THE INTERACTION OF THE PUBLIC TRUSTAND THE "TAKINGS" DOCTRINES: PROTECTING WETLANDS AND CRITICAL COASTAL AREAS

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INTRODUCTION

The politics of environmental and land use law and policy often pits advocates of property rights against supporters of the public's interest in a healthy natural and human environment, a debate that has intensified with the need for increased environmental protection and land use planning at all levels of government.[1] Property rights advocates often emphasize the importance of an unencumbered right to use private property, and guard this right with the same fervor as those who support individual civil freedoms.[2] Advocates of land use and environmental regulation emphasize the right of citizens to be free from noxious uses of property, and often focus upon the public benefits conferred by governmental regulation. The United States Constitution addresses the conflict between public and private interests in land by defining a boundary beyond which limits on the use of private property, without the payment of compensation, may not be placed. The Fifth Amendment of the United States Constitution states that when the local, state, or federal government "takes" a person's property, it must compensate the property owner.[3] This article will examine seminal

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1. One author has noted that "our debates about land are ever more intemperate and ideological as they reflect increasingly divergent views about the appropriate role of land in American society." Fred Bosselman, *Four Land Ethics: Order, Reform, Responsibility, and Opportunity*, 24 ENVTL. L. 1439, 1440-41 (1994).

2. An important distinction between property and individual rights is that the Constitution does not prohibit the taking of private property, but instead conditions the taking of private property on the exercise of state power. *See infra* note 3. Thus, the government may, in effect, force the sale of property deemed to have been taken for its fair market value.

3. The Fifth Amendment states that: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. This provision, on its face applicable only to the federal government, applies to the various states through the Fourteenth Amendment, which states that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

Supreme Court decisions on the law of takings, including the Court's recent holdings in *Lucas v. South Carolina Coastal Council*[4] and *Dolan v. City of Tigard*,[5] which establish the framework for modern takings analysis.[6] Meanwhile, a growing public understanding of the ecological and economic value of wetlands, estuaries, and other critical coastal ecosystems has led to efforts to regulate activities in and near these special aquatic areas to preserve important values.[7] Much of this increased regulation places significant restrictions on the uses of private property. When such measures are imposed, property owners may complain that these restrictions have in effect deprived them of their property and demand compensation for "regulatory takings." The Supreme Court's framework takings analysis provides guidance for mediating the disputes between owners pursuing the development of their property and environmental regulators seeking to carry out mandates enacted by legislatures and the Congress.

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government, applies to the various states through the Fourteenth Amendment, which states that: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1. *See* Part III of this article for the authors' presentation and analysis of the Supreme Court's framework takings analysis.

4. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

5. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

6. Although the modern framework takings analysis articulated by the Court since the late 1970s has been modified by recent decisions such as *Lucas*, the major elements of the Court's analysis remain intact, as argued in this article. For example, the *Lucas* decision, which established the new categorical "total takings" rule, solidifies a critical element in this analysis, that diminution of the value of property as a result of regulation does not constitute a taking. *Lucas*, 112 S. Ct. at 2899-900. If some minimum level of diminishment in the value of property is compensable as a "partial" taking, the Court would have no need for the "total takings" rule.

7. As the Council on Environmental Quality observed in 1970 in its first annual report:

> Competition for the use of the limited coastal zone is intense . . . . Industrial and residential developments compete to fill wetlands for building sites. Airport and highway construction follows and further directs growth patterns in the coastal zone. Recreation — from enjoyment of the surf and beaches to fishing, hunting, and pleasure boating — becomes more congested as available areas diminish. Since over 90 percent of U.S. fishery yields come from coastal waters, the dependence of the commercial fisheries industry on a stable estuarine system is obvious.

COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE FIRST ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 176-77 (1970) [hereinafter CEQ REPORT]. The Coastal Zone Management Act, 16 U.S.C. §§ 1451-64 (1994), and state programs implemented thereunder evidence increasing efforts on the part of the states to manage the environmental and economic development of the coastal zone. *See* CEQ REPORT at 178.

As the authors argue, the public trust doctrine,[8] part of our English common law heritage, provides the states with significant authority to protect wetlands and coastal areas. This doctrine has been interpreted expansively in many states and in recent years it is increasingly invoked to manage the broad range of activities affecting wetlands, estuaries, marshlands, tidelands, and other lands and waters subject to the trust.[9] We believe that the public trust doctrine can be an effective tool for the protection of the valuable public lands, waters, and resources subject to the trust, even in the face of increasingly stringent application by the courts of the Takings Clause of the Constitution.

Part I of this article summarizes important aspects of the public trust doctrine. Part II describes how the public trust may be used to protect wetlands and other critical coastal areas. Part III analyzes the approach to takings analysis by the United States Supreme Court, including its decisions in *Lucas* and *Dolan*. Part IV argues that when the state acts pursuant to the public trust doctrine and limits the use of private property, no "taking" will occur.

I. THE PUBLIC TRUST DOCTRINE

This section reviews the development of the public trust doctrine in the United States, focusing upon the geographic boundaries of the public trust, the survival or extinguishment of the public trust in certain lands, the concept of protected and prohibited activities in public trust lands and waters, and the extent to which the public's rights under the public trust doctrine limit uses of private property adjacent to or near public trust areas.

A. The Development of the Public Trust Doctrine in the United States

The public trust doctrine came to the American colonies as an important principle of English common law that was itself derived from Roman Law.[10] Under 17th and 18th century English common law, coastal lands were subject to two different ownership interests: the *jus privatum*

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8. Although the doctrine varies from state to state, the public trust doctrine protects public rights of usage, particularly uses related to commerce, navigation and fishing, and in many states includes recreational uses, ecological preservation, and other public uses and values. *See infra* Part I.

9. *See infra* Parts I and II for a discussion of the public trust doctrine and its application to certain environmental management issues.

10. "[B]y the most basic 'natural law' the 'air, running water, the sea, and consequently the seashore'. . ." Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763 (1970) (quoting JUSTINIAN, INSTITUTES 1, 2.2, 2.3, 2.10).

and the *jus publicum*.[11] The *jus privatum* was held by the Crown,[12] and could be conveyed to private persons.[13] This interest, however, remained subject to the *jus publicum* — the common right of the English people to use public trust lands and resources for certain purposes, originally navigation, commerce and fishing.[14] Under this division of ownership interests, the rights of the English people in public trust lands were superior to privately held interests, including those held by the Crown, and therefore, the holder of the *jus privatum* could not impede the public's use of public trust lands for traditional trust purposes.[15]

The public trust doctrine was incorporated in United States law upon the adoption of English common law in the original thirteen states.[16] Then, the passage of the Northwest Ordinance of 1787[17] established the "equal footing doctrine," according to which each new state, upon entering the Union, was granted the same sovereignty and jurisdiction over the territory within its limits as the original states.[18] Through the adoption and operation of English common law, and by virtue of the equal footing doctrine, each state upon entry to the union acquired ownership, in trust for the people, of the public trust lands within its boundaries. Under the American public trust doctrine, as developed by state and federal courts, each state has retained the authority to hold, modify, convey, or, in certain limited circumstances, to extinguish the trust with respect to these lands.[19]

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11. *See* Shively v. Bowlby, 152 U.S. 1, 12 (1894).

12. In the United States, the state, in place of the crown, holds the title, as trustee of the public trust. New York v. New York & Staten Island Ferry Co., 68 N.Y. 71 (1877).

13. Lord Chief-Justice Matthew Hale, *A Treatise in Three Parts: De Jure Maris . . . De Portibus Maris . . . Concerning the Customs of Goods Imported and Exported*, *in* 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND FROM MANUSCRIPTS 89 (Francis Hargrave 1st ed. 1787).

14. *See id.*

15. Though the King is owner, "the common people of England have regularly a liberty of fishing in the sea or creeks or the arms thereof, . . . and may not without injury to their right be restrained of it." *Id.* "For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the King's subjects . . . which may not be prejudiced or damnified." *Id.*; *Shively*, 152 U.S. at 12.

16. *See* Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

17. The Northwest Ordinance provides that "whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original States, in all respects whatever." ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, art. V.

18. *Shively*, 152 U.S. at 26; Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 486 (1988). *See also* Knight v. United States Land Ass'n, 142 U.S. 161, 183 (1891); Escanaba Co. v. Chicago, 107 U.S. 678, 688-89 (1882).

19. *See Phillips Petroleum*, 484 U.S. at 484. In *Grupe v. California Coastal Comm'n*, the California Court of Appeals stated that:

> The purpose and scope of the public trust "has evolved in tandem with the changing public perception of the values and uses of waterways . . . . [T]he public uses to which

Most states have demonstrated considerable flexibility in adapting the public trust to changing societal circumstances and needs. For instance, under the English version of the public trust doctrine, only tidelands were subject to the trust.[20] In America, which, unlike England, contains large inland non-tidal rivers and lakes, the doctrine was expanded to apply to inland navigable waters as well as to tidal areas.[21] Similarly, with respect to uses of public trust lands and waters, the American public trust doctrine has been enlarged to include a broad range of activities beyond the original uses of navigation, commerce, and fishing.[22]

B. Modern Public Trust Doctrine Principles and Issues

1. Geographic Scope

The first inquiry in analyzing the public trust doctrine is to determine which properties are subject to the trust. As a general matter, the public trust doctrine applies to two categories of lands and waters: those subject to the ebb and flow of the tide, whether navigable or not,[23] and navigable waters, including rivers, lakes, ponds, and streams.[24] In coastal waters, the public trust extends from the historic reach of the high tide seaward to the former limit of the territorial sea (three nautical miles), with seven states recognizing full public trust rights only seaward of the mean low

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> the tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another."

Grupe v. California Coastal Comm'n, 212 Cal. Rptr. 578, 592-93 n.17 (Cal. Ct. App. 1985) (citations omitted). The state's authority to alienate public trust property is, of course, conditioned by the "fiduciary" responsibilities of the state as trustee. *See infra* Part I.B.

20. *See* Illinois Central R.R. v. Illinois, 146 U.S. 387, 435-37 (1892).

21. *See infra* notes 23 to 30 and accompanying text for a discussion of the geographic scope of the public trust doctrine.

22. *See infra* notes 31 to 62 and accompanying text for a discussion of historical and modern public trust uses.

23. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 472 (1988). *See also* Oregon Shores Conservation Coalition v. Oregon Fish and Wildlife Comm'n, 662 P.2d 356, 364 (Or. Ct. App. 1983) (public trust provides for preservation of submerged and submersible lands for fishing purposes irrespective of navigability).

