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Stevens v. City of Cannon Beach: Taking Takings into the Post-Lucas Era

Peter C. Meier

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Stevens v. City of Cannon Beach: Taking Takings Into the Post-Lucas Era

Peter C. Meier*

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INTRODUCTION

In Stevens v. City of Cannon Beach,1 two beachfront property
owners brought a takings claim against the city of Cannon Beach and
the State of Oregon. The city and state, citing beach access and zon-
ing laws, had repeatedly denied the plaintiffs permits to construct a
seawall on the dry sand portion of the plaintiffs' beachfront lot.2 The

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* B.A. 1990, Columbia University, Columbia College; J.D. 1995, School of Law,
University of California at Davis.
2. Id. at 451; Interview with Jeanette Stevens, in Cannon Beach, Or. (Dec. 26, 1993).
plaintiffs alleged that the city and state effectively “took” their property without just compensation in violation of the Takings Clause.\(^3\) The trial court dismissed the complaint, and the state court of appeals affirmed.\(^4\) The property owners brought their claim to the Oregon Supreme Court, which decided against the property owners.\(^5\)

In Stevens, the Oregon Supreme Court purported to apply the rule of the United States Supreme Court’s decision in Lucas v. South Carolina Coastal Council.\(^6\) The Lucas opinion announced a new, stricter test for “total takings”: when government land use restrictions deprive the owner of all economically productive use, the Takings Clause obligates the government to compensate the owner.\(^7\) An important exception to this rigorous test applies when the government bases the regulation on the “background principles of the State’s law of property and nuisance.”\(^8\) In Lucas, the Court thus ties takings analysis where total takings are at issue to the various state common law notions of property rights and places the burden of showing that the “nuisance exception”\(^9\) applies on the government.\(^10\)

The Stevens decision is one of the first major state court interpretations of Lucas. The Stevens plaintiffs claimed that state and local officials had, by proscribing all beneficial use of the dry sand portion of their property, effected a total taking.\(^11\) The Oregon Supreme Court disagreed and ruled that preventing the plaintiffs from building a seawall on beachfront property did not effect a compensable taking.\(^12\) In applying Lucas’ nuisance exception, the court found that the plaintiffs had no property interest in developing the dry sand portion of their property.\(^13\) The court ruled that the common law doctrine of

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6. Id. at 455-57 (citing Lucas, 112 S. Ct. 2886, 2900 (1992)).
7. Lucas, 112 S. Ct. at 2895; see infra part I.B.
9. The majority in Lucas refers to background principles of nuisance and property law as the basis for state action. Justice Stevens, however, terms the exception to the majority’s categorical total takings rule as “the nuisance exception.” Id. at 2917, 2920 (Stevens, J., dissenting). This note follows what has become common practice and refers to the exception in Lucas as the nuisance exception. In Stevens v. City of Cannon Beach, however, the Oregon Supreme Court invoked this exception based upon the state’s common law doctrine of custom. See infra part II.
12. Id. at 460.
13. Id. at 456-57.
custom supported the Oregon Beach Bill, under which the plaintiffs had sought a permit to develop. Thus, the court held that when the plaintiffs took title to their land, they were on notice that the “bundle of rights” that they acquired did not include exclusive use of the dry sand part of the property.

When the plaintiffs appealed to the U.S. Supreme Court, Justice Scalia, the author of the total takings test, indicated that he believes that Stevens represents a potential “land grab.” Nonetheless, the Court denied the plaintiffs’ petition for a writ of certiorari in the case. This note argues that Stevens illustrates both the flaws in the Lucas test for total takings and the consequent need for a new total takings test.

While the Lucas test is facially stringent, Stevens illustrates that the test fails because it is too malleable. Although the Stevens court applied the Lucas test, the court reached a result completely at odds with the Lucas majority's attempt to protect private property from public appropriation. At the same time, the test impedes governments from using innovative solutions to new land use and environmental problems. By showing that courts can easily escape the confines of the Lucas test, Stevens indicates that the test will promote uncertainty by engendering inconsistent and unpredictable results.

Stevens is also important because it exemplifies the government’s need for flexibility to deal with emerging land use problems. Such flexibility would be consistent with Justice Kennedy’s Lucas concurrence, in which he argues that states should have broad authority to

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Additionally, § 390.615 provides:
Ownership of the shore of the Pacific Ocean between ordinary high tide and extreme low tide, and from the Oregon and Washington state line on the north to the Oregon and California state line on the south, excepting such portions as may have been disposed of by the state prior to July 5, 1947, is vested in the State of Oregon, and is declared to be a state recreation area. No portion of such ocean shore shall be alienated by any of the agencies of the state except as provided by law.

Id. § 390.615 (1994).

18. Id. at 1332.
20. See infra notes 139-41 and accompanying text.
21. See infra parts III.A.4, IV.A.
22. See infra part III.A.5.
23. See infra part IV.B.
define and deal with threats to the public good.\textsuperscript{24} As Stevens shows, a legal rule that denies states such flexibility breaks down when state courts apply it to regulations that implement innovative policies with compelling justifications. The Court's campaign on behalf of property rights will thus cause inconsistent results in takings cases and unduly inhibit legitimate government regulation.

Takings law limits the government's power to restrict land uses that are detrimental to the common good. The Fifth Amendment injunction "nor shall private property be taken for public use, without just compensation"\textsuperscript{25} is particularly important with regard to environmentally sensitive uses, which have been at the heart of the Court's recent takings decisions.\textsuperscript{26} The Takings Clause prevents the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."\textsuperscript{27} This note examines the post-Lucas conflict between governmental regulation and private property interests. Part I reviews the history of takings jurisprudence and examines the Court's opinion in \textit{Lucas}. Part II presents the facts and decision in \textit{Stevens}. Part III contends that \textit{Stevens} exemplifies the problems that \textit{Lucas} poses, both to takings jurisprudence and to the valid exercise of governmental regulatory power. Finally, this note concludes that states cannot successfully meet new threats to public welfare unless the Supreme Court modifies or abandons the \textit{Lucas} test.

\section{I}
\textbf{TAKINGS JURISPRUDENCE: EBB AND FLOW}

\textbf{A. The Development of Takings Law}

Today, the Fifth and Fourteenth Amendments to the U.S. Constitution are read broadly to forbid the federal and state governments from taking private property for public use without just compensation.\textsuperscript{28} Prior to the decision in \textit{Pennsylvania Coal Co. v.}}
Mahon, 29 according to the Lucas Court, the Fifth Amendment Takings Clause applied to only two types of governmental action. 30 The first type was the exercise of the eminent domain power. 31 Using this power, the government can directly appropriate property for public use by bringing a judicial or administrative action to “take” a landowner’s interest in property. 32 The second type of action governed by the Takings Clause was an action constituting the functional equivalent of ouster, where the government’s physical invasion of property acted to effectively dispossess an owner of her interest in land. 33 Where the government did not directly appropriate private property using its eminent domain power, three rules generally governed whether compensation was required: (1) the Court always required compensation if the government action entailed a physical invasion of an individual’s property; (2) the Court never required compensation if the government action prohibited a noxious use of an individual’s property; and (3) if the government action neither caused a physical invasion nor prohibited a noxious use, the Court required compensation only if the government action seriously diminished the value of the physical property affected. 34 Courts did not originally

ings Clause was intended solely to limit takings of private property without just compensation by the federal government. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833). The Court has also held, however, that the prohibition against uncompensated takings applies equally to state governments through the Fourteenth Amendment Due Process Clause. E.g., Chicago, B. & O. R.R. v. Chicago, 166 U.S. 226, 241 (1897).

29. 260 U.S. 393 (1922).
31. Id. (citing Legal Tender Cases, 79 U.S. (12 Wall.) 287, 312 (1870)).
32. San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 638 n.2 (1981) (Brennan, J., dissenting). “The right of eminent domain is the right of the state, through its regular organization, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the state on account of public exigency and for the public good.” BLACK’S LAW DICTIONARY 616 (6th ed. 1990). The state may not assert its power of eminent domain without providing just compensation to the owners of the property that is taken. Id.
33. Lucas, 112 S. Ct. at 2892 (citing Transportation Co. v. Chicago, 99 U.S. 635, 642 (1878)); see also Gibson v. United States, 166 U.S. 269, 275-76 (1897) (holding that no taking occurred where the interference with land during dike construction was not physical, but merely incidental). An ouster is a wrongful dispossession or exclusion of a party from real property. BLACK’S LAW DICTIONARY, supra note 32, at 1101.
34. Glynn S. Lunney, Jr., A Critical Reexamination of the Takings Jurisprudence, 90 Mich. L. Rev. 1892, 1898 (1992) (citing Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 46-50 (1964)). Lunney, however, argues that these principles, adopted by the modern Court and many commentators, fundamentally misinterpret the Court’s early takings decisions. Id. at 1897-98. He asserts that the early cases do not apply an ad hoc factual analysis, but rather reflect classical legal thought. Id. at 1899-900. Under this classical conception, he explains:

[T]he early Court separated compensable government control of property from noncompensable control by determining whether the property in question fell within the sphere of public authority (community) or the sphere of private authority (individual). If the Court determined that a property right fell within the [private sphere], then the right was “private property,” and the government could control or interfere with the right only by purchasing it through eminent domain.
recognize "takings" through the governmental regulation of property.35

Over time, the scope of takings law has increased, particularly in environmental law. In the past quarter century, Congress and the states have passed far-reaching laws in response to public health threats that were unforeseen a generation before.36 The rise in environmental regulation has in turn increased the conflict between protecting public welfare and preserving private property interests.37 State legislatures and municipalities often resolve this conflict by burdening private landowners with land use restrictions in an effort to protect the public from environmental harm.38

The Supreme Court greatly expanded the reach of the original Takings Clause in Pennsylvania Coal Co. v. Mahon.39 In Mahon, the Court extended the Takings Clause to protect property subject to gov-

On the other hand, if the Court determined that a right fell within the [government sphere] . . . the government could control the right or even eliminate it entirely without paying compensation, provided the government action was reasonably necessary to achieve a legitimate end.

Id. at 1900 (footnote omitted).

35. See id. at 1898-99 ("Then as now, the label a taking referred to compensable government control of a right, and the label regulation referred to noncompensable government control." (footnote omitted)); Rotunda & Nowak, supra note 3, § 15.12 (noting that takings law may have originally contemplated only physical appropriations of property). Justice Scalia acknowledges that Justice Blackmun is correct in asserting that early constitutional theorists did not believe the Takings Clause embraced regulations of property. See Lucas, 112 S. Ct. at 2900 n.15. Justice Scalia argues, however, that since the text of the Takings Clause does not explicitly exclude regulatory deprivations, the Court will not exclude such deprivations. Id.

Similarly, Justice Blackmun states that the Supreme Court "repeatedly has recognized the ability of government, in certain circumstances, to regulate property without compensation no matter how adverse the financial effect on the owner may be." Id. at 2910 (Blackmun, J., dissenting). "More than a century ago," he writes, "the Court explicitly upheld the right of States to prohibit uses of property injurious to public health, safety, or welfare without paying compensation . . . ." Id. (citing Mugler v. Kansas, 123 U.S. 623, 668-69 (1887)). Moreover, "James Madison, author of the Takings Clause, apparently intended it to apply only to direct, physical takings of property by the Federal Government." Id. at 2915 n.23.


37. Professor Frank Michelman writes that conceptions of private property and individual self-determination have changed along with social evolution, with the emergence of an economically active and regulatory state. Frank Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1626, 1627 (1988). "The result is what we see, . . . troubled and limited judicial protection of property, carried on in the name of the Constitution." Id. at 1628.

