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Daniel J. Hulsebosch  
*Saint Louis University School of Law*

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**THE TOOLS OF LAW AND THE RULE OF LAW: TEACHING  
REGULATORY TAKINGS AFTER *PALAZZOLO***

DANIEL J. HULSEBOSCH\*

INTRODUCTION

Last term the Supreme Court returned to the field of regulatory takings and bolstered the constitutional rights of property owners whose land is subject to environmental regulation. It also handed Property teachers a gift. In *Palazzolo v. Rhode Island*,<sup>1</sup> the Court struck down a state court's holding that a property owner who acquired land after the enactment of a land use regulation cannot claim that the regulation effects an unconstitutional "taking" of his property. According to the Court, a state may not *automatically* prevent post-enactment acquirers of property from pursuing takings claims because they "purchased or took title with notice of the limitation."<sup>2</sup> The takings clause is more than a notice provision.<sup>3</sup> The temporal relationship between the regulation's enactment and an owner's acquisition of property does not determine whether he can claim that the regulation deprived him of his property. In other words, the state is not completely free to alter constitutionally-protected property rights prospectively. In the circumstances of *Palazzolo*, the holding is not controversial.<sup>4</sup> The problem is that the Supreme Court previously directed state courts to define those constitutionally-protected property rights by using the state's own "background principles of nuisance and property law,"<sup>5</sup> and in *Palazzolo* the Court casts doubt on a state's power to alter those background principles at all. It is sometimes said that we have a common law

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\* Assistant Professor of Law, Saint Louis University School of Law.

1. 121 S. Ct. 2448 (2001).

2. *Id.* at 2462.

3. *Id.* at 2463 (observing that a majority of the Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), rejected dissenting Justice Brennan's proposition that those who purchase land after a regulation's enactment take title "on notice" of the new regulation's effect on their rights).

4. See, e.g., *Leading Cases—Takings Clause*, 115 HARV. L. REV. 447, 454 (2001). See also *infra* note 55.

5. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992).

constitution,<sup>6</sup> but not since the heyday of Classical Legal Thought a century ago has it been a doctrinal imperative.<sup>7</sup> Which is to say that the common law of property, as subject matter and method, should enjoy renewed interest among practitioners, scholars and students.

#### I. USING REGULATORY TAKINGS TO TEACH THE TOOLS OF THE COMMON LAW

There are three dimensions to a first-year common law course: doctrine, problem solving and policy analysis. The challenge is to integrate all three. While most topics in Property provide opportunities to explore each, few do so more than regulatory takings jurisprudence. Learning the ways that courts distinguish legitimate exercises of the police power from compensable takings requires students to master complex doctrine, analyze problems creatively and grapple with highly-charged policies.

Regulatory takings doctrine begins with the constitutional command that the government pay just compensation when it takes property for public use<sup>8</sup> and consists of the formulas used to determine whether a regulation in which the government does not physically appropriate the property amounts, constitutionally, to a taking. Doctrine stemming from the constitutional clause comes in the form of both hard rules and flexible standards.<sup>9</sup> The Supreme Court has established two per se rules. One is that a permanent physical “invasion” by the government or its licensee is automatically a taking of property that demands compensation.<sup>10</sup> The other is that a regulation depriving the owner of all economic benefit, and that is not designed to prohibit a traditional nuisance, is a taking of property requiring compensation.<sup>11</sup> If these rules do not apply, courts turn to a flexible, multifactor standard that examines the character of the government regulation, the extent of its economic impact

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6. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

7. See MORTON J. HORWITZ, *TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 27-31 (1992) (describing the common law boundaries of the police power in Classical Legal Thought); WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937* (1998).

8. U.S. CONST. amend. V. The Supreme Court incorporated the takings clause against the states in 1897. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

9. For the distinction between rules and standards, see Kathleen M. Sullivan, *The Supreme Court, 1991 Term: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 15-63 (1987); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991); Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989). See also Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

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

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

and the average reciprocity of advantage enjoyed by the affected property holder.<sup>12</sup>

Doctrine is only the beginning. The novice must also learn how to use these tools to analyze legal problems and develop persuasive arguments. The two forms of regulatory takings doctrine—rules and standards—raise fundamental questions about the nature of legal reasoning and the judicial function. What are the differences between rules and standards? What are their advantages and disadvantages? How does each work? A rule is a strict strategy for enforcing a general principle agreed upon elsewhere. The ideal rule constrains the decision-maker by forcing her to act automatically if the predicate facts are present.<sup>13</sup> A rule may be over- or under-inclusive, but that is the price paid for limiting the decision-maker's discretion to interpret the principle. Of course, judges exercise some discretion when drawing lines and defining the key terms of a rule, so that, as Kathleen Sullivan observes, rules mark the far end of "a continuum, not a divide," between mechanical and discretionary judging.<sup>14</sup> To mitigate their harsh effects, rules often contain exceptions.

Standards, on the other hand, *require* the decision-maker to exercise discretion. Typically, standards contain factors that guide rather than compel the judge toward decision. Here, the policy-maker articulates a broad principle but not the specific rule of enforcement and leaves it to the judge to apply the principle to individual cases.<sup>15</sup> Standards involve judgments of degree rather than kind, quantity rather than quality, and fact-specific reasoning rather than mechanical deduction.<sup>16</sup> The regulatory taking standard, for example, involves "essentially ad hoc, factual inquiries."<sup>17</sup> Class discussion of the differences between rules and standards illuminates not only takings law but also basic styles of legal reasoning that students will use throughout their careers.

Finally, regulatory takings jurisprudence offers an opportunity to explore policy questions that occupy the contested borderland between law and politics. Law and politics are two socio-intellectual strategies our society has developed to facilitate civilized life.<sup>18</sup> We rely on both strategies when addressing divisive issues, and the two intertwine closely in the property course. Legislation occupies much of our field, and even where it does not,

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

13. Sullivan, *supra* note 9, at 58-60.

14. *Id.* at 61. *See also id.* at 61 n. 231.

15. *Id.* at 58-61.

16. *Id.*

17. *Penn Cent.*, 438 U.S. at 124.

