The Public Trust Doctrine: the Public Trust Doctrine and Takings: a Post-Lucas view

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THE PUBLIC TRUST DOCTRINE AND TAKINGS: A POST-LUCAS VIEW

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I. INTRODUCTION

During the last five years, the United States Supreme Court has evolved a new “takings” doctrine. Starting with Nollan v. California Coastal Commission1 and then most recently in Lucas v. South Carolina Coastal Council,2 the Court has sent a clear message to land-use regulators. General regulatory control over land-use will now be carefully scrutinized.3 If a type of land-use is barred or substantially restricted,4 it will be found to be a “taking” requiring compensation, unless such controls can be justified as based on historic common law principles of property law.5 This Article will review the evolution of this new doctrine and then argue that the public trust doctrine is one of those “common law property doctrines” that can justify regulations without the paying of compensation.

II. EVOLUTION OF THE “NEW” TAKINGS DOCTRINE

The Constitution provides two ways for governments to control land-use under its “eminent domain” power6 and under its “police

3 See discussion infra note 34 (discussing how this standard narrows the scope of allowable government action).
4 Lucas seemingly focused on a situation in which the property owner was deprived of “any reasonable economic use” of his property. Lucas, 112 S. Ct. at 2890. Both Nollan and Lucas seem to accept a narrow definition of loss of value. If an owner has a house and is not allowed to build an addition, the focus could be on the loss of “all value” of the property right to build the addition, and not on the reduction, even minimal reduction, of the value of property, which includes the land, original house, and the addition. See discussion infra part III.
5 See Lucas, 112 S. Ct. at 2901-02.
6 See Kohl v. United States, 91 U.S. 367, 371 (1876) (discussing the eminent
power.’’7 Under the Fifth8 and Fourteenth9 Amendments of the Constitution, a person or private entity may have his or her or its property taken for a public purpose, provided adequate compensation is paid.10 Contrasted with this eminent domain power is the inherent “police power” of government to regulate, without compensation, to protect the public.11

The powers are seemingly quite distinct. Yet, they in fact blur in interpretation and application. Almost all government action that restricts the use of property takes some value from an owner of property. Yet, forcing government to pay for all such regulations is inconsistent with the idea that “property in this country is held under the implied obligation that [its] owner’s use . . . shall not be injurious to the community.”12 Moreover, it would make regulation a practical impossibility.13

To the property owner, of course, regulation without compensation redistributes the costs of a limitation or restriction away from the public as a whole and onto the owner alone. Such forced “good Samaritanism” is unfair and contrary to the idea in the Constitution that such “public use” or public purpose can only be assigned to the property if the landowner is compensated.14 Moreover, such a broad application of police powers encourages uncontrolled gov-

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7 Lawton v. Steele, 152 U.S. 133, 137 (1894) (discussing the police power of the states).
8 U.S. Const. amend. V. The Fifth Amendment provides in pertinent part: “[N]or shall private property be taken for public use, without just compensation.” Id.
9 U.S. Const. amend. XIV; see Chicago, Burlington & Quincy Ry. v. Drainage Comm’r, 200 U.S. 561, 583 (1906) (Takings Clause of the Fifth Amendment made applicable to state and local governments through the Fourteenth Amendment).
10 Susan Bayerd, Comment, Inverse Condemnation and the Alchemist’s Lesson: You Can’t Turn Regulations into Gold, 21 SANTA CLARA L. REV. 171, 171 & n.1 (1981) (noting that the Fifth and Fourteenth Amendments and several state constitutions provide for this power).
11 See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). Justice Holmes noted that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” Id.
14 Armstrong v. United States, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which . . . in all fairness and justice . . . should be borne by the public as a whole.”).
ernment action and even challenges the very concept of private property ownership. 16

Until recently, this conflict between the Taking Clause and the police power was resolved on a case by case basis, with a strong presumption against a regulation being elevated to a “taking” or “inverse condemnation.” 16

