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ARTICLE

THE EXPANDING PUBLIC TRUST DOCTRINE: A WARNING TO ENVIRONMENTALISTS AND POLICY MAKERS

*Geoffrey R. Scott**

“When I use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean — neither more nor less.”

“The question is,” said Alice, “whether you can make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master — that’s all.”¹

INTRODUCTION

The protracted life of the evolving beast of the law is sometimes lost as advocates strain to harness it to their daily work. So, too, are the myriad philosophies blurred that in compromise have contributed to its birth. Instead, we may, at times, stand in awe of its forceful visage. On other occasions, we may focus upon the obvious features with which we have grown most familiar and become blinded to the whole figure. In still other situations we are no less than fully ignorant of its inner character. In this context, it can be forgotten that legal decisions are often begotten of political and social struggle.² As a consequence and to

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1. LEWIS CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE 124 (1930).

2. HENRY MAINE, ANCIENT LAW 180-82 (Frederick Pollock ed. 1930) (stating that “The movement of progressive societies has been progressive in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency, and the growth of individual obligation in its place. The individual is steadily substituted for the Family, as the unit of which civil law takes account The word status may be employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to me to be sufficiently ascertained. All the forms of Status taken notice of in

the essential exclusion of a healthy perspective, we sometimes erect a false icon of critical analysis and cling steadfastly to the mere mechanics of legal decision making. In particular, as we work zealously at the perimeter of the structure, we sometimes fail to comprehend that the fabric is incomplete or that the single threads are weak. As a result, missteps are taken and mistakes are made. The result can be a misshapen and ill fitting garment. This Article intends to call attention to the irregular and halting growth of law through the example of the public trust doctrine

the Law of persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If then we employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.”). *Cf.* *Goldberg v. Kelly*, 397 U.S. 254 (1970) (acknowledging certain due process rights as flowing from the status of participating in certain entitlement programs); *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979) (allocating rights on the basis of the status of being a tenant); *see also* Charles Reich, *The New Property*, 73 *YALE L. J.* 733 (1964). Other commentators have also stated:

It might be suggested that evolving policy perspectives and changing themes in distributive justice propel law into an ad infinitum cyclical pattern of status to contract to status and so on: In the market economy, the distribution of income is determined by the sale of factor services. It thus depends upon the distribution of factor endowments. With regard to labor income, this distribution involves the distribution of abilities to earn such income, as well as the desire to do so. With regard to capital income, it involves the distribution of wealth as determined by inheritance, marriage patterns, and lifetime savings. The distribution of labor and capital endowments is linked by investment in education, which in turn affects the wage rate, which a person can command.

Given the distribution of endowments, the distribution on income depends upon factor prices. In a competitive market, these prices equal the value of the factor's marginal product. In many instances, however, returns are determined in imperfect markets where institutional factors, such as conventional salary structures, family connections, social status, sex, race, and so forth, play a significant role.

RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 82-83 (2d ed. 1976).

and to relate it to certain other dynamic ideals within the broader legal process to which it is ideologically bound. In this regard, this Article is intended to serve as a cautionary warning to environmentalists and others who have come to view the principles of law as sterile tools designed solely to yield a harvest of anointed self-interested goals.

Section I of this Article will present an overview of the public trust doctrine and speculate upon the competing social phenomena that have been a catalyst to its precipitation. It will also note certain of the purportedly mistaken judicial judgments that have been made concerning the history of the public trust that may have led to an improper development of the doctrine. Section II will briefly review the decisions of two coastal states, Delaware and New Jersey, to demonstrate that different views have been taken of this single doctrine. Section III will evaluate the solidity of the doctrine in the context of the seething cauldron of select and recent takings decisions of the United States Supreme Court. Special attention will be given to the views of Justice Scalia as the author of the Court's opinion in the germinal case of *Lucas v. South Carolina Coastal Council*.³ Sections IV and V will place the public trust doctrine in the larger context of the broader constitutional debate concerning *stare decisis* and retroactivity. This Section will take particular note of the relevant views of select individual justices in order to sensitize readers to the potential organic vulnerability of such principles as the public trust.

I. THE PUBLIC TRUST

A. *The Broader Jurisprudential Conundrum*

The public trust doctrine has been heralded by environmental activists as a valuable weapon in the fight to preserve the earth's resources in a natural state and to make their enjoyment more readily accessible to the populus at large.⁴ While the seminal

3. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

4. JACK H. ARCHER ET AL., *THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS* (1994); *PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO*

principles from which the doctrine is derived purport to date to ancient Greece and Rome and have found a seemingly respected place in the historical jurisprudence of Britain and the United States, it has only been in the last several decades that the doctrine has been employed to assertively readjust notions of the private and public interests in property. The reincarnation of the tool and its manipulation in the service of more general goals may owe credit to the land use control perspectives surrounding such activities as integrated coastal zone management and wetland preservation. To these ends, advocates' voices have stimulated some judicial and legislative minds to declaring that certain property is of its greatest positive value when left in its natural state, and in that condition it should belong, forever, to the public.⁵

Within the context of the ongoing debate, however, the use of the doctrine has been perceived as innovative by some, yet destructive of the basic fabric of the property law by others.⁶ The shift in attention that has apparently occasioned the current strife is the vision of the figure of law bending to hear the voices of those immersed in a Darwinian competition for the earth's limited resources. As is perhaps predictable, the scene is set to portray judicial and legislative attention being sought by those who want what is believed by others to be properly theirs.

The underlying dramatic tension is a consequence of the clash of the fundamental vehicles of distributive preference.⁷ Each calls upon a naively presumptive view that law should provide a rem-

THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATES (David C. Slade ed., 1990). See also Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 472 (1970).

5. Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have It Wrong*, 29 U. MICH. J.L. REFORM. 939 (1996) (noting the transformational preference).

6. See, e.g., *infra* Section II.

7. F. McDONALD, *NOVUS ORDO SECLORUM* 29 (1985), noting that property law has not been static but that "the tension between public and private property rights was continuous, ever subject to a gradual drift in favor of one at the expense of the other." See also Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 1988 COLUM. L. REV. 1630, 1639.

edy for every wrong, and that thus posited individual interests should be vindicated. In this regard, some hold steadfastly to an illusion of certainty that has been generated as society has strived, through law, for relative stability and predictability in the affairs of people. They are challenged by the claimed socio-centric (or competitive egocentric) desires of others who appeal to a general justifying aim that may be founded upon a centrifugal or egalitarian view of interests. The latter proponents proffer that their preferences are necessary, noble and superior, and as a consequence, are to be spontaneously transformed into a system of cognizable *a priori* rights.⁸

As may be anticipated, the competing and sometimes amorphous preferences are found on all sides of the controversy. Now may be a propitious time to reexamine them more closely. For purposes of discussion, it might, perhaps, be advantageous to characterize the controversy as an exercise in the familiar struggle between act and rule utilitarianism. It could be recast to inquire as to whether it is proper for a civilized polity to abide by a rule so as to inculcate the value of the predictability and reliability of legal results, or might we ask whether it is better to discard the rule in order to achieve what may, at least appear to the actors to be a more reasonable transactional result.

The specific issues being raised are truly quite elementary. Is one to conclude that, short of the use of personal physical force, there is no worldly ownership without political recognition and service, that such recognition will exist only when private ownership best serves the interest of government extant, and that it will be limited when privatization exceeds what is episodically deemed to be reasonable social bounds? Do constraints grounded in nuisance, restrictions in land use and the availability of eminent domain bespeak of the residual public interest?⁹ On

8. The complement of public and private interests in property is discussed in Glynn S. Lunney, Jr., *A Critical Reexamination of Takings Jurisprudence*, 90 MICH. L. REV. 1892 (1992). See also *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders.").

9. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). See also Lunney, *supra* note 8; William M. Treanor, *The Original*

the other side of the table, however, is there an essential inherent right to exclude others from the use of property that is grounded in a need for individuality, solitude, privacy or control,¹⁰ or might the concept of private property be required to exist to support a market economy whose function might be compromised without the ability to transfer exclusive ownership to a purchaser for a fee?¹¹ Do constitutional provisions that re-

Understanding of the Takings Clause and the Political Process, 95 COLUM. L. REV. 782 (1995).

10. Rehnquist, writing for the Court in *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), identified the right to exclude others as of singular importance in the law of private property: “[P]ublic access would deprive petitioner of the right to exclude others, ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property’” (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). Blackstone in his commentaries noted that property was essentially a claim “over the external things of the world, in total exclusion of the right of any other individual in the universe.” 2 BLACKSTONE, COMMENTARIES 2.

Medieval economy with its constant regard to the *relations of persons* was giving place to modern economy which treats the *exchange of things* as fundamental; and this has introduced an extraordinary simplification in the structure of society; the whole of the complicated industrial organisations of the middle ages have passed away, and the strong *esprit-de-corps*, which gave so much healthy life in many cities, has also disappeared. Economically, we have only three broad divisions in society, for men arrange themselves according to the things they own and exchange; they may exchange their labour for wages, or they may exchange the use of their capital for interest, or they may exchange the use of their land for rent. In modern societies Labourers, Capitalists and Landlords are the three classes which group themselves round the possession of the power to labour, the possession of wealth, and the possession of land. This is the social structure we habitually assume, but it is strangely unlike the municipal and manorial life it has superceded.

WILLIAM CUNNINGHAM, *THE GROWTH OF ENGLISH INDUSTRY AND COMMERCE DURING THE EARLY AND MIDDLE AGES* 464-65 (5th ed. 1910) (citations omitted).

11. See MUSGRAVE & MUSGRAVE, *supra* note 2, at 50-51 (“The market can function only in a situation where the ‘exclusion principle’ applies, i.e., where A’s consumption is made contingent on his paying the

strain government control over land echo one or the other of these proprietary themes? In sum, these and other related issues have long been a part of the structure of the myth of property, but one that is often shrouded from view so that a modicum of daily order can dominate.

If one takes pause, law in its grander (and perhaps more pragmatic) view need not be so adversarial. Notwithstanding what might have become a lawyer's popular conception of law as an edifice built upon continuing conflict and consequent resolution, the law may (or should be) perceived as a system of intelligent accommodation. From this perspective, order may be dependent upon an evanescent balance of authority and power, and rely for its longevity upon an induced voluntary acceptance of and compliance with the terms of basic agreements by the participants.¹² Perhaps as in a good and healthy family, there may be disagreements but there are also reliable relationships that do not require constant vigilance. Also like a family, a polity may grow when one of its number comes upon a new interest and presses it upon the group. While the homeostasis is certainly disturbed and the routine environment is altered and becomes more dynamic, the fundamental architectonics remain.

Similarly, the application of property law may not merely be the invocation of a manifest and sterile set of rules. Some rules, like the Dead Sea Scrolls, were mislaid long ago and have only recently been recovered. Rather, it is the adjustment of the varying ambitions and philosophies of the elemental constituents through the considered response of the functional and organiz-

price, while B, who does not pay, is excluded. Exchange cannot occur without property rights and property rights require exclusion. Given such exclusion, the market can function as an auction system. The consumer must bid for the product, thereby revealing preferences to the producer, and the producer, under the pressures of competition, is guided by such signals to produce what the consumers want. At least, such is the outcome with a well-functioning market.”).

12. See HAROLD D. LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY A FRAMEWORK FOR POLITICAL INQUIRY* (1950). See also HAROLD D. LASSWELL, *A PRE-VIEW OF POLICY SCIENCES* (1971); HAROLD D. LASSWELL, *POLITICS WHO GETS WHAT, WHEN, HOW* (reprinted by Peter Smith 1950).

ing social features of the polity.¹³

B. *The Social Interest - Do The Ends Justify The Means?*

It may be that within the notion of ownership a socio-political policy developed that permitted property to be withdrawn from the communal cauldron, placed into the stream of commerce by an individual's hand, transformed into private value so that all could indirectly benefit from it.¹⁴ This trend could logically have been acceptable when a state possessed a relative abundance of resources and was driven by a nascent desire to grow strong by using the energies of goal-oriented community members. As general paradigms of this premise, one might reference the principles of capture in natural resource allocation¹⁵ and the produc-

13. There are a number of outstanding works that address these phenomena in the context of property and the takings issue. They include: Kmiec, *supra* note 7; Lunney, *supra* note 8; Frank I. Michelman, *Takings*, 88 COLUM. L. REV. 1600 (1988); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Treanor, *supra* note 9.

14. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 289 (Peter Laslett ed. 1988) ("The labour that was mine, . . . hath fixed my Property . . ."). *See also* Latovick, *supra* note 5; MUSGRAVE & MUSGRAVE, *supra* note 2, at 85 ("Natural law philosophers such as Hobbes and Locke, following what are here referred to as endowment-based criteria, postulated a person's innate right to the fruits of his efforts, thereby giving ethical support to distribution by factor endowment and the pricing of factors in the market.").

15. *See* Louisiana v. United States, 832 F.2d 935, 938 (5th Cir. 1987) (discussing how the Submerged Lands Act, 43 U.S.C. § 1301, altered the allocation of rights in oil and gas (43 U.S.C. § 1337 (g)) and noting the common law principles of capture). *See also* Geer v. Connecticut, 161 U.S. 519 (1896) (presenting an excellent historical and policy review of the development of the theory of capture, including its relationship to the public trust doctrine, in the context of reviewing a game control statute that restricted the taking and transportation beyond state limits of certain birds); State of LA. Ex Rel. Guste v. M/V Testbank, 752 F.2d 1019, 1039 (5th Cir. 1985) (dissent discussing the principle of capture in the context of fishing); J. M. Young v. Ethyl Corp., 521 F.2d 771 (8th Cir. 1975) (discussing the common law rule of capture in the context of fugacious minerals); *Midwestern Gas Transmission Co. v. Fed. Power Comm'n*, 292 F.2d 119, 122 (5th Cir. 1961)

tivity requirement of the doctrine of adverse possession.¹⁶

Under other circumstances, however, there may have been a deficiency in allocative pressure. Some examples include: (i) the state of a competitor's knowledge of an item and its uses; (ii) an underdeveloped recognition of immediate personal need; or (iii) a perceived undesirability or inability to exploit the item after considering the possible failure of available technologies to spark competitive awareness. Since the element was not prized by the community, a perceived need to constrain otherwise free individual access to and use of it may not have existed.

Community perceptions may also factor into the equation. There was a time when wetlands were viewed as a nuisance and a breeding ground for vermin. Harbors, docks and bays were used as the open sewers of developing settlements. Wharves, warehouses and bars were the places where longshoremen and sailors worked and caroused. The gentile, the uninformed or the complaisant may have been content to give such places wide berth and to leave the attendant resources of such locations to the de-

(concurring opinion noting: "I still believe that Congress was equally concerned with the rights, the ownership and the imperative requirement for fairness due those who own this valuable natural resource, those whose ingenuity and risktaking captures it for man's productive use, and those who transport it from the wellhead to the burner tip."); *Ghen v. Rich*, 8 F. Supp. 159, 161-62 (D. Mass. 1881) (noting the principle of capture as used in the fin-back whaling industry); *Nixon v. United States*, 978 F.2d 1269, 1275 (D.C. Cir. 1992) (describing various means by which property may be acquired and noting: "While the precise contours of the term 'property' are not well delineated, it is settled law that the Constitution does not create property interests. Rather, 'property' is a creature of independent origins.").

16. See *Alaska Nat'l Bank v. Linck*, 559 P.2d 1049, 1054 (Ala. 1977); *Finley v. Yuba County Water Dist.*, 99 Cal. App. 3d 691, 696-7, 160 Cal. Rptr. 423, 427 (1979); *Doyle v. Hicks*, 78 Wash. App. 538, 541, 897 P.2d 420, 422 (1995); RICHARD R. POWELL, 7 POWELL ON REAL PROPERTY 1012 (Patrick Rohan, ed. 1992, rev. 1993); C. CALLAHAN, ADVERSE POSSESSION 91-94 (1961); Paul N. Bowles, *Adverse Possession of Subsurface Materials*, 71 Ky. L.J. 83 (1983); Latovick, *supra* note 5, at 941-42 (1996) (referencing the transmutational land issue); John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 820 n.11-13 (1994) (containing a list of cases referencing the policy); William B. Stoebuck, *The Law of Adverse Possession in Washington*, 35 WASH. L. REV. 53 (1960).

vices of others.¹⁷ Later, however, when the visions of a few stimu-

17. See Elizabeth B. Anderson, *Annapolis, A walk into History* (1984) (noting that there was no plumbing in Annapolis until 1870 and that people used wells placed along public streets for bathing and the gathering of water; "Baltimore had no underground sewer system or sewage treatment facility until 1909. Human waste was channeled into cesspools that often leaked into the ground water that flowed into the city's drinking wells. Other waste flowed through the streets in open sewers, making its way slowly to local streams and rivers Disease could spread rapidly because of the unsanitary water supply and the overcrowded conditions. Baltimore's smallpox epidemic of 1882-83 killed 1,184 people, most of whom lived in low-lying densely populated areas"). See also SUZANNE ELLERY GREENE CHAPPELLE ET AL., *MARYLAND, A HISTORY OF ITS PEOPLE 186* (Johns Hopkins University Press 1986); KEVIN FLEMING, *ANNAPOLIS* (1988) (noting that the waterfront in Annapolis and environs was shunned as dirty even into the 1960's:

Those who put so much value on waterfront property today might be surprised to learn that one time Spa Creek was a less desirable address. Bobby Campbell explains, The City Dock was a great cesspool. The Sewer lines went down to the end of every street, and they dumped into Spa Creek, in Severn River, in Back Creek, all sewer lines, all the sewage. When we would swim, we'd just take our arm and move the stuff out of the way. We called them blind eels. We'd move the blind eels out of the way. Talk about ecology. The alewives would come and feed on the sewage. The bluefish would come up and feed on the alewives. We'd go down and catch the bluefish and bring them home and fry them and eat them. So that's the ecology. And I'm still here.

