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DECONSTRUCTING *LINGLE*: IMPLICATIONS FOR TAKINGS DOCTRINE

DALE A. WHITMAN*

In *Lingle v. Chevron U.S.A., Inc.*,¹ Justice Sandra Day O'Connor wrote one of her last and potentially most important opinions in the field of land use regulation.² Speaking for a unanimous court, she put to rest the notion, originating in *Agins v. City of Tiburon*,³ that a due process violation — a regulation that “does not substantially advance legitimate state interests” — could be regarded as a Fifth Amendment taking.

In rallying the Court to this position, O'Connor performed an important service, although one that will probably be condemned by property rights advocates.⁴ She seems to have put an end to a

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1. 544 U.S. 528 (2005). The decision was announced on May 23, 2005.

2. O'Connor announced her retirement on July 1, 2005. Perhaps her more famous “parting shot” in the land use regulation field was her dissent in *Kelo v. City of New London*, decided one month later, on June 23, 2005, holding that a city's use of the eminent domain power for economic development objectives was legitimate under the Fifth Amendment's “public use” clause. 545 U.S. 469, 494 (2005)(O'Connor, J., dissenting). While her opinion in *Kelo* was more controversial and garnered far more public attention, it did not — unlike *Lingle* — represent the views of the court at large.

O'Connor had previously written the majority or plurality opinion in four other takings cases: *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (finding no taking in Hawaii's scheme allowing residents living on ground-leased land to buy out the reversions); *Hodel v. Irving*, 481 U.S. 704, 718 (1987) (finding a taking in a statute that prevented small fractional interests in allotted Indian lands from passing to the owner's heirs or devisees); *Yee v. City of Escondido*, 503 U.S. 519 (1992) (finding no taking in a rent control ordinance applicable to mobile home parks); *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (finding a taking in a federal statute that retroactively imposed an obligation on mining companies to pay lifetime health benefits of miners who had worked for them). For a complete review of O'Connor's takings opinions, see ROBERT MELTZ, PROPERTY RIGHTS “TAKINGS”: JUSTICE O'CONNOR'S OPINIONS, CONGRESSIONAL RESEARCH SERVICE (2005), available at www.ncseonline.org/NLE/CRSreports/05aug/RS22227.pdf

3. 447 U.S. 255 (1980).

4. See, e.g., Jonathan H. Adler, *Property Rights and Wrongs*, NATIONAL REVIEW ONLINE, June 29, 2005, <http://www.nationalreview.com/adler/adler200506290806.asp>.

long series of cases in which the Court confused and conflated due process clause violations and takings. She eliminated any possibility of future reliance by landowners on the “due process taking” notion of *Agins*, thus removing a significant litigation risk for local and state governments. She accomplished this with considerable intellectual vigor, clarity, and force.

However, it is not clear whether Justice O’Connor or her judicial colleagues recognized the full import of their work. In this essay I propose to discuss at least two implications of the *Lingle* reasoning that the opinion itself does not mention. The first is that if *Lingle* is taken seriously, it appears to destroy the “character of the governmental action” prong of the *Penn Central* takings test. That is a result that may make takings easier for landowners to establish.

The second implication arises from Justice O’Connor’s denigration in *Lingle* of “legitimate public purpose” as a factor in takings cases. If her rhetoric on this matter is taken at face value, it might be thought to lead to the conclusion that the government’s purposes and objectives in enacting a regulation are always irrelevant to a takings analysis. I propose to show that this is far from true, and that governmental purposes and objectives remain highly relevant in assessing whether a taking is justified by the “background principles” concept of *Lucas v. South Carolina Coastal Council*.⁵ Indeed, the true residual meaning of “character of the government action” is the government’s use of a regulation to enforce *Lucas* “background principles.” Of course, the existence of “background principles” makes takings more difficult for landowners to establish.

I. THE STATE OF REGULATORY TAKINGS LAW

Strangely, for a case with such important implications for land use, *Lingle* did not involve a land use regulation at all. Rather, Chevron brought a challenge to a Hawaii statute limiting rent that oil companies could charge dealers leasing company-owned service stations, thus helping independent lessee-dealers remain in business. While the ostensible objective of the legislation was to restrain the high fuel prices that Hawaii residents were paying, Chevron argued that it would be entirely ineffective in doing so.⁶ Hence, by Chevron’s view, the statute did

5. 505 U.S. 1003 (1992).

6. Economists for Chevron testified that the rent cap would allow existing lessee-dealers, when transferring occupancy rights to new lessees, to charge incoming lessee a premium reflecting the value of the rent reduction. *Lingle*, 544 U.S. at 535-36. Hence, they argued that in the long run, neither lessee-dealers as a group nor their customers would be benefited by the cap. *Id.* Of course, the State’s experts disagreed. *Id.*

not “substantially advance legitimate state interests” and consequently was a taking under *Agins*. The lower federal courts agreed, but the Supreme Court reversed, holding that the “substantially advances” test was inappropriate for determining the existence of a taking⁷ and that there was no taking on the facts of *Lingle* under any other relevant test.⁸

