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SWALLOWING ITS OWN TAIL: THE CIRCULAR GRAMMAR OF BACKGROUND PRINCIPLES UNDER *LUCAS*

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INTRODUCTION

The exception to the rule the United States Supreme Court established in *Lucas v. South Carolina Coastal Council*[1] undercuts that rule more than the Court probably anticipated, as Professor Michael C. Blumm and Ms. Rachel G. Wolfard persuasively demonstrate in a recent article.[2] And *Lucas* effectively upheld earlier case law that it claimed to modify,[3] as Professor Robert L. Glicksman persuasively shows in his response to their article.[4] This Article will not take issue with those authors' conclusions but will carry their analysis one step further. It argues that the "background principles" exception that *Lucas* claims to have recognized is, for purely linguistic reasons, not an exception to the rule of that case.[5] Justice Kennedy alluded to this fact in his *Lucas* concurrence, remarking on the "inherent . . . circularity" of the Court's analysis.[6] Professor Glicksman recognizes this circularity and states, even in his title, that the exception swallows the rule.[7] The *Lucas* Court's discussion goes beyond circularity, however, effectively swallowing its own tail. It sets forth a rule that at best contains two clauses that are redundant and at worst intrinsically incorporates its own inconsistent exception.

Lucas holds that a regulation that deprives a landowner of all economically viable use of its land is a taking per se unless "the proscribed use interests were not part of [the owner's] title to begin

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1. *See* 505 U.S. 1003, 1027–30 (1992).

2. Michael C. Blumm & Rachel G. Wolfard, *Revisiting Background Principles in Takings Litigation*, 71 FLA. L. REV. 1165, 1174–81 (2019).

3. *Lucas*, 505 U.S. at 1023–24 (alteration in original) (citations omitted) ("'Harmful or noxious use' analysis was . . . simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" . . . .'").

4. Robert L. Glicksman, *Swallowing the Rule: The* Lucas *Background Principles Exception to Takings Liability*, 71 FLA. L. REV. F. 121, 126–37 (2020).

5. The Court refers to its exception as "background principles," *see, e.g.*, *Lucas*, 505 U.S. at 1031 ("South Carolina must identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found."), while one of the dissenters calls it the "nuisance exception," *see, e.g.*, *id.* at 1067 (Stevens, J., dissenting) (labelling a section of the dissenting opinion "The Nuisance Exception"). This Article uses the terms interchangeably.

6. *Id.* at 1034 (Kennedy, J., concurring in the judgment).

7. Glicksman, *supra* note 4, at 121.

with."[8] This Article will make three grammatical arguments to demonstrate that the Court's exception is actually an essential ingredient of the main rule, and a partially contradictory one at that. First, the so-called exception is not an exception because it assumes an owner can be deprived of something it never had. Second, a categorical rule from which a large proportion of cases is excluded is, by definition, not categorical.[9] Finally, *Lucas* demands that a court answer two questions, but the "logically antecedent inquiry" that the Court describes cannot be undertaken beforehand and must be addressed concurrently.[10] Once we put these three linguistic failings together, it becomes evident that the rule of *Lucas* is self-contradictory.

One might argue that the three shortcomings of the opinion just described are nothing more than different facets of a single inconsistency in the rule the Court established. One also might argue that proof of the first point moots the second one. This Article will not dispute either of these arguments. But because the *Lucas* Court treats these three topics separately, this Article will respond to them sequentially rather than making the plausible argument that they can be collapsed into one.

I. THE NUISANCE EXCEPTION IS NOT AN EXCEPTION

Lucas v. South Carolina Coastal Council purported to create a single categorical rule along with a single exception. The Court stated both succinctly, holding, "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[11] This means that a tribunal first must assess whether a regulation deprived the plaintiff of all economically beneficial use of its land.[12] If the regulation did not, then *Lucas* is inapplicable, while if it did, then the plaintiff is entitled to compensation unless the proscribed use interests did not belong to the plaintiff in the first place.[13] The juxtaposition of these two components of the *Lucas* test highlights the opinion's first internal incongruity, for it is not possible to be constitutionally deprived of something one never owned.

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8. *Lucas*, 505 U.S. at 1027 (footnote omitted).

9. Glicksman, *supra* note 4, at 136 (footnote omitted) ("These expansive conceptions of the scope of the background principles exception go a long way toward explaining why the so-called exception has 'swallowed' the categorical rule.").

10. *Lucas*, 505 U.S. at 1027.

11. *Id.* (footnote omitted).

