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SUPREME FORESIGHT: JUDICIAL TAKINGS, REGULATORY TAKINGS, AND THE PUBLIC TRUST DOCTRINE

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Abstract: Before the Supreme Court issued its decision in Stop the Beach Renourishment, Inc., v. Florida Department of Environmental Protection, many expected the Court to finally speak about whether the public trust doctrine qualifies as a background principle for modern takings law, and whether judicial decisions can constitute an unconstitutional taking. In deciding against private property rights and in favor of states’ rights to protect their beaches, however, the Supreme Court once again avoided finally deciding these issues. Nonetheless, had the Court instead adopted the expected “foreseeability” approach to determine whether there was a judicial taking, the result would likely have been the same. That is because the public trust doctrine, which is a background principle of property law under Lucas v. South Carolina Coastal Council, allows Florida to reclaim its beaches after a destructive storm and does not unconstitutionally take any private property rights.

Introduction

Whether the public trust doctrine has any role in regulatory takings analysis is a long-standing debate that exploded on the Supreme Court in Nollan v. California Coastal Commission.1 Although Justice Scalia’s original draft of the majority opinion made no reference to the doctrine, Justice Brennan wrote a powerful dissent in which he directly incorporated the public trust doctrine into the regulatory takings analysis.2 Justice Blackmun feared that Justice Brennan’s bold assertions would pro-

voke Justice Scalia to retaliate directly by condemning and restricting the doctrine, and he was right.3 As an eleventh-hour compromise to save the public trust doctrine—facilitated by Justice Blackmun—Justice Brennan removed all reference to the public trust doctrine from his dissent and Justice Scalia did not limit the doctrine in the majority opinion.4 Consequently, the only public remnant of this battle is one cryptic reference beginning Justice Blackmun’s dissenting opinion stating that the Court’s opinion in no way implicated the public trust doctrine.5 Thus, the Supreme Court remained silent on the public trust doctrine’s role in regulatory takings analysis, and lower courts have been left to grapple with this divisive issue without guidance ever since.6

Over twenty years later, many thought this silence would be broken as the Supreme Court wrestled with establishing a third category of takings that applies to the courts—judicial takings.7 The Court, in Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection (Stop the Beach Renourishment II), rendered a decision that once again dodged the question of the public trust doctrine’s role in takings analysis, and offered a dramatically different approach to judicial takings than had ever been offered before.8 In that case, the Florida Supreme Court declared in Walton County v. Stop the Beach Renourishment, Inc. (Stop the Beach Renourishment I) that property owners suffered no regulatory taking of their beachfront property rights, an opinion that rested largely on the role of the public trust doctrine in the analysis.9 Affected property owners claimed that this decision was an unconstitutional judicial taking,10 while Florida maintained that no taking occurred.11

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3 See generally Deason, supra note 1 (indicating that Justice Scalia did retaliate against the public trust doctrine references in subsequent draft opinions, prompting Justice Brennan to remove all public trust doctrine references from his opinion).
4 See generally id.; see also Nollan, 483 U.S. at 825–64 (absent reference to public trust doctrine).
5 Nollan, 483 U.S. at 865 (Blackmun, J., dissenting); see also Deason, supra note 1 (insisting it be clear that the majority did not implicate the public trust doctrine).
6 See infra Parts I–III.
8 130 S. Ct. 2592 (2010).
9 998 So. 2d 1102, 1114–15 (Fla. 2008), aff’d sub nom., Stop the Beach Renourishment II, 130 S. Ct. 2592 (2010).
10 Petition for Writ of Certiorari at i, Stop the Beach Renourishment II, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 698518 (asking the Supreme Court to decide if there had been a judicial taking).
11 Brief of Respondent in Opposition to Petition for Writ of Certiorari at 10–11, Stop the Beach Renourishment II, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 1206633.
Ironically, it was an opinion penned by Justice Scalia that provided the legal hook necessary to assert the public trust doctrine’s role in regulatory takings analysis by establishing background principles of state law.12

If recognized as a legitimate Fifth Amendment protection, a judicial taking will likely require that a court decision be unforeseeable.13 The decision in Florida, however, was entirely foreseeable because the public trust doctrine is well-established as a background principle.14 Therefore, even if the Supreme Court had adopted a traditional approach to judicial takings, and addressed the public trust’s role in the analysis, the state court decision would still not be found to affect a judicial taking.15

Part I of this Note provides the necessary background on modern takings jurisprudence and judicial takings doctrine.16 Part II explains how the public trust doctrine has been incorporated into takings analysis.17 Part III elaborates on the Florida Supreme Court’s decision, and the United States Supreme Court’s surprising judgment on review.18 Then, Part IV demonstrates that, even if the United States Supreme Court had met expectations and considered the public trust doctrine under the foreseeability standard, the Florida Supreme Court would still not have affected a judicial taking.19

I. Takings Analysis Under the Fifth Amendment

The Takings Clause of the Fifth Amendment prevents the government from taking “private property . . . for public use, without just compensation.”20 This prohibits government from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”21 The most traditional application of the Fifth Amendment takings protection is when government uses its police power to obtain private property through eminent

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14 See infra Part II.C.1.
15 See infra Part IV.
16 See infra Part I.
17 See infra Part II.
18 See infra Part III.
19 See infra Part IV.
20 U.S. Const. amend. V.
domain. As a basic attribute of sovereignty, all governments have the power to physically appropriate private property for a proper public purpose. Nevertheless, any exercise of eminent domain must be accompanied by just compensation—the fair market value of the property—for the property owner. Thus, although the government can sue a private property owner to obtain the owner’s land, the government must pay for the land.

The Fifth Amendment also protects private property owners when government action takes a property right without going through the eminent domain process—“a taking.” A property owner who believes he is a victim of a taking can sue the government to either stop the activity that results in the taking, or obtain just compensation for the lost property.

A taking can either be a physical taking of property, which is actual physical occupation of land, or a regulatory taking of property, when a government regulation goes “too far” and deprives private property owners of reasonable use of their land. Some advocate that takings protections should also be extended to a third class of government activity—“judicial takings.” A majority of the modern Supreme Court has yet to reach consensus on the subject of applying takings analysis to...
state court decisions, and thus it is unclear what exactly would constitute a judicial taking.\(^{32}\)

A. Physical Takings

A physical taking occurs when the government physically occupies or appropriates private property.\(^{33}\) Physical takings come in multiple forms, including: constructing an airport that leads to air traffic in private property’s airspace;\(^{34}\) the nuisance caused by the noise of a nearby airport;\(^{35}\) and the placement of a cable television wire on an apartment building.\(^{36}\) If the government’s occupation of the land could ripen into a prescriptive easement\(^{37}\) over time, then it is likely that the property owner has suffered a physical taking and deserves compensation.\(^{38}\) To obtain just compensation, a property owner must first establish the threshold issue that a physical invasion of property has occurred, and then proceed to establish the value of the harm caused by the physical occupation.\(^{39}\)

B. Regulatory Takings

Not only can government take private property physically, but a government regulation that deprives a property owner of a property right can also amount to a taking.\(^{40}\) When an owner takes title to land, the owner also acquires certain rights inherent in property ownership, such as the right to exclude others from the property and the right to

\(^{32}\) See Stop the Beach Renourishment II, 130 S. Ct. 2592, 2597, 2601–02 (2010) (only a plurality reached a decision on the judicial takings issue); Stevens v. City of Cannon Beach, 510 U.S. 1207, 1207 (1994) (Scalia, J., dissenting from denial of certiorari) (majority declined to address judicial takings question); Hughes v. Washington, 389 U.S. 290, 294 (1967) (Stewart, J., concurring) (judicial takings central to concurring but not majority opinion).

\(^{33}\) See, e.g., Loretto, 458 U.S. at 437 (requiring a television cable box be put on apartment buildings was a physical taking); Thornburg v. Port of Portland, 376 P.2d 100, 110 (Or. 1962) (flying planes so close to private property as to oust the owners from quiet enjoyment of their land results in a physical taking).


\(^{35}\) Thornburg, 376 P.2d at 100.

\(^{36}\) Loretto, 458 U.S. at 419.

