

Is Iowa Code Section 657A.10A A Regulatory Step Too Far Under Federal Takings Law?

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“A fortiori the legislature’s recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated.”¹

A. INTRODUCTION

When a state legislature aggressively exercises its police power to create a novel legislative solution to a difficult socioeconomic problem, there is always the risk that constitutionally protected private property rights may be violated. This Essay contends Iowa Code section 657A.10A is exactly such an aggressive regulatory action with problematic legal consequences for Iowa landowners. By authorizing an Iowa court to order a title transfer to a local government, without compensation, of privately-owned land on which a claimed public

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1. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1026 (1992).

nuisance is located, section 657A.10A has the potential to cause an unconstitutional confiscation of Iowa landowners' property rights. To place this concern in context, what follows is a brief description of the admittedly serious Iowa socioeconomic problem section 657A.10A was enacted to remedy.

Over the past century, millions of rural and small-town residents in the Midwest migrated to larger metropolitan areas to find work, and hopefully attain better lives for their families.² As this exodus continued, smaller cities, farm market towns, and rural counties were hollowed out socially and economically.³ Their populations declined, local businesses faltered, their tax bases shrank, and fewer and fewer opportunities were presented to the young people who remained. Adding to the problems facing nonurban local communities was the perplexing question of what to do about the increasing number of empty houses, deserted farm steads, and other chronically unoccupied structures that dotted the rural landscape. These empty buildings left behind were deteriorating to the point that they presented serious public safety and health concerns, besides causing economic harm to the surrounding neighborhood.⁴ Typically, with electric power disconnected and other utilities shut off, these often boarded-up empty structures presented a daunting challenge to local governments to find ways to prevent them from becoming public nuisances, potentially dangerous to local citizens.⁵

During the past three decades, in response to urgent pleas from city and county officials, a number of states, including Iowa, adopted legislation that allowed local governments to pursue new remedial measures enabling them to deal more effectively with badly deteriorated unoccupied buildings. The new laws authorized local governments to initiate judicial proceedings to have a

2. See FRANK HOBBS & NICOLE STOOPS, U.S. CENSUS BUREAU, DEMOGRAPHIC TRENDS IN THE 20TH CENTURY, CENSUS 2000 SPECIAL REPORTS 32 (2002) (finding that nonmetropolitan U.S. population declined from 65.9 million in 1910 to 55.4 million in 2000).

3. See PATRICK J. CARR & MARIA J. KEFALAS, HOLLOWING OUT THE MIDDLE: THE RURAL BRAIN DRAIN AND WHAT IT MEANS FOR AMERICA 2 (2009). See generally Richard Rathge & Paula Highman, *Population Change in the Great Plains: A History of Prolonged Decline*, 13 RURAL DEV. PERSP. 19 (1998) (detailing the decrease in population in rural areas of the Great Plains region).

4. The Iowa Supreme Court explained the need for remedial legislation to eliminate abandoned buildings that pose public nuisances in its recent decision on a challenge to the constitutionality of section 657A.10A: "In recent years, small communities across Iowa have seen an increase in the number of unoccupied, dilapidated, and run-down properties. These types of buildings not only detract from the communities' aesthetic appeal and cause concern about the effect on the value of neighboring properties but can also constitute a danger to the public health, safety, or welfare." *City of Eagle Grove v. Cahalan Invs., LLC*, 904 N.W. 2d 552, 555 (Iowa 2017).

5. In the best cases, chronically empty structures attract unsightly debris, invite vandalism, adversely affect neighborhood property values, and suffer invasion by unwanted animal pests. See *id.* (explaining that neighbors reported seeing raccoons, squirrels, skunks and birds enter the vacant building). In worse cases, they can be occupied by illegal squatters, which creates an enhanced fire risk, taken over by criminal gangs to become sites for the manufacture of illegal drugs or trafficking of sex workers, or the buildings could deteriorate so badly that they are at risk to collapse on anyone venturing into the structure or to fall on neighboring property. See Nadav Shoked, *The Duty to Maintain*, 64 DUKE L.J. 437, 472–73 (2014).

court declare specific empty structures to be public nuisances, which could then be abated through new regulatory measures.⁶ Typically, this legislation was in the form of a special public nuisance law that authorized local governments to take graduated steps to require the owners of abandoned structures to make necessary repairs or demolish the structures.⁷

Unfortunately, newly authorized special powers to local governments to issue administrative orders, impose fines, and appoint receivers often proved inadequate⁸ to the task of ridding local communities of vacant buildings posing public nuisance threats.⁹ Frequently, the owners of the empty substandard buildings lived out of state and were very difficult to locate—or, when contacted, the owners were unwilling or unable to make the further investments required to improve their dilapidated properties.¹⁰ Orders to repair and fines for nonperformance often went unheeded. When a receiver was appointed but the costs of needed repairs exceeded the value of the property, the most that could be done was to cause the lien for unpaid property taxes and fines to be foreclosed, and then initiate a judicial sale of the land.¹¹

6. *See id.*

7. Following a judicial declaration that an unoccupied building posed a public nuisance, this new legislation commonly authorized cities and counties to issue administrative orders to the owners of nuisance buildings requiring them to initiate needed repairs or to raze the structures. If the property owners failed to comply with these orders, local governments were authorized to impose fines that were added to the property taxes on the land at issue. Ultimately, if still nothing was done to rehabilitate or raze the nuisance structure, local governments were authorized to appoint a receiver to take control of the property and do whatever was reasonably necessary to restore the building to a safe, sanitary and habitable condition or if repairs were not practical, to demolish the nuisance structure at the owner's expense, adding the costs to the owners' property taxes. *See, e.g.,* IOWA CODE ANN. §§ 657A.1–657A.9 (2019). *See generally* J.E. Macy, *Constitutional Rights of Owner as Against Destruction of Buildings by Public Authorities*, 14 A.L.R.2d 73 (1950) (detailing “the power of public authorities . . . to order the destruction of a building without compensation, as a measure of public protection”).

8. Illinois adopted a statute that allowed local governments to obtain court approval to take direct action to demolish a privately-owned building that has become a dangerous public nuisance. *See* 65 ILL. COMP. STAT. ANN. 5/11-31-1 (2009). This statute was ruled constitutional in *Village of Lake Villa v. Stokovich*, 810 N.E.2d 13, 27–28 (Ill. 2004). One state has ruled that local governments taking action to destroy a privately-owned building designated as a public nuisance is not an unconstitutional taking. *See Eagle Grove*, 904 N.W.2d at 554–55. This result is supported by a footnote in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987) (“[S]ince no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not ‘taken’ anything when it asserts its power to enjoin nuisance-like activity.”).

9. *See Eagle Grove*, 904 N.W. at 556. Defendant Kevin Cahalan appeared at the hearing, but he did not offer to perform any specific action to remedy the public nuisance, but rather requested that the City grant him more time to deal with the deficiencies in the property. The City declined this request and moved forward, demanding the court immediately transfer title to the property to the City. *Id.*

10. *Id.*

11. In the aftermath of the “Great Recession” of 2007, large numbers of foreclosed urban homes remained vacant for long periods. In an attempt to gain some control over this new problem, several cities adopted ordinances requiring the owners of vacant buildings to register them with

Most local governments, however, did not relish participating in the foreclosure process and did not regard it as a satisfactory solution to their growing problems with empty buildings deemed public nuisances. A few local governments decided to avoid constitutional issues by buying the nuisance properties (either in a voluntary sale or via eminent domain), repair or clear the substandard structures, and then either put the land to public use or resell it for private development.¹²

B. IOWA CODE SECTION 657A.10A ADDS A POWERFUL ADDITIONAL REMEDY

At the urging of Iowa cities and counties, in 2004 the Iowa General Assembly responded to the perceived inadequacy of the state's public nuisance remedies to deal with problematic vacant buildings by enacting section 657A.10A.¹³ This almost unique state statute¹⁴ was intended to create a more effective option for local governments to eliminate privately-owned nuisance structures.¹⁵ It also has the potential, however, to destroy the property rights of Iowans owning unoccupied substandard buildings that could potentially pose public nuisances.

