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The Public and Wildlife Trust Doctrines and the Untold Story of the Lucas Remand

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The Public and Wildlife Trust Doctrines and the Untold Story of the Lucas Remand

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The Public and Wildlife Trust Doctrines and the Untold Story of the *Lucas* Remand

By Blake Hudson*

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INTRODUCTION

Laws protecting wildlife challenge the notion of unrestricted dominion over private property, in some cases substantially restricting

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the extent to which a landowner can modify her property and thus alter the natural landscape. The prescriptive nature of these laws, and the broad, often indeterminate, dynamic landscape to which they apply, heighten the opportunity for conflict with landowners' expectations about the absolute and permanent nature of their rights.¹

As demonstrated in *Lucas v. South Carolina Coastal Council*,² government attempts to protect the environment are often thwarted by Fifth Amendment takings claims demanding that "just compensation" be paid to the property owner. In *Lucas*, an environmental regulation that protected upland coastal resources, such as habitat for endangered and threatened species, prohibited a landowner from developing his beachfront property.³ The landowner challenged the statute, claiming that it was a Fifth Amendment taking of his property without just compensation.⁴ The United States Supreme Court held that because the regulation wiped out all economic value of the property, it was a taking.⁵ The Court, however, also established an exception to the rule, holding that the state could overcome the claim if it could prove on remand to the South Carolina Supreme Court that "background principles" of the state's law of property already placed restrictions on the landowner's title.⁶ Such "background principles," the Court continued, must "do no more than duplicate the result that could have been achieved in the courts by adjacent landowners (or other uniquely affected persons) under the state's law of private nuisance, or by the state under its complementary power to abate nuisances that affect the public generally, or otherwise."⁷

The Court advanced the *Lucas* decision as a clarification of federal takings law. However, the Court's reference to "background principles" of state property law as the only potential exception to "preservation takings" raises important issues as to the meaning and scope of this exception. The Court's equation of

1. Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-O-Links, and Other Things That Go Bump in the Night*, 85 IOWA L. REV. 849, 858-59 (2000).

2. 505 U.S. 1003 (1992).

3. *Id.* at 1006-07.

4. *Id.* at 1003.

5. *Id.* at 1019.

6. *Id.* at 1029.

7. *Id.*

“background principles” with common-law nuisance includes a pair of deeply rooted property law principles that limit property owners’ rights under certain circumstances: the public trust doctrine and the wildlife trust doctrine. Legal scholarship since *Lucas* has highlighted this aspect of the case, focusing primarily on the Supreme Court’s introduction of the “background principles” inquiry. One scholar noted:

The Court’s reliance on common law principles to craft an exception to its per se compensation rule misapprehended the continued robustness of old maxims, such as those restricting the uses to which private property can be put when they threaten wildlife, and thus potentially created an exception much wider than intended.⁸

Another scholar, noting how *Lucas* has opened the door for application of the public and wildlife trust doctrines, explained that with traditional takings analysis

courts investigate first, whether there has been a permanent physical taking . . . and second, whether there has been a regulatory taking that has resulted in no economically viable remaining use of the property. . . . [T]raditional takings analysis . . . has come under considerable attack. Most seriously, the analysis ignores the exception laid out in *Lucas v. South Carolina Coastal Council* for background principles of property law, such as the public trust doctrine, that have the potential to provide a much firmer defense of wildlife.⁹

No scholar has discussed, however, the oral arguments presented during the *Lucas* remand before the South Carolina Supreme Court. These arguments offer definitive proof of the accuracy of prior observations regarding the public and wildlife trust doctrines and also provide a glimpse into how these doctrines may shape modern takings law as state and federal courts apply evolving

8. Babcock, *supra* note 1, at 855. The use of such “robust maxims” may be particularly important as almost ninety percent of the nearly 1000 plant and animal species protected under the ESA are found on private land. *Id.* at 857–58. As such, private property creates a large web of wildlife habitat, without which these species would likely become extinct. Despite these facts, federal and state environmental laws are increasingly coming under attack by private property owners who often see these limitations on property rights as, at the most, unconstitutional, and at the least, always compensable.

9. Anna R.C. Caspersen, Comment, *The Public Trust Doctrine and the Impossibility of “Takings” by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 384 (1996).

public and wildlife trust principles. Original research reveals that during the oral arguments, the court actually *invited* the state to assert the public trust doctrine as a background principle of common law pursuant to the United States Supreme Court's directive.¹⁰ Inexplicably, the state of South Carolina failed to make a public trust argument during the remand. Nonetheless, this invitation by the court lends new support to the argument that these doctrines may be asserted to protect environmental regulations from takings claims under the circumstances presented in *Lucas*.

Environmental regulations clearly merit protection given modern legislative attempts to enact compensation requirements for regulation affecting property rights, such as proposed federal legislation which would have required compensation for "any diminution" in the value of private property.¹¹ Several states have recently passed similarly sweeping laws.¹² This type of legislation directly targets public preservation efforts, including the South Carolina statute at issue in *Lucas*¹³ and the federal Endangered Species Act,¹⁴ among others. In view of such "takings legislation," it is important to analyze historical judicial precedent regarding

10. See *infra* notes 149–159 and accompanying text. No author has before, to my knowledge, discussed the actual oral arguments presented on remand to the South Carolina Supreme Court. These arguments were neither transcribed in court documents, nor detailed in the final court order. When I contacted the court to request a copy of the recording, the court staff informed me that I was the first person to make such a request.

11. See Just Compensation Act, H.R. 1388, 103d Cong. (1st Sess. 1993). Two other "takings" bills were introduced during the same Congressional term, as the Private Property Owners Bill of Rights was introduced in both houses of Congress in 1993. BONNIE B. BURGESS, *FATE OF THE WILD: THE ENDANGERED SPECIES ACT AND THE FUTURE OF BIODIVERSITY* 79–80 (2001).

12. See, e.g., FLA. STAT. ANN. § 70.001(3)(b) (West 2007) (requiring compensation if new government regulation negatively impacts "an existing fair market value" of property). See also Ballot Measure 37, OR. REV. STAT. § 197.305(1)–(3)(d) (2005) (renumbered from OR. REV. STAT. § 197.352 in 2007 by the Oregon Legislative Counsel). Measure 37 either "requires state and local governments to compensate private property owners for the reduction in the fair market value of their real property that results from *any land use regulations* of those governmental entities that restrict the use of the subject properties," or "allows state and local governments to 'modify, remove or not apply the land use regulation'" at all. *MacPherson v. Dep't of Admin. Servs.*, 130 P.3d 308, 312 (Or. 2006) (emphasis added). The Oregon Supreme Court upheld Measure 37, which was passed by referendum by the people of Oregon. See *id.* Louisiana and Mississippi have also enacted similar legislation. See George Charles Homsy, *The Land Use Planning Impacts of Moving "Partial Takings" from Political Theory to Legal Reality*, 37 URB. LAW. 269, 278–79, 281 (2005).

13. See *infra* notes 136–139 and accompanying text.

14. 16 U.S.C. §§ 1531–1544 (2000).

environmental regulation of private land.

There now exists a new lens through which to analyze historical and modern jurisprudence which sheds additional light on the takings analysis—the lens of the *Lucas* remand. Historical land use restrictions, such as the public and wildlife trust doctrines, provide a means to protect environmental interests with a tool more powerful than traditional takings analysis. As indicated by the court in the *Lucas* remand, the public and wildlife trust doctrines may be used to obviate certain court-ordered or statutory compensation requirements in order to allow the regulation of natural resources that the government deems to be of the utmost public interest. Furthermore, use of these doctrines may be *necessary* if the federal and state governments are to adequately protect important natural resources via environmental regulation. As one scholar noted, “government could not function if it had to pay all those inconvenienced by regulatory actions for the benefit of the public at large.”¹⁵

This article seeks to address more thoroughly how the historical “old maxims” of the public and wildlife trust doctrines can be used as *Lucas* background principles of property law to overcome takings challenges brought against state and federal environmental regulations. First, I will describe the historical underpinnings of the public trust doctrine and the wildlife trust doctrine prior to the founding of the nation. I will then summarize *Illinois Central Railroad v. Illinois*¹⁶ and *Geer v. Connecticut*,¹⁷ which are the key Supreme Court cases establishing the validity of these doctrines in the United States. I will also discuss how the public trust doctrine, as presented in *Illinois Central*, and the wildlife trust doctrine, as presented in *Geer*, are driven by the same logic and the same historical background. I assert that the doctrines may be interchangeably applied as a means of protecting important environmental resources. Also, I will show how these doctrines have expanded beyond the subject matter presented in the seminal cases and have evolved into tools useful for shielding regulations addressing a wide range of environmental resources from takings claims.

15. Caspersen, *supra* note 9, at 389 (summarizing the position of former Secretary of the Interior Bruce Babbitt).

16. 146 U.S. 387 (1892).

17. 161 U.S. 519 (1896).

Second, I will illustrate how the use of these doctrines might have changed the ultimate outcome of the *Lucas* case. During the *Lucas* remand, the state of South Carolina missed an important opportunity to ensure that the public and wildlife trust doctrines were firmly established as precedents for overcoming takings claims brought against regulations protecting important coastal resources. Furthermore, the state deprived the court of an opportunity to demonstrate that specific application of public and wildlife trust background principles may evolve over time as part of a state's body of common law. The court's willingness to allow such evolution is evidenced by the fact that it invited the state to assert the public trust doctrine, even though South Carolina courts had never before considered public trust protection for the specific resources at issue in *Lucas*.¹⁸ In addition, and perhaps more fundamentally, I will argue that federal courts can, under their own analysis, uphold application of the public and wildlife trust doctrines under the circumstances presented in *Lucas*.¹⁹ *Illinois Central* and *Geer* indicate that these doctrines, much like the police power, are background principles of property law that inhere in *every state* at the time of each state's creation. In other words, the public and wildlife trust doctrines inhere in the property rights systems of each state equally and independently, *regardless* of whether the courts of individual states have previously incorporated these doctrines into their jurisprudence regarding specific natural resources. Thus, even if public and wildlife trust protection of certain resources is not present within a state's preexisting body of common law, state *and* federal courts may permit controlled evolution of public and wildlife trust principles within states applying the doctrines in order to shield preservation regulations from federal takings claims.

18. See *infra* note 163 and accompanying text.

19. This point counters potential arguments that the Supreme Court could not have done so because federal courts will not create state common law, nor will they apply the common law of one state to another if the latter state's courts had not previously incorporated the common law principle in question into its jurisprudence. See *Murdoch v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1874).

II. THE PUBLIC AND WILDLIFE TRUST DOCTRINES: HISTORY AND INTERPRETATION

A. Pre-American Roots

A review of the historical underpinnings of the public and wildlife trust doctrines demonstrates that private property rights, as understood at the founding of America, have long yielded to important public environmental interests. These doctrines are deeply rooted in American notions of property ownership and land use, stemming from ancient Rome and subsequently passing from England to the American Colonies and ultimately to the various states.

In ancient times, Roman law divided property into either public or common property.²⁰ Public property included

res nullius, *res communes*, *res publicae*, *res universatit*, and *res divini juris*; respectively, things that are unowned and open to all by their nature, things that are publicly owned and made open to the public by law, things owned by a public group in its corporate capacity, and things ‘unownable’ because of their divine or sacred status.²¹

The Roman government viewed wildlife as a *res nullius* public property interest—the property of no one.²² Wildlife being animals *ferae naturae* (“of a wild nature”) were reducible to ownership by any person who could capture them.²³ The rule of capture was distinguished from the rules governing common property, or *res communis*, such as the oceans and navigable bodies of water.²⁴ The Romans’ believed that such property “remained held in common . . . so that no individual could appropriate any portion of it by any unilateral act whatsoever.”²⁵ Roman protection of *common* property, therefore, may be characterized as the first implementation of public trust principles by a governmental authority.

20. *Geer*, 161 U.S. at 522.