18. For a thoughtful analysis of the difference between legal and political modes of thought, see Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, NOMOS XXVIII: JUSTIFICATION 71 (J. Roland Pennock and John W. Chapman, eds., 1986).

judges often revise doctrine in the light of social policy.<sup>19</sup> From old limits on testamentary transfers to new forms of zoning and eminent domain, property law is where our society works out conflicts between private right and public will. Property is power,<sup>20</sup> which is one thing all students know before they open their casebooks.

The way property law both facilitates and constrains that power is something we hope students learn before they sit for the final examination. They are quick to see that law can serve as an instrument to further private or public goals but are slower to grasp how legal culture helps define those goals. Law is means and ends; it contains rules (as well as standards) that we use to achieve our aspirations, but it also rules us in the sense that it delimits the realm of the possible in our constitutional culture and helps shape those aspirations in the first place.<sup>21</sup>

Regulatory takings jurisprudence offers an excellent example of this tension between law's instrumental and constitutive functions. The Supreme Court is trying to use a state's own "background principles" of property law to define the limits of that state's police power. But traditionally our legal culture has viewed property law as a state creation. What is the content of a limitation on state power to regulate property that is defined in terms of the state's own property regime? A way to explore this tension is to ask students to play the role of a judge in an eminent domain case. This allows them to see how the Court, in cases like *Palazzolo*, is struggling to halt the vertiginous circularity of regulatory takings jurisprudence.

## II. BACK TO THE FUTURE: URBAN ZONING AND COASTAL WETLANDS

Role-playing is, of course, a venerable teaching strategy. One variation I find rewarding is to put the students in the position of a real, historical judge sitting on the bench during another time period. Anachronism reveals connections between areas of law, such as zoning and environmental land use regulation, that are separated in our casebooks. The Supreme Court long ago, under Chief Justice William H. Taft, held zoning to be a valid exercise of the state police power,<sup>22</sup> but in the past fifteen years, under the intellectual

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19. For historical examples, see MORTON J. HORWITZ, *TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977).

20. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

21. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Hendrik Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* in *THE CONSTITUTION AND AMERICAN LIFE* 353 (David Thelen ed., 1988).

22. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

leadership of Justice Antonin Scalia,<sup>23</sup> it has found some environmental land use regulations to effect takings. After we read the canonical takings cases, like *Pennsylvania Coal v. Mahon*<sup>24</sup> and *Penn Central Transportation Co. v. City of New York*,<sup>25</sup> as well as the more recent ones involving coastal wetlands regulation—*Nollan v. California Coastal Commission*,<sup>26</sup> *Lucas v. South Carolina Coastal Council*<sup>27</sup> and, this year, *Palazzolo*<sup>28</sup>—I give my students a homework assignment: Pretend that Justice Scalia sat on the Supreme Court in the 1920s and write the opinion that you believe he would have written in the epochal zoning case *Euclid v. Ambler Realty Co.*<sup>29</sup> Would he have voted with the Supreme Court majority to uphold zoning in 1926, or would he have struck down zoning as an unconstitutional deprivation of property rights?

The federal trial judge in the *Euclid* case found that the local zoning ordinance, which reduced the development value of Ambler's property by seventy-five percent, had taken property "without compensation under the guise of exercising the police power,"<sup>30</sup> but the Supreme Court reversed and upheld zoning as a valid exercise of the police power. Its opinion offers students a helpful commentary on the distinction between a valid exercise of the legislature's police power and a regulatory taking:

The line which . . . separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions . . . . [T]he law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power.<sup>31</sup>

The Court found that much of *Euclid*'s zoning ordinance fell within the legislative power to control nuisances, and it upheld the parts that did not, such as a restriction on apartment buildings, because in some circumstances those buildings "come very near to being nuisances."<sup>32</sup> The police power extended beyond the ability to control nuisances; its exercise was legitimate unless

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23. Cf. Scott R. Ferguson, Note, *The Evolution of the 'Nuisance' Exception to the Just Compensation Clause: From Myth to Reality*, 45 HASTINGS L.J. 1539, 1543-45 (1994) (arguing that the germ of the nuisance exception was in Justice Rehnquist's dissent in *Penn Central*).

24. 260 U.S. 393 (1986).

25. 438 U.S. 104 (1978).

26. 483 U.S. 825 (1987).

27. *Lucas*, 505 U.S. 1003.

28. 121 S.Ct. 2448.

29. 272 U.S. 365.

30. *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 316 (N.D. Ohio 1924). For a different conclusion from a noted land use planner at the time, see Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834 (1924).

31. *Euclid*, 272 U.S. at 387.

32. *Id.* at 395.

“clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>33</sup>

*Euclid* remains the foundational precedent for zoning. Just four years earlier the Taft Court had struck down another exercise of the state police power in *Pennsylvania Coal*, and this remains a foundational precedent as well for regulatory takings jurisprudence.<sup>34</sup> In that case, Justice Oliver Wendell Holmes Jr. declared the “general rule . . . that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking”; the inquiry was “a question of degree.”<sup>35</sup> Holmes articulated a standard containing three factors that a court should consider when judging whether a land use regulation goes “too far” and “takes” land without just compensation. The first is the “extent of the diminution.”<sup>36</sup> Second, a court should balance the public interest in the legislation against the damage inflicted on private property.<sup>37</sup> Third, a court should consider whether the regulation benefits the property owner by giving him some “average reciprocity of advantage” that helps compensate for the owner’s economic loss.<sup>38</sup>

The role-playing exercise encourages the students to trace the roots of zoning and regulatory takings jurisprudence and compare the Court’s approach to those issues in the 1920s with the approach undertaken during the past fifteen years. For today’s Court, like the Taft Court, is struggling with a new form of land use regulation—then it was zoning, now it’s wetlands protection.

The origins of zoning and wetlands protection share similarities. Both were designed to mitigate the negative effects of industrialization. Federal incentives furthered each. Vested rights in the form of extant development were generally protected under the two,<sup>39</sup> development expectation values were not. Zoning emerged over the course of several decades of ferment around the idea of city planning, but the first modern zoning ordinance was

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33. *Id.*

34. Cf. Gordon Hylton, *Prelude to Euclid: The United States Supreme Court and the Constitutionality of Land Use Regulation 1900-1920*, 3 WASH. U. J.L. & POL’Y 1 (2000) (juxtaposing the *Euclid* and *Pennsylvania Coal* cases).