24. *See generally* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 379 (1977); Barney v. Keokuk, 94 U.S. 324, 338 (1876). The classical test for navigability is "navigable in fact." *See* The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870). California interprets "navigable in fact" broadly, including within its definition waterways usable only for pleasure boating. *See* National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 719 (Cal. 1983) [hereinafter *Mono Lake*]. Montana includes a "log floating test" under its definition of navigability, which provides that a body of water is navigable if it has been used to float logs. *See* Montana Coalition for Stream Access, Inc. v. Curran, 682 P.2d 163, 166 (Mont. 1984).

tide line.[25] It is important to note that the public trust applies to tidal waters without regard to their navigability, and that it is therefore applicable to tidally-influenced wetlands, marshlands, and estuaries.[26] In navigable inland waters, the trust typically extends to the ordinary high water mark. Because the public trust encompasses non-navigable portions of navigable waters, it is capable of application to certain inland wetlands.[27]

Although each state entered the union with the same public trust property and related interests,[28] the states have adopted different definitions of the boundaries of the trust. In *Phillips Petroleum Co. v. Mississippi*, the United States Supreme Court held that the states have the right to "define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[29] As long as they follow appropriate procedures to protect public trust interests, the Court held that the states possess the qualified authority to redefine the boundaries of the area subject to the public trust.[30]

2. Conveyance of the Public's Interest in Trust Lands

During colonial times and thereafter, several colonies, now states (and the federal government), conveyed interests in public trust property with little regard to the requirements of the public trust doctrine.[31] The lack of reported decisions indicates that these conveyances underwent little judicial

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25. These states are Delaware, Maine, Massachusetts, New Hampshire, Pennsylvania, Virginia and Wisconsin. *See* JACK H. ARCHER, ET AL., THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS 15-16 (1994).

26. *See, e.g.*, *Phillips Petroleum*, which involved a dispute over extensive tidal wetlands, marshlands, and estuarine areas. *Phillips Petroleum*, 484 U.S. at 476. The United States Supreme Court held that these tidally-influenced areas were protected by the public trust doctrine, and that the boundary of these trust lands extended landward to the historic limit of the high tide. *Id.*

27. Although this article focuses on coastal areas, non-tidal inland wetlands may be protected to the extent that they fall within the geographic boundaries of the public trust.

28. *See* discussion of the equal footing doctrine, *supra* notes 17 to 19 and accompanying text.

29. *Phillips Petroleum*, 484 U.S. at 475 (citing Shively v. Bowlby, 152 U.S. 1, 26 (1894)).

30. *See Phillips Petroleum*, 484 U.S. at 476, 482. For example, a state may decide that certain trust lands, due to factors such as historical filling, their land-locked condition or location, are no longer appropriate for trust purposes and their regulation under the public trust is not practicable or desirable. *See, e.g.*, City of Berkeley v. Superior Court of Alameda County, 606 P.2d 362, 373 (Cal. 1980). *See also* Frank E. Maloney and Richard C. Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping*, 53 N.C. L. REV. 185, 193 (1974) (states have primary responsibility for defining the limits of public trust doctrine).

31. *Shively*, 152 U.S. at 18-28.

scrutiny.[32] Since the end of the 19th century, however, the Supreme Court and the lower federal and state courts, in their supervisory role under the public trust doctrine, have closely scrutinized conveyances of public trust property.

In *Illinois Central Railroad. Co. v. Illinois*,[33] the United States Supreme Court held that the public trust doctrine places substantive limitations upon a state's authority to convey interests in public trust lands to private parties.[34] Invalidating a legislative grant of lakebed and waterfront property (Chicago harbor), the Court stated that "[t]he control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."[35] In order to convey land subject to the public trust, the Court held that the conveyance must serve a clear public interest, and must not substantially impair the public's interest in the remaining trust "estate."[36]

A more recent judicial review of a state's alienation of public trust interests occurred in *Vermont v. Central Vermont Railway*, in which the Vermont Supreme Court held that grants of public trust property by the state contain the condition, imposed by the public trust doctrine, that public trust lands may be used only for the public purposes for which they were conveyed.[37] In so holding, the court explicitly stated that the conditions imposed by the public trust doctrine run with the property.[38] The Vermont Supreme Court relied upon an earlier decision by the Massachusetts Supreme Court in *Boston Waterfront Development*

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32. *But see, e.g.*, Arnold v. Mundy, 6 N.J.L. 1, 10 Am.Dec. 356 (N.J. 1821) (invalidating an exclusive grant of tidal oyster bed to private party in favor of a paramount public right under the public trust doctrine).

33. Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

34. *Id.* at 453.

35. *Id.*; *But cf. Appleby v. City of New York* which held that *Illinois Central* did not invalidate New York City's grants to private owners of tidal and submerged lands along the Hudson River. Appleby v. City of New York, 271 U.S. 364, 393, 395 (1926). The distinguishing factor was the relatively small grants to private owners by New York (thereby preserving sufficient public access) and the Court's approval of the promotion of commerce as the expressed public purpose of the grants. *Id.*

36. For example, a conveyance of public trust land which was filled long ago, has since been used for private purposes, and is physically no longer accessible to the shore, might well be upheld. However, a conveyance of public trust land which still is capable of use for boating, fishing, recreation, and the like would probably not be upheld under the *Illinois Central* standard. *See, e.g.*, Opinion of the Justices to the Senate, 424 N.E.2d 1092, 1100 (Mass. 1981); City of Berkeley v. Superior Court of Alameda County, 606 P.2d 362, 373 (Cal. 1980).

37. Vermont v. Central Vermont Ry., 571 A.2d 1128, 1132 (Vt. 1989).

38. *Id.*

Corporation v. Commonwealth,[39] which held that fee simple title in filled tidelands is subject to the condition subsequent that it be used for the public purpose for which it was granted.[40] If the public purpose for which the grant was made is no longer served, the state could reclaim the land.[41]

Of course, a state may convey public trust property if it meets the standards established by the Supreme Court in *Illinois Central* and elaborated in subsequent federal and state court decisions.[42] Although the formulations vary from state to state, the following six criteria are generally used in reviewing grants of public trust property to private parties: 1) the grant must refer explicitly to the land in question; 2) the legislature must acknowledge the public interests being surrendered; 3) the grant must recognize and identify future uses;[43] 4) the conveyance must serve a valid and articulated public purpose; 5) the conveyance must not cause or contribute to a substantial impairment of the remaining public trust lands or of the public's rights and interests in them; and 6) the grant of public trust land will be more favorably reviewed if the land in question is no longer suitable for public trust uses (e.g., filled land).[44]

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39. Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 369 (Mass 1979).

40. *Id.*

41. *Id.* The circumstances under which the state could retake public trust property were clarified in *Opinion of the Justices*, 424 N.E.2d at 1099.

42. *See, e.g.*, West Indian Co. v. Virgin Islands, 844 F.2d 1007, 1018 (3d Cir. 1988) (court will uphold a conveyance that is the result of a deliberate decision by the state that the conveyance advances the public's interest in public trust property); Caminiti v. Boyle, 732 P.2d 989, 993 (Wash. 1987) (court will uphold a conveyance of trust property that is consistent with the public interest). *But cf.*, Lake Michigan Fed'n v. United States Army Corps of Engineers, 742 F. Supp. 441, 445 (N.D. Ill. 1990). *Lake Michigan* involved a legislative grant of submerged lakebed to Loyola University of Chicago. *Id.* The project would have provided 2.1 acres of public recreational area and athletic fields, to which the public would have access. *Id.* at 443. The court stated that attempts by the legislature to relinquish the state's power over public trust lands are disfavored and narrowly construed, and that grants of trust land violate the public trust doctrine if the primary purpose of a grant is to benefit a private interest, and held that the subject grant was invalid. *Id.* at 445. *See also* Marine One, Inc. v. Manatee County, 898 F.2d 1490, 1492 (11th Cir. 1990) (conveyance of public trust lands may be revoked if the use of conveyed lands becomes inconsistent with public's interest).

43. For instance, grants of public trust land which have not expressly provided that the private owner or his successors may use the land for any particular purpose have been construed to be subject to a condition that private owners must use the land for a public purpose. *See, e.g.*, *Central Vermont Ry.*, 571 A.2d at 1136; *Boston Waterfront*, 393 N.E.2d at 369.

44. *See* ARCHER, ET AL., *supra* note 25, at 59-60 (citing Opinion of the Justices to the Senate, 424 N.E.2d 1092 (Mass. 1981); City of Berkeley v. Superior Court of Alameda County, 606 P.2d 362 (Cal. 1980); Scott v. Chicago Park Dist., 360 N.E.2d 773 (Ill. 1977); New York Power & Light Corp. v. State, 245 N.Y.S. 44 (1930); Obrecht v. National Gypsum Co., 105 N.W.2d 143 (Mich. 1960); Thomas v. Sanders, 413 N.E.2d 1224 (Ohio 1979)). *See also Appleby*, 271 U.S. at 399 (holding that a legislative grant of tidelands filled before a particular date did not violate the public trust doctrine); Opinion of the Justices, 437 A.2d 597, 606 (Me. 1981) (same).

Illinois Central and its progeny have established two important public trust principles relevant to the takings analysis set forth below: first, the public trust doctrine places significant limitations upon the authority of the state as trustee to convey the public's right in property subject to the trust; and second, except where the state has expressly provided otherwise, the trust persists in lands that have been conveyed to private owners. These rights in public and privately owned trust property provide the state, as trustee for the people, with significant powers which may be invoked in the protection and management of public trust property.

3. "Protected" and "Prohibited" Public Trust Uses

Once it is determined what properties are held by the state in trust for the public, or, if privately owned, whether the public has retained its public trust rights in the property, the next inquiry addresses protected and prohibited uses of trust property. These issues have been addressed by the states on an *ad hoc* basis, and the states vary in the degree to which they accord protection to certain public trust uses and prohibit other uses.

a. Protected Uses

The rights traditionally protected by the public trust doctrine — fishing, commerce, and navigation — continue to be protected public trust uses.[45] Changed circumstances have led to an expansion of protected uses, which in some states now includes recreational uses,[46] the preservation of land in its natural state,[47] and for such "ordinary purposes of life such as boating, fowling, skating, bathing, taking water for domestic or agricultural purposes, and cutting ice."[48] In *Marks v. Whitney,*[49] the California Supreme Court held that public trust uses would not be limited to navigation, commerce, and fisheries, ruling that protected public trust "easements" include "the right to fish, hunt, bathe, swim, to use for

45. *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 477 (1988).

46. *See, e.g.*, Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972) (recreational uses of foreshore are protected under the public trust); Wisconsin v. Village of Lake Delton, 286 N.W.2d 622, 633 (1979) (waterskiing protected as a recreational use).