21. James Boyle, *Foreword: The Opposite of Property?*, 66 LAW AND CONTEMP. PROBS. 1, 6 (2003).

22. Richard A. Epstein, *The Modern Uses of Ancient Law*, 48 S.C. L. REV. 243, 245 (1997).

23. *Id.*

24. *Id.*

25. *Id.*

However, the Romans viewed wildlife as a *public* property interest, rather than common, because:

There are things which we acquire the dominion of, as by the law of nature, which the light of natural reason causes every man to see, and others we acquire by the civil law; that is to say, by methods which belong to the government [T]he law of nature is more ancient, because it took birth with the human race Thus, all the animals which can be taken upon the earth, in the sea, or in the air, that is to say, wild animals, belong to those who take them, because that which belongs to nobody is acquired by the natural law by the person who first possesses it.²⁶

Based on this view, the United States Supreme Court has reasoned that Roman conceptions of natural law placed little restriction on the power of an individual to take and control wildlife.²⁷ The right of individuals to control wildlife in Roman times was distinct from the government's authority to protect "common property" resources under its lawmaking power.

A shift occurred, however, in feudal Europe, when countries first began to assert that the right to control wildlife should be "subject to the governmental authority under its power, not only as a matter of regulation, but also of absolute control."²⁸ This shift was recognized by the eighteenth century French treatise writer Pothier, who noted that "[i]n France, as well as in all other civilized countries of Europe, the civil law has restrained the liberty which the pure law of nature gave to every one to capture animals who . . . belong to no person in particular."²⁹ Pothier further noted that "the sovereigns have reserved to themselves, and to those to whom

26. *Geer v. Connecticut*, 161 U.S. 519, 523 (1896) (internal quotation marks and citation omitted).

27. *Id.* The Court in the *Geer* opinion provided a thorough historical discussion of the relationship between governments and citizens in the area of wildlife regulation. However, it appears that the Court presented an inaccurate history regarding the characterization of wildlife as common or public during Roman times. The Court asserted that wildlife was common property, rather than public, because wildlife, "having no owner, were considered as belonging in common to all the citizens of the state." *Id.* at 522. This is contradictory to the modern interpretation, as presented by Epstein, *supra* note 22, which characterizes wildlife in Roman times as public property, rather than common. Thus, the history recounted in this article tracks the modern interpretation of ancient history, and attempts to consolidate the modern view with the overarching premise regarding wildlife put forth by the Court in *Geer*.

28. *Geer*, 161 U.S. at 523.

29. *Id.* at 524 (quoting Robert Joseph Pothier, *Traité du Droit de Propriété*, Nos. 27–28.).

they judge proper to transmit it, the right to hunt all game, and have forbidden hunting to other persons.”³⁰

Pothier explained that “ancient” authors, such as those during Roman times, opposed this viewpoint, and had claimed that “as God has given to man dominion over the beasts, the prince had no authority to deprive all his subjects of a right which God had given them.”³¹ These ancient authors argued that natural law permitted hunting to each individual, and that any civil law which forbade it was “contrary to the natural law, and exceed[ed], consequently, the power of the legislator, who, being himself submitted to the natural law, can ordain nothing contrary to that law.”³² Pothier responded to these arguments, stating that:

It is easy to reply to these objections . . . From the fact that God has given to human kind dominion over wild beasts it does not follow that each individual of the human race should be permitted to exercise this dominion. The civil law, it is said, cannot be contrary to the natural law. This is true as regards those things which the natural law commands or which it forbids; *but the civil law can restrict that which the natural law only permits.* The greater part of all civil laws are nothing but restrictions on those things which the natural law would otherwise permit.³³

Thus, natural law was no longer seen as absolute in the wildlife context, but instead permissive: the sovereign could restrict that which natural law merely allowed. Under this reasoning, governments could legitimately implement regulations for the protection of wildlife, because an overall community benefit, bestowed by a system of civil law, trumped the permissive natural law interests of individual private parties.

Even Blackstone, who wrote that property was the *absolute* right of every Englishman,³⁴ distinguished between property which was private and property which was of common interest to all. Blackstone pointed out that the right of an individual to possess property depended on the nature of the property and whether or not it was held in “common.” Blackstone stated that “after all,

30. *Id.* (quoting Robert Joseph Pothier, *Traité du Droit de Propriété*, Nos. 27–28.).

31. *Id.* (quoting Robert Joseph Pothier, *Traité du Droit de Propriété*, Nos. 27–28.).

32. *Id.* (quoting Robert Joseph Pothier, *Traité du Droit de Propriété*, Nos. 27–28.).

33. *Id.* (quoting Robert Joseph Pothier, *Traité du Droit de Propriété*, Nos. 27–28.) (emphasis added).

34. WILLIAM BLACKSTONE, 1 COMMENTARIES *134.

there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common”³⁵ With specific reference to wildlife, Blackstone noted that

it cannot be denied, that, by the law of nature, every man, from the prince to the peasant, has an equal right of pursuing, and taking to his own use, all such creatures as are *ferae naturae*, and therefore the property of nobody, but liable to be seized by the first occupant. And so it was held by the imperial law, even so late as Justinian’s time. . . . *But it follows from the very end and constitution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community.*³⁶

In modern times, Blackstone’s assertion that the taking of wildlife may be restricted by positive law became a commonly held view regarding wildlife regulation, as well as other types of environmental regulation, in England. Furthermore, these basic principles passed from England to the American colonies.³⁷ In 1694, the Massachusetts Bay Colony enforced the first closed hunting season in North America, which applied to all deer within the colony.³⁸ In 1708, various New York counties also established closed seasons to protect the populations of various game species.³⁹ Regulation of wildlife thus “vested in the colonial governments, where [it was] not denied by their charters, or in conflict with grants of the royal prerogative.”⁴⁰ Today, states maintain the same “prerogative,” since “the power which the colonies thus possessed passed to the states . . . and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution.”⁴¹ Every state in the Union has since ratified the

35. WILLIAM BLACKSTONE, 2 COMMENTARIES *14. *See also Geer*, 161 U.S. at 526.

36. WILLIAM BLACKSTONE, 2 COMMENTARIES *410 (emphasis added). *See also Geer*, 161 U.S. at 527.

37. In fact, early England passed laws which established preserves, similar to U.S. wildlife refuges, which were intended to protect the land from grazing by domesticated animals. Babcock, *supra* note 1, at 882.

38. Shannon Petersen, *Bison to Blue Whales: Protecting Endangered Species Before the Endangered Species Act of 1973*, 22-SPG ENVIRONS ENVTL. L. & POL’Y J. 71, 73 (1999).

39. *Id.*

40. *Geer*, 161 U.S. at 527.

41. *Id.* at 528.

common law principles espoused by Blackstone by legislating for the protection of important environmental resources.⁴²

Thus, early state efforts to incorporate wildlife and environmental regulations into their respective bodies of law exhibit that early state governments did not set out to aggressively guard private property rights at the expense of protecting important public resources.⁴³ Furthermore, as Hope Babcock has noted, “The view of property that crossed the ocean and found root in the colonies, therefore, was not absolute, certain, or exclusive, but was encumbered by communal and political obligations well into the eighteenth century and beyond.”⁴⁴ This governmental prerogative, which later took the form of the public and wildlife trust doctrines, trumped private property interests, to a degree, and became one of the first forms of environmental regulation widely accepted as constituting such “communal obligations.”

B. The Public and Wildlife Trust Doctrines in the United States— Introduction to *Illinois Central* and *Geer*

In order to understand the legal significance of the public and wildlife trust doctrines, it is first necessary to analyze the holdings in the seminal cases establishing those doctrines and the theoretical underpinnings of each doctrine within American jurisprudence. These cases demonstrate that the United States Supreme Court long ago validated the use of the public and wildlife trust doctrines as a means of protecting important public resources and overcoming takings claims.

1. *Illinois Central*

In 1869, the Illinois legislature granted title of lands submerged under Lake Michigan to the Illinois Central Railroad (the Railroad).⁴⁵ Approximately fourteen years later, the state sought to undo this grant by bringing a claim against the Railroad asserting that the Railroad had “encroached . . . upon the domain of the state, and its original ownership and control of the waters of the

42. EPA, State Environmental Agencies, <http://www.epa.gov/epahome/state.htm> (last visited Nov. 21, 2008).

43. Babcock, *supra* note 1, at 876.

44. *Id.*

45. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 437 (1892).

harbor and of the lands thereunder”⁴⁶ The Railroad, which had already commenced reclamation of a portion of the land for the purpose of laying tracks and other development, sought to retain the property by claim of the previous state grant. The Court, however, found that the Railroad did not have a legitimate claim to the property because title to submerged lands

is a title held in trust for the people of the state The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost⁴⁷

The Court’s analysis relied largely on its characterization of lands under navigable waters as “property in which the whole people are interested” and as public property “of a special character.”⁴⁸ The Court also noted at length the value of the Chicago harbor to the people of the state of Illinois.⁴⁹ In doing so the Court asserted that the Railroad’s claim of ownership to the submerged lands, if allowed to succeed, would “place every harbor in the country at the mercy of a majority of the legislature of the state in which the harbor is situated.”⁵⁰ The Court therefore rejected the Railroad’s claim, asserting that the lands were “a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated”⁵¹ The Court continued by explaining that “[t]his follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested.”⁵² Thus, the public trust doctrine, though implicitly referenced in earlier cases,⁵³ was explicitly established by the United States

46. *Id.* at 438.

47. *Id.* at 452–53.

48. *Id.* at 453–54.

49. *Id.* at 454–55.

50. *Id.* at 455.

51. *Id.*

52. *Id.* at 456.

53. See *Martin v. Waddell’s Lessee*, 41 U.S. 367, 413 (1842) (finding it unjustifiable “[i]f the shores, and rivers and bays and arms of the sea, and the land under them, instead of being held as a public trust for the benefit of the whole community . . . had been converted by the charter itself into private property, to be parcelled out and sold by the duke, for his own individual emolument[.]”). One author has noted that the Court in *Martin* found that

Supreme Court. The language used by the Court laid the foundation for numerous subsequent cases involving the public trust and arguably established the public trust doctrine as a longstanding background principle of property law.⁵⁴

The theory driving the public trust doctrine, as derived from *Illinois Central*, is that the public's rights in trust lands inhered prior to private property owners' rights. Thus, under certain circumstances when the two conflict, as when the state conveys public trust lands to private hands or enacts legislation which may limit property rights, the private property rights must be subordinate to the rights of the public.⁵⁵ In other words, the government may not inappropriately favor private parties with public trust resources, nor can private property owners assert control over resources in which the public has a paramount interest.⁵⁶

2. *Geer*

Geer involved a Connecticut statute which regulated the hunting of game birds. The appellant argued that the state lacked authority to enact the regulation. Using similar language to that in *Illinois Central*, the Supreme Court held that states have the right to "control and regulate the common property in game," and such control "lodged in the state . . . [and] is to be exercised, like all other powers of government, as a trust for the benefit of the people . . . not . . . for the benefit of private individuals as distinguished from the public good."⁵⁷ The Court found that the state had authority to regulate game because of wildlife's "peculiar

"the public trust character of navigable waters and their submerged lands survived a grant by the King of his proprietary interest in them . . . the question was whether it also survived the American Revolution. [The Court] declared that it did." MICHAEL BEAN & MELANIE ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 11 (3d ed. 1997).

54. See, e.g., *Barrett v. State*, 116 N.E. 99 (N.Y. 1917); *Miller v. Schoene*, 276 U.S. 272 (1928); *State v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78 (App. Div. 2000); *Sierra Club v. Dep't of Forestry and Fire Protection*, 26 Cal. Rptr. 2d 338 (Dist. Ct. App. 1993) (ordered not published); *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983); *Lassen v. Ariz. ex rel. Ariz. Highway Dept.*, 385 U.S. 458 (1967); *Pullen v. Ulmer*, 923 P.2d 54 (Alaska 1996).

55. Allan Kanner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 71 (2005).

56. *Babcock*, *supra* note 1, at 892-93.