35. *Id.* at 415-16. For an analysis of Holmes’s Pragmatist reasoning in *Pennsylvania Coal*, see William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813 (1998).

36. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

37. *Id.* at 413-14.

38. *Id.* at 415. The Supreme Court reformulated these factors a half-century later in *Penn Central* as the character of the government regulation, the degree to which the regulation “frustrate[s] distinct investment-backed expectations,” and the degree to which the property owner reaps reciprocal advantage from the regulation. 438 U.S. at 105.

39. Zoning boards often exempted non-conforming uses in existence at the time the ordinance went into effect; coastal commissions usually let existing structures stand.

New York City's in 1916.<sup>40</sup> The Commerce Department then drafted a model Standard Zoning Enabling Act in 1924. Many states soon passed similar enabling acts and localities followed with a bevy of zoning ordinances.<sup>41</sup>

The proliferation of wetlands conservation statutes since the 1960s is also based on a cultural movement that eventuated in a national effort,<sup>42</sup> but this time the federal government is an active partner with the states rather than merely an instructor. The Coastal Zone Management Act of 1972, for example, established a federal agency that provides financial and technical aid to states that institute programs to protect coastal wetlands.<sup>43</sup> Typically, a state establishes a commission to locate wetlands and then limits development on them.<sup>44</sup> But despite similar origins, they have fared differently in the Supreme Court: zoning is safely within the state police power; wetlands regulation is not.

From the bench, the students can see that the two phenomena are not identical. First and most obviously, the exercise reveals the limits of the *Lucas* rule. By definition, it only applies when the regulation deprives all economic benefit. Justice Scalia could distinguish the zoning regulation in the city of Euclid on its facts because the ordinance deprived Ambler of seventy-five, not one hundred, percent of its property's value. How much this should matter is a question that gets the students thinking about the difference between analyzing a regulation with a bright line rule and with a flexible standard.

Second, there was more measurable reciprocal advantage for Ambler than there is for developers restricted by environmental regulation today. While Ambler could not maximize its land's development value, it would not be harmed by commercial development nearby either. Developers like Lucas, on

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40. See DANIEL T. RODGERS, *ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE* 112-208 (1998); *THE AMERICAN PLANNER: BIOGRAPHIES AND RECOLLECTIONS* (Donald A. Krueckeberg ed., 2d ed. 1994) (1983); MEL SCOTT, *AMERICAN CITY PLANNING SINCE 1890* (1971); ROY LUBOVE, *THE PROGRESSIVES AND THE SLUMS: TENEMENT HOUSE REFORM IN NEW YORK CITY, 1870-1917* (1962).

41. Richard H. Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 598-604 (2001).

42. See Donald Fleming, *The Roots of the New Conservation Movement*, VI PERSPECTIVES IN AMERICAN HISTORY 7 (1972); Stacy J. Silveira, Comment, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. ENVTL. AFF. L. REV. 497 (2001).

43. Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-65 (2000). See also John R. Nolon, *Land Use Controls that Achieve Smart Growth*, 31 ENVTL. L. REP. 11025 (2001); Mark A. Chertok, *Federal Regulation of Wetlands*, SF97 A.L.I.-A.B.A. 1149, 1170-71 (2001); John A. Duff, *The Coastal Zone Management Act: Reverse Preemption or Contractual Federalism?*, 6 OCEAN & COASTAL L.J. 109, 109-10 (2001). For federal protection under the Clean Water Act of wetlands connected to internal navigable waters, see Peter L. Henderer, *The Impact of Lucas v. South Carolina Coastal Commission: A Practitioner's Guide to Fifth Amendment Takings of Wetlands*, 3 ENVTL. LAW. 407, 411-12 (1997).

44. For popularity of wetlands statutes and a basic outline of how they work, see The Coastal Zone Management Program, available at [www.ocrm.nos.noaa.gov](http://www.ocrm.nos.noaa.gov).



the other hand, have a harder time realizing reciprocal gain from the restrictions on their neighbors because the benefits of ecological protection are more difficult to calculate. Gauging the environmental damage caused by a specific parcel of land demands a more sensitive notion of causation than our legal culture possesses.<sup>45</sup>

Finally, the character of the government action is different. While neither involves physical appropriation, zoning strikes many as more familiar, in part because it has in practice been a local endeavor.<sup>46</sup> Many Americans believe that the single-family home represents the natural form of domesticity, despite the many federal subsidies supporting it.<sup>47</sup> Wetlands protection, on the other hand, is driven by a federal spending program that conditions financial grants on state regulation of coastal development. The Rehnquist Court has reined in congressional powers exercised pursuant to Article I, section 8,<sup>48</sup> and while it has not directly limited congressional authority under the spending clause,<sup>49</sup> the use of the takings clause here restrains the spending power indirectly. This is so because the recent decisions privilege private expectations created under state property law in effect before the state followed the carrot of federal aid and established wetlands regulations.

I ask my class whether the key difference between South Carolina's coastal regulation and Euclid's zoning ordinance is the extent of the economic diminution. In other words, if Euclid's zoning ordinance had denied Ambler *all* economic benefit, would Justice Scalia find that the ordinance effected a taking? He would, unless zoning fell within the nuisance exception to *Lucas's*

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45. See Joseph Sax, *Comment on Harte's Paper 'Land Use, Biodiversity, and Ecosystem Integrity: The Challenge of Preserving Earth's Life Support System'*, 27 *ECOLOGY L.Q.* 1003, 1004-05 (2001) (observing that "it is very difficult . . . to link the large-caliber problems of biodiversity loss to the specific developmental acts of individual landowners or to see the usual cause and effect relationships between an individual construction project and the colossal harm to the global future"); DAVID W. PEARCE & R. KERRY TURNER, *ECONOMICS OF NATURAL RESOURCES AND THE ENVIRONMENT* 324-25 (1990). Cf. HORWITZ, *supra* note 7, at 18-19, 51-54, 135-36 (describing the Progressive critique of objective causation).

46. See Richard Briffault, *Our Localism: Part One—The Structure of Local Government Law*, 90 *COLUM. L. REV.* 1 (1990); Richard Briffault, *Our Localism: Part Two—Localism and Legal Theory*, 90 *COLUM. L. REV.* 346 (1990) (exploring the traditional deference to local government).