\(^{37}\) Plater, supra note 22, at 197. An easement is a right to use land. Id. A prescriptive easement is an easement acquired by using land without permission for certain length of time, usually five to ten years. Id.

\(^{38}\) Thornburg, 376 P.2d at 103.

\(^{39}\) Plater, supra note 22, at 1122.

quiet enjoyment of the property. The collection of rights that a property owner receives is known as the owner’s “bundle of rights.”

If a regulation goes “too far” in restricting these rights, then the owner has suffered a regulatory taking and is entitled to just compensation. To determine if there has been a regulatory taking, courts consider three factors: (1) the economic impact of the regulation; (2) the regulation’s interference with distinct investment-backed expectations; and (3) the character of the governmental action. These factors are from the Penn Central Transportation Co. v. City of New York case, and are collectively known as the Penn Central balancing test.

However, courts do not always apply the Penn Central balancing test in a regulatory takings dispute. If a regulation eliminates all economically beneficial uses of the land, then the owner has suffered a categorical taking and is entitled to compensation without applying the multi-factor test. Consequently, if a property owner believes that a government regulation goes too far in limiting certain property rights, then the owner must either satisfy the Penn Central test, or demonstrate that the regulation leaves the owner with no economic use of the land.

C. Judicial Takings: A New Category of Takings?

Although the question of what amounts to a physical or regulatory taking can be muddled, it is firmly established that the Takings Clause limits the extent to which the legislature and executive agencies can infringe upon private property rights. Proponents of applying takings analysis to judicial decisions, which are known as judicial takings, fear that without such protection “courts may be motivated to accomplish judicially what cannot be accomplished by other governmental branches.” Thus, state court decisions that favor the state over

42 Nollan, 483 U.S. at 831; Robert Meltz et al., The Takings Issue: Constitutional Limits on Land Use Control and Environmental Regulation 26–27 (1999).
43 Penn Cent., 438 U.S. at 123–24.
44 Id. at 124.
45 See id.; Plater, supra note 22, at 1154.
47 See id.
48 See id. at 1019; Penn Cent., 438 U.S. at 123–24.
49 Thompson, supra note 31, at 1449.
50 Roderick E. Walston, The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings, 2001 Utah L. Rev. 379, 437; see also Thompson, supra note 31, at 1502 (“[B]ecause . . . courts can make valuable changes in the law that would not be made
private property rights\textsuperscript{51} would be appealable on the grounds that the decision was an unconstitutional taking of property.\textsuperscript{52} Essentially, judicial changes in the law would be subject to Fifth Amendment protections.\textsuperscript{53}

Those opposed to the prospect of judicial takings protection focus on the inherent differences between the judiciary and the other branches of government,\textsuperscript{54} the breach such a decision would cause in the United States’ federal structure,\textsuperscript{55} and the impracticality of such a doctrine.\textsuperscript{56}

1. Law of Judicial Takings in Flux

Although a majority of the modern Supreme Court has not formally addressed the prospect of judicial takings,\textsuperscript{57} the issue is not without precedent. The Supreme Court grappled with whether to apply takings protections to judicial decisions around the turn of the twentieth century with inconsistent results.\textsuperscript{58} Ultimately, the Court “finally and flatly reject[ed] the notion that judicial changes in the law could violate the takings provisions of the Constitution.”\textsuperscript{59} Although the issue was

\textsuperscript{51} \textit{Hughes v. Washington}, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring). Because takings decisions involve government appropriations of private property, and property law is traditionally an area of state concern, a judicial takings doctrine would predominantly affect state court decisions. \textit{See Thompson, supra note 31, at 1450.}

\textsuperscript{52} \textit{Thompson, supra note 31, at 1511.}

\textsuperscript{53} \textit{Id.} at 1463.

\textsuperscript{54} Courts do not make the law but rather interpret the law. \textit{Walston, supra note 50, at 437–38. Additionally, courts do not have the power of the purse to compensate for judicial takings. Thompson, supra note 31, at 1499. Furthermore, courts do not wield political power. See id. at 1506. }

\textsuperscript{55} Federal courts would be overseeing state courts and ruling on areas of traditional state concern. \textit{Id.} at 1509.

\textsuperscript{56} Federal courts would be flooded with state court issues and state courts would be effectively stifled from doing their jobs. \textit{Id.} at 1511.

\textsuperscript{57} \textit{Stop the Beach Renourishment II}, 130 S. Ct. 2592, 2597, 2601–02 (2010) (only a plurality reached a decision on the judicial takings issue).


\textsuperscript{59} Thompson, \textit{supra} note 31, at 1465. In 1930, Justice Brandeis emphasized that changes in the law did not present constitutional questions. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930). In a subsequent case, Justice Cardozo stated that the Constitution did not prohibit a court from retroactively applying a change in either common law or the interpretation of a statute. Great N. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364–65 (1932). These statements directly contradict Justice Scalia’s most recent statement on the subject that “[o]ur precedents provide no support for the proposition
seemingly dead in the 1930s, the judicial takings movement was revived in 1967 by Justice Stewart. In his concurring opinion in *Hughes v. Washington*, Justice Stewart explained, “a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.”

2. Modern Revival of the Judicial Takings Question

In the wake of Justice Stewart’s concurrence in *Hughes*, property holders tried to bring judicial takings claims to the Supreme Court, a number of state courts declined to overturn precedent for fear that to do so would be unconstitutional, and some lower federal courts held state court decisions to be unconstitutional takings. The Supreme Court, however, avoided readdressing the judicial takings question for over forty years, until it granted certiorari in *Stop the Beach Renourishment II*.

In the interim, the entire bench did not remain silent on the issue. Dissenting from the denial of certiorari in *Stevens v. City of Cannon Beach*, Justice Scalia argued, “[n]o more by judicial decree than by legislative fiat may a State transform private property into public property without compensation.” Further, Justice Scalia stated plainly his belief that a judicial decision that is not grounded in a state’s prior common law amounts to an unconstitutional taking.

In *Stop the Beach Renourishment II*, a four-justice plurality led by Justice Scalia stated clearly that courts “[a]ffect a taking if they recharacterize as public property what was previously private property.” In so doing, however, these justices flatly rejected the standard laid out in *Hughes*, stating that “[w]hat counts is not whether there is precedent that takings affected by the judicial branch are entitled to special treatment” because they clearly state that the judiciary cannot affect a taking. *Stop the Beach Renourishment II*, 130 S. Ct. at 2601; see Thompson, *supra* note 31, at 1465.

60 Thompson, *supra* note 31, at 1468.
62 Id.
64 See 130 S. Ct. at 2601.
66 Id. at 1212.
67 Id.
68 *Stop the Beach Renourishment II*, 130 S. Ct. at 2601. The remaining justices declined to reach a decision on the issue. Id. at 2613, 2618.
for the allegedly confiscatory decision,” but whether the court “declares that what was once an established right of private property no longer exists.”\textsuperscript{69} This standard is a sharp deviation from what was previously thought of as a judicial taking,\textsuperscript{70} has no precedential value,\textsuperscript{71} and could be difficult to apply.\textsuperscript{72} In the end, it is likely that applying the “established property right” standard will require employing tests similar to those advocated in Hughes, even though the Hughes standard was seemingly rejected.\textsuperscript{73}

While the issue of judicial takings has been revived, what constitutes a judicial taking is still unclear.\textsuperscript{74} As of now, the clearest articulation of a judicial taking is paraphrased from Justice Stewart’s Hughes concurrence: “the [State] Supreme Court’s decision must be granted deference as long as it ‘conforms to reasonable expectations,’ but ‘to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate.’”\textsuperscript{75} The crux of judicial takings under this test rests on whether or not the state court decision was foreseeable.\textsuperscript{76} This standard was rejected, however, in \textit{Stop the Beach Renourishment II}, where the alternative “established property right” test was proposed.\textsuperscript{77} Currently neither standard has precedential value, and it is unclear whether either will be adopted in the future.\textsuperscript{78} It is possible, though, that deciding

\textsuperscript{69} \textit{Id.} at 2602, 2610.


\textsuperscript{71} Sagarin v. City of Bloomington, 932 N.E.2d. 739, 744 n.2 (Ind. Ct. App. 2010) (declining to follow plurality decision because it is “without precedential authority”).