Iowa Code section 657A.10A authorizes Iowa cities and counties to initiate judicial proceedings against the owners of targeted vacant, substandard buildings within their boundaries for the purpose of having them legally declared "abandoned public nuisances," a term of art under the statute.¹⁶ If a court agrees that the empty building before it qualifies as an abandoned public nuisance as defined in section 657A.1, it is authorized to award the local

the city. These ordinances raised legal issues of their own. *See* Keith H. Hirokawa & Ira Gonzalez, *Regulating Vacant Property*, 42 URBAN LAWYER 627, 629–33 (2010).

12. *See* Shoked, *supra* note 5, at 487–88 n.324 (describing Detroit's program for clearing abandoned structures deemed public nuisances.)

13. IOWA CODE ANN. § 657A.10A (2016).

14. Illinois is the only other state to adopt a statute like Iowa's section 657A.10A that currently awards local governments the title to private properties with nuisance structures, if the owners do not respond adequately to administrative orders to repair or demolish the vacant buildings. *See* 65 ILL. COMP. STAT. ANN. 5/11-31-1(d) (2005), which provides: "If the owner of record has not entered an appearance and proven that the owner did not intend to abandon the property, and if no person with an interest in the property files a timely request or if the requesting party fails to demolish the building or put the building in safe condition within the time specified by the court, the municipality may petition the court to issue a judicial deed for the property to the municipality." Detroit initiated a similar program in 2005, but abandoned it 2010 as too costly. *See* Shoked, *supra* note 5, at 487 n.324.

15. *See* City of Eagle Grove v. Cahalan Invs., LLC, 904 N.W.2d 552, 559 (Iowa 2107) where the court first (quoting from an earlier case: "[s]ection 657A.10A was enacted in 2004 to give municipal governments an alternative means of abating the public nuisance caused by abandoned buildings"). The court then quoted the Legislative Research Services' explanation of the purpose of section 657A.10A that "[t]he legislature enacted [the section] to give the city an opportunity to obtain title to the property rather than have a receiver appointed to manage the property." *Id.*

16. *See* IOWA CODE ANN. § 657A.10A(3).

government title to the property, without requiring the payment of any compensation to the displaced owner.¹⁷

Iowa Code section 657A.10A does not incorporate the customary common law principles governing the abandonment of private property.¹⁸ The statute instead lists 13 factors for a court to consider to determine whether the property at issue is legally abandoned.¹⁹ Not surprisingly, these factors are written in a way that makes almost every vacant, substandard building qualify as legally abandoned under the terms of the statute, and Iowa courts have had little trouble finding that the targeted structures brought before them were legally abandoned under section 657A.10A.²⁰

When an Iowa court reviews the 13 factors listed in section 657A.10A(3) and finds the targeted property is an “abandoned public nuisance” under at least one of them, the statute directs the court to enter an order transferring a clean title to the property to the local government that initiated the proceeding,²¹ without any compensation being paid to the owner of the property or to the holder of a valid lien, or to other claimants. Just to be clear about the remarkable power to terminate the private ownership of Iowa property owners that was granted to Iowa courts under section 657A.10A, the statute specifically authorizes the city or county initiating the judicial proceeding to be awarded title to the property found to be an abandoned public nuisance free and clear of all outstanding claims, without paying anything for it.²² Such uncompensated transfers are mandated even though the property at issue was not actually abandoned by its owner under common law principles, the property owner actively resisted the local government’s claim throughout the court proceedings, and the property owner strongly protested the uncompensated loss of title to the land at every stage of the proceedings. One or more of these facts were present in each of the three cases litigated in Iowa appellate courts thus far under section 657A.10A, but the courts consistently

17. See *id.* § 657A.10A(5).

18. At Iowa common law, a claim that property was abandoned required a court to consider the actions of the owner very closely to determine whether he or she truly intended to relinquish all rights to the property, never to reclaim them. See *Allamakee Cty. v. Collins Tr.*, 599 N.W.2d 448, 451–53 (Iowa 1999); Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 196–97 (2010).

19. IOWA CODE ANN. § 657A.10A(3). For example, among the 13 factors listed are questions about whether the building currently meets local building codes and housing codes, whether utilities are currently provided, whether the building is currently occupied by the owner or lessees of the owner, whether property taxes are owing, whether the building is boarded up or otherwise secured from unauthorized entry, and the presence of vermin, debris or uncut vegetation. *Id.*

20. See *infra* Section F, pp. 19–22 (discussing *City of Waterloo v. Bainbridge & HLS U.S. Bank* and *City of Monroe v. Nicol*).

21. IOWA CODE ANN. § 657A.10A(5).

22. *Id.*

ruled the property legally abandoned and ordered the transfer of title to the local government.²³

C. *HOW THE IOWA SUPREME COURT MISREAD AND MISAPPLIED THE RELEVANT FEDERAL TAKINGS LAW*

The uncompensated transfer of the title to private property to a local government required by Iowa Code section 657A.10A obviously presents a nontrivial question of federal constitutionality under the “takings” prohibition of the Fifth Amendment. Federal and state courts routinely read the Fifth Amendment takings law into the Due Process Clause of the Fourteenth Amendment, which applies to states.²⁴ For over 25 years, federal takings law has recognized that when the effect of a government regulation destroys all of the value of privately owned property, an unconstitutional “total taking” has occurred, which must be compensated or the regulation is invalidated.²⁵ There should be no doubt that a regulatory statute like section 657A.10A, which requires an uncompensated surrender of the title to private property to a local government, is at least as pernicious constitutionally as a statute that destroys all of the property’s value but leaves the bare title to the valueless property in private ownership. Over the years, the constitutionality of section 657A.10A was challenged unsuccessfully in Iowa appellate court actions twice, but the Iowa Supreme Court did not have occasion to rule directly on its validity until late in 2017, when the court decided the case of the *City of Eagle Grove v. Cahalan Investments, LLC*,²⁶ in which the court unanimously upheld the constitutionality of section 657A.10A.

The contention of this Essay is that *Eagle Grove* and the two other Iowa cases upholding the constitutionality of section 657A.10A were wrongly decided under federal takings law. Iowa courts got the federal law wrong because they consistently misconstrued and misapplied the primary U.S. Supreme Court decision on which the Iowa decisions were expressly based. The Iowa courts were correct in identifying the controlling federal authority as the 1992 U.S. Supreme Court’s decision in *Lucas*.²⁷

In *Lucas*, the High Court recognized a new category of *per se* regulatory taking. It held that a state regulation of land use causes an unconstitutional “total taking” when it removes “all economically beneficial or productive use of land” held in private ownership but makes no provision for paying just

23. See *infra* notes 79–124.

24. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 313 (Iowa 1998).

25. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026, 1030–31 (1991).

26. See *generally* *City of Eagle Grove v. Cahalan Invs., LLC*, 904 N.W.2d 552 (Iowa 2017) (finding that when two properties were deemed nuisances it was permissible for the city to take them without compensation to the owner under section 657A.10A).