Mame Warren, *Then Again . . . Annapolis, 1900-1965* xii (Time Exposure Ltd. 1990); MARION E. WARREN, *BRING BACK THE BAY* 99 (1994) (stating that "few people who live on the Susquehanna - or on the Potomac or the James River - realize how much the water they're near contributes to the Chesapeake Bay. Oh, they know it flows there eventually, but they don't think about the waste they throw overboard - or any sewage or industrial contamination - which ends up in the Chesapeake Bay."); Interview with Alicia Parker, historian for the Historic Annapolis Foundation (October 14, 1997) (observing the changing attitudes of persons who lived by the water. She noted that homes on the rivers and Bay were reconfigured, over time, to reflect the greater or lesser importance of a water site. For example, simple identification of the single water side of a structure changed from front to rear or rear to front depending upon the prevalent social convention. Interview of October 14, 1997. In addition, the Maryland State Archive Center in

lated an initiative to "clean up" these areas or convert depressed or abandoned properties into serviceable and tax paying units; the community may have encouraged "clean up" efforts to obtain ancillary, externalized and immediate benefits in the form of a reduced threats and costs of crime, or at the least, the abatement of an offending eyesore.¹⁸ This would have been particularly attractive if the collective was not asked to contribute financially to the project.

From a social dynamic point of view, might it have been that beach and marsh areas were viewed as ravaged by elements too harsh to economically permit the improvement or maintenance of properties? Or perhaps, many factors came together to lead to the customary decision that shore settlement was not propitious.¹⁹ The scarcity of fresh water, the need of seamen to live close to their vocations, the difficulty of traveling to these locales, and a distribution of wealth inadequate to support expanded leisure choice may all have contributed to this conclusion.

Eventually, however, innovation in travel and advances in construction materials and techniques and the advent of certain government subsidies²⁰ made it possible to liberate the otherwise

Annapolis has numerous diaries, notes and photographs noting the changing social perspectives).

18. See MAME WARREN, *supra* note 17 at XIV ("By the late 1930's, some enterprising local businessmen had begun to explore the possibility of developing Annapolis as a Yachting center. Over the ensuing years, a subtle, but ultimately dramatic, evolution took place in Annapolitans' perspectives of the Bay. By the 1950's and 1960's, more residents began to view the water not as a source of sustenance, but as a source of pleasure."). See also KEVIN FLEMING ET AL., *OCEAN CITY, MARYLAND'S GRAND OLD RESORT* viii (Portfolio Press 1990) (documenting the social changes following World War II that occasioned the growth of the recreation industry in Ocean City).

19. See G. Carleton Ray & William P. Gregg, Jr., *Establishing Biosphere Reserves for Coastal Barrier Ecosystems*, 41 *BIOSCIENCE* 301 (1991) (noting that "[h]arsh physical conditions, such as storms and unstable substrates, limited the development of early settlements on coastal barriers.").

20. The federal government's role in subsidizing coastal development programs such as roads, bridges, and utilities combined with government programs supporting economic development planning, beach

captive value of these resources. Further, the needs and goals of the group seemed to change. Available riches or more egalitarian dreams altered the acceptable view of leisure time. The nuclear family and neighborhood group diminished in value when compared to the call of job opportunity.²¹ As a consequence, the

erosion control, hurricane protection, navigation works, flood insurance, housing mortgage guarantees and disaster relief have contributed to growth in the vulnerable coastal zone. *See id.* at 301 (explaining that "intensive development of coastal barriers began first in parts of the Northeast early in 1900s, and eventually extended to the most remote areas during the 1960s and 1970s. This development has been made possible by the coastal barriers' exceptional recreational amenities, the proximity of urban centers, sophisticated engineering capabilities, and a growing number of corporate and individual investors."). *See also* John R. Clark, *Management of Coastal Barrier Biosphere Reserves*, 41 *BIOSCIENCE* 331 (May 1991) (Federal subsidies have played an especially important role in the development of coastal barriers. "The Interior Department reported that federal subsidies greatly contributed to the explosion of coastal growth. One of the granddaddy subsidies is the National Flood Insurance Program, which was created in 1968 to do, in part, precisely what it has failed to do: encourage coastal communities to guide development away from the water's edge. But roughly three-quarters of the program's 2.5 million policies insure coastal development"); Beth Millemann, *Our Taxes Shouldn't Wash Away*, *NEWSDAY*, Jan 13, 1993, at 89; US Department of the Interior, Final environmental impact statement: undeveloped coastal barriers, *USDI IV-37* (1983).

21. Discussion with Dr. Orrin Pilkey, Professor of Geology at Duke University and an expert on coastal ecology issues, particularly on the Outer Banks of North Carolina (December 22, 1997) (Opining that the dominant reason for the change in social perspective with respect to coastal use is economic and relates to individuals possessing increased disposable income. He concludes that the risk assumption reflected in beach use demonstrates a contempt by the public for natural resources.); *see also* ROBERT DITTON, ET AL., *COASTAL RESOURCES MANAGEMENT BEYOND BUREAUCRACY AND THE MARKET* 6 (Lexington Books 1977) ("Following World War II, Americans were more mobile and had more leisure time and discretionary income. Public participation in recreation activities increased sharply as did the need for coastal park and recreation resources. . . . The demand for coastal housing, recreational as well as permanent, was great.").

Following World War II, coastal barriers underwent rapid and extensive residential development The causes of this great desirability of coastal barrier real estate are due to

the changes in American lifestyles, which have resulted from the increased affluence, mobility, and leisure time of a progressively larger part of the population. For many people, the construction of a second home on a barrier island has meant a comfortable place for an annual vacation, considerable rental income, and various tax deductions for mortgage interest, depreciation and sometimes inadequately insured storm damage. In recent years, joint ownership has provided a means for people of modest means to experience the social and recreational benefits of a home or condominium at the beach, often through purchase of shares in a corporation which develops and finances a project and entitles the shareholder to occupy the unit for a specified time. The rapidly increasing population of young, relatively affluent, single people—the progeny of the postwar baby boom—has played a major role in creating the growing demand for residential development on coastal barriers, which has characterized the last decade, particularly in the Sun Belt. In addition, a growing population of senior citizens has become ever more willing to invest in retirement communities in the year-round congenial climates of Florida and other southern states. Many of these people are moving down from larger to smaller homes. A recent change in the tax code which allows senior citizens to claim a one-time exemption from capital gains on the first \$125,000 of the proceeds from the sale of a personal residence encourages such moves. The market for coastal barrier real estate created by these two groups augments traditional demand.

USDI Final Environmental Impact Statement, *supra* note 20, at IV-39-40 (note that on May 6, 1997 Amendment to the Internal Revenue Code has raised the exemption to \$250,000 and the exemption may be claimed for every two years of aggregate ownership use by a taxpayer during the five year period ending on the date of sale. *See* IRC § 121 as amended by P.L. 105-34; M.L. Miller, *The Rise of Coastal and Marine Tourism*, OCEAN AND COASTAL MANAGEMENT 20(3) 181-199 (1993) (“Marine tourism has surfaced as a controversial topic in the field of ocean and coastal management. Because demand for travel exhibits greater variation and magnitude than ever in history, the tourism industry has become the largest business on earth. Ecotourism, a recent phenomenon attuned to the ideal of sustainable development, is suggested to emerge through the social construction processes of restoration and enhancement.”). For documentation of the degree of population change and consequent construction *see* NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA), NATIONAL OCEAN SERVICE, 50

population was not as repulsed by or complacent with the harsh character of the locale as it had been, and people began to recognize a personal advantage in an intensified association with the rediscovered resource. It felt that it was proper to get its share of the appreciation, profit or benefit.²²

In this context, it was likely predictable that some would posit that they had been robbed of or tricked into giving up a valuable asset that they had tamed and that they should have it back. In opposition others, however, would claim that they were (and are) possessed of reasonable expectations of ownership grounded upon years of relatively undisturbed and stable experience and that they are entitled to retain their interests. It is in

YEARS OF POPULATION CHANGE ALONG THE NATION'S COASTS 1960-2010, US Dept. of Commerce (April 1990); *see also* NOAA, Building Along America's Coasts: 20 Years of Building Permits, 1970-1989, US Dept. of Commerce (August 1992).

22. Justice Scalia acknowledged this propensity. In asserting that the permit condition that the Nollans provide an easement along the beach did not have the requisite nexus to a substantial government interest, Scalia noted:

[U]nless the permit condition serves the same government purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion"

One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not justify the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.

Nollan v. California Coastal Comm'n, 483 U.S. 825, 837-38 (1987) (citations omitted); *see also* MUSGRAVE & MUSGRAVE, *supra* note 2, at 86-88 ("As distinct from supporters of these endowment-based criteria, other social philosophers rejected innate inequality as a legitimate source of differences in economic well-being [Another] version postulates that equality of welfare is inherently desirable. Based on the humanistic view of the equal worth of each individual, this tenet underlines the egalitarian views of such writers as Rousseau and Marx.").

this context that we may now turn to an examination of the various elements of the public trust doctrine.

C. *The Doctrine*

1. An Elemental Overview

The basic doctrine is, in its simplest sense, nothing less than a principle of sovereignty.²³ It stipulates that for the purpose of delimiting a government's relationship to ownership of the earth resources there are two classifications of property: (1) that which is capable of transfer, in usual and ordinary course, to private ownership; and (2) that which is not and is to be held by government in a public trust for its constituents.²⁴ This appears, how-

23. See *Oregon ex rel State Land Board v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 372-79 (1977); see also *Shively v. Bowlby*, 152 U.S. 1, 11 (1894); *Pollard's Lessee v. Hagan*, 44 U.S. (1 How.) 212 (1845); *Martin v. Waddell*, 41 U.S. 366 (1842); *Lost Tree Village Corp. v. Board of Trustees of the Internal Improvement Trust Fund*, 698 So. 2d 634 (Fla. Dist. Ct. App. 1997); *City of Los Angeles v. Venice Peninsula Properties*, 253 Cal. App. 2d 331 (1998); Fla. Const. Art. X § 11; Patrick Deveney, *Jus Publicum and the Public Trust: A Historical Analysis*, 1 SEA GRANT L. J. 13 (1976); Sax, *The Public Trust Doctrine*, *supra* note 4; *Cinque Bambini Partnership v. State*, 491 So.2d 508 (Miss. 1986) (expressing the view that the doctrine was federally created); SIR MATTHEW HALE, *DE JURE MARIS*, reprinted in STUART A. MOORE, *A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO* (3d ed. 1888).

24. See *Martin v. Waddell*, 41 U.S. 366 (1842); see also Sir Matthew Hale, *De Jure Maris* (1ST DRAFT); *Caput Secundum, Concerning the Several Interests in the Ports of the Kingdom* as reproduced in MOORE, *supra* note 23, at 318 ("There is a threefold interest in the ports of the kingdom: i. Jus regium or prerogative, ii. Jus publicum, iii. Jus Privatum." The jus publicum in Hale's view is solely an interest in navigation a public right to have navigable rivers and ports of the kingdom free of nuisances); Deveney, *supra* note 23, at 46 ("[T]he people have a publick interest, jus publicum, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions [F]or the jus privatum of the owner or proprietor is charged with and subject to that jus publicum which belongs to the king's subjects, as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a publick interest of the people"). *DE JURE MARIS*, *supra* note 23, at 336.

ever, to be the point at which agreement ends.

As to the form of property that is covered by the doctrine, some opine that it is limited to intertidal lands or those flowed by the tide.²⁵ Of those expressing this view, the landward limit has variously been that line defined with reference to the low water mark,²⁶ the ordinary low watermark,²⁷ the winter tide,²⁸ the

25. See *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); see also *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Murphy v. Dept. of Nat. Resources*, 837 F. Supp. 1217 (S.D. Fla. 1993); *Lloyd Enters. v. Dep't. of Revenue*, 651 So. 2d 735 (Fla. 1995); *Opinion of Justices*, 649 A.2d 604 (N.H. 1994); *Hall v. Nascimento*, 594 A.2d 874 (R.I. 1991); *Int'l. Paper Co. v. Miss. State Highway Dep't.*, 271 So. 2d 395 (Miss. 1972); *Long Beach v. Mansell*, 476 P.2d 423 (Cal. 1970) (the area remains subject to the public trust even if it is later filled); but see, *Berkeley v. Super. Ct. of Alameda County*, 606 P.2d 362 (Cal. 1980); Slade, *supra* note 4, at 44 n.58 (suggesting that all states with tidelands employ some interpretation of the ebb and flow of the tide in identifying property subject to the public trust).

The next evidence of the king's right and propriety in the sea and the arms thereof is his right of propriety to

The Shore; and

The Maritima Incrementa. (I.) The shore is that ground that is between the ordinary high-water mark and low-water mark. This doth prima facie and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea. . . . 1. For the first of these it is certain, that that which the sea overflows, either at high-spring tides or at extraordinary tides, comes not to this purpose under denomination of *littus maris*; and consequently, the king's title is not of that large extent, but only to land that is usually overflowed at ordinary tides. . . . 3. . . . Although it is true, that such shore may be and commonly is parcel of the manor adjacent, or so may be belonging to a subject, as shall be shewn, yet prima facie it is the king's. And as the shore of the sea doth prima facie belong to the king, between the ordinary high-water and low-water mark, so the shore of an arm of the sea between the high-water and low-water mark belongs prima facie to the king, though it may also belong to a subject

LORD CHIEF JUSTICE HALE, *A TREATISE DE JURE MARIS ET BRACHIORUM EJUSDEM* (1786), as reproduced in Moore, *supra* note 23, at 377-79.

26. See, e.g., *In re Opinion of the Justices*, 649 A.2d 604 (N.H.

neap tide,²⁹ the highest tide,³⁰ the vegetation line,³¹ or frequently,

1994) (Public use of Coastal Beaches); *Groves v. Secretary of the Dep't. of Natural Resources*, No. 92A-10-003, 1994 Del. Super. LEXIS 80, 1994 WL 89804 (Del. Super. Feb. 8, 1994); *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989); *Bradford v. Nature Conservancy*, 294 S.E.2d 866 (Va. 1982); Opinion of Justices to Senate, 424 N.E.2d 1092, 1099 (Mass. 1981); *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356 (Mass. 1979); *State v. Cockrell*, 162 So. 2d 361 (La. 1964); *Shaffer v. Baylor's Lake Ass'n.*, 141 A.2d 583 (Pa. 1958); *Lakeman v. Burnham*, 73 Mass. 437 (1856); *Gerrish v. Proprietors of Union Wharf*, 26 Me. 384 (1847).

27. See, e.g., *Gardner v. Greer*, 271 N.W. 775, 781 (N.D. 1937) (stating low water mark is the shoreline); *Slauson v. Goodrich Transp. Co.*, 69 N.W. 990, 992 (Wis. 1897) (stating that the low water mark is the boundary at which the waters of a lake stands when free of disturbing causes); *In re York Haven Water and Power Co.*, 62 A. 97, 98 (Pa. 1905) (stating that the boundary line on navigable rivers is at the low-water mark).

28. See *In re Walter Foss Sanborn*, 562 P.2d 771, 773 (Haw. 1977) ("The law of general application in Hawaii is that beachfront titles run along the upper annual reaches of the waves, excluding storms and tidal waves In the instant case, after extensive testimony the land court determined that a certain line, the 'Edge of Vegetation and Debris Line' . . . represents the 'upper reaches of the wash of the waves' during ordinary high tide during the winter season, when the . . . waves are further mauka (or inland) than the highest wash of waves during the summer season." The case further states that there can be no reliance in Hawaii due to its legal history with respect to property). See also *Dep't of Natural Resources v. Mayor & Council of Ocean City*, 332 A.2d 630, 637 (Md. 1975).