\textsuperscript{72} See Mulvaney, \textit{supra} note 70, at 256 (stating that the standard in \textit{Stop the Beach Renourishment} “falls prey to . . . malleability: it offers scant directives to future courts required to determine the bounds of ‘established’ property rights”); Daniel S. Siegel, \textit{Why We Will Probably Never See A Judicial Takings Doctrine}, 35 VT. L. REV. 459, 471–72 (2010) (implying that, after \textit{Stop the Beach Renourishment}, the judicial takings test is extremely unclear).

\textsuperscript{73} See D. Benjamin Barros, \textit{The Complexities of Judicial Takings}, 45 U. RICH. L. REV. 903, 934 (2011) (stating that a judicial takings claim will fail if the contested decision is reasonably based on prior precedent).

\textsuperscript{74} See Thompson, \textit{supra} note 31, at 1522–41 (addressing the problems with defining a judicial taking).

\textsuperscript{75} Walston, \textit{supra} note 50, at 432 (quoting Hughes v. Washington, 389 U.S. 290, 295–96 (1967) (Stewart, J., concurring)); see Barros, \textit{supra} note 73, at 911 (stating that the Hughes decision is the clearest articulation of a judicial taking); Sarratt, \textit{supra} note 31, at 1533.

\textsuperscript{76} See Mulvaney, \textit{supra} note 70, at 255; Walston, \textit{supra} note 50, at 432; Sarratt, \textit{supra} note 31, at 1533.

\textsuperscript{77} \textit{Stop the Beach Renourishment II}, 130 S. Ct. 2592, 2602 (2010).

\textsuperscript{78} See Siegel, \textit{supra} note 72, at 474.
the “established property right” standard will require applying the foreseeability standard already outlined in Hughes.79

D. Categorical Takings and Background Principles

Determining whether a regulation results in a categorical taking requires an analysis of background principles of law, one of which is the public trust doctrine.80 The Penn Central balancing test was the standard applied in all regulatory takings cases until 1992.81 Then, in Lucas v. South Carolina Coastal Council, penned by Justice Scalia, the Supreme Court established the categorical takings standard.82 In that case, a coastal landowner in South Carolina intended to develop his land, but the South Carolina Coastal Council subsequently enacted a regulation that prevented any development of the land.83 In deciding whether this amounted to a regulatory taking, the Supreme Court stated that an “owner of real property [who] has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”84 In such cases, the court can determine that a per se taking has occurred without needing to apply the three-part Penn Central test.85

This test is not absolute; courts must first engage in a threshold inquiry as to whether the proscribed use interests were initially a part of the owner’s title.86 The Court recognized that certain background principles of the state’s laws of property or nuisance are inherent in the title to land.87 A law or regulation that does “no more than duplicate the result that could have been achieved in the courts,” because of inherent background principles, does not constitute a taking and the property owner need not be compensated.88 Thus, if a background principle of state law encumbers an owner’s property, then the owner never had full title to the property interest allegedly taken.89 A regulation depriving the owner of that property interest does not take anything that

79 See generally Barros, supra note 73.
80 See infra Part II.
82 505 U.S. at 1015, 1019.
83 Id. at 1006–07.
84 Id. at 1019.
85 Id. at 1015.
86 Id. at 1027.
87 Id. at 1029.
88 Lucas, 505 U.S. at 1029.
89 See id.
the owner ever had to lose. The Court, however, left the meaning of “background principles of the State’s law of property” open to interpretation.

Nevertheless, a series of decisions established several criteria to guide lower courts in determining what constitutes a background principle: (1) it must be a state, not federal, law or doctrine; (2) the law or doctrine “cannot be newly legislated or decreed”; (3) the restriction must no more than duplicate what could have been achieved in the courts; (4) the restriction must apply to all landowners; and (5) the law or doctrine must not vacillate or have an ambiguous application. These five factors are collectively referred to as the Lucas factors. When these factors are satisfied, then a law or doctrine inheres in the title of any property owner who holds that property subject to that law or doctrine—that is to say, the property owner never had full title to that property to begin with. Further, background principles also have a role in the Penn Central balancing test to determine whether there has been a regulatory taking when public resources are at issue. This is because the doctrine or law may interfere with investment-backed expectations.

II. The Public Trust Doctrine as a Background Principle

Since the Supreme Court established the categorical takings standard and the idea of background principles, legal scholars have argued that the public trust doctrine qualifies as a background principle.

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91 Lucas, 505 U.S. at 1029 (leaving open what constitutes a background principle).
92 Id.
93 Id.
94 Id.
96 See Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 n.4 (1994) (Scalia, J., dissenting from denial of certiorari); Kleinsasser, supra note 90, at 430–32.
97 Lucas, 505 U.S. at 1027–30.
99 See Lingle, 544 U.S. at 538; Dick & Chandler, supra note 98, at 685–86; Kleinsasser, supra note 90, at 430.
100 See, e.g., David I. Callies & J. David Breemer, Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust “Exceptions” and the (Mis)Use of Investment-Backed Expectations, 36 VAL. U. L. REV. 339, 361 (2002); Timothy J. Dowling, On History,
The Supreme Court has not addressed the role of the public trust doctrine in regulatory takings analysis, but many lower courts agree that the public trust doctrine is a background principle.

A. The Public Trust Doctrine

Based on ideas originating with the Roman Emperor Justinian, the Supreme Court identified the public trust doctrine as substantive state common law early in the Nation’s history. The public trust doctrine vests states with the duty to hold public resources in trust for the people of the state. In *Illinois Central Railroad v. Illinois*, the Court advanced the public trust doctrine by recognizing that the doctrine imposes certain constraints on state action. A State cannot relinquish the trust simply by transferring title to public trust lands because the state’s obligations under the trust are analogous to the state’s obligations to exercise police powers to preserve the peace.

By the end of the twentieth century, the doctrine had expanded from its limited application to navigable and tidal waters to include lakes, tributaries, riparian banks, aquifers, marshes, wetlands, springs, groundwater, beach access, trees and forests, parks, wildlife, fossil beds, and entire ecosystems. Further, the public trust

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101 See generally *Stop the Beach Renourishment II*, 130 S. Ct. 2592, 2597 (2010) (referencing the public trust doctrine and background principles separately, but not in relation to one another); Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 825–64 (1987) (omitting, intentionally, the public trust doctrine from published opinion); Brennan, supra note 2, at 1–14 (relying substantially on public trust doctrine).

102 See infra Part II.C.

103 Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709, 718 (Cal. 1983) (“By the law of nature, these things are common to mankind: the air, running water, the sea, and consequently the shores of the sea.” (quoting Institutes of Emperor Justinian, 2.1.1)).

104 Martin v. Waddell, 41 U.S. 367, 413 (1842) (“[T]he shores, and rivers and bays and arms of the sea, and the land under them, [were to be] held as a public trust for the benefit of the whole community . . . .”); see Brennan, supra note 2, at 5.

105 *America’s Changing Coasts: Private Rights and Public Trust* 184–85 (Diana M. Whitelaw & Gerald R. Visgilio eds., 2010); Kleinsasser, supra note 90, at 424.

106 146 U.S. 387, 453–53 (1892) (stating that Illinois could not transfer a portion of Lake Michigan to a railroad company).

107 Id.


doctrine has been codified by many states, either in their constitutions, via statute, or both. In sum, the public trust doctrine is a state common law doctrine, which is also expressed in the constitutions and statutes of many states.

The increasingly expansive reach of the public trust doctrine is a function of evolving communal obligations—“[t]he public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.” The fusion of the public trust doctrine and evolving communal values necessarily implicates the relationship between the public and the public’s use and enjoyment of land. Thus, various state legislatures and state agencies have relied on public trust obligations to justify limiting the use and development of lands encumbered by the public trust doctrine. As one observer noted, “[a]s the public trust doctrine has gradually expanded to ‘meet changing conditions and needs of the public,’ so have land use restrictions gradually grown to encompass historically consistent, but nevertheless novel, natural resources.” As the needs and values of communities change, the resources protected by the public trust doctrine expand to meet those needs.