Justice O’Connor’s opinion in *Lingle* provides a convenient, concise summary of current takings law. She identifies four theories, each based in an earlier Supreme Court decision, on which a finding of a taking can be based. First, “where government requires an owner to suffer a permanent physical invasion of her property” — however minor — it must provide just compensation.⁹ A second categorical rule applies to regulations that completely deprive an owner of “all economically beneficial use” of her property.¹⁰ The Court held in *Lucas* that the government must pay just compensation for such “total regulatory takings,” except to the extent that “background principles of nuisance and property law” independently restrict the owner’s intended use of the property.¹¹ Outside these two relatively narrow categories, regulatory takings challenges are governed by the standards set forth in *Penn Central*. The Court in *Penn Central* acknowledged that it had hitherto been “unable to develop any ‘set formula’” for evaluating regulatory takings claims, but identified “several factors that have particular significance.”¹² Primary among those factors are “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.”¹³ In addition, the “character of the governmental action” — for instance whether it amounts to a physical invasion or instead merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good” — may be relevant in discerning whether a taking has occurred.¹⁴ The *Penn Central* factors — though each has given rise to vexing subsidiary questions — have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical

7. See Robert G. Dreher, *Lingle’s Legacy: Untangling Substantive Due Process From Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371 (2006).

8. *Lingle*, 544 U.S. at 536, 548.

9. *Id.* at 538; see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that a state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking).

10. *Lingle*, 544 U.S. at 538 (emphasis in original); see *Lucas*, 505 U.S. at 1019.

11. *Lucas*, 505 U.S. at 1026-32.

12. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

13. *Id.*

14. *Id.*

takings or *Lucas* rules.¹⁵

A fourth category of taking theory, not mentioned in the quotation above, is applicable only in the context of an “exaction” — a demand for land or money made by government in return for a permit, rezoning, or other land use approval sought by a landowner. Justice O’Connor referred to the *Nollan*¹⁶ and *Dolan*¹⁷ cases, which explicate when a taking will be held to occur under these circumstances, but they are not germane to my present analysis, and I therefore set them aside.

How well has the Court done its job in this area? If one rates the three non-exaction theories in terms of clarity and predictability, the record is decidedly mixed. The “permanent physical invasion” test of *Loretto* would get, without doubt, the highest grade — say, an A-. Physical occupations by, or at the behest of, the government are usually easy to identify. Moreover, the magnitude of the invasion is relevant only in calculating the landowner’s damages, and not in determining whether a taking has occurred. The test can therefore usually be applied in a straightforward manner.

The *Lucas* test, which established that a taking occurs when no economic value remains in the property, is not quite as easy to apply, mainly because of the exception for “background principles” such as nuisance law, which allows regulation without payment of compensation of activities that would have been regarded as nuisances or the like at common law. The scope of the “background principles” concept is not particularly clear and continues to be debated; it is discussed in detail below.¹⁸ Hence, I would suggest that, in terms of clarity and predictability, *Lucas* rates perhaps a B- or a C+ grade.

The third test, *Penn Central*, is by comparison a disaster in terms of clarity and predictability.¹⁹ None of the test’s three “prongs” can be calculated by landowners or government officials with any certainty. First, the “economic impact” of the regulation on the landowner is said to be relevant, but no one knows, and no one can learn from reading the Court’s opinions, how great an

15. *Lingle*, 544 U.S. at 538-39.

16. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

17. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In substance, *Nollan* and *Dolan* hold that an exaction is a taking unless the land or money demanded by the government will be used to solve a problem or meet a public burden that will be created by the landowner’s development, and even then, only if the magnitude of the exaction is roughly proportional to the cost or burden that will be imposed on the public by the development.

18. See *infra* notes 46-60.

19. See Bradley C. Davis, *Substantially Advancing Penn Central: Sharpening the Remaining Arrow in the Property Advocate’s Quiver for the New Age of Regulatory Takings*, 30 NOVA L. REV. 445 (2006).

impact is necessary to constitute a taking. The answer is presumably less than a 100% reduction of value, or else *Penn Central* and *Lucas* would be redundant of one another, as the Court plainly believes they are not. But beyond that, the required impact is simply uncertain.²⁰

The second prong of the *Penn Central* test is almost equally opaque. What are “distinct investment-backed expectations” and how can a regulation interfere with them? The only significant guidance we have from the Court is *Palazzolo v. Rhode Island*,²¹ in which the Court recognized that a *Penn Central* taking *might* have occurred despite the fact that when the landowner acquired title to the property, the regulation in question was already in place, although it was not when his predecessor, a corporation that he controlled, bought the land. While the majority held that a landowner would not be absolutely barred from a takings claim by virtue of having notice of the regulation when she or he acquired the land, the role of notice remains unclear.²²

The third prong of *Penn Central* is consideration of the “character of the governmental action,” which I treat in detail below. Of the three prongs, it is the least clear, as the discussion below will show.²³ Somehow, the courts are expected to blend or balance these three prongs in deciding whether a *Penn Central* taking has occurred.²⁴ The Court has provided no guidance as to how this is to be done. The term “balance” is itself inapt, for there is no common scale on which the three factors can be measured. If one conceives of the American judicial system as one in which appellate courts give useful guidance to trial courts about the

20. See, e.g., *Fla. Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 24 (1999) (finding a compensable taking, where about three-fourths of the land’s value was destroyed by the regulation); *Walcek v. United States*, 49 Fed. Cl. 248 (2001), *aff’d*, *Walcek v. United States*, 303 F.3d 1349, 1354 (Fed. Cir. 2002) (finding no compensable taking where about sixty percent of the land’s value was destroyed by the regulation).

21. 533 U.S. 606 (2001).