27. See *Lucas*, 505 U.S. at 1030.

compensation to the owner.²⁸ The *Lucas* decision went on, however, to posit that not all government regulations appearing to cause total takings are necessarily unconstitutional.²⁹ In its *Lucas* decision, the Court expressly carved out a narrow exception to be applied when the regulation at issue did no more than duplicate existing restrictions on the use of the plaintiff's land based on "background principles of the State's law of property and nuisance." Hereinafter, this portion of the *Lucas* ruling will be referred to as the "*Lucas* exception." The Court explained this exception by observing that where background principles imbedded in the State's common law already limited the uses the owner could make of the land, such common law restrictions limited the property owner's "bundle of rights" that inhered in the landowner's title.³⁰ When these background principles restricted the landowner's rights to use the land to the same degree as the challenged regulation, constitutionally the regulation took nothing of value from the aggrieved property owner.³¹

Sections of this Essay quote extensively from the language in the *Lucas* majority opinion creating and explaining the *Lucas* exception. This focus on the precise wording of the *Lucas* opinion is intended to provide the necessary background material for readers to determine if strong criticism of the Iowa courts' reliance on the *Lucas* exception in the cases considered is justified, and if not, whether the Iowa Supreme Court or the Iowa General Assembly should step in with corrective action to protect Iowans' property rights. The federal law governing claims of regulatory takings is in the forefront of the legal analysis here because the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution establishes a regulatory floor that all states must honor in their regulation of private property rights. Under the Supremacy Clause of the U.S. Constitution, lower courts, including state Supreme Courts, are required to give the salient language of controlling federal opinions like *Lucas* a respectful interpretation and good faith application. Arguably, this was not done by the Iowa Supreme Court in its *Eagle Grove* decision or in earlier cases applying the *Lucas* exception.

This Essay argues that in the *Eagle Grove* case, and in earlier judicial challenges to the constitutionality of section 657A.10A, the Iowa Supreme Court totally failed to recognize and apply the very narrow scope of the *Lucas* exception. This Essay contends that in all these cases, the Iowa Court incorrectly substituted modern Iowa statutory law for the background common law principles on which the *Lucas* exception was expressly based. This overly broad interpretation of the *Lucas* exception applied by the Iowa Supreme Court meant that all regulations adopted and judicial decrees rendered prior to the time a landowner acquired title to a tract of land,

28. *Id.* at 1015–16.

29. *Id.* at 1004.

30. *Id.*

31. *Id.*

including the regulation before the court challenged as a taking, would be “background principles” that automatically inhered in the title to the property. The Iowa Supreme Court’s misinterpretation of the *Lucas* exception would thus make it virtually impossible for an Iowa court to find an unconstitutional taking, so long as the landowner acquired title to the property after the effective date of the challenged regulation. One does not have to read the *Lucas* opinion very closely to understand that the Iowa rulings contradict the reasoning, the spirit, and the express language of Justice Scalia’s opinion justifying the *Lucas* exception.

D. EXAMINING THE *LUCAS* DECISION AS CONTROLLING AUTHORITY

To fully appreciate the force of the *Lucas* case as the controlling federal authority relied upon by the Iowa Supreme Court in *Eagle Grove* and in earlier decisions requires close examination of Justice Scalia’s majority opinion. The *Lucas* case and the *Eagle Grove* case are somewhat similar³² in that they both focus judicial review on a taking challenge to a state statute invoking the police power to abate conditions legislatively deemed public nuisances on private property. The South Carolina law was intended to prevent future public nuisances in the form of uncontrolled erosion of the State’s public beaches caused by housing development along the State’s Atlantic seashore.³³ In adopting its Beachfront Management Act, which prohibited any permanent development too close to the shoreline, the South Carolina General Assembly was carrying out its duties under special Congressional legislation. The Coastal Zone Management Act of 1972³⁴ provided coastal states major incentives to take action to protect against damaging erosion of their public beaches.³⁵ The Iowa statute, on the other hand, was designed to remedy existing public nuisances in the form of vacant, run-down structures that potentially caused serious health, safety, and economic problems to local communities. Both public nuisance statutes, however, had the potential to cause severe losses to private property owners affected by them, and they were challenged as unconstitutional total takings because they provided no compensation for any losses imposed.

Mr. Lucas owned two beachfront vacant lots on Isle of Palms, a barrier island with 1500 expensive homes near Charleston, South Carolina. Lucas paid nearly \$1 million for the two lots, intending to build his own home on one of

32. One obvious difference between the cases is the size of the dollar values at stake. Mr. Lucas was out almost \$1 million he paid for his two lots, if the coastline management regulation was upheld. *See id.* at 1006. The highest estimate of the value of Calahan’s two lots was \$36,600. *City of Eagle Grove v. Cahalan Invs., LLC*, 904 N.W.2d 552, 557 (Iowa 2017).

33. *See* Vicki Been, *Lucas v. the Green Machines: Using the Takings Clause to Promote More Efficient Regulation?*, in *PROPERTY STORIES* 299, 306 (Gerald Korngold et al. eds., 2d ed. 2004).

34. Coastal Zone Management Act, 16 U.S.C. §§ 1451–1466 (2012).

35. *Id.* § 1455 (authorizing administrative grants for qualifying states that participate in the program).

them, and to build an investment house on the other.³⁶ Before he could start building, under the new law, the South Carolina Coastal Council relocated the baseline for protecting the Isle of Palms public beaches from erosion to a position landward of Lucas' two lots. Under the Act, no permanent "habitable structures" could be constructed on either lot.³⁷ Lucas sued the Council claiming an unconstitutional taking of his lots. It is noteworthy that Mr. Lucas did not challenge the validity of the Beachfront Management Act under the state's police power, but simply sought compensation for what he claimed was the total taking of his property.³⁸ In the subsequent litigation, the state district court ruled that the implementation of Beachfront Management Act on the Isle of Palms had indeed rendered Lucas' two lots "valueless," which constituted an unlawful taking, and awarded him over \$1.2 million in just compensation.³⁹ On appeal, the South Carolina Supreme Court reversed the lower court decision on the ground that Lucas had conceded the constitutionality of the Beachfront Management Act as a valid exercise of the State's police power when he chose not to challenge the Act in the lower court; therefore his taking claim was not legally cognizable.⁴⁰

Mr. Lucas' appeal to the U.S. Supreme Court was granted. The *Lucas* case was decided by a six to three margin in 1992, with Justice Scalia writing the majority opinion reversing the South Carolina Supreme Court.⁴¹ In deciding in Mr. Lucas' favor, the Court recognized a new type of *per se* regulatory taking that occurred when a regulation denies a land owner "all economically beneficial or productive use" of the affected property.⁴² Thus, the finding by the lower South Carolina court that Lucas' land was rendered "valueless" by the Beachfront Act was held by the U.S. Supreme Court to be determinative on the taking issue.⁴³ There was a *per se* "total taking," which made further proof of loss by the landowner unnecessary.⁴⁴ Arguing that this "confiscatory" result logically inhered in the Court's evolving takings jurisprudence, Justice Scalia reasoned that a regulation that totally destroyed all of a property's value was equivalent to the already well-established *per se* taking rule that is applied when the government physically occupies a private owner's land permanently.⁴⁵ Justice Stevens filed a dissent in which he disputed Justice

36. See *Been*, *supra* note 33, at 304.

37. See S.C. CODE ANN. §§ 48-39-290-48-39-300 (2008).

38. See *Been*, *supra* note 33, at 309.

39. *Id.*

40. See *Lucas v. S.C. Coastal Council*, 404 S.E.2d 895, 896 (S.C. 1991).

41. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1003, 1032 (1992).

42. *Id.* at 1015.

43. *Id.* at 1020-31.

44. *Id.*

45. *Id.* at 1028-29 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)).

