Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine

Zachary C. Kleinsasser

Follow this and additional works at: http://lawdigitalcommons.bc.edu/ealr
Part of the Environmental Law Commons, and the Property Law and Real Estate Commons

Recommended Citation

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Environmental Affairs Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydlowski@bc.edu.
PUBLIC AND PRIVATE PROPERTY RIGHTS:
REGULATORY AND PHYSICAL TAKINGS
AND THE PUBLIC TRUST DOCTRINE

ZACHARY C. KLEINSASSER*

Abstract: In *Lucas v. South Carolina Coastal Council*, the Supreme Court held that, when a regulation has deprived a landowner of all economically beneficial use, a threshold issue in determining whether compensation is due is whether the landowner’s rights of ownership are confined by the limitations on the use of land which “inhere in the title itself.” For land that may fall within the public trust doctrine, *Lucas’s* threshold determination has significant consequences. Because the public trust doctrine is a “background principle,” buyers and sellers of real property may not be able to claim full title, and should be cognizant of the potential application of the doctrine to their land. Further, state and local regulatory bodies should strategically employ the public trust doctrine in environmental protection regulation. Finally, the public trust doctrine’s role in a takings analysis suggests that property rights are perhaps more communal than generally acknowledged, and reveals that it may make sense to evaluate property rights from a community-based perspective.

*By the law of nature these three things are common to mankind—the air, running water, [and] the sea.*

—Justinian Institute

Introduction

Rooted in Roman law, cultivated in medieval England, and refined during more than two centuries of American jurisprudence, the public trust doctrine is a powerful legal principle to which society has frequently turned in order to preserve public uses of property. By contrast, takings jurisprudence was borne out of the need for private landowners to guard against overreaching public laws and governmental

* * *


intrusion; \(^3\) it contemplates the often obscure line between an individual’s “bundle of rights” and the necessity of government regulation. \(^4\)

Differences between the rationales underlying the public trust doctrine and takings jurisprudence highlight a fundamental tension in American property law. \(^5\) On one hand, land is a tool for human use and consumption, an entity that, lying in its natural state, is expendable. \(^6\) It can be bought, sold, and owned. \(^7\) On the other hand, land is not passive, nor is it capable of being parcelled by humans. \(^8\) Rather, land is active and composed of functional, interconnected, ecological systems. \(^9\) The former, called the “transformative economy” by Professor Sax and others, supports the notion that title to land endows private use rights; \(^10\) the latter, labeled the “economy of nature,” suggests


\(^4\) See Lucas, 505 U.S. at 1027; Hope M. Babcock, Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-o-Links, and Other Things That Go Bump in the Night, 85 IOWA L. REV. 849, 855–56, 876–77, 901 (2000). Principally, property consists of a “bundle of rights”: the right to possess, the right to use, the right to exclude, and the right to transfer. Jesse Dukeminier & James Krier, Property 93 (5th ed. 2002). Not all forms of property, however, enjoy the same bundle of rights; in some circumstances, the law restricts or prohibits the enjoyment of certain rights. See Babcock, supra, at 855 n.25.


\(^6\) See Sax, supra note 5, at 1442.

\(^7\) See id.

\(^8\) See id.

\(^9\) See id.

\(^10\) See id. at 1442–46.
that private land use is burdened by the community’s interest in its use and enjoyment.  

This Note examines the hotly contested marriage of the public trust doctrine and takings—and the tension between their underlying, competing rationales—in the modern takings analysis.  

It argues that the public trust doctrine necessarily informs any regulatory and physical takings analysis. Part II examines the history of the public trust doctrine, and Part III reviews the modern takings analysis. Exploring the application of the public trust doctrine in recent takings cases, Parts IV and V demonstrate that the doctrine underlies a modern takings analysis. Part IV focuses on categorical regulatory takings cases, concentrating in particular on how the public trust doctrine embodies a Lucas background principle. Part V illustrates how the doctrine informs the Penn Central balancing test. Part VI concludes by identifying several important lessons that an application of the public trust doctrine to the takings analysis provides: (1) buyers and sellers of real property should be informed about applicable background principles; (2) regulatory bodies should strategically employ the public trust doctrine in environmental protection regulation; and (3) property rights should be conceptualized within a community-based paradigm.

I. The Public Trust Doctrine

The public trust doctrine was first formally declared in the fifth century A.D. by the Justinian Institute: “By the law of nature these three things are common to mankind—the air, running water, [and] the sea.” From its origin in Roman law, the English common law developed the concept of the public trust, under which the Crown owned all navigable waterways and the lands lying beneath them “as

---

11 See also Babcock, supra note 4, at 855–56, 892–94, 901–02 (arguing that “enforcing laws that embody common law communal norms . . . is one way of returning to a view of property in which landowners recognize their obligations toward society as a whole”).  
trustee of a public trust for the benefit of the people.”

With the American Revolution, trust resources previously owned by the Crown passed to the American public in the thirteen states via the equal footing doctrine. Each state was thus vested with the duty to hold public resources in trust for the people of the state. The purpose of the trust was to preserve certain resources in a manner that made them available to the public for use. In England, the Sovereign’s title to land was split into two interests: the *jus publicum*, the public’s right to use and enjoy trust lands, and the *jus privatum*, the private property rights that existed in the use and possession of trust lands.

In *Illinois Central Railroad Co. v. Illinois*, the Supreme Court advanced the seminal modern expression of the public trust doctrine, holding that a state legislature’s grant of land to a railroad company was “necessarily revocable.” “The trust,” the Court explained, “cannot be relinquished by a transfer of property.” It continued, “The State can no more abdicate its trust over property in which the whole

---

16 *Nat’l Audubon Soc’y*, 658 P.2d at 718 (internal quotation marks omitted).
17 *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472–74 (1988). The equal footing doctrine provides that, within their borders, the original thirteen states and those succeeding them inherited public trust rights equal to those previously held by the Crown. *Id.* (citing *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)). The Court in *Phillips Petroleum* turned to *Shively* when it articulated the equal footing doctrine:

> At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.

> . . . .

> The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.

*Shively*, 152 U.S. at 57.

18 See *Phillips Petroleum*, 484 U.S. at 474–74; infra Part VI.B.
20 See *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 119 (S.C. 2003); Callies & Breemer, *supra* note 12, at 339–40. The ancient Roman purpose for the public trust doctrine endures today, creating a legal obligation for governments to protect trust resources. See *infra* Part VI.B. As Professor Joseph Sax explained, “[o]f all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.” Sax, *supra* note 2, at 474 (footnote omitted).
21 146 U.S. 387, 455 (1892).
22 *Id.* at 453.
people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.”23 As Professor Joseph Sax, who reinvigorated the public trust doctrine in the early 1970s,24 famously explained:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism on any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.25

Since Illinois Central, courts and state legislatures have slowly expanded the public trust doctrine.26 While once limited to navigable and tidal waters, the doctrine has crept from beaches and rivers to lakes, tributaries, riparian banks, and now encompasses aquifers, marshes, wetlands, springs, and groundwater.27 The public trust doctrine also includes non-water natural resources.28 By the late twentieth century, courts had explicitly included beach access,29 trees and forests,30 parks,31 wildlife,32 fossil beds,33 and whole ecosystems34 under the doctrine’s increasingly broad umbrella.35

23 Id. at 453–54.
24 See Anne C. Dowling, “Un- Locke-ing” a “Just Right” Environmental Regime: Overcoming the Three Bears of International Environmentalism—Sovereignty, Locke, and Compensation, 26 WM. & MARY ENVTL. L. & POL’Y REV. 891, 930 n.160 (2002); see also Fred Shapiro, The Most-Cited Law Review Articles, 73 CAL. L. REV. 1540, 1551, 1553 (1985) (determining that Sax’s public trust article was among the 40 law review articles most often cited by other law review articles over the preceding 40 years).
25 Sax, supra note 2, at 490.
28 See supra note 26; infra notes 29–35 and accompanying text.
30 See, e.g., Sierra Club v. Dep’t of the Interior, 376 F. Supp. 90, 95–96 (D. Cal. 1974) (holding that, in addition to statutory requirements, trust obligation mandated full protection of timber, soil, and streams).
31 See, e.g., Paepcke v. Pub. Bldg. Comm’n, 263 N.E.2d 11, 15–16 (Ill. 1970) (holding that a public park was held “in trust for the uses and purposes specified and for the benefit of the public”).
A central feature of the public trust doctrine is that rules governing the use of natural resources exist in a dynamic relationship with evolving values of the community. As the New Jersey Supreme Court explained in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, “The 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.” Because the public trust doctrine is infused with communal obligations—and therefore implicates the relationship between the public and the public’s use and enjoyment of its land—it has been

---

32 See, e.g., Geer v. Connecticut, 161 U.S. 519, 529 (1896) (holding that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised “as a trust for the benefit of the people”), overruled on other grounds by Hughes v. Oklahoma, 441 U.S. 322 (1979); see also Caspersen, *supra* note 27, at 369, 374–84.

33 See Plater et al., *supra* note 5, at 1091–92.

34 See Nat’l Audubon Soc’y v. Superior Court of Alpine County, 658 P.2d 709, 732 (Cal. 1983) (holding that “[t]he human and environmental uses of Mono Lake—uses protected by the public trust doctrine—deserve to be taken into account”); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (holding that San Francisco Bay should be preserved in its natural state so that the lands “may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life”); see also Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 Harv. Envtl. L. Rev. 393, 405–06 (1991) (arguing that the Supreme Court’s implicit extension of the public trust doctrine beyond water rights in *Illinois Central* and *Phillips Petroleum* suggests that ecological boundaries may be replacing the previous navigability test).