12. The opinion is somewhat unclear as to what "all" means, with the Court suggesting that the value of an owner's property must drop by more than 95%. *Id.* at 1019 n.8. For purposes of this Article, the distinction between "all" and "substantially all" is immaterial.

13. *Id.* at 1027; *see also* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548 (2005) (reaffirming *Lucas* in a unanimous opinion).

The Oxford English Dictionary defines "deprive" to mean, "To divest, strip, . . . dispossess of . . . a possession," and notes that "to deprive (a person) of (a thing) = to take it away from him."[14] A secondary definition adds, "To keep (a person) out of . . . what he would otherwise have; to debar . . . ."[15] Similarly, "deprivation" means "the taking away *of* anything enjoyed; dispossession, loss" and "dispossession, deposition."[16] Real estate lawyers are well acquainted with this sort of terminology. This language presupposes that the object of which an owner is being deprived is something that previously belonged to that owner; indeed, it would be nonsensical to state that an owner is constitutionally entitled to just compensation for being deprived of something it did not previously own.[17]

If deprivation means dispossession or divestment, then the second half of the *Lucas* test becomes meaningless. For if proscribed use interests were not part of an owner's title to begin with, then that owner has been deprived of nothing: An owner cannot be divested of property rights that were not vested in that owner or dispossessed of property rights the owner never possessed.[18] The owner may not hold a given property right in the end, but it has not lost that right.[19] If the government prevents me from occupying my home, I have been deprived of my occupancy rights, but if the government prevents me from occupying my neighbor's home, I have

14. *Deprived*, OXFORD ENG. DICTIONARY (2d ed. 1989) (emphasis omitted).

15. *Id.*

16. *Deprivation*, OXFORD ENG. DICTIONARY (2d ed. 1989).

17. Note also that regulators have learned since *Lucas* to include safety valves in land use regulations that allow them to grant variances to owners who might otherwise suffer a *Lucas* taking. In fact, South Carolina unsuccessfully attempted to do this as the *Lucas* case was proceeding, but the Court ruled that the state acted too late. *See Lucas*, 505 U.S. at 1010–14 (describing these subsequent amendments to the state law and holding that Lucas did not have to pursue the newly created procedure for obtaining a special permit). In the most extreme cases, then, the government body can weigh the benefits of the regulation against the potential compensation costs and make an individualized determination about how to proceed.

18. *See* Blumm & Wolfard, *supra* note 2, at 1206 (footnote omitted) ("No takings claimant has a right to government compensation absent a showing that its claimed property right is in fact a verifiable and vested one."); Glicksman, *supra* note 4, at 126 (referring to "the alacrity with which the courts have identified background principles in statutory or regulatory sources, and the broad diversity of those sources"); *see also id.* at 135 (concluding that "although *Lucas* may have clarified the nature of the threshold inquiry into the presence or absence of a protected property right capable of being taken, it did not invent the inquiry").

19. Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENV'T L. REV. 321, 365 (2005) (footnote omitted) ("To abandon this threshold inquiry would imply that a takings claimant could prevail on the merits without a protected property right, an implication at odds with over a century of American takings jurisprudence.").

not been deprived of anything.[20] In the second case, the *Lucas* exception introduces no substance that is not already incorporated into the test itself. The proscribed use—occupancy of my neighbor's home—was never part of my title to begin with, but the Court does not need the second prong of the test to reject my claim. The Court practically concedes this point, when it notes that "[a] law or decree with such an effect must . . . do no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance . . . ."[21]

To be fair, contemporary American dictionaries place less emphasis on the removal of something formerly possessed. The MacMillan Dictionary definition, for instance, states, "if you deprive someone of something, you take it away from them or prevent them from having it."[22] The latter half of this definition does not appear to assume that the party claiming a deprivation previously held the interest in question. Under this meaning, a person who is homeless is deprived of shelter even if they never had any. While modern American usage of the word "deprive" may not automatically import the idea that the interest must be something previously possessed, an opinion using this word when resolving a regulatory takings case can mean nothing else.[23] The Fifth Amendment's Takings Clause prohibits "private property" from being "taken . . . without just compensation,"[24] and a private property right can be taken only from the owner of that right.[25]

The Takings Clause applies to all takings and not just the narrow subset of "deprivation of all economically feasible use"[26] takings that David Lucas claimed to have suffered. Professor Blumm and Ms. Wolfard show in considerable detail that lower courts have applied the background principles exception in other takings cases in which the plaintiff cannot meet that portion of the *Lucas* test.[27] The fact that the

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20. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) (noting that "an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property").