38. See, e.g., Dolan v. City of Tigard, 114 S. Ct. 2309 (1994) (involving city's requirement that a landowner dedicate a portion of property in a flood plain for storm drain improvement as a condition for receiving a building permit); Lucas, 112 S. Ct. 2886 (analyzing the state's beachfront management law, which facilitated public access by restricting building permits in the coastal zone); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) (rejecting plaintiffs' applications to develop a subdivision because of lack of water and sewage facilities).

ernmental regulation, in addition to property directly taken by government action. The decision used the Takings Clause to strike down a Pennsylvania statute forbidding coal mining from causing the subsidence of residences. Justice Holmes' majority opinion held that a regulation may constitute a taking, even though the government did not literally take property. Justice Holmes revolutionized takings law with the epigram that while government may regulate property to a certain extent, "if regulation goes too far it will be recognized as a taking." \(\text{Mahon}\) required an ad hoc inquiry into the particular facts of the case to determine whether the governmental regulation resulted in a taking.

In \textit{Penn Central Transportation Co. v. City of New York}, the Court affirmed its use of ad hoc, factual inquiries to resolve takings disputes, but attempted to structure these inquiries more formally. At issue was a New York City regulation designed to preserve landmarks. The Court held that use of the regulation to prevent the construction of a fifty-three-story building above Grand Central Station did not constitute a taking. The Court identified three factors

40. See id. at 415-16; \textit{Lucas}, 112 S. Ct. at 2892 ("Justice Holmes recognized in \textit{Mahon} . . . [that] the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.").

41. \textit{Mahon}, 260 U.S. at 412-16.

42. \textit{Id.} at 415. In \textit{Mahon}, the property interest at stake was the landowner's right to mine coal at a profit. \textit{Id.} at 414. Justice Holmes wrote: "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." \textit{Id.}

43. \textit{Id.} at 415. Laurence Tribe writes that \textit{Mahon} signaled a new approach under which the compensation requirement "had begun to serve the distinct function of assuring, in sufficiently ambiguous cases, that particular actions did indeed redound to the public benefit." \textit{Laurence H. Tribe, American Constitutional Law} § 9-2, at 589, § 9-4, at 595 (2d ed. 1988). Conditioning government actions on the public's willingness to pay, expressed through the legislative process, would insure that the public would benefit. \textit{Id.} § 9-2, at 589. In the modern period, Tribe writes, the requirement of compensation "continues to serve this role of surrogate assurance of public purpose." \textit{Id.} § 9-2, at 590. In his majority opinion in \textit{Lucas}, Justice Scalia indicates the continuing importance of Justice Holmes' opinion by asserting that the South Carolina Supreme Court's use of noxious-use doctrine to defeat Lucas' takings claim "would essentially nullify \textit{Mahon}'s affirmation of limits to the noncompensable exercise of the police power." \textit{Lucas}, 112 S. Ct. at 2899.

44. \textit{Mahon}, 260 U.S. at 413.


46. \textit{Id.} at 124; Andrea L. Peterson, \textit{The Takings Clause: In Search of Underlying Principles, Part I—A Critique of Current Takings Clause Doctrine}, 77 CAL. L. REV. 1299, 1317 (1989) [hereinafter Peterson, \textit{A Critique}]. Professor Tribe wrote before \textit{Lucas} that the result of \textit{Penn Central} is that the Supreme Court is unlikely to find a taking "when faced with a regulation which not only (1) advances some public interest, but also (2) falls short of destroying any classically recognized element of the bundle of property rights, (3) leaves much of the commercial value of the property untouched, and (4) includes at least some reciprocity of benefit." \textit{Tribe, supra} note 43, § 9-4, at 597.

47. \textit{Penn Cent.}, 438 U.S. at 107.

48. \textit{Id.} at 138.
that it considered particularly significant in determining whether a
government action constituted a taking.\textsuperscript{49} First, courts must consider
the character of the governmental action.\textsuperscript{50} Next, courts must weigh
the extent to which the government’s action interferes with the claim-
ant’s reasonable, investment-backed expectations.\textsuperscript{51} Finally, courts
must consider the economic impact of the governmental action on the
claimant.\textsuperscript{52}

While \textit{Penn Central} provided an analytical framework for takings
cases, two years later the Court announced another test for determin-
ing whether a taking has occurred. Under the two-part test of \textit{Agins v.
City of Tiburon},\textsuperscript{53} a law may effect a taking if it does not substantially
advance legitimate state interests, or if it denies an owner economi-
cally viable use of his land.\textsuperscript{54} Using this analysis, the Court held that a
city’s attempt to preserve open-space through zoning ordinances did
not result in an unconstitutional taking.\textsuperscript{55} The Court in \textit{Agins} did not
explain this test’s relationship to the three-part test in \textit{Penn Central},\textsuperscript{56}
but the Court has subsequently used the \textit{Agins} test as a threshold ex-
planation of its takings analysis.\textsuperscript{57}

\textit{Keystone Bituminous Coal Ass’n v. DeBenedictis}\textsuperscript{58} represents the
current state of the law. In \textit{Keystone}, the Court used both the \textit{Agins}
test and the \textit{Penn Central} balancing test in upholding a state mining
regulation.\textsuperscript{59} The law required owners of subsurface mineral rights to
leave subsurface coal deposits below certain structures and surfaces\textsuperscript{60}

\begin{footnotesize}
\textsuperscript{49} See id. at 124. Andrea L. Peterson writes that the three factors that \textit{Penn Central}
enumerated have actually provided little structure to the Court’s takings analysis. Peterson, \textit{A Critique, supra} note 46, at 1317.

First, the Court has defined each factor in a variety of ways, without acknowledg-
ing the shifts in definition. Second, it is difficult to predict what weight the Court
will give to each factor. At different times the Court has actually regarded each
one of these so-called “factors” as dispositive of whether a taking occurred. Fi-
nally, it is not clear when the \textit{Penn Central} test, rather than some other takings
test, is to be applied.

\textit{Id.}

\textsuperscript{50} See \textit{Penn Cent.}, 438 U.S. at 124.

\textsuperscript{51} See id.

\textsuperscript{52} See id.

\textsuperscript{53} 447 U.S. 255 (1980).

\textsuperscript{54} \textit{Id.} at 260.

\textsuperscript{55} \textit{Id.} at 259.

\textsuperscript{56} Peterson, \textit{A Critique, supra} note 46, at 1328.

\textsuperscript{57} See, e.g., \textit{Dolan v. City of Tigard}, 114 S. Ct. 2309, 2316 (1994) (quoting \textit{Agins}, 447
U.S. at 260) (“A land use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ and does not ‘den[y] an owner economically viable use of his land.’”).

\textsuperscript{58} 480 U.S. 470 (1986).

\textsuperscript{59} \textit{Id.} at 485. The Court stated: “We have held that land use regulation can effect a
taking if it ‘does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.’” \textit{Id.} (quoting \textit{Agins}, 447 U.S. at 260).

\textsuperscript{60} \textit{Id.} at 475-77.
\end{footnotesize}
in order to avert the safety and land conservation threats of mine subsidence. The majority held under the Agins test that the statute promoted a significant public interest and only slightly diminished the value of mining operations.

The Keystone Court's ad hoc, factual inquiry emphasized the "character of the governmental action" aspect of the Penn Central test. Instead of examining the nature of the action itself, the Court focused on the justification for the government's action. It found that the government's interest in preventing a public nuisance "lean[ed] heavily against finding a taking." "The Court relied heavily on early takings decisions in which it had applied what is often called the 'noxious use' test."

Currently, however, the Court recognizes two types of regulatory actions that are exempt from Keystone's ad hoc, factual inquiry and that constitute a taking. The first type involves a regulation that compels the property owner to suffer a physical invasion of her property. The second type involves a regulation that denies all economically beneficial or productive use of land. As discussed below, Lucas af-

61. See id. at 474.
62. Id. at 485. The Court in Keystone faced a Pennsylvania statute very similar to the one the Court struck down with Justice Holmes' decision in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Justice Stevens, writing for the majority, distinguished the earlier case by asserting that the statute considered in the earlier decision was not intended to serve a public purpose. Keystone, 480 U.S. at 481-88. One commentator explains that Justice Stevens also "asserted that the [earlier] decision turned on an excessive diminution in the value of the coal mines as a whole." Lunney, supra note 34, at 1930-31 (criticizing the Keystone decision); see also Keystone, 480 U.S. at 498. Another critic charges that Keystone is revisionist, and even that the effect of the decision is an unwitting revival of substantive due process. Douglas W. Kmiec, The Original Understanding of the Taking Clause Is Neither Weak nor Obsolete, 88 COLUM. L. REV. 1630, 1631-32 (1988).
65. Peterson, A Critique, supra note 46, at 1319.
67. E.g., Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893-94 (1992) (describing the Court's categorical treatment where regulation denies all economically beneficial use of land); see also Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987) (stating that land use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny the owner economically viable use of land). But see Lucas, 112 S. Ct. at 2910 (Blackmun, J., dissenting) (arguing that the Court prior to Lucas did not apply categorical treatment in cases of total takings); id. at 2918-19 (Stevens, J., dissenting) (stating that past Court decisions do not enunciate a categorical rule).
firmed that this second type of taking is a *per se* violation of the Takings Clause, subject to the nuisance exception.68

**B. Lucas and the Law of Takings**

The Supreme Court presented its current approach to total takings in *Lucas v. South Carolina Coastal Council*.69 In 1986, David Lucas purchased two beachfront lots in order to build single-family homes.70 In 1988, the South Carolina Legislature passed a law aimed at protecting the state’s fragile coastline from erosion.71 This law effectively barred Lucas from building on his land.72 Lucas sued, arguing that the state had in effect taken his property, entitling him to compensation.73 The state trial court found that the legislative restriction had rendered the property valueless and awarded Lucas $1.2 million.74 On appeal, the South Carolina Supreme Court reversed.75 Applying the noxious-use doctrine, the court held that the Takings Clause did not require compensating the landowner.76

The United States Supreme Court granted certiorari77 and reversed and remanded the case.78 Justice Scalia’s majority opinion held that a state must compensate a landowner if a regulation deprives land of all economically beneficial use, unless the proscribed use interests were not part of the owner’s title at the time of acquisition.79 The

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68. See generally Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369 (1993). Professor Epstein argues that Justice Scalia stopped short of establishing a *per se* test in *Lucas*. *Id.* at 1369, 1377-79. He did so, Epstein argues, with his holding that the state need not compensate the landowner for a total regulatory taking if the regulated activity constitutes some form of noxious use or nuisance-like activity subject to regulation under the state’s common law, or if the regulated activity was not part of the owner’s “bundle of rights” acquired with title to the property. *Id.*


70. *Id.* at 2889.

71. *Id.* at 2889-90. The law directed the South Carolina Coastal Council to establish a “baseline” connecting the landward-most points of erosion in an area that included David Lucas’ lots. *Id.* at 2889. The law flatly prohibited construction of occupiable improvements landward of a line drawn 20 feet landward of, and parallel to, the baseline. *Id.* at 2889-90.

72. *Id.* at 2890.

73. *Id.*

74. *Id.*


76. *Id.* at 899-902.


79. *Id.* at 2899-900. Compare, e.g., Powell v. Pennsylvania, 127 U.S. 678, 682 (1888) (holding that legislation prohibiting manufacture and sale of oleomargarine was not a taking, despite the owner’s claim of total loss of value of his property) with, e.g., Bartlett v. Zoning Comm’n, 282 A.2d 907, 910-11 (Conn. 1971) (finding a compensatory taking where the owner was effectively barred from filling a tidal marshland, despite the municipality’s goal of preserving such marshlands).
Court held that the question is informed by the public's historic understandings regarding the content of, and the state's power over, the "bundle of rights" included in property ownership. Thus, under the Lucas test, the state may regulate to restrict all economically beneficial use without compensating the landowner only if the regulation simply restates a restriction that was inherent in the title when the landowner acquired the land. Further, the inherent restriction must be based on background principles of the state's property or nuisance law, including common law doctrines such as

Justice Scalia admits that: "[T]he rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." Lucas, 112 S. Ct. at 2894 n.7. Justice Scalia explains:

When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.