35 See Caspersen, *supra* note 27, at 357, 359, 365–69 (noting that wildlife, like air and water, is held in trust by the government for the public’s benefit). The Hawaii Constitution explicitly includes a broad range of public resources: “the State . . . shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources.” Haw. Const. art. XI, § 1. Moreover, in requiring an affirmative duty by the state to take the public trust into account in *In re Water Use Permit Applications*, the Hawaii Supreme Court refused to “define the full extent of article XI, section 1’s reference to ‘all public resources,’” ostensibly leaving open the possibility of broader application of the public trust doctrine. See 9 P.3d 409, 445 (Haw. 2000).


37 Id.; see also *In re Water Use Permit Applications*, 9 P.3d 409, 447 (Haw. 2000) (holding that “[t]he public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances”). Soft-sand shorelines, for example, demonstrate the need for an ever-evolving public trust doctrine. Dick & Chandler, *supra* note 3, at 695. While shorelines along rocky coasts do not change, many coastal states south of Massachusetts and soft-sand states along the gulf coast and the Pacific Ocean face dramatic erosion and coastal migration of barrier beaches. *Id.* Protecting public trust land in rocky coast states is easier to administer, as these states do not have changing boundaries. *See id.* In soft-sand coastal states, however, it is crucial that public trust lands shift with migrating boundaries. *Id.*
used by many states to buttress environmental protection regulations. 38 Purporting to act as trustee on behalf of the beneficiary public, legislatures and state agencies have enacted or promulgated myriad restrictions on the use and development of trust land. 39 As 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. 40

II. Takings

The Takings Clause of the Fifth Amendment prevents the government from taking “private property . . . for public use, without just compensation.” 41 Governments are therefore prohibited from “forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” 42 Thus, if the government physically appropriates or occupies private property, compensation is required. 43

A “taking” need not arise from an actual physical occupation of land by the government, however. 44 The Supreme Court has held that “if regulation goes too far it will be recognized as a taking.” 45 Articulating a precise formula for determining when government regulation of private property amounts to a regulatory taking has proven to be an arduous task. 46 In defining “too far,” however, courts will consider three

38 See, e.g., Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 484 (1988) (holding that “under Mississippi law, the State’s ownership of [tidal waters] could not be lost”); In re Water Use Permit Applications, 9 P.3d at 445 (noting the state constitution’s public trust language); Paul Sarahan, Wetlands Protections Post-Lucas: Implications of the Public Trust Doctrine on Takings Analysis, 13 Va. Envtl. L.J. 537, 562 n.186 (1994) (explaining that states take varied approaches to protecting trust interests); see also Neptune City, 294 A.2d at 54.

39 See, e.g., Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455 (1892) (holding that, because of its duty as trustee, a state may revoke grants of land inconsistent with the public trust); McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 120 (S.C. 2003) (holding that, because of the public trust doctrine, a state agency denial of a permit was not a taking).

40 Neptune City, 294 A.2d at 54; see also supra notes 27–35 and accompanying text.

41 U.S. Const. amend. V; Esplanade Props., LLC v. City of Seattle, 307 F.3d 978, 983–84 (9th Cir. 2002).


43 Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (finding a taking where a cable television wire was placed on an apartment building).


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.\textsuperscript{47}

In addition, in \textit{Lucas v. South Carolina Coastal Council}, the Supreme Court created a per se, “categorical” taking: if an “owner of real property 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.”\textsuperscript{48} Thus, where a regulation “denies all economically beneficial or productive use of land,” the multi-factor test is not applied, and a compensable taking has occurred.\textsuperscript{49}

Justice Scalia and the majority in \textit{Lucas}, however, established an important threshold inquiry to such a categorical taking.\textsuperscript{50} The Court explained:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.

\ldots  \ldots Any limitation [prohibiting all economically beneficial use of the land] 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. A law or decree with such an 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.\textsuperscript{51}

\textsuperscript{47} \textit{Penn Cent.}, 438 U.S. at 124.


\textsuperscript{50} \textit{See Lucas}, 505 U.S. at 1027, 1029.

\textsuperscript{51} \textit{See id.}
Thus, the *Lucas* majority held that there are two exceptions to the otherwise inflexible categorical regulatory takings rule.\(^{52}\) If the regulation prevents a nuisance, or if the regulation is grounded in a state’s background principles of property law, the property owner need not be compensated.\(^{53}\) Although the Court provided two examples of a nuisance exception,\(^{54}\) it left the meaning of the “background principles of the State’s law of property” exception open to interpretation.\(^{55}\) In order to fall under the background principles exception, a state must show “that the proscribed use interests were not part of [the claimant’s] title to begin with.”\(^{56}\) In other words, if a background principle of state property law “inhere[s] in the title itself,” a landowner never held full title to the property interest alleged to have been taken.\(^{57}\) After *Palazzolo v. Rhode Island*,\(^{58}\) background principles that serve as a defense to a regulatory taking may include: nuisance; common law doctrines like custom and the public trust; and, some argue, relatively recent legislative enactments.\(^{59}\)

The public trust doctrine is unmistakably implicated in both the categorical regulatory takings analysis and the *Penn Central* balancing test.\(^{60}\) In a categorical regulatory takings analysis, *Lucas* requires that background principles of state property law must be considered as a threshold issue.\(^{61}\) In addition, after *Palazzolo* and several state court decisions, any *Penn Central* balancing test must include consideration

\(^{52}\) Id. at 1015.

\(^{53}\) See id. at 1027; see also Callies & Breemer, *supra* note 12, at 339–40.

\(^{54}\) *Lucas*, 505 U.S. at 1029–30. In the first example, the Court explained that an owner of a lakebed who is denied a permit to engage in a landfilling operation that would flood others’ land would not be entitled to compensation. *Id.* at 1029. In the second, a government would not be required to compensate an owner of a nuclear generating plant who is forced by regulation to remove his plant when the government learns his land sits on an earthquake fault. *Id.* at 1029–30.

\(^{55}\) See id.

\(^{56}\) See id. at 1027, 1029.

\(^{57}\) See id.; see also Dowling, *supra* note 12, at 76.

\(^{58}\) 533 U.S. 606 (2001).

\(^{59}\) *Lucas*, 505 U.S. at 1029; Dowling, *supra* note 12, at 90–91 (maintaining that background principles are not limited to common law, but may include regulations that are a “reasonable extension” of nuisance and property law). The scope of background principles is the subject of much debate. See Callies & Breemer, *supra* note 12, at 340 (arguing that the principles can, “when subject to expansive interpretation, seriously erode the basic *Lucas* doctrine meant to provide compensation for regulatory takings that deprive an owner of all economically beneficial use of land”).

\(^{60}\) See infra Parts III, IV.

\(^{61}\) See *Lucas*, 505 U.S. at 1027 (“[W]e think [a state] may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.”).
of the public trust doctrine when public resources are at issue, as the doctrine may limit the economic impact of regulation or interfere with investment-backed expectations.\textsuperscript{62} Finally, courts must focus on whether a landowner in fact owned the property for which she seeks compensation;\textsuperscript{63} if a government’s action amounts to a physical occupation or invasion of property, the public trust doctrine plays an important role in determining whether compensation is due.\textsuperscript{64}

### III. The Public Trust Doctrine and Categorical Regulatory Takings

When a regulation has deprived a landowner of all economically beneficial use, \textit{Lucas} provides that a threshold issue in determining whether compensation is due is whether the landowner’s rights of ownership are “confined by limitations on the use of land which ‘inhere in the title itself.’”\textsuperscript{65} Defining what other than a nuisance constitutes an inherent limitation which precludes compensation—which \textit{Lucas} called “background principles”—requires the consideration of a range of background principle elements articulated in \textit{Lucas} and other federal and state court decisions.\textsuperscript{66}

\begin{itemize}
  \item[\textsuperscript{62}] See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); see also Dick & Chandler, \textit{supra} note 3, at 685–86 (explaining that background principles may be applied to the \textit{Penn Central} balancing test); \textit{infra} Part IV.
  \item[\textsuperscript{63}] See \textit{supra} note 61.
  \item[\textsuperscript{64}] See Clajon Prod. Corp. v. Petera, 854 F. Supp. 843, 850–51, 852–53 (D. Wyo. 1994); Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 320–24 (2001); see also \textit{infra} Part V.
  \item[\textsuperscript{66}] See \textit{Lucas}, 505 U.S. at 1027–30; \textit{infra} Part III.A.
\end{itemize}
A. Elements of a Background Principle

Several factors contribute to rendering a legal doctrine or law a “background principle.” First, it must be a state, not federal, law or doctrine. Second, a doctrine or law “cannot be newly legislated or decreed.” That is, a limitation on property must be a “settled rule of law” that is part of the “existing rules or understandings” of state law. Third, in order to be considered a background principle, a restriction must “no more than duplicate the result that could have been achieved in the courts”; such a doctrine or law must be so implicit in state property law that, “at any point,” it is “open to the State” to make it explicit. Fourth, a doctrine or law is not a background principle if it applies to some landowners but not to others. Fifth, some courts may

67 See Palazzolo, 533 U.S. at 629–30. In addition to the background principles of property and nuisance law, Palazzolo establishes that, in appropriate circumstances, statutes and regulations also constitute background principles. See id. In Palazzolo, the Court held that statutes are “transformed into a background principle of the State’s law by mere virtue of the passage of title,” but suggested that state statutes and regulations may be background principles of state law, particularly when they codify the common law. See id. Significantly, Palazzolo’s description of background principles “in terms of those common, shared understandings of permissible limitations derived from a State’s legal tradition” may even mean that legislation extending common law beyond its traditional scope—so long as it is “derived from” common understandings—may be considered background principles. See id.; Dowling, supra note 12, at 67, 76–77, 90–91 (arguing that Lucas describes background principles as “embracing . . . the full range of property law” and Palazzolo “resolves any ambiguity by confirming that background principles may include statutes, regulations, and the full range of common law doctrine in appropriate circumstances”); see also infra Part VI.B.