22. See J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts’ Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck*, 34 SW. U. L. REV. 351, 355 (2005) (observing that landowners who are put on constructive notice have no legitimate expectations to put their property to productive use); Daniel Mandelker, *Investment-Backed Expectations in Takings Law*, 27 URB. LAW. 215, 224-25 (1995) (noting Justice Scalia’s recognition “that this limitation on the per se taking rule is consistent with taking jurisprudence”).

23. See *infra* notes 27-39.

24. See, e.g., Richard A. Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351, 355 (“The looseness of the relevant factors invites, if not requires, the Court to engage in a general balancing test that in turn places no limit on the factors to be considered or the outcome to be reached.”).

meaning and application of the law, *Penn Central* represents an appalling case of judicial malpractice. Justice O'Connor's description of *Penn Central* as "vexing" hardly begins to express its

unsatisfactory nature; it is well nigh useless. Its grade would be a D- at best, or perhaps simply an F.

II. THE IMPACT OF *LINGLE* ON *PENN CENTRAL*

My purpose here is to show how *Lingle* affects the third prong of the *Penn Central* analysis, "the character of the governmental action." I will refer to this, in the interest of simplicity, as the "character" element of the *Penn Central* test. Since the Supreme Court has never explained exactly what the "character" phrase means, lower courts and commentators have been forced to grapple with its definition.

The most obvious meaning can be drawn from the context of the phrase's use in *Penn Central*. In the next sentence in the opinion, the Court noted that "a 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."²⁵ Of course, by virtue of the Court's later decision in *Loretto*, this has become a truism; a permanent physical invasion is a *per se* taking. Hence, if this is *all* that the "character" phrase meant,²⁶ it was fully supplanted by *Loretto* and thereafter had no independent meaning at all.

However, it seems more plausible to read the sentence quoted above about physical invasions and adjustments to the benefits and burdens of economic life as simply providing one illustration of what the "character" test means, rather than as exhausting its meaning. Indeed, both courts and commentators have usually considered the test to have some further significance, although they have had difficulty deciding what that significance is exactly.

The first view of the "character" test is that it is a measure of the importance to the public of the regulation in question, and that the more important the regulation, the less likely the government will have to pay to implement it. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,²⁷ finding no compensable taking in a Pennsylvania statute requiring coal miners to maintain some coal in place in order support the surface, the Court seemed to have in

25. *Penn Central*, 438 U.S. at 124.

26. See, e.g., *Allegretti & Co. v. County of Imperial*, 42 Cal. Rptr. 3d 122, 134 (Cal. Ct. App. 2006) (understanding this to be the meaning of the "character" test).

27. 480 U.S. 470 (1987).

mind the “character” test when it observed that Pennsylvania was attempting to “arrest what it perceives to be a significant threat to the common welfare.”²⁸

Justice Stevens’ dissent in *First English Evangelical Lutheran Church v. County of Los Angeles*²⁹ made this point even more strongly. The majority in *First English* held that a compensable temporary taking might have occurred when Los Angeles County prohibited all building on the church’s land. Stevens disagreed, in part because the prohibition was intended to prevent use of a flood-prone canyon, and thus to protect public safety. Stevens wrote:

Thus, in order to protect the health and safety of the community, government may condemn unsafe structures, may close unlawful business operations, may destroy infected trees, and surely may restrict access to hazardous areas — for example, land on which radioactive materials have been discharged, land in the path of a lava flow from an erupting volcano, or land in the path of a potentially life-threatening flood. When a governmental entity imposes these types of health and safety regulations, it may not be “burdened with the condition that [it] must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.”³⁰

Thus, Justice Stevens’ opinion in *First English*, which was joined by Justices Blackmun and O’Connor, seems to give a “pass” to the government, exempting it from compensation if the public interest served by the regulation is strong and important enough. It is plausible to read Stevens’ view as responding to the *Penn Central* “character” test and as treating protection of important public interests like health and safety as giving the “character” prong enough weight to overshadow the “magnitude” and “investment-backed expectations” prongs, so that compensation would not be required.

A second alternative view of the “character” test is as a measure of whether the government is acting in bad faith — playing “dirty tricks” on the landowner. For example, in *Cooley v. United States*,³¹ the court considered a takings claim based on the

28. *Id.* at 485.

29. 482 U.S. 304 (1987).

30. *Id.* at 325-26 (quoting *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887)).

31. 324 F.3d 1297, 1307 (Fed. Cir. 2003) (holding that the denial of a permit to fill wetland by U.S. Army Corps of Engineers might constitute a regulatory taking and remanding for further findings of fact under *Lucas* and *Penn Central*).

Army Corps of Engineers' denial of a wetlands fill permit under the Clean Water Act. In discussing the issues on remand, the court concluded that the Corps was "jerking around" the landowner unjustifiably:

Accordingly, those agencies receive appropriate deference in acquiring technical information. However, in the instant case the agency admits its requests for additional information were not necessary for issuing a permit. The trial court previously discounted the credibility of the Corps' argument that the permit denial letter requested additional information in an altruistic effort to issue a permit. In conducting a *Penn Central* analysis, the trial court may weigh whether the Corps' conduct evinces elements of bad faith. A combination of extraordinary delay and intimidated bad faith, under the third prong of the *Penn Central* analysis, influence the character of the governmental action.³²

One might have expected the court to relate this sort of governmental conduct to the due process clause,³³ but the reference to *Penn Central* quite clearly indicates that the court was engaging in a takings analysis.

