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Blake Hudson

Louisiana State University Law Center, blake.hudson@law.lsu.edu

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The American Takings Revolution and Public Trust Preservation: A Tale of Two Blackstones

Blake Hudson¹

Abstract: The U.S. Constitution was forged out of a revolution that both rejected and embraced aspects of English legal tradition. The Takings Clause and its subsequent jurisprudential interpretation represents a rejection of what the Framers at the time and constitutional Reframers since that time viewed as central government over-reaching and improper interference with private property rights. The Framers left fully intact—and a different set of constitutional Reframers are increasingly seeking to use—the English common law doctrine of public trust to prevent private property rights from trumping the public’s interest in certain resources, especially in the coastal zone. This doctrine inherently conflicts with the Takings Clause in many cases, for if a resource is protected by the public trust, then any restrictions on property made pursuant to that protection cannot result in a taking—the restrained activity was never part of the property owner’s bundle of property rights to begin with. This essay highlights the inevitable legal tension between the Takings Clause and public trust doctrine and its implications for coastal zone resources in a time of climate change. The article explores three implications of the Takings Clause-public trust tension: (1) resolution of future legal controversies related to climate change along the coast; (2) a potential rebalancing of modern takings jurisprudence, which has arguably disturbed the appropriate balance between private property protections and the public good; and (3) the creation of better governance structures through institutional design enhancements and adjustments—in this case focusing on the institution that is U.S. constitutional law.

The third absolute right, inherent in every Englishman, is that of property.²

- William Blackstone

[T]here are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common³ ... 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.⁴

- William Blackstone

¹ Associate Professor of Law, LSU Law Center and LSU School of the Coast and Environment. For their comments and insights, I wish to thank all of the participants in the History, Property, & Climate Change in the Former Colonies Symposium at Washington & Lee University School of Law. I am further grateful to the organizers of the conference for inviting me to participate in the symposium, and in particular Jill Fraley for her efforts in making the conference a resounding success. Finally, I thank the peer-reviewers and editors of the *Sea Grant Law & Policy Journal* for reviewing and publishing this article and for their wonderful suggestions, edits, and effort. I dedicate this article to my good friend and mentor Clark Hultquist, who cultivated my love of history and who has provided a model of teaching, scholarship, and service to which I aspire.

² SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS, Vol. 1, *137 (William Draper Lewis ed., Rees Welsh & Company 1915).

³ SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS, Vol. 2, *14 (William Draper Lewis ed., Rees Welsh & Company 1915).

⁴ *Id.* at *411.

The story of the American Revolution and the creation of the United States' governance structure has been told many times and through many different lenses, both contemporary and historical. The continued retelling of this story is understandable given the remarkable form of governance established by the U.S. Constitution. The Constitution is the oldest written constitution in continuous use, and has become a model document upon which many other nations have based their own governmental structures.

The Constitution, of course, was forged out of revolution, which drove the need to place in more tangible textual form the new governance structure that would immediately be needed to ensure the success of a new nation. Yet it is useful to be reminded at the most fundamental level of why *precisely* the Framers chose to establish an entire governance structure in textual form and break from the manner in which governments had historically operated up until 1787. Ultimately, our Framers chose to place in written form the rules of governance and rights that they had been denied under English rule—rights they believed were not guaranteed under English law, thus leading to revolution. After all, England was, and remains to this day, governed by an unwritten constitution.⁵ The Framers did not want our new nation to be guided entirely by unwritten rules implemented at the whim of centralized authority and dependent upon the benevolence of a monarch or the policies of a parliament that, in some respects, made up procedure and rules of governance as they went. Yet the U.S. Constitution did not fully supplant English law. Rather, the Constitution can be conceptualized as a modification of English law that at its core melded one legal tradition, English common law, with a new legal institution that we call constitutional law. While English common law dates as far back as 1066 and William the Conqueror, residing largely within and developed by the individual states, modern constitutional law looks to text established at the genesis of our government for answers to the most fundamental legal questions. This melding demonstrates that our chosen form of governance in the U.S. ultimately maintained the parts of English law that we preferred within state common law, while rejecting through constitutional text those parts that we did not prefer.

Perhaps nothing illustrates the implications of this schizophrenic homage to English legal tradition as well as the inevitable collision of the Takings Clause of the Fifth Amendment of the U.S. Constitution and the common law public trust doctrine—a collision that has direct implications for coastal zone resource management in the face of climate change. These two principles of modern American law may be said to represent polar propositions put forth by the renowned English jurist and legal philosopher William Blackstone. Blackstone has been credited with providing the most thorough accounting of English law through the mid-18th Century. Indeed, by some accounts the impact of Blackstone on legal theory in the 19th century was “greater in the United States than in Blackstone’s native land. After the American Revolutionary War [Blackstone’s] Commentaries was the chief source of the knowledge of English law in the American republic. A work that was a textbook in the old country became in the new one an oracle of law.”⁶

The Takings Clause to some, and as interpreted by many courts today, represents a principle of Blackstonian philosophy often cited by property rights advocates that property rights are inherent, inalienable rights crucial to the success of a free society,⁷ and as a result should be as free as possible from government intrusion. Indeed, though some form of due process had been guaranteed to English property owners since the Magna Carta, the Takings Clause owes its very existence to, at the very least,

⁵ See generally, Jane Ball, *The Boundaries of Property Rights in English Law: Report to the XVIIIth International Congress of Comparative Law*, 10.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW (2006), available at <http://www.ejcl.org/103/abs103-1.html>.