68 See Lucas, 505 U.S. at 1027–30; infra Part III.A. For a cogent application of similar factors to the characterization of wildlife preservation as a background principle of law, see Houck, supra note 5, at 308–21.

69 See Lucas, 505 U.S. at 1029 (holding that a background principle must be of “the State’s law of property and nuisance”).

70 See id.


72 See Lucas, 505 U.S. at 1030 (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).

73 See Lucas, 505 U.S. at 1029; see also Rith Energy, Inc. v. United States, 44 Fed. Cl. 108, 113–15 (1999) (holding that, because a state water quality control statute which codified the public trust doctrine provided a background principle of state law, a denial of a mining permit “represented an exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject”).

74 See Lucas, 505 at 1030; see also Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001) (describing background principles as “those common, shared understandings of permissible limitations derived from a State’s legal tradition”).

75 See Palazzolo, 533 U.S. at 630 (explaining that a “regulation or common-law rule cannot be a background principle for some owners but not for others”).
require that a doctrine or law’s application be relatively static.\textsuperscript{76} If the application of a doctrine or law greatly “vacillates”—and, because of ambiguous application, it appears that courts are creating a doctrine or law rather than describing it—it is less likely to be a background principle.\textsuperscript{77} Finally, and perhaps most importantly, a limitation on property must “inhere in the title itself” in order to qualify as a background principle.\textsuperscript{78} As the \textit{Lucas} Court explained, “the proscribed use interests [cannot be] part of [a landowner’s] title to begin with.”\textsuperscript{79}

B. Why the Public Trust Doctrine Is a Background Principle

An examination of the public trust doctrine in light of the factors that render a law or legal doctrine a “background principle” reveals that the public trust doctrine can, and should, be characterized as a background principle.\textsuperscript{80}

First, the public trust doctrine is a state law doctrine.\textsuperscript{81} The Supreme Court’s earliest recognition of state dominion over public trust resources was in 1894 in \textit{Shively v. Bowlby}:

At common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution to the United States.\textsuperscript{82}

Since the states, and not the federal government, received ownership of public trust land upon entry into the Union, the public trust doctrine thus satisfies the first requirement that a background principle must be a state law or doctrine.\textsuperscript{83}

\textsuperscript{76} See Stevens v. City of Cannon Beach, 510 U.S. 1207, 1212 n.4 (1994) (Scalia, J., dissenting from denial of certiorari).

\textsuperscript{77} See id. Justice Scalia argued that “vacillations on the scope of the doctrine of custom . . . reinforce a sense that the court is creating the doctrine rather than describing it.” See id. Presumably, unpredictability of a doctrine limits its applicability as a background principle. See id.; see also Callies & Breemer, supra note 12, at 377–78.

\textsuperscript{78} See Lucas, 505 U.S. at 1027–30.

\textsuperscript{79} Id.

\textsuperscript{80} See Lucas, 505 U.S. at 1027–30; Houck, supra note 5, at 308–21; infra notes 81–129 and accompanying text.


\textsuperscript{82} 152 U.S. 1, 57 (1894).

\textsuperscript{83} See Phillips Petroleum, 484 U.S. at 476 (affirming that “longstanding precedents which hold that the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide”).
Second, the public trust doctrine satisfies the *Lucas* requirement that background principles be settled rules of law. Although states may codify it, no state can legislate the public trust doctrine itself. Indeed, public trust resources preceded statehood. States acquired public trust land and the accompanying responsibility to it upon their entry into the Union. The public trust doctrine thus constitutes a permanent duty impressed upon state governments to preserve trust land for the public.

Despite gradual changes in application of the public trust doctrine, the doctrine itself “cannot be newly legislated or decreed.” Many scholars acknowledge the public trust doctrine but maintain that the reach of the doctrine should be fixed. They argue that sudden shifts in the doctrine’s application cannot inhere in a title because abrupt changes in the doctrine cannot be consistent with settled rules of state law. Critics of an evolving public trust doctrine are correct that sudden shifts in a doctrine argue against its characterization as a background principle. But it is inconsistent to recognize the public trust doctrine as a background principle on one hand and then limit its application to a “traditional scope” on the other. Controlled evolution is inherent in the very definition of the public trust doctrine; the fundamental purpose of the doctrine is to meet the public’s changing circumstances and needs. Just as what constitutes a nuisance has changed over time, so too has the public

---

84 *Lucas*, 505 U.S. at 1029.
85 See *Phillips Petroleum*, 484 U.S. at 473–74 (describing how the public trust doctrine was vested in each state upon admission into the United States).
86 See id.
87 See id.; see also Sarahan, *supra* note 38, at 559.
88 See Babcock, *supra* note 4, at 891 (“Some courts have interpreted the doctrine as imposing an affirmative obligation on states to preserve trust resources for the benefit of the public.”); see also infra Part VI.B.
89 *Lucas*, 505 U.S. at 1029.
90 See, e.g., *Callies & Breemer*, *supra* note 12, at 361, 372–75 (arguing that the public trust should be restricted to tidal water and underlying lands).
91 See id.
92 See id.
93 See id.; see also *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 n.4 (1994) (Scalia, J., dissenting from denial of certiorari).
95 See *Neptune City*, 294 A.2d at 54; see also *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (holding that the public trust doctrine is “sufficiently flexible to encompass changing public needs”).
trust doctrine slowly been “molded and extended” to satisfy the needs “of the public it was created to benefit.”\textsuperscript{96} Careful, predictable expansions of the doctrine, therefore, are not novel legislative decrees, but constitute a firmly embedded exercise of state duty.\textsuperscript{97}

Consequently, the public trust doctrine is a “settled rule of law.”\textsuperscript{98} Although the reach of the doctrine is disputed, American courts have always recognized that certain resources are preserved for the public, even if the \textit{jus privatum} may be granted to private landowners.\textsuperscript{99} As a “settled rule of law,”\textsuperscript{100} the public trust doctrine is therefore part of the “existing rules or understandings”\textsuperscript{101} of American property law that comprise “background principles.”\textsuperscript{102} A government cannot newly decree that which already exists as axiom.\textsuperscript{103}

Third, any exercise of the public trust doctrine’s inherent restraint on private actions that jeopardize public trust resources—for example, as a defense to a regulatory taking—“no more than duplicate[s] the result that could have been achieved in the courts.”\textsuperscript{104} Indeed, litigants frequently have invoked the public trust doctrine as a cause of action or affirmative defense and prevailed.\textsuperscript{105} Put another way, a background principle must be implicit in state property law

\begin{itemize}
\item \textsuperscript{96} Neptune City, 294 A.2d. at 54.
\item \textsuperscript{97} See id.
\item \textsuperscript{98} Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 474 (1988) (quoting Knight v. United States Land Ass’n, 142 U.S. 161, 183 (1891)). The Phillips Petroleum Court quoted at length from Knight, which states: 
\begin{quote}

It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders.
\end{quote}

\textit{Knight}, 142 U.S. at 183.
\item \textsuperscript{99} See supra Part I.
\item \textsuperscript{100} Phillips Petroleum, 484 U.S. at 474 (quoting \textit{Knight}, 142 U.S. at 183).
\item \textsuperscript{101} Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).
\item \textsuperscript{102} Lucas, 505 U.S. at 1029–30.
\item \textsuperscript{103} See supra notes 89–92 and accompanying text.
\item \textsuperscript{104} See Lucas, 505 U.S. at 1029.
\item \textsuperscript{105} See, e.g., Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842) (finding for a state in a land ownership case because it succeeded in the ownership of a common fishery as a result of the public trust doctrine); Arnold v. Mundy, 6 N.J.L. 1 (1821) (finding for a state because it could not alienate to a private owner exclusive access to oyster beds); see also Sarahan, \textit{supra} note 38, at 568–72 (discussing Florida and Wisconsin as examples of states with legislatures using the public trust doctrine to protect critical wetlands and their surrounding natural environment).
\end{itemize}
such that, “at any point,” it is “open to the State” to make it explicit.\(^\text{106}\) The public trust doctrine exemplifies an implicit limitation on property that a state may make explicit.\(^\text{107}\) When the Rhode Island General Assembly enacted the Coastal Resource Management Act in 1971—the regulation at issue in \textit{Palazzolo}—it was the culmination of over two hundred years of limitations on private interests in tidal waters.\(^\text{108}\) Since state law had traditionally acknowledged public use rights, “it was open to the legislature to make explicit what had formerly been implicit, and to restrict uses that had formerly been liberally permitted but which, due to changing circumstances and new knowledge, it had become necessary to prohibit.”\(^\text{109}\) Because the public trust doctrine has always recognized public rights in trust resources—and has historically provided a legal hook for litigants suing on behalf of the public—the doctrine satisfies the duplication of legal results requirement for background principles.\(^\text{110}\)

Fourth, the public trust doctrine applies to all landowners equally.\(^\text{111}\) The Court in \textit{Palazzolo} was concerned with labeling a regulation as a background principle after its enactment because subsequent owners would be burdened by the newly recognized principle while prior owners would not similarly be burdened.\(^\text{112}\) “[A] regulation that otherwise would be unconstitutional absent compensation,” the Court explained, “is not transformed into a background principle of the State’s law by mere virtue of the passage of title,” because the regulation’s application would cease to be equally shared.\(^\text{113}\) The public trust doctrine steers clear of the \textit{Palazzolo} Court’s concern.\(^\text{114}\) Any owner of the \textit{jus privatum} interest of trust resources is limited by the public’s interest; even though private owners may hold title to trust resources, they hold their title subservient to the trustee-government’s right to act on behalf of the beneficiary-public.\(^\text{115}\) Because the public trust doctrine has always encumbered all landowners equally, it meets

\(^{106}\) \textit{Lucas}, 505 U.S. at 1030.