57. *Geer v. Connecticut*, 161 U.S. 519, 528-29 (1896).

nature . . . and its common ownership by the citizens of the State.”⁵⁸ *Geer* is the foundational case establishing wildlife as an environmental interest which may be legally protected pursuant to the public interest.

In 1979, *Hughes v. Oklahoma*⁵⁹ overruled *Geer*, but only on the narrow issue of whether a state could actually own wildlife.⁶⁰ In *Hughes*, a defendant claimed that an Oklahoma law prohibiting the interstate sale of minnows procured within the state was unconstitutional because it violated the federal government’s Commerce Clause power. The *Hughes* Court ruled in favor of the defendant, finding that the statute was indeed unconstitutional.⁶¹ However, the Court left fully intact the power of the state to act pursuant to the wildlife trust doctrine, as long as the state did not hinder interstate commerce in violation of the Constitution. The Court affirmatively pointed out that “overruling *Geer* does not leave the states powerless to protect and conserve wild animal life within their borders,”⁶² and “the general rule we adopt in this case makes ample allowance for preserving . . . the legitimate state concerns for conservation and protection of wild animals.”⁶³

Ultimately, the wildlife trust doctrine, as established in *Geer*, recognizes that “[w]ildlife management in this country has been a prerogative of government since colonial times, as it was in England, and, as in England, laws regarding wildlife have helped define property rights.”⁶⁴ Because the wildlife trust doctrine inheres in the title to property prior to private interests obtaining that title, it prevents landowners from using property in a way that damages wildlife resources in which the public has an interest. State laws protecting such resources are simply codifications of this common law principle.⁶⁵

58. *Id.* at 530.

59. 441 U.S. 322 (1979).

60. *See generally id.*; *see also* Babcock, *supra* note 1, at 885.

61. *See generally Hughes*, 441 U.S. 322.

62. *Id.* at 338.

63. *Id.* at 335–36. At least one modern court interpreted *Hughes* to preclude the finding of a Fifth Amendment taking for wildlife regulations because “the state as trustee has the power to regulate to protect wildlife for the benefit of the public at large.” Caspersen, *supra* note 9, at 383 (citing to Clajon Prod. Corp. v. Petera, 854 F. Supp. 843 (D. Wyo. 1994)).

64. Babcock, *supra* note 1, at 883.

65. *Id.* at 889.

C. Historical and Legal Parallels of *Illinois Central* and *Geer*

The public and wildlife trust doctrines have nearly identical historical roots, as detailed in *Illinois Central* and *Geer*. An historical analysis of the two cases allows for a virtual merger of the two doctrines, as the foundation for each doctrine can be traced to the same source—the English crown.

In *Illinois Central*, the Court, quoting *People v. N.Y. & Staten Island Ferry Co.*,⁶⁶ stated that:

The title to lands under tide waters, within the realm of England, were by the common law deemed to be vested in the king as a public trust, to subserve and protect the public right to use them The king, by virtue of his proprietary interest, could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void.⁶⁷

The Court continued by citing *Stockton v. Balt. & N.Y. R.R. Co.*,⁶⁸ which described the transmission of the public trust doctrine from England to the several states. The Court stated that “prior to the Revolution the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain, as part of the jura regalia of the crown, and devolved to the state by right of conquest.”⁶⁹ The Court asserted that after conquest “the said lands were held by the state, as they were by the king, in trust for the public [B]eing subject to this trust, they were publici juris; in other words, they were held for the use of the people at large.”⁷⁰

Similarly, the Court in *Geer*, which was decided four years after *Illinois Central*, traced an almost identical route to the source of the wildlife trust doctrine—from England to the colonies and finally to the states. The Court noted that “[t]he practice of the government

66. 68 N.Y. 71, 76 (1877).

67. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 458 (1896).

68. 32 F. 9 (C.C.N.J. 1891)

69. *Illinois Central*, 146 U.S. at 457 (quoting *Stockton*, 32 F. at 19).

70. *Id.* (quoting *Stockton*, 32 F. at 19–20).

of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.⁷¹ The Court continued by stating:

Undoubtedly, this attribute of government to control the taking of animals *ferae naturae*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments It is also certain that the power which the colonies thus possessed passed to the states with the separation from the mother country, and remains in them at the present day.⁷²

The Court further noted that at that point in time most states had already passed laws for both the protection and the preservation of wildlife.⁷³

71. Scholars have stated that “the essential core of English wildlife law on the eve of the American Revolution was the complete authority of the King and Parliament to determine what rights others might have with respect to the taking of wildlife.” BEAN, *supra* note 53, at 10. The Supreme Court has asserted that this same power transitioned to the states in an unchanged form: “[W]hen the people of New Jersey took possession of the reins of government, and took into their own hands the powers of sovereignty, the prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in the state.” *Martin v. Waddell’s Lessee*, 41 U.S. 367, 416 (1842).

72. *Geer v. Connecticut*, 161 U.S. 519, 527–28 (1896). Scholars have noted that

the English conceptualization of wildlife as *res communes* (belonging to no individual, like the air and oceans) and *ferae naturae* (animals which by their nature are wild) and common law doctrines that applied to wildlife took root in this country and endured largely without change. English laws, which gave the Crown complete authority to determine the rights of landowners with respect to wildlife management, also became part of the common law of the colonies and eventually that of the several states which assumed the Crown’s responsibility to act ‘as trustee to support the title [to wildlife] for the common use.’

Babcock, *supra* note 1, at 880–81. An example of the lengths to which the crown in England could go in order to restrain private property rights is the use of “Forest Jurisdiction”—a system of forest laws which went so far as to have special courts and officials administer them. In these jurisdictions, “all forest land ‘was subject to an easement for the benefit of wildlife’ that allowed forest officials to enter private land and remove vegetation needed for wildlife.” BEAN, *supra* note 53, at 9. The Forest Jurisdiction began in England when “William the Conqueror laid waste thirty-six Towns in Hampshire to make a Forest.” *Id.* This is an extreme example of land use regulation to say the least.

73. *Geer*, 161 U.S. at 528. Once again, “protection and preservation” of wildlife might necessarily entail protection and preservation of wildlife habitat. The Court’s historical tracing of the wildlife trust doctrine further indicates that “game” is not an exhaustive list of resources protected by the trust. The Court quoted Blackstone’s assertion that the “natural right” of man to control game, “as well as many other [natural rights] belonging to man as an individual, may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community.” *Id.* at 527 (quoting WILLIAM BLACKSTONE, 2 COMMENTARIES *411)

Illinois Central and *Geer* demonstrate that the public and wildlife trust doctrines not only have the same historical background, but are largely driven by the same reasoning. Both doctrines emphasize holding in “trust” certain natural resources in which the public has an interest, and each doctrine highlights the need to do so for the benefit of the people. Both doctrines also predate and limit private property rights to a degree. Furthermore, at least one court has interpreted *Geer* as the application of the public trust doctrine, rather than as the application of a distinctly designated “wildlife trust doctrine.” The Supreme Court of Alaska, in *Pullen v. Ulmer*,⁷⁴ used the public trust doctrine to protect salmon as an asset of public interest because it found that “the state ‘acts as trustee of the natural resources for the benefit of its citizens.’”⁷⁵ In doing so, the court noted that though *Hughes* overruled *Geer* on the ownership issue, “[n]othing in the opinion . . . indicated any retreat from the state’s *public trust* duty discussed in *Geer*.”⁷⁶ In addition, at least one scholar has since noted that “[i]n *Geer v. Connecticut*, the United States Supreme Court applied the *public trust doctrine* to the taking of wildlife.”⁷⁷

The public and wildlife trust doctrines are, therefore, interchangeable. *Illinois Central* and *Geer*, handed down four years apart, demonstrate that both lake beds under navigable waters and wildlife are on the same plane of resources in which the public has a keen interest. Furthermore, cases since *Illinois Central* and *Geer* indicate that courts should not focus on whether the subject of regulation is a lake bed or a game animal, but instead on whether the regulation in question addresses an important public resource. Various courts, as discussed below, have asserted that wildlife, plants, and the habitats upon which these flora and fauna depend are of great public import.⁷⁸ Therefore, if courts find these environmental amenities to be covered under the public or wildlife trust doctrines, regulations protecting those amenities may be immune to takings claims. If there is no pre-existing right arising from a landowner’s title to property that allows the landowner to use, allocate or destroy trust resources, then no taking of private

(emphasis added).

74. 923 P.2d 54 (Alaska 1996).

75. *Id.* at 60 (quoting *Owsichek v. State*, 763 P.2d 488, 495 (Alaska 1988)).

76. *Id.* (emphasis added).

77. Kanner, *supra* note 55, at 72 (emphasis added).

78. *See infra* note 102.

property can occur.⁷⁹

D. Broad Application of the Public and Wildlife Trust Doctrines to Environmental Resources

Some might argue that *Illinois Central's* application of the public trust doctrine should be limited to the specific subject matter that the case addressed, i.e., submerged lands. In fact, the most recent Supreme Court decision upholding application of the public trust doctrine to tidelands demonstrates the Court's narrow focus on this particular natural resource. In *Phillips Petroleum Co. v. Mississippi*,⁸⁰ the Court considered whether the state of Mississippi could exert the public trust doctrine to protect forty-two acres of non-navigable tidelands. The Court noted the existence of a long line of cases upholding "State[] dominion over lands beneath tidal waters."⁸¹ The Court concluded that "our cases firmly establish that the States, upon entering the Union, were given ownership over all lands beneath waters subject to the tide's influence."⁸²

However, because most United States Supreme Court decisions explicitly invoking the public trust doctrine have dealt with submerged lands, it does not follow that the Supreme Court intends to so limit the doctrine's application.⁸³ The Court's non-acceptance of public or wildlife trust cases regarding other natural resources is by no means definitive evidence that the Court would refuse to apply those doctrines to other resources. On the contrary, lower courts' application of these doctrines to numerous other resources and the lack of Supreme Court grants of certiorari to those types of cases demonstrate that it is not the Court's intent to limit the scope of these doctrines to submerged lands.⁸⁴ The application of the public trust doctrine (or wildlife trust doctrine) to wildlife in *Geer* lends the strongest evidence in this regard. As discussed, the two doctrines have the same historical roots, and the

79. Babcock, *supra* note 1, at 893-94.

80. 484 U.S. 469 (1988).

81. *Id.* at 474.

82. *Id.* at 484.

83. In fact, in *Phillips* the Court found that "[s]tates have the authority to define the limits of lands held in public trust and to recognize private rights in such lands as they see fit." *Id.* at 475. *But see* *Lassen v. Arizona ex rel. Ariz. Highway Dep't*, 385 U.S. 458 (1967) (the Court considered application of the public trust doctrine to public lands clearly owned by the state). *See also* Kanner, *supra* note 55, at 83.

84. *See infra* note 102.

Supreme Court used nearly the same language when applying the doctrines in *Illinois Central* and *Geer*. Thus the argument that the Supreme Court intended the public trust doctrine to apply only to submerged lands has little merit.

A closer reading of *Illinois Central* suggests that submerged land is but one example of a number of resources in which the “public has an interest,” and which may be protected from takings claims brought by private property owners. First, the Court asserted that the state must exercise the trust which “devolve[s] upon [it] for the public, and which can only be discharged by the management and control of *property in which the public has an interest.*”⁸⁵ Similarly, the Court stated, “The ownership of the navigable waters of the harbor, and of the lands under them, is a *subject of public concern* to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated”⁸⁶ The Court found that “[t]his follows necessarily from the public character of the property, being held by the whole people *for purposes in which the whole people are interested.*”⁸⁷

Property in which the “public has an interest” and which is a “subject of public concern” is not limited to submerged lands under navigable waters. The Court’s choice of language supports such a conclusion. The Court twice uses the word “like” when referring to lake beds:

The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers So with trusts connected with public property, or property of a special character, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the state.⁸⁸

The Court’s use of the word “like” indicates its intent to set submerged lands off as merely an example of a resource in which the public has an interest, and which the state can control by asserting the public trust doctrine, rather than as an exhaustive list.