Scalia's claim that this new "categorical rule"⁴⁶ was already an integral part of the Court's takings jurisprudence.⁴⁷ Notwithstanding Justice Stevens' valid point that Justice Scalia could cite no Supreme Court authority for his new *per se* rule, it is difficult to disagree with the logic of Justice Scalia's claim that a government's action resulting in a total removal of all of a property's value should be recognized as a taking. Because it is extremely rare that a government regulation actually has the effect of totally removing all the economic value from the regulated property,⁴⁸ the "*per se*" taking rule established in *Lucas* has been invoked very rarely since its pronouncement.⁴⁹

More important to the issue of the constitutionality of Iowa Code section 657A.10A, Justice Scalia's majority opinion in *Lucas* also created an express exception to this new taking rule. In explaining this exception, Justice Scalia observed that no taking should be found in a case where it can be shown the property owner's "bundle of rights" never included the right to use the land in the way the regulation forbids.⁵⁰ He elaborated on the reason for this limited exception in these words:

[To be constitutional,] a law or decree with such [a confiscatory] effect must, in other words, 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.⁵¹

Later, in discussing the prohibition of any type of development on Lucas' land, Scalia observed: "It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of

46. *Id.* at 1063–67 (Stevens, J., dissenting).

47. *Id.* at 1063–64.

48. Even in the *Lucas* case itself, it is difficult to accept the lower court's conclusion that the value of the two beachfront lots was reduced to zero. Surely, neighboring property owners would have paid substantial amounts for the lots to expand their side yards and create larger estates. Justice Souter filed a separate "Statement" in the *Lucas* case in which he said he would have denied certiorari because the case turned on an assumption (total loss in land value) that was unreviewable by the Court. *Id.* at 1076–78 (Souter, J., statement).

49. One year after the *Lucas* decision, the *Lucas per se* taking rule was considered by the Iowa Supreme Court in *Iowa Coal Mining Company, Inc. v. Monroe County*, 494 N.W. 2d 664 (Iowa 1993). On this occasion the Iowa Supreme Court found the categorical taking rule of *Lucas* did not apply because the value of the property owner's coal mining operation was not totally destroyed, but retained a great deal of value. *Id.* at 670–71. The court noted the *Lucas* exception, but had no occasion to apply it. *Id.*

The *Lucas* "total taking" rule was again before the U.S. Supreme Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). There, however, the Court held that the plaintiff's land was not totally taken, so *Lucas* did not apply, and therefore the case presented no occasion to further apply the *Lucas* exception, but it did offer some clarification as to when it would come into play. *Id.* at 617–30.

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

51. *Id.* at 1029.

land.”⁵² It is difficult to imagine a clearer or more precise statement about the narrow reach Justice Scalia intended for the *Lucas* exception—limitations on use found to inhere in the title to the land cannot be based on recent legislation, but must find their source in long-recognized and well-established common law principles governing the enforcement of state nuisance or property law.⁵³

E. HUNZIKER V. STATE OF IOWA: *THE CRITICAL FIRST MISSTEP*

This Essay contends that the seeds of the mistake made in the *Eagle Grove* decision were sown in 1994 in *Hunziker v. Iowa*,⁵⁴ the principal Iowa precedent cited to support the *Eagle Grove* holding.⁵⁵ It was in *Hunziker* that the Iowa Supreme Court first considered the application of the *Lucas* exception to an Iowa regulation limiting a property owner’s right to develop land.⁵⁶ This Essay argues that, in *Hunziker*, the Iowa Supreme Court inadvertently misconstrued and misapplied the *Lucas* exception, thereby creating a precedent that ultimately led Iowa courts to incorrectly uphold the federal constitutionality of section 657A.10A in the *Eagle Grove* case and its two predecessor cases.

In *Hunziker*, the Iowa Supreme Court was faced with determining how the *Lucas* exception should apply to an Iowa statute protecting ancient Native American burial mounds.⁵⁷ Mr. Hunziker had acquired a 59-acre tract intending to subdivide it into one-acre lots and to sell the lots for residential development.⁵⁸ Unbeknownst to Mr. Hunziker, or anyone else at the time the land was purchased and subdivided, Lot 15, one of the platted lots, contained a sizeable and very old Native American burial mound.⁵⁹ Ten years before Mr. Hunziker acquired his 59-acre tract, an Iowa statute was adopted that not only prohibited any type of disruption of such a burial mound, but required its protection by the creation of a significant buffer zone around it.⁶⁰ The combined size of the burial mound and buffer zone was so large that, under the statute, no type of legal private development was possible on Lot 15.⁶¹ As a result, the value of Lot 15, which had been sold for \$50,000 before the burial mound was

52. *Id.* at 1031.

53. Mr. Lucas subsequently wrote and published a book about his case. *See* DAVID LUCAS, *LUCAS VS. THE GREEN MACHINE* (1995).

54. *Hunziker v. Iowa*, 519 N.W.2d 367 (Iowa 1994).

55. *See City of Eagle Grove v. Cahalan Invs., LLC*, 904 N.W.2d 552, 566 (Iowa 2017).

56. *Lucas* was decided in 1992, so *Hunziker*, which was decided in 1994, was one of the first cases in the U.S. to have occasion to apply the new *per se* taking rule created by *Lucas* and to construe the *Lucas* exception.

57. *Hunziker*, 519 N.W.2d at 370–71.

58. *Id.* at 368.

59. *Id.*

60. *Id.* at 370; IOWA CODE ANN. § 263B.9 (2012) (“The state archaeologist shall have the authority to deny permission to disinter human remains that the state archaeologist determines have state and national significance from an historical or scientific standpoint for the inspiration and benefit of the people of the United States.”).

61. *Hunziker*, 519 N.W.2d at 368–69.

discovered, was arguably reduced to \$0.⁶² The Court concluded this total loss would qualify as a *per se* taking under the *Lucas* analysis, unless the *Lucas* exception based on “background principles” applied.⁶³ The lower court had ruled that the *Lucas* exception applied to the facts of the case and granted a summary judgment to the State.⁶⁴

On appeal, the Iowa Supreme Court affirmed the lower court ruling by an eight to one margin.⁶⁵ Justice Lavarato, writing for the majority stated: “We do not interpret *Lucas* as restrictively as the plaintiffs do.”⁶⁶ Under the Court’s reading of the *Lucas* precedent, unless the *Lucas* exception applied, the statute at issue clearly caused an unconstitutional total taking of Mr. Hunziker’s interest in Lot 15 because no compensation was provided for his loss.⁶⁷ The court nevertheless agreed with the lower court and held that the enforcement of the state statute did not constitute a total taking of Mr. Hunziker’s property interest because the challenged state statute qualified for application of the *Lucas* exception.⁶⁸ Without any discussion of how the Iowa common law would deal with the facts of the case, the court simply pointed out that the Iowa statutes preventing disruption of ancient burial sites and requiring their protection were enacted over a decade before Mr. Hunziker purchased the 59-acre tract containing Lot 15.⁶⁹ On that basis alone, the court ruled that because the statute protecting ancient burial sites was on the books before Mr. Hunziker purchased the land at issue, the regulatory restriction on the use of his land created by the Iowa statute already inhered in the title to Mr. Hunziker’s land at the time he purchased it, severely limiting his “bundle of rights” with respect to development of Lot 15.⁷⁰ The direct legal consequence of the Court’s expansive interpretation of the *Lucas* exception was that any statute, administrative regulation, or court decree affecting a landowner’s right to use the land, adopted prior to a property owner’s acquisition of title, could count as a “background principle” in applying the *Lucas* exception. This interpretation of the *Lucas* exception appears to flatly contradict the relevant portions of the *Lucas* opinion.⁷¹

The lone dissenter, Justice Snell, strongly disagreed with the majority decision in *Hunziker*, claiming the majority seriously misinterpreted the scope

62. *Id.* at 368.

63. *Id.* at 370–71.

64. *Id.* at 368.

65. *Id.* at 371.

66. *Id.*

67. *Id.* at 370–71.

68. *Id.*

69. *Id.* at 371.