\(^{107}\) \textit{See id.}


\(^{109}\) \textit{Id.}


\(^{112}\) \textit{See id.}

\(^{113}\) \textit{See id. at 629–30.}

\(^{114}\) \textit{See id.}

\(^{115}\) \textit{See Sarahan, supra note 38, at 557; supra Part I.}
the *Palazzolo* requirement that regulations cannot be background principles for some owners but not for others.\textsuperscript{116}

Fifth, the public trust doctrine is a background principle because it does not “vacillate.”\textsuperscript{117} Justice Scalia and several commentators have argued that the doctrine of custom should not be considered a background principle because the doctrine’s boundaries fluctuate.\textsuperscript{118} Dissenting from the Supreme Court’s denial of *certiorari* in *Stevens v. City of Cannon Beach*, Justice Scalia argued that the Oregon Supreme Court should not have accepted custom as a background principle because such “vacillations on the scope of the doctrine of custom . . . reinforce a sense that the court is creating the doctrine rather than describing it.”\textsuperscript{119} In contrast with Justice Scalia’s objection to “vacillations on the scope” of custom, concerns about pendulum-like interpretations of the public trust doctrine are unlikely given courts’ historically predictable application of the doctrine.\textsuperscript{120}

Changes in the public trust doctrine have been unambiguous, moving in one direction toward a broader scope.\textsuperscript{121} The predictable expansion of the doctrine from tidal waters to wetlands, beach access, and forests is widely acknowledged.\textsuperscript{122} Rarely, if ever, will courts limit the scope of the doctrine; rather, courts have gradually recognized that the public trust doctrine plays a larger role in protecting public trust resources.\textsuperscript{123} Moreover, a gradual expansion of the doctrine by state legislatures and courts merely reflects the doctrine’s original scope as preserving a broad range of natural resources for the pub-

\textsuperscript{116} See *Palazzolo*, 533 U.S. at 630; Sarahan, *supra* note 38, at 557.

\textsuperscript{117} See *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212 n.4 (1994) (Scalia, J., dissenting from denial of *certiorari*); see also Callies & Breemer, *supra* note 12, at 377–78; *supra* note 77 and accompanying text.

\textsuperscript{118} See *Stevens*, 510 U.S. at 1212 n.4; Callies & Breemer, *supra* note 12, at 377–78.

\textsuperscript{119} See *id.*; see also *supra* Part I; *infra* notes 121–25 and accompanying text.


\textsuperscript{121} See *supra* note 121; *supra* notes 26–40 and accompanying text.

\textsuperscript{122} See *supra* note 121; *supra* notes 26–40 and accompanying text.
lic. Because the scope of the public trust doctrine does not vacillate—courts describe the public trust doctrine rather than create it—it qualifies as a background principle.

For these reasons, the public trust doctrine comports with the basic *Lucas* characterization of background principles as restrictions that “proscribe[] use interests [that] were not part of [a landowner’s] title to begin with.” Because property interests in trust land are derived from settled, predictable state law that “no more than duplicate[s] the result that could have been achieved in the courts” and the public trust doctrine has not been “newly legislated or decreed,” the doctrine is a background principle that “inhere[s] in the title itself.”

C. Instances in Which the Public Trust Doctrine Has Been Considered a Background Principle

At least two courts in categorical regulatory takings cases have considered the factors enumerated above and held that the public trust doctrine qualifies as a background principle of state property law. Many others have strongly implied that the public trust doctrine is a background principle. The takings analysis in each case is informed by the *Lucas* threshold exception: if, because of the public

---

124 See *supra* note 121; *supra* notes 26–40 and accompanying text. Because the original expression of the public trust doctrine was so broad—encompassing the “air, running water, and [the] sea”—regulatory decisions codifying the doctrine in less expansive terms can hardly be characterized as drifting from the doctrine’s “historical moorings.” *See Nat’l Audubon Soc’y v. Superior Court of Alpine County*, 658 P.2d 709, 718 (Cal. 1983) (quoting J. Inst. 2.1.1). *Contra* Callies & Breemer, *supra* note 12, at 373.


127 *Id.* at 1029.

128 *Id.*

129 *See id.* at 1027–30. Even those critical of the public trust doctrine’s application to a takings analysis agree that the doctrine is a background principle. *See Callies & Breemer, supra* note 12, at 361 (“With respect to traditional public trust and custom, there is much to be said in favor of their apparent status as ‘background principles.’”).


trust doctrine, a limitation “inhere[s] in the title itself,” the landowner never held full title to the land in the first place.132

The decision of the Court of Appeals for the Ninth Circuit in Esplanade Properties, LLC v. City of Seattle is an unambiguous recognition of the public trust doctrine as a background principle.133 In Esplanade, a development company sued the city of Seattle after the city denied the company’s application to develop shoreline property.134 The court first found that the city’s denial of the company’s development permit was a deprivation of all beneficial uses of the company’s property.135 It then considered whether the public trust doctrine was a background principle of Washington state law.136 The Ninth Circuit noted that the doctrine was a settled rule of state law, declaring that “[i]t is beyond cavil that ‘a public trust doctrine has always existed in Washington.’”137 Explaining that the public trust doctrine is partially captured in the state constitution and reflected in the state’s Shoreline Management Act, the court underscored how Washington had substantially made the public trust doctrine explicit.138 It thus suggested that the city’s denial based on the public trust doctrine was well supported by precedent, and only duplicated what could have been achieved in state courts via the state constitution, statute, or common law.139

Finally, the court turned to the proposed development’s interference with public recreation and, therefore, the issue of whether the company’s use interests were part of the company’s title to begin with.140 Since the development company’s shoreline property was located near a public park, the court found that the company’s proposal to construct concrete pilings, driveways, and houses would have interfered with public uses.141 “Esplanade’s development plans,” the Ninth Circuit concluded, “never constituted a legally permissible use.”142 Since the public trust doctrine was a background principle, the sec-

133 307 F.3d at 985.
134 Id. at 979–80.
135 See id. at 985.
136 Id. at 985–86.
137 Id. at 985 (quoting Orion Corp. v. State, 747 P.2d 1062, 1072 (Wash. 1987)).
138 See id. at 985–86.
139 See Esplanade Props., 307 F.3d at 985–86.
140 See id. at 987.
141 Id.
142 Id.
ond Lucas exception to categorical regulatory takings was met,\textsuperscript{143} and the “takings doctrine [did] not supply plaintiff with such a right to indemnification.”\textsuperscript{144}

\textit{Esplanade} is also remarkable for its reading of Lucas with respect to the public trust doctrine.\textsuperscript{145} Quoting at length from the Lucas discussion of background principles, the Ninth Circuit reasoned that Lucas “effectively recognized the public trust doctrine.”\textsuperscript{146} Therefore, not only does \textit{Esplanade} stand for the proposition that the public trust doctrine is a background principle of state law, but it also strongly suggests that courts may interpret Lucas as a tacit recognition of the public trust doctrine as a background principle.\textsuperscript{147}

Similarly, the Supreme Court of South Carolina recognized the public trust doctrine as a background principle of state law.\textsuperscript{148} In \textit{McQueen v. South Carolina Coastal Council}, a landowner purchased two lots located adjacent to manmade saltwater canals in the 1960s.\textsuperscript{149} He did not make any improvements to the lots, and by 1991 when the landowner filed an application to build bulkheads on his lots, the majority of both lots had reverted to tidelands or critical saltwater wetlands.\textsuperscript{150} The South Carolina Coastal Council denied the landowner a permit to develop the lots.\textsuperscript{151} The landowner then alleged a taking.\textsuperscript{152}

\textsuperscript{143} See \textit{supra} notes 52–59 and accompanying text.
\textsuperscript{144} See \textit{Esplanade Props.}, 307 F.3d at 987.
\textsuperscript{145} See id. at 986–87.
\textsuperscript{146} See \textit{id}. The Ninth Circuit is not alone in its reading of Lucas. See Virginia S. Albrecht & Deidre G. Duncan, \textit{The Public Trust Doctrine and the Navigational Servitude as “Background Principles,” in Inverse Condemnation and Related Government Liability} 405, 405 (A.L.I.-A.B.A. Course of Study, May 3, 2001), available in Westlaw, SF64 ALI-ABA 403; Dowling, \textit{supra} note 12, at 76–77; Nussbaum, \textit{supra} note 130, at 520. Many commentators have argued that Lucas itself suggests that the public trust doctrine is a background principle that prevents the government from being required to compensate a landowner for a categorical regulatory taking. Albrecht & Duncan, \textit{supra}, at 405; Dowling, \textit{supra} note 12, at 76–77; Nussbaum, \textit{supra} note 130, at 520. First, the language the Lucas court employs in its summary of a “total taking” inquiry—that “the degree of harm to public lands and resources . . . posed by the claimant’s proposed activities” is required in any categorical analysis—strongly implicates the public trust doctrine. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992). Second, in addition to explicitly listing nuisance law, Lucas discusses background principles as encompassing the full range of property law. See \textit{id}. at 1029. Third, the Court notes the navigational servitude—a non-nuisance doctrine that is the federal expression of the public trust doctrine—in proffering examples of background principles that defeat a regulatory taking. See \textit{id}. at 1028–29.
\textsuperscript{147} See \textit{Esplanade Props.}, 307 F.3d at 986–87.
\textsuperscript{149} \textit{Id}. at 118.
\textsuperscript{150} \textit{Id}.
\textsuperscript{151} \textit{Id}.
\textsuperscript{152} \textit{Id}.
Like in *Esplanade*, the South Carolina Supreme Court first held that the landowner’s lots retained no value and, therefore, that there had been a total deprivation of all economically beneficial use. The court then focused on whether background principles of state property law absolved the state from an obligation to compensate the landowner. It examined the public trust doctrine, finding that the state “has a long line of cases regarding the public trust doctrine,” and noting that as early as 1884 the court recognized the state’s role as trustee of *jus privatum* and *jus publicum* land. The court further stated that the state holds “presumptive title” to public trust land. After its suggestion that the public trust doctrine in South Carolina meets the requirements of a background principle—because it is not newly legislated but is a settled rule of state law, and the Council’s decision merely duplicates that which could have been achieved in the courts—the court concluded that the reversion to tidelands “effected a restriction on [the landowner’s] property rights inherent in the ownership of property bordering tidal water.” Because the landowner’s lots were “public trust property subject to control of the State,” it was unnecessary for the state to “compensate [the landowner] for the denial of permits to do what he cannot otherwise do.” The court’s citation of *Esplanade*—the only case to explicitly include the public trust doctrine as a background principle—in support of its conclusion reveals the court’s strong affirmation of the doctrine as a background principle of South Carolina property law.

