TAKING BACKGROUND PRINCIPLES SERIOUSLY IN THE CONTEXT OF SEA-LEVEL RISE

Sean B. Hecht[*†]

INTRODUCTION

In *Lucas v. South Carolina Coastal Council*, the United States Supreme Court held that a government action prohibiting all economically beneficial use of a property effects a *per se* taking.[1] The Court also—but with less fanfare—held that where a government regulation codifies "background principles" of law that would have imposed the same restriction on property use even in the absence of the regulation, no taking results.[2] Some scholars have noted that although the initial reactions to *Lucas*, and the common perception of its importance, have focused on its primary holding, the case's most important legacy in practice might instead be its ratification of the idea that where a restriction is consistent with background principles, there can be no taking.

The Supreme Court has framed the background principles question as a "logically antecedent inquiry" to takings analysis because it determines, as a threshold matter, whether the owner possesses a property interest to be protected.[3] If the owner possesses no such interest, there cannot be a taking. Accordingly, the Supreme Court in *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, and other courts,[4] have employed the background principles doctrine to hold that specific state laws and regulatory actions cannot give rise to a valid takings claim.[5] But despite the robustness of this doctrine, courts and commentators have not always taken its implications as seriously as they should.

---

* Evan Frankel Professor of Policy and Practice; Co-Executive Director, Emmett Institute on Climate Change and the Environment, UCLA School of Law, hecht@law.ucla.edu.

† The author is grateful to Erin Ryan and Megan Herzog for their comments on drafts of this Article; to John Echeverria for his invitation to participate in this symposium; and to the editors of the *Vermont Law Review*.

1. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).
2. *Id.* at 1029.
3. *Id.* at 1027.
4. *See*, *e.g.*, McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003) (holding that the public trust doctrine constitutes a background principle of South Carolina state law for the purpose of a takings analysis); Stevens v. City of Cannon Beach, 854 P.2d 449, 456–57 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (holding that the common law doctrine of custom constitutes a background principle of Oregon state law for the purpose of a takings analysis and restricts private ownership of the dry sand beach).
5. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 731 (2010).

Background principles are especially relevant in the coastal context. Takings doctrine has had an important role historically in shaping state and local coastal regulation.[6] At the same time, many background principles operate uniquely or with special force where coastal land ownership and regulation is at issue. Responses to sea-level rise necessarily require the type of coastal regulation that affects property interests and therefore raises the potential for conflict with property owners who may raise takings defenses. Thus, a proper understanding of the role of how background principles affect takings analysis will enable government attorneys and planners to develop appropriate regulatory responses to the impacts of sea-level rise.

In this Article,[7] I argue that taking background principles seriously has some important and under-appreciated implications for takings claims involving coastal resources. Looking at takings this way limits or forecloses at least two specific approaches to the takings doctrine that scholars and courts have suggested or adopted, with special application in coastal property regulation contexts.[8] First, contrary to assumptions made by some scholars and courts, background principles must defeat takings claims as a threshold matter even where a regulation results in loss of less than all economic value of a property. Thus, the conventional *Penn Central* test,[9] which considers three factors in determining whether regulation results in a taking based on diminution in property value, is not directly applicable where a background principle would forbid the particular use, since no property right exists to be taken by the government. Second, the concept of "judicial taking" advanced by the Supreme Court plurality in *Stop the Beach Renourishment* is inconsistent with the *Lucas* approach to background principles, since the plurality held that the Supreme Court can decide that the highest court of a state has "taken" property without compensation even when the state court has held that a background

---

6. *See Lucas*, 505 U.S. at 1007–08 (discussing the takings doctrine's effect on coastal regulation).

7. Portions of the background material in this Article are adapted from Megan M. Herzog & Sean B. Hecht, *Combatting Sea-Level Rise in Southern California: How Local Governments Can Seize Adaptation Opportunities While Minimizing Legal Risk*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 463 (2013).

8. In doing so, I do not intend to suggest that these are the only consequences of taking background principles seriously; rather, this Article is intended simply to demonstrate the importance of this concept in informing takings law in coastal contexts.

9. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978) (holding that no taking has occurred when a substantial relation exists to the public welfare while still allowing Penn Central "reasonable beneficial use of the landmark site").

principle defeats a takings claim.[10] Each of these two points has important implications for regulation of coastal property in the context of sea-level rise, since regulation to address sea-level rise impacts often will implicate one or both of these scenarios. A proper understanding of how background principles interact with the takings doctrine will help local governments faced with regulatory decisions, as well as courts reviewing those decisions, to make sound decisions about coastal regulation. Failure to recognize the importance of background principles will motivate state and local governments to overstate the takings risk of regulatory actions, unduly limiting the range of tools those governments are likely to use to address coastal impacts from rising seas.