⁶ Encyclopedia Britannica, Sir William Blackstone, <http://www.britannica.com/EBchecked/topic/68589/Sir-William-Blackstone/729/Assessment> (last visited Jan. 15, 2013).

⁷ BLACKSTONE COMMENTARIES, *supra* note 2.

a partial rejection of English property law. The Takings Clause “provided greater protection for the property owner than the property owner had traditionally received,”⁸ since the Magna Carta was intended to provide compensation only when *personal* property was taken by the government. Physical governmental appropriation of private land, on the other hand, did not require compensation. The English crown was only prohibited from “tak[ing] anyone’s grain or other chattels, without immediately paying the money.”⁹ In contrast, “the sole limitation on government seizure of land was one of procedural regularity,”¹⁰ with the Magna Carta declaring that “[n]o free man shall be dispossessed ... *except by the legal judgement of his peers or by the law of the land.*”¹¹ The colonies operated under a similar application of English law, only compensating for the dispossession of personal property by the government, and “[n]o colonial charter required compensation for the seizure of land,” even when colonial governments built roads on undeveloped, private lands.¹²

Thus the Takings Clause may be viewed as a codification of Jeffersonian notions of property¹³—at least in the mind of the Framers primarily responsible for its inclusion in the Constitution, James Madison¹⁴—contemplating that a stable, free, and truly democratic society would be best crafted from the participatory decision-making of a landed populous, where citizens maintained protected rights to property as free as possible from direct interference or abuses of centralized authority.¹⁵ Madison and other Framers were obviously concerned with abuses that had occurred under English occupation. For example,

In drafting the [Takings Clause], it appears that Madison sought to address very particular concerns. One type of government action during the revolutionary era that troubled him was the seizure of loyalist land. Such seizure had occurred on a scale of epic proportions: Loyalist property worth more than twenty million dollars—one tenth the value of real property in the country—was confiscated.¹⁶

⁸ William Michael Treanor, *The Original Understanding of the Takings Clause*, Georgetown Environmental Law & Policy Institutes Papers & Reports, 5 (1998), available at http://scholarship.law.georgetown.edu/gelpi_papers/2/.

⁹ Magna Carta, Art. 28.

¹⁰ Treanor, *supra* note 8, at 5.

¹¹ Magna Carta, Art. 39 (emphasis added).

¹² Treanor, *supra* note 8, at 5.

¹³ See Luigi Marco Bassani, *Life, Liberty, and ... : Jefferson on Property Rights*, 18 J. OF LIBERTARIAN STUDIES 31, 79-81 (2004), available at http://mises.org/journals/jls/18_1/18_1_2.pdf (noting that “Jefferson did not reject the natural right of property in favor of a higher form of democracy, but rather derived his higher form of democracy from the right of property,” and that “the true meaning of the ‘pursuit of happiness’ in Jeffersonian doctrine” means that “the right to have a government that does not infringe on one’s own natural rights, in particular on property rights,” and quoting Jefferson: “the true foundation of republican government is the equal right of every citizen, in his person and property, and in their management.”)

¹⁴ Treanor, *supra* note 8, at 2.

¹⁵ The Takings Clause “was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war.” *Id.* at 4-5.

¹⁶ *Id.* at 5.

A review of the rights the English crown historically maintained, and parliament maintains today, on private property in Britain bears out a contrast to the American property ideal.¹⁷ Thus, the U.S. Constitution placed explicit and more stringent limits on the government than existed in England and that we still adhere to today (though in varying degrees depending on the constitutional interpreter). Property can be appropriated or regulated by the government, but *only* for public use and after compensation is awarded to the property owner for their loss of property or loss of use of property.

Modern debates over the meaning and scope of the Takings Clause occur somewhere between two extremes—those who argue that the Framers intended compensation to be owed for virtually *any* limitation on private property (*i.e.*, any regulations)¹⁸ and those who believe the Framers only intended the clause to apply to physical appropriation of property by the government (*i.e.*, eminent domain).¹⁹ Either way, however, it seems clear that the Framers intended more stringent protections than those existing in England, making more concrete the notion that property is the absolute and inherent right of every American, to paraphrase Blackstone.