29. See *County of Lake v. Smith*, 278 Cal. Rptr. 809, 817 (1991) A neap tide is a tide with a small range that occurs at the first and third quarters of the moon. "The *Wm. Kent* court . . . rejected the theory that seasonal variation in the water line along tidal waters should cause the boundary to shift back and forth, and instead directed the trial court to fix the boundary line based upon the records of the average of all neap tides."); see also *N.J. Sports and Exposition Auth. v. McCrane*, 292 A.2d 580, 616 (N.J. Super. 1971) ("The high water line or mark is the line formed by the intersection of the tidal plane of mean high tide with the shore. The mean (sometimes called the 'ordinary') high tide is defined as the medium between the spring and the neap tides."); *Boone v. Kingsbury*, 273 P. 797, 815 (Cal. 1928).

30. See Opinion of the Justices, 649 A.2d 604, 608 (N.H. 1994) (stating that the public trust in tidewaters extends to the high water

the mean high water mark.³² Notwithstanding the standard that

mark).

31. See *Stevens v. City of Cannon Beach*, 854 P.2d 449, 454 (Or. 1993); see also *Matthews v. Bayhead Improvement Ass'n*, 471 A.2d 355, 358 n.1 (N.J. 1984); *In re Walter Foss Sanborn*, 562 P.2d 771, 774 (Haw. 1977) (the vegetation line is frequently employed as the landward boundary by states that include the dry sand area within the public trust). See also *Cooper v. United States*, 779 F. Supp. 833, 835-36 (E.D.N.C. 1991) (if an intertidal area is filled through a public project effort the resulting dry sand area becomes part of public trust lands).

32. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); see also *Opinion of the Justices*, 649 A.2d 604, 608 (N.H. 1994); 101 *Ranch v. United States*, 714 F. Supp. 1005 (D.N.D. 1988) (ordinary high water mark); *Idaho Forest Indus. v. Hayden*, 733 P.2d 733, 737 (Idaho 1987) (natural high water mark); *State ex. rel. Haman v. Fox*, 594 P.2d 1093 (Idaho 1979) (ordinary mean high water mark); *McNally v. Zoning Comm. of Norwalk*, 621 A.2d 279 (Conn. 1993); *Opinion of the Justices*, 424 N.E.2d 1092 (Mass. 1981) (natural high water mark); *Boston Waterfront Dev. Corp.* 393 N.E.2d 356 (Mass. 1979) (the lesser of 100 rods or mean high water mark).

We acknowledge that the high watermark should be "ordinary" and should not represent the level reached by water in unusual floods The traditional method of ascertaining the high watermark in tidal waters is of little help. The height of the tides is determined primarily by the gravitational effects of the sun and the moon; these effects run one complete cycle every 18.6 years. The high tide is generally computed by averaging the high tides occurring over such a period of time. This method is inconsistent with prescriptive rights obtained during a five-year period of time. Moreover, nontidal waters generally, and waters impounded behind a dam in particular, know of no tidal rhythmic regularity. . . . Thus the 18.6-year average is of little utility. Averaging the high watermarks set over a larger number of years is also inconsistent with the theory of prescriptive rights. . . . Plaintiffs propose the method traditionally used in free-flowing rivers. The high watermark is defined as the place where the riverbed ends and the riverbank begins. This method involves examining the riverbank to find the highest point where the water's flows have prevented the growth of vegetation. This method is premised on the assumption that the river will, over a period of time, predictably return to a certain level where it will leave an indelible mark upon its banks. This method is unacceptable for several reasons. First,

is selected, however, there is no general consensus on the specific period of time over which the measurement is to be made.³³ The duration has been one year, nineteen years, twenty-three years or just a long enough time to satisfy a particular court.³⁴ Others have concluded that the principle encompasses any public resource in which the community has a special interest.³⁵ This has included submerged lands,³⁶ land over which flows navigable

resort to the physical characteristics of the riverbank is a method of ascertaining the historical levels of water where more accurate measurements are unavailable. Here we have data accurate to two decimal points. . . . We conclude the 'vegetation test,' like the mathematical averaging test, is unsuitable for present purposes.

Fogerty v. California, 231 Cal. Rptr. 810, 819 (1986) (citations omitted). See also *De Jure Maris* Cap. VI, *supra* note 23, which describes the identification of shores, discusses high and low tides, spring tides, ordinary and neap tides, reviews the means by which acquisition may be had, including custom and prescription, and considers the possibility of private ownership of the various areas.

33. See *Opinion of the Justices*, 649 A.2d 604 (Public Use of Coastal Beaches) (N.H. 1994) (not finding an answer to the question of how to establish the line); see also *South Dakota Wildlife Fed. v. Water Management Bd.*, 382 N.W.2d 26 (S.D. 1986).

34. See *United States v. Alaska*, 521 U.S. 1 (1997) (19 years); see also *United States v. California*, 382 U.S. 448, 449-50 (1966) (18.7 years); *Borax Consol. v. Los Angeles*, 296 U.S. 10, 26-27 (1935) (measured over a considerable length of time; also speaks in terms of the tide as general, usual or normal); *South Pac. Co. v. Western Pac. Ry. Co.*, 144 F. 160 (N.D. Cal. 1906); *Fogerty v. California*, 231 Cal. Rptr. 810, 819 (1996) (18.6 years or "enough" time; rejects mathematical and vegetation line tests for rivers); *Seascape Corp. v. County of Santa Cruz*, 188 Cal. Rptr. 191 (1982) (measured over a long period of time). See also *Gwathney v. State*, 464 S.E.2d 674 (N.C. 1995) (the lunar tide test is not applicable in North Carolina).

35. See *D.C. v. Air Florida, Inc.*, 750 F.2d 1077 (D.C. 1984); but see, *Larson v. Sands*, 508 N.W.2d 782 (Minn. 1993) (public not entitled to land above the intertidal zone.)

36. See *United States v. Maine*, 420 U.S. 515 (1975); see also *Martin v. Waddell*, 41 U.S. at 416; *Boone v. United States*, 944 F.2d 1489 (9th Cir. 1991) (the public trust includes all submerged lands and the seashore so long as the waters are navigable); *Capune v. Robbins*, 160 S.E.2d 881 (N.C. 1968); *King v. Oahu Ry & Land Co.*, 11 Haw. 717 (1899); cf. *Submerged Lands Act*, 43 U.S.C. § 1301.

water (fresh or salt),³⁷ dry sand beaches,³⁸ public parks or any land that possesses attributes in which the public has a found value.³⁹

The purposes that support the delimitation of this unusual species of property have historically been identified as serving the fundamental public needs of vocational navigation, fishing and commerce.⁴⁰ In more contemporary environs the reasons for subjecting property to the doctrine include sunbathing, beachcombing, walking, aesthetic enjoyment, recreation, and a myriad of other forms of pure avocational activity.⁴¹

37. See *Phillips Petroleum*, 484 U.S. at 489; see also *Alaska v. United States*, 662 F. Supp. 455, 459 (Alaska 1987); *Gianoli v. Fleiderer*, 563 N.W.2d 562 (Wis. 1997); *State v. Central Vermont Ry.*, 571 A.2d 1128 (Vt. 1989); *Bott v. Comm'r*, 327 N.W.2d 838 (Mich. 1982) (addresses inland waters; applies a floating log test to ascertain if a stream is navigable and notes that it is essentially a commercial use test; stated that the balance to be struck between competing interests should be done by the legislature and not the courts, and that the legislature should provide compensation lest there be a taking). See also *Kaiser Aetna v. United States* 444 U.S. 164, 178 (1979) (discussing the scope of the federal navigational servitude and noting that not all navigable waters are subject to servitude). Cf. *National Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) (noting that public trust in California can include non-navigable waters as well).

38. See *Phillips Petroleum*, 484 U.S. 469 (1988) (an excellent case for developing the competing views of the limits of the public trust).

39. See *Wade v. Kramer*, 459 N.E.2d 1025 (Ill. 1984) (a conservation area); see also *Paepche v. Public Bldg. Comm'n of Chicago*, 263 N.E.2d 11 (Ill. 1970) (a park).

40. See *Phillips Petroleum*, 484 U.S. at 476. See also *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892) (stating that public lands were held in trust for the people of the state so that they might enjoy the navigation of waters, carry on commerce, and fish therein); *Owsich v. State Guide Bd.*, 763 P.2d 488 (Ala. 1988).

41. See *Friends of Hatteras Island v. Coastal Resources Comm'n of N.C.*, 452 S.E.2d 337 (N.C. 1995); see also *Hayes v. A.J. Assocs. Inc.*, 846 P.2d 131 (Ala. 1993); *Klingeisen v. State Dep't of Natural Resources*, 472 N.W.2d 603 (Wis. 1991) (scenic beauty); *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist.*, 733 P.2d 733 (Idaho 1987) (aesthetic beauty); *City of Berkeley v. Super. Ct. of Alameda County*, 606 P.2d 362, 369 (Cal. 1980) (environmental needs). But see *Gianoli v. Fleiderer*, 563 N.W.2d 562 (Wis. 1997) (public trust does not include beach-combing or walking of dogs); *Bell v. Town of Wells*, 557 A.2d 168

The government may gain possession of land through a variety of means. These include conquest,⁴² discovery,⁴³ succession to the rights of a prior government or the sovereign population,⁴⁴ dedication,⁴⁵ prescriptive easement,⁴⁶ custom⁴⁷ or as the *res* of an ex-

(Me. 1989) (public trust not to be expanded beyond fishing, fowling or navigation); *Bott v. Comm'n of Natural Resources*, 327 N.W.2d 838 (Mich. 1982) (public trust does not include hunting or trapping).

42. See *Illinois Cent. R.R. Co.*, 146 U.S. at 457. See also *Hyman v. State Lands of California*, 543 F. Supp. 118 (C.D. Cal. 1982) (acquisition under treaty); *Mallon v. City of Long Beach*, 282 P.2d 481 (Cal. 1955) (revocation of a trust).

43. See *Martin v. Waddell*, 41 U.S. 367 (1842).

44. See *North Dakota ex rel. Bd. of Univ. v. Andrus*, 671 F.2d 271 (8th Cir. 1982).

45. See *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. 1964); see also *Dep't of Natural Resources v. Mayor of Ocean City*, 332 A.2d 630 (Md. 1975).

46. See *Opinion of the Justices*, 649 A.2d 604 (N.H. 1994).

In order to establish an easement by prescription, the claimant must meet the six criteria set out . . .

1. The burden of proving the elements essential to the acquisition of a prescriptive easement is on the party claiming the easement.

2. The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears.

3. The use must be adverse, hostile, or under claim of right

4. The use must be open and notorious

5. The adverse use must be continuous and uninterrupted for a period of twenty years

6. There must be substantial identity of the easement claimed

Concerned Citizens of Brunswick County Taxpayers Ass'n v. Holden Beach Enter., 404 S.E.2d 677 (N.C. 1991) (emphasis omitted). See also *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) (no prescriptive easements permitted.); *Feinman v. State*, 717 S.W.2d 106 (Tex. 1986); *Akau v. Olohana Corp.*, 652 P.2d 1130 (Haw. 1982); *Dep't of Natural Resources v. Mayor of Ocean City*, 332 A.2d 630 (Md. 1975).

47. See *Nixon v. United States*, 978 F.2d 1269, 1276 (D.C. 1992) (discussing the various means by which property may be acquired including custom); see also *Thornton v. Hay*, 462 P.2d 671 (Or. 1969); *Piper v. Voorhees*, 155 A. 556, 559 (Me. 1931); *Graham v. Walker*, 61 A.2d 98, 99 (Conn. 1905); *Bell v. Town of Wells*, 557 A.2d at 179 (no

press or implied trust.⁴⁸

Once the type of protected property is identified, either specifically or generically, the question has arisen as to whether a government can dispose of public trust property once acquired.⁴⁹ Some courts have concluded that the government cannot dispose of public trust property and that any attempt to do so is voidable or void *ab initio*.⁵⁰ To these persons the public trust doctrine may be a simple immutable principle or a means to democratize a check on a corrupt executive or legislature.⁵¹ Others have concluded that trust property can pass into private hands, while remaining quiescently impressed with the trust which can awaken any time it is in the public interest.⁵² Still others have held that government may transfer trust property so long as the grantee will place it into public service by executing a trust purpose through private initiative.⁵³ Finally, some have held that trust property may, in circumstances not fully delimited, pass unfettered into the private domain.⁵⁴

custom proved in the case.); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); *De Jure Maris Cap. V*, *supra* note 23.

48. See ARCHER, *supra* note 4, at 30; see also Slade, *supra* note 4, at 225.

49. See Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 483 (1988) (stating that the decision is governed by state law).

50. See Appleby v. City of New York, 271 U.S. 364, 394 (1926). For a list of state positions see West Indian Co. v. Virgin Islands, 643 F. Supp. 869, 876 (D. V.I. 1986) (the California Constitution prohibits alienation).

51. See Sax, *supra* note 4.

52. See Hall v. Nascimento, 594 A.2d 874, 877 (R.I. 1991); see also Lake Michigan Federation v. United States Army Corps of Engineers, 742 F. Supp. 441, 445 (N.D. Ill. 1990); CWC Fisheries, Inc. v. Bunker, 755 P.2d 1115, 1117-18 (Ala. 1988).

53. See Shively, 152 U.S. at 16; see also West Indian Co. v. Virgin Islands, 844 F.2d 1007, 1018 (3d. Cir. 1988); City of Alameda v. Todd Shipyards Corp., 632 F. Supp. 333, 336 (Cal. 1986); Besig v. Friend, 463 F. Supp. 1053, 1063 (N.D. Cal. 1979).

54. See Hardin v. Shedd, 190 U.S. 508, 519 (Ill. 1903); see also Dardar v. LaFourche, 985 F.2d 824, 829 (5th Cir. 1993); City of Berkeley v. Superior Ct. of Alameda City, 606 P.2d 362, 369 (Cal. 1980); Long Beach v. Mansell, 476 P.2d 423, 437-38 (Cal. 1970); California Co. v.

One feature of the public trust doctrine appears clear, at least in theory. A transfer of property by government must be voluntary to be effective.⁵⁵ Absent a statute to the contrary, title may not be obtained from government by operation of law through adverse possession.⁵⁶ This condition generally prevails notwithstanding open, notorious, hostile and continuous pro-active possession, under color of title or otherwise.⁵⁷

The actual contemporary definition of the public trust varies from state to state and the only certain observation that might be made about the doctrine is that there is no single or uniform, explanation or application. However, there does seem to be basic consensus that the public trust does, at least, encompass land flowed by the tide that might be put to a navigational use.⁵⁸ Perhaps this is the extent of the true scope of the doctrine. Unfortunately, the identification of a physical limitation does not definitively explain its source. The longer the doctrine is exposed to the light of analysis, the more it becomes clear that the term is truly political/legal in content, and philosophical/social in context.

Price, 74 So. 2d 1, 5 (La. 1954).

55. See *United States v. 11,037 Acres of Land*, 685 F. Supp 214 (N.D. Cal 1988). *But see* *Long Beach v. Mansell*, 476 P.2d 423 (Cal. 1970) (reclamation of land does not extinguish the public trust unless freed by the legislature); *United States v. 1.58 Acres of Land*, 523 F. Supp. 120 (D. Mass. 1981) (condemnation of land by the U.S. does not extinguish the public trust).

56. See *Latovick*, *supra* note 5 (for a review of authorities).

57. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988); *see also* *Corvalles Sand Co. v. State Land Bd.*, 439 P.2d 575, 582 (Or. 1968); *People v. Shirokow*, 605 P.2d 859 (Cal. 1980); *Idaho Forest Indus. v. Hayden Lake Watershed Improvement Dist.*, 733 P.2d 733 (Idaho 1987) (once the water has receded, the exposed land is no longer subject to the public trust and can be taken by adverse possession); *California v. Superior Ct. of Placer County*, 625 P.2d 256 (Cal. 1981) (estoppel will not apply against the government); *Amigos De Bolsa Chica v. Signal Properties, Inc.*, 190 Cal. Rptr. 798 (1983) (the Statute of Limitations will not apply against the government).