B. The Public Trust Doctrine’s Historical Role in Regulatory Takings Analysis

In both public court decisions and unpublicized arguments, judges and justices alike have endorsed the public trust doctrine’s role in takings analysis. Courts have relied on public trust principles to restrict private property rights in a variety of settings, including beach access, water use, navigable waters, tidelands, forests, and

\[113\] See Plater, supra note 22, at 1091–98.
\[116\] See generally id.
\[118\] Kleinsasser, supra note 90, at 426–27; see Brennan, supra note 2, at 6–10.
\[120\] Kleinsasser, supra note 90, at 427 (quoting Neptune City, 294 A.2d at 54).
\[121\] See id.; see also Jack H. Archer et al., The Public Trust Doctrine and the Management of America’s Coasts 4 (1994).
subaquous oil resources. The Supreme Court even acknowledged that the public trust doctrine encumbers private title to land. In *Phillips Petroleum Co. v. Mississippi*, the Court held that Mississippi had acquired title to all lands beneath waters subject to tides, not just navigable waters. In writing for the majority, Justice White recognized that “[s]tates have the authority to . . . recognize private rights in [public trust] lands as they see fit.” Thus, the Court made clear that the public trust doctrine reaches beyond the traditional navigable waters boundary, and that states have a claim to privately owned property that is encumbered by the public trust doctrine.

The Supreme Court has also directly grappled with the public trust doctrine’s role in regulatory takings. Justice Brennan’s first draft of his dissent in *Nollan v. California Coastal Commission* explicitly endorsed the limits that the public trust doctrine imposes on a property owner’s title to land. Justice Brennan began by explaining that the relevant California statutes merely duplicate what could have been accomplished under the public trust doctrine. Justice Brennan pointed out that:

States have come to recognize the need to undertake regulation in order to preserve the character of, and public access to, their coastal areas . . . [and] States have come to acknowledge that the public’s use of public trust property encompasses more than the traditional purposes of commerce, navigation, and fishing . . . [s]uch regulation is now more appropriately regarded as an employment of the police power for this particular purpose.

Justice Brennan also explained that the California Constitution adopted the public trust doctrine explicitly and that this provision is “sufficiently flexible to encompass changing public needs.”

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125 See, e.g., City of Berkeley v. Superior Court, 606 P.2d 362, 367 (Cal. 1980).
128 Id. at 475.
129 Id. at 476.
130 Id. at 475.
131 Id. at 476.
132 Id. at 475.
133 Brennan, supra note 2, at 1–14; Deason, supra note 1, at 1–7.
134 Brennan, supra note 2, at 1–14.
135 Id.
136 Id. at 6–10.
137 Id. at 10–11.
Justice Brennan concluded that the bundle of rights enjoyed by coastal property owners is subject to and subservient to the public trust doctrine; California property owners did not have “the right to use their property in any way that might impede public access to the beach.” Thus, Justice Brennan’s entire argument that there was no unconstitutional action in Nollan was premised upon establishing that the public trust doctrine was inherent in the title of coastal property owners and the owners’ rights being “qualified” by the public trust doctrine. In other words, the public trust doctrine was relevant to the regulatory takings analysis.

C. Lower Courts Find the Public Trust Doctrine to Be a Background Principle

The categorical takings standard, limited by background principles such as the public trust doctrine, dramatically altered the takings landscape by giving both plaintiffs and defendants two additional factors to consider in a takings dispute. Plaintiffs could circumvent the Penn Central balancing test by demonstrating a complete loss of economically beneficial use of the property. Defendants could defend against a takings claim by demonstrating that the owner’s title was burdened by a background principle so the owner never held the property claimed to have been lost. Lower courts have found that the public trust doctrine is a background principle in both the categorical and regulatory taking scenarios.

1. Public Trust Doctrine as a Background Principle

Several courts have explicitly held that the public trust doctrine is a background principle in categorical takings. The Ninth Circuit Court of Appeals, in Esplanade Properties, LLC v. City of Seattle, stated unambiguously that Lucas v. South Carolina Coastal Council “effectively recognized the public trust doctrine” as a background principle. The Ninth Circuit then relied on the doctrine to find that restricting devel-

138 Id. at 7, 9–11.
139 Id. at 14.
140 Brennan, supra note 2, at 14.
141 Id. at 1–14.
142 See Walston, supra note 50, at 400; see also Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027–28 (1992); Meltz, supra note 42, at 29.
143 See Lucas, 505 U.S. at 1019.
144 See id. at 1027–29.
145 Kleinsasser, supra note 90, at 437–42.
146 307 F.3d 978, 986 (9th Cir. 2002).
development of shoreline property near a public park was not a categorical taking, even though there was no other beneficial use of the property, because the development plans “never constituted a legally permissible use” of the property.147

Similarly, in McQueen v. South Carolina Coastal Council, the South Carolina Supreme Court held that compensation for a landowner who had lost all economically beneficial use of his property was unnecessary.148 The property in question was “public trust property subject to the control of the State,” and therefore no taking had occurred when the landowner was denied a permit to do what he could not otherwise have done because of the public trust doctrine.149 Thus, courts at the state and federal level have found that the public trust doctrine is a background principle under the Lucas factors.150

Beyond categorical takings, lower courts have also found the public trust doctrine relevant to the Penn Central balancing test.151 In Palazzolo v. Rhode Island, on remand from the Supreme Court, a Rhode Island court explicitly declared that the public trust doctrine is a background principle that “substantially impacts Plaintiff’s title to the parcel in question and has a direct relationship to Plaintiff’s reasonable investment-backed expectations.”152 Similarly, New Jersey recognized that a landowner’s rights to trust property were limited by the public trust doctrine.153 Because “the sovereign never waives its right to regulate the use of public trust property,” the landowner “had notice in advance of [his] investment decision” that government regulations had been, or would be, enacted on the property.154 The public trust doc-

147 Id. at 987.
149 Id. at 120; see also Hilton Head Plantation Prop. Owners’ Ass’n v. Donald, 651 S.E.2d 614, 617 (S.C. Ct. App. 2007) (reaffirming that the public trust doctrine is a background principle and stating that land owners cannot claim title to land up to the water’s edge when they artificially caused the land to expand).
150 See, e.g., Esplanade, 307 F.3d at 985–87; McQueen, 580 S.E.2d at 119–20.
151 Kleinsasser, supra note 90, at 429–30.
trine also restricts the rights of lakeshore property owners, thus conferring a right of public access across lakeshore property. 155 In 2009, the Supreme Court of Florida, in *Stop the Beach Renourishment I, Inc.*, recognized the public trust doctrine as a background principle in ruling that a Florida statute did not affect a regulatory taking of property rights of coastal land owners. 156

2. Exceptions to the Public Trust Doctrine as a Background Principle

The public trust doctrine has not achieved total recognition as a background principle. 157 In certain fact-specific situations, courts have refused to qualify the public trust doctrine as a background principle: (1) when a well-settled state regulation is directly contrary to the doctrine; (2) when a regulation codifying the doctrine limits use of property beyond the doctrine’s widely accepted boundaries; 158 and (3) when a case in federal court depends on the property laws in a state which has not spoken on the issue. 159

The first scenario is illustrated by *Tulare Lake Basin Water Storage District v. United States*. 160 The United States Court of Federal Claims did not recognize the public trust doctrine as a background principle because California had explicitly authorized the unrestricted use of water that the public trust doctrine would have restricted. 161 The court would “not be making explicit that which had always been implied under background principles of property law.” 162

Similarly, illustrating the second scenario, the Supreme Court of New Hampshire would not recognize the public trust doctrine as a background principle when a statute codifying the public trust doctrine was inconsistent with New Hampshire’s traditional understanding of the doctrine. 163 In *Purdie v. Attorney General*, the statute passed by the state legislature “went beyond the[] common law limits by extending

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155 In re Sanders Beach, 147 P.3d 75, 85–86 (Idaho 2006); Glass v. Goeckel, 703 N.W.2d 58, 73 (Mich. 2005).
156 See *Stop the Beach Renourishment I*, 998 So. 2d 1102, 1114–15 (Fla. 2008), aff’d *Stop the Beach Renourishment II*, 130 S. Ct. 2592 (2010).
158 Kleinsasser, *supra* note 90, at 442.
159 *Severance*, 566 F.3d at 502–03.
160 49 Fed. Cl. at 324.
161 Id. at 323–24.
162 Id. at 323.
public trust rights to the highest high water mark” when traditional public trust rights only established “public ownership of the shorelands to the mean high water mark.” The doctrine, as codified by the legislature, would not have achieved the same results that could have been achieved in the courts.