Similarly, in *American Pelagic Fishing Co. v. United States*,³⁴ the Court of Claims concluded that the "character of the government action" would be weighed negatively if that action seemed to be aimed unfairly at one person, and especially if the regulation was also retroactive, thus implicating the "investment-backed expectations" prong of *Penn Central*:

[I]n considering the character of a governmental action alleged to constitute a taking, at least two other factors are also relevant: (1) whether the action is retroactive in effect, and if so, the degree of retroactivity; and (2) whether the action is targeted at a particular individual. Both factors are present here.³⁵

A third approach is simply to build the *Agins* test into the "character" prong of *Penn Central*, so that a failure of due process, or particularly the "enhanced due process" test of *Agins*, makes the "character" of the government's action bad, and hence tends to lead to the conclusion that a taking has occurred. The Ninth Circuit seems to have done this in *Dodd v. Hood River County*.³⁶

32. *Id.* (internal citation omitted).

33. Of course, unfair treatment of a landowner may also be a due process or an equal protection violation. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* 526 U.S. 687 (1999) (mistreatment of landowner resulted in a violation of 42 U.S.C. § 1983); *Village of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000) (government's singling out landowner for mistreatment violated Equal Protection Clause).

34. 49 Fed. Cl. 36 (2001).

35. *Id.* at 50 (internal citation omitted).

36. 136 F.3d 1219, 1228 (9th Cir. 1998) (holding no compensable taking

Likewise, the Fourth Circuit thought that the length of the amortization period for a nonconforming use, if unreasonably short, might violate the principle of *Agins* and therefore trigger the “character of the governmental action” factor in *Georgia Outdoor Advertising, Inc. v. City of Waynesville*.³⁷ The decision of the Court of Claims in *Florida Rock Industries, Inc. v. United States*³⁸ furnishes another example, where the court summed up its “character” analysis by concluding that “[t]here is no dispute between the parties as to whether preservation of the wetlands through the Corps’ implementation of the Clean Water Act serves to advance legitimate state interests.”³⁹

There is no way to be sure which (if any) of these understandings of the “character” test of *Penn Central* is “correct” in any absolute sense, given the fact that the Supreme Court has essentially left the “character” test unexplained. But all three of these approaches have a common thread: all of them depend on the government’s reasons or motivations for taking the regulatory action in question.

Because of that fact, none of these views is legitimate today if one takes Justice O’Connor’s position in *Lingle* seriously. None of the views focus on the regulation’s impact on the owner, which is precisely the only focus that a proper takings analysis can have, according to *Lingle*. As O’Connor asserted in *Lingle*, each of the legitimate takings tests “focuses directly upon the severity of the burden that government imposes upon private property rights”⁴⁰ — not on the government’s reasons or motivations for taking regulatory action. While an inquiry into the reasons or motivations of the government may provide a useful background for determining whether substantive due process has been violated, it tells nothing useful about whether a taking has occurred. As O’Connor observed: “[I]f a government action is found to be impermissible — for instance because it fails to meet the “public use” requirement or is so arbitrary as to violate due process — that is the end of the inquiry. No amount of compensation can authorize such action.”⁴¹

Indeed, Justice O’Connor herself seems to have recognized

occurred when county refused to permit owners to construct a residence of land zoned for forest use).

37. 900 F.2d 783, 787 (4th Cir. 1990). The prohibition on all off-premises outdoor advertising signs within city did not necessarily constitute a compensable taking. *Id.* at 784.

38. *See Fla. Rock Indus.*, 45 Fed. Cl. at 76 (holding that a regulation prohibiting filling and construction on wetlands constituted a partial regulatory taking).

39. *Id.* at 66.

40. 544 U.S. at 539.

41. *Id.* at 543.

that her *Lingle* opinion would destroy the third prong of *Penn Central* when she wrote: “[T]he *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.”⁴² The quoted language omits any reference to the third prong of *Penn Central*, the “character” test, and it inserts the “weasily” italicized language precisely because, I suspect, O’Connor realized that the unmentioned “character” prong was inconsistent with the *Lingle* opinion and could not survive it.

What is left of *Penn Central*? It is now, as perhaps it should always have been, purely an inquiry into the extent of the government’s intrusion into private ownership and private value. There is no “balancing” left to do, and there are no contravening factors that must be weighed against the intrusiveness of the regulation. *Penn Central* is still ambiguous, but it is simpler and less ambiguous than *before*. No longer will an extremely worthy, or an extremely unworthy, governmental objective be relevant in deciding whether a taking has occurred. An unworthy objective will still be relevant in deciding whether the regulation violates due process, and hence must be blocked by the court, but that is all.

This is, I think, a salutary development. Property rights advocates, obviously disappointed that they have been deprived of the *Agins* “substantive due process taking” theory, will probably applaud the disappearance of the “character of the governmental action” prong of *Penn Central* on the ground that it will make takings easier to establish. I am not certain that this is correct. Perhaps the courts will compensate by ratcheting up the “economic impact” prong of *Penn Central*, although no one is sure where that line lies today.⁴³ But the “economic impact” prong is at least a coherent, understandable measure, and that is for the better.

III. PROTECTING HEALTH AND SAFETY AS A “BACKGROUND PRINCIPLE”

Justice O’Connor’s rhetoric in *Lingle*, however, proves far too much. She seems to assert that the government’s objectives and purposes in regulating land have now become irrelevant to a takings analysis:

42. *Id.* at 540.