58. See *ARCHER*, *supra* note 4.

2. The Historical Jurisprudential Myth

The purported source⁵⁹ of these features of property is frequently referenced as found in Justinian's *Institutes* 2.1:

[W]e turn to things. They are either in the category of private wealth or not. Things can be: everybody's by the law of nature; the state's; a corporation's; or nobody's. But most things belong to individuals, who acquire them in a variety of ways 1. The things which are naturally everybody's are: air, flowing water, the sea, and the sea-shore. So nobody can be stopped from going on to the sea-shore. But he must keep away from houses, monuments, and buildings. Unlike the sea, rights to those things are not determined by the law of all people. 2. Rivers and harbours are state property. So everybody shares the right to fish in them. 3. The sea-shore extends as far as the highest winter tide. 4. The law of all peoples allows public use of river banks, as of the rivers themselves: everybody is free to navigate rivers, and they can moor their boats to the banks, run ropes from trees growing there, and unload cargo. But ownership of the banks is vested in the adjacent landowners. That also makes them owners of the trees which grow there. 5. The law of all peoples gives the public a similar right to use the sea-shore, and the sea itself. Anyone is free to put up a hut there to shelter himself. He can dry his nets, or beach his boat. The right view is that ownership of these shores is vested in no one at all. Their legal position is the same as that of the sea and the land or sand under the sea. 6. Corporate, as opposed to individual, property consists in things in towns . . . in fact in all things vested in the citizen body Things become the prop-

59. Over two-thirds of the *Institutes* of Justinian are taken virtually verbatim from the *Institutes* of Gaius. See OLGA ELVELINE, TELLEGEN-COUPERUS, *A SHORT HISTORY OF ROMAN LAW* 144 (Routledge 1993); see also THE *INSTITUTES OF GAIUS* (W.M. Gordon & O.F. Robinson trans. 1988); FRANCIS DE ZULUETA, *THE INSTITUTES OF GAIUS: PART II COMMENTARY* (1953, 1967). It is also important to note that notwithstanding claimed historical origin and the propensity of advocates to compare, by analogy, the public trust doctrine to the general Anglo-American subject area of trusts and uses, trusts were essentially unknown to Roman law. See GEORGE GLEASON BOGERT, *THE LAW OF TRUSTS AND TRUSTEES*, § 9 (Rev. 2d ed. 1984) ("Although trusts were not known in Roman or civil law, and at present are not recognized in the codes of most civil law countries, there have been some recent developments which may lead to greater recognition of trusts created in common law countries by courts in civil law jurisdictions.").

erty of individuals in many ways, some by the law of nature, which, as we have said, can be described as the law of all peoples, and others by our state law . . . Obviously natural law is the earlier. It is the product of the natural order, as old as man himself. Systems of state law did not start to develop until cities were founded, magistracies were established, and law began to be written.⁶⁰

Proponents of pressing land into public service have seized upon these words as reporting nothing less than a universal truth. However, they may have, in their advocacy, elevated a mere legal philosophical preference to the level of undeserved authority.⁶¹

The foundation of the principle is, unfortunately, an arguably deficient exercise in historical jurisprudential analysis.⁶² First, the *Institutes* may be of no greater than tertiary value as an authoritative resource. They have, in fact, been likened to a hornbook for the law students of the day, or at times, a normative statement of what the emperor might have wished the law to be. The *Institutes*

60. JUSTINIAN'S INSTITUTES 55 (Peter Birks & Grant McLeod trans., Cornell Univ. Press 1987).

61. The perceived needs of navigation and commerce stimulated the Roman law of the sea and shore. Piscary was also a secondary concern. "But there was also a sentiment, primarily Stoic and philosophical, that *unless* and *until* a private person or the state required exclusive control of the resource, the sea and shore should be open for the use of all." Deveney, *supra* note 23, at 21.

A Stoic philosophy became the principal influence on the Roman educated class, and on the Roman lawyers . . . [I]ts central message was that everything in nature is to be explained by reason; and every act must be justified by reason . . . [A]lthough the decline of Greece went chronologically with the rise of Rome, the Stoic philosophy found a most congenial soil in the Roman temperament too; the streak of austerity, of simplicity, of indifference to good or ill fortune, which the Romans liked to admire in themselves or in their ancestors, represented a rather similar disciplining of self . . . At any rate, the Stoic view of the world virtually conquered the mind of the late Roman republic and of the early empire; almost all the Roman jurists . . . followed Stoic teaching . . .

J. M. Kelly, *A Short History of Western Legal Thought* 48 (1992).

62. See Deveney, *supra* note 23; Comment, *The Public Trust in Tidal Areas: A Sometimes Submerged Doctrine*, 79 YALE L.J. 762 (1970).

were originally intended to serve only as a short introduction to the *Corpus Juris Civile*. They were a simple beginner's book, a map designed to order the larger law library contained in the accompanying digest and codex.⁶³ There is also considerable speculation that they contain innumerable reforms that Justinian brought into the text.⁶⁴

Second, the dependent internal reference to the law of nature⁶⁵ as the source of the doctrine infuses the principle with an elusive origin and further obfuscates its political and organic relevance.⁶⁶ In this regard, if the *Institutes* are to be of genuine

63. "Translated rather than anglicized, the name of the Institutes would be 'Introduction' or 'Basic Principles'. The Latin '*Institutiones*' comes from the verb '*instituere*'. One of whose meanings is 'to teach'. Justinian also gave the book an alternate name, '*Elementa*'. This means much the same, though there is a hint of nourishment, the basic principles on which to grow. An equivalent modern title would be 'AN INTRODUCTION TO LAW OR FIRST PRINCIPLES OF LAW'. It is a book for beginners, only one twentieth the size of the Digest. It cannot quite be called the first year course-book, because Justinian's revised system of legal education required first year students to do more. Deveney, *supra* note 23, at 12. See also THE DIGEST OF JUSTINIAN (Theodor Mommsen, Paul Krueger and Alan Watson ed. and trans.1985) (noting that the Institutes were a basic and beginners book); A. ARTHUR SCHILLER, ROMAN LAW MECHANISMS OF DEVELOPMENT 31 (1978) ("The first part of the Corpus Iuris was compiled for Justinian as an introductory course of law study for first-year law-students. It was based on earlier books of Institutes, particularly on that of Gaius, a renowned law teacher and scholar who lived in the second century of our era, some three and a half centuries before the reign of Justinian.").

64. "The pages of the *Institutes* look different from those of the *Digest*. They do not look like a patchwork of extracts. Each title appears to be a single continuous essay. But in fact, though the *Digest's* careful attributions have been dispensed with, the method of composition is the same, subject to two differences. First, the decision to create the impression of a continuous text must have involved rather more management of the extracts. Secondly, many Justinianic reforms are brought into the text." Birks & McLeod, *supra* note 60, at 12. There is also indication that Justinian was influenced by the Stoic perspective. See *supra* note 61 and accompanying text.

65. See *supra* note 60 and accompanying text.

66. One author writes:

[T]he Roman philosophers . . . used the concept of nature in a way very different from what the Roman jurist meant by

it; and the jurists' usage, in its turn, was not uniform. All these different employments of 'nature' represented at the same time so many expressions of legal theory It is in Cicero, who was writing in high-minded academic detachment, that we encounter a conception of natural law which not only strongly resembles the Christian teaching but, very likely, has actually contributed something to the formation of that teaching. In his treatise *De legibus* ('On the Laws'), certainly influenced both by Aristotelian and by Stoic doctrine, he presents nature as the source of precepts to the human individual, a source accessible to every such individual through his or her reason; and this provision for human conduct has its origin in God.

Kelly, *supra* note 61, at 57-58 (1992).

If we move now to the Roman jurists we see that, although they very frequently speak of natural law and natural reason (*ius naturale, naturalis ratio*) as well as using the word 'natural', in certain cases, to qualify concepts like possession and obligation, they mean by this usage, in almost every case, something quite different from Cicero's concept of a primordial higher law. When they speak of natural law or natural reason underlying some rule or institution they are talking not of the law or reason of God, but of the nature of things on the ground, things as they are, things for which common sense, the facts of life, the essence of business relations, and so on, 'naturally' suggest the appropriate legal treatment. "For 'natural' was to them", wrote Ernst Levy, "not only what followed from physical qualities of men or things, but also what, within the framework of that system, seemed to square with the normal and reasonable order of human interests and, for this reason, not in need of any further evidence."

Id. at 61 (citing ERNST LEVY, *Natural Law in Roman Thought*, in *Studia et Documenta Historiae et Iuris*, 7, 15 (1949)). See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS*, 206-10 (1980).

But there is a very much more serious problem, deriving from the simple fact that the whole of Justinian's 'Corpus of Civil Law', including the *Digest*, was given the force of law; it was to be living law, not history, and it alone was to govern the lives of the people and the practice of the courts. Now since the writings of the eminent jurists of the distant 'classical' past, though in general too valuable to lose, contained much that was by Justinian's time obsolete and had to be abolished, it was necessary to alter or 'interpolate' their excerpts in the *Digest*, to bring them to date, expunge refer-

precedential value, there must be due sensitivity to the delicate balance of the social/political context from which they were drawn. There must also be sensitivity to the jurisprudential perspective that the *Institutes* reflect.⁶⁷ For example, to Justinian, the law of all peoples and the law of the state are distinguished as follows:

All peoples with laws and customs apply law which is partly theirs alone and partly shared by all mankind. The law which each people makes for itself is special to its own state. It is called 'state law', the law peculiar to the state. But the law which natural reason makes for all mankind is applied everywhere. It is called 'the law of all peoples' because it is common to every nation Law comes into being without writing when a rule is approved by use. Long-standing custom founded on the consent of those who follow it is just like legislation The law of nature, which is observed uniformly by all peoples, is sanctioned by divine providence and lasts forever, strong and unchangeable.⁶⁸

ences Only, therefore, if we can distinguish the original from the interpolated in these fragments can we say what the law was in the opinion of Ulpian and the rest; and in many cases we cannot do this with conviction. If all the places in the *Digest* that have been incriminated for interpolation in the last hundred years were laid end to end and expunged there would be little left

J.A. CROOK, *LAW AND LIFE OF ROME 14-15* (H.H. Sculland ed., 1967).

67. The influence of Roman law in the formation of English law is not without controversy. See JUSTINIAN'S *INSTITUTES*, *supra* note 60, at 8 ("In England and America it is more a question of keeping alert to borrowings and avoiding explanations which are blind to the Roman teaching which is always in the background."); WILLIAM L. BURDICK, *THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW* 56-57 (1938) ("Blackstone . . . emphasizes the greater importance of the Common Law of England, and attributes the continued teaching, in his day, of the Civil Law in the English universities to the influence of the "Poppish clergy." Blackstone's views were influenced, doubtless, by his political and ecclesiastical environment."). See also *New Perspectives in the Roman Law of Property: Essays For Barry Nicholas* (Peter Birks ed., 1989); W. W. BUCKLAND & ARNOLD D. MCNAIR, *ROMAN LAW & COMMON LAW: A COMPARISON IN OUTLINE* (1936); SCHILLER, *supra* note 63, at 10.

68. JUSTINIAN'S *INSTITUTES*, *supra* note 60, at 37.

Is it not possible, if not probable, that people of diverse cultures, varying social histories, and different temporal experiences would view state law and natural law in different ways?⁶⁹ Undoubtedly, it has been suggested that Roman jurists and Roman philosophers had divergent views of the essential significance of natural law.⁷⁰ In addition, similar terms often possess different significance to different peoples at different times. One writer, commenting on the work of the 13th century theorist, Bracton, noted that "first of all : . . in England less attention is given to the natural law than in any other region of the world because the King of England is called the Lord of the Seas on account of the power he has over the waters."⁷¹ Such qualifying views raise doubt about the utility and perhaps integrity of either resting contemporary legal principle upon such an historically intuitive device or to impress a notion of public trust as authority upon people who do not fully comprehend its antecedents, context or consequences.⁷² The insight of the *Institutes* may severely limit,

69. The concept of rights in the common law is quite different from that found in Roman law. Some have suggested that there were no true rights of citizens as we have come to know them in Roman law. Consequently, care should be taken to avoid transporting such principles into contemporary legal thought. See also Finnis, *supra* note 66.

70. See *supra* note 66.

71. Deveney, *supra* note 23 (citing Henry de Bracton & Portius Azo, Selected Passages From The Works of Bracton and Azo 125 (F. W. MAITLAND ed. 1895)).

72. Prior to 1256, Bracton wrote a book entitled DE LEGIBUS ET CONSUEUDINIBUS ANGLLIAE that addressed the interests in the foreshore and was claimed to have been based upon Roman law.

It will be noted that sec. 5 of the *Institutes*, which states that there can be no property in the shores, is wholly omitted by Bracton, and upon this Hall (p. 105) argues that Bracton did not mean to deny that the ownership (such as it was) rested with the King, asserting only that the use was common to all, as that of the sea was, and (says Hall) so far he will be found essentially right; but it is submitted that this reasoning is unsound, for Bracton must have been well aware that throughout the kingdom, the foreshore in the point of property was in very numerous places vested in the lords of manors, although subject to the *jus publicum*. It has, however, been clearly decided that many of the passages which Bracton took from the Civil Law are inconsistent with, and form no part of, the English Common Law.

rather than liberate, the public trust doctrine. Therefore, it is somewhat disruptive that many courts and commentators have embraced the *Institutes* as the germinal voice of public reason, particularly when the apposite traditions are those of another civilization under the influence of variant social mores, and perhaps poorly understood by those who put them to use.⁷³

Third, from a very practical sense, many of the actual primary sources from which the *Institutes* were derived have either been altered, destroyed or remain undiscovered. Additionally, the secondary and tertiary commentaries are generally inaccessible to anyone not fluent in Greek, Latin or German. Furthermore, even if interested parties possess the necessary ability and curiosity, the documents are not widely available. Finally, there is legitimate speculation as to whether the sources report actual controversies and resolutions or whether they are, in fact, hypotheticals or moot exercises employed by scholars of the day as parables.⁷⁴

MOORE, *supra* note 23, at 33 (1888).

73. The Roman view adapted along with their culture:

At the moment when the Roman law first yields historically reliable data, i.e., the era of the Twelve Tablets or a little earlier, say the late sixth century BC, the institution of private property is already clearly established It is, however, agreed that at an earlier stage some form of tribal or collective ownership of land existed Only very sparse traces of anything like a theory of private property, whether of its origin or of its justification, appear in Roman literature. The picture drawn by Lucretius . . . suggests a primeval condition in which all wants could be satisfied from the bounty of the earth, a condition then disrupted by the effects of greed . . . the order subsequently imposed by men on themselves to avert chaos implies the protection of the individual in the enjoyment of what is 'his'. Similarly, Cicero, in the only explicit ideology of property that the Roman literature seems to contain, compares the world's goods to the seating in a public theatre: 'just as, though the theatre is something publicly owned, yet one can properly say that the seat each person has taken is his, so in the state or in the world, though these too are common property, still no argument of right can be opposed to the idea that each man's goods should be his own'.

KELLY, *supra* note 61, at 76-77 (footnote omitted).

74. CROOK, *supra* note 66, at 15. [W]e know something of the imaginary cases that were argued in the rhetorical schools . . . and the

As a result, it is unlikely that policy or decision makers will ever be able to formulate a personal, genuine, and informed opinion of the traditions upon which they purport to rely in the course of reallocating contemporary interests in property using the public trust doctrine. Most unfortunate, however, may be that due to the common law tradition and shortsighted use of the usual technique of legal synthesis, few will even try. In a veritable rush to constitute the policies of public interest in natural resources, some may instead choose to rest their decisions upon the equivocal or inaccurate judgments of prior authorities. While this condition is not alien to our American judicial history, and other influential decisions have been founded upon a misreading of precedent,⁷⁵ or the presumed existence of a law that, unknown to the court, did not exist,⁷⁶ it may not be a characteristic that

cases in the Digest have a quite different ring of practicality - even if imaginary they are in terms of law and society The Digest often gives its litigants stock names (Seius, Titius and so on), and cases where these names appear may well be invented for discussion *Id.* See also Anthony Maurice Honore, *Justinian's Digest Work in Progress* (Scientia Verlag Aalen, 1983) (Oxford 1971); IV Digest of Justinian, *supra* note 63.

75. Justice William Douglas wrote an opinion in *Bowles v. Willingham*, 321 U.S. 503, 520 (1944), concluding that simple judicial review of an administrative decision would satisfy the rigors of procedural due process. In so doing he cited the case of *Phillips v. Commissioner*, 283 U.S. 589 (1931) as support for the proposition. Douglas, paraphrasing Justice Brandeis in *Phillips*, stated: "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Id.* at 596-97. While the *Phillips* case does indicate that the timing of due process protection may be adjusted so as to provide a hearing after property rights have been affected, it emphasized that the hearing that was to be provided in the case was "a complete hearing de novo" *Id.* at 598. Such was not the conclusion in *Bowles*. Commentators have suggested that Justice Douglas set a new and diminished jurisprudential standard of due process review while misreading or not fully appreciating the limitations in the material he cited as his influence.

76. In *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), Chief Justice Hughes wrote for the Court. The case arose when certain individuals were criminally charged with violating Petroleum Code, Article III, Section 4, a portion of the National Industrial Recovery Act. The Petroleum Code, however had been modified by an executive order of Presi-

ought to be revered and consciously inculcated for the sole purpose of achieving a preferred social goal.