Id. Justice Scalia writes that the answer may lie in looking at whether and to what degree the state's law has accorded legal recognition and protection to the particular interest in land involved. Id. The Court was able to avoid this difficult question in Lucas because the South Carolina Court of Common Pleas had found a complete loss of economic value and Lucas' interest in land was the well-protected fee simple interest. Id.

One advocate of landowner rights, Richard Epstein, argues that Justice Scalia's distinction between total and partial takings is "so rickety that it must fall of its own weight." Epstein, supra note 68, at 1370. Professor Epstein asserts that Justice Scalia's categorical distinction between partial and total takings has no parallel in private law and no place in public law. Id. at 1392.

Justice Souter in Lucas filed a statement in favor of dismissing certiorari as improvidently granted. Lucas, 112 S. Ct. at 2925 (statement of Souter, J., arguing for dismissal of certiorari). The Court had granted review on the assumption that the state, by regulation, had deprived the owner of his entire economic interest in the subject property. Id. Justice Souter found this assumption "highly questionable." Id. Because the Court could not review the question of whether there was a total deprivation, Justice Souter argued, the Court in that case was unable to clarify the concept of a total taking. Id.

80. Lucas, 112 S. Ct. at 2899. Professor William Fisher questions Justice Scalia's emphasis on the public's "historic understandings" regarding the bundle of rights that individuals acquire when taking title to property. William W. Fisher III, The Trouble with Lucas, 43 STAN. L. REV. 1393, 1400-02 (1993). Fisher argues that it is difficult for judges to identify the public's "historic understandings." Id. at 1400. Moreover, Fisher asserts that the public's attitudes have changed and do not necessarily support heightened protection for landowner rights. See id. at 1401.

[A]s the percentage of Americans who owned real property continued to decline, as recreational resources (such as beaches) became more scarce, and as more Americans came to associate security with protection of their jobs or with guaranteed flows of governmental benefits, fewer and fewer Americans had reason to see land as more worthy of protection than other forms of property.

Id. (footnote omitted).

81. Lucas, 112 S. Ct. at 2900.

82. Id. Justice Scalia explains that under the nuisance exception in Lucas, the owner of a lake bed, for example, would not be entitled to compensation when the government denies him the requisite permit to engage in landfilling operations that would have the effect of flooding others' land. Id. Nor, he writes, would the corporate owner of a nuclear generating plant have a takings claim when the government directs it to remove all im-
prescription\textsuperscript{83} and custom.\textsuperscript{84} When a regulation denies all economically productive use, the government has the burden of showing that the regulation does not restrict landowner rights beyond the limits imposed by the state's common law at the time of acquisition.\textsuperscript{85}

In his concurring opinion, Justice Kennedy argued that the common law of nuisance too narrowly confines the exercise of regulatory power.\textsuperscript{86} He states that nuisance abatement may accord with property owners' most common expectations, but it should not be the sole source of state authority to impose severe restrictions on land use.\textsuperscript{87} Instead, where an owner alleges a total taking, the test should be whether the deprivation is contrary to the owner's reasonable, investment-backed expectations,\textsuperscript{88} understood in light of "the whole of our legal tradition."\textsuperscript{89}

States need flexibility to meet future environmental and public health threats. Consequently, Justice Kennedy asserted that the Court should not inhibit states from enacting new regulatory initiatives in response to changing conditions.\textsuperscript{90} A danger may be so pressing as to justify even government regulations that fall outside the state's power under traditional property and nuisance law.\textsuperscript{91}

Justice Blackmun, in dissent, opposed the majority's elevation of property rights above the state's interest in protecting the public from environmental harm.\textsuperscript{92} He argued that if the South Carolina Legislature correctly found that a ban on oceanfront construction would pre-

\begin{itemize}
\item \textit{Id.} Such regulation, Justice Scalia writes, does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. \textit{Id.} at 2900-01.
\item \textsuperscript{83} Prescription is the actual, open, notorious, hostile, continuous, and exclusive use of another's land. ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 8.7, at 451 (2d ed. 1993). In most common law jurisdictions, a prescriptive easement can be created in favor of one person in the land of another by uninterrupted use and enjoyment of the land in a particular manner for the statutory period, so long as the use is open, adverse, and under claim of right, but without authority of law or by agreement with the owner. E.g., Feldman v. Knapp, 250 P.2d 92, 100-04 (Or. 1952).
\item \textsuperscript{84} Custom is defined as such usage as by common consent and uniform practice has become the law of the place, or of the subject matter to which it relates. 1 BOUVIER'S LAW DICTIONARY 742 (3d rev. 1914).
\item \textsuperscript{85} Lucas, 112 S. Ct. at 2901-02. Justice Scalia writes that to win its case, South Carolina would have to do more than proffer the legislature's declaration that the uses plaintiff desired are inconsistent with the public interest. \textit{Id.} at 2901. Instead, he writes, South Carolina, would have to identify background principles of nuisance and property law that prohibit the intended uses under the circumstances. \textit{Id.} at 2901-02.
\item \textsuperscript{86} \textit{Id.} at 2902, 2903 (Kennedy, J., concurring).
\item \textsuperscript{87} \textit{Id.} at 2903 (Kennedy, J., concurring).
\item \textsuperscript{88} \textit{Id.} (Kennedy, J., concurring).
\item \textsuperscript{89} \textit{Id.} (Kennedy, J., concurring).
\item \textsuperscript{90} \textit{Id.} (Kennedy, J., concurring).
\item \textsuperscript{91} \textit{See id.} (Kennedy, J., concurring).
\item \textsuperscript{92} \textit{Id.} at 2904 (Blackmun, J., dissenting).
\end{itemize}
vent serious harm, then the regulation is constitutional.\textsuperscript{93} Justice Blackmun took issue with the majority's "rationale in creating a category that obviates a 'case-specific inquiry into the public interest advanced.'"\textsuperscript{94} Where a total taking is potentially involved, the landowner's interest may be substantial, but Blackmun believes that a court must ultimately weigh conflicting private and public interests.\textsuperscript{95} Justice Blackmun argued that the Court's precedents uniformly reject the proposition that a diminution in property value alone can establish a taking.\textsuperscript{96} Justice Stevens, in a separate dissent, argued that the Court's categorical rule for total takings would deny legislatures much of their traditional power to revise property law.\textsuperscript{97}

II

\textit{STEVENS: FACTS AND DECISION}

\textit{Stevens v. City of Cannon Beach}, like \textit{Lucas}, involved beachfront landowners and state legislation aimed at preventing environmental harm.\textsuperscript{98} Irving and Jeanette Stevens own two vacant oceanfront lots in Cannon Beach, Oregon.\textsuperscript{99} These lots are improved by street construction and utility service, and are zoned for residential or motel use.\textsuperscript{100} The Stevenses applied to the city of Cannon Beach and the

\begin{itemize}
\item \textsuperscript{93} \textit{Id.} at 2906 (Blackmun, J., dissenting).
\item \textsuperscript{94} \textit{Id.} at 2910 (Blackmun, J., dissenting) (quoting \textit{Lucas}, 112 S. Ct. at 2893 (majority opinion)).
\item \textsuperscript{95} \textit{Id.} (Blackmun, J., dissenting) (quoting \textit{Agins v. City of Tiburon}, 447 U.S. 255, 261 (1980)). The Court, wrote Justice Blackmun, "repeatedly has recognized the ability of government, in certain circumstances, to regulate property without compensation no matter how adverse the financial effect on the owner may be." \textit{Id.} (Blackmun, J., dissenting).
\item \textsuperscript{96} \textit{Id.} (Blackmun, J., dissenting) (quoting \textit{Penn Cent. Transp. Co. v. City of New York}, 438 U.S. 104, 131 (1978)).
\item \textsuperscript{97} \textit{Id.} at 2921 (Stevens, J., dissenting).
\item \textsuperscript{99} \textit{Stevens}, 854 P.2d at 451. The couple owns and manages the Ecola Inn at Cannon Beach. Interview with Irving Stevens, in Cannon Beach, Or. (Dec. 26, 1993). Immediately north is the Surfsand Motel. \textit{Id.} This property was at the center of the controversy in \textit{State ex rel. Thornton v. Hay}, 462 P.2d 671 (Or. 1969). See \textit{Stan Federman, Public Beach Rights Affirmed: Decision Has Basis in Custom—Supreme Court Opens Dry Sand for Recreation, OREGONIAN}, Dec. 23, 1969, at 1. Developer Bill Hay, then the owner of the Surfsand Motel, started the controversy that led to the passage of the Beach Bill by blocking off the beach in front of his motel to nonguests. \textit{See Stan Federman, Supreme Court Decision May End Costly Legal Challenge by Coast Property Owners, OREGONIAN}, Dec. 23, 1969, at 10; \textit{Stan Federman, Cannon Beach Motel Owner Fights for Right To Fence Off Private Beach for Guests, OREGONIAN}, May 14, 1967, at 25. Immediately to the north of the Surfsand Motel is the 106-foot by 65-foot parcel the Stevenses wish to develop. Interview with Jeanette Stevens, \textit{supra} note 2. The property overlooks Haystack Rock, a famous off-shore landform. \textit{Id.}
\item \textsuperscript{100} \textit{Stevens}, 854 P.2d at 451.
\end{itemize}
Oregon Department of Parks and Recreation for permits to build a seawall in order to develop the lots as a motel.101

Both the city and state, citing reasons based on state law and policy, denied the application.102 The city denied the application, in part, because a portion of the Stevenses' lots fell within the city's Active Dune and Beach Overlay zone.103 That zoning implements the Oregon Land Conservation and Development Commission's (LCDC) Statewide Goal 18.104 Goal 18 limits development on beaches, active foredunes, and other foredunes that are conditionally stable and subject to ocean undercutting or wave overtopping.105

The plaintiffs' lots were also subject to the Oregon Beach Bill, which severely limits the ability of private landowners to develop the dry sand areas.106 Under this law, all of the Oregon coastline belongs to the public, except for certain limited portions.107 The Beach Bill

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101. Id. at 450-51. The couple wants to build a 30-unit motel on the property. Pat Forgey, Justices Hear Challenge to Beach-Access Law, OREGONIAN, Mar. 5, 1993, at F8. They believe the seawall is necessary to protect against winter storm surges. Interview with Jeanette Stevens, supra note 2. Both the Ecola Inn and the Surfsand Motel have protective seawalls. Id. The owners of these properties constructed these seawalls before passage of the Beach Bill. Id. The Stevenses originally began their attempt to build a motel on the property in 1968. Id.

102. Stevens, 854 P.2d at 450.
103. Id. at 451.
104. Id.
105. Id. (quoting CANNON BEACH, OR., ZONING ORDINANCE 79-4A, § 3.180 (1984)). The trial record indicates that the city denied the plaintiffs' application in part because the city found that the eventual proposed commercial use of the property conflicted with the Land Conservation and Development Commission's (LCDC) Goal 18. Id. The city made several findings of fact as to the problems with the proposed use. Id. at 451 n.3. The design of the proposed seawall was not based on findings of a geologic site investigation, as the city's comprehensive plan required. Id. The calculated 100-year velocity flood would overtop the proposed seawall by 4.9 feet, which could result in damage to structures located behind the seawall. Id. Also, "plaintiffs had failed to demonstrate that other higher-priority methods of erosion control (such as maintenance or planting of vegetation) would not be effective" and that therefore the seawall was required. Id.
106. See id. at 451.
107. Id. at 451 n.2 (citing OR. REV. STAT. § 390.615 (1994)).

The Beach Bill provides in part:

(2) The Legislative Assembly recognizes that over the years the public has made frequent and uninterrupted use of the ocean shore and recognizes, further, that where such use has been legally sufficient to create rights or easements in the public through dedication, prescription, grant or otherwise, that it is in the public interest to protect and preserve such public rights or easements as a permanent part of Oregon's recreational resources.

(3) Accordingly, the Legislative Assembly hereby declares that all public rights or easements legally acquired in those lands described in subsection (2) of this section are confirmed and declared vested exclusively in the State of Oregon and shall be held and administered as state recreation areas.

