoption of the agency's restrictive ordinance, the plaintiff would not be entitled to compensation because the ordinance "would appear to constitute a 'background principle of state law' applicable to all subsequent purchasers, who are presumed to have knowledge of all such restrictions."<sup>132</sup>

The weight of post-*Lucas* state court authority reveals the same broad interpretation of the nuisance exception.<sup>133</sup> The Virginia Supreme Court in *City of Virginia Beach v. Bell*, for example, also focused on whether the plaintiff bought land before the adoption of an environmental protection scheme, not on whether that scheme

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129. *Id.* at 1252.

130. 34 F Supp.2d at 1253.

131. *Id.* at 1254-55.

132. *Id.* at 1255.

133. In several cases state courts have assessed whether the nuisance exception shielded the government from takings liability solely by reference to state common law. In *Boise Cascade Corp. v. Oregon*, 991 P.2d 563 (Or. App. 1999), the state refused to permit logging on the plaintiff's land due to the presence of a spotted owl nest. The court upheld the trial court's decision to strike the state's defense that the proposed logging would have constituted a nuisance, thus shielding the state from taking liability. The state offered no support for its assertion that knocking down a bird's nest on one's property was ever regarded as a public nuisance. There is also no indication that any pre-acquisition statutory or regulatory restrictions were brought to the court's attention. In another case, the court did not need to address the "relevance" of pre-acquisition statutory law because it held that background principles of state property law were sufficient to defeat the takings claim. *See Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993) (finding that denial of permits to build seawall was not a taking because the common law doctrine of custom, recognized in *State ex Rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969), was a background principle that limited ownership rights, and the plaintiff purchased its land subject to those rights). *Cf. Raynor v. Maryland Dep't of Health and Mental Hygiene*, 676 A.2d 978, 991 (Md. App. 1996) (holding that state agency's seizure and destruction of pet ferret to determine whether it had rabies was not a compensable taking because the action was intended to abate a common law public nuisance—an animal infected with a dangerous disease; the seizure "merely denied [the owners] the right to use their property in an already prohibited manner"), *cert. denied*, 520 U.S. 1166 (1997).

duplicated the results that common law nuisance litigation would have reached.<sup>134</sup> In 1980 the state adopted the Coastal Primary Sand Dune Protection Act to prevent the despoliation of coastal primary sand dunes and beaches. The Act included a model ordinance for adoption by local governments. In the same year the city adopted such an ordinance, regulating the use and development of coastal dunes and requiring developers wishing to alter them to obtain a permit from a state wetlands board.<sup>135</sup> The plaintiffs purchased the lots in question after adoption of the ordinance, and the state board denied their application to develop. The issue was whether the denial amounted to a taking. The plaintiffs claimed that it did because the denial resulted in elimination of all economically viable use of the lots.<sup>136</sup>

The court distinguished *Lucas* because in this case the plaintiffs bought their land after adoption of the ordinance. “Therefore, the ‘bundle of rights’ which [the plaintiffs] acquired upon obtaining title to the property did not include the right to develop the lots without restrictions. . . . At best, any rights impaired by the Ordinance were those of the property owner at the time the Ordinance came into effect.”<sup>137</sup> The plaintiffs argued that *Lucas* stood for the proposition that the prohibited purpose under a regulatory restriction must have always been unlawful, but the court disagreed. Because the ordinance was effective before the plaintiffs acquired the property, the city did not have to prove the existence of any nuisance or property law preceding its adoption that would have prevented development. This inquiry was “irrelevant and unnecessary” because the plaintiffs acquired their property interest “already burdened by regulatory restrictions. Thus, the city, by enacting the ordinance, took no property rights from [the plaintiffs] since they cannot suffer a taking of rights never possessed.”<sup>138</sup> The court, therefore, found nothing sacrosanct in the common law method for defining property rights in land or in its methods for resolving conflicts between public and

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134. 498 S.E.2d 414 (Va. 1998).

135. *Id.* at 415.

136. *Id.* at 416.

137. *Id.* at 417 (footnote omitted).

138. *Id.* at 418.

private resources.