43. See Steven J. Eagle & William H. Mellor III, *Regulatory Takings After the Supreme Court’s 1991-92 Term: An Evolving Return to Property Rights*, 29 CAL. W. L. REV. 209, 235 (1993) (predicting the same sort of development, but by way of relaxation of the “no remaining economic value” standard of *Lucas* rather than a tightening of the “economic impact” standard of *Penn Central*).

The “substantially advances” formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose But such a test is not a valid method of discerning whether private property has been “taken” for purposes of the Fifth Amendment.⁴⁴

But in reality, governmental objectives and purposes remain highly relevant to takings analysis. The inescapable reason is that the “background principles of nuisance and property law” referred to by Justice Scalia in his opinion in *Lucas*⁴⁵ continue to provide a defense to a takings claim, and those principles are often directly connected to governmental objectives and purposes. Under the “background principles” concept, since no one has the right, under property law, to engage in a nuisance, no one has a right to compensation when the government regulates or prohibits the nuisance, even if the result of doing so is to deprive the land of all of its economic value.⁴⁶ It seems clear that, conceptually, the “background principles” defense applies no matter what theory of takings is at issue, *Loretto*, *Lucas*, or *Penn Central*, for no taking of any sort can occur when a landowner is prohibited by regulation from using land in a manner in which she or he could not have legally used it in any event. The “background principles” exception applies to all types of takings.⁴⁷

Nor is nuisance the only example of a “background principle.” As the *Lucas* majority opinion explains:

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

44. 544 U.S. at 542.

45. 505 U.S. at 1030.

46. See, e.g., *Keshbro, Inc. v. City of Miami*, 801 So. 2d 864 (Fla. 2001) (closing of motel that was being operated as a drug house and brothel was justified on the ground that it was a public nuisance). Cf. *State ex rel. R.T.G., Inc. v. State*, 753 N.E.2d 869 (Ohio Ct. App. 2001) (prohibiting coal mining was a compensable taking, where mining activity was not a nuisance).

47. See, e.g., *Mutschler v. City of Phoenix*, 129 P.3d 71, 75-76 (Ariz. Ct. App. 2006) (quoting with approval Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321 (2005)). The court in *Mutschler* stated: “*Lucas*’s threshold inquiry applies not only to *Lucas*-style complete economic wipeout takings, but also to physical occupation cases and, more importantly, to *Penn Central*-type regulatory cases where less than total economic deprivation has occurred.” *Id.*; see also *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002) (implicitly finding that satisfaction of the “background principles” doctrine would bar the finding of a taking under both *Lucas* and *Penn Central*).

action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles.⁴⁸

These illustrations of "background principles of nuisance and property law" provided by Justice Scalia in *Lucas* are quite telling. First, they establish the fairly obvious principle that literal application of nuisance law is not the only "background principle." Landfilling that results in flooding of a neighbor's land would probably be a trespass rather than a nuisance,⁴⁹ but either way, it would be illegal and enjoined, and hence not included in the landowner's property rights. One can think of other "background principles" as well, such as the public's right to use beaches under the doctrine of "custom" recognized by the Oregon Supreme Court in *State ex rel Thornton v. Hay*,⁵⁰ or the hunting and fishing rights of native Hawaiians on vacant land recognized by the Hawaii Supreme Court in the *PASH* case.⁵¹ Michael C. Blumm and Lucas Ritchie⁵² have catalogued several other categories of "background principles" identified by state and lower federal courts, including preexisting water rights,⁵³ the federal servitude on navigable waterways,⁵⁴ the "natural use" doctrine,⁵⁵ the duty to maintain

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

49. See *Lyons v. Twp. of Wayne*, 888 A.2d 426, 433 (N.J. 2005) ("Individually, an instance of flooding is a trespass, but it is also a nuisance if it is repeated or of long duration." (internal citation omitted)).

50. 462 P.2d 671 (Or. 1969) (finding that "custom" comprehended a right of the public to make use of the dry sand portion of all beaches in the state); *Stevens v. City of Cannon Beach*, 835 P.2d 940 (Or. 1992) (determining that the right of "custom" recognized in *Thornton* is a *Lucas* "background principle").

51. See *Public Access Shoreline Hawaii v. County of Hawaii*, 903 P.2d 1246 (Haw. 1995).

52. See *supra* note 47.

53. See, e.g., *West Maricopa Combine, Inc. v. Ariz. Dept. of Water Res.*, 26 P.3d 1171 (Ariz. Ct. App. 2001).

54. See *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000) (holding that the federal navigation servitude is a "background principle" under *Lucas*). Justice Scalia's opinion in *Lucas* concedes that the government's navigation servitude may be a "background principle" when he cites *Scranton v. Wheeler*, 179 U.S. 141 (1900), which recognizes such a servitude. *Lucas*, 505 U.S. at 1029.

55. See *Just v. Marinette County*, 201 N.W.2d 761, 768 (Wis. 1972) (limiting undeveloped or agrarian land to its "natural" uses); *Lucas*, 505 U.S. at 1059 (Blackmun, J., dissenting) (same). *Contra McQueen v. S. C. Coastal Council*, 530 S.E.2d 628 (S.C. Ct. App. 2000) (holding that the "natural use" doctrine is not a "background principle" of state law); *K & K Const., Inc. v. Dep't of Natural Res.*, 551 N.W.2d 413, 417 (Mich. Ct. App. 1996), *rev'd on other grounds*, 575 N.W.2d 531 (1998) ("[A] request to fill in wetlands does not constitute a nuisance that the government may abate"). See also *Good v. United States*, 39 Fed. Cl. 81, 98 n.30 (1997), *aff'd*, 189 F.3d 1355 (1999)

lateral support of a public highway,⁵⁶ the public trust doctrine,⁵⁷ and the “wildlife trust” doctrine.⁵⁸ A regulation enforcing such principles could not be a taking under Justice Scalia’s analysis because the regulation would only be restating historical limitations on the landowner’s rights.