(4) The Legislative Assembly further declares that it is in the public interest to do whatever is necessary to preserve and protect scenic and recreational use of Oregon's ocean shore.

OR. REV. STAT. § 390.610 (1994); see also Timothy Egan, Oregon's Law on Open Coastline Faces Test, N.Y. TIMES, Feb. 21, 1988, § 1, pt. 1, at 25. The open coastline, in part, accounts
requires landowners to obtain state permits to improve the dry sand portion of their properties. The plaintiffs' application to the state agency failed to satisfy a number of criteria for a permit.

The Beach Bill has long been the center of considerable controversy. Commentators regard it as the strongest public beach access law in the country. In contrast to the common notion that the state
controls only that area between the high and low tide mark, the Oregon law extends state control to the vegetation line. The impetus for the Beach Bill was protection of the dry sand beaches as a recreational resource. Among the reasons the state agency gave for denying the plaintiffs' permit under the Beach Bill was concerns about erosion and about protection of the recreational resource.

After the government denied the Stevenses permission to build a seawall on the dry sand portion of their land, the couple brought an inverse condemnation action against the city and state. The plaintiffs claimed that the agencies, in enforcing the zoning ordinance and the Beach Bill to prevent the plaintiffs from building a seawall (and thus, a motel), had perpetrated an unconstitutional taking. The Stevenses also claimed that the city's zoning ordinance and the state's rules implementing Goal were unconstitutional. The trial court, in granting a motion to dismiss, cited State ex rel. Thornton v. Hay, an important 1969 case that upheld the Beach Bill.

The state court of appeals affirmed the decision. It held that while the state owns the foreshore of beach property and the landowner owns the upland, neither owns the full bundle of rights of either

Plaque at State Capitol, Salem, Or. (quoting Tom McCall, Tom McCall: Maverick, an Autobiography with Steve Neal (1982)).

12. See, e.g., Borax Ltd. v. Los Angeles, 296 U.S. 10, 22 (1935) (redefining the boundary of land belonging to the state as extending to the mean high tide line).


14. For the relevant text of the Beach Bill and a discussion of the Bill's origins in the controversy over recreational access, see supra note 99, 107.

15. Stevens, 854 P.2d at 451 n.4; see also supra note 109 (listing the reasons that the state agency gave for denying the permit).


17. Id. at 450-51. The plaintiffs argued that the agency actions constituted a taking of private property for a public purpose. Id. at 451-52. This claim of a regulatory taking was the basis for the inverse condemnation action. Id.

18. Id.

19. 462 P.2d 671 (Or. 1969). In Thornton, the Oregon Supreme Court enjoined landowners from constructing fences or other improvements in the dry sand area seaward of the mean high tide line, on the grounds that the public has rights in the dry sand area contained within the legal description of oceanfront property, and the state has authority to protect those public rights. Id. at 673.

20. Stevens, 854 P.2d at 452-53. After the Stevenses brought their inverse condemnation action, defendants moved to dismiss the complaint. Relying on Thornton, the trial court granted the motion. Id. at 450-51. "The [trial] court explained that defendants' denials took nothing from plaintiffs, because plaintiffs' property interests in the lots never have included development rights that could interfere with the public's use of the dry sand area." Id. at 452-53.

property. The court also held that the newly released *Lucas* decision did not require a different result. The court concluded that, according to *Lucas*, "the issue is to be decided under the 'State's law of property and nuisance.'"

On review by the Oregon Supreme Court, the Stevenses argued that the court of appeals decision conflicted with *Lucas*. They also claimed that the court should not apply the regulation retroactively to them, because the Stevenses acquired their property before the 1969 decision in *Thornton*. The court concluded that even if there was a total taking, under Oregon property law, unrestrained use of the dry sand area did not inhere in the Stevenses' title itself. The court reasoned that the doctrine of custom was "one of 'the restrictions that background principles of the State's law of property... already placed upon land ownership.'" The court then cited *Thornton*'s holding that the general public has enjoyed the dry sand area of Oregon's beaches since the beginning of the state's political history. In conclusion, the court found that under the doctrine of custom, the plain-

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122. *Id.* at 941-42. The appeals court quoted *Thornton*: "'The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his.'" *Id.* at 942 (quoting *Thornton*, 462 P.2d at 678).
123. *Id.* The court of appeals noted that *Lucas* was decided after oral arguments in *Stevens*. *Id.*
124. *Id.*
126. *Id.*
127. See *id.* at 456-57.
128. *Id.* at 453-57.
129. *Id.* at 456-57 (quoting *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992)).
130. *Id.* at 453. The court quoted *Thornton*'s application of the doctrine of custom to hold that the state could prevent such beach enclosures:

"The dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history. The first European settlers on these shores found the aboriginal inhabitants using the foreshore for clam digging and the dry-sand area for their cooking fires. The newcomers continued these customs after statehood. Thus, from the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede. In the Cannon Beach vicinity, state and local officers have policed the dry sand, and municipal sanitary crews have attempted to keep the area reasonably free from man-made litter.

Perhaps one explanation for the evolution of the custom of the public to use the dry-sand area for recreational purposes is that the area could not be used conveniently by its owners for any other purpose. The dry-sand area is unstable in its seaward boundaries, unsafe during winter storms, and for the most part unfit for the construction of permanent structures."

*Id.* at 453-54 (quoting State *ex rel.* *Thornton v. Hay*, 462 P.2d 671, 673-74 (Or. 1969)).
tiffs were on notice when they took title that their bundle of rights did not include exclusive use of the dry sand areas.  

On March 21, 1994, the United States Supreme Court denied the Stevenses' petition for certiorari. In a dissent to the denial, Justice Scalia, joined by Justice O'Connor, accused the Oregon Supreme Court of invoking "nonexistent rules of state substantive law." Justice Scalia was harsh in his appraisal of the Stevens decision. He argued that the decision is one of "questionable constitutionality" because it may involve a "land-grab . . . running the entire length of the Oregon coast." Justice Scalia asserted that it is unclear whether the Stevenses' property, let alone the entire Oregon coast, meets the requirements for the English doctrine of custom. The rest of the Lucas majority voted to deny the petition.

III

DEFINING THE LIMITS OF STATE POWER

A. Stevens: The Fall of a House Built on Sand

Stevens is significant because the Oregon Supreme Court used Lucas to reach a decision that in its practical effect allows just the type of public servitude on private land that Justice Scalia identified in Lucas as unconstitutional. Lucas held that state regulation is limited

131. Id. at 456.
133. Id. at 1334 (Scalia, J., dissenting).
134. Id. at 1335 (Scalia, J., dissenting).
135. Id. (Scalia, J., dissenting).
136. Id. (Scalia, J., dissenting). Justice Scalia questioned the Stevens court's use of the doctrine of custom because recent state court precedent seemed to curtail application of the doctrine. Id. at 1333 (Scalia, J., dissenting) (citing McDonald v. Halvorson, 780 P.2d 714 (Or. 1989)).
137. Id. at 1332. If the Court had granted certiorari in Stevens, it would seem to have had an excellent opportunity to define the contours of the Lucas requirement that a total taking regulation be based in the state's "background law." Indeed, Justice Scalia seized on this issue in his dissent to the denial of the petition, writing that the decisions of the Oregon Supreme Court "reinforce a sense that the court is creating the doctrine [of custom] rather than describing it." Id. at 1335 n.4 (Scalia, J., dissenting). Justice Scalia noted, however, that the factual record regarding the public entry was lacking in Stevens, since the case was decided on a motion to dismiss. Id. at 1335 (Scalia, J., dissenting). Therefore, he wrote, the Court could not evaluate the petitioners' takings claims unless it took the extraordinary step of appointing a master to conduct factual inquiries. Id. (Scalia, J., dissenting). Justice Scalia nonetheless argued for review of the petitioners' claim of a due process violation. Id. at 1335-36 (Scalia, J., dissenting). Justice Scalia stated that if the Court found for the petitioners on this point, "we would not only set right a procedural injustice, but would hasten the clarification of Oregon substantive law that casts a shifting shadow upon federal constitutional rights the length of the State." Id. at 1336 (Scalia, J., dissenting).
by the public's understandings of state power. By applying Lucas' nuisance exception to reach a result inapposite with Justice Scalia's intentions to protect private property rights, the Oregon Supreme Court in Stevens essentially supported Justice Kennedy's argument that states need flexibility to meet new environmental threats. The Stevens decision, in using an obscure common law doctrine to circumvent Lucas' broad policy goals, illustrated five major problems with Lucas' total takings analysis.

140. See id. at 2899. The Supreme Court of Oregon addressed whether the common law doctrine of custom as applied in State ex rel. Thornton v. Hay, 462 P.2d 671, 673-74 (Or. 1969), met the Lucas requirement that total takings be based on the state's background principles of property and nuisance law. Stevens, 854 P.2d at 456. The court held that the requirements of Lucas were satisfied. Id. The court held that the ordinances and administrative rules at issue withstood plaintiffs' facial challenge to their constitutional validity "because 'the proscribed use interests' asserted by plaintiffs were not part of plaintiffs' title to begin with." Id. at 460 (quoting Lucas, 112 S. Ct. at 2899). The court further stated that the ordinances and rules "do not deny to dry sand area owners all economically viable use of their land." Id. Reasoning that the seawall could have been built if plaintiffs had met other unchallenged criteria, the court also denied the Stevenses' claim that state planning goals and local zoning ordinances constituted a taking as applied to their property. Id.

141. See Lucas, 112 S. Ct. at 2900. Justice Scalia writes that a law or decree that prohibits all economically beneficial use of land must do no more than duplicate the result that could have been achieved through two types of court actions. Id. The first is a private nuisance action. Id. The second is an action by a state under its complementary power to abate nuisances that affect the public generally. Id. The result in Stevens is consistent with Lucas' textual requirements, but conflicts with the policy concerns behind Justice Scalia's opinion. See Michael C. Blumm, Property Myths, Judicial Activism, and the Lucas Case, 23 ENVTL. L. 907, 915 (1993) [hereinafter Blumm, Property Myths] ("The Lucas decision... continues Justice Scalia's assault on legislative attempts to change the common law model of public and private rights with respect to land and environmental regulation."); Michael C. Blumm, Remarks at a Colloquium at the Northwestern School of Law of Lewis and Clark College (Sept. 29, 1992), in A Colloquium on Lucas: Panel Discussion, 23 ENVTL. L. 925, 929-30 (1993) [hereinafter Blumm Remarks] (suggesting, in a speech given while the Oregon Supreme Court was deciding Stevens, that Lucas ratifies Oregon's doctrine of custom so long as this doctrine is based on "objectively reasonable application of relevant precedents," as Lucas requires) (quoting Lucas, 112 S. Ct. at 2902 n.18).

Professor Michelman writes that the Supreme Court decisions of the late 1980's can be explained by a reading of the Takings Clause that includes an abstract and decisive rule against all net-redistributive government actions." Michelman, supra note 37, at 1626. "Permanent physical occupation, total abrogation of the right to pass on property, denial of economic viability—all of these may be regarded as judicial devices for putting some kind of stop to the denaturalization and disintegration of property." Id. at 1628.

142. See supra notes 86-91 and accompanying text.

143. See Stevens, 854 P.2d at 454, 456. The Oregon Supreme Court claimed that a public right to use the dry sand area of beaches is a background principle of Oregon property law, as required by Lucas. Id. at 456. The court acknowledged that the doctrine of custom was not enunciated until the decision in Thornton, 462 P.2d 671. See Stevens, 854 P.2d at 452 & n.9, 453-54. The court stated, however, that the state has claimed a public right to use the dry sand area of beaches for more than 80 years. Id. at 456. The court therefore may have based its rationale for protecting the public right more on Justice Kennedy's notion of landowner expectations than on Justice Scalia's notion of background principles of state property law.
1. Deemphasizing the Conflict Between Private and Public Interests

The first problem Stevens illustrates is that courts may misuse the Lucas nuisance exception to evade a rigorous takings analysis. The result is to circumvent the Supreme Court’s efforts to protect landowner interests by scrutinizing government motives. Lucas is flawed because, instead of forcing courts to confront the conflict between public and private interests, as would be required under Keystone Bituminous Coal Ass’n v. DeBenedictis, it allows state courts to employ often hazy doctrines of common law nuisance to decide whether there was a taking of all economic value.