In addition to the recognition by *Esplanade* and *McQueen* that the public trust doctrine is a background principle, numerous courts have strongly indicated that background principles include the public trust doctrine. Although never expressly describing the public trust doctrine as a background principle, in *In re Water Use Permit Applications*, *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002); *McQueen*, 580 S.E.2d at 119. [153]

153 See *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002); *McQueen*, 580 S.E.2d at 119.

154 *McQueen*, 580 S.E.2d at 119.

155 Id.

156 Id.

157 See id. at 119–20.


159 *McQueen*, 580 S.E.2d at 120.

160 Id.

161 See id.

162 *Esplanade Props., LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002); *McQueen*, 580 S.E.2d at 119–20.

tions, the Hawaii Supreme Court held that the doctrine defeated a regulatory takings objection because the “original limitation of the public trust defeats [the plaintiff’s] claims of absolute entitlement.”

In *In re Water Use Permit Applications*, private citizens sued the state water commission because a public trust-based water regime prohibited them from using groundwater that had at one time been considered private property. The court looked to the Hawaii state constitution, which enshrines the public trust doctrine. Recognizing that the public trust doctrine has been firmly embedded as a settled law since the state’s inception, the court held: “[T]he people of this state have elevated the public trust doctrine to the level of a constitutional mandate. . . . We therefore hold that [the constitution] adopt[s] the public trust doctrine as a fundamental principle of constitutional law in Hawai‘i.” The court further noted the fact that the public trust doctrine was a state property law doctrine that the legislature had merely made explicit:

[T]he reserved sovereign prerogatives over the waters of the state precludes the assertion of vested rights to water contrary to public trust purposes. This restriction preceded the formation of property rights in this jurisdiction; in other words, the right to absolute ownership of water exclusive of the public trust never accompanied the “bundle of rights” conferred in the Māhele.

The Hawaii Supreme Court’s analysis of the public trust doctrine as a predictable, settled rule of state law that has not been newly legislated

---

164 9 P.3d at 494. The majority so held in an 80-page opinion that required a half-page just for its table of contents. *Id.* at 421.

165 See *id.* at 422–23, 426.

166 Haw. Const. art. XI, § 1 (“All public natural resources are held in trust by the State for the benefit of the people.”).

167 *In re Water Use Permit Applications*, 9 P.3d at 443–44.

168 See *id.* at 494. In the 1840s, Hawaii’s King Kamehameha III determined that a land “mahele,” or division, was an important step toward modernizing the traditional system of land tenure. *See State v. Zimring*, 566 P.2d 725, 730 (Haw. 1977). The Great Mahele of 1848 provided that the King would retain all his private lands as individual property and that, of the remaining lands, one-third was to be set aside for the Government, one-third to the chiefs, and one-third for the tenants. *See id.* For a fascinating historical analysis of the Great Mahele of 1848, see the Hawaii Supreme Court’s opinion in *State v. Zimring*, 566 P.2d at 729–31.
essentially affirmed the doctrine as a background principle that inheres in the title of public trust land itself.\(^{169}\)

Further, in *Rith Energy, Inc. v. United States*, the U.S. Court of Federal Claims held that a statute codifying the public trust doctrine was a background principle and, therefore, the statute served as a defense to a categorical regulatory taking.\(^{170}\) In *Rith Energy*, a holder of leases to a surface coal mine alleged a regulatory taking after the federal government rejected a proposed mining plan due to the plan’s potential adverse effects on soil.\(^{171}\) The court first described how the Tennessee Water Quality Control Act of 1977 codified the public trust doctrine.\(^{172}\) It then considered whether this codification of the public trust doctrine was a background principle of state law.\(^{173}\) The court held that it was.\(^{174}\) Focusing on the background principle element that a restriction may no more than duplicate a result that could have been achieved in the courts, the court held that the permit denial “represented an exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject under Tennessee nuisance law.”\(^{175}\) In recognizing the Act as a background principle, the court effectively held that the public trust doctrine is a background principle of Tennessee property law.\(^{176}\)

D. *Instances in Which the Public Trust Doctrine Has Not Been Considered a Background Principle*

In certain, fact-specific circumstances, courts have held that the public trust doctrine does not qualify as a background principle that may be used as a defense to a regulatory takings claim.\(^{177}\) It appears that there are two exceptions to the general rule that the doctrine is a background principle which precludes a taking: (1) when a well set-

---

\(^{169}\) See *In re Water Use Permit Applications*, 9 P.3d at 443–44; Callies & Breemer, *supra* note 12, at 358.


\(^{171}\) *Id.* at 110–12; Nussbaum, *supra* note 130, at 519.

\(^{172}\) *Rith Energy*, 44 Fed. Cl. at 114 (holding that the Act “recognizes the waters of the state, including its groundwaters, as property of the state, held in public trust, and subject to a right of ‘the people of Tennessee, as beneficiaries of this trust . . . to unpolluted waters’”) (alteration in original) (quoting *Tenn. Code Ann.* § 69-3-102(a) (1998)).

\(^{173}\) See *id.* at 113–14.

\(^{174}\) *Id.* at 114.

\(^{175}\) *Id.* at 115.

\(^{176}\) See *id.* at 113–14, 115; Nussbaum, *supra* note 130, at 519–20.

\(^{177}\) See Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 324 (2001); *infra* notes 179–93.
tled state regulation is directly contrary to the doctrine; and (2) when a regulation codifying the doctrine limits use of property beyond the doctrine’s widely accepted boundaries.\footnote{See Purdie v. Attorney General, 732 A.2d 442, 447 (N.H. 1999).}

In Tulare Lake Basin Water Storage District v. United States, for example, California water users claimed that federal water use restrictions under the Endangered Species Act (ESA) effected a taking of their right to the use of water.\footnote{Tulare, 49 Fed. Cl. at 314. As noted below, the Tulare court concluded that the deprivation of water amounted to a physical taking. Id. at 318–19; see infra Part V. Despite the fact that this section focuses on categorical regulatory takings, a discussion of Tulare is included here because of the court’s detailed analysis of whether the public trust doctrine in the specific circumstances qualified as a background principle.} Examining whether the public trust doctrine was a background principle of California state property law, the Tulare court first emphasized that using or diverting water in an unreasonable manner violated the public trust.\footnote{Tulare, 49 Fed. Cl. at 324 (“There is, in the end, no dispute that . . . plaintiffs’ contract rights, [were] subject to the doctrines of reasonable use and public trust . . . .”).} It then explained that the facts of the case with respect to the public trust doctrine as a background principle were unique because the prohibited water use had been specifically authorized in a century-old regime of private water rights.\footnote{See id. at 314, 321, 324.} The ESA, which the government claimed had effectively codified the state’s traditional public trust doctrine, would have provided a result precisely opposite from that which could have been achieved in the courts.\footnote{See id. at 323.} Therefore, the doctrine’s alleged codification in the ESA was not the codification of a background principle.\footnote{See id.}

By deeming unreasonable a use that had once been considered reasonable, the court reasoned, “we would not be making explicit that which had always been implied under background principles of property law, but would instead be replacing the state’s judgment with our own.”\footnote{Id.} The Tulare court therefore affirmed the notion that water use permits are subject to the public trust doctrine, but awarded compensatory damages because a statute had specifically replaced part of an entrenched regulatory regime.\footnote{Id. at 323–24.}

Likewise, in Purdie v. Attorney General, the Supreme Court of New Hampshire held that a regulation purporting to codify the public trust doctrine, but which was inconsistent with traditional understandings of the doctrine, was not the codification of a background princi-
There, beachfront property owners sued the state, claiming that a regulation defining the public’s trust rights in coastal shorelands effected an unconstitutional taking. Because the “New Hampshire common law limits public ownership of the shorelands to the mean high water mark,” the court concluded that “the legislature went beyond these common law limits by extending public trust rights to the highest high water mark.” Thus, because the property restriction in this case was not implicit in state property law, the limitation was not a background principle.

Aside from the rare situations in which a statute codifying the public trust doctrine directly replaces traditional understandings of state property law, or a regulation suddenly broadens the scope of the doctrine beyond the public’s changing circumstances or needs, use restrictions consistent with the public trust doctrine “inhere in the title itself.” A codification of the public trust doctrine, therefore, is the explicit recognition of a background principle. Thus, where the public trust doctrine limits landowner rights, a categorical regulatory takings inquiry ends. Because the threshold issue when a regulation totally deprives a landowner of all economically beneficial use is whether a proscribed use was part of the owner’s title to begin with—and because the public trust doctrine encumbers land with limitations which “inhere in the title itself”—no compensation is due if a regulation is a codification of the public trust doctrine.