47. *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1088 (Idaho 1983); Wisconsin v. Trudeau, 408 N.W.2d 337, 343 (Wis. 1987).

48. Nelson v. DeLong, 7 N.W.2d 342, 346 (Minn. 1942).

49. *Marks*, 491 P.2d 374 (Cal. 1971).

boating and general recreation purposes . . . and to use the bottom of the navigable waters for anchoring, standing, or other purposes."[50]

Following the modern trend of expanding public trust uses, the New Jersey Supreme Court has held that bathing, swimming, recreation, and other shore activities are protected public trust uses.[51] In order to effectuate these uses, the New Jersey Supreme Court has held that the public's enjoyment of its rights under the doctrine may include the right of access across private property to public trust beaches, and, to a limited extent, the use of privately-owned dry sand areas above the mean high tide line in circumstances where public access is otherwise restricted or not available.[52] In other states, recreational uses may include such diverse activities as waterskiing,[53] sailing, rowing, and skating,[54] and the broad category of "varied public recreational uses in navigable waters."[55]

It must be noted that not all states have viewed public rights in trust lands expansively. For instance, the Maine Supreme Judicial Court held that public trust uses are limited to fishing, fowling, and navigation.[56] In Massachusetts, courts have held that the protected uses do not include recreation, but are limited to fishing, fowling, shellfishing, and the harvesting of marine plants.[57] In these states the public's rights to use privately owned public trust lands are more limited than in states that recognize a wide range of protected uses.

b. Prohibited Uses

In order to protect certain public trust uses, other uses may be prohibited; hence, the concept of prohibited and competing uses. "Prohibited uses" are those uses that are inconsistent with the rights of the

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50. *Id.* at 380.

51. *See Neptune City*, 294 A.2d at 54-55.

52. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 364 (N.J. 1984), *cert denied*, 469 U.S. 82 (1984); Van Ness v. Borough of Deal, 393 A.2d 571, 573-74 (N.J. 1978); *Neptune City*, 294 A.2d at 54 (addresses municipally-owned beaches).

53. *Lake Delton*, 286 N.W.2d at 633.

54. Lamprey v. Metcalf, 53 N.W. 1139, 1143 (Minn. 1893).

55. *Kootenai*, 671 P.2d at 1088.

56. Bell v. Town of Wells, 557 A.2d 168, 173 (Me. 1989).

57. *See, e.g.*, Opinion of the Justices, 313 N.E.2d 561, 566-67 (Mass. 1974); Butler v. Attorney General, 80 N.E. 688, 689 (Mass. 1907).

public, that harm the public trust property itself, or that interfere with protected uses.[58]

Given the irreplaceability of critical ecosystems such as wetlands lying within public trust areas and the fiduciary responsibilities of the states to preserve these areas for present use and future generations, it is rational that environmental preservation is emerging as a legitimate use of the public trust power. For example, the California Supreme Court held that the state may act to preserve the ecological integrity of the property entrusted to it by preserving public trust lands in their natural state:

> There is a growing public recognition that one of the most important public uses of the tidelands — a use encompassed within the tidelands trust — is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[59]

The change in thinking from permitting certain uses on public trust lands to affirmatively protecting trust values in such lands is a natural expansion of the common law public trust doctrine.[60] The historical development of the American public trust doctrine has been distinguished by major doctrinal shifts such as extending the doctrine to inland waters and abandoning the navigability criterion with regard to coastal waters. Therefore, it should not be surprising that the courts have expanded the doctrine in response to changing circumstances to incorporate uses not recognized by earlier courts.

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58. For instance, filling a submerged lakebed for private purposes is prohibited because it interferes with the public's interest in trust property. *See* Lake Michigan Fed'n v. United States Army Corps of Engineers, 742 F. Supp. 441, 446 (N.D. Ill. 1990) (rescinding a conveyance of submerged lakebed along Lake Michigan where the conveyance did not serve a legitimate public purpose).

59. Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (citation omitted); *see also Mono Lake*, 658 P.2d 709, 719 (Cal. 1983) (noting that California courts, from their earliest days, have recognized and enforced obligations under the public trust doctrine).

60. *See* James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson,* 63 DENV. U. L. REV. 565, 569 (1986) (arguing that conservation was not considered part of the early public trust doctrine). For a contrary view, *see* Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 785-86 (1970) (arguing that "it has long been recognized that adequate conservation is a necessary prerequisite to the enjoyment of protected activities"). "Had the issue been squarely put before those concerned with the public trust, it is virtually certain that they would have seen it as an inherent part of the public trust to take steps to preserve the public's access to the coastal resources, because the evils thereby created were precisely the same as would have existed had private landowners monopolized the shores and excluded the public." ARCHER, *supra* note 25, at 26-27.

In part, the dynamism of this common law doctrine is attributable to the fact that the public trust is an ownership-based doctrine,[61] with courts recognizing that the public, as the beneficiary of the trust, and the government as its trustee, are empowered to act in order to protect trust property.[62] The courts, as guardians of the common law, have historically acted to adapt common law principles to meet different social, economic, and cultural conditions.

4. Public Rights in Private Lands: The Long Arm of the Public Trust

In addition to protected rights in property subject to the trust, the public may acquire by operation of the public trust concomitant rights in private property. For instance, in some states, the public has the right to cross private land in order to engage in certain protected public trust uses, such as fishing and shellfishing.[63] The New Jersey Supreme Court held that the public trust may, in some instances, permit public access to privately owned dry sand areas beyond the foreshore, stating that "[w]ithout some means of access the public right to use the foreshore would be meaningless."[64] In such an instance, even though the mean high tide line defines the boundary of the property held in public trust, the public's right to make meaningful use of such property may include the right to make limited use of adjacent privately owned property.[65]

Further, to ensure public access to engage in protected activities, the public trust doctrine may be invoked to protect public trust property from

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61. The public trust establishes equitable ownership of public trust lands in the public, with legal ownership vesting in the state as trustee. *See* ARCHER, *supra* note 25, at 38-43. Thus the authority of the state to manage and regulate this property is not based upon police power, but instead derives from the state's trusteeship.

62. *See generally*, Illinois Central R.R. v. Illinois, 146 U.S. 387 (1892); *Marks*, 491 P.2d 374.

63. *See, e.g.*, Opinion of the Justices, 313 N.E.2d 561, 566-67 (Mass. 1974); Butler v. Attorney General, 80 N.E. 688, 689 (Mass. 1907).

64. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 364 (N.J. 1984), *cert denied*, 469 U.S. 82 (1984); *see also* Van Ness v. Borough of Deal, 393 A.2d 571, 573-74 (N.J. 1978) (upland sand area adjacent to tidal water must be open to public right of use and enjoyment); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972) (public rights in tidelands are not limited to "the ancient prerogatives of fishing and navigation, but" extend to recreational uses as well).

65. *Matthews*, 471 A.2d at 365. The court stated that the determination whether privately owned beaches are subject to public use will depend upon consideration of such factors as the "[l]ocation of the dry sand area in relation to the foreshore, extent and availability of publicly-owned upland sand area, nature and extent of the public demand, and usage of the upland sand land by the owner." *Id.* A useful analogy may be made here to the doctrine of easement by necessity (an easement by necessity arises by operation of law when a parcel of land is completely shut off from access to any right of way). *See* Tarr v. Watkins, 4 Cal. Rptr. 293, 296 (1960) (the law protects certain important rights of ownership in one parcel of land by creating concomitant rights in adjacent or nearby properties).

harm caused by activities conducted by upland landowners. As a result, the public trust may be used to regulate the uses and activities upon upland properties if such uses and activities harm or threaten to harm public trust property, resources, and uses. For instance, in *Mono Lake*,[66] the upstream diversion of recharging non-navigable (and therefore non-public trust) waters threatened the ecological integrity of Mono Lake, by decreasing the lake's depth and surface area and by increasing its salinity.[67] The California Supreme Court held that the state cannot forego its fiduciary responsibilities to the public, and that it must consider the effect of the diversion of non-navigable upland streams upon public trust waters.[68] The court established that the state must act if it is necessary to prevent or to mitigate the deterioration of the public trust waters into which the streams flow.[69]

The application of the public trust to upland property by the state or its subdivisions is analogous to a private property owner relying upon the common law doctrine of nuisance to prevent unreasonable uses by other property owners from affecting his or her property.[70] With respect to the public trust, the state, as trustee for the public, acts as the property owner, and may take legal action to abate uses of adjacent properties that are harmful to the public's use and enjoyment of public trust property. Further, it may be argued, on the basis of decisions ranging from *Illinois Central* to *Mono Lake*, that the public trust, in addition to providing a source of state authority, charges the state with the stewardship of public trust property and the people's interests in it. The affirmative character of the public trust doctrine, requiring that the state trustee take steps to preserve trust properties, has emerged with increasing clarity in recent decisions as an essential public trust principle. This stands in marked

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66. *Mono Lake*, 658 P.2d 709 (Cal. 1983).

67. *Id.* at 711.

68. *Id.* at 727-28. The *Mono Lake* decision was based upon early established principles giving the state authority to protect its resources from destruction or pollution by activities upland or upstream. *See, e.g.*, People v. Gold Run Ditch & Mining Co., 4 P. 1152, 1158-59 (Cal. 1884); People v. Russ, 64 P. 111-13 (Cal. 1901).

69. *Mono Lake*, 658 P.2d at 727.

70. Pollution of waters or interference with the flow of waters may constitute a nuisance. RESTATEMENT (SECOND) OF TORTS § 832 cmt. c-e (1979). The law of public nuisance may also be applicable. By statute or common law, a person is liable for any act or omission which unreasonably interferes with or damages the rights, interests, comfort, or convenience of the community at large or the general public, including conducting activities on one's land that cause unreasonable noise, obnoxious odors, smoke, dust, or pollution affecting the public (*e.g.*, a pigpen or blasting operations) or interfering with the exercise of a public right (*e.g.*, obstructing a public highway). *See generally*, W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 90 (5th ed. 1984).

contrast to the permissive "trust" obligations of the federal and state governments with respect to other public lands and resources.[71]

II. THE PUBLIC TRUST DOCTRINE AS A TOOL FOR THE PROTECTION OF COASTAL ECOSYSTEMS

The previous section argues that the public trust doctrine provides substantial legal authority to manage and protect coastal and other areas subject to the doctrine. Applicable to tidally influenced and navigable waters, the public trust may be invoked to protect such areas as beaches,[72] estuaries,[73] wetlands,[74] and other critical coastal ecosystems. As the ecological importance of these areas is increasingly understood and appreciated, so are the problems caused by their deterioration and outright destruction.[75]

This section considers the application of the public trust doctrine to protect coastal ecosystems, briefly describes the potential application of the doctrine to selected problems in coastal management, and suggests ways in which the doctrine can be incorporated into existing coastal environmental and resource management programs.