Finally, illustrating the third scenario, the Fifth Circuit declined to decide whether the public trust doctrine was a background principle of Texas’ property law because Texas had not spoken on the issue. In Severance v. Patterson, to determine whether there was an unconstitutional taking of property rights when the Texas legislature declared a “rolling easement” along the Gulf Coast, the Fifth Circuit asked the Texas Supreme Court whether the easement was based on the public trust doctrine or was created by the statute. Thus, this case does not actually suggest that the public trust doctrine is not a background principle, but rather that in order to be declared as such the relevant state court precedent must be clear. In sum, the three instances in which the public trust doctrine was not recognized as a background principle are factually unique situations, and clear anomalies to the overwhelming trend of courts recognizing the public trust doctrine as a background principle.

III. Stop the Beach Renourishment II Raises the Question of a Judicial Taking in Florida

The Supreme Court of the United States granted certiorari in Stop the Beach Renourishment II to decide whether the Florida Supreme Court’s decision resulted in a judicial taking. The Florida Supreme Court declared a statute to be so grounded in the public trust doctrine that the property rights limited by the statute were never present in the owner’s title to begin with. The property owners appealed the deci-

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164 Id.
165 See id.
166 Severance v. Patterson, 566 F.3d 490, 502–03 (5th Cir. 2009).
167 A rolling easement is an easement that changes as the vegetation line on the coast changes. Id. at 493. The public has a right to use the wet and dry sand beach up to the vegetation line, and this easement shifts as the vegetation line shifts. Id.
168 See id. at 502–04.
169 See id.
170 Kleinsasser, supra note 90, at 444.
171 Stop the Beach Renourishment II, 130 S. Ct. 2592, 2600–01 (2010).
172 See Stop the Beach Renourishment I, 998 So. 2d 1102, 1114–15 ( Fla. 2008), aff’d sub nom., Stop the Beach Renourishment, 130 S. Ct. 2592.
sion claiming that it was a judicial taking. Before one can understand the nuances of the Florida court’s decision, however, it is necessary to establish a foundation in Florida’s coastal property law.

A. A Brief Survey of Florida State Land Law

1. Rights to Land Bordering Water: Littoral Rights

In general, property owners in the eastern United States, who own land that touches a body of water, including rivers, lakes, and the ocean, own title to the land with certain rights commonly referred to as riparian or littoral rights. Common littoral rights include the right to have water pass in its natural state, the right to use the water, and the right to an unobstructed view of the water.

In Florida, coastal owners “hold several special or exclusive common law littoral rights: (1) the right to have access to the water; (2) the right to reasonably use the water; (3) the right to accretion and reliction; and (4) the right to an unobstructed view of the water.” Accretion occurs when the littoral owner’s land is increased “by the gradual deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water.” Reliction, on the other hand, refers to land that becomes dry land due to the removal of water instead of the build up of soil. In Florida, any new dry land created because of accretion or reliction becomes part of the littoral land owner’s title.

The opposite is also true, however. Any land that is lost from a littoral owner’s land through erosion is lost from the land owner’s

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174 John W. Johnson, United States Water Law: An Introduction 35 (2009). Riparian rights are traditionally used in the eastern states, whereas a different system of “apportioned rights” is used in the western states. Id. Every state’s water law is different, however, and many states now combine riparian and apportionment methods. Id. Currently, approximately twenty-nine states use a predominantly riparian method. Id. at 35–36.
175 Id. at 36. Although the terms are often used interchangeably, the Florida Supreme Court asserts that “riparian owners” are owners of land along rivers or streams, whereas “littoral owner” applies to land abutting an ocean, sea, or lake. Stop the Beach Renourishment I, 998 So. 2d at 1105 n.3. Because the Florida Supreme Court refers to these rights as littoral rights, this Note will also use that term.
176 Johnson, supra note 174, at 36.
177 Stop the Beach Renourishment I, 998 So. 2d at 1111.
178 Johnson, supra note 174, at 43 (citation omitted).
179 Id. at 43.
180 Stop the Beach Renourishment I, 998 So. 2d at 1113–14.
181 Id.
title. Land lost from the littoral owner’s title, because it is no longer dry land, becomes subject to the public trust doctrine and the protections of the state.\textsuperscript{183} The distinctive feature of land that is gained or lost from the coast due to accretion, reliction, or erosion, is the imperceptible change that occurs over a long period of time.\textsuperscript{184}

The boundary between the littoral owner’s land and the land subject to the public trust doctrine, is the mean high water line (MHWL).\textsuperscript{185} Because the MHWL regularly changes, due to the ebbs and flows and the tide, this boundary is known as a dynamic boundary.\textsuperscript{186} Thus, as more dry land is created due to accretion and reliction, the MHWL moves towards the water creating more land for the littoral owner.\textsuperscript{187} Correspondingly, as dry land is lost due to the process of erosion, the MHWL moves towards the littoral owner’s property, reducing the littoral owner’s land.\textsuperscript{188}

However, not all landscape changes on the coasts happen imperceptibly over a long span of time.\textsuperscript{189} Avulsion is “the sudden or perceptible loss of or addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream.”\textsuperscript{190} If the change in the land is due to avulsion, and not accretion, reliction, or erosion, then the MHWL does not change regardless of the different coastline.\textsuperscript{191} Thus, if more land is created suddenly due to avulsion, and not gradually due to accretion or reliction, then the title to the new land lies with the state.\textsuperscript{192} Likewise, if land is lost due to sudden avulsion, instead of gradual erosion, then the land lost is the state’s land and not the littoral owner’s land.\textsuperscript{193} In addition, when land is lost due to avulsion, the affected property owners have the right to reclaim the lost land within a reasonable time.\textsuperscript{194}

\textsuperscript{182} Erosion is the “wearing away of something by action of the elements; esp., the gradual eating away of soil by the operation of currents or tides.” \textit{Black’s Law Dictionary} 621 (9th ed. 2009).

\textsuperscript{183} The public trust doctrine encumbers all lands that lie beneath navigable waters. \textit{See supra} notes 103–116 and accompanying text.

\textsuperscript{184} \textit{Stop the Beach Renourishment I}, 998 So. 2d at 1113–14.

\textsuperscript{185} The MHWL is determined based on where the average high-tide line sits over a nineteen-year period. \textit{Fla. Stat. Ann.} § 177.27(14) (West 2000).

\textsuperscript{186} \textit{Stop the Beach Renourishment I}, 998 So. 2d at 1112.

\textsuperscript{187} \textit{See id.} at 1113–14.

\textsuperscript{188} \textit{See id.}

\textsuperscript{189} \textit{Id.} at 1113.

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.} at 1114.

\textsuperscript{192} \textit{See Stop the Beach Renourishment I}, 998 So. 2d at 1114.