The New York Court of Appeals has been particularly active in quashing the notion that the only legal principles relevant to ascertaining the scope of the nuisance exception are those ordained by the common law. Its 1997 decision in *Kim v. City of New York* illustrates this point, even though it was arguably a physical rather than a regulatory takings case.<sup>139</sup> The city regraded a public road and placed side fill on a portion of plaintiffs' property that abutted the roadway to maintain lateral support. The plaintiffs acquired their property with constructive notice that the property abutted a public road below the legal grade. They nevertheless claimed a taking in the form of a permanent physical invasion. The court held that due to both the common law and the city charter obligation of lateral support to a public roadway the plaintiffs' title never included the property interest they alleged was taken.<sup>140</sup>

The court began by stating that, regardless of whether it characterized the alleged taking as physical or regulatory (a question it found unnecessary to reach),<sup>141</sup> "our analysis starts with a search into the bundle of rights and concomitant obligations contained in plaintiffs' title."<sup>142</sup> The court rejected the contention that this "logically antecedent inquiry" into the owner's title should be confined to an assessment of common law property and nuisance rules, and should exclude statutory law. In particular, it refused to interpret *Lucas* narrowly in order to dictate that result.<sup>143</sup> Given the theoretical basis of the inquiry (i.e., the bundle of rights that existed at the time of acquisition),

we can discern no sound reason to isolate the inquiry to some arbitrary earlier time in the evolution of the common law. It would be an illogical and incomplete inquiry if courts were to look exclusively to common-law principles to identify the

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139. *Kim v. City of New York*, 681 N.E.2d 312 (N.Y.), cert. denied, 522 U.S. 809 (1997).

140. 681 N.E.2d at 314.

141. The case might have been characterized as a regulatory taking dispute because the "plaintiffs' real grievance [was] with the City's regulation requiring the maintenance of lateral support to the roadway." The city placed the fill on the plaintiffs' property only after they refused to comply with their obligation under the Charter to do so. *Id.* at 315 n.2.

142. *Id.* at 315.

143. *Id.*

preexisting rules of State property law, while ignoring statutory law in force when the owner acquired title. To accept this proposition would elevate common law over statutory law, and would represent a departure from the established understanding that statutory law may trump an inconsistent principle of the common law.<sup>144</sup>

Quoting *Munn v. Illinois*,<sup>145</sup> the court ruled flatly that:

[a] person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. . . . [T]he law itself . . . may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.<sup>146</sup>

The law of the State originates in constitutional provisions, statutes, and common law. To the extent that each source establishes binding rules of property law, “each plays a role in defining the rights and restrictions contained in a property owner’s title. Therefore, in identifying the background rules of State property law that inhere in an owner’s title, a court should look to the law in force, whatever its source, when the owner acquired the property.”<sup>147</sup> In *Kim*, the applicable rules included the common law and the city charter. The obligation to preserve and maintain the legal grade originated in common law and was later set forth in the charter. The charter provisions applied because the city raised the roadway up to the legal grade before the plaintiffs acquired their property. The plaintiffs, therefore, acquired their lot subject to the obligation in the charter to raise it up to the legal grade, and the city met its burden of proving that the plaintiffs never owned the property interest they claimed was

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144. *Id.* (citations omitted).

145. 94 U.S. 113 (1876).

146. *Kim*, 681 N.E.2d at 315 (quoting *Munn*, 94 U.S. at 134).

147. *Id.* at 315-16. The court cited Professor Mandelker’s article, *Investment-Backed Expectations*, *supra* note 2, to support the position that preexisting statutory or regulatory restrictions, as well as common law restrictions, are relevant to determining the scope of the background rules of property. *Id.* at 316 n.3.

taken.<sup>148</sup>

The Court of Appeals endorsed the same result in other cases as well. In *Anello v. Zoning Board of Appeals*, for example, the local government adopted a steep-slope ordinance to protect environmentally sensitive lands and promote the orderly development of land with excessively steep slope areas.<sup>149</sup> The plaintiff sought to build a one-family home and applied for a variance from the ordinance. The zoning board denied the variance, concluding that it would have a substantial detrimental impact on the health, safety, and welfare of the neighborhood. The plaintiff sued, claiming that denial of the variance worked a taking. The court rejected the takings claim because the plaintiff, who acquired the property two years after adoption of the steep-slope ordinance, never acquired an unrestricted right to build on the property free from the inhibitions originating from the ordinance. The statutory restriction encumbered the owner's title from the outset of ownership.<sup>150</sup> Likewise, in *Gazza v. New York State Department of Environmental Conservation*,<sup>151</sup> a case involving denial of a variance based on the anticipated adverse impact of development on tidal wetlands, the court stated that in applying the *Lucas* nuisance exception "[s]tate law may be examined 'whatever its source.' Thus, common-law principles and State statutes may be examined to determine the limits and rights of a landowner's . . . use . . ."<sup>152</sup>