47. See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 190-218 (1985).

48. See Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 *HARV. L. REV.* 4 (2001); Michael J. Gerhardt, *Federal Environmental Regulations in a Post-Lopez World: Some Questions and Answers*, 30 *ENVTL. L. REP.* 10980 (2000).

49. U.S. CONST. art. I, § 8. For a recent analysis of the doctrine of unconstitutional conditions, see Mitchell N. Berman, *Coercion without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 *GEO. L. J.* 1 (2001). See also Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 *HARV. L. REV.* 4 (1988).

bright-line rule. To fit within this exception, a state regulation must, Justice Scalia wrote in *Lucas*, “do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.”<sup>50</sup> In such cases, “the proscribed use interests were not part of [the property owner’s] title to begin with.”<sup>51</sup>

At first glance, the *Lucas* exception appears circular. The Court defined an exception to the state’s police power in terms of the state’s own law of property and nuisance. Ordinarily, we teach first-year students that a legislature is free to alter the state’s background property regime—some historical accumulation of common and statutory law—at least prospectively. But *Palazzolo* demonstrates that some of the Justices have in mind a conception of “background principles” that is constitutionally bounded and that may transcend state lines.<sup>52</sup> The declaration of those background principles remains, however, a matter of *state* law, so that there are limits to the Supreme Court’s ability to define state property rights. But the Court is signaling to state courts that they should interpret state property law more strictly to protect traditional land rights.

The signals are, however, mixed. While the *Palazzolo* majority offered little guidance about how to define those “background principles,” Justice Scalia advocated a fixed conception and disagreed with the evolutionary conception of Justices Sandra Day O’Connor and Stephen Breyer. Although *Lucas* and *Palazzolo* would not determine the outcome of a latter day *Euclid*, most students begin to see that the way Justice Scalia crafted his opinions in those cases might well influence the application of the ad hoc balancing test used in most regulatory takings cases.<sup>53</sup> His version of the nuisance exception has the force of a general rule that could be applied to all takings cases, and his concurrence in *Palazzolo* further suggests that he is trying to establish a bright line for distinguishing constitutionally-protected property rights on the one

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50. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

51. *Id.* at 1027.

52. As Frank I. Michelman observed after *Lucas*, the Court may be reviving the notion of a general federal common law associated with *Swift v. Tyson* and repudiated in *Erie v. Tompkins*. Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 315 (1993).

53. See Ferguson, *supra* note 23, at 1558 (predicting that the “common-law background principles of takings law will figure prominently in the balancing analysis undertaken in the majority of cases and, perhaps, will lead courts to find that a given regulation that falls short of a total taking is nonetheless invalid because its goals were not addressed at common law”). See also Michael A. Wolff, 50 WASH. U. J. URB. & CONTEMP. L. 5, 20 (1996) (noting that the *Lucas* nuisance exception “holds a special bond” with other land use decisions “especially as the Court invokes common-law nuisance principles long eclipsed by modern statutes and regulations”).

hand and the legitimate objects of the police power on the other.<sup>54</sup> Pushed to its logical extreme, Justice Scalia's reasoning would greatly limit the state police power to nuisance control.

### III. PALAZZOLO AND THE COMMON LAW "BACKGROUND" OF CONSTITUTIONAL PROPERTY RIGHTS

*Palazzolo* arose when the Rhode Island Coastal Commission denied Anthony Palazzolo's application for a permit to develop his coastal property. Palazzolo sued the state, claiming under the *Lucas* rule that the Commission's regulations, issued in 1971, denied him all economic benefit of land he acquired in 1978.<sup>55</sup> He pleaded alternatively, under the *Penn Central* standard, that the regulations so greatly interfered with his investment-backed expectations that they effected a taking. The Rhode Island Supreme Court rejected both claims on the ground that Palazzolo acquired his property after the enactment of the regulations and therefore took title subject to their development restrictions.<sup>56</sup> The state court reasoned that, while the regulations might have taken property from whoever owned the parcel at the time they were enacted, an owner who acquired the land after their enactment could not pursue a takings claim; the new regulations became part of the title when the property was transferred.

Justice Anthony Kennedy for a majority of the Supreme Court answered that

[t]he State may not put so potent a Hobbesian stick into the Lockean bundle . . . . Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through the passage of time or title.<sup>57</sup>

The Court's holding was narrow: the majority only ruled that the state could not *automatically* bar a post-enactment acquirer from challenging a land use

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54. Justice Scalia has endorsed a rule-based approach to judging off the bench as well. See Scalia, *The Rule of Law as a Law of Rules*, *supra* note 9.

55. The chain of title to the parcel at issue in *Palazzolo* is unusual because Palazzolo received title to the land when the state revoked the charter of the corporation that owned it, and of which he was once a part and then the sole owner, for failing to pay income taxes. *Palazzolo*, 121 S. Ct. at 2456. As a result, this title transfer was not that of a typical purchaser buying land with full knowledge of the land use regulations affecting the land's title. Pursuant to the legal fiction of corporate personality and its dissolution in bankruptcy, Palazzolo was transformed from shareholder into freeholder. The majority did not emphasize the peculiar circumstances of this transfer in its reasoning; Justice Breyer, in his dissent, did. *Palazzolo*, 121 S. Ct. at 2477 (Breyer, J., dissenting). See also Brittany Adams, Note, *From Lucas to Palazzolo: A Case Study of Title Limitations*, 16 J. LAND USE & ENVTL. L. 225, 261 (2001).

56. *Palazzolo*, 121 S. Ct. at 2456-57.

57. *Id.* at 2462.

regulation. It also rejected Palazzolo's *Lucas* claim,<sup>58</sup> but it did not rule on the merits of the plaintiff's *Penn Central*<sup>59</sup> claim. That determination will ultimately depend on the state court's assessment of the reasonableness of those expectations, in light of the state's "background principles." That decision will also help reveal the extent to which the nuisance exception to the *Lucas* rule is influencing the *Penn Central* standard.