The Oregon Supreme Court in Stevens complied with the technical requirements of Lucas by relying on the Oregon common law doctrine of custom. The court, however, reached a result contrary to Lucas’ aim of restraining state regulatory action. Moreover, it did so without ever examining the state and private interests at stake. The Oregon court never examined the legislative rationale, nor the importance of that rationale, for protecting public access to the dry sand beaches. Instead, the court truncated its inquiry, which it could permissibly do under Lucas.

144. The result in Stevens may contradict Justice Scalia’s statement in Lucas that the fact that similarly situated landowners have long engaged in a particular use indicates the lack of any common law prohibition. See Lucas, 112 S. Ct. at 2901. The Stevens’ property is located immediately to the north of two motels with seawalls. Interview with Jeanette Stevens, supra note 2. According to the Stevenses, following passage of the Beach Act in 1967, the state permitted motel construction on the dry sand area at two other coastal locations. Petition for Writ of Certiorari at 25, Stevens v. City of Cannon Beach (Sept. 25, 1993) (No. 93-496). They also claim that in 1992, the state allowed construction of a restaurant on the dry sand area of Lincoln Beach. Id.

145. See supra notes 45-68 and accompanying text.

146. See Lucas, 112 S. Ct. at 2900-01 (applying the Lucas rule to hypothetical factual scenarios). Professor Fisher writes that states can also circumvent Lucas, which only applies to total takings, by enacting severe restrictions on land use and then simply enumerating the activities in which the affected landowners may still participate. Fisher, supra note 80, at 1409. In Lucas itself, the South Carolina Legislature could have avoided the total takings bar by including in its regulation a provision assuring owners of beachfront lots that they could still “picnic, swim, camp, or live on their property in a movable trailer.” Id. (citing Lucas, 112 S. Ct. at 2909 (Blackmun, J., dissenting)).

147. Stevens, 854 P.2d at 453-56.

148. See Lucas, 112 S. Ct. at 2899 (“Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the prescribed use interests were not part of his title to begin with.”); see also discussion infra note 162.

149. See Stevens, 854 P.2d at 453-54 (discussing the origin of the Beach Bill and dry sand protections without discussing the character of governmental action, which is part of the Penn Central test); see also supra text accompanying note 50.

150. The court cited Thornton’s application of the doctrine of custom, but did not reexamine that case’s holding 24 years prior to Stevens that the Beach Bill is constitutional. Stevens, 854 P.2d at 454 (citing State ex rel. Thornton v. Hay, 462 P.2d 671, 673 (Or. 1969)).
2. Malleability of Common Law Doctrines

The second problem Stevens illustrates with Lucas is that courts may easily contrive means to fit state common law doctrines within the nuisance exception. Besides being vague, common law nuisance doctrine continues to evolve. Other common law doctrines are equally adaptable. The Stevens court, in applying the Lucas nuisance exception, relied on Oregon's doctrine of custom. However, it is questionable whether the custom doctrine legitimately applies to statewide beach access. In Stevens, the Oregon Supreme Court cited its first use of the doctrine of custom, in 1969, in State ex rel. Thornton v. Hay. The doctrine, however, is of questionable lineage in the state, especially since the court in Thornton indicated that it was employing the doctrine out of convenience. That the Oregon Supreme Court could base its holding on such a tenuous doctrine illustrates the malleability of such common law doctrines.

3. Federalization of State Property Law

The third problem Stevens illustrates is the Lucas Court's lack of respect for state court decisions regarding state property law. Justice Scalia suggests that the Supreme Court will review state court applications of state common law to ensure that they are "objectively reason-
Justice Scalia’s view essentially provides a means for trumping state substantive law decisions on the basis of protecting procedural rights. However, the Court can only maintain its focus on nuisance law in total takings analysis as required by *Lucas* through challenges to state court interpretations of state real property law, which would in effect create a federal "law of property." Under this approach, if the U.S. Supreme Court had granted certiorari in *Stevens*, it could have prevented the Oregon Supreme Court from circumventing *Lucas*. Justice Scalia advocated review of *Stevens*. Such action would have excessively encroached on the state court’s prerogative to determine state property and nuisance law. Even Justice Scalia agrees that: "As a general matter, the Constitution leaves the law of real property to the States." Justice Kennedy’s more deferential approach is preferable.

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155. See *Lucas*, 112 S. Ct. at 2902 n.18.
157. Blumm, Property Myths, supra note 141, at 914-15. Professor Blumm writes that Justice Scalia in *Lucas* "appears to promise Supreme Court review of state court interpretations of state nuisance law to ascertain whether they constitute ‘objectively reasonable application[s] of relevant precedents.’ ” Id. (quoting *Lucas*, 112 S. Ct. at 2902 n.18). Justice Scalia implies that the Court will strike down decisions from the highest state courts that do not satisfactorily apply state property law precedent. Id. This may result, professor Blumm argues, in Supreme Court interpretations of state property law that ignore the highest state court’s most recent interpretation of that law, resulting in development of a separate federal law of property. Id. However, Justice Scalia acknowledged in *Lucas* that the emphasis on background nuisance principles would grant courts "some leeway" in interpreting what existing state law permits. *Lucas*, 112 S. Ct. at 2902 n.18.
158. See discussion supra note 137.
159. See *Stevens*, 114 S. Ct. 1332 (cert. denied) (Scalia, J., dissenting). Justice Scalia wrote that the *Lucas* opinion would be a nullity if anything that a state court chooses to denominate "background law" could eliminate property rights. Id. (Scalia, J., dissenting). "No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation.” Id. (Scalia, J., dissenting) (citing Webb’s Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980)). Richard Lazarus suggests that Justice Scalia singles out state court takings decisions for greater scrutiny because he assumes state courts are intruding on "essential uses" of land by preventing development. Richard J. Lazarus, Putting the Correct “Spin” on *Lucas*, 45 STAN. L. REV. 1411, 1424-25 (1993).
161. Justice Kennedy, in his *Lucas* concurrence, argues for more deference to state determinations of whether a governmental regulation accords with reasonable landowner expectations. *Lucas*, 112 S. Ct. at 2903 (Kennedy, J., concurring). Professor Lazarus writes that the Court in *Lucas* displayed no appreciation of the factors that led South Carolina to conclude that the physical characteristics of Lucas’ land made it the wrong place for the construction of a house. Lazarus, supra note 159, at 1421-22. He writes that Justice Kennedy, as a Californian, displays a far better insight into the physical characteristics of land. Id. at 1423. California courts have historically been particularly responsive to environmental concerns, possibly because of the state’s repeated losses of life and destruction of property due to earthquakes, mudslides, floods, and fires. Id. Professor Lazarus suggests that similar awareness prompted South Carolina, a state not known for regulatory excess, to enact the restrictions that Lucas challenged. *Id.* The South Carolina Supreme Court, un-
The fourth problem Stevens illustrates is that Lucas will constrain effective legislative decisionmaking by injecting more uncertainty into the question of what constitutes a compensable taking. Justice Stevens expressed fear that the majority's categorical approach would hamper the efforts of local officials and planners who must deal with increasingly complex problems in land use and environmental regulations. After Lucas, state legislatures must interpret both state and federal law to determine whether regulations will result in total takings or whether they will be authorized by ancient doctrines of state common law.

There are many sources of doubt for legislatures. Perhaps the most important source of legislative doubt is the vagueness of nuisance doctrine. Another source is the difficulty of determining what factors to consider in deciding whether a total deprivation occurs. A further source of doubt is the majority's emphasis on the public's historic understanding of their property rights, which is dif-

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162. The uncertainty inherent in the nuisance exception, professor Sax writes, may actually support the majority's purpose. Joseph L. Sax, Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433 (1993). He writes that the majority may have designed the seemingly odd ruling to isolate those regulations that the Court wants to illegitimate, without jeopardizing mainstream regulations. Id. at 1440-41. Lucas' nuisance exception illustrates this, since traditional nuisance law did not characterize property as having inherent public attributes that always trump the landowner's rights. Id. at 1441.

163. Lucas, 112 S. Ct. at 2922 (Stevens, J., dissenting).

164. See supra note 151 and accompanying text.

165. See Lucas, 112 S. Ct. at 2919 (Stevens, J., dissenting). Justice Stevens questions whether the uses left to Lucas were truly "valueless." Id. at 2919 n.3 (Stevens, J., dissenting). To Justice Stevens, this highlights a fundamental weakness in the Court's analysis: its failure to explain the emphasis on economically productive uses. Id. (Stevens, J., dissenting). "[A] regulation arbitrarily prohibiting an owner from continuing to use her property for bird-watching or sunbathing might constitute a taking under some circumstances . . . ," Justice Stevens writes. Id. (Stevens, J., dissenting). "Yet the Court offers no basis for its assumption that the only uses of property cognizable under the Constitution are developmental uses." Id. (Stevens, J., dissenting).

166. Justice Scalia writes in Lucas that 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" have traditionally guided takings jurisprudence. Id. at 2899-900.
ficult to establish. The high cost of wrong interpretations will dissuade the government from using innovative approaches to mitigate threats to public health and the environment. As Justice Stevens argued, the result will also be economically inefficient: developers will overinvest, safe in the knowledge that if the law changes adversely, they will be entitled to compensation.

5. Chaotic Variability of Post-Lucas Federal Constitutional Law

The final problem Stevens illustrates is that Lucas will inject inconsistent results into takings claims. Because Lucas left the question of when a regulation becomes a taking to the inconsistent property and nuisance laws of the fifty states, the meaning of the Takings Clause will vary from state to state and within each state. Not every state has recourse to common law doctrines such as custom in order to protect and enhance public access to public lands. Thus, for example, California cannot effectively restrict dry sand development through regulation to the extent that Oregon has merely because California state courts have never applied the doctrine of custom to its shores. Defining the Takings Clause according to state law also means that the Supreme Court will be powerless to strike down some extreme restrictions on land use. No matter how egregious a regulation may be, the Lucas majority cannot condemn the action as an unconst-

167. See Fisher, supra note 80, at 1400-01 (discussing the difficulties of ascertaining divergent and changing public perceptions of property rights).
168. "As this case—in which the claims of an individual property owner exceed $1 million—well demonstrates, these officials face both substantial uncertainty because of the ad hoc nature of takings law and unacceptable penalties if they guess incorrectly about that law." Lucas, 112 S. Ct. at 2922 (Stevens, J., dissenting).
169. See id. at 2903 (Kennedy, J., concurring).
170. Id. at 2919-20 (Stevens, J., dissenting).
171. See id. at 2899-900.
172. See Blumm, Property Myths, supra note 141, at 914 & n.44; Fisher, supra note 80, at 1401-04 (arguing that Lucas will lead to arbitrary and surprising outcomes in state court takings decisions). Justice Scalia, in professor Blumm's view, anticipated the problems of inconsistent state adjudication on takings in his last footnote in Lucas. Blumm, Property Myths, supra note 141, at 914. In that footnote, he wrote: "We stress that an affirmative decree eliminating all economically beneficial uses may be defended [by the state] only if an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances which the land is presently found." Lucas, 112 S. Ct. at 2902 n.18. Blumm writes that this indicates that the Court is willing to review state court interpretations of state nuisance law to determine whether they constitute "objectively reason-
able application[s]." Blumm, Property Myths, supra note 141, at 914. This, Blumm writes, would result in a federal law of property, "another surprising result from a purportedly conservative Court." Id. at 915.
174. See Blumm, Property Myths, supra note 141, at 914 n.44 (noting that Oregon is unusual among states in recognizing the public's customary right to use ocean beaches).
tutional taking as long as it has some grounding in state property or nuisance law.\textsuperscript{175} The only alternative for the Court is to intrude further on state court interpretations of common law property rights. Thus, the Court will have two choices. It can either allow inconsistent state court decisions to rewrite the essential nature of the Court's takings analysis, or it can constantly impose its own interpretations of state common law so as to create a federal law of property.\textsuperscript{176}

B. Stevens and the Property Perspective

Property rights advocates would perhaps argue that Stevens is a mere anomaly that the Supreme Court would have overturned had the case reached the Court with a proper factual record.\textsuperscript{177} In fact, Justice Scalia, the author of the majority opinion in Lucas and the Court's staunchest property rights advocate, dissented to the Court's decision not to review Stevens.\textsuperscript{178} Moreover, such advocates would likely applaud Lucas' restrictive effect,\textsuperscript{179} accomplished through the injection of uncertainty into environmental regulation, as better than no restriction at all. They might also believe that the threat of state creation of common law doctrines for the nuisance exception is overstated.\textsuperscript{180} For example, while the doctrine of custom may have provided the Oregon Supreme Court with a convenient way to dispose of

\textsuperscript{175} See Lucas, 112 S. Ct. at 2899; see also Blumm Remarks, supra note 141, at 929-30 (arguing that under Lucas the Supreme Court must accept Oregon's use of the doctrine of custom).