Finally, there is ample commentary that reflects or admits of the discontinuity in the historical development and interpretation and the rather serious disagreement over the legal basis, definition, applicability and vitality of the public trust theory.⁷⁷

dent Roosevelt in which Section 4 had been eliminated for a period apposite to the charges against the defendants. Noting the oversight, the Court stated:

The controversy with respect to the provision of . . . the Petroleum Code was initiated and proceeded in the courts below upon a false assumption. That assumption was that this section still contained the paragraph (eliminated by the Executive Order of September 13, 1933) by which the production in excess of assigned quotas was made an unfair practice and a violation of the code. Whatever the cause of the failure to give appropriate public notice of the change in the section, with the result that the persons affected, the prosecuting authorities, and the courts, were alike ignorant of the alteration, the fact is that the attack in this respect was upon a provision which did not exist. . . . When this suit was brought, and when it was heard, there was no cause of action for the injunction sought.

Id. at 412-13.

This case was the stimulus for creating the Federal Register.

77. See MOORE, *supra* note 23. In speaking of the influence of the Magna Carta as a source of public interest one author notes: "[L]imitations, found in Chapters 16 and 23, are in themselves of little practical significance and are, in their origins, historically unrelated to what they became through the process of creative judicial misunderstanding in favor of the public's rights." Patrick Deveney, *Jus Publicum and the Public Trust: A Historical Analysis*, 1 SEA GRANT L. J. 13, 39 (1976). In the context of analyzing the New Jersey case of *Arnold v. Mundy*, 6 N.J.L. 1 (N.J. Sup. Ct. 1821), the same author observed: "As a policy decision to reclaim for the people of the coastal area of the state which would have otherwise been *entirely* in private hands, *Arnold v. Mundy* is an impressive display of judicial dexterity; as history it is nonsense." Deveney, at 56. In another article commenting upon the public trust doctrine and its development, Deveney writes: "The current situation is unsatisfactory. The protection afforded the public interest in tidal areas lags behind an exploding demand/supply ratio In part because of this lag, and in part because of its history, tidal doctrine is over-complex, if not confused." 79 YALE L.J., *supra* note 62, at 773. Commentators are not, however, alone in the equivocation; judges could be in-

This commentary actually includes a number of the seminal and most influential judicial opinions, which have expanded the public trust doctrine. The obfuscation of principle in these sources is, however, most disturbing. To highlight an elemental example, the Magna Carta has often been referenced as significant in the chain of English authorities verifying the public interest in the seashore. The relevant section of that venerable document, chapter 33, states that "(a)ll kydells (weirs) for the future shall be removed altogether from Thames and Medway, and throughout all England"78 Unacknowledged in many references, however, is the immediately adjacent and qualifying language in the document that continues, "except upon the seashore."⁷⁹ The longevity of this unfortunate tendency to distort the public trust doctrine could be exemplified by another reference to the thirteenth century work of Bracton purporting to reflect the state of English law at the time. Claiming to rely upon Roman Law, Bracton concluded that the sea and seashore are common to all.⁸⁰ However, in so doing he altered the Roman texts and omitted the significant qualification found therein that

cluded within their ranks. For example, Chief Justice Taney, writing in *Martin v. Waddell*, 41 U.S. 367, 410 (1842), noted: "We do not propose to meddle with the point which was very much discussed at the bar, as to the power of the king, since the Magna Carta, to grant to a subject a portion of the soil covered by the navigable waters of the kingdom, so as to give him an immediate and exclusive right of fishery, either for shell-fish or floating fish, within the limits of his grant. The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled.

78. WILLIAM SHARP MCKECHNIE, *MAGNA CARTA A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 403* (1905). "It has been gratuitously assumed that the motive for prohibiting these 'kydells' must have been . . . to prevent any monopoly in rights of fishing. Law courts and writers on jurisprudence for many centuries endorsed this mistaken view, and treated the Magna Carta as an absolute prohibition of the creation of 'several' (or exclusive) fisheries in tidal waters. Although this legal doctrine has been frequently and authoritatively enunciated, it rests on a historical misconception. The Great Charter sought to protect freedom of navigation, not freedom of fishing; and this is obvious from the last words of the chapter . . . 'except upon the sea coast.'" *Id.* at 403.

79. *Id.* See also YALE L.J., *supra* note 62, at 766; Deveney, 1 SEA GRANT L.J., *supra* note 23, at 39; see generally *Martin v. Waddell*, 41 U.S. 367 (1842).

80. See MOORE, *supra* note 23, at 33-34.

the property of the shore was in no one. He also ignored Azo, his authoritative source, who explained that such common things could be appropriated to private hands by occupation.⁸¹ Commentators have well noted this preference adjustment to principle. "It will therefore be seen that Bracton must have been well aware that the property in the foreshore was, at any rate in some cases, vested in the subject, and for that reason he omitted the passages in the *Institutes* which avers that the property in it cannot be owned by anyone."⁸² Other writers have labeled such events as creative judicial misunderstandings.⁸³ Scholars, too, seem at times to conveniently overlook that certain authors did not intend to be mere reporters but, rather, were position advocates.⁸⁴

81. *See id.*

82. *See id.* Also of interest is *Blundell v. Catterall*, 106 ENGL. REP. 1190, 1198 (K.B. 1821), an important germinal English case in which Justice Holroyd reviews and discounts claims made upon the authority of Justinian and Bracton, rejecting them as inconsistent with established principles of English law. *See also* Deveney, 1 SEA GRANT L.J., at 40. In discussing the Magna Carta Chief Justice Hale notes: "The exception of weares upon the sea-coasts, and likewise frequent examples, some whereof are before mentioned, make it appear that there might be such private interests not only in point of liberty, but in point of propriety, on the sea-coast and below the low-water mark; for such were regularly all weares." *De Jure Maris supra* note 23 at 389.

83. Deveney, 1 SEA GRANT L.J., *supra* note 23, at 39.

84. Thomas Digges wrote a treatise in 1568-69 entitled PROOFS OF THE QUEEN'S INTEREST IN LANDS LEFT BY THE SEA AND THE SALT SHORES THEREOF. This tract is frequently noted as the source of the *prima facie* theory of the public trust.

By this treatise was first invented and set up the claim of the Crown to the foreshore, reclaimed land, salt marsh, and derelict land in right of prerogative. Mr. Digges boldly affirms that no one can make title to the foreshore or land overflowed by the sea, and says it is a sure maxim in the common law that "whatsoever land there is within the King's dominion whereunto no man can justly make property, it is the King's by prerogative"

But it has been decided that Mr. Digges' argument is unsound in the law. It is now settled that the foreshore may be shewn to be parcel of the manor . . . yet we find the officers of the Crown still at this day persistently asserting Mr. Digges' contention Upon Mr. Digges' theory they pro-

Therefore, if we are swayed by the emotional appeal of an argument, accept its purported weight, and fail to critically analyze its synthesis with other seminal principles of our democratic republic, we likely invite the doctrinal indeterminacy and disintegration of principle observed in some of the recent public trust cases, and some would claim, certain of the recent Supreme Court takings decisions. Perhaps we ought to take heed of the observations of Birks & McLeod in their translation of *The Insti-*

ceed from day to day, and have done so persistently since 1830, as if the theory were true in fact. When a question arises as to the true ownership of a piece of foreshore, they institute no inquiry to see whether it has been granted out; they make no investigation as to whether the true owner can shew a sufficient enjoyment for the requisite statutory period; but they sell or lease it behind his back, without giving him notice or opportunity to make good his claim; and if he asserts it by taking steps against some trespasser, or by doing any substantial act himself, they call upon him to shew his grant and his evidence; if he produces his grant (supposing him to have one in existence), they question its validity; if he produces his evidence of user, they treat it as usurpation, or endeavor to explain away the affect of it by alleging that his acts and those of his predecessors have been done in the exercise of his and their rights of water frontage. They proceed against him by the arbitrary and unconstitutional process of information (without any previous inquisition to charge the land to the Crown), and they make him set out his title and discover his documents, and answer interrogatories of the most searching kind; they refuse any discovery of their own documents, and when he has done his utmost to set forth every scrap of information in his power, they arbitrarily amend the information without leave of the Court, and put him again through the same process, and further re-amend, and further re-amend the information *ad infinitum* arbitrarily at their own option and without control of the Court. That kept the suit hanging over his head for years until all his witnesses are dead, for they cannot be ruled on as an ordinary litigant can; and they have it in their power to crush him with costs which he is helpless to avoid, and this wholly and solely upon an allegation of a theory, a theory of fact which is untrue, and which was invented by the ingenuity of Mr.

Thomas Digges in the treatise set out below.

MOORE, *supra* note 23, at 182-84 (referring to Digges' original treatise). Cf. John Selden, *Of The Dominion or Ownership of the Sea* (1972).

tutes: "In England and America it is more a question of keeping alert to borrowings and avoiding explanations which are blind to the Roman learning which is always in the background."⁸⁵

The real question may be whether the ethics of the legal system can tolerate the intensified use of such an amorphous fiction considering the structural violence that it does to other seminal principles of legal process. The use of the public trust doctrine as used in the service of immediate social reorganization may expose the operative attributes of the traditional common law to ridicule as a mere contrivance. As a byproduct it may also bring the organizing themes of precedent and *stare decisis* into disrespect. Like individual thoughts of human mortality, the broader jurisprudential content of these themes may be found to have been conveniently thrust into the legal subconscious to permit one to meet the daily challenges of the living law. However, at the least, an honest and analytical examination of the principle may demonstrate that no matter how crisply and cleanly we would like to pretend that the drape of justice is cut, the edges are, in fact, unfinished. If lawyers were to assume that posture, they might be better equipped to meet the challenges of tomorrow.

II. THE PUBLIC TRUST IN DELAWARE AND NEW JERSEY

After presenting the broad policy observations, it is now instructive to briefly compare and contrast the development of the public trust doctrine in two adjacent jurisdictions that share a body of water affected by the tide, namely Delaware and New Jersey. Through this comparison the similarities, and more importantly the differences, within what has been presented by advocates as a uniform principle become distinguishable.

In the early case, *New Jersey v. Delaware*,⁸⁶ the border between the two states upon the Delaware River and Bay was at issue. The title in controversy upon which Delaware relied in part, until the War of Independence with England, was that transmitted to William Penn and his successors by estoppel from the Duke of York in 1682.⁸⁷ The claim thereafter was founded upon a transfer in

85. JUSTINIAN'S INSTITUTES, *supra* note 60, at 9.

86. 291 U.S. 361 (1934).

87. *Cf.* *Martin v. Waddell*, 41 U.S. 367 (1842).

law on July 4, 1776 and a confirmation of the transfer by the Treaty of Paris in 1783. In deciding the dispute, the Court addressed certain common law principles that had an early influence upon defining the principles of the public trust.

In response to a claim by New Jersey that the Crown was without power to grant away soil beneath navigable waters, the Court noted “[t]here is high authority for the view that power was in the Crown by virtue of the *jus privatum* to convey the soil beneath the waters for uses merely private, but subject always to the *jus publicum*, the right to navigate and fish.”⁸⁸ While the grant at issue was an instrument of government, the Court did note, in addressing whether that title was impaired by the wharfing out into the river by the State of New Jersey, that in Delaware, unlike New Jersey, title to the foreshore is in the riparian proprietor. In New Jersey the common law rule that the state owns the foreshore has always been followed, i.e., the riparian owner owns only to the high water mark. In Delaware, however, the riparian owner holds to the low water mark.⁸⁹ In settling the dispute over ownership of the submerged and tidal lands, the Court concluded that within the twelve mile circle of the specific grant, near New Castle, the river and the subaqueous soil up to the low water mark on the New Jersey side belonged to Delaware and below the twelve mile circle and without the grant the boundary was the middle of the ship channel in the Delaware River and Bay. The Court also acknowledged the diversity in defining coastal boundaries.

Having noted the generic issues that implicate the character of governmentally owned property at the periphery of fast land, the identified but limited purposes that define the character from the viewpoint of the Supreme Court, and the diverse application to geographic boundaries within the subject states, it would now be propitious to turn to a concise survey of the respective interpretations of the public trust as found in New Jersey and Delaware.

88. 291 U.S. 361, 373.

89. *New Jersey v. Delaware*, 291 U.S. 361, 375 (1934).

A. *The New Jersey View*

New Jersey has employed quite an expansive interpretation of the Public Trust Doctrine in its contemporary decisions.⁹⁰ The current tone was begun in the case of *Borough of Neptune City v. Borough of Avon-By-The-Sea*.⁹¹ The question before the court was whether an oceanfront municipality could charge residents different rates than non-residents for use of a municipally owned beach area.⁹² In the course of its decision the court observed that “[y]ears ago Avon’s beach, like the rest of New Jersey, was

90. The State of New Jersey has instituted a program whereby it has identified certain lands previously flowed by the tides and that were purported to have been filled and sold to private persons. The State has proceeded to offer to quiet title to said lands and transfer title to the holders upon payment of a fee. See Marc Duvoisin, *On Tidal Lands, Homeowners’ Nightmares Come True*, PHILADELPHIA INQUIRER (October 5, 1986); see also Marc Duvoisin, *Its Tidal-land Origin Haunts Exclusive Avalon Neighborhood*, PHILADELPHIA INQUIRER (October 6, 1986); Dan Weissman, *Riparian Rights Buy-Back Clouds Title and Angers Homeowners at Shore*, THE SUNDAY STAR-LEDGER (October 2, 1988). See also John P. Ellington et al., Comment, *State Riparian Claims: A New Direction in Revenue Raising*, 2 DICK. J. ENVTL. L. & POLICY 35 (1992); William E. Anderson, Esq., Deputy Attorney General and Special Counsel to the Tidelands Resource Council of New Jersey, *State Tidelands in New Jersey and the Public Trust Doctrine*, Lecture at The Dickinson School of Law (Nov. 24, 1992). This is not unlike early activities of the Crown in England to support its continued needs:

On the accession of James I (knowing, as we do, the exalted notion that King had of the rights of the prerogative) one is not surprised to find that the efforts of his officials were redoubled. This searching and careful inquiry usurpations, or supposed usurpations, of the rights of the Crown not unnaturally brought into existence a class of persons known as “title-hunters,” who made a regular profession of gathering information respecting titles in order to discover some flaw in them by which lands might be brought into the net of the Exchequer commissioners with a view to the impeachment of the title on behalf of the crown, or the extortion of blackmail for a new grant to cure the supposed defect in the title.

MOORE, *supra* note 23, at 16, 170-71. The lands would then be resold either to the original transferee or to another member of the public.

91. 294 A.2d 47 (N.J. 1972).

92. See *id.* at 48.

free to all comers."⁹³ Early statutes had granted to municipalities the power to institute charges for beach use. These were judicially characterized as a mere delegation of state police power, and extended to "any municipality bordering on the Atlantic Ocean . . . which owns or shall acquire, by any deed of dedication or otherwise, lands bordering on the ocean . . . or easement rights therein"⁹⁴ In concluding that the borough may not discriminate against non-residents by charging the different fees, the court rested its decision on what it perceived as a modern meaning of the public trust doctrine.⁹⁵

There are several important questions that might be asked. First, did the dry sand area under consideration possess the geomorphological characteristics that, in the language of cited precedent, justified special treatment? Second, was it necessary or proper for the court to rely upon an amplified doctrine of public trust for the purpose of deciding the case when there were more accepted and traditional doctrines within municipal law that could have been employed? Third, was the creeping expansion of the doctrine consistent with a genuine respect for such tenets of legal decision making as precedent and *stare decisis*? Fourth, did the decision demonstrate due cognizance of the broader and traditional policies of property law including the favored stability of titles and the demands postulated by the takings concerns as found in the U.S. Constitution?

In this regard, there are several important observations that can be made about the opinion. First, the court referenced the early case of *Arnold v. Mundy*⁹⁶ in support of its application of the public trust doctrine. That case indicated: "[T]he things which constitute this *common property* are things in which a sort of transient usufructuary possession, only, can be had"⁹⁷ The *Avon* court never explained, however, why the physical character of the fast lands of the dry sand area were so ill-defined or so different from other inland properties as to justify it falling within the select class of public trust property and therefore, require

93. *Id.* at 49.

94. *Id.* at 49-50.

95. *See id.* at 54.

96. 6 N.J.L. 1 (Sup. Ct. 1821).