Before *Palazzolo*, some commentators believed that "background" had only a temporal connotation. In an analysis that tracked traditional ideas of vested rights,<sup>60</sup> they believed that while a legislature might not be able to alter some property rights retroactively, it could change all of them prospectively; a new regulation that redefined property rights became part of the background against which takings claims by post-enactment transferees would be judged.<sup>61</sup> But in *Palazzolo*, the Supreme Court held that "background" signifies something more than the temporal relationship between a regulation and the acquisition of land subject to that regulation. The majority explained that if post-enactment acquirers of property could not challenge such regulations, "[a] State would be allowed, in effect, to put an expiration date on the Takings Clause."<sup>62</sup> It concluded that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."<sup>63</sup>

The majority in *Palazzolo* implied that there are some property rights that the state may not, or at least not easily, restrict. That is the meaning of the references to Locke, standing apparently for the proposition that some property rights are either pre-political or created at a foundational moment of consent,<sup>64</sup> and Hobbes, symbolizing the idea of an all powerful sovereign that may

58. *Id.* at 2457-58 (finding that the parties stipulated that Palazzolo "had \$200,000 in development value remaining on an upland parcel of the property").

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

60. On the nineteenth-century vested rights doctrine, see HORWITZ, *supra* note 7, at 148-51.

61. See, e.g., Peter L. Henderer, *The Impact of Lucas v. South Carolina Coastal Council and the Logically Antecedent Question: A Practitioner's Guide to the Fifth Amendment Takings of Wetlands*, 3 ENVTL. LAW. 407, 421-22, 426-27, 428, 436-37 (1997) (analyzing the effect of the *Lucas* exception on Clean Water Act enforcement and concluding that "the post-CWA property purchaser's interest in development is not a 'stick' in his or her 'bundle of rights'"); Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-enactment Owners, and Post-enactment Buyers*, 61 OHIO ST. L.J. 89 (2000). See also Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation"*, 80 HARV. L. REV. 1165 (1967).

62. *Palazzolo*, 121 S. Ct. at 2463.

63. *Id.* at 2364.

64. For analysis of this distinction in Locke's thought, see Peter Laslett, *Introduction to JOHN LOCKE, TWO TREATISES OF GOVERNMENT* 15, 113-20 (1960) (1679-83); Melvin Chernov, *Locke on Property: A Reappraisal*, 68 ETHICS 51 (1951).

continually redefine private rights.<sup>65</sup> But the Court did not linger in the state of nature. Quickly it returned to the less imaginary, though ill-defined, realm of state common law. The majority stated that the background principles of a state's law of nuisance and property remain the benchmark for judging even the prospective effect of new land use regulations, but it rejected the claim that a state statute automatically becomes part of those background principles for land transferred after its enactment.<sup>66</sup>

The question remaining after *Palazzolo* is whether there is an expiration date, not on the takings clause, but rather on the reasonableness of a particular land use. How and when does a land use cross the line between those uses permitted under a state's background principles and those impermissible? Most important, what role does a legislative declaration of unreasonableness play in this process? The Court's majority declined to engage these questions, finding that "[w]e have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."<sup>67</sup>

In their concurrences and dissent, respectively, Justices Scalia, O'Connor, and Breyer did opine on how a new regulation affects the state's background principles of property and nuisance. While some Justices, like former Justice William Brennan, would classify all new legislative acts as instantly part of the background principles,<sup>68</sup> Justice Scalia classifies none of them as such, unless a statute merely prohibits a common law nuisance. Eschewing a hard rule, Justices O'Connor and Breyer are struggling to locate ground in between these extremes.

For Justice Scalia, the legislative declaration of a land use as unreasonable is irrelevant to the judicial determination of whether a regulation effects a taking of that property, retroactively or prospectively.<sup>69</sup> He assumes that the state's background principles are easily identifiable and unchanging. Accordingly, the reasonableness of a land use does not change over time, though the changing circumstances around that land use might transform it into a nuisance. For a land use regulation to fall within the nuisance exception, the activity it regulates must have been "*always* unlawful" and "not part of his title."<sup>70</sup>

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65. See JEAN HAMPTON, *HOBBS AND THE SOCIAL CONTRACT TRADITION* 107-10 (1986); HOWARD WARRENDER, *THE POLITICAL PHILOSOPHY OF HOBBS: HIS THEORY OF OBLIGATION* 325-26 (1957).

66. *Palazzolo*, 121 S. Ct. at 2464.

67. *Id.*

68. *Nollan v. California Coastal Commission*, 483 U.S. 825, 860 (1987) (Brennan, J., dissenting).

69. *Palazzolo*, 121 S. Ct. at 2468 (Scalia, J., concurring).

70. *Lucas*, 505 U.S. at 1029-30 (using the example of a nuclear power plant located on a newly discovered earthquake fault).

Despite the reference to “always,” Justice Scalia’s nuisance exception does not require the land use to have been treated as a common law nuisance time out of mind; his conception of the background principles is historically and analytically precise.<sup>71</sup> The date he chooses for defining the background is 1897,<sup>72</sup> when the Supreme Court incorporated the Fifth Amendment’s taking clause against the States through the due process clause of the Fourteenth Amendment<sup>73</sup>—the first time the Supreme Court incorporated part of the Bill of Rights against the States and a measure of the increased solicitude for property rights at the time.<sup>74</sup> There is a curious though perhaps unintentional realism in choosing 1897 rather than 1868, when the Fourteenth Amendment was enacted, or 1791, when the Fifth Amendment became part of the Constitution. The benefit for his jurisprudence in looking to the late nineteenth century instead of the founding era is that many early state constitutions lacked takings clauses; states that did have takings clauses interpreted them more narrowly than they would a century later.<sup>75</sup> Justice Scalia is aware of these narrow early interpretations but declares them “irrelevant,” in part because they preceded 1897 and in part because those state practices “were out of accord with *any* plausible interpretation of those provisions.”<sup>76</sup> An advantage of 1897 over 1868 is that the former is approximately when modern zoning was born and not long before the decisions in *Euclid* and *Pennsylvania Coal*.<sup>77</sup> The year 1897 also coincides with the high tide of Classical Legal Thought, which was marked by a new or at least more explicit embrace of natural law conceptions of property rights and a predilection for categorical restraints on government power.<sup>78</sup> Before 1868, property law was almost entirely state law; the ratification of the Fourteenth Amendment, or at least the Supreme Court’s broad interpretation of it a generation later, federalized the boundaries of state

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71. See Joseph Sax, *Understanding Lucas v. South Carolina Coastal Council, Property Rights and the Economy of Nature*, 45 STAN. L. REV. 1433, 1454 (1993); Joseph Sax, *Rights that “Inhere in the Title Itself”*: *The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 945 (1993).