The Supreme Court did recognize, as early as 1922, in Pennsylvania Coal Co. v. Mahon 17 that “if [a] regulation goes too far it will be recognized as a taking.” 18 However, the Court also noted in cases in the same decade, that uncompensated restrictions on property must be allowed to be imposed to respond to “new and different conditions.” 19 Such regulations of property “controlled by considerations of social policy which are not unreasonable,” are valid. 20

This conflict between “ takings” and “regulatory control” under the police power was reviewed in the 6-3 decision of Penn Central Transportation Co. v. New York City. 21 In that case, the owners of Grand Central Station challenged a New York City ordinance 22 that declared the station a “landmark” 23 and barred construction of a multi-story office building above the station itself. 24

The Court noted that there was no “set formula” for determining when regulatory action became a taking. 25 If there was, in fact, a “physical invasion,” a “ taking” may more readily be found . . . 26 Otherwise, the inquiry was ad hoc, looking at: (1) “[t]he economic impact of the regulations on the claimant [including] investment-backed expectations” 27 as against (2) the degree to which

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15 Cf. Hawaii Hous. Auth. v. Midkaff, 467 U.S. 229, 241-42 (1984) (holding that a Hawaii statute authorizing the government to buy property from owners in order to sell it to tenants at reduced costs does not violate the “public use” requirement of the Fifth Amendment).


17 260 U.S. 393 (1922).

18 Id. at 415.


22 New York City, N.Y., ADMIN. CODE § 207-2.0 (1976).

23 Penn Cent., 438 U.S. at 113.

24 Id. at 116-17.

25 Id. at 124 (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

26 Id.

27 Id. (citing Goldblatt, 369 U.S. at 594).
the "‘health, safety, morals, or general welfare’ would be promoted . . . .”

Diminution in value, alone, was not sufficient to show a taking. The reviewing court had to look at the "parcel as a whole." Here, after the appropriate weighing of factors, the Court found no regulatory taking.

In 1987, the Court started to take a more serious look at the application of the Taking Clause to land-use regulations. A more conservative majority had emerged, led by Chief Justice Rehnquist and Justice Scalia. This new Court refocused attention on constitutional protection of economic rights.

In *Nollan v. California Coastal Commission*, the Court applied this new economic civil liberties doctrine to "takeings." The Court held, in a 5-4 decision written by Justice Scalia, that, if not compensated as a taking, a regulatory limitation on a landowner's rights to use his, her, or its property will be invalid unless the regulation "‘substantially advances [a] legitimate state interest[.] . . . .'" Moreover, the Court seemed interested in reviewing the

28 Id. at 125 (quoting Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)).
29 Id. at 124-25.
30 Id. at 130-31. The Court specifically rejected an "add-on approach" to taking jurisprudence. See id. at 130. "‘Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Id; see also infra part III (discussing this issue, particularly as it applies to implementation of the *Lucas* decision).
31 Id. at 138. Justice Rehnquist dissented, joined by Chief Justice Burger and Justice Stevens. Id. at 144-50 (Rehnquist, J., dissenting). The dissenters rejected the taking analysis of the majority. Id. Landmark or historic preservation was not like zoning as it was not part of a comprehensive land-use regulation system. Id. at 139-40. Here, an undue burden was being put on a land-owner for a unique aesthetic interest. Id. at 140. The dissent concluded that the government's act constituted a "taking." Id. at 143.
32 See Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 ST. JOHN'S L. REV. 433, 447-51 (1989) (indicating that the recent takings cases are really a return to the days of Lochner v. New York, 198 U.S. 45 (1903), when regulations that required increased costs to a business were knocked out as violations of "substantive due process").
34 Id. at 834 (quoting Aging v. City of Tiburon, 447 U.S. 255, 260 (1980)). The phrase used in *Nollan* is that the regulation will have to show that it "substantially advances legitimate state interests." Id. (quoting *Aging*, 447 U.S. at 260). This is a seeming adoption of the standard from prior precedent. However, it is clear that the impact of this decision is the determination to strictly apply prior general language and require a more substantial connection between regulation and harm. See id. at 842, 861 (Brennan, J., dissenting). Justice Brennan criticized the majority opinion as moving away from traditional "rational basis" and "reasonable relationship" test for reviewing regulations. See Thomas W. Merrill, *Takings Clause Re-Emerges, but No Clear Pattern Seen*, NAT'L L.J. Aug. 17.
regulators' actions to determine how close a "nexus" there is between the regulation and the public purpose\(^3\) or, stated differently, "how close a 'fit' [there is] between the condition and the burden . . . ."\(^4\)

