The Trouble with *Lucas*

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In *Lucas v. South Carolina Coastal Council*,[1] the Supreme Court held that when government restrictions on the use of a tract of land deprive the owner of all "economically beneficial or productive options for its use,"[2] the government is constitutionally obligated to compensate the owner, unless the regulation does "no more than duplicate the result that could have been achieved . . . under the State's law of private nuisance" or by the State itself using the doctrine of public nuisance.[3] The South Carolina statute at issue in the case prohibited David Lucas from building any permanent habitable structures on two beachfront lots. Relying on the state trial court's finding that the regulation rendered Lucas' parcels "valueless,"[4] the United States Supreme Court ruled that the statute must be deemed to violate the Fifth and Fourteenth Amendments unless the state courts found on remand that "an objectively reasonable application" of South Carolina nuisance law would also proscribe the construction of permanent structures on the property in question.[5]

Most of the commentary on *Lucas* asks whether the decision materially tightens the constraints imposed by the takings doctrine on land-use regulation.[6] This essay addresses a different set of questions: What arguments and attitudes underlie the ruling, and do they make sense?

I. The Character of the Author

Legal scholars as well as lay commentators frequently describe Justice Scalia as the intellectual leader of the conservative wing of the Supreme Court. He is typically portrayed as a brilliant, systematic ideologue. During his career as a law professor, it is commonly asserted or assumed, he developed a detailed and consistent constitutional vision. Since his appointment to the Court, he has attempted to modify a host of constitutional doctrines to

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1. 112 S. Ct. 2886 (1992).
2. *Id.* at 2894-95.
3. *Id.* at 2900.
4. *Id.* at 2890.
5. *Id.* at 2902 n.18 (emphasis omitted).
6. *See, e.g.*, Jemery Paul, *After Dust Settles, Not Much Change in Property Rights*, Legal Times, July 13, 1992, at 17, 20; Daniel J. Popeo & Paul D. Kamenar, *For Regulators, Court's Ruling Spells Trouble*, Legal Times, July 13, 1992, at 17, 21.

conform to that vision. Because the other appointees of Presidents Reagan and Bush often follow Justice Scalia's lead, his efforts have met with increasing success.[7]

An examination of Justice Scalia's "takings" opinions—of which the majority opinion in *Lucas* is the most recent—casts doubt upon the foregoing characterization of his jurisprudence. He surely has a strong set of political inclinations, most of which could be described as libertarian. But those inclinations are not connected to a stable constitutional theory. Instead, Justice Scalia selects from a large and eclectic set of constitutional principles those that best suit his purposes in a given case. If the principles he employs in one case prove inconvenient in the next, he casually abandons them. The result is that, although it is usually easy to predict how he will vote in a constitutional case, it is often difficult to predict how he will justify his vote.

His *Lucas* opinion contains two striking manifestations of this analytical style. The first concerns his overall approach to constitutional interpretation. In several prior opinions and articles, Justice Scalia insisted that constitutional provisions should be construed in light of the "original intent" of the persons who drafted and ratified them.[8] In his dissenting opinion in *Lucas*, Justice Blackmun points out that the drafters of the Takings Clause believed that it proscribed only formal expropriations of private property, and that its reach "did not extend to regulations of property, whatever the effect" of those regulations on the value of the property.[9] In his majority opinion, Justice Scalia agrees with this characterization of the clause's original meaning but proclaims it "entirely irrelevant."[10]

Justice Scalia offers two arguments in support of his remarkable assertion. First, he contends that, prior to 1897, when the Supreme Court "incorporated" into the Fourteenth Amendment's Due Process Clause the Fifth Amendment's ban on uncompensated takings,[11] "[t]he practices of the States . . . were out of accord with *any* plausible interpretation of those provisions."[12] From this he apparently concludes that the Framers' intent in drafting those provisions does not merit our deference. Second, he contends that fidelity to the original understanding of the Takings Clause would require us to "renounce" virtually the entire body of twentieth century constitutional doctrine construing the provision. He concludes by noting that even Justice Blackmun does not propose such a radical course.[13] In the end, Justice Scalia falls back upon a generous version of a textualist theory of

7. *See, e.g.*, J.M. Balkin, *What is a Postmodern Constitutionalism?*, 90 MICH. L. REV. 1966 (1992).

8. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527, 528-29 (1989) (Scalia, J., concurring); Blanchard v. Bergeron, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

9. 112 S. Ct. at 2915 (Blackmun, J., dissenting).

10. *Id.* at 2900 n.15.

11. *See* Chicago, B. & Q. R. v. City of Chicago, 166 U.S. 226 (1897).

12. *Lucas*, 112 S. Ct. at 2900 n.15.

13. *Id.*

interpretation: Because "the text of the Clause *can* be read to encompass regulatory as well as physical deprivations," the Court is not disabled from doing so.[14] Whatever one thinks of these arguments, they plainly diverge from the originalist theory to which he formerly pledged his allegiance.