70. *Id.*

71. Compare *id.* (parenthetical), with *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015–20 (1992) (parenthetical).

of the exception contemplated in *Lucas*, which he claimed was mere *dicta*.⁷² Justice Snell further argued that the majority decision allowed the State to acquire total rights in Lot 15 without paying for them—a result that was the antithesis of what federal and state takings jurisprudence was intended to prevent.⁷³ As Justice Snell put it poetically: “In this case, a dead bones doctrine has risen from the soil, like a phoenix, to consume the live marrow of land ownership.”⁷⁴

This Essay claims that, based on the express language Justice Scalia employed in formulating the *Lucas* exception, it is conceptually and practically much narrower than the interpretation given it by the Iowa Supreme Court in *Hunziker*. Further, that the Iowa Court’s consistent misapplication of the *Lucas* exception since *Hunziker* is contrary to the well-settled federal constitutional takings law. Examined closely, the Iowa Court’s misapplication of the *Lucas* exception in *Hunziker* means that the only property owners who could successfully challenge a law that resulted in a *per se* taking of their property under *Lucas* were landowners who acquired their interest prior to adoption of the challenged regulation. It is difficult to imagine that Justice Scalia would agree with this application of his *Lucas* opinion. This broad interpretation of the *Lucas* exception appears to ignore Justice Scalia’s deliberate shaping of a narrow exception spelled out in the *Lucas* opinion; an exception based strictly on background common law principles. If he were still alive, it is almost certain Justice Scalia would strongly object to this type of “bootstrap analysis.” Under this reasoning, the very statute under constitutional scrutiny will be found to qualify as its own background principle, so long as it was enacted before the plaintiff acquired his land, and therefore it cannot be found to commit an unconstitutional taking.

But it is not necessary to speculate on the views of a deceased Justice. In 2001, the U.S. Supreme Court rejected this overly broad expansion of the scope of the *Lucas* exception in *Palazzolo v. Rhode Island*.⁷⁵ *Palazzolo* was another case challenging a state regulation severely restricting a private landowner’s right to develop his land, which was mostly natural wetlands.⁷⁶ In *Palazzolo*, the Court upheld the state law and rejected a broad reading of the *Lucas* exception, saying:

72. *Hunziker*, 519 N.W.2d at 372–73 (Snell, J., dissenting). Justice Snell got the limited scope of the *Lucas* exception right, but he was clearly wrong in describing it as *dicta*. It was on the basis of the *Lucas* exception that the case was remanded to South Carolina to determine whether the *Lucas* exception applied, based on the state’s background common law property and nuisance law. *Lucas*, 505 U.S. at 1031–32; *see also* *Lucas v. S.C. Coastal Council*, 424 S.E. 2d 484, 485–86 (S.C. 1992). It did not. *Id.* at 486.

73. *Hunziker*, 519 N.W.2d at 373 (Snell, J., dissenting).

74. *Id.*

75. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

76. *Id.* at 611. In *Palazzolo* much of the property at issue was natural wetlands that could not be filled for development without a permit from the U. S. Army Corps of Engineers. *Id.*

"[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. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common, shared understandings of permissible limitations derived from a state's legal tradition. A regulation or common-law rule cannot be a background principle for some owners but not for others."⁷⁷

The Iowa Supreme Court did not mention *Palazzolo's* reinforcement of the narrowness of the *Lucas* exception in its *Eagle Grove* opinion.⁷⁸ If the Iowa Court had been forced to deal with the *Palazzolo* case, it is difficult to imagine how it could have distinguished the case and reached the result it did.⁷⁹

F. IOWA CONSTITUTIONALITY RULINGS ON SECTION 657A.10A BEFORE
EAGLE GROVE

The validity and scope of Iowa Code section 657A.10A came before Iowa appellate courts twice after *Hunziker*, but before the *Eagle Grove* decision. The constitutionality of this controversial statute first reached the Iowa Supreme Court in 2008 in the case of *City of Waterloo v. Bainbridge & HLS U.S. Bank*.⁸⁰ Mr. Bainbridge, the primary defendant in the case below, was the record owner of the property at issue. An unoccupied house sat on Bainbridge's urban lot that the City claimed was an abandoned public nuisance under Iowa Code section 657A.10A. Bainbridge presumably resisted the City's claim, but lost in the court below and did not appeal. The appeal to the Iowa Supreme Court was taken by HLS U.S. Bank. The Bank held a tax sale certificate to the property, acquired when it was sold at a property tax foreclosure sale in 2003.⁸¹ For some reason, the Bank had delayed its redemption of the tax sale certificate until after the City of Waterloo had initiated a court proceeding under 657A.10A in which the City was awarded title to the property at issue as "abandoned nuisance property."⁸² The Bank challenged the constitutionality of the statute in the lower court and lost, but failed to preserve the constitutional issue on appeal.⁸³ The Iowa Supreme Court therefore declined to directly address the constitutionality of the statute.⁸⁴ Implicitly, however, the court upheld the validity of the statute by denying continued enforceability for the Bank's tax

77. *Id.* at 629–30 (citations omitted).

78. *City of Eagle Grove v. Cahalan Invs., LLC*, 904 N.W.2d 552, 563–66 (Iowa 2017).

79. One possible ground for distinguishing *Palazzolo* is that the comments in the case about the *Lucas* exception were only dicta, because the Court ruled that there was no total taking of the property rights at issue. *Palazzolo*, 533 U.S. at 629–30.

80. *City of Waterloo v. Bainbridge & HLS U.S. Bank*, 749 N.W.2d 245 (Iowa 2008).

81. *Id.* at 246.

82. *See id.* at 250.

83. *Id.* at 246–47.

84. *Id.* at 247.

certificate claim. The court reached this result by citing section 657A.10A(5), which provides that a city or county to whom title to “abandoned nuisance property” is awarded take the title “free and clear of any claims, liens, or encumbrances.”⁸⁵

Much of the court’s opinion focused on the question of whether section 657A.10A(5) should be given retroactive effect with respect to the Bank’s tax certificate, which predated the enactment of the statute by over a year.⁸⁶ The court ruled that the Bank’s tax certificate was indeed a substantive property right, but held section 657A.10A(5) was intended to operate retroactively and had the effect of wiping out the Bank’s claim.⁸⁷ Although the *Lucas per se* taking rule would appear to apply to the destruction of the Bank’s valid lien interest under Iowa Code 657A.10A(5), the court did not mention the *Lucas* holding or the *Lucas* exception. Rather, the court held that the Bank had not preserved its constitutional claim on appeal, and treated the issue before it as a simple matter of statutory construction. The court then gave 657A.10A(5) retroactive effect to destroy the Bank’s lien. How this could be justified under the 14th Amendment as interpreted in *Lucas* was not explained.

The first time the constitutionality of section 657A.10A was directly adjudicated was early in 2017, when the case of *City of Monroe v. Nicol*⁸⁸ was decided by the Iowa Court of Appeals. Nicol and Street owned a building in the City of Monroe that was both unoccupied for some years and badly run down.⁸⁹ Property taxes on the property were several years in arrears and all utilities were disconnected.⁹⁰ Nicol and Street had ignored several notices from the City ordering them to abate the public nuisance his building posed, and they had failed to pay the civil penalties assessed against him.⁹¹ When the City initiated judicial proceeding under section 657A.10A, Nicol and Street objected, claiming the statute was unconstitutional because it allowed the City to take away their title without paying any just compensation.⁹² The Iowa District Court upheld the constitutionality of the statute as a reasonable exercise of the State’s police power and awarded title to Nicol and Street’s property to the City.⁹³

On appeal, the Iowa Court of Appeals affirmed the lower court’s decision on the constitutionality of the statute.⁹⁴ The court acknowledged that “loss of title to property is a significant loss,” but nevertheless upheld the

85. *Id.* at 248 (quoting IOWA CODE ANN. § 657A.10A(5) (2016)).

86. *Id.* at 251.

87. *Id.* at 248–51.

88. *City of Monroe v. Nicol*, 898 N.W.2d 899 (Iowa Ct. App. 2017).