In fact, it appears from the second statement above that the operative language that triggers protection is “property of a special

85. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892) (emphasis added).

86. *Id.* at 455 (emphasis added).

87. *Id.* at 456 (emphasis added).

88. *Id.* at 453–54 (emphasis added).

character.” This language indicates that courts should focus on a specific subset of resources for application of the public trust doctrine (in addition to “public property,” of course). Furthermore, the Court’s apparent test to determine whether to apply the public trust doctrine is whether a “property of a special character” is being held “for purposes in which the whole people are interested,” rather than the narrow factual determination that the resource itself is submerged land.

The *Illinois Central* Court also provided an interesting analogy that further demonstrates the broad application of the public trust doctrine to a variety of public interests. The Court discussed the case of *Newton v. Mahong County Commissioners*,⁸⁹ which involved an 1874 act passed by the Ohio legislature that ordered the transfer of a county seat from one town to another.⁹⁰ Citizens brought suit, arguing that the original act of 1846 establishing the county seat in their town “constituted an executed contract which is binding on the state,” and the 1874 act unconstitutionally “impair[ed] the obligation of the contract.”⁹¹ The Court disagreed, declaring that state legislatures must be allowed the freedom to protect important public interests regardless of what commitments previous legislatures made.⁹² The *Illinois Central* Court reiterated this principle, and stated that:

[L]egislative acts concerning public interests are necessarily public laws . . . ; it is vital to the public welfare that each [legislature] should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require

. . . [I]f this is true doctrine as to the location of a county seat, it is apparent that *it must apply with greater force* to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for their common use and of common right, as an incident to their sovereignty.⁹³

The “true doctrine” to which the Court is referring is the doctrine of legislative discretion regarding the protection of important public interests. The Court, however, made its doctrinal

89. 100 U.S. 548 (1879).

90. *Id.* at 556.

91. *Id.*

92. *Id.* at 559.

93. *Illinois Central*, 146 U.S. at 459–60 (emphasis added).

analogy to a clearly “non-environmental” matter, and in doing so demonstrated the wide range of public trust interests to which the doctrine may apply.⁹⁴

The more recent expansion of the public and wildlife trust doctrines to numerous other environmental resources also exhibits that its common law application is not confined to the narrow scope that some may argue it should have. The public trust doctrine’s scope has been expanded to protect important recreational, educational, scientific, and aesthetic resources in which the public has been deemed to have an interest.⁹⁵ Indeed, the Supreme Court of Iowa recognized that the public trust doctrine has “emerged from the watery depths [of navigable waterways] to embrace the dry sand area of a beach, rural parklands, a historic battlefield, wildlife, archaeological remains, and even a downtown area.”⁹⁶

94. *Id.* at 460. The Court also introduced a temporal element into the analysis when it stated, “[t]he legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the state in the execution of the trust devolved upon it.” *Id.* This premise demonstrates that circumstances can change, and this principle should also apply to *which resources* are considered subject to the trust in the first instance—the harbor in Illinois today, the beachfront in South Carolina tomorrow. In fact, in *Lucas v. S.C. Coastal Council*, the Court stated that “changed circumstances or new knowledge may make what was previously permissible no longer so.” 505 U.S. 1003, 1031 (1992).

95. *Babcock*, *supra* note 1, at 891. See also *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (noting the “growing recognition” that the public trust doctrine applies to tidelands because such lands “serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area”).

96. *State v. Sorensen*, 436 N.W.2d 358, 362 (Iowa 1989) (citing Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning The Public Trust Doctrine*, 71 IOWA L. REV. 631, 632–33 (1986)). See also *National Audubon Soc’y v. Superior Court*, 658 P.2d 709 (Cal. 1983) (public trust doctrine prevented Los Angeles from draining non-tidal streams which fed a lake upon which wildlife depended); *Eagle Envtl. II, L.P. v. Dep’t of Envtl. Prot.*, 884 A.2d 867 (Pa. 2005) (applying the public trust doctrine to protect the battlefield at Gettysburg). Furthermore, in *Pullen v. Ulmer*, 923 P.2d 54, 60 (Alaska 1996), the Alaska Supreme Court noted that *Hughes v. Oklahoma*, 441 U.S. 322 (1979), overruled the state ownership doctrine as it was presented in *Geer v. Connecticut*, 161 U.S. 519 (1896), for the purpose of preventing interference with interstate commerce. Nonetheless, the court noted that *Hughes* made clear that the state’s public trust responsibilities regarding wildlife remained intact. The court went on to note that Article VIII of the Alaska Constitution incorporated public trust responsibilities and “compel[led] the conclusion that fish occurring in their natural state are property of the state for purposes of carrying out its trust responsibilities.” *Pullen*, 923 P.2d at 60. The court then stated that “it is the authority to control naturally occurring fish which gives the state property-like interests in these resources. For that reason, naturally occurring salmon are, like other state natural resources, state assets belonging to the state which controls them for the benefit of all of its people.” *Id.*

This expansions of the doctrines have held up numerous times in the face of Fifth Amendment takings claims. The wildlife trust doctrine was originally used to protect government regulations that restricted not only the killing of game, but also the *harming* of game from Fifth Amendment takings claims.⁹⁷ As early as 1881, the Illinois Supreme Court used language which indicated that not only may states regulate the *taking* of wildlife, but may also regulate *harm* which may occur to wildlife as reasonably judged by the legislature:

So far as we are aware, it has never been judicially denied that the government, under its police powers, may make regulations for the preservation of game and fish, restricting their taking and *molestation* . . . although laws to this effect, it is believed, have been in force, in many of the older States since the organization of the Federal government. . . . On the contrary, the constitutional right to enact such laws has been expressly affirmed And upon principle, the right is clear.

The ownership being in the people of the State . . . and no individual having any property rights to be affected, it necessarily results, that the legislature, as the representative of the people of the State, may withhold or grant to individuals the right to hunt and kill game, or qualify and restrict it, as, in the opinions of its members, will

at 61. Another scholar stated regarding the expansion of the public trust doctrine:

In its early form, the public trust doctrine applied to submerged lands, the foreshore and navigable waters and protected the public's rights and interests in navigation, fishing, and commerce. Since the 1970s, states and courts have extended the scope of the doctrine to protect other public uses including hunting, boating, swimming, bathing, and other recreational activities. Under the influence of changing public perceptions, states have applied the public trust doctrine to preserve and protect tidelands and other environments that provide food, shelter and habitat for birds and marine life and that enhance the scenery and climate of certain areas. The geographical reach of the doctrine has also been expanded. The public trust doctrine now also encompasses non-navigable waters and streams as well as parks, land, wetlands and wildlife. Thus, compared to its original scope, the public trust doctrine has been expanded considerably.

EDWARD H.P. BRANS, LIABILITY FOR DAMAGE TO PUBLIC NATURAL RESOURCES 51 (Kluwer Law Int'l 2001) (citations omitted).

97. See *infra* notes 116–117 and accompanying text; see also *infra* note 134. The “harming” of game in a legal sense may result from the destruction of habitat, which creates a potentially far-reaching expansion of wildlife trust doctrine coverage beyond the actual animals themselves. Such an expansion could potentially guard a much wider range of environmental regulations from takings claims.

best subserve the public welfare.⁹⁸

The focus on “harm” and “molestation” is important as these terms arguably include harm or molestation resulting from habitat destruction, thus bringing important ecological habitat under the protection of the wildlife trust doctrine.⁹⁹

One scholar has even stated that “[i]t is thus apparent that courts generally find no duty to compensate landowners for economic losses that result from state or federal restrictions on the killing of wildlife.”¹⁰⁰ Another scholar has noted that, if the wildlife trust doctrine can be effectively asserted against takings claims, then “[t]hose who care about protecting wildlife may find . . . that wildlife laws may escape the Just Compensation Clause, thereby taking out of harm’s way important wildlife habitat.”¹⁰¹ As discussed below, some courts have been willing to extend the wildlife trust doctrine, as a protection from Fifth Amendment takings claims, beyond game animals. Protection has indeed already been extended to animal *habitat*, as well as plants, in order to preserve the important public interests provided by those resources.¹⁰²

The following cases demonstrate that the principles established in *Illinois Central* and *Geer* extend beyond the protection of wildlife. In these cases, courts used these doctrines to protect plants and the overall habitats of both flora and fauna. Such an extension has huge implications for expanding the scope of the public and wildlife trust doctrines to protect various environmental regulations from takings claims.

Barrett v. State provides one example that demonstrates the broad authority of the government to regulate private land in the name of wildlife and environmental protection.¹⁰³ In that case, plaintiffs brought a takings claim against a New York statute that declared, “[n]o person shall *molest or disturb any wild beaver or the dams, houses, homes or abiding places of same.*”¹⁰⁴ The court undertook an

98. *Magner v. People*, 97 Ill. 320, 327 (1881) (emphasis added).

99. *See infra* note 134 and accompanying text.

100. BEAN, *supra* note 53, at 37.

101. Babcock, *supra* note 1, at 903.

102. *See, e.g.*, *Barrett v. State*, 116 N.E. 99 (N.Y. 1917); *Miller v. Schoene*, 276 U.S. 272 (1928); *State v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78 (App. Div. 2000); *Sierra Club v. Dep’t of Forestry and Fire Protection*, 26 Cal. Rptr. 2d 338 (Dist. Ct. App. 1993) (ordered not published); *National Audubon Soc’y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

103. 116 N.E. 99 (N.Y. 1917).

104. *Id.* at 100 (emphasis added).

interesting and unusual analysis of the history of beavers in New York, detailing the importance of that animal to the state. The court noted that beavers were at one time “very numerous” in the state of New York, but because of their great economic value, they were killed almost to the point of extinction.¹⁰⁵

Plaintiffs claimed that vast acres of valuable timber were felled by beavers, the population of which was recovering under the statute.¹⁰⁶ The lower court found that the plaintiffs had incurred damage of \$1900 due to the beavers and granted plaintiffs that amount in damages.¹⁰⁷ On the state’s appeal, the plaintiffs maintained the following three claims: first, the state could not protect an animal that was destructive; second, the 1904 law prohibiting the molestation of beavers prohibited plaintiffs from protecting their property, and thus was an unreasonable exercise of the police power; and third, the state was in possession of the beavers which had caused the damage and was thus liable for damage caused by them.¹⁰⁸

The court responded by stating that “the general right of the government to protect wild animals is too well established to be now called into question. . . . Their preservation is a matter of public interest. They are species of natural wealth which without special protection would be destroyed.”¹⁰⁹ The court noted that this power in New York dated back to 1705, when the colony passed a similar act for the protection of deer.¹¹⁰ Despite the fact that individual landowners may be harmed, the court stated that such regulation was “clearly a matter which is confided to [the legislature’s] discretion.”¹¹¹ The court further found that “[t]he state may exercise the police power ‘*wherever the public interests demand it*, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests.’”¹¹² The court, echoing *Illinois Central’s* focus on natural resources “of a special character” in which “the

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 101 (quoting *Lawton v. Steele*, 152 U.S. 133, 136 (1894)) (emphasis added).

whole people are interested,”¹¹³ stated as follows:

The eagle is preserved, not for its use but for its beauty.

The same thing may be said of the beaver. They are one of the most valuable of the fur-bearing animals of the state. They may be used for food. But apart from these considerations their habits and customs, their curious instincts and intelligence place them in a class by themselves. Observation of the animals at work or play is a source of never-failing interest and instruction. If they are to be preserved experience has taught us that protection is required.¹¹⁴

Thus, the court concluded that protecting beavers was within the authority of the legislature, largely because protection was of great interest to the public at large.¹¹⁵ As noted, not only was protecting the beaver a valid act, but so too was prohibiting *molestation* of the beaver *or its habitat* since “[t]he destruction of dams and houses w[ould] result in driving away the beaver.”¹¹⁶ According to this reasoning, not only may a state regulate the taking and molestation of an animal itself, but also the *habitat* upon which the animal depends. This is a clear expansion of wildlife protection towards general environmental protection and is reflective of many state and federal laws today.