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71. Alabama v. Texas, 347 U.S. 272, 73 (1954).

> The United States holds [such] resources . . . in trust for its citizens in one sense, but not in the sense that a private trustee holds for [a beneficiary of the trust]. The responsibility of Congress is to utilize the assets that come into its hands as sovereign in the way that it decides is best for the future of the Nation.

Id.

72. The traditional boundaries of the public trust doctrine include the foreshore, the wet sand area between the high and low tide lines, and, in some states (*e.g.*, Oregon and New Jersey), may include the dry sand areas above the mean high tide line for recreational use. *See, e.g.*, Thornton v. Hay, 462 P.2d 671 (Or. 1969) (public access to dry sand area based on custom); Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984), *cert. denied*, 469 U.S. 82 (1984) (public has rights in dry sand area).

73. Estuaries are partially enclosed coastal water bodies where salt water from the ocean mixes with fresh waters from inland. Estuarine areas include river mouths and sea inlets, bays, sounds, harbors, lagoons, tidal marshes, coasts and inshore waters subject to tidal action. *See* RICHARD G. HILDRETH & RALPH W. JOHNSON, OCEAN AND COASTAL LAW 7-11 (1983); Cheyenne Chapman, *Regulating Fills in Estuaries: The Public Trust Doctrine in Oregon*, 61 OR. L. REV. 523, 523-24 (1982).

74. *See, e.g.*, Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 476 (1988).

75. Of the approximately 221 million acres of wetlands that existed in what would become the continental United States in the eighteenth century, less than one-half that amount remains today. Environmental Defense Fund and World Wildlife Fund, HOW WET IS A WETLAND?: THE IMPACT OF THE PROPOSED REVISIONS TO THE FEDERAL WETLANDS DELINEATION MANUAL 3 (1992). Most of this loss is due to human activity. *Id.* Of the approximately 11 million acres of coastal wetlands that existed in the 1780s, less than half remain, with a continuing trend of gradual loss. William G. Gordon, *Fisheries*, in NATURAL RESOURCES FOR THE 21ST CENTURY 227 (R. Neil Sampson & Dwight Hair eds., 1990).

A. The Applicability of the Public Trust Doctrine to Selected Environmental Management Issues

The previous section considered the jurisdiction and authority of the state trustee to act in order to prevent harm and to ensure public access to protected public trust property, resources, and uses. While environmental protection[76] has only recently emerged as a protected use, its inevitability as a logical antecedent to the public's right to enjoy public trust property makes the doctrine an even more powerful means of environmental management.[77]

One method of environmental protection, recognized in many states as a permissible goal under the public trust doctrine, is to preserve property in its natural, undeveloped state.[78] This may be a difficult goal to achieve given the fact that most coastal properties are privately owned, subject to great development pressures, and afforded protection against certain types of regulation by the takings clause of the United States Constitution.[79] However, the public trust decisions since the early 1970s have established a legal basis to include environmental protection among protected public trust uses.[80]

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76. The court in *Marks* states that "[t]here is a growing public recognition that one of the most important public uses [encompassed in the public trust] of the tidelands . . . is the preservation . . . of ecological units . . . ." Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971).

77. *See supra* notes 66 to 69 and accompanying text for a discussion on emergence of environmental protection as a goal of public trust.

78. For instance, the California Supreme Court held in *Marks* that "one of the most important public uses of the tidelands . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." *Marks*, 491 P.2d at 380. *See also*, District of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1083 (D.C. Cir. 1984) (public trust doctrine, developed almost exclusively as a matter of state law, functions as a constraint on states' ability to alienate public trust lands and limits uses that interfere with trust purposes); California v. Superior Court of Lake County, 625 P.2d 239, 251 (Cal. 1981) (range of uses subject to the public trust is broad, and may include the right to preserve tidelands in their natural state); Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1095 (Idaho 1983) (the public trust is a dynamic concept that is destined to expand with development and recognition of new public uses); Wisconsin v. Trudeau, 408 N.W.2d 337, 343 (Wis. 1987) (the public's right to preserve wetland resources is a protectable interest under the public trust doctrine).

79. The Council on Environmental Quality reported that coastal areas "represent attractive waterfront acreage in particular demand by industrial and commercial concerns and home buyers. Relatively inexpensive to dredge, fill, and bulkhead for building sites, shallow wetlands attract many industries which are not dependent on waterfront sites but which find an economic advantage in developing these low-priced lands." CEQ REPORT, *supra* note 7, at 177.

80. For example, Wisconsin and Florida courts have held that the public trust may be used to limit wetlands areas to natural uses. *See* Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972); Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1381 (Fla. 1981). Even where preservation of natural features is not explicitly protected by the doctrine, it can be argued that, given the fact that the

The public trust doctrine also furnishes jurisdiction to regulate and prevent the alteration of the hydrologic features of public trust areas.[81] Because of the stark negative impact upon public trust lands, waters, and resources, state trustees may invoke their authority under the public trust doctrine to regulate the conversion of tidelands or wetlands into drylands[82] for development purposes, even when those lands have been conveyed to private ownership.[83]

In addition to providing the authority to manage changes to the hydrologic features of areas subject to the trust, the public trust may be invoked to protect water quality in public trust waters.[84] The protection of water quality can be justified as preservation of the resource itself, and as necessary to secure access to protected uses, such as fishing and recreation.[85] While water quality *per se* has not yet been recognized as a

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alteration of one ecosystem often harms the functioning of adjacent (and sometimes even distant) ecosystems, states may preserve coastal ecosystems in order to protect fisheries, to protect water quality, and to preserve protected recreational uses.

81. *See, e.g.*, Lake Michigan Fed'n v. United States Army Corps of Engineers, 742 F. Supp. 441, 445 (N.D. Ill. 1990); *Just*, 201 N.W.2d, at 768; *Graham*, 399 So. 2d at 1382.

82. This may occur when landowners wish to dredge or fill tidal wetlands, marshlands, or grasslands.

83. *Orion Corp. v. Washington* provides an example of how the public trust doctrine can be employed to prevent the filling of tidelands subject to the public trust. Orion Corp. v. Washington, 747 P.2d 1062, 1065 (Wash. 1987). The state of Washington prohibited, by regulation, the dredging and filling of certain tidelands for agricultural or residential use on the basis that filling was an inappropriate use of "aquatic" property. *Id.* In upholding the regulations, the Washington Supreme Court stated that because the public retains a continuing ownership interest in tidelands, their conversion for agricultural or residential purposes "never constituted a legally permissible use." *Id.* at 1082-83. *See also, Lake Michigan Fed'n*, which held that the public trust doctrine prohibited a conveyance of tidelands to a private university, even though some rights of public access in the property would remain. *Lake Michigan Fed'n*, 742 F. Supp. at 445. *See also Just*, 201 N.W.2d at 768 (the owner of a piece of property does not have the right to use his property to the detriment of other rights and the state has a trust duty to prevent such detrimental use through zoning); *Graham*, 399 So. 2d at 1382 (the police power may be exercised to prevent private property owners from making the highest and best use of their property if that use will create public harm). Of course, in states that include the preservation of land in its natural state as an interest protected by the public trust doctrine, a state may invoke the public trust doctrine not only to prevent the conversion of tidelands, but to preserve public trust lands in their natural state. *See supra* notes 58 to 62 and accompanying text.

84. Legal writers have suggested that the public trust doctrine could be invoked to address problems associated with nonpoint source pollution (Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485, 488 (1989)) and wetlands (*see generally* Michael L. Wolz, *Applications of the Public Trust Doctrine to the Protection and Preservation of Wetlands: Can It Fill the Statutory Gaps?* 6 B.Y.U. J. PUB. L. 475 (1992)).

85. For instance, in *Mono Lake*, upstream diversions lowered the water level in Mono Lake causing an increase in the Lake's salinity level. *Mono Lake*, 658 P.2d 709, 715 (Cal. 1983). The California Supreme Court held that the state must consider the impact of the diversion of water from public trust waters. *Id.* at 721. In *Kootenai*, the Idaho Supreme Court let stand a moratorium on future permits for encroachments on a lake subject to the public trust in order to protect the lake's

protected resource under the public trust doctrine, if the doctrine is to protect fish, wildlife, recreational and other uses, it must of necessity encompass water quality and other ecological values.[86]

As the trustee of the people's interest in public trust lands and uses, the state possesses the legal authority to abate nuisance and "nuisance-like" activities that occur on the shores[87] and tributaries[88] of a protected public trust body of water. While the public trust doctrine has not yet been applied to regulate directly activities farther upland, where such activities clearly and adversely affect public trust waters, resource, and uses, the application of public trust principles to evaluate the effects of such activities on public trust property is logically compelling and reasonable.[89]

This proposition is consistent with judicial holdings that the public trust doctrine imposes upon the state the duty to consider the effects of certain upland activities upon public trust property, and that the state may be required to preserve the interests of the public beneficiaries of the trust.[90] Thus, in addition to the state trustee's duty to preserve public trust property (e.g., no conveyance of such property into private ownership except in limited circumstances),[91] the state trustee must act when public trust property, resources, or uses are threatened:[92]

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water quality. *Kootenai*, 671 P.2d at 1091, 1096. *See also* Caminiti v. Boyle, 732 P.2d 989, 994 (Wash. 1987) (characterizing fishing, swimming, and water skiing as uses protected by the public trust doctrine); *Cf.* PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900 (1994) (water quantity is an important aspect in protecting water quality under the CWA).

86. *See* City of Berkeley v. Superior Court of Alameda County, 606 P.2d 362, 364-65 (Cal. 1980); Wisconsin Envtl. Decade v. Department of Natural Resources, 271 N.W.2d 69, 72 (Wis. 1978); *Marks*, 491 P.2d at 380.

87. *See, e.g.*, *Kootenai*, 671 P.2d at 1087, 1092.

88. *See, e.g.*, *Mono Lake*, 658 P.2d at 720-21.

89. *See, e.g.*, *Kootenai*, 671 P.2d at 1092; *Mono Lake*, 658 P.2d at 721; United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457, 460 (N.D. 1976). These cases state that the public trust places limitations upon the authority of the state to appropriate water where the appropriation is harmful to the public's interest in the trust land. *See generally* RALPH W. JOHNSON, *The Emerging Recognition of a Public Interest in Water: Water Quality Control by the Public Trust Doctrine*, *in* WATER AND THE AMERICAN WEST: ESSAYS IN HONOR OF RAPHAEL J. MOSES 127-142 (David H. Getches ed., 1987); *see also* Richard G. Hildreth, *The Public Trust Doctrine and Coastal and Ocean Resources Management*, 8 J. ENVTL. L. AND LITIG. 221, 232-35 (1993) (the public trust doctrine provides authority for the regulation of nonpoint sources that cause pollution in public trust areas); *see generally* ARCHER, *supra* note 25, for a comparison of the public trust doctrine with private and charitable trust law.