89. *See id.* at 901.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 902–03.

constitutionality of the statute against Mr. Nicol's takings claim.⁹⁵ To support its ruling, the court quoted language from the *Lucas* opinion validating regulations that do "no more than duplicate the result that could have been achieved in the courts"⁹⁶ by private or public litigants. The court did not bother to explain, however, exactly what Iowa Code section 657A.10A duplicated. The court cited only the general Iowa law governing abatement of public nuisances and section 657A.10A(3) as the authority for upholding the uncompensated transfer of Nicol's title to the City. No Iowa common law or statute-based case was cited, however, in which an Iowa court had directed forfeiture of title to the land on which a problematic public nuisance was located. The court apparently simply assumed the right of a local government to go to court to abate a public nuisance automatically included the right to claim a forfeiture of the title to the nuisance property as part of the abatement process. Neither the Iowa common law of public nuisance nor statutory public nuisance abatement provisions confer such a forfeiture right on private or public nuisance plaintiffs.⁹⁷

More troubling perhaps, the brief Court of Appeals' opinion does not consider the numerous paragraphs in the *Lucas* opinion (quoted extensively herein) emphasizing the narrowness of the *Lucas* exception, and limiting it to proof of existing background principles of the State's common law nuisance and property law that inhered in the property owner's title, thereby restricting the very use the challenged statute prohibited. Curiously, the *Nicol* opinion also failed to mention the *Hunziker* decision, the one prior Iowa Supreme Court case on point interpreting the *Lucas* exception very broadly, and which would have strongly bolstered the court's decision. Suffice it to say, the *Nicol* opinion was unsatisfactorily conclusory in its treatment of the Mr. Nicol's taking claim, and it was hardly a model of careful research or analytical rigor. Before the *Nicol* decision could be appealed, however, the Iowa Supreme Court had already accepted the appeal in the *Eagle Grove* case, the outcome of which would presumably control the result in the appeal of the *Nicol* case.

G. A CLOSER LOOK AT THE EAGLE GROVE DECISION

In 2014, the City of Eagle Grove, Iowa embarked on an ambitious campaign to rid the city of vacant, dilapidated, and possibly dangerous houses and other structures that qualified as public nuisances. In furtherance of this effort, the City entered into a funding agreement with the Eagle Grove Community Development Corporation ("CDC") for the CDC to acquire, repair, rehabilitate, or demolish problematic nuisance properties.⁹⁸ Two badly rundown properties

95. *Id.* at 903.

96. *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)).

97. See IOWA CODE ANN. § 657.1 (2016); *Weinhold v. Wolff*, 555 N.W. 2d 454, 460–64 (Iowa 1996) (laying out all the remedies available to a winning private nuisance plaintiff, but making no mention of forfeiture of the defendant's land title as a possible remedy).

98. *City of Eagle Grove v. Cahalan Invs., LLC*, 904 N.W.2d 552, 555 (Iowa 2017).

targeted by the City under this agreement were owned by Cahalan Investments, LLC, which was an investment vehicle created by Richard Cahalan and his wife Rachel Cahalan. In the early stages of their dealings with the City, the Calahans made clear that they were not interested in investing any additional money to make the needed improvements to the unoccupied dilapidated houses on either of their two lots.⁹⁹ The City then offered to buy the two lots for \$2,000 each.¹⁰⁰ The Cahalans rejected this offer and counteroffered to sell the lots to the City for their assessed valuations, \$15,000 for the older lot and \$20,000 for the newer lot.¹⁰¹ The City then initiated an action in the local district court under Iowa Code section 657A.10A seeking to have both properties declared abandoned public nuisances and have their titles transferred to the City.¹⁰² In the trial that followed, the district court denied the City's claim, ruling that transferring the title to the two lots to the City, without paying the Cahalans just compensation, would constitute a *per se* taking of their land under the Fourteenth Amendment to the U.S. Constitution.¹⁰³ The district court cited the *Lucas* case as controlling federal authority for its ruling that section 657A.10A was unconstitutional.¹⁰⁴

On appeal, the Iowa Supreme Court reversed the district court's decision. The court agreed that generally a transfer to the City of title to Cahalans' lots without compensation would be a *per se* taking under *Lucas*, but then applied the exception to this principle that was also created in *Lucas* to find no taking.¹⁰⁵ Quoting from *Lucas*, the court ruled that there was no taking by the City because it could be demonstrated that the Cahalans' "bundle of rights" to their two properties never included the right to create a substantial public nuisance on the land in the way section 657A.10A forbids.¹⁰⁶ Further interpreting *Lucas*, the court observed that the precise content of a landowner's "bundle of rights" is determined under the state's property and nuisance law, and these elements of Iowa law support the validity of section 657A.10A.¹⁰⁷

The court organized its *Eagle Grove* opinion around what it described as a well-established analytical framework for determining the constitutionality of a statute, which consisted of a three-prong test that should be applied to Cahalans' taking claim. The three elements of the test are: "(1) Is there a constitutionally protected private property interest at stake? (2) Has this private property interest been 'taken' by the government for public use? and (3) If the protected private property interest has been taken, has just

99. *Id.* at 557.

100. *Id.* at 556.

101. *Id.*

102. *Id.*

103. *Id.* at 554.

104. *Id.*

105. *Id.* at 554–55.

106. *Id.* at 563–66.

107. *Id.* at 564.

compensation been paid to the owner?”¹⁰⁸ The answers to questions (2) and (3) are more or less self-evident based on the court’s recitation of the facts in the case: The City’s taking away title to Cahalans’ two lots would ordinarily be a *per se* taking under *Lucas* because it denies Cahalan “all economically beneficial or productive use” of his property, and Cahalan received no compensation for the lots taken by the City.¹⁰⁹ Therefore, everything turned on the court’s answer to question (1).¹¹⁰ Based on the reasoning discussed below, the court provided a rather emphatic “no” answer to the key question about whether the Cahalans had a constitutionally protected private interest in his two lots that were appropriated by the City.

As to the lot acquired after 657A.10A was enacted, the court’s reasoning was similar to that in the *Nicol* case. The court stated that under longstanding Iowa nuisance law, the City was authorized to abate the public nuisance posed by Cahalans’ dilapidated vacant house; therefore, Cahalans’ “bundle” of private property rights never included the right to carry on a public nuisance on their lot.¹¹¹ Thus, the court reasoned, the enactment of the Iowa statute invoked here to remove Cahalans’ title to that lot was not unconstitutional because it simply “duplicat[ed] the result that could have been achieved” by an action in court to abate the public nuisance.¹¹² As pointed out in the discussion of the *Nicol* decision, the problem with this conclusion is that it assumes that an action to abate a public nuisance, either at common law or under Chapter 657 (prior to the addition of 657A.10A) would automatically result in a condemnation of the nuisance property by the City, without the City having to pay just compensation. This is clearly not the traditional Iowa law regarding abatement of public nuisances, which can result in an injunction, civil fines, and criminal penalties, but not loss of title.¹¹³ Only through the enactment of a statute like 657A.10A could awarding title to the City without just compensation be accomplished.

The court’s reasoning displayed much greater ingenuity in justifying its holding that 657A.10A was not an unconstitutional taking as applied to Cahalans’ second lot, which was acquired before the statute was enacted.¹¹⁴ The argument of the court for subjecting this lot to title loss under 657A.10A starts out with the same public nuisance abatement theory applied to the first lot, but

108. *Id.* at 560 (citations omitted).

109. *Id.* at 563 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)).

110. In a footnote, the Court acknowledged that its holding that the Cahalans did not have a constitutionally protected private property interest was dispositive of the case, but explained that it also considered the second prong at some length because both parties focused their arguments on it. *Id.* at 561 n.9.

111. *Id.* at 566.

112. *Id.* at 565 (quoting *Monroe v. Nicol*, 898 N.W.2d 899, 903 (Iowa Ct. App. 2017)).