The same year, in First English Evangelical Lutheran Church v. County of Los Angeles,\(^5\) the Court held that if the government temporarily interferes with a property right, without such substantial justification, it is a "temporary taking" requiring compensation.\(^6\)

The result of this double whammy was to "chill" regulators and reduce attempts to regulate land-use.\(^7\) Nevertheless, some regulators argued that these decisions could be limited to their facts.\(^8\)

First English, it was argued, involved a concession that there was an invalid regulation and thus the only issue was whether a temporary interference with a property right was a taking.\(^9\)

Nollan involved a "physical occupation" of property pursuant to the regulation and such "trespasses" had long been held to be takings.\(^10\)

\(^{10}\) See Nollan, 483 U.S. at 866 (Stevens, J., dissenting); Doran, supra note 16, at 359-60.

\(^{11}\) Some regulators relied on Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), a decision virtually contemporaneous with Nollan and First English. In Keystone, a bare five member majority upheld a state statute that prohibited, without compensation, mining below a level which risked subsidence, or a caving in, of a coal mine. Id. at 501-02. Rather than read this as an affirmation of the narrowness of Nollan and First English, I believe it indicates that four members of the Court were willing to find a taking even when there was a clear health, safety and welfare need. See Laurence H. Tribe, American Constitutional Law, § 9-2, at 589 n.9 (2d ed. 1988). See generally Keystone, 480 U.S. at 509-20 (Rehnquist, C.J., dissenting).

\(^{12}\) Some regulators relied on First English, 482 U.S. at 310; see also Tribe, supra note 40, § 9-4, at 596 n.2, 598 n.13.

\(^{13}\) Nollan, 483 U.S. at 831. In Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), the Supreme Court established a per se rule that a "permanent physical occupation [of property] is a taking" regardless of the government justification for the intrusion. Id. at 433 n.9. Nollan involved a state requirement that, to receive a permit to build an addition, the Nollans had to provide an easement across their beach-front property to the public. Nollan, 483 U.S. at 828. Justice Scalia was careful to premise his decision on prior precedents like Loretto and hold that "a 'permanent physical occupation' occurred [here] for purposes of that [per se] rule . . . ." Id. at 832; see Glynn S. Lunney, Jr., A Critical Reexamination of the Takings Jurisprudence, 90 Mich. L. Rev. 1892, 1892 (1992); Frank Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1611-14 (1988).
This optimism about the narrow impact of *Nollan* and *First English* was belied by court cases and federal government regulations. Following earlier Supreme Court decisions, courts generally had sided with regulators who gave a rational basis for their restrictions on land-use. Broader and broader powers were given, under zoning, and other powers. After *Nollan*, more and more of these regulations were challenged as “regulatory takings.” Both federal and state claims courts started to shift and increasingly ruled in favor of the property owners, declaring restrictions invalid unless compensated for as takings.

Another indication of this broad reading of the new takings cases is shown in President Reagan’s promulgation of Executive Order No. 12,630 in 1988. The title of the Order, *Governmental Actions and Interference with Constitutionally Protected Property Rights*, indicates its broad intent. The Order notes the “[r]ecent Supreme Court decisions” and then continues that its purpose is to require governmental agencies to review its actions and limit its actions to assure “due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful government action.”