But these background principles can easily be stated as representing government programs designed to enhance the public good, and thus to accomplish “legitimate public purposes.” For example, the doctrine of “custom” recognized by the Oregon Supreme Court in *Hay* is simply the recognition of the public benefits of providing the state’s citizens with broad access to the state’s beaches.⁵⁹ The right of native Hawaiians to make customary uses of vacant land is the recognition of the traditional values of those individuals and the desirability of respecting and protecting those values. Indeed, the law of nuisance can be described either

(noting that the status of “natural use” as a background principle of state law is unclear).

56. *Kim v. City of N.Y.*, 681 N.E.2d 312 (N.Y. 1997).

57. The public trust doctrine provides that the state holds public trust lands, waters, and resources for the benefit of its citizens, with an inherent right of the public to enjoy them even if they are privately owned. *See Palazzolo v. State*, No. WM 88-0297, 2005 WL 1645974, at *6-8 (R.I. Super. Ct., July 5, 2005) (prohibition of owner’s development of coastal land was warranted by public trust doctrine as well as nuisance law); *McQueen v. S. C. Coastal Council*, 580 S.E.2d 116 (S.C. 2003) (prohibition of development was justified by public trust doctrine); *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978 (9th Cir. 2002) (finding that the public trust doctrine was a “background principle” that would preclude finding a taking when the City of Seattle, acting under the Washington’s Shoreline Management Act (“SMA”), WASH. REV. CODE § 90.58.010, prohibited the owner from developing the shoreline with housing). The *Esplanade* holding was foreshadowed in *Hope M. Babcock, Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1 (1995).

58. A branch of the public trust doctrine that holds that government ownership of wildlife should be exercised as a trust for the benefit of the public. *See Sierra Club v. Dep’t of Forestry & Fire Prot.*, 26 Cal. Rptr. 2d 338, 347 (Cal. Ct. App. 1993) (finding that “wildlife regulation of some sort has been historically a part of the preexisting law of property” and is thus a *Lucas* background principle); *Geer v. Conn.*, 161 U.S. 519, 529 (1896) (“[T]he power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people”); Mary Christina Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 ENVTL. L. 605, 608-09 (2004) (discussing the wildlife trust doctrine).

59. The court’s action can, of course, be criticized as a retroactive “recognition” of a public right that had never before been noticed by the judiciary. *See, e.g.*, David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust “Exceptions” and the (Mis)Use of Investment-backed Expectations*, 36 VAL. U. L. REV. 339 (2002). But that is not my point here.

as designed to prevent one landowner from harming the rights of others, or as securing the public benefits of quiet, of freedom from offensive odors, and the like. One could go on, but the point is obvious: the existence of a legitimate public purpose is inherent in the “background principles” concept. Hence, public purpose is anything *but* irrelevant to a takings analysis.

The intriguing question, however, is how far the notion of “background principles” can be extended. To push the concept a bit, let us consider another type of regulation: a parcel of land has become dangerous (or has come to be recognized as dangerous) for human use. Lutherglen, the land owned by the Lutheran Church in *First English*, provides an apt illustration. Los Angeles County’s only objection to rebuilding on Lutherglen was that it was located in a canyon subject to flash flooding. The county had designated the canyon as within a flood protection area, and had prohibited construction of all buildings and structures. In essence, the land had been severely restricted by regulation in order to forestall the risks to personal safety that would be raised through its use.⁶⁰

Now assume that the regulatory restriction on Lutherglen is sufficiently severe and permanent to constitute a *Lucas* or *Penn Central* taking.⁶¹ Can the “background principles” concept be employed as a defense to a takings claim? What background principle would be applicable? The law of nuisance pretty clearly does not apply, for if the Lutheran Church rebuilt the structure on Lutherglen, doing so would have no adverse effect on nearby land. The concept of nuisance, of necessity, assumes that use of the land generates negative externalities affecting *other* land.⁶²

60. Note that the regulatory remedy did not precisely fit the risk, for the county ordinance prohibited only construction of buildings and structures, and not low-intensity uses such as tent camping (which might indeed have been quite dangerous). Nonetheless, prohibiting structures could quite rationally be expected to reduce or minimize, if not to completely eliminate, human use of the land.

61. The California Court of Appeal, on remand in *First English*, held that no taking had occurred, both because the land had some residual value despite the inability of the church to build on it, and because of the serious threat to safety that would be raised by building on the land. *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 905-07 (Cal. Ct. App. 1989). The decision must be understood in the light of a long record of hostility to regulatory takings claims in the California courts. For example, in 1979 the California Supreme Court held in *Agins v. City of Tiburon*, 157 Cal. Rptr. 372 (Cal. Ct. App. 1979), that there was no such thing as a regulatory taking, and that the landowner’s only remedy for an unduly burdensome regulation was to have the court treat it as a due process violation and suspend its operation.

62. See *Carpenter v. Double R Cattle Co.*, 669 P.2d 643 (Idaho Ct. App. 1983); David S. Wilgus, *The Nature of Nuisance: Judicial Environmental Ethics and Landowner Stewardship in the Age of Ecology*, 33 MCGEORGE L. REV. 99, 125 (2001).