I. BACKGROUND PRINCIPLES

In general, background principles of state law are underlying restrictions that define the contours of private property interests.[11] As the Supreme Court stated in *Lucas*, these principles "inhere in the title itself."[12] The Court has described background principles as "common, shared understandings of permissible limitations . . . derived from a state's legal tradition."[13] Using traditional property law terms, some have noted that background principles describe land uses that never were a part of an owner's so-called bundle of sticks.[14] Consequently, a state action that simply recognizes or enforces background principles cannot effect a taking, because the government cannot take a property interest that an owner never legitimately possessed in the first place.[15]

Despite the importance of background principles to the takings doctrine, courts have not precisely defined which legal doctrines constitute

---

10. *See Stop the Beach Renourishment*, 560 U.S. at 731–32 (discussing how the Florida law was consistent with relevant background principles).

11. *See* Michael C. Blumm & Lucus Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 349 n.180 (2005) (showing the basis of background principles as state property and nuisance law).

12. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

13. *See* BILL HIGGINS ET AL., INST. FOR LOCAL GOV'T, REGULATORY TAKINGS AND LAND USE REGULATION: A PRIMER FOR PUBLIC AGENCY STAFF 14 (2006) (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001)) (discussing the Supreme Court's analysis of background principles and the Takings Clause).

14. *Id.*; *Lucas*, 505 U.S. at 1027; *see* Erin Ryan, *Palazzolo, the Public Trust, and the Property Owner's Reasonable Expectations: Takings and the South Carolina Marsh Island Bridge Debate*, 15 SOUTHEASTERN ENVTL. L.J. 121, 133–34 (2006) (calling the invocation of background principles the "No Stick Taken defense").

15. HIGGINS ET AL., *supra* note 13, at 14; Ryan, *supra* note 14, at 135.

background principles.[16] Though the question of exactly what constitutes such a principle is contested, courts and commentators have identified several sources of background principles, including nuisance, the public trust doctrine, custom, and public necessity.

Common law nuisance, as a limitation on the rights of a property owner in fee simple as far back as Blackstone, is unquestionably a background principle.[17] Nuisance doctrines in every jurisdiction prevent property owners from using their property in a harmful or offensive way.[18] Thus, regulation that accomplishes the same result as application of the nuisance doctrine cannot constitute a regulatory taking, even if the regulation significantly restricts land use.

There is also very broad agreement that the public trust doctrine, which reflects state governments' responsibility to manage tidelands for public benefit and to retain property interests on behalf of the public, is a source of background principles.[19] Therefore, regulations that codify public trust principles cannot constitute a regulatory taking.[20] The Supreme Court has held Florida's property law doctrines of accretion and avulsion to define property limits in *Stop the Beach Renourishment* because those doctrines define the contours of the public-trust holdings of the state, and may even constitute background principles in their own right.[21] Related doctrines that,

---

16. HIGGINS ET AL., *supra* note 13, at 14.

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

18. *See* BLACK'S LAW DICTIONARY 1233 (10th ed. 2014) (defining nuisance as "[a] condition, activity, or situation (such as a loud noise or foul odor) that interferes with the use or enjoyment of property; esp., a nontransitory condition or persistent activity that either injures the physical condition of adjacent land or interferes with its use or with the enjoyment of easements on the land or of public highways.").

19. *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) (holding "the state holds title to soils under tidewater, by the common law . . . . in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."); Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1970) (discussing the public trust doctrine's substantive restrictions on governmental authority).

20. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 740–41 (2006); HIGGINS ET AL., *supra* note 13, at 14 (citing Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 723 (Cal. 1983); *cf.* Esplanade Props. v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002) (holding that the public trust doctrine constitutes a background principle of Washington state law for the purpose of a takings analysis); Stevens v. City of Cannon Beach, 854 P.2d 449, 456–57 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (holding that the common law doctrine of custom constitutes a background principle of Oregon state law for the purpose of a takings analysis and restricts private ownership of the dry sand beach); McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 119 (S.C. 2003) (holding that the public trust doctrine constitutes a background principle of South Carolina state law for the purpose of a takings analysis).

21. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 731 (2010).

for example, adjust public trust boundaries where land erodes and is replaced by the sea, similarly qualify as background principles.[22] Various customs embodied in state common law[23] or even statutory law[24] have also been held to constitute background principles, as has the doctrine of public necessity.[25]

While some background principles, such as the law of nuisance, necessitate that the state forbid conduct inconsistent with those principles, other background principles are consistent with a state practice of allowing specific private conduct without granting a property owner the right to engage in that conduct. [26] For example, a background limitation on property rights can coexist with a license or other mechanism that allows particular conduct provisionally, but does not confer a property right to continue it. As John Echeverria notes, "the only essential element of a background principle for takings purposes is that it excludes a claim of entitlement."[27]

The U.S. Supreme Court has addressed background principles since *Lucas*. In *Palazzolo v. Rhode Island*, the Court considered whether "any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment."[28] The Court disagreed with that assertion, noting that:

> a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common,

---

22. Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENVTL. L.J. 51, 67 (2011).