The second illustration of Justice Scalia's cavalier use of constitutional principles involves the concept of fault. To understand his maneuvers, one needs a bit of doctrinal background. For many years, the Supreme Court consistently ruled that when a state forbids an owner to use his property in a way that would be harmful or "noxious" to neighbors or to the public, the state is not obliged to indemnify the owner. For example, in *Miller v. Schoene*,[15] the Court upheld on the basis of this doctrine a Virginia statute that required the owner of ornamental cedar trees to cut them down because they produced cedar rust that endangered apple trees in the vicinity.[16] In *Penn Central Transportation Co. v. New York City*,[17] the court appeared to eschew this mode of analysis, perhaps due to commentators' sharp criticisms. Writing for the Court, Justice Brennan argued that, properly construed, *Miller* and cases like it involve

> no "blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induce[d society] to shift the cost to any pa[rt]icular individual." These cases are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property.[18]

Subsequently, however, the Court retreated from this stance of causal agnosticism and began once again to distinguish between "noxious" and "innocent" uses of private property when assessing constitutional challenges to regulations that proscribe them.[19]

One might have expected Justice Scalia to try to bring some order—or at least consistency—to this field. Instead, he has exacerbated the confusion. In his early opinions dealing with the takings doctrine, he argued that the blameworthiness of the landowners adversely affected by a regulation is crucial in determining whether the regulation comports with the Constitution. For example, in his dissenting opinion in *Pennell v. City of San Jose*,[20] he argued that, if "there is a cause-and-effect relationship between the property use restricted by [a] regulation and the social evil that the regulation seeks to

14. *Id.* (emphasis added).

15. 276 U.S. 272 (1928).

16. *Id.* at 279-80. Similarly, in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), the Court used this theory to uphold a city ordinance banning excavations below the level of the water table, even though the ordinance effectively forced the petitioner to close down his sand and gravel business.

17. 438 U.S. 104 (1978).

18. *Id.* at 134 n.30 (quoting Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 50 (1964)) (alterations in original except for final ellipsis) (citation omitted).

19. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 489-92 (1987).

20. 485 U.S. 1 (1988).

remedy," the government may impose the regulation without compensating the owner.[21] "Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly."[22] By contrast, if the property owners targeted by a regulation cannot fairly be said to have caused the social problem the regulation addresses, then the regulation should be deemed unconstitutional. Applying the latter principle, he contended that, because landlords who rent apartments to poor tenants are no more to blame for their poverty than "the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages," a city should not be permitted to impose especially sharp rent control restrictions on apartments occupied by poor tenants.[23]

In *Lucas*, Justice Scalia adopts a fundamentally different posture toward the issues of causation and fault. In passing the coastal regulation, the South Carolina General Assembly had found that construction of homes near the beach was a noxious use of the property in question, insofar as it " 'jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property.' "[24] The state supreme court ruled that a statute proscribing an activity that causes such injuries does not violate the Constitution. Justice Scalia responds to this line of argument as follows:

> [T]he distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder. . . . Whether one or the other of the competing characterizations will come to one's lips in a particular case depends primarily upon one's evaluation of the worth of competing uses of real estate . . . . A given restraint will be seen as mitigating "harm" to the adjacent parcels or securing a "benefit" for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors. "[T]he problem [in this area] is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses."[25]

If confronted with the tension between the foregoing language and the analysis he proffered in *Pennell*, Justice Scalia might respond: The cases simply deal with different issues. When a court is confronted with a regulation that reduces but does not eliminate altogether the economic value of a piece of property, it should ask whether the regulation seeks to prevent a "harm" for which the adversely affected owner is responsible. When confronted with a regulation that leaves a property owner without any "economically beneficial or productive use," the court should bypass that inquiry. But the problem cannot be solved so easily. Justice Scalia has not offered any reason why the "fault" of the owner should be relevant in one

21. *Id.* at 20 (Scalia, J., concurring in part and dissenting in part).

22. *Id.* (Scalia, J., concurring in part and dissenting in part).

23. *Id.* at 21 (Scalia, J., concurring in part and dissenting in part).

24. *Lucas*, 112 S. Ct. 2886, 2906 (Blackmun, J., dissenting) (quoting S.C. CODE ANN. § 48-39-250(4) (Law. Co-op. Supp. 1991)).

25. *Id.* at 2897-98 (quoting Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 49 (1964)) (citation omitted).

context and not the other. More seriously, the burden of his remarks in *Lucas* is that the kind of question he asked in *Pennell* rests upon a naive understanding of the sources of social ills.

Why should we be concerned when a Supreme Court justice vacillates (or perhaps simply changes his mind) on issues of this sort? Of the several available reasons, one is particularly relevant to the topics explored in the remainder of this essay.[26] Uncertainty regarding the premises of an argument is often correlated with confusion or ambiguity regarding its details and implications. As will be seen, the majority opinion in *Lucas* is rife with confusion and ambiguity. Although the source of those problems is uncertain, one possibility is that Justice Scalia has not adequately thought through the foundations of his constitutional theory.

II. PUBLIC PERCEPTIONS

Partly because of its novelty and partly because of its importance, one aspect of *Lucas*' rationale stands out: The judiciary should strike down regulations that deprive landowners of all economically beneficial use of their property (unless those regulations mimic extant nuisance doctrine) simply because the public "expects" such protection:

> [O]ur "takings" jurisprudence . . . has traditionally been guided by 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. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers. . . . In the case of land, however, we think the notion . . . that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.[27]

The most obvious question provoked by this unusual rationale is *why* should the Supreme Court's interpretation of the Fifth and Fourteenth Amendments track "the understandings of our citizens"? In an earlier essay, I considered various possible reasons for attending to public perceptions when construing the Takings Clause,[28] two of which might underlie the Court's decision. First, Justice Scalia and the four justices who joined his opinion might recognize and wish to avoid the substantial social costs of judicial rulings inconsistent with widespread popular expectations. These include the costs associated with the discomfort and outrage people experience from witnessing what they perceive as injustice, as well as the "search

26. Other reasons are explored in William W. Fisher III, *The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights, in* A CULTURE OF RIGHTS 266, 319-65 (Michael J. Lacey & Knud Haakonssen eds., 1991).