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

22. *Deprive*, MACMILLAN DICTIONARY, https://www.macmillandictionary.com/us/dictionary/american/deprive (U.S. version) [https://perma.cc/2QV2-63ZU].

23. *See* Glicksman, *supra* note 4, at 136 (highlighting that "unless the plaintiff has an interest capable of being taken, no taking is possible").

24. U.S. CONST. amend. V.

25. *See, e.g.*, United States v. Dow, 357 U.S. 17, 20 (1958) ("Dow can prevail only if the 'taking' occurred while he was the owner."); *see also* Danforth v. United States, 308 U.S. 271, 284 (1939) (footnote omitted) (finding that "the owner at [the time of the taking], not the owner at an earlier or later date, receives the payment").

26. *Lucas*, 505 U.S. at 1016 n.7.

27. Blumm & Wolfard, *supra* note 2, at 1170 ("[A]ll takings claims are premised on the alleged governmental taking of private property, and background principles define the nature of a landowner's legitimate property interests.").

Lucas nuisance exception has been expanded to these non-*Lucas* settings further buttresses the conclusion that the exception is actually an integral component of takings law itself and not just an exception to a rule: A plaintiff cannot be deprived of something it never owned whether the plaintiff claims a total deprivation or some other type of taking. In non-*Lucas* settings, too, the government is not required to compensate a party that has not been deprived of constitutionally protected property rights.[28] Thus, background principles inherently limit all takings, not just total takings.

In cases of permanent physical occupation, the government's action is different in kind.[29] In these cases, the government or its agent is physically occupying property and is doing so perpetually, two types of infringement that David Lucas never claimed to have suffered.[30] But even in cases exhibiting these more intrusive government actions, the government need not pay compensation unless it has deprived the plaintiff of something, as *Loretto v. Teleprompter Manhattan CATV Corp.* held.[31] Jean Loretto recovered because her right to use, exclude others from, and dispose of a small amount of space on her rooftop had been taken from her perpetually, but if she had never enjoyed these rights, she would not have recovered.[32] Once again, the exception adds nothing that was not already implicit in the main test.

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28. *See, e.g.*, Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548 (2005).

29. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982) (explaining that "an occupation is qualitatively more severe than a regulation of the *use* of property").

30. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006–09 (1992) (describing the facts of the case).

31. *Loretto*, 458 U.S. at 441; *see also Lucas*, 505 U.S. at 1028–29 ("[W]e assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title."); Blumm & Wolfard, *supra* note 2, at 1206 ("[A]n inquiry into background principles is the antecedent inquiry concerning alleged physical invasions . . . .").

32. Although the Court did not emphasize the point, Ms. Loretto bought her building after the cable company placed its equipment on the roof, which should have raised the question of whether she was the correct party to bring the claim. *Loretto*, 458 U.S. at 421–24 (describing the facts of the case). While *Palazzolo v. Rhode Island* subsequently held that a claimant's acquisition of property after an alleged taking occurred is not a complete bar to her claim, 533 U.S. 606, 629–30 (2001) (commenting 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"), one could argue that only her predecessor was deprived of anything and possessed a viable takings claim, *see supra* note 25, a fact that she should have factored into the amount she paid for the property. This is all the more true in cases alleging permanent physical occupations, since in those cases the infringement is accomplished in its entirety during the prior owner's period of ownership. *See Palazzolo*, 533 U.S. at 628 ("[W]hen a State has physically invaded the property without filing suit, the fact and extent of the taking are known. In such an instance, it is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking . . . ."). By contrast, regulatory takings often ripen over an extended period of time, during which title may have changed hands. *Id.* at 626–27 (describing the effect of notice

If an alleged taking does not fall within the categorical rules of *Loretto* or *Lucas*, then a court must fall back on the multi-factor test set forth in *Penn Central Transportation Co. v. City of New York*.[33] Under *Penn Central*, a court is tasked with examining several standards, some of which it has not fleshed out satisfactorily.[34] But under those standards, too, a court cannot find a taking of a property right that the plaintiff never owned, as Professor Blumm and Ms. Wolfard demonstrate.[35] This expansion of the *Lucas* exception to non-*Lucas* takings since 1992 causes no harm but also adds nothing, since it is inherent in the meaning of the words "deprive" and "taken." It merely illustrates the Court's unstated recognition that a government action cannot constitutionally deprive a party of a property right that party never held.