\textsuperscript{193} \textit{See id.}

\textsuperscript{194} \textit{Id.} at 1117.
2. Florida’s Beach and Shore Preservation Act

In 1961, Florida’s legislature adopted a comprehensive statutory scheme to protect the coasts, which included the Beach and Shore Preservation Act (BSPA) to address the problems associated with erosion.195 The statute provides a mechanism for Florida to restore and renourish critically eroded beaches.196 The Florida Department of Environmental Protection is charged with “determin[ing] ‘those beaches which are critically eroded and in need of restoration’” and “‘authoriz[ing] appropriations to pay up to 75 percent of the actual costs for restoring and renourishing a critically eroded beach.’”197

Under the statute, when a local government applies for funding, a survey of the shoreline is conducted to determine the MHWL for the area.198 After the MHWL is established, the erosion control line (ECL) is determined, and this represents the area to be protected by the restoration project.199 The MHWL—the boundary between public and private property—is considered when determining the ECL, but it is not a controlling factor and the restoration project could include private property.200

The ECL is the new boundary between public and private coastal property once it is recorded, regardless of whether restoration has begun or not.201 At this point, “the common law no longer operates ‘to increase or decrease the proportions of any upland property lying landward of such line, either by accretion or erosion or by any other natural or artificial process.’”202 Although the right of accretion and the right for the coastal land owner’s property to touch the water are eliminated, all other littoral rights are preserved under the BSPA.203

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196 Id. at §§ 161.011–.45. A critically eroded beach is a shoreline that is so eroded that upland development, recreational interests, wildlife habitat, or important cultural resources are threatened or lost. See Fla. Admin. Code. Ann. r. 62B-36.002(4) (2011).
197 Stop the Beach Renourishment I, 998 So. 2d at 1107–08 (quoting § 161.101(1)).
198 § 161.141.
199 Id. § 161.161(3).
200 See Stop the Beach Renourishment I, 998 So. 2d at 1108 (citing § 161.161(5)).
201 § 161.191(1).
202 Stop the Beach Renourishment I, 998 So. 2d at 1108 (quoting § 161.191(2)).
203 Id. (“[S]ection 161.201 expressly preserves the upland owners’ littoral rights, including, but not limited to, rights of ingress, egress, view, boating, bathing, and fishing, and prevents the State from erecting structures on the beach seaward of the ECL except as required to prevent erosion.”). Furthermore, “the State has no intention ‘to extend its claims to lands not already held by it or to deprive any upland . . . owner of the legitimate and constitutional use and enjoyment of his or her property.’” Id. (quoting § 161.141).
3. The Florida Supreme Court’s Decision in *Stop the Beach Renourishment I*

In 1995, following coastal damage from Hurricane Opal, Destin and Walton Counties filed permits to repair the beaches. Stop the Beach Renourishment, Inc. (STBR), a not-for-profit association consisting of six owners of beachfront property in the area of the proposed project, quickly challenged the decision on procedural and constitutional grounds. STBR claimed that section 161.191(1) of the BSPA was unconstitutional because it severed common law littoral rights from coastal owners—in other words, the action of Destin and Walton Counties, pursuant to the BSPA, affected a regulatory taking. On July 3, 2006, a Florida appeals court certified the following question to the Florida Supreme Court: “On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?”

The Florida Supreme Court found that there was no taking at all because the BSPA merely reflected what could have been done under common law. The common law, the court said, balanced the public and private “interests in [the] ever-changing shoreline.” The State is interested in protecting the beaches, and allowing public access to the beaches, whereas property owners are interested in conserving their littoral property rights.

The court began the discussion of common law with an acknowledgment that the public trust doctrine required the State to “own and hold the lands under navigable waters for the benefit of the people.” Furthermore, the Florida Constitution required the State to conserve and protect the entire beach as a natural resource and to fulfill its obligation under the public trust doctrine.

As stated above, the MHWL—the boundary between private and public land—shifts to account for accretion and reliction but stays stagnant when the coast is altered because of avulsion. This, the court reasoned, is the mechanism employed by the common law to balance

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204 Id. at 1106.
205 Id. at 1106 n.5.
206 Id. at 1106.
207 See *Stop the Beach Renourishment I*, 998 So. 2d at 1107.
208 Id. at 1105.
209 Id. at 1120–21.
210 Id. at 1114.
211 Id. at 1114–15.
212 Id. at 1110.
213 See *Stop the Beach Renourishment I*, 998 So. 2d at 1110–11.
214 See *supra* notes 185–194 and accompanying text.
the competing interests of the public obligations and private rights to coastal property. Coastal owners get the benefit of accretion and reliction when the MHWL moves to accommodate the change, whereas the public is benefitted by the MHWL remaining stationary after an avulsive event.

The BSPA, the court stated, achieves this same balance. The BSPA allows the State to fulfill its duty to protect the beaches, while serving private interests by protecting private property from future storm damage and erosion, and conserving the view of the water. Furthermore, coastal land owners retain their present littoral rights to use, access, and view the water. In particular, the act of fixing the ECL and suspending the common law rule of accretion is constitutional when considered with the common law rule of avulsion.

Unlike accretion, when there is an avulsive event the boundary between public and private property does not change and the party that lost land due to avulsion has a right to reclaim the land. Hurricanes are considered avulsion-causing events. Thus, because trust lands were lost due to avulsion, the State could take reasonable steps to restore those lands and reclaim title, which is what the BSPA authorizes.

The Florida Supreme Court also disposed of the lower court’s arguments by demonstrating that the doctrine of accretion is not implicated by the BSPA because it is a right that is contingent on other factors intended to balance the interests of the public and private rights to the water. These factors, according to the court, are not implicated under the statute. Thus, because the right to accretion and reliction is a future right that only materializes under specific conditions, which were not triggered in this case, that right could not be taken because it did not yet exist.

215 See Stop the Beach Renourishment I, 998 So. 2d at 1114.
216 See id.
217 Id. at 1115.
218 Id.
219 Id.
220 Id. at 1116.
221 See supra notes 191–194 and accompanying text.
222 Stop the Beach Renourishment I, 998 So. 2d at 1116.
223 See id.
224 Id. at 1118.
225 Id.
226 See id. at 1119.
Finally, the court stated that under Florida common law, the right to have direct contact with the water is ancillary to the right to access the water.\textsuperscript{227} There is no explicit littoral right to contact the water in Florida.\textsuperscript{228} To the extent that there is, it only exists to ensure that property owners have access to the water.\textsuperscript{229} Because the right to access the water is not threatened by the BSPA, there was no loss by not having actual contact with the water.\textsuperscript{230} The court ultimately held that the right of coastal landowners to have their property touch the water’s edge was subject to the public trust doctrine and, thus, not inherent in their title.\textsuperscript{231}

4. The United States Supreme Court’s Decision in \textit{Stop the Beach Renourishment II}

The United States Supreme Court granted certiorari in \textit{Stop the Beach Renourishment II} to determine whether a judicial taking, or any other kind of taking, had occurred.\textsuperscript{232} In a unanimous decision, the Court held that no taking had occurred, finding the Florida common law of avulsion clear, and that the state’s right to fill its submerged land was superior to any private rights to future accretions and contact with the water.\textsuperscript{233}

This decision was a surprise to many, who predicted that the decision would come out five-to-four in favor of the private property owners.\textsuperscript{234} Further, it was expected that Justice Scalia’s majority opinion would condemn the public trust doctrine’s role in takings analysis, and use the test outlined in \textit{Hughes v. Washington} to firmly establish a judicial takings doctrine.\textsuperscript{235} The reverberations of such a decision would have reached far beyond land use disputes with coastal property owners, and would have affected private property disputes of any kind.\textsuperscript{236}

\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{Stop the Beach Renourishment I}, 998 So. 2d at 1119.
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.} at 1120.
\textsuperscript{231} \textit{See id.} at 1120–21.
\textsuperscript{232} 130 S. Ct. 2592, 2600–01 (2010).
\textsuperscript{233} \textit{Id.} at 2597, 2611–13.
\textsuperscript{234} \textit{See} ZYGMUNT J.B. PLATER ET AL., \textit{supra} note 22, ch. 22, at 22 (3d ed. Supp. 2009) (forecasting that the Supreme Court would reverse the decision in \textit{Stop the Beach Renourishment I}); Barros, \textit{supra} note 7.
\textsuperscript{235} Barros, \textit{supra} note 7; \textit{see also} PLATER ET AL., \textit{supra} note 234, at 22.
\textsuperscript{236} \textit{See} Brief for the United States as Amicus Curiae Supporting Respondents at 16–18, \textit{Stop the Beach Renourishment II}, 130 S. Ct. 2592 (No. 08-1151), 2009 WL 3183079; Barros, \textit{supra} note 7 ("[A]ccepting the idea of judicial takings would put the Supreme Court in the
Instead, the Court once again failed to decide whether the public trust doctrine had a role in takings analysis, and proposed an entirely new judicial takings standard around which Justice Scalia was not able to garner a majority.  