23. *See Cannon Beach*, 854 P.2d at 456–57 (holding that custom within state common law acts as a background principle that precludes a takings claim); Blumm & Ritchie, *supra* note 11, at 347–50 (explaining how the doctrine of custom has been applied in different jurisdictions, for example by allowing beach access and allowing Native Hawaiians to exercise their native gathering rights on others' private property).

24. *See* Hunziker v. State, 519 N.W.2d 367, 371 (Iowa 1994) (holding that existing state statutes that prevented disinterment of burial sites constituted a "limitation or restriction on the use of the land inhered in the plaintiffs' title").

25. *See* Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast*, 26 J. Land Use & Envtl. L. 395, 402 (2011) ((providing a survey of various states' laws with respect to the public trust and public necessity doctrines)..

26. John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 950 (2012).

27. *Id.*

28. Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001).

> shared understandings of permissible limitations derived from a State's legal tradition . . . .[29]

The Court added that a "regulation or common-law rule cannot be a background principle for some owners but not for others," and that "[a] law does not become a background principle for subsequent owners by enactment itself."[30]

At the same time, the Court made clear that it was not deciding the precise contours of what might constitute a background principle, and did not specifically hold that no background principle could possibly bar the takings claim in that case.[31] In fact, on remand, the Rhode Island Superior Court re-analyzed the claim and found that public nuisance law functioned as a background principle that would bar takings liability.[32] The *Palazzolo* decision thus established both that background principles must be applied evenhandedly to all property owners regardless of the passage of time or title and that not every new statute or regulation will constitute a background principle. Neither of these concepts represents a departure from *Lucas*, which contemplated that background principles—even those embodied in new legislative or regulatory enactments or new court decisions—necessarily reflect the application of basic principles of property law that would bar any takings claim based on a claim of title incompatible with those principles.

A few scholars—very much in the minority—have expressed skepticism about the fundamental idea that background principles ought to limit the scope of property rights recognized for takings purposes.[33] On the other hand, some have suggested that the principles limiting property rights ought not to be limited to "background principles" at all, but instead should include numerous statutory and regulatory limitations on property rights that have enabled society to adapt to changing physical and legal conditions.[34] Overall, continuing a trend that Michael Blumm and Lucus

---

29. *Id.* at 629–30 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992)).

30. *Id.* at 630.

31. *Id.* at 629.

32. Palazzolo v. State, No. 88-0297, 2005 WL 1645974, at *4–5 (R.I. Super. Ct. July 5, 2005).

33. *See, e.g.*, James L. Huffman, *Background Principles and the Rule of Law: Fifteen Years After Lucas*, 35 ECOLOGY L.Q. 1, 13–14 (2008) (discussing "categorical defenses" to takings claims); James L. Huffman, *Beware of Greens in Praise of the Common Law*, 58 CASE W. RES. L. REV. 813, 816 (2008) (examining how common law nuisance that prevented certain types of economic activity would make it impossible to have a takings claim).

34. *See* Timothy M. Mulvaney, *Foreground Principles*, 20 GEO. MASON L. REV. 837, 875–77 (2013) (arguing that "background principles" are not a coherent and useful means of assessing the limits of takings doctrine and that limiting compensable property rights based on "foreground principles"—

Ritchie noted almost a decade ago, many courts have been receptive to increasing the scope and nature of the state-law principles that may defeat a takings claim by limiting the rights that are inherent in an owner's title.[35]

II. APPLICATION OF BACKGROUND PRINCIPLES IN THE COASTAL CONTEXT

Against this legal backdrop, local and state governments must make difficult decisions about how to manage a dynamic coastline. The public trust doctrine, the public necessity doctrine, and the law of public nuisance have developed under dynamic coastal conditions and are particularly relevant to coastal management decisions.[36] Courts determining the scope of property rights in the context of coastal regulation have long recognized that coastal features are not stable but change over time, both incrementally and suddenly.[37] And human-created development, along with the desire for human use of coastlines for recreation, has made coastlines even less stable.[38] Sea-level rise due to increased carbon dioxide in the atmosphere is further exacerbating this instability and will likely lead to significant changes in our coastlines over the coming decades.[39]

The law has thus always incorporated, and indeed, in some cases has been motivated by, the dynamic nature of coastal property boundaries, as well as the implications that this dynamism has for property rights. These implications include the understanding that property boundaries and rights have always been affected by physical processes.[40] Doctrines such as

---

"[n]ew principles that do not fit tidily into recognized background common law categories" but which would take into account real, evolving human interests and values—would better serve societal needs).

35. *See, e.g.*, Stevens v. City of Cannon Beach, 854 P.2d 449, 457 (Or. 1993) (quoting the Oregon Beach Bill as an example of state law reserving rights in property to the state as long as it is "in the public interest"); *see also supra* note 20 and accompanying text and cases.