Barrett is cited as an early manifestation of the public trust doctrine’s application to wildlife for the purposes of defeating a takings claim.¹¹⁷ Perhaps more importantly, *Barrett* lays a historical foundation for the expansion of the public trust doctrine to cover general environmental concerns, rather than merely protecting the taking or hunting of game animals. The holding in *Barrett* provides an example of how modern courts may hold modern environmental laws to be valid governmental measures to protect important public interests without payment of “just compensation.”

The case of *Miller v. Schoene*,¹¹⁸ decided in 1928, further

113. See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453–54 (1892).

114. *Barrett*, 116 N.E. at 101.

115. *Id.* at 102.

116. *Id.* at 101.

117. Caspersen, *supra* note 9, at 382.

118. 276 U.S. 272 (1928). The Court, in *Lucas v. S.C. Coastal Council*, construed *Miller* as one of several cases establishing the denial of takings claims when the state uses its police power to regulate activities that are “akin to public nuisances.” 505 U.S. 1003, 1022 (1992); see also *Mugler v. Kansas*, 123 U.S. 623 (1887) (state prohibited the manufacture of alcoholic beverages); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (state barred the operation of a

demonstrates the broad authority of states to regulate private property to prevent environmental degradation without incurring compensation liability under a Takings Clause analysis. In *Miller*, plaintiffs challenged the Cedar Rust Act of Virginia,¹¹⁹ which gave the government the authority to force private property owners to cut trees to prevent the spread of a plant disease. The state entomologists had ordered plaintiffs to cut a large number of trees on their own property to protect an apple orchard on an adjoining property.¹²⁰ Plaintiffs claimed this was a violation of their Fourteenth Amendment right to due process.¹²¹

The Court first noted the importance of apple harvesting in the state of Virginia as the state's economy was highly dependent upon orchards. The Court found that given the purpose of the statute, to protect the apple economy, the state was necessarily forced to choose between "the preservation of one class of property and that of the other."¹²² The Court reasoned that "[w]hen forced to such a choice the state does not exceed its constitutional powers by

brick mill in a residential area); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (state effectively prevented continued operation of a quarry in a residential area). In *Lucas*, the Court actually rejected this use of the state's police power, despite having upheld such a use under the circumstances of *Miller*. However, given the blurry line between the use of the police power to protect the public from harm and the use of the public trust doctrine to preserve interests important to the public, *Miller* could equally be construed as the latter. It has been noted that

[i]t is sometimes difficult to fix boundary stones between the private right of property and the police power But it is recognized that the State as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned.

Babcock, *supra* note 1, at 876. See also *infra* notes 191–193 and accompanying text. The Court in *Geer v. Connecticut*, 161 U.S. 519, 527–28 (1896), and the Minnesota and Illinois courts it cites, seems to assert that use of the police power to protect animals is synonymous with use of the wildlife trust doctrine.

119. The statute stated that it was

unlawful for any person to 'own, plant or keep alive and standing' on his premises any red cedar tree which is or may be the source or 'host plant' of the communicable plant disease known as cedar rust, and any such tree growing within a certain radius of any apple orchard is declared to be a public nuisance, subject to destruction.

Miller, 276 U.S. at 277.

120. *Id.*

121. *Id.*

122. *Id.* at 279.

deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.”¹²³ Apple harvesting was “one of the principal agricultural pursuits in Virginia” and the statewide value of red cedars was “shown to be small as compared with that of the apple orchards of the state.”¹²⁴ The Court therefore dismissed the contention that this “case is merely one of a conflict of two private interests,” and instead found it “obvious that there may be, and that there is, a preponderant public concern in the preservation of the one interest over the other.”¹²⁵ Thus, the Court ruled that the public interest in protecting apple orchards superseded the interest of the private landowner in keeping his trees, and that the state acted legitimately to protect the more important resource in such a circumstance.¹²⁶

Perhaps most interestingly, the Court in *Miller* decided that it need not “weigh with nicety the question of whether the infected cedars constitute a nuisance according to the common law or whether they may be so declared by statute,” because where “the choice is unavoidable, we cannot say that exercise [of the police power], controlled by considerations of social policy which are not unreasonable, involves any denial of due process.”¹²⁷ Thus, the Court reasoned that the takings issue could be decided not on the basis of nuisance, but on the basis of the general public policy interests at stake. This assertion by the Court is particularly intriguing, especially considering how the legal analysis of takings law has become increasingly opaque in modern times.¹²⁸ In *Miller*, the Court made clear that protection of significant public interests

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 280.

127. *Id.* The *Lucas* dissent also noted a parallel to *Miller* when it stated that

the Court has relied in the past, as the South Carolina court has done here, on legislative judgments of what constitutes a harm In *Miller*, the Court adopted the exact approach of the South Carolina court: It found the cedar trees harmful, and their destruction not a taking, whether or not they were a nuisance.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1053 n.17 (1992) (Blackmun, J., dissenting). In other words, the dissent argued that legislatures can use the police power to determine what constitutes harm and can pass legislation pursuant to those findings that is impervious to takings claims. See *infra* note 164.

128. See *supra* notes 6–9 and accompanying text.

could justify regulation of private property for environmental purposes, not only by prohibiting landowners from engaging in certain activities, but even to the point of requiring affirmative acts by a private landowner to destroy the landowner's *own property*.¹²⁹

In addition to the early twentieth century cases, at least two post-*Lucas* courts have allowed states to assert the public and wildlife

129. Other cases also demonstrate how courts have invoked "reasonable social policy" to uphold legal protections for important resources pursuant to the public and wildlife trust doctrines. In the 1919 case *State v. Pollock*, the Supreme Court of North Dakota ruled on the validity of a law that criminalized the possession of certain fish between the months of March and May. 175 N.W. 557, 558 (N.D. 1919). Plaintiffs contended that the statute was an unconstitutional interference with the right of U.S. citizens to "acquire and protect property, in that any statute which interferes with this right, except in cases where the public health, morals, or safety or the general welfare authorizes such restrictions as an exercise of police power, is . . . unconstitutional and void." *Id.* The court noted the historical roots of state control over wildlife when it stated that

the ownership of game being in the first instance lodged in the people of the state, may be reserved by them Any ownership which an individual is allowed to acquire may be subject to such conditions and limitations as the people acting through their legislative agents, may wish to impose. . . . This power of the state is based largely on the circumstance that the property right to the wild game within its borders is vested in the people of the state in their sovereign capacity; and as an exercise of its police powers and to protect its property for the benefit of its citizens, it is not only the right but it is the duty of the state to take such steps as shall preserve the game [C]onsequently nothing is taken from the individual and his constitutional rights are not infringed

Id. at 559 (emphasis added) (internal quotations and citations omitted). Similar to the Court in *Miller*, the court in *Pollock* made an interesting policy valuation in this passage, stating that governments not only have the legal right to regulate the environment, but also have the affirmative duty to preserve the public's proprietary environmental interests. The court found that the government's exercise of its duty does not infringe upon individual constitutional rights, which would presumably include the right to claim a taking without just compensation. Another case which demonstrates the focus on social policy regarding environmental regulation is *Toomer v. Witsell*, 334 U.S. 385 (1948). In *Toomer*, the Court augmented the legal "ownership" analysis which courts had previously used to justify state regulation of wildlife, and blatantly asserted that policy considerations regarding the public interest were in and of themselves sufficient support for valid environmental regulation. *Toomer* involved an assertion by Georgia shrimpers that South Carolina statutes regulating commercial shrimp fishing off the coast of South Carolina were unconstitutional. *See id.* at 389-91. South Carolina defended its regulations by invoking an historical line of laws regarding wildlife ownership—beginning in Roman times and as passed on to individual states by colonial governments. *Id.* at 399-401. The Court stated that "[t]he whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Id.* at 402. As in *Miller*, the Court indicated that the necessary ingredient for protecting environmental regulations from takings claims was that plaintiffs demonstrate a state interest in preserving the environment, as an "important resource," for the people as a whole. *Id.*

trust doctrines as common law background principles of property law, pursuant to *Lucas*, as a defense to takings claims brought against environmental regulations protecting a broad spectrum of natural resources. The court in *State v. Sour Mountain Realty, Inc.*¹³⁰ rejected a takings claim by owners of property who had been ordered to remove fences which kept threatened snakes from reaching their habitat. The court found that “[t]he State’s interest in protecting its wild animals is a venerable principle that can properly serve as a legitimate basis” for denying the claim.¹³¹ In *Sierra Club v. Department of Forestry & Fire Protection*,¹³² a timber harvest permit was denied to a plaintiff because harvesting would have caused habitat destruction that would have threatened various endangered species. The court found that “wildlife regulation of some sort has been historically a part of the preexisting law of property.”¹³³

The above cases demonstrate that courts have found a wide range of public environmental interests to be paramount to private property rights. These precedents have great implications for modern takings jurisprudence in the area of environmental regulation. The cases establish that the public and wildlife trust doctrines, as background principles of property law, may be used to shield environmental regulations protecting a variety of important public resources from the takings claims brought by private property owners. If jurisprudence in this area were to continue to develop in this direction, the outcome of a case similar to *Lucas* might be quite different. Because the statute at issue in *Lucas* was enacted in part to protect endangered species that depend on coastal habitat for survival, an extension of wildlife trust principles to that habitat might have saved the regulation from the takings claim.¹³⁴ A closer look at *Lucas*, with specific emphasis on a first-

130. 714 N.Y.S.2d 78 (App. Div. 2000).

131. *Id.* at 84. Some modern commentators on the public trust doctrine have asserted that it should be used as a tool for large scale ecological preservation, rather than just targeting species on a case by case basis. Caspersen, *supra* note 9, at 375.

132. 26 Cal. Rptr. 2d 338 (Dist. Ct. App. 1993) (ordered not published).

133. *Id.* at 347.

134. *See infra* note 136 and accompanying text. This statement is further supported by the premise put forth in *Palila v. Hawaii Department of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981). The limits of this premise have not been identified by the Supreme Court since, arguably, the legal theory driving *Palila* was only partially tested by the Supreme Court in *Babbitt v. Sweet Home*, 515 U.S. 687 (1995). In *Palila*, plaintiffs charged that the state was taking an endangered bird species in violation of the Endangered Species Act (“ESA”).

time review of the oral arguments presented during the *Lucas* remand, will further demonstrate this point.

III. THE UNTOLD STORY OF THE *LUCAS* REMAND AND THE INHERENT NATURE OF THE PUBLIC AND WILDLIFE TRUST DOCTRINES

A. Background

Given the property law precedents established in the late 19th and early 20th centuries, it is important to analyze whether the public and wildlife trust doctrines would provide a defense against the current trend of resistance to environmental protection measures, like the regulation at issue in *Lucas*.

In 1986 David Lucas purchased two residential lots, with the purported intention of building single-family homes.¹³⁵ In 1988 the South Carolina legislature enacted the Beachfront Management Act (“BMA”) in order to protect the South Carolina coast as a source of a variety of valuable uses and resources (the creation of a storm barrier, the generation of tourism, and the protection of both habitat for threatened and endangered species and vegetation crucial to the survival of the shoreline ecosystem).¹³⁶ The legislature found that these uses and resources were increasingly threatened by development occurring along beachfront properties, and such development had increasingly caused the erosion of coastal lands.¹³⁷ Thus, the legislature passed the BMA to “protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.”¹³⁸ The legislature amended the BMA in 1990

639 F.2d at 496. The state maintained a population of sheep and goats for sport hunting, but these animals destroyed the native forest upon which the bird depended. *Id.* In its analysis, the court applied the Fish and Wildlife Service’s regulatory definition of “harm” under the ESA, which includes activity that degrades or destroys an endangered animal’s habitat. *Id.* at 497. The court concluded that the state caused harm to the Palila’s habitat and therefore its actions violated the ESA. *Id.* at 497–98. Application of the ESA to a parcel of property arguably makes bringing a successful takings claim much more difficult. Since, in the *Lucas* case, the South Carolina legislature enacted its regulation in part to protect endangered species which depend on coastal habitat for survival, the wildlife trust doctrine could potentially be used to bolster the protection of such regulations from takings claims.

135. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008 (1992).

136. S.C. CODE ANN. §§ 48-39-10–48-39-30 (2008).

137. S.C. CODE ANN. § 48-39-20; *see also Lucas*, 505 U.S. at 1022 n.10.

138. S.C. CODE ANN. § 48-39-20.

to include an administrative remedy allowing the South Carolina Coastal Council (“Council”) to issue special use permits under some circumstances.¹³⁹

Because the BMA barred Lucas from erecting homes on his property, Lucas argued that it constituted a taking of his property under the Fifth and Fourteenth Amendments to the Constitution.¹⁴⁰ The trial court agreed, finding that Lucas’s property had been rendered “valueless.”¹⁴¹ However, the Supreme Court of South Carolina reversed, holding that the BMA was a valid use of the state’s police power.

The case ultimately made its way to the United States Supreme Court, where Justice Scalia began his analysis by noting the oft-quoted language in *Pennsylvania Coal* that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”¹⁴² The Court then established yet another nuance of takings jurisprudence, explaining that a regulation which strips property of all economic value is categorically a taking requiring just compensation.¹⁴³ However, the Court’s holding also established an exception to the rule, stating that:

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

. . . .

. . . 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.¹⁴⁴

Without such a requirement, the Court found, a private property owner would have no notice that the value of his or her property

139. S.C. CODE ANN. § 48-39-290(D)(1).

140. *Lucas*, 505 U.S. at 1007.

141. *Id.* (internal quotation marks and citation omitted).

142. *Id.* at 1014 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

143. *Id.* at 1016–18. Scalia claimed that this was not a new aspect of takings law. However, others have asserted that the holding in *Lucas* is indeed a new slant on the takings analysis. See, e.g., Babcock, *supra* note 1 at 850–51.

144. *Lucas*, 505 U.S. at 1027, 1029.

could potentially be eliminated.¹⁴⁵ Thus, the Court asserted that in order for South Carolina to avoid compensating Lucas, it would need to prove on remand to the South Carolina Supreme Court that the purposes of the BMA were supported by background principles of South Carolina's law of property or nuisance.

B. The *Lucas* Remand

On remand to the state supreme court, the state of South Carolina made little attempt to formulate the argument that the *Lucas* decision required before the state could avoid compensating for the BMA. Less than a month after the United States Supreme Court handed down its decision, the Council filed a "Motion to Clarify Remand," in which the Council requested that the South Carolina Supreme Court consider three issues: 1) whether Lucas could obtain a special use permit from the Council pursuant to the 1990 amendments to the BMA, 2) whether a total or temporary taking had occurred, including a determination of damages, if any, and 3) whether there were any background principles of nuisance or property law that would deny a takings claim.¹⁴⁶ The Council further asked the court to grant "permission to the parties to submit briefs or orally argue the positions concerning the framework for remand in order to insure that this case is brought to a speedy and conclusive end."¹⁴⁷ Lucas's counsel filed a "Motion on Remand from the United States Supreme Court," which focused primarily on proving economic loss. Lucas claimed that his use of the property would not constitute a nuisance and asserted that the trial court's grant of damages should be affirmed.¹⁴⁸

The South Carolina Supreme Court ultimately granted an oral argument for the case, which was held on November 18, 1992. During oral argument, the opening statement given by one justice was quite telling regarding the subsequently misdirected development of the arguments, and especially the arguments of the

145. *Id.* at 1027–28.

146. *See generally* Motion to Clarify Remand, South Carolina Coastal Council, Appellant, Jul. 23, 1992, at 2–4, *Lucas v. S.C. Coastal Council*, 309 S.C. 424 (Case No. 90–38) (on file with South Carolina Supreme Court Library).

147. *Id.* at 4.

148. *See generally* Motion on Remand from the United States Supreme Court, David H. Lucas, Respondent, Aug. 20, 1992, at 4–8, *Lucas v. S.C. Coastal Council*, 309 S.C. 424 (Case No. 90–38) (on file with South Carolina Supreme Court Library) [hereinafter Motion on Remand].

Council:

We really are not too sure that the things that you have filed really address what is concerning the court. This matter was remanded to this court, and the purpose for having this hearing is to hear from Coastal Council and from counsel for Mr. Lucas regarding your interpretation of what the United States Supreme Court is requiring the South Carolina Supreme Court to do. We don't think it would be beneficial to hear you reargue your position that you argued before, because the United States Supreme Court has determined that that is not the law in this case.¹⁴⁹

Thus the court highlighted that the motion filed by the Council was not adequately responsive to the directive handed down by the United States Supreme Court. Even so, the Council opened the argument by addressing those same unresponsive issues. Contrary to the third prong of the motion it filed, the Council failed to mention any intention to discuss background principles of property law that would allow the state to overcome Lucas's takings claim. Instead, the Council focused primarily on the special permit issue and whether or not there was a total or temporary taking warranting damages.¹⁵⁰ In essence, the Council argued that the United States Supreme Court never definitively ruled that there was a total taking, and that no total taking existed because Lucas had not yet exhausted administrative remedies by applying for a special use permit under the 1990 amendments to the BMA. The Council argued that as a result, the only question was whether a temporary taking occurred between the passage of the original BMA in 1988 and the amendments to the BMA in 1990. The Council asserted that any temporary taking should only result in *de minimis* damages since Lucas did not suffer any substantial, actual damages. Then the Council requested that the matter be remanded to them to decide whether a special use permit should be issued.¹⁵¹

149. Audio tape: Oral argument before the South Carolina Supreme Court on remand from the Supreme Court's decision in *Lucas v. S.C. Coastal Council* (see 505 U.S. 1003) (Nov. 18, 1992) (on file with South Carolina Supreme Court Library).

150. *Id.*

151. *Id.* The Council argued that actual damages for the temporary take should be based on four factors: that Lucas was 1) able to use the property, 2) intended to use the property, 3) had the capacity to begin construction, and 4) could provide an end date for the construction. The Council argued there was nothing in the record to show the regulation from 1988 to 1990 did Lucas any harm. Lucas maintained a vacant lot, and as a consequence the Council asserted that he may not have ever had plans to build during the two year period

Responding to Council's argument that administrative remedies had not been exhausted under the 1990 BMA, and that the court should determine damages due for a temporary taking, one justice stated:

But that case is not before us, is it . . . ? [Lucas] has not made an application to [the] Coastal Council. How can we remand a man when he has not made an application? . . . [T]he "total take" [question] . . . is not in front of us, is it? The only thing that is in front of us is the impact of the 1988 Beachfront Management Act. Both parties asked us to let them amend the pleadings or amend the appeal to bring in the 1990 Act. We declined to do that. So what we have in front of us is the effect of the '88 Act only. Isn't that correct? Well then, how could [the] Coastal Council ever be involved in that?¹⁵²

Another justice evidenced similar frustration by asking, "wouldn't you agree that up until this court makes some decision about this matter as a result of the United States Supreme Court, [Lucas] couldn't do anything . . . regarding those two lots, could he?" The justice further inquired how Lucas could have possibly applied for a permit under the 1990 Act since this court, in its decision in the case prior to the United States Supreme Court's grant of certiorari, held that his proposed activities were properly barred by the 1988 Act.¹⁵³

Even after the court pointed out that the Council's arguments were misguided and failed to address the issue for which the Supreme Court issued the remand, the Council persisted in its original argument. The Council continued to concede that there was some form of taking, though only temporary, and that the *de minimis* damages for that taking should be determined by the court. In short, the Council proved to be completely unprepared and did not even attempt to argue the validity of the BMA on the basis of background principles of property law as the United States Supreme Court had required.¹⁵⁴

in the first instance. As such, the Council argued that any damages awarded for the temporary take should be negligible. *Id.*

152. *Id.*

153. *Id.*

154. In fact, the Council seemed primarily focused on the need for quick resolution of the case. In response to the South Carolina Supreme Court's suggestion that the Council was incorrect regarding the procedural posture of the case when it requested a remand to

Even when *directly asked* by the South Carolina Supreme Court to argue the United States Supreme Court’s “background principles” directive, the Council failed to effectively address the issue. Most strikingly, one justice actually *invited* the Council to argue application of the public trust doctrine to the BMA:

Would you propose to justify [the BMA] on the basis of some common law doctrine of . . . noxious use or on some *public trust doctrine*? . . . [T]he Supreme Court forbids you to justify the regulation on the basis of the ‘88 Beach Management Act. They say if you are going to completely prohibit use under that Act, then you have “taken,” certainly for that period of time [T]hey leave open the question of whether you could justify that regulatory taking on some common law basis, *which presumably would include public trust* But as a practical matter, what else would you really have to say besides that, to justify the regulatory taking in the face of what the Supreme Court said . . . ?¹⁵⁵

Thus the court *itself* suggested that the Council could legitimately argue for the application of the public trust doctrine pursuant to the Supreme Court’s directive, possibly saving the BMA and the resources it protected from Lucas’s takings claim. Instead, the Council only focused briefly on the nuisance portion of the Supreme Court’s directive. For instance, one justice asked the Council, “Can you even attempt to prove any kind of common law nuisance? . . . The only way you’re going to be able to prevail is you are going to have to prove that something in his title would prevent him from building. You are out of the ballpark on that, right?”¹⁵⁶ The Council then basically capitulated, declaring that it was unprepared to make a nuisance argument and that this was a “very

the agency, the Council stated “if we could actually deal with the temporary damages issue . . . we would all be better off in terms of the length of time the trial took. But again I cannot change court procedure.” Furthermore, the Council’s attorney made numerous statements that arguably indicated not only a lack of vigorous representation, but also a lack of understanding of the United States Supreme Court’s decision. Regarding the requested remand to the Council on the special permit issue, which a justice pointed out was not a question before the court, the Council stated, “I’ve found of late that some of my legal conclusions may not be the best in the world . . . I’ve certainly had my share of . . . misunderstandings of the law in the course of my career.” *Id.* Counsel also responded to opposing counsel’s suggestion to settle the case by stating that, “[f]or me personally, I’d almost say ‘sure’ and write him a check myself . . . I cannot speak for my fourteen member board.” *Id.*

155. *Id.* (emphasis added).

156. *Id.*

difficult hurdle for the Council to overcome.”¹⁵⁷

When the Council finally attempted to make an improvised nuisance argument, one justice highlighted the futility of that argument by stating that there are “fine homes built on both sides of . . . these two lots. There is no way in the world you are going to be able to establish that . . . a nuisance is going to be created there by building a home”¹⁵⁸ The Council once again reverted to the primary arguments it established in its motion and finally concluded by simply stating that it “would like to get this matter resolved in the fashion of an appropriate remand or just a conclusion that [Lucas] did not effectively, at trial, prove that there was a total taking.”¹⁵⁹

Ultimately, the oral arguments before the South Carolina Supreme Court exhibited a failure on the part of the Council to adequately address the question that the United States Supreme Court directed it to address on remand. Most importantly, at the same time that the Council failed to make a public trust argument in order to save the BMA, the court itself suggested the use of the public trust doctrine as a potential background principle of property law that might overcome takings claims brought against regulations protecting upland coastal resources in South Carolina. However, the Council was unprepared to accept the court’s invitation to argue the public trust doctrine, and therefore missed an important opportunity to establish a strong public trust precedent for the defense of such environmental regulations in response to the *Lucas* decision.

Given the misdirected arguments made by the Council, it is not surprising that the court ruled in favor of Lucas, who argued that “[b]ecause ‘background principles of nuisance and property law’ in South Carolina do not prohibit construction of a conforming and similarly situated residence in an area zoned residential, there is no need to remand this case for further evidentiary findings.”¹⁶⁰ The court gave short shrift to the matter, stating in its final order:

We have reviewed the record and heard arguments from the parties

157. *Id.*

158. *Id.* Lucas’s counsel also focused solely on the nuisance directive issued by the Supreme Court, and never responded to the background principle of property law directive, which would have potentially covered the public trust doctrine.