90. *See Mono Lake*, 658 P.2d at 721 (state must consider the effect of water diversion on public trust resources); Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892) (states' fiduciary responsibilities under the public trust doctrine limit the states' authority to alienate interests in public trust property); *Kootenai*, 671 P.2d at 1089.

91. *See, e.g.*, *Illinois Central*, 146 U.S. at 453; Vermont v. Central Vermont Ry., 571 A.2d 1128, 1132-33 (Vt. 1989).

92. *See, e.g.*, *Mono Lake*, 658 P.2d at 724.

> [T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.[93]

In sum, the public trust doctrine provides authority to challenge actions affecting public trust lands, waters, and resources that are harmful to the public's interests. Further, recent public trust decisions acknowledge that the doctrine imposes an affirmative duty on the trustee to preserve trust property. Finally, members of the public, the "beneficiaries" of the public trust, have standing to enforce the state trustee's obligation to fulfill its duties under the doctrine.[94]

B. Incorporating the Public Trust Doctrine into Existing Environmental Management Programs

Although the public trust is a common law doctrine, it may be effectively employed as a legislative and regulatory tool, with the courts playing a supervisory role to protect the public's interests under the trust.[95] Coastal wetlands and other critical areas are subject to management under both federal and state authorities that may readily incorporate public trust principles. For example, the primary purpose of the federal Coastal Zone Management Act ("CZMA") and the state coastal zone management programs ("CZMPs") approved thereunder is to provide for the

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93. *Id.* The court in *Mono Lake* addresses both the private rights of prior appropriation and the public trust doctrine, holding that the state must consider the effect of water appropriation rights under the public trust doctrine and that in allocating water the state must take full and adequate account of public trust interests. *Id.* at 712. *See also United Plainsmen Ass'n*, in which the North Dakota court held that the discretionary authority of state officials to allocate water resources is circumscribed by the public trust doctrine, which requires, at a minimum, a determination of the potential effect of allocation of present water supply and future water needs on public trust interests. *United Plainsmen Ass'n*, 247 N.W.2d at 460.

94. Marks v. Whitney, 491 P.2d 374, 381-82 (Cal. 1971); *See Mono Lake*, 658 P.2d at 712; Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, 473 (1970).

95. For discussion of the application of the public trust doctrine to coastal management programs, *see* ARCHER, *supra* note 25, at 85-136.

management of coastal ecosystems.[96] Public trust principles are incorporated into these programs in varying degrees.[97]

Most coastal zone management programs include one or more "areas of particular concern," targeting these areas for special, more intensive, management efforts.[98] Under the CZMA, state CZMPs must identify at least one or more "areas of particular concern" meriting special management.[99] In addition to critical area designations, broader management authorities for bays, harbors, lakes, rivers, or watersheds, such as the San Francisco Bay Conservation and Development Commission or the Chesapeake Bay Commission, may also benefit from incorporating and applying public trust principles. Where a public trust body of water spans more than one state, public trust principles effective in the bordering states can support comprehensive planning and management strategies for their common resources.[100]

The Federal Water Pollution Control Act ("FWPCA" or the Clean Water Act) is designed to protect water quality generally, and includes measures for the protection of the nation's wetlands, and like the CZMA, relies upon the states for implementation.[101] Section 404 of the FWPCA establishes a permit system for the discharge of materials into navigable

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96. 16 U.S.C. § 1452 (1988 & Supp. 1994).

97. For example, the North Carolina Coastal Area Management Act declares one of its goals to be the "[p]rotection of present common-law and statutory public rights in the lands and waters of the coastal area." N.C. GEN. STAT. § 113A-102(b)(4)(f) (1994). Washington's Shoreline Management Act of 1971, WASH. REV. CODE § 90.58.020 (West 1992), does not explicitly mention the public trust doctrine, although it has been found to reflect public trust principles. *See* Department of Ecology v. Ballards Elks Lodge, 527 P.2d 1121 (Wash. 1974) (purpose of Act is to ensure that development is within keeping of public interest). In Massachusetts, public trust principles provide broad management authority for the conservation and preservation of the public's rights in tidelands. MASS REGS. CODE tit. 310, § 9.01(2)(a) (1995). The Connecticut General Statutes declare a "public trust in the air, water and other natural resources of the state of Connecticut." CONN. GEN. STAT. § 22a-15 (West 1985).

98. The designation of areas of concern are mandated by the program development provisions of the CZMA, which requires states to identify such areas before they can receive federal approval and funding for their coastal programs. *See* 16 U.S.C. 1455(c) (1988 & Supp. 1994).

99. 16 U.S.C. § 1454(b)(3) (1988). All coastal programs have engaged in special area management to some degree, and some states have effectively used special area designations to protect valuable public trust lands and resources. *See, e.g.*, N.C. ADMIN. CODE tit. 15A, r. 7H.0203 (effective Nov. 1, 1989) (establishing "Areas of Environmental Concern" in certain coastal areas); ARCHER, *supra* note 25, at 91-92 (citing Rhode Island Coastal Resources Management Program, §200.1 (categorizing coastal waters and establishing priorities of use within the categories)).

100. *See, e.g.*, The Chesapeake Bay Commission of Maryland and Virginia. MD. CODE ANN., NAT. RES. § 8-302 (1990 & Supp. 1994); VA. CODE ANN. §§ 62.1-69.5 to 69.20 (1992).

101. 33 U.S.C. § 1344(h) (1988) (a state may take over permitting after approval of the state program by the Administrator of the Environmental Protection Agency).

waters, including wetlands.[102] This system contains, however, statutory exceptions, especially those that may permit the conversion of wetlands for agricultural, ranching, or silvicultural uses.[103] The National Estuary Program[104] under the FWPCA and the National Estuarine Reserve Research System[105] under the CZMA both provide limited measures for the protection of estuaries. The effectiveness of these programs can be improved by incorporating and implementing public trust principles.

State coastal and environmental managers rely upon police power, statutes, and constitutions for their authority. Their management authority, however, is increasingly limited by the Takings Clause of the United States Constitution when the uses of private property are restricted. However, as this Part has shown, the Public Trust provides a source of authority, separate from and in addition to a state's police power, to manage, protect, and preserve public trust lands and waters for the benefit of the people. Parts III and IV of this article will then examine the takings analysis developed by the Supreme Court, and the interaction of the Takings Clause and the public trust doctrine with respect to trust lands, waters, and resources.

III. THE TAKINGS CLAUSE

The Takings Clause of the Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use, without the payment of just compensation to the owner.[106] This provision has been held to "bar [the] 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."[107]

Until 1922, the takings clause was applied only in the case of an actual, physical occupation of private property by government entities (i.e., when the government occupied the property and dispossessed its

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102. 33 U.S.C. § 1344 (1988 & Supp. 1994). The term "navigable waters" has been interpreted broadly, referring to all waters within the constitutional reach of the commerce clause. Natural Resources Defense Council v. Callaway, 392 F. Supp. 685, 686 (D.D.C. 1975).

103. *See* 33 U.S.C. § 1344(f) (1988). *See generally* Wolz, *supra* note 84. The conversion of wetlands for agricultural use receives some regulatory attention via the "Swampbuster" program (16 U.S.C. §§ 3821-23 (1988 & Supp. 1994)), which denies benefits to farmers who cultivate certain wetlands, and the Wetlands Reserve Program (16 U.S.C. §§ 3837(a)-(f) (1988 & Supp. 1994)), through which the federal government purchases easements in wetlands subject to agricultural usage.

104. 33 U.S.C. 1330 (1994).

105. 16 U.S.C. § 1461 (1994).

106. *See supra* note 3.

107. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123 (1978) (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

owner).[108] *Pennsylvania Coal Co. v. Mahon* launched the doctrine of "regulatory takings" with this broad formulation: "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[109]

A. The Framework Takings Analysis

Although frequently criticized for its refusal to do so, the United States Supreme Court has been reluctant to develop any set formula for determining when justice and fairness require the government to compensate individuals for regulations deemed too burdensome to property owners.[110] Since *Pennsylvania Coal Co. v. Mahon*,[111] and especially during the past two decades, the Supreme Court has analyzed takings claims by means of a fact-specific, *ad hoc* methodology, or "framework takings analysis," to guide the determination of whether a regulation is a taking.[112] This analysis is essentially a balancing test, and was first set forth in *Penn Central Transportation Co. v. New York City*.[113] In the *Penn Central* case, the Supreme Court established that the adjudication of a regulatory takings claim must be guided by consideration of several critical factors: the economic impact of the regulation upon the claimant's property, an evaluation of the extent to which the regulation interferes with the property owner's "distinct investment-backed expectations," and the character of the governmental action.[114]

While this formulation of the takings analysis is often used and cited, the Supreme Court may now be leaning toward a second formulation, under which "reasonable" land use regulation will not be adjudged "a

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108. *But cf. Lucas v. South Carolina Coastal Council*, in which Justice Blackmun argued in his dissent, that in the formative days of the republic, the government was either not required to, or simply did not, compensate owners even for physical appropriations (such as rights of way) of private property. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2914 (1992) (Blackmun, J., dissenting).

109. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The regulatory takings doctrine is sometimes referred to as "inverse condemnation," so called because the finding of a taking is equivalent to the finding that the government must acquire the rights regulated by eminent domain and condemnation. *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 316-17 (1987).

110. *Penn Cent.*, 438 U.S. at 124. *See* Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 566-69 (1984).

111. *Mahon*, 260 U.S. 393.

112. *Penn Cent.*, 438 U.S. at 124.

113. *Id.*

114. *Id. See also* Florida Rock Industries, Inc. v. United States [hereinafter *Florida Rock*], 18 F.3d 1560, 1564 (Fed. Cir. 1994) (discussing the regulatory takings framework employed by the U.S. Supreme Court in *Penn Central*).

taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"[115] This test resembles the familiar "rational basis" and "strict scrutiny" tests used to analyze other constitutional provisions,[116] with its strictness lying somewhere in between.[117]

Either formulation of the "framework takings analysis," which seem to differ in emphasis more than in substance, will ordinarily result in upholding reasonable land use regulation against a takings challenge. Under either test, however, there are circumstances in which this presumption does not hold: when the government interferes with the claimant's possessory interests (engages in a *de facto* condemnation or a "physical appropriation"); or when a regulation denies an owner all economically viable use of his or her property ("total takings").