36. *See* Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast*, 26 J. LAND USE & ENVTL. L. 395, 402 (2011) (providing a survey of various states' laws with respect to the public trust and public necessity doctrines).

37. *See* Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed,* 23 TUL. ENVTL. L.J. 305, 307–8 (2010) (providing a thorough historical treatment of the doctrines of avulsion and accretion, which provided an important means for common-law courts to take account of property-law implications of coastal change). Professor Sax has critiqued the modern application of these doctrines and proposed new roles for these doctrines in light of contemporary understandings of coastal dynamics. *Id.* at 353–54.

38. Robert J. Nicholls & Anny Casanave, *Sea-Level Rise and Its Impact on Coastal Zones*, 328 SCIENCE 1517, 1518–19 (2010), *available at* http://www.webpages.uidaho.edu/envs501/downloads/Nicholls%20%26%20Cazenave%202010.pdf.

39. *Id.* at 1517–18.

40. *See* Peloso & Caldwell, *supra* note 22, at 57–58 (explaining the public trust doctrine and how it applies in coastal areas where the property line is dynamic).

avulsion, accretion, erosion, and reliction—which all address the property rights implications of changing shoreline contours—evolved precisely because of the need for legal principles to address the inherent instability of coastal and riparian property.[41] Indeed, background principles are ubiquitous in the coastal context. In short, where a statutory or regulatory regime or a common law precedent implements public trust principles or prevents public nuisances to serve public goals, or where the government engages in permissible activity on public trust lands that creates "winners" and "losers" based on the government's determination of the best public policy, property owners cannot hold the government responsible for compensation. Those property owners never possessed the right to limit the government's implementation of public trust or nuisance principles.

At the margins, property law has always accounted for the fact that physical change is a central feature of how we experience property on the ground. But rapid change makes that feature of the law even more essential. Moreover, the large-scale concerns about the impact of sea-level rise on coastlines, coupled with the fact that the trend is largely in a single direction—towards loss of coastal land and increased calls for governmental intervention and control—have heightened property owners' and property-rights advocates' concern about the prospect of loss of private property rights in coastal lands.[42] Accordingly, the legal issues involved in coastal property regulation have been brought into sharper focus recently.

Sea-level rise heightens the need for legal principles capable of addressing dynamic physical reality. The reality of sea-level rise challenges the presumption (or fiction) that the legal implications of the changing face of coastlines are addressable with reference to static ideas about the character of property ownership.[43] State and local governments will have to make difficult decisions about whether to further restrict or prohibit new development, as well as how to address the vulnerability of existing development. Some of the potential tools to implement these types of decisions, such as setbacks, exactions, rolling easements, prohibitions on armoring, or abandoning public infrastructure that serves coastal properties,

---

41. *See* J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 81–82 (2012) (discussing the history of these doctrines and critiquing the courts' propensity to privilege these common-law doctrines over other legal principles derived from statutory sources).

42. *See, e.g.*, *id.* at 81 (noting that "[c]limate-induced sea-level rise ensures that littoral owners will be net losers from accretion for the foreseeable future").

43. *See*, *e.g.*, Sax, *The Accretion/Avulsion Puzzle*, *supra* note 37, at 351 (discussing the ways the old doctrines of avulsion and accretion are outdated given modern scientific knowledge and updated notions of public values).

may motivate property owners to assert takings claims, since these tools may reduce the ability of property owners to develop their property or to maintain existing development.[44]

Stop the Beach Renourishment illustrates how the complex concept of background principles often arises in coastal property contexts. In this case, Florida homeowners challenged a beach nourishment project that would have added seventy-five feet of dry sand seaward of the mean high tideline.[45] The homeowners argued that the project deprived them of their right to have their properties touch the water and their right to benefit from future sand accretions.[46] When the Florida Supreme Court ruled against the homeowners,[47] the homeowners appealed to the U.S. Supreme Court claiming that a "judicial taking" had occurred. The Court found in favor of the state, relying significantly on state law.[48] Although the Court ruled 8-0 that no judicial taking had occurred because the Florida Supreme Court's decision was consistent with the background principles of state law, it split 4-4 on whether a judicial taking is possible.[49] The Court relied on background principles of property law that are peculiar to coastal and riparian contexts, holding that the complex interplay of the doctrines of avulsion and accretion under Florida law compelled the Court to decide that the landowners did not have a viable takings claim.[50] Because the rights of property ownership are inherently limited by government's traditional powers to protect public safety, public property, or other public resources through the application of nuisance, public trust, and other background principles, the fact that changing conditions make a particular individual's property more vulnerable to negative impacts in the context of regulation cannot give rise to a takings claim. This is especially important in the coastal context given the centrality of state-law public trust principles in determining the limits of private property rights in tidelands. For example, if an ordinance that prohibits coastal hard armoring codifies preexisting legal principles that prohibit owners from using private property in a way

---

44. *See generally* Herzog & Hecht, *supra* note 7 (discussing takings claims in the context of various development restrictions).

45. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 711 (2010).

46. *Id.*

47. *Id.* at 712.

48. *Id.* at 745.

49. Robert R.M. Verchick & Joel D. Scheraga, *Protecting the Coast*, *in* THE LAW OF ADAPATATION TO CLIMATE CHANGE 253 (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012) (citing *Stop the Beach Renourishment*, 560 U.S. 702).

50. *Stop the Beach Renourishment*, 560 U.S. at 709. See *infra* Part IV for a detailed discussion of the significance of background principles to this case.

that interferes with public trust resources and with the obligation of trustees to protect public trust resources for the benefit of the state's citizens, continued enforcement of that ordinance cannot give rise to takings liability regardless of changing conditions on the ground.[51] Accordingly, courts generally should enforce ordinances that prohibit future armoring where those ordinances express public trust-based limitations on private development in tidelands.[52] An owner's mistaken assumption that an existing level of development constitutes an entitlement cannot serve as the basis for a takings claim since the background public trust principle "excludes a claim of entitlement" to take actions inconsistent with the public trust.[53]

Public trust responsibilities, custom, and common law doctrines allocating property rights under conditions of erosion and avulsion are already developing and evolving under dynamic coastal conditions. Understanding and incorporating these principles effectively will be essential to any efforts to further theorize and develop takings doctrine.

III. BACKGROUND PRINCIPLES AND PARTIAL TAKINGS

The background principle limitation ought to defeat takings claims as a threshold matter regardless of whether the regulation would have rendered the property economically valueless, or simply reduced the property's value (sometimes referred to as a "partial taking"). Nonetheless, some courts and commentators have analyzed situations in which property value was

---

51. *See* Herzog & Hecht, *supra* note 7, at 515.

52. *See id*.; *see* J. Peter Byrne & Jessica Grannis, *Coastal Retreat Measures*, *in* THE LAW OF ADAPTATION TO CLIMATE CHANGE, 267, 274-75 (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012) (describing the need for state governments to prohibit armoring as a public trust limitation to coastline development).

53. Echeverria, *supra* note 26, at 950. The limitations that "background principles" place on protectable property rights also are in tension with the recently advanced claim that local governments should be held liable for "passive takings." The idea behind passive takings, articulated by Christopher Serkin in a recent article, is that regulations that were justifiable at the time they were enacted may become unjustifiable because of changing ecological or other "natural" events. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 377–78, 396 (2014). "Passive takings liability will . . . attach to property that the government substantially regulates and has consequently rendered especially vulnerable to a change in the world." *Id.* at 377–78. "At a minimum, then, passive takings claims should arise when: 1. The state has effective control over the injury-causing condition; or 2. The state has rendered the property especially susceptible to adverse changes in the world." *Id.* at 378. Serkin notes that defenses to traditional takings liability are equally applicable to "passive takings claims." *Id.* at 396. But in doing so, he neglects to articulate the force of the "background principle" concept in this context, instead framing the issue as a relatively narrow "nuisance exception" to takings liability. This framing drastically understates the importance of background principles. *Id.*

reduced rather than eliminated under a different framework, based on the incorrect assumption that background principles operate differently in the context of a "partial takings" claim.

Courts will judge a regulation that deprives a property owner of all economically beneficial use of her property in accordance with *Lucas*. In *Lucas*, a property owner purchased coastal property with the intent to construct a home.[54] Subsequent to his purchase, the state passed a coastal protection law that denied him the right to construct a home on his property.[55] The Supreme Court held that any regulation depriving a property owner of all economically beneficial use of her property effects a per se taking and must be compensated, unless the regulation codifies or expresses a background state-law principle limiting the owner's use of her property.[56] By contrast, courts will analyze a regulation that results in only a partial diminution in property value under a three-factor balancing test.[57]

In *Penn Central Transportation Co. v. City of New York*, Penn Central challenged New York City's historic preservation law as affecting a regulatory taking because it prohibited the company from constructing a skyscraper office building over the historic Grand Central Terminal.[58] The U.S. Supreme Court used a balancing test to weigh the economic impact of the regulation on the parcel against the reasonable investment-backed expectations of the property owner by also considering the "character" of the regulation (that is, whether the regulation served a public good or targeted specific property owners).[59] This balancing test required a fact-intensive inquiry. Given the facts in *Penn Central*, the Court was persuaded that Penn Central obtained a reasonable return on its investment because it could continue to operate Grand Central Terminal.[60]

While *Penn Central* did not itself explicitly refer to background principles, and the discussion of these principles by the Court took place in *Lucas* in the context of a claim for a "total taking," the categorical defense that a background principle provides also governs situations where a takings claim is for a partial diminution under *Penn Central*. That is, where a background principle of state law would establish that the property interest allegedly "taken" was not part of the property owner's interest to

54. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006–07 (1992).