97. *Id.* at 71.

differential treatment.⁹⁸ Second, the *Avon* court observed that where the upland sand is owned by a municipality, a political subdivision of the state, and when the area is dedicated to public beach purposes, it must be open to all on equal terms.⁹⁹ Would this not have been an adequate, simple and direct (and, perhaps, the only) foundation upon which to place the legal conclusion? Third, the *Avon* court stated that the scope and limitations of the doctrine had never been defined with any precision in New Jersey.¹⁰⁰ The court never explained, however, why it was proper to depart from traditional notions of *stare decisis* and available precedent and conclude that the application of the doctrine in this instance was natural, predictable and consistent with sound legal decision-making. Fourth, and important to comprehending the scope of the court's action, it extended the public rights in tidal lands beyond the prerogatives of fishing and navigation to include recreational uses.¹⁰¹ It stated: "The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit."¹⁰² Should not such a change have reflected due considerations of the principles of eminent domain and the advised conditions under which retrospective alteration of land titles should be made?

Divested of the perspective of social manipulation of land management, the *Avon* decision should be read as simply stating two principles. First, the geomorphological characteristics of some areas may make it difficult to adequately identify the features necessary for complete transfer into private ownership. These areas may, therefore, be included within an expanded government interest and the public trust. Second, a cognizable principle of state and local government law suggests that when a municipality is sub-delegated the authority of police power over state owned or interested property (the intertidal zone and other public property held in a municipal capacity), it must honor the

98. See 294 A.2d at 54.

99. See *id.*.

100. See *id.* at 53.

101. See *id.*

102. *Id.* at 54.

terms of any public dedication or transfer into an explicit public trust, and govern these areas in a responsive and even-handed manner for the sovereign of the state. Unfortunately, the court chose to reject this elemental path.¹⁰³ Instead, the decision has been interpreted as implying that even land possessing the usual characteristics that make it capable of private ownership, e.g., the dry sand area, may be impressed with the burden of an inchoate, expanded and positive right to public access through the public trust doctrine, and in the judgment of a court an execution of this interest is proper whenever the public develops and expresses a desire to use it.

*Van Ness v. Borough of Deal*¹⁰⁴ continued the trend of judicial activism. In that case the public advocate of New Jersey brought suit against a municipality, charging that it had engaged in discriminatory practices in the maintenance and operation of publicly owned beach and related facilities.¹⁰⁵ A municipally owned casino was located on the South Beach and was operated on a restricted basis.¹⁰⁶ The public possessed an unrestricted right to bathe and swim in the ocean in front of the casino, and it was also allowed use of a fifty-foot wide strip of dry sand area adjacent to the foreshore at the site.¹⁰⁷ The dry sand immediately in front of the casino was reserved, however, for casino members and guests.¹⁰⁸ The original suit sought to open the casino facilities and its adjacent dry sand beach to the public.¹⁰⁹ The trial court sustained the proposition that the facilities and beach should be open to the public, and based the decision on the concept of municipal power and equal protection.¹¹⁰ On appeal to the Appellate Division, the Superior Court concluded first, that there was no denial of equal protection since the classifications of membership were reasonable, and second, that the ca-

103. *See id.* at 51.

104. 393 A.2d 571 (N.J. 1978).

105. *See id.* at 571.

106. *See id.* at 572.

107. *See id.*

108. *See id.*

109. *See* 393 A.2d 571, 572 (N.J. 1978).

110. *See id.*

sino beach had not been dedicated to the general public.¹¹¹ As a consequence, it held that the municipality could restrict use of the area.¹¹² The public advocate appealed the decision to the New Jersey Supreme Court.¹¹³

Before the Supreme Court, the public advocate abandoned the claim that the casino facilities were subject to the public trust and must, therefore, be opened to the public.¹¹⁴ The sole contention was that the dry sand beach, seaward of the casino, should be subject to the doctrine and open to the public.¹¹⁵ The court held that the municipally owned upland sand area that was adjacent to tidal waters had to be open to the public under the public trust doctrine.¹¹⁶ In so doing it abandoned the limitation found in *Avon* that the upland must be dedicated to public beach purposes in order for the doctrine to apply.¹¹⁷ The *Van Ness* Court determined that notwithstanding that Deal had never dedicated the area to the public, the beach was dedicated to recreational purposes, and this was sufficient to require that it be open to the public.¹¹⁸

In the course of its decision, the court opined: "If the area, which is under municipal ownership and dedication, is subject to the Public Trust Doctrine, and we hold that it is, all have the right to use and enjoy it. Deal cannot frustrate the public right by limiting its dedication of use to residents of Deal."¹¹⁹ It is this sentence, rather elusive in its structure, that liberates the opportunity for infusion of social policy and may, in fact, more properly reflect a policy predisposition than a strict legal analysis. Thus, were it to have been interpreted to mean that any dry sand area that is owned by a municipality becomes impressed with the terms of the public trust, then it is through a principle of basic municipal law and a delineation of the field between

111. *See id.*

112. *See id.*

113. *See id.* at 572-73.

114. *See id.* at 573.

115. *See* 393 A.2d 571, 573 (N.J. 1978).

116. *See id.* at 574.

117. *See id.* at 573.

118. *See id.* at 573-74.

119. *Id.* at 574.

public and proprietary governmental ownership that the public gains the right of access. If the sentence is read, however, as implying that all recreational areas adjacent to the intertidal zone must be open to the public, as some public advocates have suggested, it might be an ambitious, and perhaps improper, judicial abrogation of private property interests. The *Deal* court, in fact, failed to base its decision upon allocated municipal responsibility. Although it did try to take care to point out that it did not intend to create a public interest where none existed but was merely recognizing the preexistence of the right,¹²⁰ there was no indication that any attempt was made to elicit evidence of such a proprietary condition.¹²¹ To the contrary, reliance was placed upon a theory of trust "molded and extended to meet changing conditions and the needs of the public. . . ."¹²²

In that regard, certain questions might be posed. If effect is given the latter interpretation, is there any significance to municipal ownership? Is it only land when governmentally owned that can be subject to the doctrine? Can land be freed of the trust if transferred out of public ownership? These are questions that the later courts would address. At what point is it, however, that old standards are so adaptable that they lose their past character and create totally new expectations?¹²³

The decision in *Matthews v. Bay Head Improvement Association*¹²⁴ suggested answers that appeared to favor public rights. In *Matthews*, the court addressed the issue of whether the public had a right to use dry sand areas, not owned by a municipality but by a quasi-public body, as ancillary to an enjoyment of tidal lands. In that decision, the court explicitly acknowledged that the public trust doctrine had expanded to include municipally owned dry sand areas. Following an extensive review of the mounting demands for recreational facilities by the public and the various policies that have responded to the claims, the court concluded:

120. See 393 A.2d 574 (N.J. 1978).

121. Cf. *Seaway Co. v. Att'y General of Texas*, 375 S.W.2d 923 (Tex. 1964).

122. 393 A.2d at 573.

123. See generally, *Hyland v. Borough of Allenhurst*, 372 A.2d 1133 (N.J. 1977).

124. 471 A.2d 355 (N.J. 1984).

We see no reason why rights under the public trust doctrine to use the upland dry sand area should be limited to municipally-owned property. It is true that the private owner's interest in the upland dry sand area is not identical to that of a municipality. Nonetheless, where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interest of the owner.¹²⁵

In its decision the court disclaimed any reliance on the traditional acquisitive theories of dedication or prescription.¹²⁶ Instead, it chose to ground itself squarely on a newly defined public trust doctrine.¹²⁷ In effect the court employed a balancing test, founded in the spirit of the existential struggle with act utilitarianism, that emphasized a heightened attention to the public interest in use of property.¹²⁸ Continuing to be absent in the analysis, however, was any discussion of the stability of title in land, the essential qualities of private ownership including the right to exclude others, constraints upon retrospective alterations of the definitions of land title, and any limits upon the public interest in communal use of property that may be found in the prohibitions of takings.

In sum, it might be observed that New Jersey has generally taken a politically active and acquisitive approach to the public trust doctrine, and the courts have responded in support. In recent years, however, the effort seems to have begun to subside. Perhaps this is in response to the backswing of the pendulum of public opinion. For example, The New Jersey Office of the Public Advocate, the moving force in many of the public trust cases,

125. 471 A.2d at 365.

126. *Id.*

127. *See id.* at 365-66.

128. *Cf. Mathews v. Eldridge*, 424 U.S. 319 (1976) (a Due Process case balancing public and private interests). Justice Brennan in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) purports to suggest that the standards applied in takings cases had been the same as those in the due process and equal protection cases. In the opinion of the Court, Justice Scalia suggests to the contrary: "[O]ur verbal formulations in the takings field have been generally quite different. We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, not that 'the State *could rationally have decided*' that the measure adopted might achieve the States objective." 483 U.S. at 836 n.3.

was dismantled by the Governor of the State.¹²⁹ The concentric circles created by the impact of the New Jersey cases, however, are still being widely felt. The decisions are frequently (although, perhaps uncritically) cited as influential authority in definition of the doctrine, and the offspring of the supporting cast are alive in other jurisdictions. For example, a graduate of Rutgers Law School recently filed suit against the City of Greenwich, Connecticut for having excluded him from running on the beach during his law school years.¹³⁰

B. *The Delaware View*

The Public Trust Doctrine has found a respected place within Delaware jurisprudence. While there are few reported cases, the clear and concise explanation and application that is contained in those that are found appears to suggest a conservative and less judicially active approach. They claim to strike a cogent legal balance between private and public rights in property that accepts a more traditional view of Anglo-American property law. The continuity in the synthesis of the decisions seems to support an historic view of long standing policies of property law that favor stability in title. There appear to be two seminal cases, namely, *Buckson v. The Pennsylvania Railroad Company*¹³¹ and *Groves v. Secretary of the Department of Natural Resources and Environmental Control*.¹³² *Buckson* concerned a dispute between the State and the Railroad over title to a strip of land lying along the westerly shore of the Delaware River between high and low tide. Dela-

129. The Office of the Public Advocate was dismantled by Governor Whitman in 1994 as a cost-saving measure.

130. Arthur Hayes, NATIONAL LAW JOURNAL A4 (August 11, 1997) (Brenden Leydon, of Stamford, an attorney and former student at Rutgers Law School, sued Greenwich, Connecticut to gain access to the public beach). Arguments were presented before Superior Court Judge Edward Karozon Jr. in March 1998. On July 9, 1998 the Judge found for the Town of Greenwich, and it is evident that Mr. Leydon intends to appeal. See Jane Doe, Judge allows restricted bench scene, THE HARTFORD COURANT, page A3 (July 10, 1998).

131. 267 A.2d 455 (Del. 1969).

132. *Groves v. Secretary of the Dep't. of Natural Resources*, No. 92A-10-003, 1994 Del. Super. LEXIS 80, 1994 WL 89804 (Del. Super. Feb. 8, 1994).

ware claimed title through the grant from Penn that had been previously affirmed in its dispute with New Jersey.¹³³ The Railroad's position was founded upon its interests as a riparian owner. The fundamental issue was whether a riparian owner held title to the low water mark of a navigable river. The State Supreme Court chose to follow the lead of the U.S. Supreme Court and decided in favor of riparian ownership of the foreshore. In so concluding it stated:

Rules of property, established by decisional law and long acquiesced in, may not be overthrown by the courts except for compelling reasons of public policy or imperative demands of justice. . . . We find no public policy or demand of justice requiring this Court to abandon the recognized rule of property here under scrutiny. Indeed, if we consider the confusion and chaotic effect upon land titles which would follow an abrupt abandonment of the prevailing rule, it may be said that public policy and the demands of justice compel preservation of the existing rule. If there is to be a change, it must be accomplished by the General Assembly with due regard for the law of eminent domain.¹³⁴

In the *Groves* case,¹³⁵ Judge Lee, in a decision eloquent in its simplicity and clarity, specifically reviewed the application of the public trust doctrine in Delaware. In that case, a Ms. Mertes owned property on the Rehoboth Bay at Delaware Beach. Her property was located between that of Mr. Groves and the water. Ms. Mertes and her neighbor decided to put rip-rap on their properties to impede the erosion of the beach. The project was to cover an area between the mean high and low tides, and since the construction was to be on tidal lands, they were required to obtain a permit from DENREC in accord with 7 Del. C. Section 7205(a). A permit was issued and was stated to be effective for a period of three years. Mr. Groves had an easement from his property to the water's edge at another location, and the proposed construction would not impair that easement. It would, however, interfere with lateral movement down the beach.¹³⁶ The

133. *See* *New Jersey v. Delaware*, 291 U.S. 361 (1934).

134. 267 A.2d at 458-59.

135. *Groves v. Secretary of the Dep't. of Natural Resources*, No. 92A-10-003, 1994 Del. Super. LEXIS 80, 1994 WL 89804 (Del. Super. Feb. 8, 1994).

136. 7 Del. Code § 7210.

only time that any beach was exposed at the site was at low tide. Mr. Groves appealed the granting of the permit to the Environmental Appeals Board. As part of its decision, the Board stated:

Under the public trust doctrine, the State owns the land over which tidal waters flow and the State holds these lands in public trust for the people, who have the right to use these lands for navigation, fishing and other recreational uses. The genesis of this doctrine can be traced to Roman jurisprudence. *Matthews v. Bay Head Improvement Assoc.*, 95 N.J. 306, 471 A.2d 355, 358-60 (N.J. Super. 1984). This doctrine grants rights to all the people in the State; it is not limited to individuals who own property close to the beach.¹³⁷

The Board affirmed the Secretary's decision to grant the permit to Ms. Mertes. Mr. Groves appealed the adverse ruling. Among his claims, Mr. Groves included that the Secretary failed to adequately consider the public interest prior to issuing the permit. He argued, in language similar to that of the New Jersey Court, that the public has a right of access to the foreshore on Ms. Mertes property to walk, sunbathe, and recreate.

Citing *Buckson* and other relevant cases, Judge Lee concluded on review that the rights of a riparian enure to the owner of bay and oceanfront properties in Delaware, and a private riparian owns to the low water mark.¹³⁸ The public does possess an interest in the foreshore, known under the rubric of the public trust. The rights include the right to navigate and fish as well as a broad State police power. The latter includes the right to protect life, health, comfort, and property within Delaware as well as the right to promote the public morals, safety, and welfare. In upholding the decision of the Secretary, the court explicitly rejected the authority of New Jersey's *Matthews* case and stated:

There does not and never has existed, as part of this doctrine in Delaware, a right of the public superior to the landowner to access to the foreshore for walking and/or recreational activities. The private rights of ownership may not be taken absent some just compensation as mandated by the United States and Delaware constitutions. If the Court or Legislature recognizes this right of the public superior to the landowner to access to the foreshore for walking and/or recreational activities, then

137. *Groves v. Secretary of the Dep't. of Natural Resources*, No. 92A-10-003, 1994 Del. Super. LEXIS 80, *9 1994 WL 89804 (Del. Super. Feb. 8, 1994).

138. *See id.*

the State will have to compensate the affected landowners for the taking.¹³⁹

To date, Delaware has assumed a position not unlike that reflected in the views of some of the early English commentators. The *jus publicum* in the doctrine appears to be restricted to the intertidal zone, and it is to serve the basic ends of navigation and fishing. While the development of the doctrine has avoided being overwhelmed by an analogy to the vehicle of private transfer into public or charitable trust, it does seem to have come to occupy an integrated place in the panoply of interests that a state has in property that has been placed into the service of the public and over which it has responsibility.

From a comparison of the two jurisdictions, it is evident that the law of the public trust is not as uniform or as settled as some commentators suggest. The most certain and faithful statement one can make is that in most states, on most occasions, the public will possess some interest in the intertidal zone that is separate from and superior to that of private upland owners. It may be in the form of ownership, or it may be an easement or servitude. Also, private owners may, in most jurisdictions, have some reasonable expectation that most traditional notions of property will remain applicable to their ownership of beach property. The property that is subject to the doctrine is, however, located on the physical periphery of fast land. The doctrine is also located on the conceptual periphery of legal theory. The pragmatic issue may be whether the readjustment of the various interests will be slow, imperceptible and rather stable, as is physical erosion or will, like a storm, cause abrupt and evulsive changes that do violence to the legal environment. The true concerns may be the method employed as policy evolves and the respect that the use of the doctrine has for other important legal policies.

III. THE TAKINGS PRINCIPLES

The perceived value of the public trust doctrine to advocates of change has really been two fold. First, it has purported to offer standing where none had previously existed. Citizens, as beneficiaries of the trust, have in many jurisdictions been able to challenge the government with respect to its actions.¹⁴⁰ Second,

139. *Id.* at *18-19.