B. Interference With Possessory Rights and the First Takings Per Se Rule

The first set of circumstances undermining the presumption of regulatory validity occurs when there is a "physical invasion" or appropriation of property. A "physical occupation" may occur, for instance, where the government places a chattel upon private property,[118] or "where individuals are given a permanent and continuous right to pass to and fro, so that real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[119]

Focusing upon the "character of the governmental action,"[120] the Supreme Court has adopted a *per se* rule, noting that "the landowner's right to exclude [is] 'one of the most essential sticks in the bundle of rights

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115. Dolan v. City of Tigard, 114 S. Ct. 2309, 2316 (1994) (citing Agins v. Tiburon, 447 U.S. 255, 260 (1980) (alterations in original)).

116. *See* Wilson v. Commonwealth, 583 N.E.2d 894, 899 n.12, (Mass. App. Ct. 1992), *aff'd*, 597 N.E.2d 43 (Mass. 1992) (comparing the takings test with the "rational basis" test).

117. *See* Orion Corp. v. Washington, 747 P.2d 1062, 1076 (Wash. 1987) ("commentators have also pointed out that the regulatory takings doctrine and the longstanding substantive due process test seem analytically identical"); *see, e.g.*, William J. Stoebuck, *San Diego Gas: Problems, Pitfalls and a Better Way*, 25 WASH. U. J. URB. & CONTEMP. L. 3, 20 (1983); Ross A. Macfarlane, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715, 729 (1982).

118. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (government required that a small cable television box be placed upon apartment building).

119. Nollan v. California Coastal Comm'n, 483 U.S. 825, 832 (1987); *Dolan*, 114 S. Ct. at 2321.

120. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 128 (1978).

that are commonly characterized as property.'"[121] Very protective of this particular stick, the Court has held that where governmental action results in a physical occupation of property, whether by the government itself or by those authorized by the government, a taking will be found "to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[122]

The Supreme Court has declined to apply the *per se* rule in situations in which the state could prohibit a property use but permits the property use subject to conditions that otherwise would interfere with the claimant's possessory interest (the "required dedication" condition).[123] In such cases, the Supreme Court has required that the state meet a two-part test. First, the state must establish the existence of an "essential nexus" between the "legitimate state interests" asserted as justification for the condition (the "ends") and the land use regulation or permit condition imposed by the state (the "means").[124] If the "essential nexus" test is satisfied, the state must then meet the "rough proportionality" criterion recently added to the framework takings analysis by the *Dolan* decision.[125] Under the rough proportionality test, the state is required to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[126]

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121. *Loretto*, 458 U.S. at 433 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

122. *Id.* at 434-35.

123. In *Nollan v. California Coastal Commission*, the State required the owner to dedicate rights of lateral access along the seashore. *Nollan*, 483 U.S. at 829. In *Dolan v. City of Tigard*, the City required a landowner to dedicate a strip of land lying within a floodplain for use as a "greenway." *Dolan*, 114 S. Ct. 2309, 2313 (1994).

124. The "essential nexus" test was first established in *Nollan*. *Nollan*, 483 U.S. at 837. *Nollan* involved a permit requirement that the property owner dedicate an easement of lateral access along the shore as a condition for a permit to renovate a house. *Id.* at 829. The State claimed that the condition was necessary to ameliorate the blockage of "visual access" from the street. *Id.* The Supreme Court held that the requirement of lateral access along the beach did not remedy the problem of visual access from the street, and that there was no "essential nexus" between the stated governmental interest and the restriction imposed. *Id.* at 837. In *Dolan*, the City claimed that the proposed development lay within and would negatively affect a floodplain, and that the development would result in increased traffic pressures. *Dolan*, 114 S. Ct. at 2315. The City established a setback from the 100 year floodplain, and required the dedication of a strip of land lying within that floodplain for use as a bicycle path as a means for offsetting the adverse traffic impacts. *Id.* at 2314 n.2. The Court found that the "essential nexus" between the governmental interests and the regulations was sufficient, and then considered the second part of the test. *Id.* at 2317.

125. *Dolan*, 114 S. Ct. at 2319.

126. *Id.* at 2319-20. In *Dolan*, the Court found that the required dedication condition was not "roughly proportional" (a new criterion of considerable imprecision) to the state interests involved. *Id.* at 2321-22. In measuring the private interests involved, the Court noted that the "right to exclude others" has a heightened status among property rights. *Nollan*, 483 U.S. at 831; *see, e.g.*, *Loretto*,

C. "Total Takings" and the Second Per Se Rule

In addition to cases involving physical appropriations, the Supreme Court in *Lucas v. South Carolina Coastal Council* has adopted a second *per se* rule applicable when a regulation denies a landowner all economically viable uses of his or her land.[127] The United States Supreme Court held that whenever a governmental regulation deprives an owner of all economic value of his or her property, it will be deemed to have "taken" the property for Fifth Amendment purposes, even if the regulation is an otherwise valid exercise of the state's police power.[128] In such cases, the Court ruled that the government must provide compensation to the landowner unless the deprivation could have been justified on the basis of principles of common law nuisance (the "nuisance exception") or other "background principles" of property law.[129]

In establishing the categorical rule, the Court noted that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[130] The Court reasoned that when

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458 U.S. at 435. The Court stated that the City had based its requirement on the fact that a bikeway could offset increased traffic demands, but that the City had not established that the required dedication would in fact result in the amelioration of the possible increase in traffic. *Dolan*, 114 S. Ct. at 2321. The Court held that the City had therefore failed to satisfy the "rough proportionality" criterion because the nature of the private interest lost was great, while the government's interest was speculative. *Id.* at 2321. The Court's analysis might have been different if the City had established that the dedication would offset or would be likely to offset the demand. *Id.* at 2322. Despite the Court's assertion of the heightened status of the right to exclude others in *Dolan*, it is interesting also to note the Chief Justice's explication of the Court's ruling in *Nollan*:

> We agreed that the Coastal Commission's concern with protecting visual access to the ocean constituted a legitimate public interest. We also agreed that the permit condition would have been constitutional 'even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.'

Id. at 2317 (citing *Nollan*, 483 U.S. at 825-26). Therefore, when the permit condition requiring public access to, or use of, private property serves a legitimate state interest, the "right to exclude others," must yield despite its heightened status.

127. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992).

128. Members of the Court have argued whether the majority has created a new rule, or whether its previous holdings had already established the rule. *See id.* at 2895, n.8, 2910-12 (Blackmun, J., dissenting), 2918-20 (Stevens, J., dissenting).

129. Id. at 2900-01. *See infra* notes 161 to 179 and accompanying text for a discussion of the exceptions to the "total takings" rule.

130. *Id. at* 2894 (citing San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)). "[F]or what is the land but the profits thereof[?]" 112 S. Ct. at 2894 (citing 1 EDWARD COKE, INSTITUTES ch. 1, § 1 (1st Am. ed. 1812) (alterations in original)). For a critique of the economic perspective and the advocacy of an ecological perspective *see* David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311 (1988).

a landowner is denied all economically beneficial uses of his or her property, "it is less realistic to indulge our usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life' in a manner that secures an 'average reciprocity of advantage' to everyone concerned."[131] According to the Court, a denial of all uses creates an impermissibly "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[132]

As with cases involving physical appropriations, the Supreme Court has established (but not yet adjudicated) a class of exceptions to its second *per se* rule. Pursuant to these exceptions, compensation will not be required when the government by regulation does what it could have done anyway through the common law, invoking the tenets of nuisance and other "background principles" of property law:

> Any limitation so severe [prohibiting "all economically beneficial use of land"] cannot be newly legislated or decreed (without compensation), but must inhere in the title [to the land] 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.[133]

The Court then set forth its "total takings" analysis and related exceptions based upon nuisance and property law:

> [t]he "total taking" inquiry we require today will ordinarily entail . . . analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may

131. *Lucas*, 112 S. Ct. at 2894 (citations omitted).

132. *Id.* at 2895 (citations omitted).

133. *Id.* at 2900.

> make what was previously permissible no longer so[])][sic]. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.[134]

Thus, even when all economic value of property is destroyed, a taking will not be found for restrictions that derive from "background principles" of property or nuisance and that inhere in the property title. Part IV of this article examines these several exceptions to the "total takings" rule when applied to public trust property.[135]

The following points about the impact of *Lucas* upon takings claims are noteworthy. First, the new categorical rule established in *Lucas* comes into play only when a court finds that the property owner has been deprived of all economically viable use of his or her property; that is, when there has been a "total taking." Otherwise, the court proceeds along the lines prescribed by the "framework takings analysis" discussed above.[136] But *Lucas* provides little guidance for the resolution of the initial inquiry: whether a regulation in fact deprives a property owner of all economically productive uses.[137] This determination will remain difficult and imprecise.[138] Owners of wetlands and other coastal property, however, will often come to court with apparently strong claims of total takings, given the severity of regulation imposed upon the uses of their property.[139] As discussed more fully below, such claims would severely

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134. *Id.* at 2901 (citations omitted).

135. *See infra* Part IV.B.

136. For a discussion of the Supreme Court's framework takings analysis, *see supra* notes 110 to 117 and accompanying text.

137. In *Lucas*, the Supreme Court provides the following guidance: "The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property — i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Lucas*, 112 S. Ct. at 2894 n.7.

138. *Florida Rock* provides an example of the difficulty inherent in the determination of whether a regulation deprives an owner of all economically viable use of his property. *Florida Rock*, 18 F.3d 1560, 1564-81 (Fed. Cir. 1994). The court also noted the existence of yet another variable in the total takings calculus: the benefits of a regulation accruing to the general public also benefit the encumbered landowner, and that this in turn adds value to the parcel. *Id.* at 1570-71.

139. The majority opinion asserts that "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." *Lucas*, 112 S. Ct. at 2894 n.7. The Court then stated that it was unclear whether it would compare a restricted interest (*e.g.*, denial of right to build on 90% of a property) as a mere diminution in value of the entire tract, or as a total taking (assuming this was the case) of the unbuildable 90%. *Id.* The Court questioned whether the "denominator" (the owner's remaining interest in the property), against which the "numerator" (the interest taken) was measured, would consist of the claimant's entire estate or only the burdened portions of the properties. *Id.* Of course, if the Court chose the latter, the probability that at least a portion of a claimant's

limit attempts to protect wetlands and other special aquatic areas, absent the public trust doctrine.