159. *Id.*

160. Motion on Remand, *supra* note 148, at 5.

regarding whether Coastal Council possesses the ability under the common law to prohibit Lucas from constructing a habitable structure on his land. Coastal Council has not persuaded us that any common law basis exists by which it could restrain Lucas's desired use of his land.¹⁶¹

By failing to present an argument based on the public trust doctrine, the Council forced the court to “ignore[] the second part of the exception for ‘background principles of property law,’ . . . [by] not analyz[ing] possible public trust rights in the beach front property.”¹⁶²

Ultimately, the *Lucas* remand demonstrates that the South Carolina Supreme Court understood the United States Supreme Court's decision to allow state assertion of the public trust doctrine as a background principle of property law in order to defend the BMA. This point is particularly important considering that the BMA protected a variety of resources over which the state of South Carolina had never before asserted public trust authority. South Carolina common law at the time of *Lucas* included public trust protection of navigable waters and tidal lands, but had never before incorporated public trust protection of species' habitat, shoreline vegetation, and other upland coastal resources.¹⁶³ The South Carolina Supreme Court's invitation to the state indicates that state courts, in their role as author of state common law property rights,

161. *Lucas v. S.C. Coastal Council*, 424 S.E.2d 484, 486 (S.C. 1992).

162. Caspersen, *supra* note 9, at 373.

163. In the most recent South Carolina case upholding public trust protection for navigable waters and tidal lands, a landowner claimed that he was deprived of all economically beneficial use of his property due to wetlands regulations, and so was owed 5th Amendment takings compensation. *McQueen v. S.C. Coastal Council*, 589 S.E.2d 116, *cert. denied*, 540 U.S. 982 (2003). In denying the claim the court noted the longstanding South Carolina common law tradition of applying public trust principles to navigable waters and tidal lands, stating that

South Carolina has a long line of cases regarding the public trust doctrine in the context of land bordering navigable waters. Historically, the State holds presumptive title to land below the high water mark. As stated by this Court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State.

Id. at 119 (internal citations omitted). Another South Carolina Supreme Court case, decided over four years prior to *Lucas*, applied the public trust doctrine to protect streams and marshland from impoundment by the South Carolina Coastal Council. *State ex rel. Medlock v. S.C. Coastal Council*, 346 S.E.2d 716 (1986). On remand, the state did not argue the relevance of any of the above cited cases.

can permit the evolution of background principles over time, even in the absence of prior state precedent.¹⁶⁴

But what of federal courts? Do they have a role to play in applying these doctrines? In *Lucas*, the United States Supreme Court gave no indication that it considered the application of public trust principles or that it would have upheld the South Carolina statute had the state made a public trust argument. In fact, the Court focused primarily on nuisance as one example of background principles and failed to highlight other examples, which it could have done by acknowledging its own precedent establishing the public and wildlife trust doctrines as background principles of property law (*Illinois Central* and *Geer*). Under the circumstances presented in *Lucas*, consideration of these principles is clearly warranted. For instance, given that the South Carolina legislature focused on wildlife habitat, vegetation, and general protection of the coastal zone as reasons for passage of the BMA,¹⁶⁵ the public and wildlife trust doctrines were clearly relevant to the outcome of the state's case under the "background principles" analysis of *Lucas*. In other words, the BMA is itself evidence that

164. In fact, scholars have highlighted that positive legislative enactments, like the Beachfront Management Act, may also constitute "background principles" of property law, and that courts need not be limited by prior state court precedent. One scholar noted that the *Lucas* Court

insisted that a newly enacted land use restriction must be solidly grounded in the [] age-old principles [of property and nuisance law] if it is to be considered an inherent limitation on title. In fact, the Court also spoke of 'newly decreed' limitations on land use—a phrase that at least intimates that the application of existing legislation may require compensation if it goes beyond the limitations inherent in common law principles In my view, the scope of the exception to the total takings rule should not be defined (or limited) solely by reference to common law principles. Statutes have historically played an important role in establishing the contours of private property rights, and the Court does not, in other contexts, distinguish between state law derived from legislation and state common law. Moreover, nothing about the genesis of common law principles so distinguishes the common law from legislation that we should privilege it above statutes in determining whether a particular land use entitlement was inherent in an owner's title.

Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1, 5–7 (1996). See also Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 354–61 (2005) (discussing state and federal court cases holding that statutes, regulations, and constitutional provisions can constitute background principles of property and nuisance law).

165. See *supra* note 136 and accompanying text.

the legislature sought to protect resources in trust for the public and, had the state made such an argument, the specific application of the BMA in question may have survived the takings claim. Scholars have noted:

The reasoning in . . . *Lucas* . . . suggests the possibility that land use restrictions may be imposed without offending the Fifth Amendment if they are aimed at protecting wildlife However, if the land use restriction inheres in the landowner's title, no compensation is owed. This qualification leaves open the possibility that because a landowner's property right has never been construed to extend to wildlife, and because under old English law the rights of private landowners were constrained by obligations to protect wildlife and its habitat, restrictions to protect wildlife will not require compensation.¹⁶⁶

Given the apparent relevance of the public and wildlife trust doctrines to takings analysis, as demonstrated by the *Lucas* remand, and the early establishment of public and wildlife trust precedent in United States Supreme Court jurisprudence, why did the United States Supreme Court fail to consider these doctrines under the circumstances that *Lucas* presented?

It is possible that the majority of the Court—if they considered the issue—doubted that these doctrines were background principles under South Carolina's law of property because South Carolina's public trust protections at common law did not extend beyond navigable waters and tidal lands. As noted, the state of South Carolina had never before declared, nor had it historically viewed the upland coastal resources at issue in *Lucas* as protected by the public trust doctrine.¹⁶⁷ It is a long-settled premise that federal courts do not craft state common law.¹⁶⁸ Indeed, the United States Supreme Court makes it very clear that the background principles that should determine the outcome of a particular case are “background principles of the *State's* law of property,” not background principles recognized by *other* states.¹⁶⁹ In this view, principles of public trust protection for upland coastal resources may very well be background principles of property law

166. BEAN, *supra* note 53, at 38.

167. The author could not locate any cases directly on point on this issue.

168. *See, e.g.*, *Murdoch v. City of Memphis*, 87 U.S. (20 Wall.) 590, 608 (1875).

169. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992) (emphasis added).

in Oregon¹⁷⁰ or Maine,¹⁷¹ but not of South Carolina.¹⁷² Similarly, the Court might recognize the wildlife trust doctrine as a background principle of property law in New York,¹⁷³ but deem that of little relevance to the law of property in South Carolina. Such an outcome might be necessary due to the issue of notice, as recognizing one state's public or wildlife trust doctrine as a background principle of another state's common law might deprive the property owner of notice of important risks to ownership.¹⁷⁴

This argument, although with surface appeal, fails to recognize that the public and wildlife trust doctrines are principles very much akin to the police power, arising from the inherent sovereignty of each and every state. Because of this "background principle," a state government can act on those powers via its legislative authority at whatever point in time the state deems necessary—whether it be 1788 or 1988. In fact, the public trust doctrine and the police power have been analogized in this way by the United States Supreme Court.¹⁷⁵ In both *Illinois Central* and *Geer*, the Court's approach assumed that both the public and wildlife trust doctrines inhere in all property in the U.S. prior to the transfer of that property to private hands. As a result, these doctrines became "background principles of property law" in each and every state. This inherency not only allows state courts to apply the doctrines in an evolving fashion over time, but also allows *federal* courts to uphold state application of the doctrines even in the absence of prior state precedent. Such precedent may not be available if the state is seeking to apply the doctrines for the first time or in a new fashion to previously unprotected resources. However, federal court action is appropriate because the underlying public and wildlife trust background principles, as required by *Lucas*, remain perpetually available for invocation by *any* state that is party to a federal case.

Environmental legislation passed pursuant to these doctrines, in a non-arbitrary fashion and with appropriate parameters as determined by the courts, should, therefore, be immune from takings claims under the circumstances presented in a case like

170. *Stevens v. City of Cannon Beach*, 835 P.2d 940, 942 (Or. Ct. App. 1992).

171. *Bell v. Town of Wells*, 557 A.2d 168, 172 (Me. 1989).

172. *See supra* note 163.

173. *See generally* *Barrett v. State*, 116 N.E. 99 (N.Y. 1917).

174. *See Lucas*, 505 U.S. at 1027–28.

175. *See infra* notes 177–184 and accompanying text.

Lucas. Furthermore, state legislatures enacting environmental regulations should be allowed to emulate other states' legislative applications of the public and wildlife trust doctrines regardless of whether those fact-specific applications had previously been a part of the enacting state's common law of property.

C. Inherent Doctrines: Applying the Public and Wildlife Trust Doctrines Non-Exclusively

The Court in *Illinois Central* stated that the public trust is embedded in states as a part of "their inherent sovereignty" and that "any act of legislation concerning [the use of lands subject to the trust] affects the public welfare."¹⁷⁶ The Court's statement indicates that this governmental prerogative and inherent common law principle vested in each state *equally* at the time of its creation; in other words as a "background principle of property law." As such, the public and wildlife trust doctrines are pre-existing principles that inhere in each landowner's title to property, regardless of the state in which the landowner owns property.

Not only did this sovereignty inhere with regard to the *general* authority of states to act pursuant to the public trust doctrine, but also with regard to the *specific* natural resources a state chooses to protect. A parallel can be drawn between use of the public trust doctrine and use of the police power—just as all state legislatures can enact different zoning regulations pursuant to the police power, they are able to make determinations on what constitutes a public trust-protected resource without first having it declared a common law principle by the particular state's court.

The parallel between the police power and public trust doctrine is made clear by the statement in *Illinois Central* that the state "can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government . . ."¹⁷⁷ Thus, the Court analogizes the inherent nature of state public trust power with that of the police power. The police power, like the public trust doctrine, inhered in all states equally at the time of state establishment,¹⁷⁸ and therefore one state may act pursuant to the police power in a

176. Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 459 (1892).

177. *Id.* at 453.

178. See U.S. v. Morrison, 529 U.S. 598, 618 (2000) (stating that "the Founders denied the National Government [the police power] and reposed [it] in the States").

non-exclusive fashion. For example, the South Carolina legislature could enact legislation under its police power which emulated a North Carolina law, regardless of whether South Carolina courts had previously incorporated the specific subject of legislation into South Carolina common law. The only role of the courts in such circumstances is to ensure that the legislature's use of the police power is not arbitrary or unreasonable.¹⁷⁹

The Supreme Court validated the general applicability of inherent powers in the context of the police power in *Village of Euclid v. Ambler Realty Co.*¹⁸⁰ There the Court paved the way for federal courts to uphold state laws invoking the public or wildlife trust doctrines for protection of resources regardless of whether those doctrines had been previously invoked by the state to protect the same or similar resources. *Euclid* involved a constitutional challenge to zoning regulations passed by the local government.¹⁸¹ As is often the case with environmental regulation, the claimants argued that zoning was an unreasonable intrusion on their private property rights and that the government should not use zoning to restrict the use of their property.¹⁸² The Supreme Court disagreed, ruling that zoning was a proper exercise of the state's inherent police power. The Court noted that "it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to" the proper exercise of the inherent police power.¹⁸³ Though the case arose in the state of Ohio, the Court's ruling

179. *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

180. 272 U.S. 365. In fact, scholars have observed the parallel between the inherent police power (and zoning laws passed pursuant to it) and *Lucas* "background principles" by noting that

Chief Justice Rehnquist's dissent in *Tahoe-Sierra* helps identify the types of regulations that are sufficiently traditional in scope to be background principles of property law. . . . [T]he Chief Justice conceded that at least some 'valid zoning and land-use' regulations are insulated from takings liability under *Lucas*'s background principles framework. The Chief Justice explained that 'zoning and permit regimes are a longstanding feature of state property law'

Blumm, *supra* note 164, at 358 (citing *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 352 (2002)).

181. *Euclid*, 272 U.S. at 384.