27. *Lucas*, 112 S. Ct. at 2899-2900.

28. *See* William W. Fisher III, *The Significance of Public Perceptions of the Takings Doctrine*, 88 COLUM. L. REV. 1774 (1988).

costs" that result from undermining the public's faith that the law comports with their sense of justice.[29] Such a concern would be reasonable if the justices subscribed to a utilitarian theory of constitutional interpretation—in other words, if they were committed to defining and applying the takings doctrine so as to force the government to behave in the fashion that maximized allocative efficiency.[30] But if the justices adopted such a perspective, they would have to take into account several considerations in addition to public perceptions—such as the costs of measuring the injuries inflicted on landowners by a challenged statute and the impact upon future investment caused by leaving the "victims" of the statute uncompensated.[31] Neither the majority opinion in *Lucas* nor any of the Court's other opinions mention such considerations. Thus, it seems unlikely that the invocation of public perceptions is a sign that the Court is turning toward a utilitarian theory of the takings doctrine.

A second possible explanation for the focus on popular "understandings" is that Justice Scalia has been influenced by Margaret Jane Radin's repeated exhortations that the Supreme Court recognize that people constitute and identify themselves partly through association and interaction with certain forms of property, and that governmental interference with or confiscation of those objects can be traumatic and disorienting.[32] Under this theory, public perceptions would be relevant because, presumably, most people would be especially hostile to governmental activities that interfered with forms of ownership most central to their "personhood."[33] The plausibility of this interpretation quickly dissipates, however, when one considers how Justice Scalia applies his argument. The owners of "personal property," he insists, should expect and accept extensive governmental control of their possessions, including regulations that render their possessions "economically worthless."[34] By contrast, the owners of land—and Justice Scalia seems to have in mind here principally land held for speculative purposes—can expect greater protections from governmental interference.[35] This is nearly the opposite of Radin's doctrinal pattern. Moreover, the decision in *Lucas* requires that the government compensate the property owner when it crosses the con-

29. For a discussion of these costs and the theories that underlie them, see *id.* at 1779-80.

30. For detailed presentations and defenses of such a theory, see BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 41-70 (1977); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1215-24 (1967).

31. For divergent analyses of these and other economic considerations, see, for example, William A. Fischel, *Exploring the Kozinski Paradox: Why Is More Efficient Regulation a Taking of Property?,* 67 CHI.-KENT L. REV. 865 (1991); Louis Kaplow, *An Economic Analysis of Legal Transitions,* 99 HARV. L. REV. 509 (1986); Michelman, *supra* note 30, at 1245-58; Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman,* 88 COLUM. L. REV. 1697 (1988).

32. *See* Margaret Jane Radin, *Property and Personhood,* 34 STAN. L. REV. 957 (1982).

33. Fidelity to Radin's theory would require modification of this generalization to take into account the phenomena of false consciousness and commodity fetishism. *Id.* at 965-70. But, for the reasons indicated below, that level of refinement would do little to help us understand Justice Scalia's analysis.

34. *Lucas,* 112 S. Ct. at 2899.

35. *Id.* at 2899-2900.

stitutional boundary, whereas Radin would shield the owner's possessory interest in the property. In short, Justice Scalia's argument does not seem to be founded on a personhood theory.

What else might explain the sensitivity to public perceptions evident in the *Lucas* opinion? In a recent comment on the case, Frank Michelman suggests that this sensitivity is grounded in a desire to "maintain[ ] the legitimacy of constitutional law in [an] empirical, sociological sense. [The Court's] members doubtless feel some responsibility for adjudicating in ways conducive to sustained public confidence in the lawful and constitutional character of governance in the United States . . . ."[36] Michelman contends that the justices may be concerned that an interpretation of the Takings Clause inconsistent with the public's expectations would undermine popular faith in the rule of law. As Michelman acknowledges, there are some puzzles and worries associated with this view.[37] For one thing, it would seem to require the Court to renounce at least some of its supposed anti-majoritarian responsibilities. Imagine, for example, that the large majority of Americans believed that it would be neither improper nor unconstitutional for the federal government to expropriate the property of neo-Nazi groups without compensating the owners thereof. Should the Supreme Court uphold a statute that authorized such a taking? Would doing so enhance or erode public confidence in our system of government? But, such difficulties aside, Michelman's hypothesis regarding the basis of Justice Scalia's argument seems more plausible than the two just considered.

A final possibility is suggested by the last sentence of the *Lucas* passage quoted above. The notion that a government may through regulation reduce the economic value of land to zero is inconsistent, Justice Scalia maintains, "with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."[38] The most obvious interpretation of this language, for which there is substantial historical precedent, is that the original Constitution and its first ten amendments constitute a "social contract" in the classical sense.[39] That reading, however, is difficult to reconcile with Justice Scalia's repudiation of a theory of original intent.[40] Perhaps he means instead to suggest that the relevant social contract is not the one supposedly entered into by the persons who ratified the original Constitution and its first set of amendments, but rather the one entered into by the government and the current citizens of the United States when the latter first

36. Frank Michelman, Construing Old Constitutional Texts: Regulation of Use as "Taking" of Property in United States Constitutional Jurisprudence 18 (paper presented at the Conference on Constitutional Justice under Old Constitutions, Oslo, Sept. 7-9, 1992) (on file with the *Stanford Law Review*).