\textsuperscript{176} See supra part III.A.3.

\textsuperscript{177} See supra note 137.

\textsuperscript{178} Stevens v. City of Cannon Beach, 114 S. Ct. 1332, 1332 (1994) (cert. denied) (Scalia, J., dissenting) (arguing that the Court should review Stevens).

\textsuperscript{179} See Taking Cover: The Supreme Court Suggests—Obliquely—that Even Partial Government Takings May Require Compensation, CAL. LAW., Jan. 1993, at 32 [hereinafter Taking Cover] (interview with Michael Berger and Joseph Sax). Berger agreed with Sax that the Court may be trying to chill the zeal of regulators indirectly rather than actually deciding questions of law. Id. Berger expressed frustration, however, with the Court's indirect method, saying it will only lead to more litigation. Id.

\textsuperscript{180} The Oregon Legislature, when it passed the Beach Bill, was reacting to a changing public interest. See Stan Federman, Fight Rages Over Access to Beach, SUNDAY OREGONIAN, May 7, 1967, at 1, 20.

The public has had access to much of this southern coastal land for years and has used its beaches. But California developers are moving into the area, the value of the land has skyrocketed recently and major commercial developments are on their way. When they come, the public may well lose the right to use these beaches forever.

\textsuperscript{Id.} at 1. The Oregon Legislature was trying to remedy this problem of overdevelopment by preventing landowners from building on the dry sand area of state beaches. Id.
the Stevenses' claims, the doctrine's usefulness in other circumstances is unclear.

C. Summary

Despite the potential weaknesses of the Stevens holding, the doctrine of custom as used by the Oregon Supreme Court illustrates the inconsistencies and problems that Lucas has produced. Because of these problems, Lucas is ultimately a weak limit on state regulatory power. It will foster unpredictable and inconsistent decisions as state courts adjudicate takings claims based on their states' individual background principles of property and nuisance law. Lucas thus

181. The court in Thornton chose to apply the doctrine of custom, rather than other legal rules, to uphold the public right of access. See State ex rel. Thornton v. Hay, 462 P.2d 671, 676 (Or. 1969). The Thornton court rejected the doctrine of implied dedication, reasoning that it would not work to uphold the public rights because of the difficulty of establishing the landowner's intent. Id. at 675. Similarly, the court found that relying on prescription was unworkable because it applied only to the specific tract of land before the court, and "doubtful prescription cases could fill the courts for years with tract-by-tract litigation." Id. at 676. An established custom, in contrast, was advantageous because custom "can be proven with reference to a larger region," without regard to the public's use of the particular property at issue. Id.

182. See Alice G. Carmichael, Comment, Sunbathers Versus Property Owners: Public Access to North Carolina Beaches, 64 N.C. L. Rev. 159, 173-75 (1985) (asserting that most American jurisdictions have refused to recognize customary rights in beach property). But see Gilbert L. Finnell, Jr., Public Access to Coastal Public Property: Judicial Theories and the Taking Issue, 67 N.C. L. Rev. 627, 638 n.93 (1991) (arguing that while courts in this country have not uniformly accepted the doctrine of custom, "custom, as well as the public trust doctrine, could (and indeed should) emerge as viable theories for guaranteeing public access to North Carolina's beaches").

183. Thornton, the best known American custom case, has influenced those jurisdictions that have embraced custom. Finnell, supra, at 637-40 (discussing Thornton, 462 P.2d 671); see United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769, 773 (D. V.I. 1974), aff'd mem., 529 F.2d 513 (3d Cir. 1975) (citing Thornton in applying custom to uphold a Virgin Islands law prohibiting obstructions on beaches); see also City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 78 (Fla. 1974) (holding that the general public may continue to use a dry sand area for recreational activities, not because they have any interest in the land itself, but because of the right gained by custom); Arrington v. Mattox, 767 S.W.2d 957 (Tex. Ct. App. 1989) (holding that the public had acquired a right of use of an easement by prescription, dedication, and custom across and over a homeowner's property).

184. Professor Lazarus argues that the decision in Lucas will ultimately lead to further curtailing of landowner rights. Lazarus, supra note 159, at 1425-26. The reason for this, he argues, is that state courts will rarely find that the factual situations in takings cases constitute a total taking. Id. at 1427. Because environmental protection laws almost never result in total economic deprivations, he argues, Lucas' categorical rule will almost never apply. Id. This will create a negative implication that will dominate the lower courts' takings analysis, leading the courts to the opposite presumption that no taking occurred. Id.

185. See Blumm, Property Myths, supra note 141, at 914-15. Lucas' impact, Lazarus writes, may ultimately turn on the lower courts' willingness to accept the majority's invitation to scrutinize state court property and tort rulings to determine whether the relevant precedents support them. Lazarus, supra note 159, at 1430.
transforms total takings jurisprudence from ad hoc, fact-based inquiries into a tangled trap of state-by-state constitutional lawmaking.186

IV

AFTER STEVENS: REEXAMINING THE LUCAS APPROACH

A. Freezing the Flow of Environmental Regulation

The dispute in Lucas revolves around conflicting conceptions of property and of property owners' rights.187 The Court justified its holding, in part, by stating that regulations resulting in a total taking carry a heightened risk that government is pressing private property into public service.188 Justice Stevens expressed the view, however, that new understandings of environmental matters, such as the importance of wetlands and the vulnerability of coastal lands, require evolving definitions of property rights.189

186. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2910, 2914 (1992) (Blackmun, J., dissenting) (arguing that the majority's reliance on common law nuisance will not lead to principled decisionmaking). The nuisance exception gives courts room to apply reasoning deferential to the government's regulatory powers, and thereby to challenge Justice Scalia's warning that the Court will review such determinations to ensure they are "objectively reasonable" applications of state law. See id. at 2902 n.18. One commentator concluded a law review article by encouraging Great Lakes state courts to challenge Justice Scalia's warning and thus "alert the United States Supreme Court that this exception needs to be reconsidered." Jan G. Laitos, The Takings Clause in America's Industrial States After Lucas, 24 U. TOL. L. REV. 281, 317 (1993).

Professor Lazarus writes that the Lucas majority's intimations that judge-made common law, and not legislative or regulatory enactment, must supply the background principles of property law will probably not survive future review. See Lazarus, supra note 159, at 1426. He notes that three of the four Justices (Justices Kennedy, Blackmun, and Stevens) who did not join the majority opinion explicitly criticized this aspect of the holding. Id. (citing Lucas, 112 S. Ct. at 2903 (Kennedy, J., concurring), 2916 (Blackmun, J., dissenting), 2921-22 (Stevens, J., dissenting)). He speculated that Justice White's successor, unknown at the time, would not share Justice Scalia's agenda. Id.

187. See Sax, supra note 162, at 1440-42. Professor Sax writes: "The Court correctly perceives that an ecological worldview presents a fundamental challenge to established property rights." Id. at 1439. Sax writes that the "economy of nature" perspective, which views land as consisting of systems defined by their function, not by man-made boundaries, "is emerging as a predominant viewpoint." Id. at 1442-46. Lucas, however, "represents the Court's rejection of pleas to engraft the values of the economy of nature onto traditional notions of the rights of land ownership." Id. at 1446.

On the other hand, professor Lazarus writes that Lucas "likely signals the emergence of a takings analysis that is more receptive to environmental concerns." Lazarus, supra note 159, at 1431. He writes that the Court ultimately acknowledged that the physical interaction among natural resources may justify government restrictions on private property rights and recognized that the nature of permissible restrictions may change under new circumstances. Id.

188. Lucas, 112 S. Ct. at 2894-95.

189. See id. at 2921-22 (Stevens, J., dissenting) (arguing that legislatures must often revise the definition of property and the rights of property owners, as legislatures did in the case of slavery).
Driving the Court's attempt at overhauling takings law seems to be the new-found suspicion that state regulatory actions are often pretexts for wealth redistribution,\textsuperscript{190} which perhaps has led to the prominence of the Takings Clause on the conservative agenda.\textsuperscript{191} According to Justice Scalia, takings analysis generally emphasizes the economic impact of the regulation on the claimant and the extent to which the regulation has interfered with the claimant's distinct, investment-backed expectations.\textsuperscript{192} Justice Scalia believes that without such an analysis, burgeoning governmental regulation will prevent landowners from using their land to generate wealth.\textsuperscript{193} Thus, in order to prevent excessive state regulation of private land, he attempts to limit the burdens imposed on landowners by state and local governments confronted with environmental problems.

\textsuperscript{190} For example, Justice Scalia is concerned that the effect of federal and state statutes preventing landowners from developing private scenic lands, or acquiring such lands for the state, is to impose public servitudes on private land. See \textit{id.} at 2895; Lazarus, supra note 159, at 1413-21 (explaining the attempt by pro-property Justices on the Court to curtail perceived state regulatory excesses burdening private property for environmental protection). Since 1978, Lazarus writes, the Justices' concern about the impact of environmental regulation on private property has often led them to review state court rejections of takings challenges. Lazarus, \textit{supra} note 159, at 1415. Professor Lazarus also notes that the Court in \textit{Lucas} seemed to consider the regulation at issue in \textit{Lucas} no less suspect because it originated in a conservative state like South Carolina, rather than in California, the source of many state court environmental decisions that the Court has viewed with skepticism in recent years. \textit{Id.} at 1417-18 n.41 (citing \textit{Yee v. City of Escondido}, 112 S. Ct. 1522 (1992); \textit{Pennell v. City of San Jose}, 485 U.S. 1 (1988); \textit{Nollan v. California Coastal Comm'n}, 483 U.S. 825 (1987); First English Evangelical Church v. County of Los Angeles, 482 U.S. 304 (1987); \textit{MacDonald, Sommer & Frates v. County of Yolo}, 477 U.S. 340 (1986); \textit{San Diego Gas & Elec. Co. v. City of San Diego}, 450 U.S. 621 (1981); \textit{Agins v. City of Tiburon}, 447 U.S. 255 (1980); \textit{Prune Yard Shopping Ctr. v. Robins}, 447 U.S. 74 (1980)).

\textsuperscript{191} Lazarus, \textit{supra} note 159, at 1415.

\textsuperscript{192} \textit{Lucas}, 112 S. Ct. at 2895 n.8.

\textsuperscript{193} See \textit{id.} at 2894-95 (opposing situations where private land is pressed into public service without compensation). As Justice Scalia states: "[F]or what is the land but the profits thereof[?]" \textit{Id.} at 2894 (quoting 1 \textit{E. Coke, Institutes} ch. 1, § 1 (1st Am. ed. 1812)).