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148. The "lateral-support obligation imposed on plaintiffs was a prevailing rule of the State's property law when they acquired their property and, accordingly, encumbered plaintiffs' title and the constituent bundle of rights. The City's enforcement of this legal obligation therefore does not constitute a taking of any property interest owned by plaintiffs for which they are entitled to compensation." *Id.* at 319.

149. 678 N.E.2d 870 (N.Y.), *cert. dismissed*, 521 U.S. 1132 (1997).

150. 89 N.Y.2d 535, 539-40.

151. 679 N.E.2d 1035 (N.Y.), *cert. denied*, 522 U.S. 813 (1997).

152. 679 N.E.2d at 1041 (citation omitted). The plaintiff in *Gazza* bought property in a residential zoned district. The purchase price reflected the fact that a variance would be required to build a residence on the property because it included tidal wetlands. The plaintiff applied to the state environmental agency for two setback variances, but the agency denied the variances due to the anticipated adverse impact on tidal wetlands. The plaintiff then sued, claiming that the denial amounted to a taking. The threshold inquiry was whether a property interest even existed to support a taking claim:

Since the enactment of the wetland regulations [before the plaintiff bought the property], the only permissible uses for the subject property were dependent upon those regulations which were a legitimate exercise of police power. Petitioner cannot

Two other cases involving tideland and beach protection regulatory schemes also support the position that all types of law, not just common law, provide background principles relevant to the “logically antecedent inquiry” into the nature of the regulated property owner’s title at the time of acquisition of the regulated interest. In *Grant v. South Carolina Coastal Council*, a South Carolina Supreme Court decision, the plaintiff bought ten acres in 1987 that included critical area tidelands defined by a state statute.<sup>153</sup> Even though the statute barred dredging or filling these tidelands without a permit, the plaintiff hired a contractor to haul fill material into the area without first obtaining a permit. When a state agency held the plaintiff in violation of the statute, he sued, alleging that the agency’s order forbidding him from filling the area constituted a compensable taking. The court held that no taking had occurred. The plaintiff never had the right to fill the tidelands because at the time he purchased the property a state statute forbade his doing so without a permit.<sup>154</sup> In *Scott v. City of Del Mar*, a California appellate court decision, a city, relying on a beach overlay zone ordinance adopted to protect public access to the shoreline, ordered the plaintiffs to remove improvements to seawalls on their land because they amounted to nuisances.<sup>155</sup> The plaintiffs sued in inverse condemnation for the property taken for public beach. The court held that the evidence produced at the hearing on the removal orders proved that the seawalls were abatable nuisances per se. The legislature had declared that the obstruction of a public right-of-way was a nuisance, and the zoning ordinance said that nonconforming structures constituted a public nuisance abatable at the owner’s expense. Thus, no compensation was due.<sup>156</sup>

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base a taking claim upon an interest he never owned. The relevant property interests owned by the petitioner are defined by those State laws enacted and in effect at the time he took title and they are not dependent on the timing of State action pursuant to such laws.

*Id.* at 1041.

153. 461 S.E.2d 388 (S.C. 1995).

154. *Id.* at 391.

155. 68 Cal. Rptr. 2d 317 (1997).

156. *Id.* at 323. Other state cases also reflect a broad reading of the *Lucas* nuisance exception to include pre-acquisition legislative measures. See, e.g., *Hunziker v. Iowa*, 519 N.W.2d 367 (Iowa 1994) (holding that property owner was not entitled to compensation, even

## 2. Mandelker's Take on the Nuisance Exception: Distinguishing Reasonable v. Unreasonable Investment-Backed Expectations

This survey of post-*Lucas* case law demonstrates that a substantial majority of the courts that have addressed the scope of the nuisance exception recognized in *Lucas* have reached the same conclusion. They have concluded that they should consider restrictions derived from legislation and administrative regulation, as well as from common law doctrines such as nuisance law, in order to ascertain what use restrictions “inhere in the title”<sup>157</sup> at the time of acquisition by the property owner alleging a categorical taking based on denial of all economically beneficial use.