IV. The Public Trust Doctrine and the Penn Central Balancing Test

When there has been no physical occupation or deprivation of all economic or beneficial use, the public trust doctrine often plays a critical role in determining whether compensation is due. In cases where there has been no categorical taking, the public trust doctrine informs each factor of the ad-hoc, factual inquiry first articulated in

---

187 Id. at 444.
188 Id. at 447.
189 See id.
191 See supra Part III.A–C.
192 See Palazzolo, 533 U.S. at 629; supra Part III.A–C.
193 See supra notes 198–233 and accompanying text.
Regulatory and Physical Takings and the Public Trust Doctrine

Penn Central Transportation Co. v. New York City.\textsuperscript{195} Thus, in determining whether a regulation on land use goes “too far,”\textsuperscript{196} courts have frequently considered the public trust doctrine in examining the economic impact of the regulation, its interference with distinct investment-backed expectations, and the character of the governmental action.\textsuperscript{197}

In evaluating the public trust doctrine’s relationship to economic impact, courts generally focus on property rights that accompany a landowner’s title.\textsuperscript{198} If the public trust doctrine encumbered the landowner’s title from the beginning, a regulation effectively has little or no economic impact.\textsuperscript{199} Similarly, courts examine the property interests actually transferred to a landowner in considering the public trust doctrine’s effect on investment-backed expectations.\textsuperscript{200} If a landowner’s proposed use was never permissible because of the public trust doctrine, the court evaluates investment-backed expectations accordingly.\textsuperscript{201} Generally, this means that constructive knowledge of a state’s common law property restrictions is a critical factor in evaluating a landowner’s expectations.\textsuperscript{202} For this reason, as Patrick Parentau points out, “it is often difficult to distinguish background principles from investment-backed expectations.”\textsuperscript{203} Because a limitation on

\textsuperscript{195} See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); see also Dick & Chandler, supra note 3, at 685–86 (explaining that the public trust doctrine may be applied to the Penn Central balancing test).


\textsuperscript{197} See infra notes 198–233 and accompanying text.


\textsuperscript{199} See Karam, 705 A.2d at 1226–29; R.W. Docks & Slips, 628 N.W.2d at 790–91.

\textsuperscript{200} See Karam, 705 A.2d at 1228–29; R.W. Docks & Slips, 628 N.W.2d at 790–91.

\textsuperscript{201} See Karam, 705 A.2d at 1228–29; R.W. Docks & Slips, 628 N.W.2d at 790–91.

\textsuperscript{202} See Sarahan, supra note 38, at 572–73. Sarahan argues that a court considering a property owner’s expectations in a regulatory takings context should look at seven factors:

1. the historical character of the property and that of the relevant public trust lands at the time of the landowner’s purchase of the property; (2) the state of the property and that of the relevant public trust lands from the time of the landowner’s purchase through the time of the intended development; (3) the historic application of the state’s public trust doctrine; (4) the economic and environmental value of the property; (5) the nature of the intended development; (6) the scientific evidence supporting the restriction on development; and (7) the extent of damage likely to be caused by the development, from both an individual and a cumulative perspective.

\textsuperscript{203} Parenteau, supra note 108, at 127.
property must “inhere in the title itself” in order to qualify as a background principle, and because an investment-backed expectation is handicapped by a landowner’s constructive knowledge of inhering restrictions on property use, the two are inextricably linked. Finally, in a Penn Central analysis, courts will weigh the benefits of a regulation’s impact on trust resources in evaluating the character of governmental action. If a restriction protecting a trust resource provides a socially important function, the character of governmental action will weigh against compensation for a regulatory taking.

In R.W. Docks & Slips v. State, the Wisconsin Supreme Court evaluated the denial by that state’s Department of Natural Resources (Department) of a marina developer’s dredging permit by examining how the public trust doctrine was implicated in the character of the Department’s action, its economic impact, and the degree to which it interfered with the developer’s investment-backed expectations. Turning first to the character of the Department’s action, the court found that the Department “acted primarily to protect an emergent weedbed on behalf of the public.” The court then held that the “state . . . holds title to the lakebed, and therefore, to the extent that a private property interest is implicated here, it is riparian only and therefore qualified in nature, encumbered by the public trust doctrine.” The character of the governmental action in R.W. Docks & Slips—protecting an emergent weedbed held in trust for the public—“weighs against a finding that [the developer] has suffered a compensable regulatory taking.”

The Wisconsin Supreme Court then considered the economic impact of the Department’s permit denial and the extent to which it interfered with the developer’s investment-backed expectations. The court began by explaining that its evaluation of both factors is “strongly influenced by the fact that the development of this private marina on the bed and waters of Lake Superior was encumbered by the public trust doctrine . . . from the get-go.” It then noted that

205 See Parenteau, supra note 108, at 127.
206 See R.W. Docks & Slips, 628 N.W.2d at 790.
207 See id.
208 Id. at 790–91.
209 Id. at 790.
210 Id.
211 Id.
212 See R.W. Docks & Slips, 628 N.W.2d at 790–91.
213 Id. at 790.
the developer never “possessed an unfettered ‘right’” to develop;\textsuperscript{214} even though the developer’s plans were frustrated, “those plans were encumbered by the public trust doctrine and contingent upon the periodic issuance of [Department] permits from the beginning.”\textsuperscript{215} Because the weedbed was encumbered by the public trust doctrine before the developer purchased it, the economic impact of the permit denial on the developer was minimized because he should have been on notice that his plans to develop would be limited by the doctrine “in the first place.”\textsuperscript{216} Likewise, even though the developer’s plans may have been proscribed by the permit denial, his investment-backed expectations should not have been disappointed, as the land was encumbered by the public trust doctrine “from the beginning.”\textsuperscript{217} “Under the circumstances of this case,” the court concluded, “the [Department’s] action cannot be said to have ‘gone too far’ to cause the sort of negative economic impact or substantial interference with investment expectations as to amount to a regulatory taking.”\textsuperscript{218}

Similarly, in \textit{Karam v. State}, the court examined whether New Jersey’s denial of a development permit worked a taking of the riparian landowners’ property.\textsuperscript{219} In \textit{Karam}, the court adopted a unique approach to the \textit{Penn Central} balancing test.\textsuperscript{220} It explained that in order to evaluate the regulation’s economic impact and landowner’s investment-backed expectations, it must first define what sticks made up the “bundle of rights” acquired by the owner.\textsuperscript{221} Turning first to the economic impact of the permit denial, the court held that because the tidal land was burdened by use restrictions “in the name of the common good” when the land was conveyed to the landowner, the economic impact weighed against a taking.\textsuperscript{222}

Next, the court found that under the public trust doctrine, “ownership of and domain and sovereignty over lands covered by tide waters . . . belong to the respective states.”\textsuperscript{223} Moreover, it concluded that “the sovereign never waives its right to regulate the use of public

\textsuperscript{214} See \textit{id.}.
\textsuperscript{215} Id. at 791.
\textsuperscript{216} See \textit{id.} at 790–91.
\textsuperscript{217} See \textit{id.} at 791.
\textsuperscript{218} \textit{R.W. Docks & Slips}, 628 N.W.2d at 791.
\textsuperscript{220} See \textit{id.} at 1225–26.
\textsuperscript{221} See \textit{id.}.
\textsuperscript{222} See \textit{id.} at 1226–27.
\textsuperscript{223} See \textit{id.} at 1228 (quoting Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892) (alteration in original))).
trust property” and, therefore, the state’s riparian grant to the landowners “did not create an absolute and perpetual right to” develop property. The landowner thus “had notice in advance of [his] investment decision that the governmental regulations . . . had been or would be enacted.” Therefore, the permit denial did not destroy the owner’s reasonable investment-backed expectations.

Likewise, the Washington Supreme Court held that the public trust doctrine informed an inquiry into the reasonability of a developer’s investment-backed expectations. In *Orion Corp. v. State*, the plaintiff purchased tideland acreage for the purpose of creating a residential community. Intending to dredge and fill a bay for his residential community, the developer claimed a regulatory taking when the state passed a tideland law limiting the developer’s use of the tidal wetlands. The court held that the developer purchased his property “subject to the limitations imposed by the public trust.” Because the tidelands were held in public trust, the court found that the developer’s plans for a residential community never constituted a legally permissible use and, therefore, the regulation never interfered with the developer’s reasonable investment-backed expectations.

**V. The Public Trust Doctrine and Categorical Physical Takings**

When a regulatory body’s action amounts to a physical occupation or invasion of property—when a categorical physical taking occurs—the public trust doctrine may also play a role in determining whether compensation is due. If public trust resources are implicated in a categorical physical taking, the analysis appears to mirror

---

225 See Karam, 705 A.2d at 1229.
227 See id. at 1228–29.
229 See id. at 1065.
230 See id. at 1065–66, 1067.
231 See id. at 1082.
232 See id. at 1082–83.
233 See id. at 1086; see also Dick & Chandler, supra note 3, at 693–94 (discussing the role of the public trust doctrine in the evaluation of investment-backed expectations in Orion).
the categorical regulatory takings analysis. That is, after having concluded that a regulatory body’s action amounts to a physical taking, courts will determine whether a landowner in fact owned the property for which she seeks compensation.

Thus, at least one court has examined the extent to which physical appropriation merely reflects limitations of title inherent in background principles of state law. In *Tulare Lake Basin Water Storage District v. United States*, the U.S. Court of Federal Claims explained that, “[h]aving concluded that a deprivation of water amounts to a physical taking, we turn now to the question of whether plaintiffs in fact owned the property for which they seek to be compensated.” Examining the “background principles of state law” that may have “limit[ed] the scope of [the] plaintiffs’ property right,” the *Tulare* court extensively discussed the public trust doctrine. Although it ultimately determined that a codification of the public trust doctrine was not the codification of a background principle, the court’s analysis lucidly illustrates the potential impact of the public trust doctrine on a physical takings claim. Like in a categorical regulatory analysis, the public trust doctrine serves as a background principle and, therefore, courts must consider the doctrine’s applicability when a landowner claims that a regulatory body’s action amounts to a physical occupation or invasion.

The public trust doctrine may play a particularly important role in the context of wildlife damage to private property. In the wake of reintroduction programs and other wildlife protection initiatives, landowners have brought a variety of physical takings claims.