Professor Fisher writes that Justice Scalia has "frequently in his takings opinions intimated that he has little faith that the other branches of government will ordinarily act" in a manner consistent with his view of the proper limits of legitimate governmental action. Fisher, \textit{supra} note 80, at 1408. In Justice Scalia's dissenting opinion in \textit{Pennell v. City of San Jose}, for example, Scalia "contended that local officials, unless policed by the judiciary, will contrive ways 'with relative invisibility and thus relative immunity from normal democratic processes' to transfer wealth from the citizenry at large to social groups they favor, such as 'hardship' tenants and 'senior citizens (no matter how affluent).'." \textit{Id.} (citing \textit{Pennell}, 485 U.S. at 22-23 (Scalia, J., dissenting)) (footnotes omitted). Professor Fisher also notes that Justice Scalia "justified several features of the complex 'nexus' test he announced in \textit{Nollan v. California Coastal Commission} as essential to prevent unscrupulous legislators from 'leveraging' their police powers into powers of expropriation, using imaginative recitations of public purposes to conceal their true intentions." \textit{Id.} at 1409 (citing \textit{Nollan}, 483 U.S. at 837 n.5) (footnotes omitted).
Justice Scalia bluntly stated both his mistrust of state regulatory decisionmaking and his belief in the insufficiency of deference to legislative judgments in a retort to Justice Blackmun. Blackmun argued that the test for requiring compensation is whether the legislature has recited a justification based on nuisance or property law.\textsuperscript{194} Justice Scalia responded that this view amounted "to a test of whether the legislature has a stupid staff," since one could formulate such a justification in virtually every case.\textsuperscript{195}

Accordingly, \textit{Lucas} discourages states from increasing regulatory burdens on landowners by requiring greater scrutiny of these regulations in the state courts.\textsuperscript{196} Justice Scalia seems more concerned with "newly decreed" legislative pronouncements than with past legislative decisions.\textsuperscript{197} To justify a regulatory taking without compensation, the state regulation must be based on limits the state common law already placed on the bundle of rights when the landowner took title.\textsuperscript{198}

However, by limiting state regulations to prohibitions based on common law, \textit{Lucas} freezes takings law into limits imposed by state common law doctrines that matured more than a century ago.\textsuperscript{199} \textit{Lucas} therefore prevents legislatures from employing innovative ap-

\textsuperscript{194} \textit{Lucas}, 112 S. Ct. at 2898 n.12 (citing 112 S. Ct. at 2910-12 (Blackmun, J., dissenting)).

\textsuperscript{195} \textit{Id.} In the future, the Supreme Court will probably review and scrutinize some decisions like \textit{Stevens} in which a state court has upheld a state statute against a takings challenge on the ground that the statute is based on the state's law of property. Fisher, \textit{supra} note 80, at 1407. Justice Scalia writes that in such situations, the Supreme Court would not defer to a determination of this sort unless the state court's decision is based on "an objectively reasonable application of relevant precedents." \textit{Lucas}, 112 S. Ct. at 2902 n.18. This is somewhat in tension with the general approach of federal courts. When construing state law in diversity cases, Fisher writes, federal courts generally presume that a state court knows the law of its own jurisdiction better than a federal court, and certainly better than the United States Supreme Court. Fisher, \textit{supra} note 80, at 1407. Perhaps the result of \textit{Lucas} is an acceptance by the Supreme Court of separate notions of unconstitutional takings from each of the 50 states. See \textit{supra} notes 171-76 and accompanying text (arguing that \textit{Lucas} will lead to a fracturing of takings law). One commentator argues that Justice Scalia's attempt to avoid a "50 points of light" problem would otherwise result in a federal law of property. See Blumm, \textit{Property Myths}, \textit{supra} note 141, at 914-15.

\textsuperscript{196} See \textit{Lucas}, 112 S. Ct. at 2902 n.18. Responding to Justice Blackmun's criticism that the state courts may easily manipulate the background nuisance principles so central to the \textit{Lucas} analysis, Justice Scalia states that courts may only uphold a statute that results in a total taking if an objectively reasonable application of relevant precedents supports the nuisance exception. \textit{Id.} Justice Scalia also states:

[R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

\textit{Id.} at 2894-95.

\textsuperscript{197} See \textit{id.} at 2900 (stating that regulations that prohibit all economically beneficial use of land cannot be newly legislated or decreed).

\textsuperscript{198} \textit{Id.} at 2899.

\textsuperscript{199} \textit{Id.} at 2921 (Stevens, J., dissenting). Sax writes:
proaches to new threats to the environment and public welfare. This
deterrent is particularly troublesome because legislatures, which have
superior fact-finding abilities, can best determine when threats to pub-
lic welfare require innovative solutions. As Justice Stevens argued,
changes in the economy and the environment occur with increasing
frequency and importance. These changes often require legislative
responses that necessarily reshape historical notions of property
rights.

Justice Scalia's view gives states some room to determine which
laws comport with public expectations regarding private land, but
nearly no leeway to determine which laws comport with current public
interests. The state, therefore, can justify regulations by looking

The majority opinion correctly recognizes that a fundamental redefinition of
property was possible in *Lucas*. In this light, *Lucas* represents the Court's rejec-
tion of pleas to engraft the values of the economy of nature onto traditional no-
tions of the rights of land ownership. Justice Scalia assumes that redefinition of
property rights to accommodate ecosystem demands is not possible. The Court
treats claims that land be left in its natural condition as unacceptable impositions
on landowners.

Sax, *supra* note 162, at 1446.

200. *See* Lazarus, *supra* note 159, at 1422 (arguing that the South Carolina Legislature
is better situated to anticipate and meet threats to public welfare than the U.S. Supreme
Court). Justice Kennedy acknowledges the need for deference to state legislatures in his
*Lucas* concurrence by stating that coastal property may present such unique concerns that
the state should be able to go further in regulating its development than the common law


202. *See id.* at 2921-22 (Stevens, J., dissenting). One commentator suggests that *Penn
Central* illustrates how conduct that the public once considered acceptable may later appear
blameworthy to the public. Andrea L. Peterson, *The Takings Clause: In Search of
Underlying Principles, Part II—Takings As Intentional Deprivations of Property Without

Fifty years ago, for example, a law that prohibited the owner of an historically
significant building from destroying the exterior of the building would probably
have been perceived by the public as prohibiting the owner from acting in an
undesirable manner, perhaps, but not a wrongful manner. Today, however, it
may well be that lawmakers in many localities could reasonably believe that their
constituents would consider it wrong to destroy the exterior of an historically sig-
nificant building.

Because judgments of wrongdoing vary over time, what constitutes a taking
also varies over time.

*Id.* at 110-11.

203. Professor Fisher illustrates the problem with Justice Scalia's use of the nuisance
exception with an example:

*Imagine that Wisconsin courts construed that state's nuisance law to prevent,
under certain circumstances, landowners from casting shadows onto solar collec-
tors located on their neighbors' roofs. At the same time, the Minnesota courts
achieved the same result by announcing a new "estate"... consisting of a right,
under certain circumstances, to a continuous flow of light. Imagine further that,
some years later, the legislatures of both states decided that this innovation was
inaudible and declared that, henceforth, landowners shall have no rights to
light. Minnesota landowners adversely affected by the new statute could, under
Justice Scalia's approach, recover damages, while those in Wisconsin could not.

Fisher, *supra* note 80, at 1403-04.
backward to the original understandings of nuisance and property law, but it may not look forward. Thus, the state has no way to preempt future harms that common law principles did not anticipate. Rather than establishing a moderate threshold that recognizes the historical authority of states to define and protect the public interest through regulation, Justice Scalia builds a high wall with many flaws that threaten to undermine it. By contrast, Justice Kennedy in Lucas articulated a broader, more rational, and more effective approach to total takings analysis.

B. Toward a Post-Lucas Takings Jurisprudence

The Supreme Court can best resolve the problems that Stevens has exposed in Lucas’ total takings analysis by compromising between Lucas and typical takings balancing. Justice Scalia’s concern about government wealth distributions, discussed in part IV.A, is a flawed basis for so drastically shifting the regulatory burden from landowners to the general public. It is true, however, that a landowner must not bear a disproportionate burden in meeting environmental threats. The risk of such an unfair burden is greater when there is a depriva-

204. See Lucas, 112 S. Ct. at 2903 (Kennedy, J., concurring).
205. See id. at 2912-14 (Blackmun, J., dissenting). Justice Blackmun wrote that the Court cannot embrace the full implications of a per se rule for total takings. Id. at 2912 (Blackmun, J., dissenting). He questions the wisdom of Justice Scalia’s exception based on common law principles of nuisance. Id. at 2914 (Blackmun, J., dissenting).

Professor Joseph Sax suggests that the reason for the inconsistency is that the conservative Justices cannot put together a majority that would support a more severe restraint on government regulation. Taking Cover, supra note 179, at 32. Professor Sax suggests that the Court in Lucas showed its unwillingness to unravel the whole skein of regulatory government. Id. As a result, the Court is “beating the drum,” saying some things that are supportive of property owners in order to make regulators back off. Id.
206. See Lucas, 112 S. Ct. at 2902-04 (Kennedy, J., concurring).
207. See id. at 2895. See generally Fisher, supra note 80, at 1393-97 (discussing Justice Scalia’s analytical approach). Justice Scalia cites several federal and state statutes authorizing acquisition of lands as “scenic easements” as examples of negative regulation and appropriation. Lucas, 112 S. Ct. at 2895. The implication is that these statutes reflect a tendency in government to use private land to satiate a public appetite for scenic views. Justice Rehnquist expressed a similar attitude in his Penn Central dissent, in which he criticized the New York City law that prohibited the owners of Grand Central Station from constructing a skyscraper on top of their building. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 138 (1978). “The city of New York,” Justice Rehnquist wrote, “because of its unadorned admiration for the design [of the terminal], has decided that owners of the building must preserve it unchanged for the benefit of sightseeing New Yorkers and tourists.” Id. at 146. The conservative Justices seem to forego their typical deference to legislative decisionmaking in the realm of property rights.
208. Richard A. Epstein proposes a stringent application of Lucas: “In order for Justice Scalia’s reasoning to work, it would have to bring many more forms of land use regulation within the Takings Clause, where they could receive the close scrutiny and swift dispatch that many of them so richly deserve.” Epstein, supra note 68, at 1392.
tion of all economic value. As Joseph Sax has noted, when regulation leaves no opportunities for private use, it also does not allow owners to adopt different behavior as an alternative to compensation. Thus, landowners denied all economic value should receive more protection than in typical takings claims.

The test for whether a landowner has been denied all economic value, however, must be more realistic than the *Lucas* standard. The *Lucas* test is aimed primarily at protecting developmental uses of land. But despite Justice Scalia's dictum, land is more than the profits thereof. Thus, true deprivation of all economic value should require a showing that the regulation has effectively erased the landowner's reasonable, investment-backed expectations. The main aspect in which this test should differ from *Lucas* is in consideration of nondevelopmental uses in determining whether a total taking occurred. The test, however, should not include nondevelopmental uses that do not impact the market value of the property at issue.

The best way for the Court to reconcile conflicts between public and private interests in land use is to adopt Justice Kennedy's broader view of governmental authority to meet environmental challenges. Under Kennedy's test, the finding that there has been a total taking "must be considered . . . by reference to the owner's reasonable, investment-backed expectations." Additionally, Justice Kennedy argued that nuisance law is too restrictive and should not be the sole source of state authority to impose severe restrictions. This is because the Court should not prevent states from enacting new regulatory initiatives in response to changing conditions. Justice Kennedy's approach therefore encompasses a far broader understanding of regulatory power than Justice Scalia's nuisance exception allows

209. *See Lucas*, 112 S. Ct. at 2894-95; Sax, *supra* note 162, at 1455 (noting that owners of land deprived of all economic value often bear the heaviest burden of "the new ecological era").
211. *See Lucas*, 112 S. Ct. at 2894-95 (equating the loss of the ability to make a profit with the loss of all economic value).
212. *See supra* note 193 (noting Justice Scalia's characterization of land in *Lucas*).
213. *See Lucas*, 112 S. Ct. 2903 (Kennedy, J., concurring) (arguing that the test for total takings must focus on the landowner's "reasonable, investment-backed expectations"). The contours of the proposed test would have to be developed through resolution of actual controversies.
214. Justice Stevens suggests that uses other than economically beneficial ones are relevant in takings analysis. *Id.* at 2919 n.3 (Stevens, J., dissenting). For example, Justice Stevens states that a regulation arbitrarily prohibiting an owner from continuing to use her property for birdwatching or sunbathing might constitute a taking under some circumstances. *Id.* (Stevens, J., dissenting).
215. *Id.* at 2903 (Kennedy, J., concurring).
216. *Id.* (Kennedy, J., concurring).
217. *Id.* (Kennedy, J., concurring).
and consequently would permit states greater flexibility, even where there is a total taking.\textsuperscript{218} Instead of wrapping the riddle of takings law inside the enigma of state nuisance law, the Court should allow states to confront new problems that do not fit neatly into state property or nuisance law.