This result, moreover, is defensible. Justice Scalia indicated in *Lucas* that the answer to the “difficult question” of how to define the regulated property interest for purposes of determining the extent of the diminution in value caused by regulation:

may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.<sup>158</sup>

If the property owner's reasonable expectations are relevant to (and perhaps determinative of) the task of defining the regulated property interest for purposes of calculating the extent of the diminution in value, why should those expectations not also be relevant to the task of defining the nature of the property interest affected by regulation for purposes of determining whether the nuisance exception applies? Justice Scalia hinted that they should be relevant, remarking that

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though development of its land was not feasible, because state statute prohibiting disinterment of land containing burial mounds predated the owner's acquisition and the restrictions imposed by the statute therefore inhered in the owner's title), *cert. denied*, 514 U.S. 1003 (1995); *Starzenski v. City of Elkhart*, 659 N.E.2d 1132 (Ind. Ct. App.) (holding that city's entry onto property to remove accumulated trash that had been declared a nuisance at a public hearing was not a taking because building and safety code provisions authorized nuisance abatement measures), *cert. denied*, 519 U.S. 1028 (1996).

157. *Lucas*, 505 U.S. at 1029.

158. *Id.* at 1017 n.7.

“newly legislated” limitations that deny all economically viable uses give rise to a taking. The inference is that pre-existing (i.e., pre-acquisition) limitations are part of the owner’s title to begin with and, therefore, not subject to being taken; the owner simply has no reasonable expectation of being able to engage in uses barred by pre-existing limitations on title.

That is essentially the analysis endorsed by the Court of Appeals for the Federal Circuit in a 1999 decision, *Good v. United States*.<sup>159</sup> A developer asserted that the Corps of Engineers’ denial of a permit under the CWA to fill wetlands in constructing a residential development amounted to a taking. The court rejected the proposition that a property owner alleging a categorical taking under *Lucas* need not demonstrate interference with reasonable, investment-backed expectations.<sup>160</sup> It reasoned that the developer lacked a reasonable expectation to be able to build a residential subdivision in the wetlands due to “the regulatory climate that existed” when the developer bought the property.<sup>161</sup> At that time, the CWA already required a permit from the Corps to dredge or fill wetlands adjacent to navigable waters, and the Corps had considered environmental factors in ruling on permit applications for years. In addition, development required approval by the state and county. Accordingly, the plaintiff “had both constructive and actual knowledge that either state or federal regulations could ultimately prevent him from building on the property.”<sup>162</sup> Further, the owner did not apply for a permit until 1980, after adoption of the Endangered Species Act. As a result, the court held the developer lacked a reasonable, investment-backed expectation that the developer would obtain the regulatory approval necessary for development.<sup>163</sup>

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159. 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000).

160. 189 F.3d at 1361.

161. *Id.*

162. *Id.* at 1362.

163. *Id.* at 1363. *See also* *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (“One who buys with knowledge of a restraint assumes the risk of economic loss.”) (quoting *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994)), *cert. denied sub nom.* *RCK Properties, Inc. v. United States*, 120 S. Ct. 373 (1999). The cases seem to make the time of acquisition, not the time the owner sought formal permission to develop, the relevant time for assessing the reasonableness of the owner’s expectations. If the developer in *Good* had acquired the property after the adoption of the Endangered Species Act, but had delayed

More importantly for present celebratory purposes, the approach most courts follow is precisely the one promoted by Dan Mandelker in his work on the investment-backed expectations component of the *Penn Central* balancing test applicable to cases not subject to *Lucas*'s categorical rule. As Mandelker points out, the nuisance exception enunciated by the *Lucas* majority suggests that a failure of investment-backed expectations can avoid a taking even for regulation that prohibits all economically viable use.<sup>164</sup> Professor Mandelker asserts that “[l]andowners have every right to expect protection when government action takes away reserved property rights or interferes with vested rights the government created.”<sup>165</sup> They lack such an expectation, however, when they purchase their interest with notice (including constructive notice) of pre-existing regulatory programs or of government ownership of common resources.<sup>166</sup> In such cases, Professor Mandelker argues, the landowners have assumed regulatory risk and do not deserve, as a normative matter, compensation if that risk materializes in such a way as to preclude desired uses.<sup>167</sup> Indeed, Mandelker would deny the right to compensation to landowners even in cases in which they purchase with the knowledge that they *might* be regulated in the future.<sup>168</sup> Obviously, the case for denial of compensation is even stronger if the landowner actually knew or should have known that a regulatory restriction on title was already in place at the time of acquisition.