IV. Florida Supreme Court Did Not Commit a Judicial Taking Under Any Standard

The Supreme Court surprised many when deciding *Stop the Beach Renourishment II*. Not only did the Court decide against private property rights, but it did not speak about the role of the public trust doctrine in takings analysis, nor did the justices reach consensus about judicial takings, or even articulate a traditional judicial takings test. Even if the Court reached its decision based on a traditional approach to judicial takings and the public trust doctrine, the Florida Supreme Court decision would still not have amounted to a judicial taking. To constitute a judicial taking under pre-*Stop the Beach Renourishment II* doctrine, a decision must be “a sudden change” and “unpredictable.”

Thus, if the decision was foreseeable, then it is unlikely to be a judicial taking. The Florida Supreme Court’s decision in *Stop the Beach Renourishment I* was foreseeable because: (1) the public trust doctrine is a background principle under the *Lucas v. South Carolina Coastal Council* factors, generally and in Florida; and (2) the limits placed on private property by the public trust doctrine were established well before the concept of background principles was articulated by the Court.

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237 Stop the Beach Renourishment II, 130 S. Ct. at 2592.

238 See, e.g., Barros, supra note 7 (expecting a five-to-four decision in favor of judicial takings and private property rights, and a statement regarding the public trust doctrine).

239 See generally Stop the Beach Renourishment II, 130 S. Ct. at 2592.

240 See Hughes v. Washington, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring). If a judicial takings doctrine is established, it will likely be based on Justice Stewart’s *Hughes* opinion. See supra notes 74–79 and accompanying text. See Bederman, supra note 31, at 1436 (stating that the contemporary judicial takings doctrine can be traced to *Hughes*); Thompson, supra note 31, at 1468–71; Walston, supra note 50, at 432; Sarratt, supra note 31, at 1509–10.

241 See Hughes, 389 U.S. at 296.

242 See id.; Bederman, supra note 31, at 1436; Thompson, supra note 31, at 1468–71; Walston, supra note 50, at 432; Sarratt, supra note 31, at 1509–10.
A. The Public Trust Doctrine Is a Background Principle in Florida Law

It is not surprising that the public trust doctrine is declared a background principle by any state because, even theoretically, the public trust doctrine satisfies the *Lucas* factors. Consider the following: (1) the public trust doctrine is a state doctrine; (2) the public trust doctrine is a settled rule of law that has even been codified in many states; (3) any restraint on private actions that jeopardize public trust resources merely duplicates what could have been achieved in the courts; (4) the doctrine applies to all landowners equally, because any owner of trust resources holds title subservient to the public interest; and (5) the public trust doctrine does not vacillate, because the doctrine has continuously and predictably expanded throughout our Nation’s history. Thus, any restriction of property rights that has its roots in the public trust doctrine was not, to begin with, part of the landowner’s original title. The Florida Supreme Court’s holding that the public trust doctrine fulfilled each of the *Lucas* factors in *Stop the Beach Renourishment I* was therefore entirely foreseeable.

The Florida Supreme Court began the discussion by emphasizing that the public trust doctrine is part of Florida’s common law, has been adopted by Florida’s constitution, and the BSPA was enacted to carry

243 Kleinsasser, supra note 90, at 432–37; see also Archer, supra note 121, at 78 (stating that the public trust doctrine is one of the most traditional common law property principles); Meltz, supra note 42, at 376–77 (suggesting that the public trust doctrine is a background principle and a defense against a takings claim). The *Lucas* factors are the five factors established by the Supreme Court as elements of a background principle. See supra notes 92–97 and accompanying text.

244 See Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 473 (1988); Martin v. Waddell, 41 U.S. 367, 413 (1842) (“[T]he shores, and rivers and bay, and arms of the sea, and the land under them, [were to be] held as a public trust for the benefit of the whole community . . . .”); Brennan, supra note 2, at 5.

245 Craig, supra note 115, at 1.

246 See, e.g., Kleinsasser, supra note 90, at 434; Patrick A. Parenteau, *Unreasonable Expectations: Why Palazzolo Has No Right to Turn a Silk Purse into a Sow’s Ear*, 30 B.C. Envtl. Aff. L. Rev. 101, 117 (2002) (stating that when Rhode Island passed a regulation protecting coastal resources it made explicit what had formerly been implicit—the public trust doctrine).


248 See Archer, supra note 121 (“[A]lthough the core of the public trust doctrine has remained stable over the past two centuries, it shares the inherent common law capacity to grow and adapt.”).


250 See supra notes 242–248 and accompanying text.
out Florida’s public trust duties—satisfying the first two factors. The third *Lucas* factor was satisfied because the BSPA merely duplicated what could have been achieved at common law due to the balance between accretion and avulsion. Specifically, “the Act effectuates the State’s constitutional duty to protect Florida’s beaches . . . .” Next, the BSPA applies to all coastal property in Florida so it affects all coastal owners equally—satisfying the fourth factor. Finally, the duty to protect Florida coasts in such a way has existed since Florida was admitted to the Union as a state, and was recognized by Florida courts as early as 1912. Thus, as applied here, the public trust doctrine has been fairly static in its role protecting beaches. Given the public trust doctrine’s role as a background principle generally, and in *Stop the Beach Renourishment I* specifically, it is entirely foreseeable that the public trust doctrine would place restrictions on an owner’s title to land in the manner outlined in *Lucas*.

That this decision was foreseeable is amplified because the BSPA was enacted in 1961. One judicial takings scholar has argued that “statutory law, if enacted long ago, may itself form part of the state’s ‘background’ principles of law.” Therefore, even if the common law public trust doctrine does not restrict an owner’s title in the manner articulated in *Stop the Beach Renourishment I*, the BSPA itself is so long-established in Florida that it has also become a background principle. With both the BSPA and the common law public trust doctrine functioning as background principles of Florida property law, it is certainly predictable that these principles would place restrictions on

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251 See *Stop the Beach Renourishment I*, 998 So. 2d 1102, 1109, 1114–15 (Fla. 2008), aff’d sub nom., *Stop the Beach Renourishment II*, 130 S. Ct. 2592 (2010).
252 See id. at 1115.
253 Id.
254 See FLA. STAT. ANN. §§ 161.011–.45 (West 2006). The BSPA does not distinguish between coastal property owners. Id.
255 See *Stop the Beach Renourishment I*, 998 So. 2d at 1110.
256 See id.; Clement v. Watson, 58 So. 25, 26 (Fla. 1912).
257 See *Stop the Beach Renourishment I*, 998 So. 2d at 1107, 1110, 1120–21.
258 See *Lucas* v. S.C. Coastal Council, 505 U.S. 1003, 1027–30 (1992); *Stop the Beach Renourishment I*, 998 So. 2d at 1120–21; *Archer*, supra note 121, at 110–11 (stating that the BSPA demonstrates a legitimate exercise of state power under the public trust doctrine).
259 See § 161.011; *Walston*, supra note 50, at 403.
260 *Walston*, supra note 50, at 403.
261 See § 161.011; *Walston*, supra note 50, at 403.
coastal owners’ title to land. At the very least, the longevity of the BSPA implies the probability that the statute would be enforced.

In sum, the public trust doctrine easily satisfies the five Lucas factors, making the doctrine a background principle that places limits on an owner’s title to land. The common law and statutory public trust doctrine function as background principles of Florida property law that place limits on the title of coastal land owners. Thus, it is fully foreseeable that the Florida Supreme Court would recognize these restrictions on coastal land owners’ titles and find that the BSPA does not affect a regulatory taking.

B. Public Trust Doctrine Is Long Established and Thus Foreseeable

The restrictions that the public trust doctrine can place on an owner’s title to land even pre-date the establishment of the background principle concept in Lucas. The substantial case history and Justice Brennan’s unpublished dissenting opinion in Nollan v. California Coastal Commission serve as further evidence that the Stop the Beach Renourishment decision was predictable.