II. THE CATEGORICAL RULE IS NOT CATEGORICAL

The *Lucas* Court refers to its holding as a categorical rule, meaning that any landowner who fits within the category the case recognizes wins automatically, no matter the government's justification for the infringement.[36] Rather than looking at facts and circumstances and weighing different elements against one another, as *Penn Central* requires courts to do for other types of regulatory takings, a court that believes a property owner has shoehorned itself into the narrow *Lucas* category must award compensation.[37] This feature of the opinion supposedly makes the rule easier to apply and is one that the dissenters criticize heavily.[38]

The Court immediately backtracks from this categorical rule, recognizing that the state nonetheless "may resist compensation . . . if the logically antecedent inquiry into the nature of the owner's estate shows

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on owners claiming a regulatory taking); *see generally* Gregory M. Stein, *The Effect of* Palazzolo v. Rhode Island *on the Role of Reasonable Investment-Backed Expectations*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 41 (Thomas E. Roberts ed., 2002) (describing the interplay between ripeness rules and substantive law in regulatory takings cases).

33. 438 U.S. 104, 124 (1978) (describing the Court's "ad hoc, factual inquiries").

34. *Id.*

35. Blumm & Wolfard, *supra* note 2, at 1206 (observing that "an inquiry into background principles is the antecedent inquiry concerning . . . *Penn Central* regulatory takings").

36. *Lucas*, 505 U.S. at 1015 (finding "categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land" and noting that this is true "without case-specific inquiry into the public interest advanced in support of the restraint").

37. *Id.* at 1026 (referring to "our categorical rule that total regulatory takings must be compensated").

38. *See, e.g.*, *id.* at 1071 (Stevens, J., dissenting) (decrying that "'fairness and justice' are often disserved by categorical rules").

that the proscribed use interests were not part of his title to begin with."[39] The parties, just informed that there are no defenses to a specific category of actions, are promptly told that there are, with the majority and a concurring Justice squabbling over just how expansive these defenses are.[40]

This feature of *Lucas* is particularly ironic given the Court's insistence that it was replacing its earlier "noxious use" test because that standard is too easy for legislatures to manipulate.[41] The Court feared that under the old rule, legislatures could fabricate justifications in all or most cases, which means that "logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation."[42] Its new categorical rule is supposed to sidestep the possibility of such legislative misbehavior, because a plaintiff's facts either fit into the requisite category or they do not.

However, as one of the dissenters notes, "The Court . . . fails to explain how its proposed common-law alternative escapes the same trap."[43] For, "[a]s the Court admits, whether the owner has been deprived of all economic value of his property will depend on how 'property' is defined."[44] The Court claims to be replacing a standard with a rule, but the new rule incorporates a new standard.[45] This new standard "will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's

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39. *Id.* at 1027 (footnote omitted); *see also id.* at 1036 (Blackmun, J., dissenting) (stating that "the Court . . . creates simultaneously a new categorical rule and an exception"); *id.* at 1067 (Stevens, J., dissenting) (citations omitted) (arguing that "the categorical rule established in this case is only 'categorical' for a page or two in the U.S. Reports. No sooner does the Court state that 'total regulatory takings must be compensated,' than it quickly establishes an exception to that rule").

40. *Compare id.* at 1029 (acceptable background principles must "do no more than duplicate the result that could have been achieved in the courts . . . under the State's law of private nuisance"), *with id.* at 1035 (Kennedy, J., concurring in the judgment) ("I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions.").

41. *Id.* at 1025 n.12 ("Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.").

42. *Id.* at 1026.

43. *Id.* at 1053 (Blackmun, J., dissenting); *see also* Blumm & Wolfard, *supra* note 2, at 1206 (footnote omitted) ("The background principles defense resembles the old categorical government nuisance-prevention defense, which the *Lucas* majority rejected.").

44. *Lucas*, 505 U.S. at 1054 (Blackmun, J., dissenting).

45. *See* Richard J. Lazarus, *Putting the Correct "Spin" on* Lucas, 45 STAN. L. REV. 1411, 1426 (1993) (referring to this as "a shell game" and calling the two "analytical equivalent[s]").

proposed activities."[46] This approach is just as subjective as the one it replaced, if not identical to it.[47] The ostensibly categorical rule is not categorical.