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applying for a permit until afterward, it would apparently be appropriate to judge the legitimacy of its expectations against a pre-Endangered Species Act backdrop.

164. *Investment-Backed Expectations*, *supra* note 2, at 224-25.

165. *Id.* at 238.

166. *Id.* at 244-45.

167. *Id.* at 227, 233-35. *Cf.* Tarlock, *supra* note 83, at 589 (“To the extent that a state, either through legislation or judicial decisions, has identified harms that may result from the unfettered use of property, the property owner’s reasonable expectation of compensation diminishes.”).

168. *Investment-Backed Expectations*, *supra* note 2, at 236.

### III. A SIMPLE TWIST OF FATE: JUDICIAL PROTECTION OF NEIGHBORS FROM LEGISLATIVELY ENDORSED NUISANCES

#### A. *Three Forms of Land Use Conflict Resolution*

If land use and environmental regulation entails resolution of potentially incompatible resource uses, then the government's decision about the appropriate degree of regulation necessarily favors one use at the expense of another. *Miller v. Schoene* illustrates this point.<sup>169</sup> If the government chose to do nothing to address the risk that red cedar rust would kill nearby apple trees its decision would favor the owners of the cedar trees, who would escape having to take action to suppress the risk. On the other hand, if the government chose to take action to protect the apple trees, its decision would impose restrictions on the cedar tree owners in order to achieve that protection (in that case, the restrictions took the form of mandatory destruction of the resource). By appearing to confine the nuisance exception to background principles of common law, *Lucas* gave the upper hand to the judiciary in determining when this kind of conflict resolution would proceed at public as opposed to private expense. The post-*Lucas* cases afford the legislature at least an equal say in making that determination.<sup>170</sup> Regardless of whether the land use restriction is judicial or legislative in origin, as long as it takes effect before the purchase of the property interest that has allegedly been taken, the property owner is not entitled to payment for its inability to engage in the restricted use.

Most of the cases in which takings claims are asserted involve property owners such as developers who are engaged in what might be called "active" externality-producing activities. A governmental entity may resolve a potential conflict between a developer and its neighbors in several ways. First, it may adopt a land use restriction barring activity by a developer that would generate adverse impacts for neighboring uses. The beneficiaries of such a measure would include the owners of the neighboring properties that avoid exposure to those impacts. I will call this a "first form" of resource use conflict

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169. See *supra* notes 85-91 and accompanying text.

170. See *supra* notes 108-56 and accompanying text.

resolution. Second, the government may choose not to impose a land use restriction on the developer (or it may waive application of an existing land use restriction), thereby resolving the conflict in favor of the developer by relegating adversely affected neighbors to remedies available at common law, such as nuisance or negligence. I will call this a “second form” of resource use conflict resolution. Third, the government may go one step further and adopt legislation that bars adversely affected neighbors from pursuing common law remedies against harm-producing developmental activities. Perhaps the most common example of this “third form” of resource use conflict resolution is the “right-to-farm” statute, which immunizes certain agricultural activities from common law tort actions.<sup>171</sup>

In the 1984 article *The White River Junction Manifesto*, Mandelker and his co-authors noted that in judicial challenges by neighbors to the second form of conflict resolution discussed above “neighbors usually lose.”<sup>172</sup> The *Manifesto* authors proceeded to endorse reform that “strengthen[s] the legal position of neighbors.”<sup>173</sup> It may be that relief to neighbors on the losing side of government resolution of land use conflicts is increasing, though not necessarily in the form that the *Manifesto* authors envisioned. Rather, relief may be available to these neighbors in the context of the third form of land use conflict resolution rather than the second. An important issue raised by cases involving attacks by the neighbors on this third form of land use conflict resolution is the degree to which the judiciary will defer to the legislature’s chosen method of conflict resolution.