Any proposed action regulating private property must be accompanied by a “Takings Impact Analysis” (TIA):

1. identifying the public health or safety risk;
2. establishing that the action “substantially advances the purposes [of the regulation] against the specifically identified risk”;
3. demonstrating the “close fit” by showing that the regulations “are not disproportionate to the extent the use contributes to the

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43 The docket of recent annual filings of the United States Court of Claims for such takings cases doubled over the last decade. Jim Carlton, "Takings" Cases Don't Always Favor Takers, WALL ST. J., Nov. 10, 1992, at B1.
46 Id., 3 C.F.R. at 554.
47 Id., § 1(a), 3 C.F.R. at 554.
48 Id., § 1(c), 3 C.F.R. at 555.
51 Id. § 4(d)(2), 3 C.F.R. at 558.
overall risk,"\textsuperscript{52} and

(4) "estimat[ing] ... the potential cost to the government in the event that a court later determines that the action constituted a taking."\textsuperscript{53}

The Attorney General’s Guidelines as to this Executive Order go even further. "In those instances in which a range of alternatives are available, each of which would meet the statutorily required objective, prudent management requires selection of the \textit{least risk alternative}. In instances in which alternatives are not available, the takings implications are noted."\textsuperscript{54}

The impact of this Order and its implementing guidelines was to chill even further federal governmental regulations. The affected agency would be required to add more and costly hoops to its regulatory decision-making. Moreover, there would be an identified "price tag" on the cost of the regulation and, of course, no price tag on the environmental or aesthetic value of the regulation.\textsuperscript{55}

Finally, under other executive orders and policies,\textsuperscript{56} even if the regulation passes the agency scrutiny, a special White House review body or the Office of Management and Budget, using this TIA, can reject the regulation or remand it for further study.\textsuperscript{57}

Within this context arose \textit{Lucas v. South Carolina Coastal Council}.\textsuperscript{58} In 1986, David Lucas bought two vacant lots on the Isle

\textsuperscript{52} Id. \S 4(d)(3), 3 C.F.R. at 558.

\textsuperscript{53} Id. \S 4(d)(4), 3 C.F.R. at 558.

\textsuperscript{54} \textit{Attorney General’s Guidelines}, supra note 49, \S 1(a), at 35,168 (emphasis added). It seems the Executive Branch and the Attorney General implicitly rejected the two part analysis described by Professor Lunney. \textit{See} Lunney, supra note 42, at 1892. Lunney reviewed earlier cases, primarily \textit{Penn Central}. Id. at 1925-35. Supreme Court decisions, he states, established a procedure that, at least prior to \textit{Lucas}, looked at the totality of the circumstances, \textit{Id.} at 1925-26. These \textit{ad hoc} determinations would be the basis for any finding that compensation was required. \textit{Id.} at 1925-27.

\textsuperscript{55} As I have noted elsewhere, cost-benefit or risk-benefit analysis biases regulations against environmental protection as environmental benefits are difficult if not impossible to quantify. \textit{See} Martin H. Belsky, \textit{Environmental Policy Law in the 1980’s: Shifting Back the Burden of Proof}, 12 Ecology L.Q. 1, 52-61 (1984). Here, the new Order and Guidelines aggravate the problem even further. Only the potential cost of the regulation—by estimating the property value of the restriction—is listed. The benefit of the regulation, difficult to determine in any event, is not to be included in the TIA.


\textsuperscript{57} \textit{See} Belsky supra note 55, at 47-49; Wise, supra note 56, at 408 ("The TIA must be included in any submission[ ] of proposed regulations ... to the Office of Management and Budget [or White House task forces].").

\textsuperscript{58} 112 S. Ct. 2836 (1992). Unless noted otherwise, the description of the factual
of Palms in Charlestown County, South Carolina. Each lot was about 300 feet from the beach and Lucas intended to build one house on each lot, keep one for himself, and sell the other. Although South Carolina had, at the time of Lucas’ purchase, a Beachfront Management Act, it did not bar such construction.

In 1988, South Carolina amended its Beachfront Management Act to bar any new permanent structure so close to the beachfront. When Lucas requested a permit to build, the South Carolina Coastal Council denied the permit based on the amended statute. Lucas then brought an “inverse condemnation suit” in the South Carolina Court of Common Pleas.

In his lawsuit, Lucas stated that denial of the permit deprived him of all practical use of the property and demanded full compensation. Following a trial by the judge, without a jury, the court agreed and awarded Lucas $1,232,387.50 as “just compensation” for the taking. The South Carolina Supreme Court reversed.