III. THE "LOGICALLY ANTECEDENT" INQUIRY IS NOT ANTECEDENT

As already noted, *Lucas* requires courts to ascertain both whether there has been a deprivation of all economically viable use and whether the property interests allegedly lost were part of the owner's property rights to begin with.[48] The Court's phrasing of this test suggests that a trier of fact must make the first finding first and proceed to the second inquiry only if it answers the first one affirmatively. There is no need to waste judicial resources elucidating what interests the plaintiff began with if the court or administrative agency concludes that the government did not deprive that owner of all economically viable use of those interests.[49]

A court or administrative agency may initially view the first question as easier to answer than the second one. If the plaintiff retains property rights of significant value even after the alleged deprivation, then the court may conclude the plaintiff has not suffered a total taking and need not move on to the difficult question of property rights that follows. But this first finding cannot be determinative, because diminution in value is a fraction, and the trier cannot accurately assess whether the plaintiff has been deprived of all of its economic value without also determining what that initial value was.[50] As an administrative matter, the court can address either of these questions first but cannot resolve the case until it has answered both of them and compared the two numbers. The issue for the court is, "How large is the fraction?" It does not matter whether the court establishes its numerator or denominator first.

The grammatical implication that a court should apply the first clause before the second is undercut by the Supreme Court's reference to the

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46. *Lucas*, 505 U.S. at 1030–31 (citing RESTATEMENT (SECOND) OF TORTS §§ 826, 827 (AM. L. INST. (1986))).

47. *See* Lazarus*, supra* note 45, at 1419 ("[T]he Court bent over backwards to draft an opinion that seemed wholly favorable to the landowner, while in fact rejecting much, if not all, of his legal theory.").

48. *See supra* Part I.

49. While this statement is true in the "total taking" cases that *Lucas* addresses, the fact that courts apply the nuisance exception to other types of alleged takings may make it necessary to undertake this inquiry in those cases. *See supra* notes 27–35 and accompanying text.

50. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987), illustrates this point vividly. The Court there concluded that the petitioners had lost the ability to mine 27 million tons of coal but held for the respondent anyway, because this represented "less than 2% of petitioners' coal." *Id.* The numerator was huge, but the denominator was more than fifty times larger.

second part of its test as "logically antecedent."[51] Perhaps the test would read more smoothly if it were phrased the other way around: A trier of fact first must determine what interests a property owner started with before it can decide whether the state has rendered those interests economically valueless.[52] Reversing the clauses, though, still does not change the fact that one cannot evaluate the magnitude of a fraction without knowing both its components.[53]

Justice Kennedy, seemingly alone among the Justices in the majority, acknowledged this point.[54] He noted that any attempt to answer the question whether a government entity has taken property demands an investigation into the owner's "reasonable, investment-backed expectations."[55] But the analysis of whether the owner has lost everything begs the question of what the owner began with:

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51. *Lucas*, 505 U.S. at 1027; *see also* Blumm & Wolfard, *supra* note 2, at 1203 ("This survey of recent case law reveals that background principles remain a critical first inquiry that takings claimants must successfully hurdle to succeed in takings cases.").

52. *See* Glicksman, *supra* note 4, at 131 ("[T]he analysis of the applicability of the background principles exception precedes rather than follows an inquiry into whether a regulation results in an economic wipeout.").

53. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 419 (1922) (Brandeis, J., dissenting) ("If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property."); *see also id.* ("[T]he value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property, or even as compared with that part of it which is represented by the coal remaining in place and which may be extracted despite the statute.").

54. *Lucas*, 505 U.S. at 1033–34 (Kennedy, J., concurring in the judgment). Justice Scalia's opinion for the Court was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Thomas. *Id.* at 1005. Justice Kennedy concurred in the judgment, providing a sixth vote for the outcome, but none of the other five Justices in the majority joined Justice Kennedy's concurrence. *Id.* at 1032.

55. *Id.* at 1034 (Kennedy, J., concurring in the judgment) ("The finding of no value must be considered under the Takings Clause by reference to the owner's reasonable, investment-backed expectations."). This phrasing began to develop fourteen years earlier, in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124–25 (1978) ("[T]his Court has dismissed 'taking' challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes"), and has become a touchstone of the Court's regulatory takings jurisprudence. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538–39 (2005) (endorsing this test unanimously and citing *Penn Central*); *see also* Palazzolo v. Rhode Island, 533 U.S. 606, 633 (O'Connor, J., concurring):

> Our polestar . . . remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at

> There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres.[56]

Lucas requires a trier of fact to ascertain both the numerator and the denominator of a fraction and then compare their relative sizes. In determining both these numbers, the trier is calculating the magnitude of the loss the regulation caused. As a practical matter, a court may decide that it makes the most sense to determine whether a plaintiff possesses a protected property interest before deciding whether the government has taken that interest. But unless the plaintiff possesses no property interest at all, the court cannot finally resolve the dispute until it has undertaken both halves of the inquiry. The two constituents of the fraction are essential to this determination, which means that neither one is "antecedent" to the other.