#### B. “Strengthening the Position of the Neighbors” in a Third Form Land Use Conflict Resolution Case

The Supreme Court laid the blueprint for “strengthening the legal position of [the] neighbors” in *Richards v. Washington Terminal*

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171. See generally Margaret Rosso Grossman & Thomas G. Fisher, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1 WIS. L. REV. 95 (1983) (discussing right to farm statutes and their relationship with other legal regimes, such as environmental standards and municipal ordinances).

172. Williams et al., *supra* note 2, at 199.

173. *Id.* at 240-41.

*Co.*<sup>174</sup> A decision handed down the year after *Richards, Hadacheck v. Sebastian*, involved a typical first form conflict resolution case, in which the owner of a brickyard alleged that his conviction for violating a city ordinance that barred him from continuing to operate in his current location was invalid.<sup>175</sup> The owner alleged that the ordinance amounted to a taking because it rendered the operation useless. The Court refused to vacate the conviction, concluding that the ordinance represented a valid and noncompensable exercise of the police power even though the brickyard's appearance on the scene preceded that of the neighbors whom the city sought to protect by inducing the brickyard to shut down. *Richards* also resulted in protection of the neighbors from an "active" harm generator, but the Court afforded protection to neighbors in the rarer context of a third form conflict resolution case.

The plaintiffs in *Richards* were the owners of properties exposed to and damaged by dust, dirt, cinders, and gases emitted by trains passing over railroad tracks adjacent to their land. The tracks were located, constructed, and maintained under the authority of federal legislation and implementing permits issued by the District of Columbia local government.<sup>176</sup> The Court agreed with the plaintiffs, who argued they were entitled to compensation under the Fifth Amendment for the damage they experienced as a result of the railroad's operation. The Court regarded the legislation that authorized construction and operation of the tracks as legalizing those activities so that they were not characterized as a public nuisance. At the same time, "the acts done by defendant, if done without legislative sanction, would form the subject of an action by plaintiff to recover damages as for a private nuisance."<sup>177</sup> The Court concluded that "the true rule" that governed the case recognized the ability of legislatures to immunize what otherwise would be a public nuisance, but it precluded such bodies from "confer[ring] immunity from action for a private nuisance of such a character as to amount in

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174. 233 U.S. 546 (1914).

175. 239 U.S. 394 (1915).

176. 233 U.S. at 550-51.

177. *Id.* at 551.

effect to a taking of private property for public use.”<sup>178</sup> The Fifth Amendment barred Congress from forcing the plaintiffs to bear the burden of the adverse effects of operation of the railroad without compensation for the resulting harm.<sup>179</sup>

In the ensuing eighty-five years, both federal and state courts have periodically cited *Richards*, particularly in aircraft overflight and airport noise cases.<sup>180</sup> The Iowa Supreme Court placed it back in the limelight in *Bormann v. Board of Supervisors*, which relied heavily on *Richards* by holding that a right-to-farm statute constituted a taking of neighboring landowners’ property.<sup>181</sup> A group of Iowa farmers applied to the Kossuth County Board of Supervisors to establish an “agricultural area” that would include their land. When the Board approved the designation in 1995 neighboring property owners sued the Board, alleging, among other things, that the designation deprived them of property without due process and amounted to a taking of their property under both the state and federal constitutions.<sup>182</sup> Under an Iowa statute the effect of the designation was to immunize from nuisance suits those farmers whose land was located in the designated agricultural area.<sup>183</sup> The neighbors asserted that the statutory immunity gave the farmers the right to maintain a nuisance over their property, thereby creating an easement over their lands and amounting to a per se taking.<sup>184</sup>

The first question the court addressed was whether the neighbors had a constitutionally protected property right. The court held that they did, relying on Iowa precedent establishing that the right to maintain a nuisance is an easement.<sup>185</sup> The immunity allowed the

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178. *Id.* at 553.

179. *Id.* at 557.

180. *E.g.*, *United States v. Causby*, 328 U.S. 256 (1946); *Argent v. United States*, 124 F.3d 1277, 1283-84 (Fed. Cir. 1997); *Batten v. United States*, 306 F.2d 580, 583-84 (10th Cir. 1962). Commentators also made note of the *Richards* case. *See, e.g.*, Davis & Glicksman, *supra* note 32, at 395-96.