The South Carolina Supreme Court found the issue involved “a relatively straightforward” one: “whether governmental regulation of the use of property, in order to prevent serious public harm, amounts to a ‘regulatory taking’ of property for which compensation must be paid.” Put in that manner, the Court’s conclusion was obvious: Here was a regulation intended to control a “nuisance-like” activity and so a “nuisance-like” exception to the rule that compensation was due if “all economically viable use” of the

background comes from the Supreme Court decision.

59 Id. at 2889.
60 Id.
61 John F. Matlock, Lucas v. South Carolina Coastal Council, 12 Water Log (Univ. of Miss., Sea Grant Legal Program, University, Miss.) No. 2, 1992, at 3, 3.
62 Lucas, 112 S. Ct. at 2889.
64 See Lucas, 112 S. Ct. at 2889.
65 Id. at 2890. An inverse condemnation suit, like the one brought in Lucas, states that one’s property has been taken or condemned by government regulatory action. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.14, at 449 (4th ed. 1991). As a result, it is argued, the property owner is entitled to compensation. See Thomas L. Albert & Jesse A. Halvorsen, Land Use Regulation—Lucas v. South Carolina Coastal Council: A New Use for Takings Law, NAT. RESOURCES & ENV’T, Fall 1992, at 65, 65; Matlock, supra note 61, at 3.
66 See Lucas, 112 S. Ct. 2890.
67 Id.
68 Id.
70 Id. at 896.
land was taken.\textsuperscript{71}

The United States Supreme Court reversed.\textsuperscript{72} Justice Scalia wrote the opinion on behalf of a clear majority of the Court.\textsuperscript{73} He found a clear “taking” and rejected the premise and philosophy of the South Carolina Court.\textsuperscript{74}

Here, said Justice Scalia, was a lower court finding that “all beneficial use of the land” was barred by the beachfront restriction.\textsuperscript{75}

We think, in short, that there are good reasons for our frequently expressed belief that when the 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{76}

The only exception to this general doctrine is a limited one:

[The government] must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, [a statute or regulation] is taking nothing.\textsuperscript{77}

This Article will shortly describe how the public trust doctrine can be used to justify regulatory actions and how that application would fall into the common law property doctrine exception to the Taking Clause described in \textit{Lucas}.\textsuperscript{78} First, however, the Article will discuss why \textit{Lucas} should not be seen as a very narrow holding.\textsuperscript{79}

\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Lucas}, 112 S. Ct. at 2902.
\textsuperscript{73} \textit{Id.} at 2899. Justice Scalia’s opinion was joined by five justices. \textit{Id.} at 2888. Justice Kennedy concurred, but did not endorse all the principles in the Scalia opinion. \textit{Id.} at 2902-04. (Kennedy, J., concurring). Justices Blackmun and Stevens individually dissented, rejecting the majority’s taking analysis. \textit{Id.} at 2908 (Blackmun, J., dissenting); \textit{id.} at 2920 (Stevens, J., dissenting). Justice Souter would have dismissed the writ of certiorari as improvidently granted. \textit{Id.} at 2925 (Souter, J., filing a separate statement).
\textsuperscript{74} \textit{Id.} at 2896-902.
\textsuperscript{75} See \textit{id.} at 2896.
\textsuperscript{76} \textit{Id.} at 2895.
\textsuperscript{77} \textit{Id.} at 2901-02. Justice Blackmun dissented to complain about the narrowness of the exception in the majority opinion of a common law nuisance or property right. \textit{Id.} at 2914-17 (Blackmun, J., dissenting). This exception narrows the historical broader “public health, safety or welfare” exception to the Taking Clause. See \textit{id.} at 2917. Justice Stevens also criticizes the new “categorical rule” limiting exceptions to the Taking Clause and broadening the application of that clause to regulatory action. \textit{Id.} at 2918-20 (Stevens, J., dissenting).
\textsuperscript{78} See \textit{infra} parts IV-V.
\textsuperscript{79} See \textit{infra} part III.
It will, in fact, have a significant impact.