113. See IOWA CODE ANN. § 657.1 (2016); *Weinhold v. Wolff*, 555 N.W. 2d 454, 460–64 (Iowa 1996).

114. *Eagle Grove*, 904 N.W.2d at 565–66.

then it takes off in what can only be described as a flight of conjecture.¹¹⁵ The opinion first points out that the Iowa Code section 657.3, first enacted in the 19th Century, makes a public nuisance a low-grade crime—specifically an aggravated misdemeanor.¹¹⁶ It then notes that Iowa Code section 809A.3(1), which was also enacted well before the Cahalans purchased the lot, provides that property used criminally in the commission of an aggravated misdemeanor may give rise to a forfeiture of the property to the state.¹¹⁷ Putting these two statutes together, the court reasoned that even though 657A.10A was enacted after the Cahalans purchased the lot at issue, theoretically their “bundle of rights” to this lot nevertheless did not include the right to conduct a public nuisance on the premises, on penalty of forfeiture of their title.¹¹⁸ The court then ruled that because the State could have first abated the nuisance, then taken away title to his lot under the forfeiture statute, section 657A.10A simply duplicated existing Iowa law.¹¹⁹ Thus, the challenged statute fit within the *Lucas* exception as applied by Iowa courts, and did not result in a taking of Cahalans’ property.

In spinning out this theory, the court failed to mention that the forfeiture statute it cited had mostly been applied in cases involving illegal drug transactions, and had never before been applied to public nuisance wrongdoers.¹²⁰ Lacking any Iowa case authority, the court could only speculate that maintaining a public nuisance like the ramshackle house owned by the Cahalans would have resulted in a loss of title to the city under this Iowa forfeiture statute. But the Iowa forfeiture statute specifically awards the title to forfeited property to the State, not to a local government, and it would presumably have required an amendment of the statute to cause forfeited property to pass to local governments. The only case cited by the court applying a state forfeiture statute to a non-drug related crime was a U.S. Supreme Court case from Michigan that upheld the forfeiture of an automobile in which a prostitute conducted her unlawful sex business.¹²¹

115. *Id.*

116. *Id.* at 565.

117. *Id.* at 565–66.

118. *Id.* at 563, 566 (quoting *Hunziker v. State*, 519 N.W.2d 367, 370 (Iowa 1994)).

119. *Id.* at 566.

120. Chapter 809A of the Iowa Code is entitled the “Forfeiture Reform Act.” It was adopted in 1996 and substantially amended in 2017. Its legislative history clearly shows it was stimulated by public concern about spreading drug law violations. The Act authorizes any Iowa peace officer to obtain a seizure warrant from an Iowa court for the purpose of taking possession of private property subject to seizure under the Act. The language and context of the Act simply do not fit well with the efforts of local governments to abate public nuisances posed by abandoned buildings. There does not appear to be a single Iowa case in which 809A was used to abate a public nuisance. See IOWA CODE ANN. §§ 809A.1–809A.25 (2018).

121. *Eagle Grove*, 904 N.W.2d at 566 (citing *Bennis v. Michigan*, 516 U.S. 442, 443, 452, 453 (1996)).

The validity of the Iowa Court's hypothetical application of Iowa forfeiture law was called further into question by the U.S. Supreme Court's recent unanimous ruling in *Timbs v. Indiana* that the Eighth Amendment's prohibition of "Excessive Fines" applies to the states through the Due Process Clause of the Fourteenth Amendment.¹²² In the *Timbs* case the U.S. Supreme Court reversed an Indiana Supreme Court decision upholding forfeiture of a high-priced automobile used in a misdemeanor drug deal. The High Court strongly disagreed with the Indiana Supreme Court's ruling that "civil *in rem*" forfeitures under state law were not subject to the constitutional prohibition of excessive fines applicable to the states through the Due Process clause of the 14th Amendment.¹²³ The 2017 amendments to Iowa's Forfeiture Reform Act added a new provision, 809A.12B that imposes on Iowa forfeitures the same type of excessiveness limit the U.S. Supreme Court recently created in the *Timbs* case.¹²⁴

*H. THE IOWA COURT'S APPLICATION OF THE LUCAS EXCEPTION IS BLATANTLY
INCONSISTENT WITH THE SALIENT LANGUAGE OF THE LUCAS OPINION*

Some readers might think this Essay goes overboard in too closely parsing the language employed by Justice Scalia in creating the special exception to *Lucas*' total taking analysis. But takings law is important constitutionally and it deserves careful application by state courts. Takings law embodies a fundamental principle that establishes the level of constitutional protection the Fourteenth Amendment affords private property owners against excessive state regulation. When it is properly invoked, the *Lucas* exception greatly ameliorates the force of the *per se* total taking principle the *Lucas* decision introduced into federal takings jurisprudence. If every modern regulatory statute qualified for the *Lucas* exception, the total taking concept of *Lucas* would be severely eroded, if not eliminated. Therefore, it is crucial for state courts to correctly recognize the limited scope of this unique *cul de sac* in federal takings law and to get it right, not only to promote the integrity of federal constitutional law administration, but for the benefit of Iowa landowners affected by potentially confiscatory regulations.

The key language in the *Lucas* opinion preceding the pronouncement of the *Lucas* exception first posited that the new *per se* taking rule announced in the case was based on the Court's "traditional resort to 'existing rules or

122. See generally *Timbs v. Indiana*, 139 S. Ct. 682 (2019) (reversing an Indiana Supreme Court decision upholding forfeiture of a Land Rover used in a minor drug sale).

123. *Id.* at 686–87.

124. Iowa Code section 809A.12B forbids forfeiture where the value of the forfeited property is "grossly disproportionate to the severity of the offense." IOWA CODE ANN. § 809A.12B. No Iowa court has yet to be called upon to interpret the meaning of this new restriction on Iowa forfeitures, but section 809A.12B would seem to further undermine the Iowa Supreme Court's conjecture about how Iowa forfeiture law could play out in the case of a local government abating a public nuisance.

understandings that stem from an independent source such as state law.”¹²⁵ The opinion then went on to observe that the “recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those ‘existing rules or understandings’ is surely unexceptional.”¹²⁶ Explaining the reason for its emphasis on “existing rules or understandings,” the Court’s opinion continued by strictly limiting the prior state law that can qualify for the *Lucas* exception: “Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”¹²⁷ Thus, as clearly envisioned by the *Lucas* opinion, only in the rare case where background common law principles imbedded in the state’s property or nuisance law already prevented the use of the plaintiff’s land in the way the challenged regulation prohibited would an exception be recognized that foreclosed the finding of an unconstitutional taking.

The flaw in the rulings of the Iowa courts is obvious when a fair and respectful interpretation is given to the critical language from the *Lucas* opinion explaining how the exception was intended to operate. To further clarify the narrow limits of the exception he was creating to the new *per se* taking rule, Justice Scalia stated, “[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner’s land; they rarely support prohibition of the ‘essential use’ of land.”¹²⁸ Justice Scalia went on to project how the *Lucas* exception should be applied to the facts of the *Lucas* case on remand to the South Carolina Supreme Court:

We emphasize that to win its case South Carolina must do more than proffer the legislature’s declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim such as *sic utere tuo ut alienum non laedas*.¹²⁹ As we have said, a “State by *ipse dixit*, may not transform private property into public property without compensation.”¹³⁰

Finally, the *Lucas* opinion concludes with this statement:

[To prevail] South Carolina must identify background principles of nuisance and property law that prohibit the uses he [Lucas] now intends in the circumstances in which the property is presently found.

125. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (citations omitted).

126. *Id.*

127. *Id.* at 1029.

128. *Id.* at 1031 (citations omitted).