140. *See supra* note 4 (denoting the doctrine as an instrument of

and perhaps an elusive artifice, courts and commentators have posited that the doctrine is a legal refuge from the effects and application of the federal takings principles.¹⁴¹ The reasoning asserts that insofar as government possesses an emblem of title, its assertion of control is not in derogation of a private ownership interest. The latter position has been constructed in response to the concerns of some that liberating a public interest in beach access through use of state regulation under the police power has been curtailed by recent takings cases such as *Lucas v. South Carolina Coastal Council*¹⁴² and *Dolan v. City of Tigard*.¹⁴³ These advocates may, however, have failed to perceive the broader warnings found in the cases. Instead, they have continued to view the law of the case as a literal and fully directive and definitive sanctuary possessed of an unrealistic and contrived clarity. However, if law is truly so malleable that it can be bent to the will of one, it may also spring to the service of another. Therefore, it is really the frequency and amplitude of the oscillation between opposing interests that should be scrutinized. As a

democratization). In most jurisdictions it is the Attorney General or another designated public official who possesses standing to enforce a public or charitable trust. A suit may be brought by the official or on the relation of a third party. See *Wilmington v. Lord*, 378 A.2d 635 (Del. 1977). In addition, persons having a special interest in the enforcement of the trust have been permitted standing. See *Jersey City v. N.J. Dep't of Env'tl. Protection*, 545 A.2d 774 (N.J. 1988). In general, however, "a third person who has no special interest cannot himself maintain the suit. If a third person were permitted to sue as a matter of right it would be possible to subject the charity to harassing litigation." AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, *IVA THE LAW OF TRUSTS* section 391, page 373 (4th ed. 1989). In some situations classes of individuals have been denied standing. See *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). In other circumstances classes have been permitted standing. See *Jones v. Grant*, 344 So. 2d 1210 (Ala. 1977). Finally, a small number of states have permitted individuals to sue to enforce a public trust. See *National Audubon Soc'y v. Super. Court of Alpine Cty*, 658 P.2d 709 (Cal. 1983). See also *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990).

141. See ARCHER, *supra* note 4; see also Slade, *supra* note 4.

142. 505 U.S. 1003 (1992).

143. See *supra* note 10.

result we will now turn to a review of several of the most relevant decisions and attempt to disclose their germane meaning.

The United States Supreme Court has observed that the just compensation clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹⁴⁴ It has also observed that "[a]ccordingly, one of the central concerns of our takings jurisprudence is 'prevent[ing] the public from loading upon one individual more than his share of the burdens of government.'"¹⁴⁵

A closer look at *Lucas*¹⁴⁶ and other decisions may suggest, however, that placing a substantial degree of confidence in the public trust doctrine is ill-considered. Perhaps *Lucas* even suggests that a high degree of confidence in any legal conclusion is unwarranted.

The *Lucas* case¹⁴⁷ considered the effect of the state Beachfront Management Act, which barred Lucas from erecting any perma-

144. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also* *Nollan*, 483 U.S. 825, 837; *Lunney*, *supra* note 8. For an excellent article providing an overview of takings and recent legislation see Leslie M. MacRae, *The Regulatory Takings Bill: A Cure With Unintended Side Effects*, 5 *DICK. J. ENVTL. L. & POLICY* 57 (1996).

145. 505 U.S. at 1071-72 (dissenting opinion by Justice Blackman) (quoting *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312, 325 (1893)). *See also* the dissenting opinion by Chief Justice Rehnquist in *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104 (1978).

The distinction drawn in these examples . . . relates directly to whether an individual is being singled out 'to assume the cost of a benefit conferred on others without the hope for recoupment of the cost.' Dunham faulted such impositions as being contrary to statutory and common-law principles from 'time immemorial.' Moreover, such impositions defeat the democratic process by concealing the true cost of public benefits and avoiding tax and spending mechanisms that would allow for a better approximation of an 'equal sharing of cost or of sharing according to capacity to pay.'

Kmiec, *supra* note 7, at 1637 (quoting *Dunham, A Legal and Economic Basis for City Planning*, 58 *COLUM. L. REV.* 650 (1958)); *see also* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

146. *See supra* note 3.

147. *See id.*

ment habitable structure on his lots. The Court held that the enforcement of certain coastal regulations may be considered a taking if it deprives a person of all economically beneficial use of the land. More generally, the holding may have been a suggestion to the government that it should not move too quickly and advance too far in the evolution of its definition of property.

It may be important to note that Justice Scalia authored the majority's opinion in *Lucas*. In the course of his opinion, Scalia presented a summary of takings jurisprudence. He noted that prior to *Pennsylvania Coal Co. v. Mahon*,¹⁴⁸ it was believed that takings required a direct appropriation:

Justice Holmes recognized in *Mahon*, however, that if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. 260 U.S., at 414-415. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]'.¹⁴⁹

Scalia identified two discrete categories of action as compensable. The first would compel an owner to suffer a physical invasion at the behest of the public. With respect to this class, he stated: "In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."¹⁵⁰ Justice Scalia pointed to the Court's decision in *Loretto v.*

148. 260 U.S. 393 (1922).

149. 505 U.S. at 1014.

150. *Id.* at 1015. See also *Nollan*, 483 U.S. at 831 ("Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking."); *Dolan*, *supra* note 10, at 384 ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred.").

*Teleprompter Manhattan CATV Corporation*¹⁵¹ as authority. In that case it was determined that a New York regulation that required landlords to allow cable companies to place cable facilities in their apartments constituted a taking even though the space taken was only 1.5 cubic feet.¹⁵²

The second category, the one at particular issue in *Lucas*, is where a regulation denies all economically beneficial or productive use of land. The Coastal Council advocated the position in *Lucas* that title to property was somehow impressed with an inchoate limitation that permitted the state to limit its value with apparent impunity. The Court concluded that this view was inconsistent with the historical compact that the government had

151. 458 U.S. 419 (1982). See also the opinion of the Court by Justice Scalia in *Nollan*, 483 U.S. at 831.

152. See *Loretto*, 458 U.S. 419 (1982). A physical taking appears as a seminal principle in takings theory. See Lunney, *supra* note 8 at 1896 (listing a number of authorities that support the proposition); see also Kmiec, *supra* note 7, at 1649 ("Prior to *Nollan*, it was reasonably clear that a permanent physical occupation was a per se taking. After *Nollan* . . . even this minimal protection from governmental intrusion is not absolutely precluded, but only subject to a less protective 'means-ends' scrutiny. As Michelman suggests, the Court deliberately chooses not to go down the *Loretto* path to invalidate the easement condition as an impermissible physical invasion." (citations omitted)). However, Justice Scalia in his opinion in *Nollan* states:

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of property but rather . . . [is] "a mere restriction on its use" . . . is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principle uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. . . . We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"

483 U.S. at 831. (Citations omitted).

with its citizens as found in the Takings Clause of the U.S. Constitution. It stated:

Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "Public interests" involved, *Loretto v. Teleprompter*, 458 U.S. at 426 -though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. Compare *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (interests of "riparian owner in the submerged lands . . . bordering on a public navigable water" held subject to Government's navigational servitude), with *Kaiser Aetna v. United States*, 444 U.S. at 178-80 (imposition of navigational servitude on marina created and rendered navigable at private expense held to constitute a taking). We believe similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. 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 itself under its complementary power to abate nuisances that affect the public generally, or otherwise.¹⁵³

Later courts have relied upon this particular language as they purport to discover the avenue of application of the long forgotten or overlooked doctrine of the Public Trust. The theory employed in this service seems to be that by retrospectively refining (some would suggest redefining) title, the manifest change in use would fall within the noted exception to the takings theory. This may, however, prove to be a far too mechanical reading of the language and one that lacks genetic context.

Perhaps the goals of the polity would be better served if less reliance were placed upon social desires and contrived advocacy and more attention were given to reassessing the allocation of public energies and persuasively changing underlying centripetal attitudes. One obvious choice would be to consider that if the public feels it has a need for a resource, it should compose a

153. 505 U.S. 1003, 1028-29 (1992).

means by which to set aside assets to purchase it. It should not merely redefine the rules by which the game is played.¹⁵⁴

The pragmatic risk of a redefinitional approach may be better assessed in Constitutional terms if one's attention is drawn to Justice Scalia's dissenting opinion in the post-*Lucas* case, *Stevens v. Cannon Beach*.¹⁵⁵ The petitioners in that dispute brought a suit against the City of Cannon in inverse condemnation. A taking in violation of the Fifth and Fourteenth Amendments was alleged. The Stevens had sought a building permit for construction of a seawall on the dry sand area of property they purchased in 1957. The trial court dismissed their suit for failing to state a claim upon which relief could be granted, and concluded that the Stevens never possessed the right to obstruct the dry sand portion of the property. The decision was sustained on appeal to the Oregon Supreme Court; the conclusion being founded upon the precedent of *State ex rel. Thornton v. Hay*.¹⁵⁶ The petitioners appealed to the U.S. Supreme Court and certiorari was denied, with Mr. Justice Scalia dissenting.

In order to comprehend Justice Scalia's reservations, it is important to note that in *Thornton*, the State of Oregon initiated suit to enjoin the owners of certain beachfront tourist facilities from building on the dry sand area. The State presented its case upon the alternative theories of implied dedication and prescriptive easement. It argued that by these well-known principles of property, the public had acquired the right to use the dry sand for recreation. The Oregon Supreme Court, however, in affirming the grant of an injunction against the property owners, relied upon a different theory. It stated:

The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to

154. "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

155. 510 U.S. 1207 (1994).

156. 462 P.2d 671 (Or. 1969).

be treated uniformly.¹⁵⁷

After setting forth the elements of custom,¹⁵⁸ the court sustained the injunction stating that "it takes from no man anything which he had a legitimate right to regard as his."¹⁵⁹

In 1989, however, the Supreme Court of Oregon revisited the issue of public access to the dry sand beach in *McDonald v. Halvorson*.¹⁶⁰ In *McDonald*, the plaintiffs sought a declaration specifying that certain dry sand beaches belonging to the defendant and adjacent to a cove on the Pacific Ocean were accessible to them as members of the public. The Court held that the public had no right to recreational use of the dry sand area in dispute. It observed that there was an absence of testimony demonstrating customary use of the cove beach, and as a result, determined that there was no factual predicate upon which to ground the application of the doctrine of custom. The Court reasoned that nothing in *Thornton* should be read as having established an undisputable public claim to recreational use of the entire Oregon coast.

157. *See id.* at 676.

158. *See id.* Sir William Blackstone set out the requisites of custom, as paraphrased by the Thornton Court, in his treatise as follows:

[T]he first requirement of a custom, to be recognized as law, is that it must be ancient. It must have been used so long 'that the memory of man runneth not to the contrary' The second requirement is that the right be exercised without interruption. A customary right need not be exercised continuously, but it must be exercised without an interruption caused by anyone possessing a paramount right Blackstone's third requirement (is) that the customary use be peaceable and free from dispute. The fourth requirement, that of reasonableness, is satisfied by the evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community The fifth requirement, certainty, is satisfied by the visible boundaries of the dry-sand area and by the character of the land The Sixth requirement is that a custom must be obligatory; that is . . . not left to the option of each landowner Finally, a custom must not be repugnant, or inconsistent, with other customs or with other law.

1 BLACKSTONE, COMMENTARIES 75-78.

159. *See* 462 P.2d at 678.

160. *See* 780 P.2d 714 (Or. 1989).

Justice Scalia noted that the trial court in *Cannon Beach* failed to acknowledge the *McDonald* decision and that the appellate courts declined to permit the petitioners to present factual material that could have demonstrated that the doctrine of custom should not have been applied. Instead, the Supreme Court of Oregon reverted to quoting the sweeping language of *Thornton* to the effect that the doctrine applied to all of the Oregon shore, and stated that the doctrine was just such a background principle of Oregon law as was anticipated and required by *Lucas*.¹⁶¹ Therefore, the Oregon Court concluded that petitioners never had a claim to the dry sand area.¹⁶²

While acknowledging that this case was decided upon a motion to dismiss and that the lack of an adequate factual record may have placed review beyond the actual power of the federal court, Scalia stated that "to say that the case raises serious Fifth Amendment takings issues is an understatement."¹⁶³ While acknowledging that the Constitution does leave the development of property law to the States, they may not deny the rights protected under the Constitution "by invoking nonexistent rules of substantive law."¹⁶⁴ Scalia continues:

Our opinion in *Lucas*, for example, would be a nullity if anything that a State court chooses to denominate "background law" -regardless of whether it really is such -could eliminate property rights No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).¹⁶⁵

In so opining, Justice Scalia favorably cited an often overlooked view of Justice Stewart as communicated in *Hughes v. Washington*.¹⁶⁶ In that case, the State of Washington had disputed the ownership of accretions to oceanfront land owned by Mrs. Hughes. The State's claim was based upon the State Constitution

161. See *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1210 (1994).

162. See *id.* at 1207.

163. *Id.* at 1212; see also 510 U.S. at 1335 ("The issue is serious in the sense that it involves a holding of questionable constitutionality; and it is serious in the sense that the land-grab (if there is one) may run the entire length of the Oregon coast.").

164. *Id.* at 1211.

165. *Id.* at 1211-1212.

166. 389 U.S. 290, 296-97 (1977) (Stewart, J., concurring).

of 1889 that set ownership of the foreshore in the State to the high water mark as of that date. Mrs. Hughes claimed title to her property as the successor to a federal grant. Federal law awarded accretions to the riparian owner. The issue was whether state or federal law governed the ownership of the added dry sand area. The Supreme Court, through Justice Black, concluded that federal law applied to federal grants and that, therefore, Mrs. Hughes was the owner of accretions to her property. In a concurring opinion Mr. Justice Stewart presented a perspective that was incorporated into the *Lucas* decision, in part, and that was cited explicitly and favorably by Justice Scalia in his opinion in the *Cannon Beach* case. The most relevant portions of Justice Stewart's comments are, as follows:

Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners Like any other property owner, however, Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation.

To the extent that the decisions of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.

Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property — without paying for the privilege of doing so.¹⁶⁷

167. *Id.* at 295-98.

Therefore, before advocates set forth in the lifeboat of the language of *Lucas* on a presumed course toward a safe harbor for public interest, they may want to note that their vessel may not be as seaworthy as they might have assumed. Upon closer inspection they may, in fact, observe the fluid waters of the takings theory puddling at their feet. While the various Supreme Court opinions in recent cases offer diverse perspectives in takings theory, one element is, however, becoming clearer. Courts and legislatures might be advised to tread more cautiously as they forge the devices of securing the public interest at the expense of individual interests. As Justice Kennedy observed of the application of the Fifth and Fourteenth Amendments in his concurring opinion in *Lucas*:

There is an inherent tendency toward circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what the courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. Some circularity must be tolerated in these matters, however, as it is in other spheres. . . . The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.¹⁶⁸

IV. FAIRNESS IN RETROSPECTIVE DECISION-MAKING

The specter of retrospective judicial action may be most disturbing to persons adversely affected by the application of the public trust doctrine. Many had thought they had protected ownership interests in coastal property. Most were surprised to learn that, at least in some circumstances, they did not own as much as they had believed. As a result, two questions, in addition to those previously discussed, have been raised in those circumstances when courts appear to have altered prior trends in decision-making by invoking the public trust doctrine. Unfortunately, the questions are rarely, if ever, addressed by those courts except in oblique ways. The first is whether decisions that readjust developed expectations about property should be made retroactive.¹⁶⁹ The second is whether there is truly an adequate precedent to

168. 505 U.S. 1003, 1034-35 (1992) (Kennedy, J., concurring).

169. See, e.g., *Neptune v. Avon by the Sea*, 294 A.2d 47, 55 (N.J. 1972).

justify the retroactive effect of adjudication in these circumstances.

One of the measures of an innovative judicial decision may be its success in balancing the varying and sometimes competing principles of continuity and evolution. The justice of the end should, at least in part, be judged in terms of whether the means employed in reaching the result are appropriate and fair. Certain standards used to evaluate the means by which law impacts events or actors have developed under the rubric of prospective and retrospective activity. This is of particular relevance to the public trust analysis so as to appreciate a meaning of the *Lucas* decision within the broader jurisprudence of Justice Scalia. Therefore, in order to properly assess the quality of past public trust decisions as well as consider the future direction of the doctrine, it might be appropriate to briefly review these principles.

A. *The Nature of Judicial and Legislative Action*

First, in order to compose a proper response to the initial inquiry, it might be appropriate to note that our basic jurisprudence has, in this regard, distinguished between adjudicative and legislative decision-making. While the Supreme Court has noted that the distinction should be known even to law students, it may, in fact, be an explication that is oft neglected and rarely articulated.¹⁷⁰ In sum, judicial decisions are, by their nature, retrospective, and legislative standards are to be prospective. While this may be clouded by judicial opinions that contain suggestions about the direction which developing law should take or by judicially active attempts to make decisions prospective in effect, a court's responsibility usually arises upon a case or controversy, acts upon past facts, and pointedly affects the persons before the court. Legislation, to the contrary, is generally prospective in application, considers policy, and has general applicability to anyone in the affected class to which the statute might apply.¹⁷¹

170. See *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982); see also *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311-12 (1994).