III. Application of the New Takings Doctrine

It is possible to read *Lucas* narrowly. The only "'per se' rule requiring compensation [is] where the entire value of property is lost through regulation—'100 percent' takings . . . [and] courts may prove reluctant to find such sweeping takings except on egregious facts . . . ." Such a narrow reading is inappropriate. The decision defines in its text and footnotes a process by which the Court "may be willing to find a compensable taking even where something less than a total loss of economic value occurs." In other words, the majority redefines what is "all economically viable use" and in doing so overrules prior precedent, especially *Penn Central Transportation Co. v. New York City*, and opens the door to more successful takings claims for regulatory actions.

In *Penn Central*, the Court focused not just on a segment of a property right, but on the whole "bundle of rights." Specifically, in that case, the issue was whether New York City had "taken" the right to construct additional levels on a building. The Court said it would not just look at the value of the additional areas that were being restricted, but rather, look to the parcel as a whole.

This "totality of the circumstances" approach was barely reaffirmed in 1987 in the 5-4 decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*. *Keystone* involved the constitutionality of sections four and six of the Bituminous Mine Subsidence and Land Conservation Act, which was passed by the Pennsylvania legislature. This statute, along with Title 25 of the Pennsylvania Administrative Code, restricted mining that causes subsidence damage and required 50% of the coal in the ground to be kept in place to protect certain surface areas where there is a risk of such subsidence. The coal association argued that this was a taking.

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80 Matlock, *supra* note 61, at 5.
84 *Penn Cent.,* 438 U.S. at 122, 130.
85 *Id.* at 130-31.
87 *Id.* at 474.
89 *Keystone,* 480 U.S. at 478-79.
They were deprived of property rights to specific tons of coal that must be left in the ground and also they were deprived of a specific estate in the land: the “support estate.”

Relying on Penn Central, the Court found that the 27 million tons of coal forced to stay in the ground “do not constitute a separate segment of property for takings law purposes.” Similarly, like the air rights above Grand Central Station in the Penn Central case, the support estate was just “one element of the owner’s property interest” and merely part of an owner’s bundle of rights.

Chief Justice Rehnquist strongly disagreed, joined in his dissent by Justices Powell, O’Connor, and Scalia. The twenty-seven million tons of coal and the “support estate” are “identifiable and separable property” interests.

From the relevant perspective—that of the property owners—this interest has been destroyed . . . . The regulation, then, does not merely inhibit one strand in the bundle, but instead destroys completely any interest in a segment of property . . . . I would hold that . . . the Subsidence Act works a taking of these property interests.

The beginning of the end of the “bundle of rights totality” had been indicated. Lucas has confirmed that indication. With a change in the Court’s composition, the minority position in Keystone has now been made doctrine.

In Lucas, Justice Scalia was explicit. He rejected the “unsupportable” view in Penn Central that measured the “diminution in a particular parcel’s value produced by [the regulation] in light of

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90 Id. at 496-97.
91 Id. at 498.
93 Keystone, 480 U.S. at 500-01.
94 Id. at 506 (Rehnquist, C.J., dissenting).
95 Id. at 517.
96 Id. at 518. (citation omitted).
97 By 1992, Justices Brennan and Marshall of the Keystone majority had been replaced by Justices Kennedy and Thomas. Kennedy and Thomas joined the Keystone dissenting members (Rehnquist, Scalia, and O’Connor) to form a five vote majority. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2888 (1992). In addition, Justice White went along with the new majority to form a 6-2-1 majority in Lucas. Id. As noted earlier, Justice Souter issued a separate statement indicating that he would dismiss the writ of certiorari as having been granted improvidently. Id. at 2925 (Souter, J., filing a separate statement). See supra note 73.
98 See Lucas, 112 S. Ct. at 2894 n.7.
total value of the taking claimant's other holdings . . . ." A taking can be found even in restrictions to a "particular interest in land" if the state's law of property has created reasonable expectations of protection of that interest. Lucas, Scalia continues, only provides for an absolute categorical rule that requires compensation if all economically beneficial use of the land is sacrificed. A landowner, however, "whose deprivation is one step short of complete" may still be entitled to compensation, depending on his reasonable expectations.