One possible alternative “background principle” argument in the Lutherglen case harks back to *Mugler v. Kansas*,⁶³ in which a brewery owner asserted that a state liquor prohibition law constituted a taking of his property rights without compensation because it denied him use of his property. In sweeping language, the 1887 Supreme Court denied the claim, holding the regulation a valid exercise of the police power:

It cannot be supposed that the States intended, by adopting . . . [the Fourteenth] Amendment, to impose restraints upon the exercise of their powers for the protection of the safety, health, or morals of the community [A]ll property in this country is held under the

implied obligation that the owner’s use of it shall not be injurious to the community.

. . .

A prohibition simply upon the use of property for purposes that are declared by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.⁶⁴

One can almost hear, in the quotation above, echoes of Justice Scalia’s “background principles” language in *Lucas*. Taken literally, *Mugler* would seem to teach that if each landowner has a preexisting obligation not to use his or her property in a manner “injurious to the community,” than a regulation that prevents such use cannot be a taking, no matter how severe its economic impact. Indeed, this is virtually the position taken by the California Court of Appeal on remand in *First English*.⁶⁵ After quoting from *Mugler*, the court noted: “We recognize a brewery is a far cry from a Bible camp. But here the threat to public health and safety emanates not from what is produced on the property but from the presence of any substantial structures on that property.”⁶⁶ Hence, according to the court’s logic, prohibiting the rebuilding of the structures could not be a taking. Justice Stevens’ dissent from the Supreme Court’s majority opinion in *First English*⁶⁷ expresses the same view: if the regulation protects health or safety (or perhaps other important

63. 123 U.S. 623 (1887).

64. *Id.* at 664-65, 668-69.

65. *See First English*, 258 Cal. Rptr. at 898.

66. *Id.* at 899.

67. *See supra* note 30.

public values), every property owner is legally bound to comply with it, and hence it cannot constitute a taking.

Can this view be taken seriously? Surely not. Its reference to *Mugler* reaches back 120 years, to a time when the distinctions between the takings and due process clauses had not been worked out. Such a view would turn *Lingle* on its head, teaching not only that a due process violation cannot *per se* be the basis for finding a taking, but also that a regulation satisfying the due process clause cannot *possibly* be a taking. This is manifestly unacceptable to the modern Supreme Court. It would disregard *Lucas* itself, in which there was a legislative finding of, and presumably the actual presence of, abundant benefits to the public welfare — some relating to health or safety — from prohibiting the building of houses on the South Carolina beach.⁶⁸ It would completely undercut Justice O'Connor's argument that the government's purposes and objectives should be irrelevant to the finding of a taking. In essence, it would completely gut the concept of regulatory takings. Ultimately, then, *Mugler*, and such progeny as the California Court of Appeal's opinion in *First English*, must be understood to hold that a finding that the government has acted to advance a valid police power objective will insulate the government against a due process attack, but not necessarily against attack based on the takings clause.

IV. A MORE LIMITED "BACKGROUND PRINCIPLE": THE DOCTRINE OF NECESSITY

It is nonetheless almost certain that some narrower version of the "health and safety regulation as a background principle" argument can succeed. While I lack the temerity to guess what possible forms it might take, I will offer one illustration, provided by Justice Scalia himself in a footnote in his *Lucas* opinion.⁶⁹ A city has caught fire, and the fire is spreading. The city's officers conclude that the best (or only) way to stop the fire's spread is to destroy a building or a row of buildings, thus creating a firebreak.⁷⁰ This example differs from the example of *First English* discussed above because there is nothing dangerous or unsafe — at least at the time of demolition — about the building itself, and even if

68. The South Carolina legislature had found that a stable, uneroded beach benefited the public by acting as a barrier to storms, promoting tourism, providing a habitat for various plants and animals, and providing a desirable environment for human use. Construction on the beach was found to threaten and impair these benefits. *Lucas*, 505 U.S. at 1022.

69. *Id.* at 1029 n.16.

70. *Id.* See *Inhabitants of Frankfort v. Waldo County Comm'rs*, 40 Me. 389 (1855), in which the government paid compensation to the building owner on similar facts.

there were, the danger could be eliminated simply by prohibiting occupancy until the fire risk had passed. The building is demolished to protect *other* properties; it is simply in the wrong place at the wrong time. Moreover, the building cannot credibly be called a nuisance,⁷¹ nor does it fit any of the other categories of “background principles” thus far identified by the courts.⁷² It seems quite arguable that this sort of public action can qualify facially as a *Loretto* taking — a permanent physical occupation. The government’s demolition team physically enters on the real estate and the consequences, at least, are permanent: the building is removed.⁷³ Nonetheless, there is ample authority for the proposition that no compensation need be paid. In *Bowditch v. Boston*,⁷⁴ the 1879 Supreme Court rejected a landowner’s claim to compensation on these facts and asserted that such was the historic rule: “At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner.”⁷⁵ This principle, sometimes denominated “necessity”, continues to be applied,⁷⁶ and it was recognized by Justice Scalia in his opinion in *Lucas* as a proper illustration of a “background principle” that would eliminate the necessity of the government’s paying compensation.⁷⁷

There is, however, some disingenuousness at work here. “Necessity” is always a matter of degree, and the degree required might be a matter on which opinions differ.⁷⁸ There may be a

71. The Eastern District of Michigan made precisely this point in discussing *Bowditch* in *Flatford v. City of Monroe*, 794 F. Supp. 227, 233 (E.D. Mich. 1992).