129. Translated to English this maxim reads: Use your land in a way that does not harm your neighbor.

130. *Lucas*, 505 U.S. at 1031 (internal punctuation omitted) (quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 115, 164 (1980)).

Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing.¹³¹

It is difficult to imagine how Justice Scalia could have made the narrow scope of the *Lucas* exception clearer—the exception is limited to longstanding common law background legal principles of state property and nuisance law; modern regulatory statutes do not count.¹³²

Arguments in the long dissent filed by Justice Blackmun in the *Lucas* case bolster the argument that the *Lucas* exception did not contemplate reference to modern statutes, regulations, or recent judicial decrees. In his dissent, Justice Blackmun rebuked Justice Scalia for privileging ancient common law rules over modern legislative enactments and judicial rulings. Blackmun observed:

There is nothing magical in the reasoning of judges long dead. They determined a harm in the same way as state judges and legislatures do today. If judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators?¹³³

There can be little doubt that at the time of the *Lucas* decision Justice Blackmun understood the exception created by Justice Scalia to his newly created *per se* taking rule to be quite narrow.

I. CONCLUSION

In both the *Hunziker* and *Eagle Grove* cases, the Iowa Supreme Court greatly expanded the reach of the *Lucas* exception to the “Total Taking” rule. In what this Essay argues was an extraordinary misreading and misapplication of the exception, the Iowa Supreme Court included within the *Lucas* exception’s “bundle of rights” analysis any type of law in place at the time the plaintiff came into ownership of the land, including the very modern statutes that were challenged as takings. This Essay contends that the Iowa Court’s interpretation of the *Lucas* exception is not a fair and plausible reading of the clear language of the *Lucas* opinion. The Iowa Court’s application totally ignores the basic idea on which the exception is premised, namely its foundation in the background common law principles of the state’s nuisance and property law. The *Lucas* opinion expressly rejects the idea that modern statutes can qualify as fitting within the exception. As argued earlier, the *Lucas* exception was certainly not intended to allow a “bootstrap” maneuver in which the very statute challenged

131. *Id.* at 1031–32.

132. On remand, the South Carolina Supreme Court determined that there were no state law background nuisance or property principles that would have prevented Lucas from building house on his two lots. *See Lucas v. S.C. Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992). The State ended up paying Lucas \$1.575 million in just compensation for the taking of his property. *See LUCAS, supra* note 53, at 237–240.

133. *Lucas*, 505 U.S. at 1055 (Blackmun, J., dissenting).

as a taking could serve as its own background principle thereby triggering the application of the exception that validates it. The Iowa Court's use of modern statutes in its constitutional analysis in *Eagle Grove* might have been valid, if the plaintiff's claim had been one of "excessive diminution" in the value of the property under *Penn Central Transportation Co. v. New York City*,¹³⁴ but as the Iowa Court expressly acknowledged, the plaintiff's claim in *Eagle Grove* was based on a "Total Taking" under *Lucas*.¹³⁵

The argument developed throughout this Essay is that, starting with the 1994 *Hunziker* case, the Iowa Supreme Court consistently misread and misapplied the *Lucas* exception by invoking modern statutory enactments as qualifying for the exception. The Iowa courts definitely did not limit their application of the *Lucas* exception to background common law principles, as the *Lucas* opinion expressly requires. If the search of background principles of property and nuisance law was confined to Iowa common law cases or ancient statutes, no instance could be found where a property owner was forced to surrender his title to a private plaintiff or a local government because he was determined to be conducting a public nuisance on his land. Forfeitures in Iowa law are based strictly on modern statutes. Therefore, it is not a justifiable defense for the constitutionality of section 657A.10A to claim, as Iowa appellate courts have repeatedly maintained, that the challenged regulation takes nothing from the affected landowners because it merely duplicates existing land use limitations created by modern statutes that inhere in every Iowa landowner's title.

Almost a century ago, Justice Oliver Wendell Holmes, Jr. penned this oft-quoted passage concerning "takings" law: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."¹³⁶ Local governments all over the Midwest have moved forward to deal directly with the problem of abandoned private structures that pose public nuisance dangers by buying the properties, either through voluntary sales or by initiating eminent domain proceedings, and then eliminating the hazard.¹³⁷ Iowa cities and counties could certainly do the same, and in fact they have been doing so for many years.¹³⁸ For example, Iowa communities suffering major flooding damage have routinely purchased partially destroyed private homes

134. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The takings analysis under *Penn Central* and later cases focused on claims of excessive diminution in value and expressly considers the "distinct investment-backed expectations" of the plaintiff, which presumably takes into account the presence of regulatory restrictions on the use of the property at the time the plaintiff acquired it. *See id.* at 105.

135. *City of Eagle Grove v. Cahalan Invs., LLC*, 904 N.W.2d 552, 561–62 (Iowa 2017).

136. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

137. *See Shoked*, *supra* note 5, at 482.

138. Note, before filing legal proceedings under 657A.10A, *Eagle Grove* made an offer to purchase both of the Cahalans' lots for \$2,000 each, but the offer was so low it was quickly rejected. *See supra* text accompanying notes 100 and 101.

to prevent them from being rebuilt in flood plains subject to periodic flooding.¹³⁹ In contrast to the enforcement of section 657A.10A, following Justice Holmes admonition and purchasing the land on which there are nuisance abandoned structures would be the constitutional way of solving what is admittedly a serious problem in many Iowa communities.

If the *Eagle Grove* case had been appealed to the U.S. Supreme Court, the analysis in this Essay strongly suggests that the decision would have been overturned. The decision of the Iowa Supreme Court would have been reversed because it illegitimately expanded the limited *Lucas* exception to the decision's *per se* taking rule far beyond what Justice Scalia obviously intended. Reviewing the relevant language about the narrow *Lucas* exception from Justice Scalia's majority opinion makes clear that the "background principles" to which it refers must be found in the jurisdiction's common law nuisance and property law heritage, and not in modern legislative enactments.¹⁴⁰

Finally, this Essay urges that the Iowa Supreme Court's rulings in *Eagle Grove* and earlier cases relying on *Lucas* are not just wrongly decided, but they are so inconsistent with settled federal takings law that they require corrective action by the Iowa Supreme Court¹⁴¹ or reform legislation by the General Assembly. By consistently misinterpreting and misapplying federal takings law as established in the *Lucas* case, the Iowa courts are not only failing to apply federal law responsibly, and thereby failing to meet their duties under the Supremacy Clause, they are also substantially eroding affected Iowan's private property rights protected by the Fourteenth Amendment.

139. See, e.g., Rick Smith, *Government Buys Out Cedar Rapids Home Repeatedly Damaged by Flash Floods*, GAZETTE (July 14, 2015), <https://www.thegazette.com/subject/news/government/government-buys-out-cedar-rapids-home-repeatedly-damaged-by-flash-floods-20150714>; Josh O'Leary, *Iowa City Eyes Nine More Buyouts in Flood Plain*, IOWA CITY PRESS-CITIZEN (May 1, 2015, 9:35 PM), <https://www.press-citizen.com/story/news/local/2015/05/01/buyouts-flood-plain/26752725>.

140. Of course, if the U.S. Supreme Court had accepted an appeal of the *Eagle Grove* case, in its wisdom, it could agree with Justice Blackmun's dissent and expand the reach of the *Lucas* exception to include modern statutes. This reinterpretation is highly unlikely, however, and it certainly is not the province of a state supreme court to so greatly expand the scope of such an important federal ruling.

141. The *Eagle Grove* opinion provides an excellent example of how the Court could correct its misreading of the *Lucas* exception. The opinion describes at length how the U.S. Supreme Court abandoned decades of incorrect analysis that posited a requirement that regulations challenged as takings must "substantially advance[] a legitimate state interest." *City of Eagle Grove v. Cahalan Invs., LLC*, 904 N.W.2d 552, 563 n.14 (Iowa 2017) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005)).