Thus, under Lucas and the minority opinion in Keystone, which would likely receive majority support today, a regulation that causes a significant loss in value can be a taking. Moreover, under Nollan and Lucas, justifications under the police powers that might preclude a requirement of compensation are narrowed. Only if the "proscribed use interests were not part of [the owner's] title to begin with" would there be an exception to the compensation requirement. Specifically, "common law principles" or "background principles of nuisance and property law" must be "identif[ied]" in order to allow a state to restrict land uses and not pay compensation for a taking.

This Article will now describe one such set of "principles"—the public trust doctrine—and then indicate how that doctrine can be applied.

IV. THE PUBLIC TRUST DOCTRINE

The public trust doctrine, which had its origins in Roman law,
was refined in British law, and established in American law in *Illinois Central Railroad v. Illinois*. Under the doctrine, certain lands, in this case lands under navigable waters, are owned by the people, as a commons, and the title is "held in trust for the people of the State [so] that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein ..." This trust "devolving upon the State for the public ... cannot be relinquished by a transfer of the property."

Two years later, the Court expressed the doctrine in similar language: "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 ... [or in appropriate situations,] the United States."

The application of the doctrine is straightforward. Once it is found that a regulation is of property that is part of the public trust, even if held in private hands, the regulation is justified and is not a taking. However, the scope of the doctrine is unclear. Cases indicate that the doctrine applies to tidelands and, by analogy, to areas where there is a navigational servitude.

But it may go much farther. It embodies the concept of stewardship and common ownership. It can be read to be a broad common law principle protecting all types of government actions meant to provide a sound ecologically based property law.

fied lands and property rights into "public" and "private." *Res omnium communis* and later *res publicae* were property interests that were public in nature and to be held for common use. Searle, *supra* at 398.

See Searle, *supra* note 109, at 899. Under the British crown, title to lands under English waters and other public lands were held in trust by the King. *Id.* He "could grant land to private owners but the grants were subject to the public's paramount right to the use ... , a right the King could neither abridge nor destroy." *Id.*

146 U.S. 387 (1892).

*Id.* at 452.

*Id.* at 453.

Shivley v. Bowly, 152 U.S. 1, 57 (1894).

See, e.g., Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365-66 (N.J.) (holding that the public trust doctrine supports a state requirement of beach access through private property); *cert. denied*, 469 U.S. 821 (1984); Just v. Marinette County, 201 N.W.2d 781, 789 (Wis. 1972) (holding that the public trust doctrine allows the government to bar swampland filling to protect wetlands).

See, e.g., Marks v. Whitney, 491 P.2d 374, 379 n.5 (Cal. 1971) (en banc); State ex rel. Ellis v. Gerbing, 47 So. 353, 356 (Fla. 1908).

In response to the *Nollan* and *Lucas* cases, it can be read to be a flexible doctrine that must be responsive to changing public needs and apply not just to tidelands, but also to public parks, or lands adjacent to a state coast (i.e., coastal zones). It could be used to uphold mandates for beach access, found to be a taking in *Nollan*. It could be used to support restrictions on building in beachfront zones found to be a potential taking in *Lucas*. The doctrine could be used wherever and whenever possible, when the issue is “stewardship” of fragile environmental resources. In doing so, regulators might be able to avoid application of the Taking Clause.

V. APPLICATION OF THE PUBLIC TRUST DOCTRINE

Supporters of the new “sensitivity” to regulatory takings recognize that the public trust doctrine could carve out a huge exception. It is part of the strategy of challengers to regulatory action to stay away from the doctrine. For example, in *Keystone*, the attorney for the coal companies specifically decided not to raise certain claims, most likely to avoid application of the public trust doctrine.

Use of the doctrine should be part of the strategy of those seeking to provide for increased protection. The public trust doctrine is

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119 *See id.*


121 *See Deltona Corp. v. United States*, 455 U.S. 1017 (1982). This case is not a public trust case. However, it applies analogous concepts: the power of the federal government to regulate under its commerce power over navigable waters. *Id.* at 1191-92. The court upheld Corps of Engineers regulations barring construction on a recently purchased Gulf Coast property and found that the regulations do not constitute a taking. *Id.* at 1194.