37. *See id.* at 19-22 (addressing several difficulties associated with the view Michelman imputes to Justice Scalia).

38. *Lucas*, 112 S. Ct. at 2900.

39. For an early expression of this idea, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 132-34 (1975).

40. *See* text accompanying notes 8-14 *supra*.

became active members of the polity.[41] One of the terms of that contract, Justice Scalia might be proposing, is an implicit commitment by the judiciary to adhere to the body of judicial doctrine, originating in the *Mahon* decision, that applies the Takings Clause to regulations of property. During the past thirty years, the Court has repeatedly promised (even though it has not exactly held) that regulations eliminating the economic value of land will be deemed to "go too far." Failure to abide by that promise now would breach the commitments implicitly made by the United States to the current generation of citizens when they "signed up." One implication of this variant of social contract theory is that our "constitutional culture" would function like a ratchet; rights long established (such as reproductive freedoms) could not be taken away. This is all highly speculative, of course, but it seems the only way to make sense of Justice Scalia's association of the phrases "understandings of our citizens" and "historical compact."

Now on to more mundane matters. Where has Justice Scalia found—and where does he think lower court judges applying his method should find—information concerning 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"?[42] Very little is known of Americans' attitudes toward property. Sociologists and social psychologists are just beginning to investigate the matter.[43] Does Justice Scalia believe that his experience as an American citizen—or perhaps as a judge—is sufficient to inform him of the beliefs of his countrymen? For that matter, does he think that his fellow citizens would agree as to the nature of the protection that should be accorded different kinds of property—that, for example, poor residents of Charleston would be just as likely as the residents or developers of the Isle of Palms to regard the South Carolina statute as fundamentally unjust?

The empirical assertions in *Lucas* do not inspire great confidence in his method. For example, as indicated above, he contends that Americans assume that land deserves greater protection than "personal property." This assertion may have been accurate in the eighteenth or nineteenth centuries. For much of our nation's history, many (perhaps most) Americans regarded land as somehow special. That every person could, at some point in his life, own a farm (later a house) of his own was central to the American Dream and to Americans' beliefs concerning the exceptional character of their cul-

41. The model for such a theory would not be the kind of social contract envisioned by Locke and Rousseau (an agreement among a group of persons in a state of nature by which they form and, consequently, surrender some of their powers to, a government) but rather the kind of social contract that figured prominently in seventeenth and eighteenth century English political thought (an agreement between ruler and people, whereby, in return for the people's promise of allegiance and obedience, the ruler promises to secure their rights and promote only the public good). *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 268-70 (1969).

42. *Lucas,* 112 S. Ct. at 2899.

43. *See* Fisher, *supra* note 28, at 1791-93.

ture.[44] Threats to the security of such holdings were viewed with alarm. From the beginning, however, there were dissenting voices. Many leaders of the American Revolution, for example, distinguished property, including land, acquired through honest labor from that acquired in some other way, such as through special privileges conferred by the imperial administration; only the former was entitled to protection from governmental confiscation.[45] In the early nineteenth century, a growing number of social critics and workers' advocates contended that land, especially land held for speculative purposes, should be expropriated and redistributed to the propertyless.[46] In the twentieth century, popular commitment to the notion that land is especially important and deserves special protection eroded further. The dream of owning a home (perhaps in a suburb) retained considerable power, of course.[47] But as 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,[48] fewer and fewer Americans had reason to see land as more worthy of protection than other forms of property. In sum, Justice Scalia's generalizations do not align well with what little we do know of popular attitudes.

A few remaining puzzles: Suppose that an empirical study revealed that residents of California value certain attributes of property differently than residents of South Carolina. For instance, imagine that Californians overwhelmingly objected to any changes in the legal rules governing water rights, whereas South Carolinians thought their state government should have extensive power to modify such rights. Should the judiciary construe the Takings Clause to bar changes in common law or statutory water law in California but not in South Carolina? After all, we pay attention to local opinion when deciding how much protection the First Amendment accords pornography.[49] Taking Justice Scalia's approach seriously, shouldn't we do the same when construing the Fifth Amendment? One's intuitive reaction is: of course not; the Constitution cannot mean different things in different places. But it is hard to see why not. More to the point, it is difficult to see how, on the basis of any of the four rationales reviewed at the outset of this section, Justice Scalia could avoid allowing for local variations.

Finally, my guess (based, admittedly, on casual conversation with a non-

44. *See, e.g.*, LAWRENCE A. FRIEDMAN, A HISTORY OF AMERICAN LAW 427 (2d ed. 1985); DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 27-28 (1991).

45. *See, e.g.*, 1 THE WRITINGS OF SAMUEL ADAMS 190-91 (Henry Alonzo Cushing ed., 1968).

46. *See, e.g.*, JOHN PICKERING, THE WORKING MAN'S POLITICAL ECONOMY 46-55 (1847); THOMAS SKIDMORE, THE RIGHTS OF MAN TO PROPERTY! (1829).

47. *See, e.g.*, JOHN STILGOE, BORDERLAND: ORIGINS OF THE AMERICAN SUBURB, 1820-1939 (1988).

48. *See, e.g.*, Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (discussing how the growth of government benefits has changed the meaning of property); *cf.* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980) (discussing generally the dephysicalization of the legal concept of property that took place during the nineteenth century).