171. See *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908) ("A judicial inquiry investigates, declares and enforces liabilities as they

Second, the Constitution places certain limits upon retroactivity. For example:

The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation. Article I, Section 10, Cl. 1 prohibits States from passing another type of retroactive legislation, laws impairing the Obligation of Contracts. The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving persons of vested property rights except for a "public use" and upon payment of "just compensation." The prohibition on "Bills of Attainder" in Art. I Sections 9-10, prohibits legislatures from singling out disfavored persons and meeting out summary punishments for past conduct. The Due Process Clause also protects the interests in fair notice and re-

stand on present or past facts and under laws supposed to already exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power"); *see also* Griffith v. Kentucky, 479 U.S. 314, 322 (1987) ("First it is a well settled principle that this Court adjudicates only 'cases' and 'controversies.' Unlike a legislature we do not promulgate new rules . . . on a broad basis. Rather, the nature of judicial review requires that we adjudicate specific cases, and each case usually becomes the vehicle for announcement of a new rule");

Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules. It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct. Since the question is whether the court should apply the old rule or the new one, retroactivity is improperly seen in the first instance as a matter of choice of law, "a choice . . . between the principle of forward operation and that of relation backward."

501 U.S. 529 (1991); *but cf.* Harper v. Virginia, *infra* note 200 and accompanying text (banning selective application of new rules); JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 17-20 (1927); Ralph F. Fuchs, *Procedure in Administrative Rule-Making*, 52 HARV. L. REV. 259 (1938); Frederick Schauer, *A Brief Note on the Logic of Rules*, 42 ADMIN. L. REV. 447, 454 (1990) (with special reference to *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988)).

pose that may be compromised by retroactive legislation; a justification sufficient to invalidate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application.¹⁷²

1. The Legislative Standard

For a considerable time, the general view was that there was to be no retroactivity to legislative rules.¹⁷³ The Court did, however, struggle with applying legislation retroactively in select cases. For example, in circumstances where the negative effects were solely economic, some retrospectivity had been permitted.¹⁷⁴ The re-

172. *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994).

173. *See Kaiser Aluminum v. Bonjorno*, 494 U.S. 827, 855 (1990) (Justice Scalia expressing very strong views on the separation of powers issues and on the fairness in the method of changing a trend in the law).

174. The Court has customarily tolerated a modicum of retroactivity in such areas as taxation. In *United States v. Carlton*, 512 U.S. 26 (1994), the Court reviewed a December 1987 amendment to the Internal Revenue Estate and Gift Code which was made retroactive to October 1986, the date of a prior amendment. Relying upon the 1986 Code, Respondent engaged in a stock purchase and sale consistent with its provisions in December 1986. The Court concluded that the 1987 amendment's retroactive effect did not violate Due Process. In the course of the opinion and noting that much tax legislation has been retrospective Justice Blackmun, quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976) stated:

This Court repeatedly has upheld retroactive tax legislation against a due process challenge. Some of its decisions have stated that the validity of a retroactive tax provision under the Due Process Clause depends upon whether "retroactive application is so harsh and oppressive as to transgress the constitutional limitation." The "harsh and oppressive" formulation, however, "does not differ from the prohibition against arbitrary and irrational legislation" that applies generally to enactments in the sphere of economic policy. The due process standard to be applied to tax statutes with retroactive effect, therefore, is the same as that generally applicable to retroactive legislation:

"Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such

cent case of *Landsgraf v. USI Film Products*¹⁷⁵ presents the current statement on the subject. *Landsgraf* involved a sexual harassment claim under an amendment to Title VII of the Civil Rights Act of 1964. In order to resolve the issue, the Court had to consider two contradictory canons of statutory interpretation, i.e., the rule stated in *Bradley v. City of Richmond*¹⁷⁶ that the court must apply the law in effect at the time of its decision and the sometimes opposing axiom, found in *Bowen v. Georgetown University Hospital*¹⁷⁷ that statutory retroactivity is not favored.

Justice Stevens, writing for the Court, attempted to reconcile these oftentimes competing values. First, he observed that the Court has consistently declined to give retroactive effect to legislation that burdens private rights unless Congress has clearly evinced such an intention.¹⁷⁸ Even when legislative intent is explicit, however, there is a presumption against retroactive legisla-

legislation remain within the exclusive province of the legislative and executive branches" 512 U.S. at 30-31 (citations omitted).

In a concurring opinion Justice Scalia commented upon the Court's view of substantive due process in this case.

I cannot avoid observing, however, two stark discrepancies between today's due process reasoning and the due process reasoning the Court applies to its identification of new so-called fundamental rights, such as the right to structure family living arrangements, and the right to an abortion. First and most obviously, where respondent's claimed right to hold onto his property is at issue, the Court upholds the tax amendment because it rationally furthers a legitimate interest; whereas when other claimed rights that the Court deems fundamental are at issue, the Court strikes down laws that concededly promote legitimate interests. . . . The picking and choosing among various rights to be accorded "substantive due process" protection is alone enough to arouse suspicion; but the categorical and inexplicit exclusion of so-called "economic rights" (even though the Due Process Clause explicitly applies to "property") unquestionably involves policymaking rather than neutral legal analysis.

512 U.S. at 40-42 (Scalia concurring).

175. See 511 U.S. 244 (1994).

176. 416 U.S. 696, 711 (1974).

177. 488 U.S. 204, 208 (1988).

178. See *id.* at 258.

tion that is deeply rooted in our tradition.¹⁷⁹ “Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.”¹⁸⁰ Second, he noted that while there are Constitutional limitations upon retroactivity, the restrictions do have limits. Absent a violation of one of the specific Constitutional provisions, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended effect. “Retroactivity provisions often serve entirely benign and legitimate purposes”¹⁸¹ Third, and of particular import in the context of the public trust doctrine, he observed: “The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability are of prime importance.”¹⁸² Finally, if the legislative intention is not clear, the Justice concluded that the presumption against retroactivity should prevail except in certain limited circumstances. These are: 1. When the new provision only affects the propriety of prospective relief; 2. When the statute confers or ousts judicial jurisdiction; and 3. When the change is to procedural rules.¹⁸³ In sum, the *Landsgraf* decision appears to support the historic axiom that legislation is, generally, to be prospective and general in effect.

2. The Judicial Standard

The judicial restraints, however, have been more elusive to identify. The nature of the legal process and the ideals of stability and predictability compete very heavily with the evolution of principle in response to changing conditions. For example, in the case of first impression a court may reference a developed customary social resolution, not previously specifically institutionalized, and invoke it in the course of its decision. The most

179. See *Landgraf v. USI Film Products*, 511 U.S. 244, 258 (1994).

180. 511 U.S. at 264.

181. 511 U.S. at 267-8.

182. 511 U.S. at 271. See also *United States v. Security Industrial Bank*, 459 U.S. 70, 75 (1982).

183. 511 U.S. at 280-83.

troubling paradigm, however, may be in circumstances when courts have previously addressed an issue and set standards but where either circumstances or policies have become altered over time and call for dramatic reconsideration.

The concerns are generally three fold: 1. Should a judicial decision alter a developed trend in stare decisis, and if so, what are the proper precedential limits when persons have invested in an established state of affairs in reliance upon the existing standard? 2. Should a judicial decision that sets forth a new rule be binding upon any or all other pending cases notwithstanding that the parties in those other cases could not have known of the decision before they acted? This consideration has been labeled selective prospectivity. 3. May a new rule of law be authoritatively set forth in a judicial decision yet not be applied to the parties before the court? This has been labeled as pure prospectivity. The first question is a mere restatement of one that was posed above, and it will be addressed in the next section of the Article. The latter questions relate to the nature of the judicial process, and a discussion of these follows immediately.

The subject of judicial retroactivity, originally, had different considerations depending upon whether the issue fell within the realm of criminal or civil law, however, the courts employed a balancing approach in each. In 1965 the Supreme Court addressed the issue in the context of a criminal conviction in *Linkletter v. Walker*.¹⁸⁴ It held that a court had discretion in determining if a decision setting a criminal precedent should be applied retrospectively, and in the course of the opinion the Court set forth certain standards that should be applied in making the determination.¹⁸⁵ The standards included: 1. the purpose of the new rule, 2. the reliance placed upon the purpose of the old rule and 3. the effect upon the administration of justice of a retroactive application of a new rule.

In 1971 in *Chevron Oil Co. v. Huson*,¹⁸⁶ the Court adopted a similar discretionary position with respect to civil cases and again set forth appropriate factors that might be taken into consideration.

184. 381 U.S. 618 (1965).

185. 381 U.S. at 629.

186. 404 U.S. 97 (1971).

First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retrospective application . . .¹⁸⁷

In 1987 the trend was qualified. In *Griffith v. Kentucky*,¹⁸⁸ the Court altered its course in the criminal area and overruled *Linkletter*.¹⁸⁹ The Court concluded first that it would be improper and unfair if standards applied to one individual were not applied to all, and second that determining the timing of the application of a new constitutional principle was essentially legislative, not judicial, in character.¹⁹⁰ *Griffith* clearly indicated that the Court did not intend to alter the civil rule,¹⁹¹ and that such cases would continue to be governed by *Chevron*.

American Trucking Association, Inc. v. Smith,¹⁹² a 5-4 decision, reaffirmed the balancing test for civil actions. Justice O'Connor writing for a plurality of the Court, declined to extend the policies of the *Griffith* holding to civil cases. Choosing to continue to apply the *Chevron* principles, the Court concluded that application of a prior decision invalidating certain taxes would place too great a burden upon the state if applied retroactively.¹⁹³ Justice Scalia concurred in the result in *American Trucking* and provided the fifth vote. However, he rejected the discretionary retroactivity position of the plurality. Scalia explicitly asserted the conclusion that prospective adjudication is incompatible with the judicial role.¹⁹⁴

Support for the balancing method as applied to permit civil prospectivity began to erode the following year. The views of the individual justices began to refine. In *James B. Beam Distilling Co.*

187. 404 U.S. at 106-07 (citation omitted).

188. 479 U.S. 314 (1987).

189. 381 U.S. 618.

190. 479 U.S. at 322-23.

191. 479 U.S. at 328.

192. 496 U.S. 167 (1990).

193. 496 U.S. at 182-83.

194. 496 U.S. at 201.

v. Georgia,¹⁹⁵ the Court considered the principle of selective prospectivity. [This theorem had permitted courts to apply a new rule to the litigants but to decline to make it retroactive to others.] The Court, through an opinion by Justice Souter, held that once a new rule is applied to one litigant it must be applied to all others who are similarly situated.¹⁹⁶ There was, however, no consensus as to the reasons for the rule. There were, in fact, five separate opinions written in the case. Justice Souter writing for the Court expressly rejected the principle of selective prospectivity and stated that differential treatment of similarly situated litigants was impermissible.¹⁹⁷ “*Griffith* cannot be confined to criminal law. Its equality principle . . . carries comparable force in the civil context.”¹⁹⁸ Justice Souter explicitly stated that he did not address pure prospectivity.¹⁹⁹ However, Justice Scalia again proffered that organic principles of the separation of powers rendered prospective adjudication unconstitutional.

If the division of federal powers central to the constitutional scheme is to succeed in its objective, it seems to me that the fundamental nature of those powers must be preserved as that nature was understood when the Constitution was enacted I think, “[t]he judicial Power of the United States” . . . must be deemed to be the judicial power as understood by our common-law tradition. That is the power “to say what the law is,” not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense “make” law. But they make it *as judges make it* . . . which is to say *as though* they were “finding” it —discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be For this reason, and not reasons of equity, I would find both “selective prospectivity” and “pure prospectivity” beyond our power.²⁰⁰

Blackmun agreed with Scalia’s conclusion but based his decision upon the case or controversy requirement of Article III.²⁰¹ In dissent, Justice O’Connor, joined by Chief Justice Rehnquist and Justice Kennedy, supported the continued use of the discre-

195. 501 U.S. 529 (1991).

196. 501 U.S. at 540-44.

197. 501 U.S. at 540.

198. *Id.*

199. *Id.* at 544.

200. 501 U.S. at 549 (emphasis in the original) (citations omitted).

201. 501 U.S. at 547.

tionary test as set forth in *Chevron*.²⁰²

Finally, in *Harper v. Virginia Department of Taxation*,²⁰³ the Justices appeared to coalesce into a majority, applying a rule similar to that found in *Griffith*. Adjudication was determined to be essentially retrospective in character. Writing for the Court, Justice Thomas stated:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith's* ban against "selective application of new rules."²⁰⁴

In a concurring opinion, Justice Scalia characterized the political tone of attempts at prospective adjudication:

Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of *stare decisis*. It was formulated in the heyday of legal realism and promoted as a "techniqu[e] of judicial lawmaking" in general, and more specifically as a means of making it easier to overrule prior precedent.²⁰⁵

The true traditional view is that prospective decisionmaking is quite incompatible with the judicial power, and that courts have no authority to engage in the practice.²⁰⁶

Therefore, it is possible to fashion a reasonable response to the latter questions posed in this section. The legislative process is probably the preferred vehicle to be used to set future policy for the public trust. If, however, a court chooses to act in the area, it is proper to assume that whatever its decision, it would be applicable to the parties before it and would have serious implications to others having a similar status. Consequently, to the extent that the judiciary alters past trends through its actions, due attention must be afforded to the policies of *stare decisis*.

B. *Stare Decisis*

Because the historical perspective that judicial decisions are essentially retroactive seems to have been reconfirmed, the ques-

202. 501 U.S. at 549-59.

203. 509 U.S. 86 (1993).

204. 509 U.S. at 97.

205. 509 U.S. at 105 (citation omitted).

206. *Id.* at 106.

tion is raised as to the standards that courts should apply when upsetting established expectations. As Justice Souter noted in the *Beam* case:

In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to disputes that come to the bar. Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules.

It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct.²⁰⁷

As a result of many of the public trust decisions, numerous confidences and assurances in title to property have been undermined or qualified. Therefore, the second issue to be raised is under what circumstances should a court alter prior judicial trends, and what are the standards it should apply in that exercise of judicial discretion. Justice O'Connor has provided some cogent insight into the apposite principles in *Planned Parenthood v. Casey*:

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an "inexorable command," and certainly it is not such in every constitutional case. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of

207. 501 U.S. at 534.

overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification.²⁰⁸

Whether the theory of title espoused by the public trust doctrine has been newly constructed or newly discovered, it seems that in many circumstances the judicial announcement recognizing the nascent principles has come as a legitimate shock to landowners. In those cases that have relied upon such settled principles of law as easement and dedication and have taken the time to muster the evidence necessary to support the ultimate conclusion that the public does possess a certain interest within the bounds of established theory, the traditions of the legal process are supported. It does not matter that the anguished cries of those individually injured can be heard. At least the means and principles by which their interests were altered were considered as a part of the decision-making structure with which they had become accustomed. However, in those cases at the margin of the legal process, where the courts have relied upon a changing judicial horizon to newly declare what purports to be old but undiscovered principles, or to expand an older doctrine that had been confined to one geomorphological area to include another, one must seriously question the action. This is particularly true where the arena is further circumscribed by a counter-opposing principle such as the constitutional takings provisions. In this situation, the decisions speak less of the voice of the legal system providing order to the lives of sovereign community members and more of the political questions and unrest at the foundation of the decision-making system itself. This is not to suggest that the law should fail to evolve. It is to proffer that if judicial changes alter significant interests in property, the public fisc should be prepared to accept a part of the burden.

208. 505 U.S. 833, 854 (1992) (citations omitted).

V. A CONCLUSION AND WARNING TO ENVIRONMENTALISTS

Eventually everybody wants something, and the goal is, for the sake of psychosocial integration, often characterized as striving to leave everyone in an improved condition. At least it is assumed that no one is left in a worse position. Achieving results, however, requires competition with others who frequently see the proposed end in less desirable ways. It is not unusual that feelings of entitlement on each side build, causing proponents to believe it logical and also just that they prevail. So it has been in the debate over the public trust. Public advocates, as well as those who resist, struggle to cast their arguments to fit the legal jargon which clothes seemingly acceptable behavior. It is not likely, however, that both can actually wear the same garment. A responsible and respectable resolution will require alteration and adjustment or else the dress will tear. The more dramatic the change, however, the more vulnerable the resulting style becomes.

Environmentalists have exhibited great excitement over the advances of their interests through the public trust. Many, particularly those who are not legally trained, celebrate their victories as though they have liberated universal truths and cry out for more change. They may, in their zeal, reverence, and hopeful innocence, however, have overestimated the stability of their claimed victory. They fail to consider that, like the fated regulation in the *Lucas* case, the reconstitution of the public trust doctrine may be vulnerable to the same political forces through which it found expression. There is a distinction to be made between evolutionary development and revolutionary change. At the least, the principles raise questions concerning the functioning of a legal system and the proper balancing of the mechanisms of growth. They also raise questions of who should bear the costs of the growth.