123 1 Victor J. Yannacone et al., *Environmental Rights and Remedies* § 2:1, at 13 (1971) (“The Trust Doctrine must be urged in as many courts in the land as necessary. Suits must be brought each time a smoke stack spew[s] sulphur dioxide ..., waste from a paper mill pollutes the water ..., a pesticide [causes] contamination, ..., a ‘fastback’ developer landfills a wetland or estuary ..., and each time a governmental authority callously decides to build ... in such a manner as to threaten [the integrity of the ecosystem].”)


a historical, common law principal justifying land-use regulation. Or to use the words of the Lucas case itself, the doctrine indicates “background principles of . . . property law” that could be used to justify restrictions on “the uses [the property owner] now intends in the circumstances in which the property is presently found.” Yet, as indicated by both Nollan and Lucas, more aggressive lawyering may be required to assure success.

In Nollan, one argument that could have been raised was that the regulation, or conditional permit, was based on the California Constitution, which provided for overriding public rights, as part of the state’s historic public trust. This public right includes the right to require beach access and, as such, “[t]he public’s expectation of access considerably antedates any private development on the coast.” There can, therefore, be no “settled expectations” that have been disturbed and certainly no “taking.” Yet, this public trust claim was essentially waived.

Similarly, in Lucas, the public trust doctrine could have been used to argue that the right to build on the beachfront “w[as] not part of the title to begin with.” Protection of the beach from erosion could be included in a comprehensive state public trust policy. In fact, South Carolina has a broad public trust doctrine

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127 Id.
128 See Cal. Const. art. X, § 4 (“No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in the State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose . . . .”).
129 Id.
131 Id. at 847-48.
132 See id. at 832-33. As noted by Justice Scalia, “the Court of Appeal did not rest its decision on [this California constitutional provision articulating the public trust doctrine and . . . the Commission did not [raise or] advance this argument in the Court of Appeal . . . .” Id. at 833 (citations omitted); see also id. at 865 (Blackmun, J., dissenting). Justice Blackmun noted:

I do not understand the Court's opinion in this case to implicate in any way the public trust doctrine. The Court certainly had no reason to address the issue, for the Court of Appeal of California did not rest its decision on [California's constitutional provision articulating the public trust doctrine]. Nor did the parties base their arguments before this Court on the doctrine.

Id.
134 See Donald L. Connors et al., The Public Trust Doctrine and Coastal Resource Management, in PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS
policy\textsuperscript{135} and it could have used it to justify a restriction over the coastal zone areas or tidelands, adjacent to the ocean.\textsuperscript{136} It did not.\textsuperscript{137}

VI. Conclusion

The anti-regulatory mood of the Supreme Court has limited the options for environmental protection. Regulations will increasingly be found to be takings. Therefore, regulators will be unable to manage or control environmentally risky activities unless they are willing to pay for the restricted use. Even short-term regulatory restrictions can now be “temporary takings” requiring compensation. There are essentially only a few “windows” of opportunity. One is a clear “nuisance” as described in \textit{Nollan} and \textit{Lucas}. Another is the public trust doctrine — broadly, but carefully defined.

\textsuperscript{135} See Searle, \textit{supra} note 109, at 904-09.

\textsuperscript{136} The South Carolina Coastal Council was established under the state’s Coastal Zone Management Act. \textit{Lucas}, 112 S. Ct. at 2889; see S.C. Code Ann. § 48-35-120 (Law. Co-op. 1987). The state’s Act, in turn, like that of California in \textit{Nollan} was part of a federal program established pursuant to the Coastal Zone Management Act, which gave states with approved plans the right to manage all uses in a three mile ocean area adjacent to the coast and in an inland coastal zone bordering this ocean area. \textit{Lucas}, 112 S. Ct. at 2904-05 (Blackmun, J., dissenting); \textit{Nollan}, 483 U.S. at 846-47 (Brennan, J., dissenting).

\textsuperscript{137} Platt, \textit{supra} note 104, at 14.