72. *Lucas*, 505 U.S. at 1028 n. 15.

73. *Chicago, Burlington and Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

74. HORWITZ, *supra* note 7.

75. See generally, John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

76. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 n. 15 (1992).

77. Some historians identify the “White City” at the Chicago Columbian Exposition and World’s Fair of 1893, for example, as “the beginning of modern planning in American.” Donald A. Krueckenberg, *The American Planner: A New Introduction*, in THE AMERICAN PLANNER, *supra* note 41, 1-14.

78. HORWITZ, *supra* note 7, at 9-31, 156-59.

property law. After the New Deal, the Supreme Court largely exited the business of supervising state property rights. Consequently, the turn of the nineteenth century may be the best time in which to locate a transcendental conception of property and nuisance.

Just as important is the negative function of the phrase “background principles of property and nuisance.” A more contemporary term would be “regulatory environment,” and it may be to protest this modern idea as much as to restore the property regime of the 1890s that Justice Scalia’s version of the *Lucas* exception operates.<sup>79</sup> He has also avoided “common law background,” perhaps because the prevailing, positivist conception of the common law makes this term oxymoronic.<sup>80</sup> Indeed, Justice Scalia’s remedy for reductionist positivism—his resort to transcendental principles—is itself a symptom of it.

In contrast, Justice O’Connor believes that the test for determining whether a regulation is consistent with a state’s background principles should resemble a standard. Even when using the *Lucas* bright line rule she would resort to a standard to explore whether the regulation falls within the exception.<sup>81</sup> In addition, she thinks that this “temporal relationship between regulatory enactment and title acquisition” should figure into a court’s calculation of investment-backed expectations in the *Penn Central* standard used in most regulatory takings cases.<sup>82</sup> In contrast to Justice Scalia,<sup>83</sup> she believes that a legislative declaration of unreasonableness, while not conclusive, plays a role in the analysis of whether a landowner had a protected property interest in the first place. In other words, she does not want the strict *Lucas* exception to become identical to the investment-backed expectations factor in the *Penn Central* analysis. “[I]t would be just as much error,” Justice O’Connor argued in her concurrence, “to expunge this consideration [meaning, ‘the effect of existing regulations’] from the takings inquiry as it would be to accord it exclusive significance.”<sup>84</sup> This “temporal relationship” is an important factor in calculating the reasonableness of a property owner’s investment-backed

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79. Cf. Frank Michleman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply To Professor Epstein*, 64 U. CHI. L. REV. 57, 69 (1997) (observing that “[r]egulation stands, in our public law, as an ordinary part of the background of risk and opportunity against which we all take our chances in our roles as investors in property”).

80. See *infra* text accompanying notes 91-96. See also Louise A. Halper, *Why the Nuisance Knot Can’t Undo the Takings Muddle*, 28 IND. L. REV. 329, 330 (1995) (arguing that Justice Scalia’s “recourse to the common law is possible only by a determined evasion of the history of the common law as it applied to land use”).

81. “The temptation to adopt what amounts to *per se* rules in either direction must be resisted.” *Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2467 (2001) (O’Connor, J., concurring).

82. *Id.* at 2465 (O’Connor, J., concurring); see also *id.* at 2477 (Breyer, J., dissenting).

83. The two Justices openly criticized each other’s opinions. Compare *id.* at 2467 n.\* (O’Connor, J., concurring) with *id.* at 2467-68 (Scalia, J., concurring).

84. *Id.* at 2465 (2001) (O’Connor, J., concurring).

expectations—a factor within a factor—because “the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.”<sup>85</sup> In his dissent, Justice Breyer agreed with Justice O’Connor on this point. He added that, after the enactment of a regulation, “expectations will diminish in force and significance—rapidly and dramatically—as property continues to change hands over time.”<sup>86</sup>

The most interesting possibility under the approach of Justices O’Connor and Breyer is that a regulation effecting a taking from present holders might someday be assimilated into the background principles of property law so that some or all post-enactment acquirers would not succeed with takings claims. There is, however, no widely accepted theory of constitutional change that would explain, let alone justify, this inconsistency. Some deny that the Constitution should change without amendment.<sup>87</sup> Theories accepting informal amendment are divided between those emphasizing “constitutional moments” and those that trace gradual, evolutionary change.<sup>88</sup> They differ not unlike the way rules and standards differ: constitutional moments are clear and formal occurrences of which most people are aware; gradual change results from many factors, and not everyone agrees on how and when it happens. Evolutionary legal change is more difficult to explain. It involves some mixture of time, the assimilation of the regulation’s means into our legal culture, and the regulation’s popular acceptance. In turn, acceptance depends on a negotiation between the consumers and enforcers of law; here, between

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85. *Id.* at 2466. See also Adams, *supra* note 56 at 261 (stating that “the most equitable approach to these fact-sensitive cases is to closely examine the issues surrounding each case” such as the time the regulation was “in place” before acquisition); Carol Rose, *Preservation and Community: New Directions in the Law of Historical Preservation*, 33 STAN. L. REV. 473 (1981) (discussing the community-building function of laws that preserve historical buildings).

86. *Palazzolo*, 121 S. Ct. at 2477.

87. Compare Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239 (1989) (concluding that “[t]he framers and ratifiers did not want the Constitution to change in adaptation to the economic, political, cultural, or moral developments of American society”), with Kramer, *supra* note 49 at 16-33 (exploring the customary “popular constitutionalism” of the founding generation).