55. *Id.* at 1007.

56. *Id.* at 1031–1032.

57. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978).

58. *Id.* at 104.

59. *Id.* at 124.

60. *Id*. at 135. *See also* Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979) (adding "reasonable" to clarify the meaning of the *Penn Central* phrase "investment-backed expectations").

begin with, it should not matter whether the alleged taking was "partial" or "total." While many scholars and courts have recognized this,[61] other courts and commentators have—either intentionally or by omission—analyzed partial takings cases as requiring the *Penn Central* balancing test in all cases, even where background principles are clearly implicated.[62] But as the *Lucas* Court noted, the application of background principles is logically antecedent to the takings analysis.[63] This must be so regardless of whether the taking is a total wipeout of the owner's value. Barring takings claims categorically based on background principles in situations where a property owner is deprived of all economically beneficial use of a property, while theoretically allowing such taking claims under a *Penn Central* analysis, makes no sense. If that were the case, a property owner with partial diminution in property value could potentially recover compensation for a

61. *See* Blumm & Ritchie, *supra* note 11, at 325–26 ("[T]he background principles defense to takings liability is expansive. Courts in multiple jurisdictions have determined that *Lucas*'s threshold inquiry applies not only to *Lucas*-style complete economic wipeout takings, but also to physical occupation cases and, more importantly, to *Penn Central*–type regulatory cases where less than total economic deprivation has occurred. Consequently, the first question a court must address in any takings case (whether a *Lucas*, *Penn Central*, or physical occupation scenario) is whether the property use at issue was in fact one of the sticks in the bundle of rights acquired by the owner. If the contested use was not authorized by the claimant's title at purchase, a court should reject the takings claim at the threshold level." (citations omitted)).

62. *See*, *e.g.*, Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421, 444 (2005) ("When there has been no physical occupation or deprivation of all economic or beneficial use, the public trust doctrine often plays a critical role in determining whether compensation is due. In cases where there has been no categorical taking, the public trust doctrine informs each factor of the ad-hoc, factual inquiry first articulated in *Penn Central Transportation Co. v. New York City*. Thus, in determining whether a regulation on land use goes 'too far,' courts have frequently considered the public trust doctrine in examining the economic impact of the regulation, its interference with distinct investment-backed expectations, and the character of the *governmental action*." (citations omitted)); Gove v. Zoning Bd. of Appeals of Chatham, 831 N.E.2d 865, 873 (Mass. 2005) (characterizing "background principles" as part of the *Lucas* "total taking" analysis only, and applying the *Penn Central* test without first examining whether background principles applied to a partial taking); Rose Acre Farms, Inc. v. United States, 559 F.3d 1260, 1281 (Fed. Cir. 2009) (noting that "the government writes that 'Rose Acre has no private property right dictating that the Government pay it to stop using its property in a manner that threatens public health," but then engaging in a *Penn Central* balancing analysis without citing or considering the application of "background principles" to support a categorical takings defense based on an antecedent inquiry into the existence of the property right); State *ex rel.* R.T.G., Inc. v. State, 780 N.E.2d 998, 1006–07 (Ohio 2002) ("If . . . the value of the property taken equals the value of the relevant parcel . . . , then there has been a categorical taking as defined in *Lucas* and compensation is due unless the use of the property conflicts with background principles of the state's law of property and nuisance. But if the fraction equals anything less than one, then there has been no categorical taking, and the *Penn Cent.* ad hoc balancing test applies to determine whether a compensable taking has occurred." (citations omitted)); *see also* Peloso & Caldwell, *supra* note 22, at 82–83 (analyzing public trust-based partial takings claims in the coastal regulation context under *Penn Central*'s balancing test).

63. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031–32 (1992).

taking based on the application of a regulation, where a similarly situated property owner with a total wipeout of value from the same regulation would necessarily fail to assert a viable claim as a threshold matter.[64]

It is worth noting that the end result of both modes of analysis, if fully litigated to conclusion, may be the same in every or virtually every case where a background principle applies. Under a proper *Penn Central* analysis, if a court finds that a state law embodying a background principle prevents a taking, that court would likewise have to hold that the property owner could not have a reasonable expectation to develop the property contrary to that state law requirement. The Supreme Court implicitly recognized this possibility when it remanded *Palazzolo* to the Rhode Island courts for application of the *Penn Central* factors.[65] Moreover, the Rhode Island Superior Court's decision on remand explicitly analyzed the issue both ways, ultimately concluding both that background public nuisance principles barred the plaintiff's claim[66] and that given the regulatory and common-law-based limitations applicable to the property, the plaintiff did not possess a reasonable investment-backed expectation that the property could be developed.[67]

Nonetheless, the question of whether courts consider background principles to be a categorical defense is not just an academic or semantic one, especially in the context of coastal property regulation. As a general matter, while application of the *Penn Central* balancing test still broadly favors the government over property owners, the mere prospect of having to defend against such fact-specific claims under a balancing test is likely to have a chilling effect on governmental efforts to aggressively address sea-level rise through property regulation. Cases since *Lucas* have demonstrated that it is rare that a court will find a total taking that would require the application of the *per se* rule. Therefore, the government faces the prospect of defending takings claims through the application of the *Penn Central* test, which would take additional time and resources.