182. *Id.*

183. *Id.* at 395.

applies to all states because *each state* was vested with the police power at the time of the state's creation.¹⁸⁴ It was not necessary that each and every state in the union bring a separate zoning case prior to enacting zoning regulations pursuant to the police power; the police power is considered both a background principle and general tool of common law legislative authority.

Similarly, the *Illinois Central* Court made numerous additional statements indicating that the public and wildlife trust doctrines are inherent background principles of common law property vested in each and every state upon its creation. At the outset of its analysis, the Court made clear that "[t]he state of Illinois was admitted into the Union . . . on equal footing with the original states, in all respects."¹⁸⁵ The Court also noted that states need not be subject to principles of exclusivity in exercising public trust sovereignty when it stated that "[t]here can be no distinction between the several states of the Union in the character of their jurisdiction, sovereignty, and dominion which they may possess and exercise over persons and subjects within their respective limits."¹⁸⁶

The Court further noted that:

It is . . . settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found

The same doctrine is . . . applicable to lands covered by fresh water in the Great Lakes.¹⁸⁷

The Court thus asserted that the public trust in this particular resource, lake beds, inhered in all states in this regard, not just the state of Illinois. As a result, it is clear that lake beds in the state of South Carolina could be similarly protected by the state legislature without the express prior approval of the South Carolina state courts.¹⁸⁸ Furthermore, since it appears that submerged lands are

184. *See* U.S. v. Morrison, 529 U.S. 598, 618 n.8 (2000) (stating that "the principle that [t]he Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history") (internal quotations and citations omitted).

185. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 434 (1892).

186. *Id.*

187. *Id.* at 435.

188. *But see supra* note 163.

but one resource which may be protected pursuant to the public trust doctrine, the South Carolina legislature should be able to protect wildlife, habitat, coasts, and other resources accordingly.

In addition to *Illinois Central*, *Geer* provides perhaps the strongest evidence that the Supreme Court did not regard the public or wildlife trust doctrines as doctrines to examine purely within the precedential confines of independent state jurisdictions. Indeed, as discussed below, the *Geer* Court did what has here been suggested—the Court looked to the wildlife trust doctrine as exercised in *other states* and applied it to a state which had never previously incorporated those fact-specific applications of the doctrine into its common law jurisprudence.

The *Geer* Court cited courts in three different states for the proposition that the state of Connecticut could enact a regulation for the protection of wildlife. In contrast, the Court cited no case from the state of Connecticut, and it appears that no Connecticut court had ever before considered the specific wildlife trust doctrine application in question;¹⁸⁹ just as South Carolina had never considered the application of the public trust doctrine to upland coastal resources prior to *Lucas*.

First, the *Geer* Court recognized “a well-considered opinion of the supreme court of California,” which had ruled that:

The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good.¹⁹⁰

Next, the Court noted that “the same view ha[d] been expressed by the Supreme Court of Minnesota,” which stated that:

The preservation of such animals . . . is a matter of public interest, and it is within the police power of the state, as the representative of the people in their united sovereignty, to make such laws as will best preserve such game, and secure its beneficial use in the future to the

189. The author could not locate any cases that indicated that Connecticut had previously considered the issue in question in *Geer*.

190. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896) (citing *Ex parte Maier*, 37 P. 402, 402 (Cal. 1894)).

citizens; and to that end it may adopt any reasonable regulations.¹⁹¹

Finally, the Court acknowledged the wildlife trust doctrine as set forth by the Supreme Court of Illinois, which had found that:

So far as we are aware, it has never been judicially denied that the government, under its police powers, may make regulations for the preservation of game and fish, restricting their taking and molestation It is, perhaps, accurate to say that the ownership of the sovereign authority is in trust for all the people of the state; and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state. But, in any view, the question of individual enjoyment is one of public policy, and not of private right.¹⁹²

Ultimately, the Court reasoned that “[t]he foregoing analysis of the principles upon which alone rests the . . . power of the state . . . to control [] ownership [in game] for the common benefit, clearly demonstrates the validity of the statute of the state of Connecticut here in controversy.”¹⁹³

Geer is a good example of how the Supreme Court has applied a background principle of property law, the wildlife trust doctrine, equally across states, even though the individual state in question had not incorporated the specific application of that principle into its common law. The Court did so with the wildlife trust doctrine in *Geer*, with the public trust doctrine in *Illinois Central*, and with the police power in *Euclid*. Given that federal courts do not craft state common law, inherent sovereign powers like the police power and public and wildlife trust doctrines are the only powers which may be so exercised. This interpretation should be an adequate response to arguments objecting to the application of the public and wildlife trust doctrines by federal courts in such circumstances.

In summary, in order to uphold environmental regulation based upon the public and wildlife trust doctrines, federal courts need not look with exclusivity at the public trust doctrine case law of individual states. Instead, exercise of the public trust doctrine should be viewed on the same plane as state exercise of the police

191. *Id.* at 533 (citing *State v. Rodman*, 59 N.W. 1098, 1099 (Minn. 1894)).

192. *Id.* at 533–34 (citing *Magner v. People*, 97 Ill. 320, 334 (1881)).

193. *Id.* at 529.

power, as in *Euclid*. The public and wildlife trust doctrines can serve as background principles of state property law, per *Lucas*, without the state courts having ever previously incorporated the regulation of the specific resource in question into the state's common law. Had the Supreme Court undertaken this analysis of its own precedent, as established in *Illinois Central* and *Geer*, the outcome of *Lucas* might have been quite different—the Court could have upheld state application of the public and wildlife trust doctrines itself to overcome the takings claim.¹⁹⁴

D. Checks on Expansive Public and Wildlife Trust Doctrine Application

Finally, one might argue that allowing broad application of the public and wildlife trust doctrines, to both the types of resources which may be protected and the breadth of jurisdictions which may exert such protections, could destroy important private property rights. The criticism might be that almost any amenity or resource could be characterized as a “public interest,” and there would be no limit on the application of these doctrines. A democratically elected government might then be allowed to “take” property by regulation without paying for it. Scholars have addressed this criticism, stating that:

Indeed, the scope of the public trust doctrine is subject to considerable debate. Many scholars acknowledge the public trust doctrine but maintain that the reach of the doctrine should be fixed. They argue that sudden shifts in the doctrine's application cannot inhere in a title because abrupt changes in the doctrine cannot be consistent with settled rules of state law. Critics of an evolving public trust doctrine are correct that sudden shifts in a doctrine argue against its characterization as a background principle. But it is inconsistent to recognize the public trust doctrine as a background principle on one hand and then limit its application to a “traditional scope” on the other. Controlled evolution is inherent in the very definition of the public trust doctrine; the fundamental purpose of the doctrine is to meet the public's changing circumstances and needs. Just as what constitutes nuisance has changed over time, so too has the public trust doctrine slowly been “molded and extended” to satisfy the needs “of the public it was created to benefit.” Careful, predictable expansions of the doctrine, therefore, are not novel

194. This would be contrary to the Court's assertion that this was to be decided at the state level. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031 (1992).

legislative decrees, but constitute a firmly embedded exercise of state duty.¹⁹⁵

Indeed, courts already perform a check on application of the public trust doctrine in the various states. As the above statement demonstrates, the public and wildlife trust doctrines need not be treated any differently than nuisance law, especially with regard to the way each doctrine has evolved. Furthermore, standards of controlled application are already in place for other background principles of state power, such as the sovereign and inherent police power, as no regulation enacted pursuant to that power may be arbitrary or unreasonable.¹⁹⁶

Likewise, the courts can continue to place bounds on application of the public and wildlife trust doctrines. Cases already demonstrate such bounds, as legislatures have been required to show that species or resources are numerically valuable, i.e. scarce or endangered, or otherwise economically valuable.¹⁹⁷ As such,

195. Kanner, *supra* note 55, at 67 (citing Zachary C. Kleinsasser, *The Law and Planning of Public Open Space: Boston's Big Dig and Beyond*, 32 B.C. ENVTL. AFF. L. REV. 421, 433–34 (2005) (citation omitted)). Another scholar noted that

[s]ome commentators have argued that an expanded, non-tidal application of the public trust as a defense to takings claims is inconsistent and irreconcilable with *Lucas* because it exceeds common law understandings of the doctrine. But this argument seems inconsistent with the *Lucas* Court's suggestion that background principles may have the potential to evolve beyond their historical scope.

Blumm, *supra* note 164, at 343.

196. *See* *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1928) (holding that it is the role of the courts to ensure that the legislature's use of the police power is not arbitrary).

197. *See, e.g.*, *Barrett v. State*, 116 N.E. 99 (N.Y. 1917); *Miller v. Schoene*, 276 U.S. 272 (1928); *State v. Sour Mountain Realty, Inc.*, 714 N.Y.S.2d 78 (App. Div. 2000); *Sierra Club v. Dep't of Forestry and Fire Protection*, 26 Cal. Rptr. 2d 338 (Dist. Ct. App. 1993) (ordered not published); *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983). For example, economic value presumably could include medicinal value of plants which treat a variety of illnesses. Also, in another parallel to zoning, Justice Stevens's dissent in *Lucas* highlighted that courts have frequently looked to the generality of a regulation to determine whether or not a taking occurred. Stevens, citing *Euclid*, stated,

[p]erhaps the most familiar application of this principle of generality arises in zoning cases. A diminution in value caused by a zoning regulation is far less likely to constitute a takings if it is part of a general and comprehensive land-use plan . . . conversely 'spot zoning' is far more likely to constitute a taking.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1073 (1992). Stevens continued,

assertion of the public or wildlife trust doctrines by legislatures would not reflect the whimsical will of a determined majority, but instead a genuine, statistically validated attempt by the legislature to protect an important environmental resource which otherwise would be lost to the public at large.

IV. CONCLUSION

In order to protect the environment from the harmful acts of private landowners, it is necessary for the government to maintain the authority to enact necessary environmental regulations. Such regulations are sometimes thwarted by private property owners asserting Fifth Amendment takings claims. It is clear, however, that the public and wildlife trust doctrines, deeply rooted in American historical jurisprudence, provide valuable tools to overcome some of these challenges. These doctrines have been applied in an evolving fashion by both state legislatures and state courts. A collection of federal and state cases, guided primarily by the principles established in *Illinois Central* and *Geer*, place not only submerged lands and coastal zones within the coverage of the public and wildlife trust doctrines, but also wildlife, plants, habitat, and other environmental resources of great public concern. If properly asserted, or even argued at all, these doctrines may have obviated the need of the South Carolina Supreme Court, on the *Lucas* remand, to find that the BMA constituted a taking.

Just as with the police power, a strong argument exists that the public and wildlife trust doctrines are virtually identical background principles of property law vested in every state equally at the time of creation. If any state validly retains the power to protect a particular valuable resource under the public or wildlife trust doctrines, any and all states may attempt to regulate in such a manner, regardless of whether that particular state's courts

[i]n considering Lucas's claim, the generality of the Beachfront Management Act is significant. The Act does not target particular landowners, but rather regulates the use of the coastline of the entire State. Indeed, South Carolina's Act is best understood as part of a national effort to protect the coastline, one initiated by the federal Coastal Zone Management Act of 1972.

Lucas, 505 U.S. at 1074. Thus, whether or not the public or wildlife trust doctrines are asserted as part of a general comprehensive scheme might provide an additional parameter to appropriately limit application of the doctrines in the takings context.

previously incorporated the subject of regulation into its body of common law. It is enough that the state legislature makes a valid, supported assertion that the resource being protected is of great public importance, and that courts find the statute to be reasonable and non-arbitrary. This approach is supported by the “inherent sovereignty” analysis of *Illinois Central*, as well as the *Geer* Court’s reliance on other states’ public trust doctrines when interpreting a Connecticut statute. Had the Supreme Court considered these principles in *Lucas*, perhaps it would have found it unnecessary to remand the case to the South Carolina Supreme Court.

History demonstrates that the public and wildlife trust doctrines are valid “background principles of property law” which can overcome takings claims brought against state environmental regulations, both at the state and federal level. It will be important to look to history if today’s environment is to be preserved for future generations of private property owners.