72. See cases cited *supra* notes 50-58.

73. But see *Hoeck v. City of Portland*, 57 F.3d 781, 787 (9th Cir. 1995), disagreeing with this view. Portland had demolished a partially renovated but abandoned, boarded-up building — a clear case of nuisance — but the court commented that “this does not amount to a physical occupation even where the government’s activity has a permanent effect.” *Id.* at 787.

74. 101 U.S. 16 (1879).

75. *Id.* at 18.

76. See, e.g., *United States v. Caltex*, 344 U.S. 149 (1953) (no compensation was granted to owners of oil terminal facilities in the Philippines that were demolished by the United States Army to prevent their falling into Japanese hands at the commencement of World War II); *Strickland v. Dep’t of Agric. & Consumer Servs.*, 922 So. 2d 1022 (Fla. Dist. Ct. App. 2006) (no compensation available to landowner whose property was damaged by firefighters); *McCoy v. Sanders*, 148 S.E.2d 902 (Ga. Ct. App. 1966) (no compensation was available to landowner whose pond was drained by police seeking body of murder victim). See also *Inhabitants of Frankfort*, 40 Me. 389, in which the government paid compensation to the building owner on similar facts.

77. 505 U.S. at 1029.

78. See, for example, *Steele v. City of Houston*, 603 S.W.2d 786 (Tex. 1980),

difference between the importance to the public of stopping the fire in *Bowditch* and stopping erosion of the beach in *Lucas*, but it is not a conceptually fundamental difference. The flood-protection ordinance in *First English* would seem to be somewhere in between, but presumably on the compensable side of the line.⁷⁹ The present (and likely future) state of the law of regulatory takings leaves the courts to search for that elusive and ill-defined boundary between regulations that address “necessity” and hence leave the government free of the duty to compensate, and those that address issues of public importance somewhere short of “necessity” and thus require compensation if they go too far.

Perhaps this is not so bad. It is, after all, the sort of thing judges are paid to decide. Greater predictability would be desirable, but at least it is easy enough to discern the nature of the scale on which these cases are arrayed, even if we cannot be sure exactly where the line between “necessity” and ordinary police power regulations is to be placed.

V. CONCLUSION

What has *Lingle* accomplished for the future of takings law, aside from its obvious effect of eliminating the “due process taking” theory? First, I have suggested that it has eliminated from any further consideration the speculative meanings of the “character of the governmental action” element of the *Penn Central* test that have been proposed by the lower courts.⁸⁰ This simplifies and rationalizes *Penn Central* in a desirable way. Second, I have argued that, despite Justice O’Connor’s rhetorical efforts, *Lingle* did not eliminate, and could not possibly have eliminated, the relevance of the government’s aims, objectives, and purposes in assessing whether a Fifth Amendment taking has

in which the police burned down a house in which escaped convicts were hiding in order to capture them. The court ordered compensation, based primarily on the Texas Constitution, which provides that property may not be “taken, damaged, or destroyed for or applied to public use, without adequate compensation.” TEX. CONST. of 1876, art. I, § 17. The court recognized the doctrine of necessity, but concluded that it should not apply. The court quoted Prosser on Torts to emphasize that the *degree* of necessity is the critical fact:

Thus one who dynamites a house to stop the spread of a conflagration that threatens a town, or shoots a mad dog in the street, or burns clothing infected with smallpox germs, or, in time of war, destroys property which should not be allowed to fall into the hands of the enemy, is not liable to the owner, *so long as the emergency is great enough*, and he has acted reasonably under the circumstances.

Steele, 603 S.W.2d at 792 (citing PROSSER, THE LAW OF TORTS § 24 (4th ed. 1971)) (emphasis added).

79. The California Court of Appeals to the contrary notwithstanding. See *supra* note 65 and accompanying text.

80. See *supra* notes 27-39 and accompanying text.

occurred. The reason is that those aims, objectives, and purposes are intimately bound up in the “background principles” concept of *Lucas*, and by their nature cannot be separated.

Indeed, the remaining meaning of “character of the governmental action” is nothing more or less than the incorporation into *Penn Central* of the *Lucas* “background principles” concept.⁸¹ To that extent but no further, “character of the governmental action” is a test that remains alive and well. The practical difficulty, of course, is that the scope of the “background principles” is often unclear or debatable. Thus we are left to conclude that some regulations of land conform to “background principles” and others do not, and that the distinction between the two types of regulations is likely to remain indistinct and debatable long into the future.

81. Judge Allegra of the U.S. Court of Claims recognized this fact in his opinion in *Walcek v. United States*, 49 Fed. Cl. 248 (2001), *aff'd*, *Walcek v. United States*, 303 F.3d 1349 (D.C. Cir. 2002), when he wrote, as part of his analysis of the “character of the governmental action” prong of the *Penn Central* test:

There is no significant evidence in this case that the plaintiffs’ proposed use of the Property would formally constitute a nuisance under Delaware state law, so that the application of the Federal wetland regulations could be viewed as enforcing a limitation already inherent in the Property. At the same time, the existence of the wetland regulations in question, as well as their application to the Property, indisputably serve an *important public purpose* — one which benefits plaintiffs as members of the public at large.

49 Fed. Cl. at 270 (emphasis added and citations omitted).