181. 584 N.W.2d 309 (Iowa 1998), *cert. denied sub nom.* *Girres v. Bormann*, 119 S. Ct. 1096 (1999).

182. 584 N.W.2d at 312.

183. The statute provides that a farm located in a designated agricultural area “shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities” of the farm. IOWA CODE § 352.11(1)(a) (1999).

184. *See* 584 N.W.2d at 313.

185. *Id.* at 315 (citing *Churchill v. Burlington Water Co.*, 62 N.W. 646, 647 (1895)).

farmers to engage in activities that would otherwise have amounted to a nuisance.<sup>186</sup> The court interpreted *Richards*, which it regarded as factually analogous,<sup>187</sup> as establishing that “the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance.”<sup>188</sup> The court analogized the effect of the immunity statute to a “condemnation by nuisance,” a situation in which the government incurs takings liability for its own operation of nuisance-producing enterprises.<sup>189</sup> Accordingly, the court declared the immunity-vesting statute invalid because it amounted to a taking under both the federal and state constitutions.<sup>190</sup>

Both *Richards* and *Bormann* amount to a constitutional judicial overriding of the accommodation of conflicting uses reached by the Congress of the United States in one case and by the state legislature of Iowa in the other. The *Bormann* court acknowledged its obligation to adopt a deferential posture to the state legislature, the branch of government responsible for “reach[ing] consensus in highly controversial public decisions. Those decisions demand our sincere respect.”<sup>191</sup> However, in this case the statute amounted to “a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.”<sup>192</sup> In such circumstances, the courts are obliged to vitiate the politically based decisions of the legislature.<sup>193</sup>

The conclusion that legislative usurpation of a previously available tort cause of action constitutes a taking is consistent with the view that a cause of action is an intangible property interest

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186. 584 N.W.2d at 316.

187. *Id.* at 319.

188. *Id.* at 319-20. The court cited *Pennsylvania R.R. v. Angel*, 41 N.J. Eq. 316, 7 A. 432 (1886), as a case supportive of the same proposition.

189. 584 N.W.2d at 320-21. *Cf.* Sax, *supra* note 90, at 36 (arguing that the government should have to compensate when it imposes harm in the course of acting in an entrepreneurial capacity).

190. 584 N.W.2d at 321. The neighbors sought no compensation. The court remanded for issuance of an order declaring the Iowa statute unconstitutional and void. *Id.* at 321-22.

191. *Id.* at 322.

192. *Id.*

193. *Id.*

protected by the Fifth or Fourteenth Amendment. This theory applies even in circumstances where the cause of action is not designed to protect a person's interest in the possession, use, or enjoyment of land.<sup>194</sup> But is the judicial invalidation of the particular means of land use conflict resolution approved by the legislatures in *Richards* and *Bormann* consistent with the thrust of the post-*Lucas* cases interpreting the nuisance exception? The courts in most of those cases have concluded that when they define the property interest allegedly taken they must abide by legislative accommodations of conflicting land uses by taking into account statutory restrictions on land use.<sup>195</sup>

The key to reconciling the first form and the third form of land use conflict resolution cases may lie again with the concept of legitimate investment-backed expectations. Neither the *Richards* nor *Bormann* court indicated whether the plaintiffs making the takings claims purchased their properties before or after the adoption of the statutes that legally foisted upon them the externalities produced by the railroad and farming activities. If the neighbors purchased their properties before the statutes were adopted, then they had a legitimate expectation that they could pursue a private nuisance cause of action against any activity that unreasonably interfered with the ability to use and enjoy their properties, including a dust-spewing railroad or an odor-producing farm. Interference with these expectations through legislative elimination of the cause of action may thus require compensation.<sup>196</sup> If the neighbors purchased their lands after adoption

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194. See, e.g., *Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478, 485 (1988); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (interpreting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), as “affirmatively settl[ing] . . . that a cause of action is a species of property protected by the Fourteenth Amendment’s Due Process Clause”). Cf. Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 305 (1988) (“A party who can establish the elements of a cause of action has a property interest in using a state’s adjudicatory mechanism to vindicate the rights protected by the substantive law.”).