---

235 See Clajon Prod., 854 F. Supp. at 852–53; Tulare, 49 Fed. Cl. at 320, 324; see also supra Part III.
236 See Tulare, 49 Fed. Cl. at 320.
237 See id.
238 See supra notes 179–85 and accompanying text (discussing takings claim in Tulare).
239 Tulare, 49 Fed. Cl. at 320 (citing Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1357 (Fed. Cir. 2000)). The *Tulare* court described *Palm Beach Isles* as “defining the inquiry in a physical takings case as whether the plaintiff owned the property at the time of the taking.” Id.
240 Id. at 320, 320–24.
241 See id.; supra notes 179–85.
243 See id.; see also supra Part III.
244 See Caspersen, supra note 27, at 385–87.
ever, because wildlife is a trust resource, the presence of wild animals on private land cannot effect a physical taking. First, private landowners have never owned wildlife on their property because wildlife is “a sort of common property.” Thus, a landowner is not deprived of a property interest when she is prohibited from killing wildlife. Second, the presence of wildlife on private land does not effect a taking because wildlife has always enjoyed a natural right to inhabit the land. Unlike the cable wire in *Loretto v. Teleprompter Manhattan CATV Corp.*, the public trust doctrine provides wildlife with an overriding right to occupy private land, particularly when its presence is the result of a rehabilitation effort.

In *Clajon Production Corp. v. Petera*, for example, a federal court in Wyoming applied the public trust doctrine to a claim that a state hunting regulation was a physical taking of property. The landowners in *Clajon* argued that both the wild animals’ presence on their property, as well as the animals’ consumption of the forage on their property, constituted a physical taking. The court reasoned that the success of the landowners’ claim turned on the ownership of the animals.

---

246 See, e.g., Geer v. Connecticut, 161 U.S. 519, 528–29 (1896) (holding that wild animals are not the private property of those whose land they occupy, but are instead a sort of common property whose control and regulation are to be exercised “as a trust for the benefit of the people”), overruled on other grounds by Hughes v. Oklahoma, 441 U.S. 322 (1979).

247 See *Clajon Prod.*, 854 F. Supp. at 852–53 (holding that the presence of animals on private property not a taking because landowners cannot claim a property interest in wildlife); Caspersen, *supra* note 27, at 386–87.

248 Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1426 (10th Cir. 1986).

249 See id.

250 See Mountain States Legal Found. v. Hodel, 799 F.2d 1423, 1426 (10th Cir. 1986).

251 458 U.S. 419, 421 (1982). While the Court’s strong language in *Loretto* suggests that a physical occupation of real property is “invariably” a taking, *Loretto* is distinguishable when the public trust doctrine is at issue. See *id.* at 427. Where the public trust doctrine inheres in a title, a landowner never in fact owned the property for which she seeks compensation. See *id.*; see also Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992). Like its application to a categorical regulatory takings analysis, whether a background principle inhered in a title is a threshold inquiry in a physical takings analysis. *Clajon Prod. Corp. v. Petera*, 854 F. Supp. 843, 852–53 (D. Wyo. 1994); Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313, 320, 324 (2001); Caspersen, *supra* note 27, at 381–87; see *supra* Part III. If the public trust doctrine places limitations on property ownership from the beginning, compensation for physical occupation may not be required. See *Loretto*, 458 U.S. at 427.


254 See *id.* at 852.

255 See *id.*
noting in particular the Tenth Circuit’s holding that wild animals are “‘common property whose control and regulation are to be exercised as a trust for the benefit of the people.’”\textsuperscript{256} Finding that “wild animals are owned, in the proprietary sense, by no one,” the Clajon court held that there was no physical invasion attributable to the state.\textsuperscript{257}

VI. Lessons from the Application of the Public Trust Doctrine to Modern Takings Analysis

Recognizing that the public trust doctrine underlies a modern takings analysis provides several salient lessons about buying and selling property, regulatory strategy, and a community-based approach to conceptualizing property rights.

A. Buyers and Sellers of Property Should Be Informed About Applicable Background Principles

Not only is the traditionally recognized knowledge of a parcel’s metes and bounds vital to property ownership, but a takings analysis cognizant of the public trust doctrine reveals that landowners must also be informed about firmly embedded understandings of state property law.\textsuperscript{258} Purchasing land without full knowledge of a state’s background principles places landowners in a precarious situation.\textsuperscript{259} Despite possession of a deed, landowners may not actually hold full...
title; if the deed is to land encumbered by the public trust doctrine, for example, landowners can merely claim title to the *jus privatum*.  

Moreover, lack of knowledge about property use rights that results in unfounded development expectations may dash the most grandiose development plans.  

Regardless of what property use a landowner anticipates enjoying, courts read long-established, predictable state property law principles—like the public trust doctrine—into a title.  

The government will prevail on any regulatory or physical takings claim in such a case, in spite of what a landowner thought she owned, and irrespective of her plans to develop it.  

Further, buyers and sellers of land and their attorneys should be intimately familiar with what a state may potentially consider to be a background principle of its property law, and how such a principle might restrict a landowner’s title.  

Such familiarity is critical in two contexts. First, landowners must be aware of changes in their land that may implicate a background principle that was not previously at issue. The South Carolina Supreme Court’s poignant words in *McQueen v. South Carolina Coastal Council* serve as a strong incentive for prospective and current landowners to be informed about natural transformation of land that might invite application of the public trust doctrine: “Any taking McQueen suffered is not a taking effected by State regulation but by the forces of nature and McQueen’s own lack of vigilance in protecting his property.”  

Second, landowners should be aware of changes in legislation that may implicate a background principle that, at the time of purchase, may not have been a background principle. An informed owner of land should keep abreast of environmental trends, and be

---

260 See *Lucas*, 505 U.S. at 1027, 1029–30; *supra* Parts I, III.A–C.  
261 See, e.g., *Esplanade Props.*, LLC v. City of Seattle, 307 F.3d 978, 987 (9th Cir. 2002) (affirming a denial of an application to construct driveways and houses in a navigable tidelands area); *Orion Corp.* v. State, 747 P.2d 1062, 1066, 1089 (Wash. 1987) (holding that a state law precluding developer from constructing Venetian-style residential community was not a taking).  
263 See *Sarahan*, *supra* note 38, at 564; *supra* Parts III, IV, V.  
264 See *supra* notes 258–63 and accompanying text.  
266 Id.; see also Nussbaum, *supra* note 130, at 522–24 (explaining that, at least for land adjacent to tidelands, landowners have “at a minimum, constructive knowledge of both the public trust doctrine and the ‘water’s inherent tendency to change its borders’” (quoting *Sarahan*, *supra* note 38, at 564).  
wary of land that is or may be slated for environmental protection. At least one court has found that developers are responsible for awareness of the “regulatory climate” and, therefore, should be held accountable for failing to anticipate reasonably foreseeable legislation. Another, in *Karam v. State*, forcefully articulated the responsibility placed on landowners to keep abreast of broad policy change:

The crucial fact is that since the early 1970’s the regulatory jurisdiction . . . has substantially expanded . . . . The decision to shift public policy from commerce to environmental protection and wildlife preservation was not made by a faceless bureaucrat somewhere within the administrative labyrinth of a nameless office building in Trenton. Instead, it was articulated by our Legislature in carefully crafted enactments and heralded by the Governor with great fanfare. Plaintiffs must be held to have had constructive notice of these developments.

Both before and after purchase, therefore, the public trust doctrine’s application to takings should strongly encourage landowners to ensure that what courts will consider constructive knowledge is their actual knowledge. Ignorance of background principles in a takings context is indeed no excuse.

**B. State and Local Regulatory Bodies Should Strategically Employ the Public Trust Doctrine in Environmental Protection Regulation**

Recognizing that the public trust doctrine underlies a modern takings analysis reveals certain duties and responsibilities required of state and local regulatory bodies, but, perhaps more importantly, also illustrates that such regulatory bodies are afforded an impregnable environmental protection technique.

That a takings analysis is informed by the public trust doctrine underscores the fact that state regulatory bodies are required to pro-

\footnotesize

\textsuperscript{268} See id.; see also Sarahan, supra note 38, at 565–66 (explaining that the “symbiotic relationship” between wetlands and other waters is becoming increasingly understood).

\textsuperscript{269} See Good v. United States, 189 F.3d 1355, 1361–63 (Fed. Cir. 1999) (holding that the landowner could not have been “oblivious” to “rising environmental awareness [that] translated into ever-tightening land use regulations”); *Karam*, 705 A.2d at 1229.

\textsuperscript{270} 705 A.2d at 1229.

\textsuperscript{271} See Sarahan, supra note 38, at 564.

\textsuperscript{272} See id..

\textsuperscript{273} See infra notes 274–86 and accompanying text.
tect certain resources. 274 Because states act as trustees for the beneficiary public, they must fulfill their fiduciary duties by acting on behalf of the public when trust resources are jeopardized. 275 In turn, courts must permit regulatory bodies to take action—by passing laws, enforcing existing environmental regulations, or denying development permits—to protect trust resources. 276 A takings claim against a regulatory body using its legislative muscle to act as trustee of public resources should therefore fail. 277

Thus, in drafting legislation that formally restricts the use of land for environmental protection reasons, state and local regulatory bodies should state that such restrictions are an explicit declaration of the public trust doctrine. 278 In this way, regulatory bodies can clearly con-

274 See In re Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (“Under the public trust doctrine, the State . . . and the United States have the right and the duty to protect and preserve the public’s interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people.”); State v. Jersey Cent. Power & Light Co., 336 A.2d 750, 759 (N.J. Super. Ct. App. Div. 1975) (“The State has not only the right but also the affirmative fiduciary obligation to ensure that the rights of the public to a viable marine environment are protected . . . .”); Orion Corp. v. State, 747 P.2d 1062, 1072 (Wash. 1987) (holding that the “public trust doctrine emanates from this public authority interest, which requires the state to maintain its dominion in trust for the people”).