88. Compare BRUCE A. ACKERMAN, *WE THE PEOPLE*, 2 vols. (1991, 1998), with David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001) (“The constitutional principles that actually govern a mature society accumulate and evolve over time through a variety of complex means”). See also Strauss *supra* note 6; BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998); Daniel J. Hulsebosch, *The New Deal Court: Emergence of a New Reason*, 90 COLUM. L. REV. 1973, 2014-15 (1990); Eben Moglen, *The Incomplete Burkean: Bruce Ackerman’s Foundation for Constitutional History*, 5 YALE J. L. & HUM. 531, 547-53 (1993) (finding a revival of Burkean custom in recent constitutional theory). See generally MAXWELL BLOOMFIELD, *PEACEFUL REVOLUTION: CONSTITUTIONAL CHANGE AND AMERICAN CULTURE FROM PROGRESSIVISM TO THE NEW DEAL* (2000); HERMAN BELZ, *A LIVING CONSTITUTION OR FUNDAMENTAL LAW? AMERICAN CONSTITUTIONALISM IN HISTORICAL PERSPECTIVE* 245-48 (1998).



property owners, who calculate whether it is wiser to sue for inverse condemnation or compromise with local land use officials,<sup>89</sup> and the Supreme Court Justices, whose willingness to entertain such suits changes over time and with the type of regulation. The open question is whether, and if so to what extent, the state legislature participates in this process of negotiating the constitutional meaning of property rights.<sup>90</sup>

This is why *Palazzolo* is a wonderful teaching tool. It is a constitutional case but also raises questions about the nature of the common law. Most of the Court acknowledges that property rights change over time, but the case provides no way of understanding when a particular right has changed. The best term for this process is custom.

The problem is that our post-realist legal culture lacks not just a convincing theory of evolutionary constitutionalism; it also lacks a sophisticated way of discussing the irregular changes in any body of law that Anglo-American legal thinkers used to capture under the rubric of custom.<sup>91</sup> The positivist turn in legal theory has collapsed foreground and background, legislation and common law, the traditions of the interpretive community of common lawyers and who gets what, when, how.<sup>92</sup> Legal realism has come to stand for the proposition that law is politics. But the slogan has been torn from its political context as a criticism of Classical Legal Thought and its natural law conception of property.<sup>93</sup> The instrumental conception of the common law has rendered the idea of custom irrelevant to most modern theories of law. There remains little sense of how lawyers and judges, for better and ill, have reshaped that tradition to accommodate and also influence “the felt necessities of the time”<sup>94</sup> We do have theories of norms, and norms may seem like substitutes for custom. The older idea of custom, however, included room for change that did not follow academic logic; today’s norms, we are told, hew to

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89. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 749 (1986) (discussing the role of “self-management by orderly and civilized people” in the evolution of property rights).

90. A growing literature is exploring the legislature’s role in defining constitutions. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

91. See A.W. B. SIMPSON, *The Common Law and Legal Theory*, in *LEGAL THEORY AND LEGAL HISTORY: ESSAYS ON THE COMMON LAW* 359 (1987) (noting the decline of custom in Anglo-American law); Morton J. Horwitz, *The Constitution of Change: Legal Fundamentalism without Fundamentalism*, 107 HARV. L. REV. 30, 45-47 (1993) (noting the rise and decline of evolutionary custom in English law). As Horwitz notes, the immemorial conception of custom gave way to an evolutionary one in the seventeenth century. *Id.* See also Rose *supra* note 91 (discussing custom in property law).

92. See HAROLD D. LASWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936). For an observation similar to mine but containing a different prescription, see ALAN BRUDNER, *THE UNITY OF THE COMMON LAW: STUDIES IN HEGELIAN JURISPRUDENCE* (1995).

93. This interpretation of legal realism relies on HORWITZ *supra* note 19.

94. See Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

the laws of efficiency.<sup>95</sup> The closest we come to exploring custom in this traditional sense of a gradually changing corpus is in first-year courses like Property that analyze recalcitrant common law rules, how they change over time and the forces that guide that change.<sup>96</sup> Outside those courses, custom makes few appearances.

The Supreme Court may bring it back to the mainstream. It is trying to distinguish legislation and principle, foreground and background, anew. Justice Scalia does so by embracing hard rules and static background principles. Justices O'Connor and Breyer, on the other hand, are groping toward a customary conception of property rights. Historically in Anglo-American legal culture, custom was a concept that functioned to allow legal professionals to negotiate incremental change while maintaining, as a matter of ideology, that the common law remained substantially the same from generation to generation. It was method more than substance.<sup>97</sup> As Sir Matthew Hale wrote in the late seventeenth century, law responds to "the Conditions, Exigencies and Conveniences of the People," so that over time "there grows insensibly a Variation of Laws." When and how those exigencies altered the common law was, Hale thought, difficult to trace; statutes played a role along with "Judicial Resolutions." Nonetheless,

tho' those particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho' in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials.<sup>98</sup>

This is a vision of legal change more radical than the "changed circumstances" conception Justice Scalia endorses.<sup>99</sup> A brief survey of American land use regulation suggests that it remains relevant to the question of whether wetlands regulations reflect a fair evolution of customary property rights.<sup>100</sup>

#### IV. THE LEGISLATIVE TRADITION OF MORAL TOPOGRAPHY

Do environmental land use regulations offend the background principles of American property law? John F. Hart's examination of early American land

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95. See ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). See also Richard Epstein, *The Path to the T. J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEG. STUD. 3 (1992).

96. See Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781 (1989); See also MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 154-61 (1988).

97. See Simpson *supra* note 93 at 376.

98. MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 40 (Charles Gray ed., 1971).

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

100. For a different approach to a similar question see Rose, *supra* note 91.

use regulation<sup>101</sup> demonstrates that there is a long tradition of land use legislation based on what might be called moral topography: the belief that forms of land use have moral consequences.<sup>102</sup> For example, after the American Revolution the new states regulated the physical use of space to create a civic republican environment.<sup>103</sup> The private was public in the sense that early Americans believed that the visual experience of a neighborhood inculcated values that in turn shaped human behavior. The built environment was didactic; it was designed, literally, to educate citizens.<sup>104</sup>

The specific conception of the best way to shape the land has changed over time and at most times is contested. In broad outline, the neoclassicism that was the aesthetic expression of republican ideology—the grid, clean lines, spare facades, monumental public buildings and a wariness toward untamed nature<sup>105</sup>—gave way in the nineteenth century to a romantic conception emphasizing organic shapes, fanciful design and a pastoral vision of nature.<sup>106</sup> Its legal manifestation took the form of, for example, public parks and cemetery laws.<sup>107</sup>

Progressives at the end of the nineteenth century returned focus to the urban environment. More light and air circulation would, they thought, reduce disease; healthy citizens would avoid vice and become productive members of society.<sup>108</sup> Recent ecological regulation is also premised on a belief that how Americans use their physical environment reflects and shapes who they are as a people. While these land use regulations often retard economic development,

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101. See Hart, *supra* note 76, at 1007.