The public trust doctrine has restricted an owner’s title to land for over a century. In 1892, the Supreme Court declared that private property owners could not acquire full title to public trust lands held by the state under any circumstances. Throughout the twentieth century, courts have restricted private citizens’ use of water; private land

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262 See Lucas, 505 U.S. at 1027–30; Stop the Beach Renourishment I, 998 So. 2d at 1107–20.
263 Cf. Walston, supra note 50, at 403 (implying that statutes with a long history are more likely to be enforced; thus, their enforcement is foreseeable).
264 See supra notes 92–97 and accompanying text.
265 See Lucas, 505 U.S. at 1027–30; Stop the Beach Renourishment I, 998 So. 2d at 1107–20; Walston, supra note 50, at 403.
owners’ ability to exclude the public from private property, and private claims to the use of oil fields. In a 1988 dispute over oil reserves located under water, the Supreme Court declared that states recognize private rights in public trust lands “as they see fit.” Thus, even before Lucas, it was well established that the public trust doctrine placed restrictions on private citizens’ use of land, and that states were entitled to define the parameters of those restrictions. This history renders it even more predictable that the Florida Supreme Court would define certain restrictions on private property rights due to the public trust doctrine—and certainly makes it less unforeseeable.

Although Justice Brennan never used the term background principle, the fourteen-page analysis at the beginning of his unpublished dissenting opinion in Nollan satisfied all the Lucas factors necessary to demonstrate that the public trust doctrine was a background principle of California property law. Justice Brennan began the first draft by outlining how the public trust doctrine was incorporated as a fundamental part of California coastal law through adoption in the California Constitution in 1879, and embodiment in statutes. This history indicates that the public trust doctrine is a California state doctrine, and that it is not “newly legislated or decreed.”

Justice Brennan continued by outlining how California state courts have interpreted private rights pursuant to the public trust doctrine. Not only had California courts previously found that private parties holding tidelands were “subject to an easement for the public trust . . . provid[ing] access thereto,” but also that “[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs . . . .” Thus, Justice Brennan demonstrated that the

275 Id. at 475.
276 See supra Part II.B.
277 See Phillips Petroleum, 484 U.S. at 475.
279 See Brennan, supra note 2, at 1–14; supra notes 83–90 and accompanying text.
280 Brennan, supra note 2, at 92–97.
282 See Lucas, 505 U.S. at 1029; Brennan, supra note 2, at 2–12 (satisfying the second Lucas factor).
283 See Brennan, supra note 2, at 11.
284 See id.
right to access along the beach is well established in California, as is the recognition by California courts that the trust is flexible and expansive.\textsuperscript{285} Given this, the result achieved by the condition placed on the Nollans’ permit\textsuperscript{286} “no more than duplicate[d] the result that could have been achieved in the courts.”\textsuperscript{287}

Furthermore, the consistent manner in which California courts have increasingly expanded the doctrine’s breadth suggests that the doctrine neither vacillates greatly nor is it applied ambiguously.\textsuperscript{288} Finally, because the public trust doctrine applies to all private owners of trust property, the doctrine applies equally to everyone.\textsuperscript{289}

Thus, Justice Brennan demonstrated that coastal landowners never had a full title to their land because the public trust doctrine “inhere[d] in the title itself.”\textsuperscript{290} This point is made explicit when Justice Brennan concluded the public trust doctrine analysis by stating:

Thus, for more than a century California’s basic governing document has expressed a commitment to preserving the public’s ancient right of access to the sea. The State has declared that the bundle of property rights enjoyed by property owners along the coast does not include the right to use their property in any way that might impede public access to the beach. California courts have consistently affirmed the fact that coastal property rights are so qualified.\textsuperscript{291}

This unpublished portion of Justice Brennan’s Nollan dissent adds further support to the assertion that the public trust doctrine is a background principle.\textsuperscript{292} The analysis independently establishes the same criteria that later evolved into the model for determining what constituted a background principle.\textsuperscript{293} This adds further support to the contention that the Stop the Beach Renourishment I decision, declaring the

\textsuperscript{285} See Lucas, 505 U.S. at 1027–30; Brennan, supra note 2, at 11 (satisfying the third Lucas factor).

\textsuperscript{286} Specifically, allowing the public to walk across their land to get to the public beach.

\textsuperscript{287} See Lucas, 505 U.S. at 1029.

\textsuperscript{288} See Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 n.4 (1994) (Scalia, J., dissenting from denial of certiorari); Brennan, supra note 2, at 11.

\textsuperscript{289} See supra note 238.

\textsuperscript{290} See Lucas, 505 U.S. at 1029; Brennan, supra note 2, at 13–14.

\textsuperscript{291} Brennan, supra note 2, at 13–14.

\textsuperscript{292} See Lucas, 505 U.S. at 1027–30; Brennan, supra note 2, at 1–14 (fulfilling all of the Lucas factors of a background principle).

\textsuperscript{293} See Kleinsasser, supra note 90, at 430–32 (explaining the Lucas factors); Brennan, supra note 2, at 1–14 (fulfilling the Lucas factors).
public trust doctrine to be a background principle, was predictable. Therefore, even if the Supreme Court had employed the expected judicial takings test in *Stop the Beach Renourishment II*—foreseeability—and finally addressed the public trust doctrine’s role in takings analysis, the Florida court in *Stop the Beach Renourishment I* clearly did not affect a judicial taking.

**CONCLUSION**

When the Supreme Court decided *Stop the Beach Renourishment II*, the Court once again failed to answer several questions that have plagued legal scholars for years. There was no consensus as to whether Fifth Amendment takings protections apply to the judiciary—a “judicial takings” doctrine. Also, the Court did not clarify the definition of a “background principle” as articulated in *Lucas v. South Carolina Coastal Commission*. Furthermore, the Court again evaded addressing whether or not the public trust doctrine plays a role in takings analysis.

This Note argues that the public trust doctrine should, and does, play a role in takings analysis. The doctrine satisfies all apparent criteria for a background principle under the *Lucas* model, and a substantial history of decisions, rendered both prior to and after *Lucas*, recognize that the public trust doctrine imposes limits on a private property owner’s title to trust resources.

Because the public trust doctrine is a background principle, the decision in *Stop the Beach Renourishment I* does not constitute a judicial taking under any standard, including that standard articulated in *Hughes v. Washington*. A judicial taking, as thus perceived, requires that a

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294 See *Hughes v. Washington*, 389 U.S. 290, 296–97 (1967) (Stewart, J., concurring); *Stop the Beach Renourishment I*, 998 So. 2d 1102, 1109, 1114–15 (Fla. 2008), aff’d sub nom., *Stop the Beach Renourishment II*, 130 S. Ct. 2592 (2010). The decision appears even more predictable when one considers the similarities between Justice Brennan’s unpublished *Nollan* dissent and *Stop the Beach Renourishment I*. Compare Brennan, *supra* note 2, at 1–14, with *Stop the Beach Renourishment I*, 998 So. 2d at 1102–21. Both opinions begin by tracing the common law history of the public trust doctrine in the state, then trace the history of the relevant statutes in the state, and then declare that the statute is merely a reflection of what could have been achieved at common law. Compare Brennan, *supra* note 2, at 1–14, with *Stop the Beach Renourishment I*, 998 So. 2d at 1102–21.

295 See *Hughes*, 389 U.S. at 296–97; *Stop the Beach Renourishment I*, 998 So. 2d at 1109, 1114–15. In fact, given the substantial precedent towards recognizing the restrictions that the public trust doctrine places on private property rights, a decision that broadly declared the public trust doctrine not to be a background principle would itself be unpredictable, and constitute judicial taking. See *supra* notes 31, 51. Perhaps this dichotomy should be considered when determining whether judicial takings are legitimate claims at all. See *supra* Part I.C.
decision be unreasonable and unpredictable given the relevant precedents—or be unforeseeable. Even though the Supreme Court articulated a novel judicial takings standard in this case—the “established property rights” standard—the decision would have been the same had they applied *Hughes* as expected. Despite the Court’s unwillingness to speak on this issue, the public trust doctrine is a background principle, so the decision in *Stop the Beach Renourishment I* was entirely foreseeable. The strength and longevity of the precedents establishing the public trust doctrine as a background principle are so strong that the *Stop the Beach Renourishment I* decision was not a judicial taking under any test. Ironically, even though the Court reached the correct result, the test for judicial takings offered in *Stop the Beach Renourishment II* was such a dramatic shift from all prior takings precedent, that, had the decision received a majority vote, it may have been a judicial taking in and of itself.296

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296 See Mulvaney, *supra* note 70, at 266 (stating that under the “established” standard, even recent landmark Supreme Court decisions would have been judicial takings, and *Stop the Beach Renourishment II* itself constitutes a judicial taking).