Environmental problems, in particular, pose myriad challenges to governmental decisionmaking.\textsuperscript{219} The state’s inability to fund a necessary taking should not prevent the state from protecting the public interest. As constant development pressures squeeze resources, environmental protection may require state sanctions similar to those in the Oregon Beach Bill.\textsuperscript{220} Environmental challenges take many forms\textsuperscript{221} and often require innovative and unproven solutions.\textsuperscript{222} As Justice Kennedy wrote in \textit{Lucas}, unique concerns for a fragile land system should allow the state to go further in regulating land use and development than the common law of nuisance might permit.\textsuperscript{223}

An illustration of how Justice Kennedy’s approach would work involves examining Massachusetts’ response to a serious threat to the public water supply from nonpoint source pollution. The state has proscribed most development within 150 to 200 feet of the state’s rivers and streams.\textsuperscript{224} The private expectations of the affected landowners thus clash with the public’s need for clean water.

Under the \textit{Lucas} test, there is likely no common law basis for finding that Massachusetts’ regulation meets the nuisance exception.\textsuperscript{225} The public’s need for clean water would thus yield to the property owner’s interest in developing her land, unless the state could afford to pay for the taking.\textsuperscript{226} If the state could not afford compensation, it could not protect the public by restricting development. In such situations, the government’s ability to restrict property use by compensating the landowners is entirely theoretical. As a result, the public, not the landowner, would bear all the costs of environmental protection, even though the public need is compelling.

\begin{itemize}
\item \textsuperscript{218} See id. (Kennedy, J., concurring).
\item \textsuperscript{219} See Lazarus, supra note 159, at 1423.
\item \textsuperscript{220} Oregon’s rationale for the Beach Bill would likely have to be more than tourism promotion under Justice Kennedy’s approach to takings, since he believes this rationale is an insufficient reason to deprive specific property of all value without a corresponding duty to compensate. \textit{Lucas}, 112 S. Ct. at 2904 (Kennedy, J., concurring).
\item \textsuperscript{221} Sometimes the threat has been a diseased orchard, see, e.g., Miller v. Schoene, 276 U.S. 272 (1928); sometimes a liquor distillery, see, e.g., Mugler v. Kansas, 123 U.S. 623 (1887); and sometimes a house built on unstable sand, see \textit{Lucas}, 112 S. Ct. at 2896.
\item \textsuperscript{222} See \textit{Lucas}, 112 S. Ct. at 2903-04 (Kennedy, J., concurring).
\item \textsuperscript{223} Id. at 2903 (Kennedy, J., concurring).
\item \textsuperscript{224} Hutchinson, supra note 173, at 237, 238 n.12.
\item \textsuperscript{225} Id. at 266-68.
\item \textsuperscript{226} See \textit{Lucas}, 112 S. Ct. at 2899 (stating the \textit{Lucas} rule); see also \textit{Taking Cover}, supra note 179, at 33-34 (arguing that takings law should hold government accountable for its actions).
\end{itemize}
Under Justice Kennedy's proposed test, reasonable, investment-backed expectations understood in light of "the whole of our legal tradition," which would change according to the economic and environmental conditions of society, would govern the inquiry. Under this view, Massachusetts could limit riverfront development by showing that such regulation accorded with reasonable landowner expectations in light of the water quality problem's changing dimensions. The seriousness of the nonpoint source water pollution threat would justify extensive governmental regulation. Such regulation would most likely not conflict with Justice Kennedy's notion of reasonable landowner expectations.

Abandoning Lucas' attempt to protect property by linking nuisance law with total takings is unlikely to leave landowners unreasonably at risk. There is little proof that state courts and legislatures are arbitrarily or unfairly encroaching on property rights. In fact, the Supreme Court has never had an occasion to decide whether compensation should be paid in cases where the state prohibits all economic use of real estate. Prior to Lucas, the Oregon Supreme

227. Lucas, 112 S. Ct. at 2903. Joseph Sax proposes a similar solution by calling for heightened scrutiny, rather than a per se test, for total takings. Sax, supra note 162, at 1455. He argues that instead of freezing outdated conceptions of property law, as does Lucas, "courts could respond with flexibility to governmental excess and to the pains unfair regulations inflict on landowners." Id.

228. See Hutchinson, supra note 173, at 237-38 (noting that nonpoint source pollution is considered a major contributing factor to continued poor water quality in Massachusetts and describing legislative attempts to ameliorate the problem).

229. Under Justice Kennedy's view the question of whether compensation is appropriate should depend on "objective rules and customs that can be understood as reasonable by all parties involved." Lucas, 112 S. Ct. at 2903 (Kennedy, J., concurring). While this may be somewhat vague, Justice Kennedy's discomfort with the restrictiveness of the Lucas majority's approach indicates he would flesh out his own test in a manner that would recognize the state's power to handle new environmental threats.


231. See Blumm, Property Myths, supra note 141, at 916 ("[D]evelopment rights are well represented in the legislatures and hardly need the protection of the judiciary for their existence."); Lazarus, supra note 159, at 1421 (arguing that attempts to curtail environmental regulation are based on anecdotal occurrences of governmental abuses).

232. See Lucas, 112 S. Ct. at 2904 (Blackmun, J., dissenting). The Court in Lucas, writes Justice Blackmun, "launches a missile to kill a mouse." Id. (Blackmun, J., dissenting). The Court has continuously expanded the reach of the Takings Clause. As Justice Blackmun points out, the drafters of the Takings Clause believed that it proscribed only formal expropriations of private property and did not reach regulations of property. Id. at 2915 (Blackmun, J., dissenting). The Court's more recent takings cases have increased the threat of litigation against the government, leading the Washington Supreme Court to adopt a comprehensive framework to analyze regulatory challenges and mitigate the effect of potential financial liability. Jill M. Teutsch, Taking Issue with Takings: Has the Washington Supreme Court Gone Too Far?, 66 WASH. L. REV. 545, 545-48 (1991) (citing Presbytery of Seattle v. King County, 787 P.2d 907 (Wash. 1990), cert. denied, 111 S. Ct. 284 (1990)). Justice Scalia would possibly even concede that cases of governmental abuse are few, since
Court refused to expand the doctrine of custom where no evidence existed that the public used the land.233

If the Court chooses to maintain greater protection against deprivations of all economic use, it must refine the test as proposed by Justice Kennedy. Stevens calls into question the wisdom of maintaining a separate total takings analysis.234 Indeed, Justice Kennedy's approach would replace the categorical rule and nuisance exception with a single test based upon reasonable expectations.235 Adopting Justice Kennedy's broader notion of state authority and abandoning Justice Scalia's link to common law nuisance would improve the consistency and efficacy of the Court's takings analysis, while still giving heightened protection to landowners deprived of all economic value of their land.

CONCLUSION

Stevens indicates that the sword of Lucas, when wielded against the government by state court plaintiffs, may point backwards.236 At-

in Lucas he cited cases illustrating when state courts have found legislatures pressing private land into public service, but cited no cases in which states have failed to protect private interests. See Lucas, 112 S. Ct. at 2895 (citing Annicelli v. Town of S. Kingstown, 463 A.2d 133, 140-41 (R.I. 1983); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 193 A.2d 232, 240 (N.J. 1963)). Instead, Justice Scalia lists statutes allowing the government to acquire scenic easements as his only examples of states going too far. Id. It is also interesting that the California Supreme Court, which prior to 1987 had fostered the most pro-government takings jurisprudence in the Nation, has not since attempted to take on the Supreme Court. Michael M. Berger, Silence at the Court: The Curious Absence of Regulatory Takings Cases from California Supreme Court Jurisprudence, 26 Loy. L.A. L. Rev. 1133, 1140-43 (1993).

233. McDonald v. Halvorson, 780 P.2d 714, 724 (Or. 1989) (holding that the state was not allowed to regulate plaintiff's tidal property because it was not part of the dry sand area of customary use).

234. See Lucas, 112 S. Ct. at 2910 (Blackmun, J., dissenting) (arguing that pre-Lucas authority provided adequate landowner protection without categorical treatment for total takings). Under the analysis in Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1986), plaintiffs such as those in Lucas and Stevens prevail if they can prove that the harm-preventing benefits of the statute at issue did not justify the character of the governmental action. See Peterson, A Critique, supra note 46, at 1319 (explaining the Keystone analysis). For example, the government would likely lose if a statute conferred minimal benefit on the public while imposing extensive burdens on the landowner.

235. See supra notes 215-18 and accompanying text.

236. See Lazarus, supra note 159, at 1427. Lazarus writes that because environmental protection laws almost never result in total economic deprivations, the categorical presumption in Lucas will almost never apply. Id. He writes: "Instead, the negative implication of the category's nonapplicability will dominate the lower courts' takings analyses. These courts will likely apply the opposite presumption that no taking occurred." Id. Moreover, Epstein writes: "The Supreme Court's inability to understand the role of reasonable expectations in generating entitlements paves the way for the rapid elimination of all perceived entitlements by simply claiming that the enactment of a single government regulation reasonably creates an expectation that further regulations will follow." Epstein, supra note 68, at 1371. He writes that under the Lucas majority's conception of expectations, individual property owners are considered "on notice" about the prospect of new
tempts to vindicate private property rights under *Lucas* will yield inconsistent decisions that will undermine the attractiveness of a separate, *per se* rule for total takings. Alternatively, the federal courts will have to undertake an unprecedented invasion into the traditional state domain of property law. Such a step would greatly hinder state attempts to serve as laboratories of democracy that can invent solutions to our society's myriad problems. In constructing a rigorous test undermined by an unpredictable and unworkable exception, the Supreme Court built *Lucas* on untenable ground.

In recent years, democratic institutions have struggled with the question of who should bear the burden of attempts to improve the quality of the environment. Undoubtedly, private landowners have borne much of this burden. Proponents of an expanded understanding of private property rights have used the courts to stage a rally, and the Takings Clause is their weapon. The result has been an entanglement of notions of limited government with judicial activism on behalf of landowners.

At a time when states are struggling to respond to the legacy of decades of environmental degradation, *Lucas* threatens to bring government innovation to a halt. Governments need flexibility to cope with environmental threats. The Supreme Court's takings analysis will foster more unpredictable, confusing decisions like *Stevens*, thereby burdening the public with the costs of uncertainty. The public as a whole suffers from environmental degradation, and nearly all recognize the basic wisdom of most environmental legislation. Any test protecting landowners from takings of all economic value must contain in its calculus a broad understanding of the government's need to respond to new and growing environmental threats.

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237. *See* Fisher, supra note 80, at 1409-10 (arguing that the nuisance exception in *Lucas* will worsen the vagueness of takings law and render many landowners more vulnerable to severe land use regulation).

238. PerCival et al., supra note 36, at 1.


240. *See* PerCival et al., supra note 36, at 962-63 (arguing that the Supreme Court is encouraging plaintiffs to aggressively press takings claims as environmental regulation expands).

241. *See* supra note 37 and accompanying text.

242. *See* PerCival et al., supra note 36, at 2-3 (describing the wide impact of environmental problems).

243. *See* id. at 3 (noting widespread bipartisan support for environmental regulation in the United States).