102. Cf. Chused, *supra* note 42 at 601 (quoting PAUL BOYER, *URBAN MASSES AND MORAL ORDER, 1820-1920* (1978) (arguing that the “positive environmentalism” of the Progressive era represented a break from earlier planning theories). See also Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 370 (arguing that proponents of zoning sought to “actualize” the ideologies of domesticity and pastoralism).

103. See HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1860* (1983).

104. See J. B. Jackson, *The Order of a Landscape: Reason and Religion in Newtonian America*, *INTERPRETATION OF ORDINARY LANDSCAPES: GEOGRAPHICAL ESSAYS*, 153-63 (D. W. Meinig, ed., 1979); JOHN R. STILGOE, *COMMON LANDSCAPE OF AMERICA, 1580-1845* 87-134 (1982). On the didactic strand of the American Enlightenment, see generally HENRY MAY, *THE ENLIGHTENMENT IN AMERICA* (1976).

105. See JOHN D. SEELYE, *BEAUTIFUL MACHINE: RIVERS AND THE REPUBLICAN PLAN, 1755-1825* (1991).

106. See THOMAS BENDER, *TOWARD AN URBAN VISION: IDEAS AND INSTITUTIONS IN NINETEENTH CENTURY AMERICA* (1975).

107. See, e.g., *THE PARK AND THE PEOPLE: A HISTORY OF CENTRAL PARK* (Elizabeth Blackmar and Roy Rosenzweig eds., 1992).

108. See LUBOVE *supra* note 41; Chused, *supra* note 42.

they are also leavened with human-centered utilitarianism, with calls for sustainable or “smart growth.”<sup>109</sup>

The point for instructional purposes is that there has been a long tradition of legislative shaping of our physical environment that includes but is not limited to zoning. The tradition has persisted, although its constitutive materials have changed radically. Courts have shown great deference to this tradition except when it has been used explicitly to exclude people on the basis of race or ethnicity.<sup>110</sup> Early Americans did not recognize these regulations as taking property because not all expectation interests were recognized as legal interests until the Supreme Court, in a series of late nineteenth-century rate regulation cases, constitutionalized the protection of what we now call investment-backed expectations.<sup>111</sup> Put simply, the bag of early modern writs did not include one for suing government officials for reducing the development potential of land caused by the legislative pursuit of moral topography. We tend to think of the “bundle of sticks” metaphor as reflecting a modern conception of property, but in the early modern period property really was a bundle of interests rather than a coherent thing. It was a bundle of rights because Anglo-American legal culture had developed a bundle of common law writs to vindicate those rights; institutionally at least, writ preceded right.<sup>112</sup> The state’s denial of one of those recognized interests, whether directly through physical appropriation or indirectly through regulation, amounted to a taking. If there was no recognized interest, there was no taking.

Today, investment-backed expectations are factored into the scrutiny of regulations that may go “too far.” A conventional, or customary, conception of expectation interests would preserve room for change and ensure that such interests do not rigidify into unchangeable, static rights.<sup>113</sup> That process—the

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109. See, e.g., James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets and the Quality of Life under the Takings and Other Provisions*, 9 DICKINSON J. ENV’T L. & POL. 421 (2001).

110. See Joel Kosman, *Toward an Inclusionary Jurisprudence: A Reconceptualization of Zoning*, 43 CATH. U. L. REV. 59 (1994).

111. See HORWITZ *supra* note 7 at 148-51, 160-64, 194-98. See also Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187 (1984).

112. See Daniel J. Hulsebosch, *Writs to Rights: “Navigability” and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049 (2002); Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 YALE L. J. 601 (1998); Robert W. Gordon, *Paradoxical Property*, in EARLY MODERN CONCEPTIONS OF PROPERTY 95 (John Brewer & Susan Staves eds., 1995).

113. An approach to gauging expectations is used in contract clause cases. When a private party claims that a new, retroactive state law has impaired contractual obligations, the Court surveys the regulatory environment at the time the contract was made to gauge whether that party

abstraction of rights—has helped destroy theories of custom.<sup>114</sup> If Justice Scalia's version of investment-backed expectations succeeds, a dynamic sense of expectations interests will fade too.

#### V. CONCLUSION

A century and more of positivist legal theory has, as it were, accustomed us to viewing legal principles as social constructions; while they do change over time, it remains difficult and controversial to take a free hand in the building. Perhaps this is what the Supreme Court is trying to say in its regulatory takings jurisprudence. Understood functionally, when the Court holds that a regulation effects a taking, it is signaling that the legislature has tried to accelerate change faster than the Justices believe fair or wise.<sup>115</sup> "Taking" symbolizes the belief that the means of the law are endangering its ends, that the tools of the law threaten the rule of law. This judgment too is "a question of degree"<sup>116</sup>—a matter of convention—and no doctrine will ever make it mechanical.<sup>117</sup> Students sense the difficulty when asked to apply modern takings doctrine to old zoning cases. Someday, before the bar and on the bench, they will participate in that judgment. It is not yet clear whether they will continue to do so as voters and legislators.

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should reasonably have expected the new regulation. *See, e.g.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

114. *Cf.* Thomas Haskell, *The Curious Persistence of Rights Talk in the "Age of Interpretation,"* 74 J. AM. HIST. 984 (1987).

115. *See* Michelman, *supra* note 53; *See also* Rose, *supra* note 91 at 761-74.

116. *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1986).

117. In a case decided as this Essay went to press, a six-member majority of the Supreme Court embraced Justice O'Connor's flexible approach to takings jurisprudence and refused to create a *per se* rule that would recognize a new category of total but temporary takings. *See Tahoe-Sierra, Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, No. 00-1167, 2002 U.S. LEXIS 3028 (Apr. 23, 2002).