Second, in what may be characterized as an attempt to add certainty to the *ad hoc* taking inquiry, the majority chose the law of nuisance as one of its guiding principles. Thus, once a court decides whether a "total taking" has occurred, it must then determine whether the prohibited or restricted use would have constituted a common law nuisance. As the dissenters noted, the reliance upon nuisance law adds mischief rather than certainty to the takings inquiry: "[o]nce one abandons the level of generality of *sic utere tuo ut alienum non laedas*,[140] one searches in vain . . . for anything resembling a principle in the common law of nuisance."[141]

As discussed in the next section, the *Lucas* decision should not nullify state actions taken to protect public trust lands, waters, and resources because the public trust doctrine fits squarely within the nuisance and background principles of property law exceptions recognized by the Supreme Court in that decision.

IV. THE TAKINGS CLAUSE AND THE PUBLIC TRUST DOCTRINE

As discussed above, when challenged as unconstitutional takings, regulations enacted under the state's police power will be examined by the courts according to the elements of the framework takings analysis. Pursuant to this analysis, reasonable regulation that substantially advances a legitimate state interest should be upheld. However, regulations that deprive an owner of all economically viable use of his or her property, or that result in a "physical appropriation" of land, will be treated with less deference in the takings analysis. When environmental regulations enacted

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property interests had been taken would be greatly increased. *See id.* That the Court has not yet allowed claims of takings when only a portion of the property's value is diminished is apparent from the adoption of the "total takings" *per se* rule in *Lucas*. No such rule would be necessary if any discernible burden on the use of property would be grounds for finding a taking. Footnote 7 attempts to cast doubt upon the viability of the essential principle of the Court's framework takings analysis that "mere diminution" of the value of property does not constitute a taking. Justices Rehnquist and Scalia have consistently sought to reverse this long-standing interpretation by the courts. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 517 (1987) (Rehnquist, C. J., dissenting); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 139-40 (1978) (Rehnquist, J., dissenting). This footnote is an open invitation for claimants to bring takings claims when any interest in property is limited by government regulation, despite the remaining economic value of the property.

140. *Black's Law Dictionary* defines *sic utere tuo ut alienum non laedas* as a "[c]ommon law maxim meaning that one should use his own property in such a manner as not to injure that of another." BLACK'S LAW DICTIONARY 1380 (6th ed. 1990).

141. *Lucas*, 112 S. Ct. at 2914 (Blackmun, J., dissenting) (citation omitted).

under the state's police power encroach the limits of the takings clause, the state may be faced with a difficult choice: forego regulation or purchase the property.

When applied to actions taken to manage and protect public trust wetlands and other critical coastal areas, this choice could entail the abdication of the state's common law duties under the public trust doctrine. As this section will argue, however, regulatory actions undertaken pursuant to the public trust doctrine should not be subject to the increasingly strict takings analysis because such actions by the state trustee either do not "take" any property from the owner or come within the exceptions established in *Lucas v. South Carolina Coastal Council*.[142]

A. The Public Trust as a Pre-Existing Servitude

The typical takings claim results from environmental and land use regulation, imposed pursuant to a state's police power, restricting an otherwise lawful right of use or activity.[143] Actions taken pursuant to the public trust doctrine, however, can be distinguished from police power regulation because their justification derives from the state's duty as trustee to manage and protect the public's interests in public trust property. This character of the state's action is seen in its clearest form when the state trustee acts to preserve public trust property that remains wholly in public ownership (e.g., lands and waters below the mean high water line or ordinary high water mark). But when the private interest in trust property (the *jus privatum*) has been conveyed into private hands, the character of the state's action to preserve the remaining public interests (the *jus publicum*) by limiting private uses may be more difficult to discern. The state's action in either situation is essentially the same.

The public trust doctrine has long been viewed as tantamount to a servitude upon or an easement in trust lands conveyed to a private owner that is held by the state in trust for the public.[144] Therefore, when it acts

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142. *Lucas*, 112 S. Ct. 2886 (1992).

143. *Black's Law Dictionary* defines police power as "[t]he power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity." BLACK'S LAW DICTIONARY 1156 (6th ed. 1990) (citing Marshall v. Kansas City, 355 S.W.2d 877, 883 (1962)).

144. *See supra* Part I; *see also* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892) (public trust persists in lands granted by legislature to private owners); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); Orion Corp. v. Washington, 747 P.2d 1062, 1072 (Mass. 1979) (stating that public trust is an "easement" in public trust lands and waters); Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 369 (Mass. 1979) (comparing public trust interest in conveyed properties as a "condition subsequent" to the underlying fee simple estate).

to preserve public interests in such property, the state trustee does not take anything belonging to the owner whose property is burdened by the public trust.[145] Before an individual can have a constitutional right to compensation, some thing must have been "taken" by the government — "a property right must exist before it can be taken."[146]

The principle that the public trust acts as an easement in or servitude on trust property conveyed into private ownership is clearly evident in the line of cases beginning with *Illinois Central Railroad v. Illinois*.[147] The *Illinois Central* decision affirmed the essential principle that the public trust persists in trust property conveyed to private owners and that there is an "inherent revocability" of grants of public trust lands when the public interest ceases to be advanced by the conveyance of public trust property.[148] Even where the trustee does not seek to reassert public ownership and control of trust lands, the state nevertheless retains important rights through its "continuing supervisory control" over the owner's use of the property as an aspect of the easement or servitude burdening such property.[149]

Whether the state "condemns" private property rights when it acts under its public trust authority has been decided by many state courts.[150] For instance, in the *Mono Lake* case, the California Supreme Court, in finding that application of the public trust to upland, non-navigable tributaries of a public trust body of water did not divest riparian owners of any property rights, stated that:

> Once again we rejected the claim that establishment of the public trust constituted a taking of property for which compensation was required: "We do not divest anyone of title to property; the consequence of our decision will be only that some landowners . . . hold [title] subject to the public trust."[151]

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145. *See infra* notes 147 to 149 for a discussion of the public trust as a servitude upon estates in land.

146. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488-90 (1987); *see Orion Corp*, 747 P.2d at 1070.

147. *Illinois Central*, 146 U.S. at 455. *See supra* Part I.

148. *Illinois Central*, 146 U.S. at 455. *See* Harrison C. Dunning, *Impact of the Public Right on Private Rights*, *in* 4 WATER AND WATER RIGHTS 105-06 (Robert E. Beck ed., 1991).

149. *See Mono Lake*, 658 P.2d 709, 727 (Cal. 1983). *See also* Vermont v. Central Vermont Ry., 571 A.2d 1128, 1135 (Vt. 1989); Lake Michigan Fed'n v. United States Army Corps of Engineers, 742 F. Supp. 441, 445 (N.D. Ill. 1990); Nelson v. DeLong, 7 N.W.2d 342, 347 (Minn. 1942).

150. *See Orion Corp.*, 747 P.2d at 1072-73.

151. *Mono Lake*, 658 P.2d at 723 (citing City of Berkeley v. Superior Court of Alameda, 606 P.2d 362 (Cal. 1980)); *Boston Waterfront*, 393 N.E.2d at 367. *Cf.* Stevens v. City of Cannon Beach, 854 P.2d 449, 456-57 (Or. 1993); McDonald v. Halvorson, 760 P.2d 263, 269 (Or. 1988). These

Likewise, in holding that a train trestle over a public trust watercourse did not interfere with the claimant's vested property rights, the Maine Supreme Court held that "[t]he sovereign had the absolute control of it [the public trust] and could regulate, enlarge, limit, or even destroy it . . . without making or providing for any compensation to such individuals as might be inconvenienced or damaged thereby."[152] In *Xidis v. City of Gulfport*,[153] the Mississippi Supreme Court held that "the rights of riparian owners are subject to the prior right of the State to impose an additional public use upon the lands without requiring the payment of additional compensation."[154]

It is clear that when the state trustee acts to protect public trust interests in privately owned property no taking will occur because the trust is a servitude on such property. But it is necessary, with respect to public trust property, to distinguish between state action under the public trust doctrine and police power. In *Orion Corp. v. State*, the Washington Supreme Court distinguished between uses that conflict with, and those that are consistent with, the public trust.[155] Noting that when public trust property is conveyed to private owners, public interests appurtenant to the property remain subject to the trust,[156] the court held that a property owner can have no legitimate investment-backed expectations with respect to those uses that are in conflict with the trust.[157] Therefore, challenged

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cases hold that "dry sands" areas along the Oregon coast are subject to the public's right of recreational use as a matter of customary use, and that because the public had established its customary use of certain beach areas, the property owners had failed to show that a protected property interest had been taken.

152. Frost v. Washington County R.R., 51 A. 806, 809 (Me. 1901). The Maine Supreme Court stated that "[t]he sovereign cannot take private property for public uses without providing for just compensation to its owner, but this constitutional provision does not limit the power of the sovereign over public rights." *Id.*

153. Xidis v. City of Gulfport, 72 So. 2d 153 (Miss. 1954).

154. *Id.* at 158 (quoting Crary v. State Highway Comm'n, 68 So. 2d 468 (Miss. 1953)). *See also* Miramar Co. v. City of Santa Barbara, 143 P.2d 1, 2-3 (Cal. 1943) (city may construct breakwater reducing flow of sand to littoral owner's property causing erosion and migration of the mean high tide line inland); Colberg, Inc. v. California, 432 P.2d 3, 6, 14 (Cal. 1967) (state may build bridge blocking shipyard plaintiff's access to navigable water, denying more than 80% of plaintiff's business); State v. Masheter, 203 N.E.2d 325, 328 (Ohio 1964) (no private rights "taken" when bridge interferes with riparian's right to navigation); Grupe v. California Coastal Comm'n, 212 Cal. Rptr. 578, 593 (Cal. Ct. App. 1985) (where state acts to promote public trust, courts will not find a taking, even though the action might be deemed a taking in a non-public trust context); Wilson v. Commonwealth, 583 N.E.2d 894, 901 (Mass. App. Ct. 1992), *aff'd*, 597 N.E.2d 43 (Mass. 1992) (where plaintiffs brought a takings claim after being denied a permit to build a revetment, takings claim remanded to trial court to determine effect of public trust on takings claim).

155. *Orion Corp*, 747 P.2d at 1083.