49. *E.g.*, Roth v. United States, 354 U.S. 476, 488-89 (1957).

random sample of students and friends) is that most Americans would be surprised to learn that, in order to stop the spread of a fire or to limit a similar catastrophe, a city government may order privately owned houses destroyed without compensating the owners. Yet Justice Scalia expressly reaffirms this long-standing (but little known) doctrine in *Lucas*.[50] Public perceptions seem not to concern him in this context. Does precedent always trump "the understandings of our citizens"? The answer is not apparent from his opinion.

III. DENOMINATORS

At the close of the nineteenth century, the Supreme Court began to construe the Due Process Clause of the Fourteenth Amendment to proscribe statutes that had the effect of depriving property owners of a "reasonable" or "fair" rate of return on their investments.[51] On this basis it struck down several Progressive-era reforms, most notably state regulations of railroad rates.[52] Over the next thirty years, however, the Court had greater and greater difficulty justifying and applying this doctrine—largely because of its inability to define satisfactorily the value of the property against which the owner's income must be compared to determine whether it is "reasonable." It gradually became evident that, if the denominator of the fraction used to measure the "rate of return" were the market value of the property before the regulation was adopted, then the owner would always prevail. By contrast, if the denominator were the market value of the property after the regulation went into effect, then the state would prevail.[53] The Court's efforts to develop more defensible formulae were ineffectual.[54]

An analogous problem will beset the doctrine announced in *Lucas*. To ascertain whether a regulation has deprived an owner of "all economically feasible use" of his property, a court must first define the "property" to which the regulation applies. In virtually every case, the breadth of the definition it chooses will determine whether the regulation stands or falls. Justice Scalia acknowledges this difficulty in his opinion.[55] Although he expressly refrains from announcing a definitive solution to it, he provides two clues to his (and his colleagues') views on the matter. First, he dismisses as "extreme" and "unsupportable" the procedure employed by the New York Court of Appeals in the *Penn Central* case—which compared "the diminution in a particular parcel's value produced by [the challenged] municipal ordinance" to the "total value of the . . . claimant's other holdings in

50. 112 S. Ct. at 2900 n.16.

51. *See* Smyth v. Ames, 169 U.S. 466, 546-47, *aff'd as modified,* 171 U.S. 361 (1898).

52. *See* Stephen A. Siegal, *Understanding the* Lochner *Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation,* 70 VA. L. REV. 187 (1984).

53. For the classic version of this argument, see JOHN R. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 25, 196-97 (1924).

54. *See* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 160-64 (1992).

55. *Lucas,* 112 S. Ct. at 2894 n.7.

the vicinity."[56] Apparently, he believes that, however the denominator is defined, it cannot be broader than the "parcel" to which the ordinance applies. Second, Justice Scalia proposes that "[t]he answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value."[57] Here he seems to invite lower courts to employ the procedure Professor Radin has described as "conceptual severance";[58] instead of asking whether a challenged regulation has reduced to zero the economic value of a "parcel," a judge may ask whether the regulation has reduced to zero the economic value of any discrete property interest recognized and respected by the state's common law.

The potential implications of the latter suggestion are enormous. Its adoption would dramatically expand the set of land-use regulations vulnerable to constitutional challenge. Consider, for example, a statute that, in order to centralize governmental control of nuclear material, forbade landowners to extract uranium located under their property without governmental permission, thereby destroying the economic value of their "mineral rights." Or consider a statute that, to stabilize the water table and respond to a perpetual drought, forbade certain landowners from extracting water from an aquifer underlying their parcels, thereby destroying the economic value of their "water rights." If such entitlements previously had been recognized as distinct estates under the relevant state's common law, the statutes presumably would fall. For similar reasons, adoption of Justice Scalia's proposal would almost certainly have produced a different outcome in *Keystone*.[59]

Not only would Justice Scalia's method substantially expand the protections enjoyed by landowners under the takings doctrine, it would often lead to arbitrary and surprising outcomes. For example, imagine that Wisconsin courts construed that state's nuisance law to prevent, under certain circumstances, landowners from casting shadows onto solar collectors located on their neighbors' roofs.[60] At the same time, the Minnesota courts achieved the same result by announcing a new "estate" (analogous to the traditional "support estate") consisting of a right, under certain circumstances, to a continuous flow of light. Imagine further that, some years later, the legisla-

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56. *Id.*

57. *Id.*

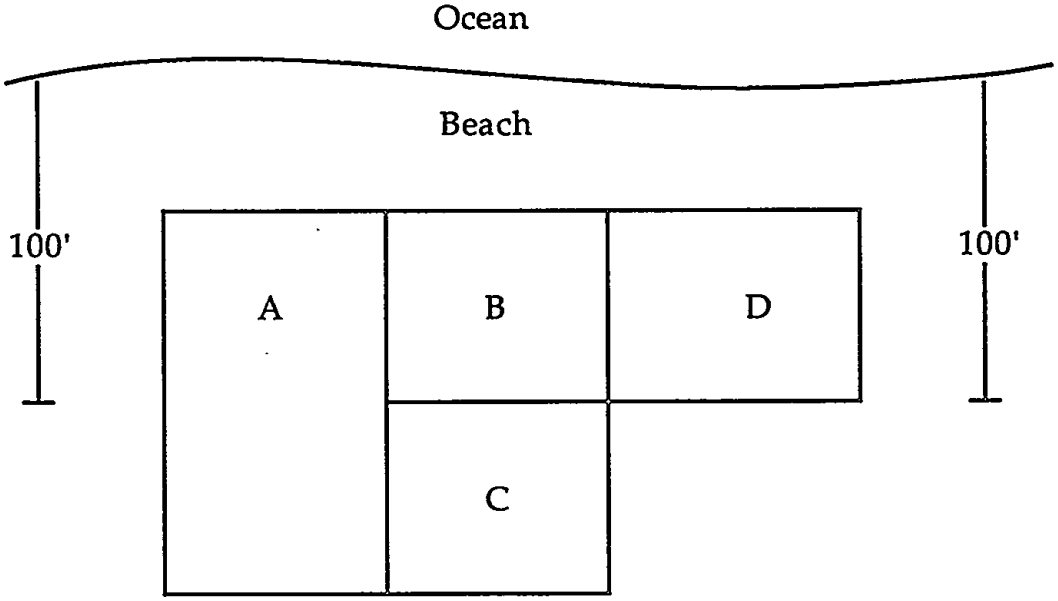
58. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

59. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987). In *Keystone*, the Court rejected the petitioner's claim that a Pennsylvania regulation prohibiting mining that causes subsidence damages constituted a taking of petitioner's "support estate." In refusing to protect the "support estate" as a distinct property interest, Justice Stevens noted, "[i]t is clear . . . that our takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Id.* at 500.

60. *See* Prah v. Maretti, 108 Wis. 2d 223, 321 N.W.2d 182 (1982).

tures of both states decided that this innovation was inadvisable and declared that, henceforth, landowners shall have no rights to light.[61] Minnesota landowners adversely affected by the new statute could, under Justice Scalia's approach, recover damages, while those in Wisconsin could not. Such a result would be hard to justify on any basis.

The first of the two guidelines proposed by Justice Scalia—that a court, when defining the denominator, should look first to the boundaries of the "particular parcel" adversely affected by the challenged regulation—will give rise to similar difficulties. Suppose, for example, that the four vacant beachfront lots in the illustration below become available for purchase at roughly the same time.



Developer #1 buys plot A. Developer #2 buys plot B, and, one week later, buys plot C. Developer #3 buys plot D. The state then adopts a statute forbidding the construction of permanent habitable structures within 100 feet of the beach. All three developers bring takings claims against the state. If the court focuses on the impact of the statute on the economic value of the separate parcels, it will award Developer #3 the fair market value of plot D, award Developer #2 the fair market value of plot B, and deny any recovery to Developer #1—even though her position is identical to that of Developer #2.[62] Sensing the awkwardness of this result, Justice Scalia equivocates:

61. *See* Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. 1959).

62. A resolution other than compensating Developer #2 is conceivable. Using as a model the "common ownership" rule (employed in some jurisdictions to determine whether two contiguous parcels, only one of which abuts a stream, are both "riparian"), the court might rule that the relevant "parcel" is now B+C. *See* CLESSON S. KINNEY, 1 TREATISE ON THE LAW OF IRRIGATION AND WATER RIGHTS § 464, at 788-90 (2d ed. 1912). Because the economic value of that parcel has not been wholly eliminated, Developer #2 would be denied relief. However, the fact that Justice

> When . . . 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.[63]

Assume that, seizing on the first of these options, the court in our hypothetical case awards Developer #1 the fair market value of the portion of her land affected by the ordinance. In one sense, the result would be equitable: The three developers have suffered identical injuries and are now entitled to the same amount of compensation. But the attractiveness of this solution is short-lived. Consistent application of Justice Scalia's proposal would produce a host of new problems. Imagine, for example, that a city increases by ten feet the distance that houses or other structures must be "set back" from a road. Is it obliged to pay all landowners in the city the market value of the slices of their property that are thereby rendered unbuildable? Or suppose a landowner buys a two-acre parcel, constructs a house near one end of it, and plans to build a second house near the other end. Before the second house can be built, the city changes the minimum residential lot size in the neighborhood from one acre to two. Does the landowner now have a valid claim against the city for the value of the portion of his lot on which he is forbidden to build? Unless the Supreme Court intends to revolutionize the law of zoning, the answer to both of these hypotheticals must be no. But there is no readily apparent way of distinguishing such situations from that of Developer #1, whom we have decided is entitled to recovery.

In sum, the denominator problem is more serious than Justice Scalia seems to recognize. At a minimum, it will increase the already infamous arbitrariness of the law of takings. Perhaps practical and conceptual difficulties of the sort outlined above will eventually lead the Court to abandon altogether the test announced in *Lucas*.

IV. NUISANCES

The central argument of Justice Scalia's 1989 Holmes Lecture at Harvard Law School was that "clear and definite rules" are better than "standards," whose meanings vary with the predilections and whims of the judges and officials who interpret them on a case-by-case basis.[64] The tone of his opinion in *Lucas* is consistent with that thesis. He is impatient with the " 'essentially ad hoc, factual inquiries' " on which the Court has relied for the past seventy years in construing the Takings Clause.[65] He is pleased,

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Scalia is uncertain whether Developer #1 is entitled to relief, *see* text accompanying notes 55-57 *supra*, suggests that he would not support such a solution.

63. *Lucas*, 112 S. Ct. at 2894 n.7.

64. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989). For a recent synthesis of the literature on the characteristics and merits of "rules" and "standards," see Kathleen M. Sullivan, *The Supreme Court—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 56-69 (1992).