CONCLUSION

This Article has attempted to demonstrate that the nuisance exception is not an exception, the categorical rule is not categorical, and the logically antecedent inquiry is not antecedent. To a large extent, the three clauses of the previous sentence make similar points in three different ways. Moreover, the Supreme Court's confusion is not surprising, given the difficulty of the issue raised in *Lucas*. That issue is whether the application of a new South Carolina statute took the landowner's property within the meaning of the Fifth Amendment's Takings Clause.[57] Because this was a claim of a regulatory taking, the Court was forced to assess whether the state law went "too far," as described in the Court's prior regulatory takings jurisprudence.[58]

The Court can hardly be faulted for the problems it has faced in devising useful rules to guide property owners, government regulators, and lower courts.[59] The issue is a challenging one that the language of the

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> the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.

Id.

56. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring in the judgment).

57. *Id.* at 1007.

58. *See, e.g.*, *id.* at 1014 ("[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (quoting *Pa. Coal Co.*, 260 U.S. at 415)).

59. *See, e.g.*, *Penn Cent.*, 438 U.S. at 124 (citation omitted) ("[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . . .").

Takings Clause does not specifically address,[60] regulatory takings cases are highly fact-specific,[61] and the Court has been attempting to triangulate an answer for well over a century.[62] While it is reasonable to expect the Supreme Court to address difficult issues clearly and fairly, it is also understandable when unanticipated facts that arise in subsequent cases demonstrate the shortcomings of and questions left unaddressed in its earlier holdings. Lower courts often must fill in these gaps.

That seems to be what has happened in the years following *Lucas*, as Professor Blumm and Ms. Wolfard demonstrate.[63] At the time of the decision, prognosticators on both sides of the issues attempted to forecast where the Court's holding would lead. Now, with the benefit of nearly three decades of hindsight, it is possible to analyze *Lucas*'s consequences with ample case law to support one's conclusions, as these authors have done. The categorical rule of *Lucas* has offered increased certainty to owners, regulators, and lawyers but, ironically, not in the manner the Court's majority anticipated.

Lucas ostensibly replaces a malleable standard with a more crystalline rule, one that legislatures and regulatory bodies were supposed to have a harder time manipulating. That new rule, however, is subject to an exception that is just as flexible as the prior standard and, in fact, similar to it in many ways. The exception turns out to be an inherent feature of the rule, neither of which makes any grammatical sense without the other, and the new rule is no more categorical than the older standard it was designed to supplant. In addition, since the magnitude of a loss can be examined only after determining the magnitude of the original property interest, neither inquiry is antecedent, and certainly not "logically antecedent," to the other.

What the years since *Lucas* have shown, as Professor Blumm and Ms. Wolfard and then Professor Glicksman demonstrate, is that *Lucas* marked much less of a doctrinal transformation than its authors probably intended

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60. One set of commentators has described "[t]he attempt to distinguish 'regulation' from 'taking' [as] the most haunting jurisprudential problem in the field of contemporary land-use law—one that . . . may be the lawyer's equivalent of the physicist's hunt for the quark." CHARLES M. HAAR & MICHAEL ALLAN WOLF, LAND-USE PLANNING: A CASEBOOK ON THE USE, MISUSE, AND RE-USE OF URBAN LAND 875 (4th ed. 1989).

61. *See, e.g.*, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986) (citation omitted) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.").

62. The Court's difficulties with this issue date back at least to *Mugler v. Kansas*. *See* 123 U.S. 623, 668–69 (1887) ("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.").

63. *See, e.g.*, Blumm & Wolfard, *supra* note 2, at 1182 (summarizing the expansion of the concept of background principles since *Lucas* was decided).

and much less than some commentators at the time foresaw. Justice Blackmun feared that the Court had "launche[d] a missile to kill a mouse"[64] and authored a dissent "not because I can intercept the Court's missile, or save the targeted mouse, but because I hope perhaps to limit the collateral damage."[65] He need not have worried, as it turns out, because the Court's missile sailed harmlessly into the Atlantic, just off the picturesque Charleston coast.

64. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).
65. *Id.* at 1036–37.