156. *Id.*

157. *Id.* at 1083-84.

regulations that prohibit uses that violate the public trust are insulated from a takings claim.[158] Conversely, regulations which prohibit uses that are consistent with the public trust would be subject to takings analysis in the same manner as police power regulations.[159]

State trustees may bolster their efforts to protect public trust areas such as wetlands and other critical aquatic areas by clearly defining permissible and prohibited uses under the public trust doctrine. Coastal and environmental managers may then establish specific land and water uses with greater certainty that such regulation will survive a takings challenge. However, it should be noted, if the state trustee imposes regulations that are more restrictive than are justified by the public trust doctrine in that state, such regulations may be subject to challenge as a regulatory taking.[160]

B. The Lucas Decision's Total Takings Rule and Its Exceptions

The decisions discussed above reflect the inherent authority of the state to regulate activities occurring upon public trust property. Under the Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council,*[161] a regulation depriving an owner of all economic value of his or her property (a "total taking") will not be considered a taking when the basis for the regulation inheres in the "title [to the property] itself, [or] in the restrictions that background principles of the State's law of property

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158. *Id.*

159. *Id.* at 1087. The Washington court added that if there were a regulatory taking, the state would be given the choice of two remedies: it could either pay compensation for the taking or amend its regulations to permit the Orion Corporation to use the property for such uses as would be allowable under the public trust doctrine. If the state chose to amend its regulations, the Orion Corporation would be entitled to compensation for the temporary regulatory taking in the amount of the leasehold value of the land for the period while the regulations were in effect. *Id.* at 1088. Any takings compensation would be limited to the reduction in value of the land as a result of the new regulations, taking into account that the value of the land was limited from the outset by restrictions inherent in the public trust doctrine. *Id. Cf.* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 310-11 (1987) (requiring compensation for "temporary" takings).

160. *See, e.g., Orion Corp,* in which the Washington Supreme Court stated that where the state seeks to prohibit uses that are permitted by the trust, the state cannot rely upon the public trust doctrine to defend against a takings claim. *Orion Corp.*, 747 P.2d at 1083-84. *Compare* Scranton v. Wheeler, 179 U.S. 141, 163 (1900) (no taking because federal navigational servitude in naturally navigable waterways is paramount over public interests) *with* Kaiser Aetna v. United States, 444 U.S. 164, 177-78, 180 (1979) (federal navigable servitude cannot be asserted to defeat takings claim where waterbody made navigable by efforts of private owner). *See also* Dunning, *supra* note 148, at 107-08.

161. *Lucas*, 112 S. Ct. 2886 (1992).

and nuisance already place upon land ownership."[162] Thus, *Lucas* establishes three "exceptions" to the "total takings" rule. No taking will be found when the regulation of property incorporates: 1) restrictions that inhere in the title to the property itself; 2) restrictions upon the use of property deriving from background principles of state property law; or 3) restrictions grounded in nuisance law.[163] Each of these "exceptions" incorporates an element or principle of the common law public trust doctrine.

The first exception concerns restrictions that inhere in the property's title. As shown above, restrictions placed upon owners of *jus privatum* interests in public trust property inhere in the title itself, either under the rule declaring the trustee's authority to revoke the transfer of certain public trust property (e.g., a harbor, as in *Illinois Central Railroad*), or pursuant to the state trustee's "continuing supervisory control" over trust lands, waters, and resources.[164] When public trust lands are conveyed to private parties, the public trust interest may be characterized as a conditional[165] or a defeasible[166] fee. Similarly, the trust has been likened to "a covenant running with the land (or lake or marsh or shore) for the benefit of the public and the land's dependent wildlife,"[167] and to an easement.[168] The private interest in public trust lands has been held to constitute no more than a revocable license.[169] In either case, it is clear that the restrictions imposed by the public trust inhere in the title itself, and will qualify under this exception.

The second exception concerns restrictions upon the use of property imposed by "background" principles of state property law. The *Lucas*

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162. *Id.* at 2900. "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 complimentary power to abate nuisances that affect the public generally, or otherwise." *Id.*

163. *Id.*

164. *See supra* notes 143 to 149 and accompanying text.

165. *See, e.g.*, Boston Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 367 (Mass. 1979). *Black's Law Dictionary* defines a conditional fee as a type of fee that is "determine[d] or . . . defeated on the happening of some contingent event or act." BLACK'S LAW DICTIONARY 553 (5th Ed. 1979).

166. *See, e.g.*, Vermont v. Central Vermont Ry., 571 A.2d 1128, 1135 (Vt. 1989) (grant of lakefront property subject to uses consistent with public trust). *Black's Law Dictionary* defines a defeasible fee as a type of "fee that is liable to be defeated by some future contingency." BLACK'S LAW DICTIONARY 376 (5th Ed. 1979). In either case, the ongoing contingency is that the use of the property remain consistent with public trust purposes.

167. *See, e.g., Orion Corp*, 747 P.2d at 1072-73 (citing Scott W. Reed, *The Public Trust Doctrine: Is It Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 118 (1986)).

168. *See, e.g.*, Marks v. Whitney, 491 U.S. 374, 380 (Cal. 1971).

169. *See, e.g.*, Crary v. State Highway Comm'n, 68 So. 2d 468, 471 (Miss. 1953).

Court illustrated this exception when it stated that "we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title,"[170] and cited as an example restrictions upon the use of riparian property imposed by the federal government's navigational servitude.[171] As was noted, the public trust, like the federal navigational servitude, constitutes a pre-existing servitude limiting the landowner's title.[172] Also supporting the conclusion that the public trust is a "background" principle of property law under *Lucas* is the fact that the public trust was part of the common law of the thirteen colonies before the formation of the union, and that the trust passed to the people of each state upon that state's entrance into the union under the equal footing doctrine.[173]

This exception is clearly applicable in situations in which the state trustee regulates land uses outside public trust territory in order to protect public trust property and uses. Applying public trust principles to regulate the activities of upland property owners may be accomplished either by regulating certain activities occurring beyond public trust boundaries (as suggested in the New Jersey beach access cases[174] or as done in the *Mono Lake* decision[175]) in order to permit public access, use, and preservation of public trust areas.

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170. *Lucas*, 112 S. Ct. at 2900.

171. *Id.* (citing Scranton v. Wheeler, 179 U.S. 141, 163 (1900)).

172. Easements and covenants running with the land constitute servitudes; as does "continuing supervisory control of the state." The doctrine of "inherent revocability," described above, acts as a limitation upon the title of the claimant. *See, e.g.*, Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 455 (1892); *Central Vermont* Ry., 571 A.2d at 1135.

173. *See supra* Part I.A for a discussion of the historical development of the public trust doctrine in the United States.

174. *See, e.g.*, *Matthews v. Bay Head Improvement Ass'n*, in which the New Jersey Supreme Court examined circumstances in which an extension of the public trust boundary would be justified to include the public use of privately owned dry sand areas and to permit access across private property to public trust beaches:

> The bathers' right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. . . . [W]here use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the [public trust] doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.

Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984), *cert denied*, 469 U.S. 82 (1984). *See also* Lusardi v. Curtis Point Property Owners Ass'n, 430 A.2d 881, 886 (N.J. 1981); Van Ness v. Borough of Deal, 393 A.2d 571, 573 (N.J. 1978); Hyland v. Borough of Allenhurst, 372 A.2d 1133, 1137 (N.J. Super. Ct. App. Div. 1977); Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972).

175. *See, e.g.*, *Mono Lake*, 658 P.2d 709, 732 (1983). The *Mono Lake* decision is an important precedent for California and other states seeking to extend their authority under the public trust doctrine to lands above the traditional boundary in order to protect public trust areas and resources from activities on such lands.

The third exception exempts from the "total takings" rule regulations that may be justified under principles of common law nuisance.[176] Like the owner of private property, the state trustee may act to protect trust property. When a state legislature or agency charged with implementation of the public trust acts to prevent upland owners from using their land or engaging in activities that would result in significant harm to public trust lands, waters, and resources, the state trustee invokes the authority of nuisance law.[177] Even where the activities regulated do not rise to the level of unreasonableness required to sustain a claim of common law nuisance, it is clear that the public trust includes the authority to prevent "nuisance-like" activities by regulating the use of private property harmful to public trust property interests. For instance, a coastal state could establish a setback limitation in order to prevent the erosion of the shoreline and the destruction of the intertidal area subject to the public trust. Likewise, it has been suggested, the public trust may be invoked to reduce pollution caused by "return flows" of surface water from nonpoint sources.[178]

The key idea underlying all of these exceptions, the Court noted, is that if a regulation deprives an owner of all economically viable uses of his

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176. Under this exception, a law or decree can "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." *Lucas*, 112 S. Ct. at 2900. It is noteworthy that the Court illustrates its "nuisance" analysis with the hypothetical case of the owner of a lake bed, who, according to the Court, would not be entitled to compensation if denied permission to engage in a landfilling operation that would have the effect of flooding another's land. *Id.* Dredging and filling of land presents a textbook case of strict liability nuisance. *See* KEETON, supra note 70, § 90 at 643-45.

177. An owner of land may recover for private nuisance against another for nontrespassory invasion of the owner's land, as long as the "invasion" is deemed unreasonable. RESTATEMENT (SECOND) TORTS §§ 831-33 (1979). Pollution of waters or interference with the flow of waters may constitute a nuisance. *Id.* at §§ 832-33. The law of public nuisance may also be applicable. A public nuisance consists of any act or omission which unreasonably obstructs, interferes with, or damages the rights, interests, comfort or convenience of the community at large or the general public, including conducting activities on one's land leading to noise, obnoxious odors, smoke, dust, or pollution affecting the public (*e.g.*, a pigpen or blasting operations) or interfering with the exercise of a public right (*e.g.*, obstructing a public highway). *Id.* A public official, usually the Attorney General, is empowered to "abate" such nuisances, typically by instituting a court action seeking an order to enter upon the land from which the nuisance is emanating to terminate it. *See generally*, KEETON, *supra* note 70. The law of nuisance is an extension of the ancient common law principle *sic utere tuo ut alienum non laedas*, "use what is yours so that others are not injured," which for centuries has been a basic maxim underlying the regulation of landowners who share the same physical environment and which demonstrates that the use of private land has never been, in our law, an entirely private matter beyond regulatory authority. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623, 665 (1887); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978).

178. *See* Johnson, *supra* note 84, at 512.

or her property, then it may prohibit only what was already unlawful under "existing rules or understandings that stem from an independent source such as state law" in order to withstand a takings challenge.[179] The public trust doctrine has always placed limitations upon the use of property subject to the trust, and provides authority to prevent harm to public trust interests from activities being carried out on privately-owned lands.

CONCLUSION

In contrast to the uncertainties inherent in reliance upon police power as a basis for regulation, the public trust doctrine provides rational, coherent principles to guide the management of lands, waters, and resources subject to the doctrine. Federal and state decisions have established that when a state trustee's management decisions are properly justified under the public trust doctrine, affected property owners will not be successful in claiming that something "owned" by them has been "taken." The *Lucas* decision has given state trustees of critical public trust property such as wetlands an additional and substantial reason to ground their management actions in public trust principles.

179. *Lucas*, 112 S. Ct. at 2901(citations omitted).