65. *Lucas*, 112 S. Ct. at 2893 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

however, that the Court has managed in that period to identify at least two kinds of controversies in which such "case-specific inquir[ies]" are unnecessary: when the plaintiff has suffered "a physical 'invasion' of his property" and "where regulation denies all economically beneficial or productive use of land."[66] The more such formally realizable rules we can extract from the "mud" of takings law, he implies, the better.[67]

Unfortunately, the elimination-of-economic-value test he announces in *Lucas* is far from crystalline. Aside from the difficulty discussed in the preceding section of defining the property whose economic value is at issue, the principal source of ambiguity and confusion is the exception Justice Scalia builds into the doctrine: A regulation that destroys the economic value of property is not unconstitutional if the same limitation on land use could have been effected using the common law doctrines of public or private nuisance.

The most obvious problem generated by this exception is that the law of nuisance is notoriously vague. As Justice Blackmun observes, " '[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance." . . .' It is an area of law that 'straddles the legal universe, virtually defies synthesis, and generates case law to suit every taste.' "[68] Determining whether a piece of property could have been as severely regulated through the law of nuisance as through a challenged statute will often be difficult, and the outcomes of such inquiries will be unpredictable.

One way to see the oddity of Justice Scalia's formulation is to place it alongside the schematic history of the takings doctrine recently developed by Carol Rose.[69] Rose contends that, broadly speaking, one can identify three partially overlapping stages in the evolution of the relationship between government and private property in the United States: (1) Unrestrained use ("anything goes" in the use of land); (2) Nuisance adjudication (courts, under the auspices of nuisance law, use case-by-case, ex post rulings to curtail the negative externalities associated with unrestrained land use); (3) Local regulation (state and local planners, empowered by state legislatures, displace nuisance law with more precise, detailed, and predictable ex ante land use regulations). Stage 3, local regulation, similarly undergoes three substages: (A) Unrestrained regulation (there are no limitations on land-use regulation by government); (B) Takings adjudication (courts, under the auspices of the Fifth and Fourteenth Amendments, use case-by-case ex post rulings to curtail the rent-seeking associated with unrestrained regulation);

66. *Id.*

67. *Cf.* Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685, 1687 (1976); Carol M. Rose, *Crystals and Mud in Property Law,* 40 STAN. L. REV. 577 (1988) (exploring the arguments for and against formally realizable rules).

68. *Lucas,* 112 S. Ct. at 2914 n.19 (Blackmun, J., dissenting) (quoting, respectively, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 616 (5th ed. 1984) and W. RODGERS, ENVIRONMENTAL LAW § 2.4, at 48 (1986)) (citation omitted).

69. Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach,* 57 TENN. L. REV. 577 (1990).

(C) State regulation ("state legislatures—sometimes acting under the compulsion of federal environmental legislation"—displace takings law with more precise ex ante rules curbing short-sighted or abusive land-use regulation).[70] Every stage in this process, Rose contends, represents an improvement over its predecessors, and one manifestation of this progress has been the gradual reduction of the doctrinal ambiguity and unpredictability associated with ex post, ad hoc legal norms.[71] Against this background, what is most striking about the holding of *Lucas* is that it embeds in the already muddy law of takings (stage 3B) the even muddier law of nuisance (stage 2). If one finds Rose's stylized story at all convincing, it is hard not to view Justice Scalia's innovation as retrogressive.

The vagueness of nuisance doctrine is not the only source of difficulty in Justice Scalia's formulation; the test articulated in *Lucas* is also likely to strain the relationship between the federal and state judiciaries. In the future, the Supreme Court almost certainly will be asked to review decisions in which a state court has upheld a state statute against a takings challenge on the ground that it replicates the state's common law of nuisance. In *Lucas*, Justice Scalia makes clear that the Supreme Court would not simply defer to a determination of this sort; only if the state court's ruling were based on "an *objectively reasonable application* of relevant precedents" would it be allowed to stand.[72] We can thus expect to see the Supreme Court reexamining and sometimes overturning state courts' interpretations of their own states' common law. When construing state law in diversity cases, federal courts scrupulously avoid determinations of just this sort.[73] They do so for good reason; a state court presumably knows the law of its own jurisdiction better than a federal court, and certainly better than the United States Supreme Court. A state judge whose interpretation is overturned by the Supreme Court thus could not help but see in such a ruling an adverse evaluation of either his competence or his honesty. In sum, if it is taken seriously, the nuisance exception to the *Lucas* test may lead to considerable awkwardness and resentment.

A final problem: The common law of nuisance continues to evolve. State courts frequently tighten (and occasionally loosen) the restrictions imposed on private landowners.[74] As a result, the answer to the question of whether a challenged land use regulation could have been effected through the state's nuisance law will sometimes depend on the date as of which the state's nuisance law is measured. What date should a court use? Justice Scalia does not address this issue in his opinion, but the logic of his argu-

70. *Id.* at 588-91.

71. *Id.*

72. *Lucas,* 112 S. Ct. at 2902 n.18.

73. *See, e.g.,* Salve Regina College v. Russell, 111 S. Ct. 1217, 1225 (1991); Meredith v. Winter Haven, 320 U.S. 228, 237-38 (1943) (requiring federal courts in diversity cases to defer whenever possible to state courts' interpretations of state law).

74. For examples of dramatic changes in nuisance law, see Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); Prah v. Maretti, 108 Wis. 2d 223, 321 N.W.2d 182 (1982).

ment—in particular, his commitment to respecting "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*"[75]—suggests that the appropriate date is when the plaintiff acquired his property.