277 See Ill. Cent. R.R., 146 U.S. at 453; Esplanade Props., 307 F.3d at 985; McQueen, 580 S.E.2d at 119–20. While the doctrine’s application to the takings analysis illustrates certain limits on owners of property, its relationship to a modern takings analysis also demonstrates legislative limitations. See Dick & Chandler, supra note 3, at 691. First, where the public trust doctrine inheres in the title of a parcel of land, the parcel cannot be fully owned by a private citizen, but it cannot be owned by a government either. See supra Part I. Second, as trustee, states are restricted in their ability to alienate trust land. See Ill. Cent. R.R., 146 U.S. at 453. Although a state may transfer the jus privitum of trust land, trust land is continually encumbered by the requirement that it be used to benefit the public. See Dick & Chandler, supra note 3, at 691. For instance, in In re Water Use Permit Applications, the Hawaii Supreme Court prohibited a state agency decision from derogating the public trust, holding that its state water commission was bound by an “affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” 9 P.3d 409, 453 (Haw. 2000) (quoting Nat’l Audubon Soc’y v. Superior Court of Alpine County, 658 P.2d 709, 728 (Cal. 1983)). Resources held in trust are held for the benefit of the present and future public—not for the benefit of a current governmental body—and therefore a government cannot alienate or derogate any parcel of land encumbered by the public trust doctrine. Ill. Cent. R.R., 146 U.S. at 453.

278 See supra notes 273–77 and accompanying text. In Hawaii, for example, a presumption in favor of public use and enjoyment is explicitly written into the state constitution, mandating the state to promote and utilize trust resources “in a manner consistent with their conservation.” See Haw. Const. art. XI, § 1.
vey that they intend to “make the implication of . . . background principles of nuisance and property law explicit.”

Moreover, regulatory bodies can be confident that regulation incrementally expanding the public trust doctrine will not create takings liability. To be sure, regulatory bodies should be careful not to expand the public trust doctrine too quickly or stretch it too far beyond its traditional scope. They should identify the traditional scope of the state’s public trust doctrine and cautiously broaden the doctrine to reflect changing needs and circumstances. However, because Palazzolo defined background principles as “those common, shared understandings of permissible limitations derived from a State’s legal tradition,” regulations protecting land outside the traditional scope of trust resources are likely to be immune from takings because they will be considered background principles. One technique for placing restrictions on previously unrecognized trust resources is to focus on the ecological relationship between the targeted land and traditional public trust resources. Under this approach, explicit regulatory language can mitigate against a taking because a failure to regulate adjacent non-trust land may endanger trust resources.

In addition, because the public trust doctrine plays a role in the Penn Central multi-factor test, even if a regulatory body cannot prevail on a takings claim, it can utilize the doctrine to mitigate damages. Where traditional or potential public trust resources are protected by government restrictions, regulatory bodies faced with a takings challenge should argue that a landowner’s proposed use of land will injure a resource held in trust by the state. Since constructive knowledge of the public trust doctrine is an essential element in evaluating investment-backed expectations, compensation for an owner’s lost opportunity in a successful takings claim should therefore be reduced.

---

280 See supra Part III.D.
283 See id.; see also Dowling, supra note 12, at 90–91.
284 See Sarahan, supra note 38, at 573.
285 See id.
286 See id. at 576–77.
287 See id.
to the value of investment-backed expectations as limited by the public trust-based use restrictions.\textsuperscript{289}

Finally, the fact that the doctrine underlies a modern takings analysis—coupled with states’ responsibilities to protect trust resources—demonstrates that the majority of modern environmental protection laws, like wetlands protection, can hardly be characterized as overreaching.\textsuperscript{290} Many environmental protection restrictions could be characterized as codifications of background principles like the public trust doctrine, and thus do no more than that which could have been achieved by courts applying common law principles.\textsuperscript{291} Further, in describing background principles as limitations “derived from a State’s legal tradition,”\textsuperscript{292} Palazzolo strongly implies that regulations which reasonably expand existing background principles may themselves be considered background principles.\textsuperscript{293} Thus, state and local regulatory bodies can be confident in pursuing novel environmental protection of lands held in trust for the public—such as wetlands, forests, and parks—without fear of takings challenges.\textsuperscript{294} Such legislation merely codifies the public trust doctrine or is a reasonable extension of it.\textsuperscript{295}

C. Property Rights Should Be Conceptualized Within a Community-Based Paradigm

As Hope Babcock explains, “the use of private property has always been constrained by transcendent social or communal obligations.”\textsuperscript{296} Indeed, the public trust doctrine’s role in a takings analysis suggests that property rights are perhaps more communal than generally acknowledged, and reveals that it may make sense to think about property rights from an interconnected, community-based perspective.\textsuperscript{297}


\textsuperscript{290} See supra Parts III, IV, V; supra notes 273–77 and accompanying text.


\textsuperscript{293} See Dowling, supra note 12, at 91.

\textsuperscript{294} See id.

\textsuperscript{295} See id.

\textsuperscript{296} Babcock, supra note 4, at 897.

\textsuperscript{297} See Babcock, supra note 4, at 898–901. Babcock explains that, in the context of wildlife, the public trust doctrine offers an antidote to our culture’s loss of a sense of community and to our modern inability to see our society as individuals arrayed in a series of continuous interactions with each other and with our surroundings. . . .
American courts historically have invoked the public trust doctrine and other similar common law doctrines in order to protect shared resources like beaches, rivers, and wildlife in the face of strong private property interests.\textsuperscript{298} Courts applying the public trust doctrine to a modern takings analysis continue this deep-seated property law tradition that a property “right” is more than the power to use and consume a purchased resource; they affirm that property rights encompass a legal relationship between an individual and her community.\textsuperscript{299}

The fact that the public trust doctrine is infused into the takings analysis informs landowners that they are not entitled to compensation if a regulation requires them to cease using property in a way that harms the community.\textsuperscript{300} Land is not simply a commodity valued by its market price, the public trust doctrine reminds landowners; it also is burdened by the duty to conform its uses with the public’s needs and values.\textsuperscript{301} To be sure, many landowners mistakenly believe that they have an inherent right to use purchased property as they choose.\textsuperscript{302} As the doctrine’s application to takings reveals, however, landowners should not expect absolute property use protection.\textsuperscript{303} The public trust doctrine limits the unfettered right of a landowner to use her parcel as she sees fit, and, should the owner claim that a regulation prohibits her from using her parcel as she wishes, precludes the owner from recovery.\textsuperscript{304}

Further, the application of the public trust doctrine to takings reaffirms the notion that property rights continually evolve according to community needs.\textsuperscript{305} Critics of the inclusion of the public trust doctrine as a background principle are concerned that regulatory bodies will justify land use restrictions by expanding the scope of public trust rights.\textsuperscript{306} But the public trust doctrine has never been static.\textsuperscript{307} Rather,

\ldots \textit{Lucas}, oddly enough, with its incorporation of common law into takings jurisprudence, may allow us to regain that sense of neighborliness.

\textit{Id.} at 900–01.
\textsuperscript{298} See \textit{supra} Part I.
\textsuperscript{299} See Babcock, \textit{supra} note 4, at 900.
\textsuperscript{300} See \textit{id.} at 897.
\textsuperscript{301} See \textit{id.} at 902.
\textsuperscript{302} \textit{Id.} at 855 n.25.
\textsuperscript{303} See \textit{id.}
\textsuperscript{304} See \textit{id.}
\textsuperscript{305} See Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972); see also Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1974) (holding that public trust doctrine is “sufficiently flexible to encompass changing public needs”); \textit{supra} Part I.
\textsuperscript{306} See Callies & Breemer, \textit{supra} note 12, at 372–73.
\textsuperscript{307} See \textit{supra} Part I.
it has continually conformed to changing societal needs and circumstances. While abrupt shifts in the doctrine’s application cannot serve as a defense to a takings claim, cautious expansion of the public trust doctrine is hardly without precedent. It should surprise no landowner in a soft-sand state, for example, that the public trust doctrine may shift with a migrating coastline. That several courts have concluded that the public trust doctrine underlies a modern takings analysis, therefore, indicates a growing recognition of adaptable property rights ultimately subject to public use and enjoyment. Because the public trust doctrine evolves—and is considered both a background principle and a constructive limitation on investment-backed expectations—property rights burdened by the doctrine continually evolve according to the community’s changing needs.

Indeed, the application of the public trust doctrine as a threshold issue in a takings analysis suggests adopting a fundamental shift in our conception of private property rights. Whereas a conventional perspective of private property rights views land as an expendable resource and tool for human use and consumption, the modern takings analysis’s deference to the public trust doctrine indicates a growing acceptance of Professor Sax’s economy of nature. Where the public trust doctrine serves as a background principle or restricts a landowner’s investment-backed expectations, private use rights give way to community needs. The doctrine’s complete defense to a takings claim is an affirmation of ecological and communal interconnectedness; it reflects a perspective that a landowner’s relationship to the land is colored by the land’s relationship to the landowner’s community.

**Conclusion**

Any evaluation of a regulatory or physical takings claim requires a careful consideration of the public trust doctrine. Property owner-

---

308 See In re Water Use Permit Applications, 9 P.3d 409, 447 (Haw. 2000).
309 See Dick & Chandler, supra note 3, at 695.
310 See supra Part I.
312 See supra notes 306–13 and accompanying text.
313 See Sax, supra note 5, at 1442.
314 See id. at 1442–43.
315 See supra notes 297–305 and accompanying text.
316 See supra notes 297–305 and accompanying text.
ship in the United States does not provide landowners with a right to lay harm to valuable resources held in trust for the public, nor does it require courts to award landowners compensation when a legislature acts to restrict the use of such resources. State and local regulatory bodies therefore can be confident in promoting environmental protection of a slowly growing list of public trust resources by drafting regulations explicit in their recognition of the public trust doctrine.