195. See *supra* part II.B.

196. See Beermann, *supra* note 194, at 302 (stating that “the holder of a cause of action has a legitimate expectation that the claim will be recognized by state law”). As previously indicated, *supra* note 183, the Iowa right-to-farm statute provided that a farm located in a designated agricultural area was immune from nuisance liability “regardless of the established date of operation” of the farming activities. Iowa Code § 352.11(1)(a) (1999). In this situation the neighbors are thus stripped of their tort cause of action against externality-generating farms even if they acquired their properties before the farms began operating.

of the relevant statutes, they would have had no legitimate expectation of being able to seek relief against the activity in tort because they would have been on notice of the unavailability of a cause of action against the offensive activity, and presumably would have paid a reduced price for land burdened by the resulting easement. The situation is thus the same as the one facing neighbors in a first form land use conflict resolution case. If the landowner acquired the property interest before adoption of the land use statutes, then the landowner's legitimate expectations are defined without reference to those statutes. If, however, the landowner acquired the property interest after the statutory enactment, the landowner takes title subject to the statute; the restrictive measures inhere in the title. In this situation the landowner is on notice of the restriction, presumably paying less than the cost of similar land without constraints, and having no reasonable expectation of using the land free of the restrictions. Enforcement of the pre-acquisition restrictions, therefore, does not amount to a taking, regardless of its economic impact on the regulated property.

#### IV. CONCLUSION

The task of defining the boundary line between permissible, noncompensable police power regulation and a compensable, regulatory taking may be no more "intractable" today than it was before *Lucas*.<sup>197</sup> Per se rules are supposedly easier to implement than legal approaches based on multi-factor balancing tests,<sup>198</sup> and the Supreme Court in *Lucas* invented (or confirmed, depending upon one's interpretation of preexisting Supreme Court precedents in the area) a per se rule for regulations that eliminate all economically beneficial use of the regulated property. At the same time the Court enunciated an exception to this categorical rule. Under the nuisance exception, a restriction on the use of property does not trigger

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197. *Investment-Backed Expectations*, *supra* note 2, at 249.

198. For an analysis of the relationship between the degree of complexity of legal rules and the administrative costs for their implementation, see generally RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* (1995). *But cf.* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for A Complex World*, 72 CHI.-KENT L. REV. 987, 989 (1997) (arguing that "[t]here are no simple rules for this complex world").

liability under the takings clause, despite causing a total wipeout of economic value, if the restriction inhered in the regulated property owner's title under relevant background principles of property law.

The tandem of the *Lucas* categorical rule and its exception may have provided structure to the analytical inquiries attendant upon deciding whether a regulation with a dramatic economic impact amounts to a compensable taking. However, it clearly has not answered, or even addressed, all of the relevant questions. For example, how is a court supposed to define the "property interest" affected by the regulation in order to determine whether a deprivation of all economically viable use has occurred? How is a court supposed to ascertain whether economically viable use remains? What kinds of restrictions inhere in the pre-regulation title such that the property owner's inability to engage in them provides no basis for a per se taking claim?

Shortly after the *Lucas* decision, Professor Mandelker predicted that this last question would become the focus of controversy and debate, and he was right. He took issue with the Supreme Court's apparent intention to limit the relevant background principles to those reflected in the state's common law, arguing that such a limitation displayed an unseemly judicial disregard for the authority of the legislature to accommodate conflicts in land use. The courts, with some exceptions, seem to be endorsing this criticism and responding to it by expanding the scope of the nuisance exception to include pre-acquisition legislative and regulatory restrictions. Mandelker also emphasized the importance of focusing on the legitimacy of the regulated property owner's investment-backed expectations. Indeed, that factor has played a key role in the judicial efforts to work out the parameters of the *Lucas* categorical rule and accompanying exception. Finally, Mandelker urged enhanced measures to protect the efforts of those whose lands adjoin active externality-generating activities. The Iowa Supreme Court's decision in *Bormann* provides just such protection.

One important question remains: is there anything else that Mandelker has been telling us about the law of regulatory takings to which we may not yet have paid sufficient attention? If the foregoing analysis serves no other function, it at least counsels strongly in favor of the most careful perusal of anything Mandelker has to say about

takings law. Who knows how many more predictions and prescriptions Professor Mandelker has already made and is yet to make concerning the law of regulatory takings law that the opinions in future takings cases will ultimately bear out?