This refinement of the *Lucas* test will have two unfortunate consequences. First, it will further complicate the task of courts confronted with takings challenges. They must determine not only the content of the nuisance law of the state where the property in question is located, but also the content of that law as of a particular date. Second, parcels of land within a given state will enjoy different degrees of protection from governmental regulation depending on the date on which they were purchased by their current owners. A comparable situation currently exists in California, where many residents are unhappy with the results of the incorporation into their state constitution of "Proposition 13"—under which the owners of similar, adjacent tracts are likely to pay sharply different amounts in property taxes if they purchased their tracts at different times. It seems inadvisable to construe the Takings Clause in a way that produces an analogous outcome for the nation.

V. GOVERNMENTAL GOOD FAITH

Bruce Ackerman observed long ago that a judge's behavior when confronted with a takings question will depend partly on whether she believes that the "nonjudicial organs of government generally act consistently with the Comprehensive View" (i.e., the coherent system of overarching purposes) that she "impute[s] to the legal system."[76] Her degree of confidence in the other branches of government will affect not only the extent to which she is "activist" or "deferential" in her decisionmaking, but also her sense of the kinds of regulations that are most problematic.[77]

Although Justice Scalia has not yet made clear the content of his "Comprehensive View,"[78] he has frequently in his takings opinions intimated that he has little faith that other branches of government will ordinarily act in conformity with it. His dissenting opinion in *Pennell*, for example, contended that local officials, unless policed by the judiciary, will contrive ways "with relative invisibility and thus relative immunity from normal democratic processes"[79] to transfer wealth from the citizenry at large to social groups they favor, such as " 'hardship' tenants" and "senior citizens (no matter how affluent)."[80] Similarly, Justice Scalia justified several features of the complex "nexus" test he announced in *Nollan v. California Coastal Com-*

75. *Lucas*, 112 S. Ct. at 2899 (emphasis added).

76. ACKERMAN, *supra* note 30, at 37.

77. *Id.* at 11, 37, 49-54, 77-80.

78. It is possible, of course, that Justice Scalia has no stable "Comprehensive View." *See* text accompanying notes 7-26 *supra*.

79. Pennell v. City of San Jose, 485 U.S. 1, 22 (1988) (Scalia, J., dissenting).

80. *Id.* at 23 (Scalia, J., dissenting).

mission[81] 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.[82]

This cynicism regarding the inclinations of government officials finds expression in several aspects of the majority opinion in *Lucas*. In the introduction to the critical portion of his argument, Justice Scalia quotes with approval Justice Holmes' remark that "the natural tendency of human nature [would be] to extend the qualification [imposed on property through the police power] more and more until at last private property disappear[ed]."[83] Later, he denounces the takings test proposed by Justice Blackmun because it would enable a legislature to enact almost any land use regulation by disingenuously "recit[ing] a harm-preventing justification"—unless, of course, "the legislature has a stupid staff."[84] The same dark view of the motives and findings of state officials also influences Justice Scalia's elaboration of the "nuisance" exception to his elimination-of-economic-value test: "We emphasize that to win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim . . . ."[85] Justice Blackmun may be exaggerating when he accuses Justice Scalia of imposing on the State "the burden to convince the courts that its legislative judgments are correct," but Justice Blackmun is surely right that the majority opinion evinces a suspicion of and "hostility toward state legislators."[86]

Ironically, if legislators behave as unscrupulously as Justice Scalia apparently believes, they will be able to circumvent easily the constraints enunciated in *Lucas*. When imposing severe restrictions on land use, they will simply enumerate the activities in which the affected owners are still permitted to engage. In *Lucas* itself, for example, the South Carolina legislature could have included in its 1988 statute a provision assuring the owners of the affected beachfront lots that they could still "picnic, swim, camp in a tent, or live on [their] property in a movable trailer."[87] The right to engage in such activities close to the ocean and in relative privacy certainly has *some* economic value. The elimination-of-economic-value test would therefore be inapplicable. It is difficult to imagine land-use regulations that could not in this fashion be rendered *Lucas*-proof.

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81. 483 U.S. 825 (1987).

82. *Id.* at 837 n.5.

83. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), *quoted in Lucas,* 112 S. Ct. at 2893.

84. *Lucas,* 112 S. Ct. at 2898 n.12.

85. *Id.* at 2901.

86. *Id.* at 2909 (Blackmun, J., dissenting).

87. These suggestions are listed in Justice Blackmun's dissenting opinion. *Id.* at 2908 (Blackmun, J., dissenting). A competent legislative staff could likely think of many more permissible activities.

VI. CONCLUSION

Several features of the Supreme Court's opinion in *Lucas* are highly problematic. The effort to tie the content of the takings doctrine to "the understandings of our citizens" concerning the scope of their property rights is difficult to justify, has unpalatable practical implications, and provides, at best, weak justification for the elimination-of-economic-value test adopted by the Court. The problem of defining the property whose "economic value" is at issue has not been solved by the Court and does not seem susceptible to any satisfactory solution. The nuisance exception that the Court builds into its new test will contribute to the already infamous vagueness of the takings doctrine and may lead to inconsistency in the vulnerability of similar tracts of land to severe land-use regulation. Finally, if the cynical view of state legislators on which the opinion seems to be founded is realistic, the decision will be wholly ineffectual.

The opinion's evident dissatisfaction with the current state of the takings doctrine is understandable, and the Court's apparent aspiration to improve the doctrine is commendable. But the ruling in *Lucas* is not a step in the right direction.