A more robust understanding that regulatory efforts that codify background principles defeat such claims as a threshold matter, without having to resolve phantom disputes over "investment-backed expectations"

---

64. Reasonable investment-backed expectations may, however, take into account a broader universe of laws and regulations, even if they do not rise to the level of a "background principle." As Blumm and Ritchie note: "The background principles inquiry does not supplant the *Penn Central* balancing test . . . it simply precedes it." Blumm & Ritchie, *supra* note 11, at 366.

65. Palazzolo v. Rhode Island, 533 U.S. 696, 630 (2001).

66. Palazzolo v. State, No. 88-0297, 2005 WL 1645974, at *4–5, *8–14 (R.I. Super. Ct. July 5, 2005).

67. *Id.* at *12–14.

or the economic impact or "character" of the regulation, will provide a clearer and more theoretically sound basis for governments to take necessary steps to implement publicly beneficial strategies to address sea-level rise. These strategies might include, for example, implementing prohibitions on hard armoring in order to protect public trust resources or other public resources on adjacent beaches, or requiring limitations on development upland of ocean-adjacent wetlands in an attempt to ensure that those wetlands are not destroyed by development as sea level rises.

IV. BACKGROUND PRINCIPLES AND JUDICIAL TAKINGS

Taking background principles seriously also ought to mean that judicial decisions applying background principles cannot give rise to takings liability. A background principle, by definition, is an application of state law. State courts are the final arbiters of what state laws mean, with the exception of constitutional challenges to those laws. But to find a judicial taking, the Supreme Court must find that a state's highest court has misapplied its own background principles or has misunderstood the significance of those principles within the context of state law. Because the U.S. Supreme Court lacks the authority to make such a finding, it cannot legitimately determine that a state court application of a background principle constitutes a taking.

Courts—in particular, the highest court of each state—must necessarily be the final arbiters of the background principles of a given state's law that define the limits of property rights. Justice Antonin Scalia, writing for the plurality in *Stop the Beach Renourishment*, expressed the opinion that it is the Supreme Court's duty to determine whether state courts have departed from settled state-law legal principles for purposes of a takings analysis.[68] Notably, the Court relied on an interpretation of Florida law that the Florida Supreme Court had not suggested, and implicitly rejected the Florida Supreme Court's own interpretation of Florida's coastal property doctrines.[69] Justice Scalia made a similar argument in his dissent from the denial of certiorari in *Stevens v. City of Cannon Beach*,[70] in which the Oregon Supreme Court held that the common law doctrine of custom

68. Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 727 (2010) ("A constitutional provision that forbids the uncompensated taking of property is quite simply insusceptible of enforcement by federal courts unless they have the power to decide what property rights exist under state law.").

69. *Id.* at 731–32.

70. Stevens v. City of Cannon Beach, 510 U.S. 1207, 1207 (1994) (Scalia, J., dissenting denial of certiorari).

constitutes a background principle of Oregon state law for the purpose of a takings analysis and restricts private ownership of the dry sand beach.[71] But as some scholars have noted, this view is in tension with basic principles of federalism and denies the authority of state courts to determine the scope of their own states' laws.[72]

Perhaps more significantly, Justice Scalia's conception of judicial takings requires a static vision of the application of legal principles, rather than a recognition that evolving legal standards can inform the application of background principles of state law.[73] State courts often make judgments that apply law in new contexts or even recognize new applications of existing doctrine. While *Lucas* notes that application of background principles should "no more than duplicate the result that could have been achieved in the courts,"[74] the *Stop the Beach Renourishment* plurality would instead reverse state courts' own judgments about the scope of state property law where the Supreme Court believes that those judgments reflect an incorrect interpretation of state-law principles. Justice Scalia's position as articulated in *Stop the Beach Renourishment* and *Stevens* indicates that when he referred in *Lucas* to background principles reflecting "the result that could have been achieved in the courts,"[75] he may have instead meant to say "what Justices of the U.S. Supreme Court believe ought to have been the result that could have been achieved in the courts."

---

71. *See* Stevens v. City of Cannon Beach, 854 P.2d 449, 454 (Or. 1993) (discussing the common law doctrine of custom within a takings analysis).

72. *See, e.g.*, Mary Doyle & Stephen J. Schnably, *Going Rogue:* Stop the Beach Renourishment *as an Object of Morbid Fascination*, 64 HASTINGS L.J. 83, 110–22 (2012) (providing a thorough critique of the Supreme Court's decision in *Stop the Beach Renourishment*).

73. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 753 (2006) ("That these background principles are now applied in modern ways to modern issues is simply a function of the development of state common law and does not run afoul of *Lucas* or constitutional takings jurisprudence."). In *Lucas*, the Court approved specifically the notion that later-enacted standards or enforcement mechanisms that make explicit the "implication" of background principles may bar takings claims. The Court noted, as examples of the appropriate application of background principles to defeat a takings claim, that:

> [T]he owner of a lake-bed . . . would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992). The Court went on to add that "[t]he 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." *Id.* at 1030.

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

75. *Id.* at 1028.

Based on *Stop the Beach Renourishment*, four Supreme Court Justices appear now to believe that "judicial takings" may arise when state courts depart from entirely settled applications of age-old principles; in other words, the boundaries of a landowner's property rights for takings purposes are fixed by settled applications of law and not by evolving legal standards. But even those settled applications of state law are subject to the review of the Supreme Court to determine how settled they really are. Ironically, the holding and reasoning of the plurality in *Stop the Beach Renourishment* itself utilized a novel approach—one never applied by Florida courts—by applying Florida's background principles of avulsion and accretion to deny the existence of the property rights asserted by the landowner in that case.[76] The Court, in rejecting the takings claim and even the rationale the Florida Supreme Court used to arrive at the same result, surprised most observers and undercut its own argument for judicial takings.[77]

The nascent doctrine of judicial takings creates unwarranted uncertainty for regulators attempting to craft regulations to address competing coastal uses and values in a way that protects public resources and rights. In the context of rising seas and concern about the stability of coastal resources, future courts will likely face more of the types of decisions that are likely to receive scrutiny from the Supreme Court, following in the steps of *Lucas* and *Stop the Beach Renourishment*. State supreme courts in South Carolina,[78] Texas,[79] Washington,[80] Florida,[81]

---

76. Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 730–33 (2010); *see* Doyle & Schnably, *supra* note 72, at 110–22 (explaining in detail how the *Stop the Beach Renourishment* plurality's reasoning differs from that of the Florida Supreme Court, including the plurality's reliance on a prior Florida Supreme Court case, *Martin v. Busch*, 112 So. 274, 287 (1927), that the Florida Supreme Court found "entirely unnecessary to the decision").

77. *See* Mulvaney, *supra* note 34, at 863–66 (discussing the case at length and noting its "rather strained constructions of the common law").

78. *See, e.g.*, McQueen v. S.C. Coastal Council, 530 S.E.2d 628 (S.C. 2000) *cert. granted, judgment vacated sub nom.* McQueen v. S.C. Dep't of Health & Envtl. Control, 533 U.S. 943 (2001) (interpreting South Carolina's state law with respect to constitutional takings, background principles, and shoreline resources).

79. *See, e.g.*, Severance v. Patterson, 370 S.W.3d 705, 708–09 (Tex. 2012) (answering certified questions on "rolling" easements for beachfront access and whether providing that access would effectuate a taking using common law principles and private property rights conferred by both the Texas and United States constitutions).

80. *See, e.g.*, Biggers v. City of Bainbridge Island, 169 P.3d 14, 14 (Wash. 2007) (holding the city could not prohibit shoreline development under its police power).

81. *See, e.g.*, Walton Cnty. v. Stop Beach Renourishment, Inc., 998 So. 2d 1102, 1105 (Fla. 2008) *aff'd sub nom.* Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 560 U.S. 702, 731–32 (2010) (interpreting the implications for takings doctrine of the interplay between Florida statutes and common law, in the context of coastal property).

Rhode Island,[82] and other states have had to interpret principles of state law, including public trust, nuisance, custom, and other doctrines, in the context of shoreline resources. Many more such cases are resolved in lower state courts. The bulk of these cases represent attempts by state and local governments to ensure that they are managing coastal resources for the benefit of the public in accordance with these doctrines, rather than ceding the public's rights to landowners in possible violation of state law. The prospect of having to fight against takings liability, even where state courts have recognized that state regulation is supported by long-standing background principles, will surely make state and local governments less likely to pursue the full range of management options available to protect public rights in public resources.

CONCLUSION

The Supreme Court and numerous states' highest courts have made clear that background principles delimit the threshold property interests to which takings analysis applies. Those same background principles underlie much of the regulatory effort undertaken by states to protect coastal resources. Courts and commentators considering both conventional and novel approaches to the takings doctrine should thus take background principles seriously. At a minimum, this means that they should be especially aware of the ways in which background limitations on property interests operate in coastal property contexts and incorporate an understanding of those limitations into their analysis.

82. *See e.g.*, Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 717 (R.I. 2000) *aff'd in part, rev'd in part sub nom.* Palazzolo v. Rhode Island, 533 U.S. 606, 629–30 (2001) (analyzing the impact of Rhode Island regulatory law regarding filling of wetlands on a property owner's takings claim).