Even though the Framers rejected an aspect of English legal tradition by etching in stone Takings Clause protections, they left fully intact English common law principles of public trust, which has historically applied to resources like the coastal zone, submerged lake beds, and wildlife.²⁰ Though the public trust doctrine had been implicitly discussed in earlier cases,²¹ the genesis of the doctrine in the United States has long been considered the case of *Illinois Central Railroad vs. Illinois*.²² In *Illinois Central*, the U.S. Supreme Court held that the state of Illinois could not divest the submerged lake bed under Lake Michigan to a private enterprise without considering whether such a divestment properly accounted for the interests of the public, who in fact held title to the property. The Court went to great lengths to trace the origins of the doctrine back to England (and even further to Roman times), detailing that the rights of the public tracked the historic rights of the English Crown regarding navigable waters and land submerged underneath them.

Just four years after *Illinois Central* the Court undertook a similar historical analysis in the case of *Geer v. Connecticut*,²³ where it upheld the authority of the state to establish laws regulating the taking of wildlife. The Court's analysis hinged on the finding that the rights of the public inhered in the state's wildlife just as the Crown in England maintained ultimate control over wildlife. As scholars have noted, "the essential core of English wildlife law on the eve of the American Revolution was the complete

¹⁷ MICHAEL BEAN AND MELANIE ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 7-10 (3d ed. 1997). For an example of the fluid nature of English property rights and the ability of the government to change and adapt them over time, see CHRISTOPHER RODGERS, *PROPERTY RIGHTS, LAND USE AND THE RURAL ENVIRONMENT: A CASE FOR REFORM, LAND USE POLICY* 26S S134-S141 (2009), available at http://www.bis.gov.uk/assets/foresight/docs/land-use/jlup/16_property_rights_land_use_and_the_rural_environment_-_a_case_for_reform.pdf.

¹⁸ See, e.g., RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (arguing that any net diminution in the value of property requires compensation).

¹⁹ See Treanor, *supra* note 8.

²⁰ See Blake Hudson, *The Public and Wildlife Trust Doctrines and the Untold Story of the Lucas Remand*, 34 *COLUM. J. ENVTL. L.* 99 (2009).

²¹ See, *i.e.*, *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842). In *Martin*, the Court found it unjustifiable for "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[.]" *Id.* at 413. One author has noted that the Court in *Martin* found that "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." BEAN, *supra* note 17, at 11.

²² 146 U.S. 387 (1892).

²³ 161 U.S. 519, 528-29 (1896).

authority of the King and Parliament to determine what rights others might have with respect to the taking of wildlife”—largely with little regard to what citizen property rights may be infringed.²⁴ The U.S. Supreme Court has described the transition of this power to the states, noting that when state citizens “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,”²⁵ and that,

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.²⁶

Scholars have further described the authority that this trust gave the English Crown and U.S. state governments as follows,

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.’²⁷

Indeed, the English Crown could go to great lengths to restrain private property rights when exercising the public trust. Take, for example, the use of the “Forest Jurisdiction”—which was an early system of forest laws administered by special courts and officials. 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.”²⁸ The origin of the Forest Jurisdiction in England was quite dramatic, beginning when “William the Conqueror laid waste thirty-six Towns in Hampshire to make a Forest.”²⁹ Today, in a time when urban sprawl places forests, coastal wetlands, and the climate regulation services they provide under increasing stress, it is hard to conceptualize a policy mandating that forest or wetland “sprawl” replace human development. Yet this extreme form of land use regulation exercised by the English Crown was the origin of public trust protections that now reside in state common law and which have been expanded over time to protect a variety of resources other than submerged lakebeds under navigable waters and wildlife. Indeed, the continuing expansion of public trust protections in the U.S. represents a second line of Blackstonian philosophy that private rights may be restrained by positive law enacted for the benefit of the community.³⁰

The fundamental paradox presented by the Framers’ implicit retention of the public trust doctrine within state common law (through the 10th Amendment) and their revolutionary textual codification of the Takings Clause, is that if the public trust doctrine is found to legitimately apply, it renders the Takings Clause meaningless, at least in some ill-defined and unclear set of circumstances that continue

²⁴ BEAN, *supra* note 17, at 10.

²⁵ *Martin*, 41 U.S. at 416.

²⁶ *Geer*, 161 U.S. at 527–28.

²⁷ 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, 880-81 (2000).

²⁸ BEAN, *supra* note 17, at 9.

²⁹ *Id.*

³⁰ BLACKSTONE COMMENTARIES, *supra* note 3, at *411.

to expand in scope. The entire premise of the public trust doctrine is that the public's rights inhered in certain resources or property *prior* to any private property rights that may later be granted or claimed by owners with otherwise legal title to that property. In other words, the rights of the public operate much like a restrictive covenant embedded within an individual's title. Thus if the public trust inhered in one's property—presumably pursuant to the crown's authority during the time of British rule—and continued through colonial governance, state governance under the Articles of Confederation, and federal and state governance under the U.S. Constitution, then any governmental restrictions later placed on that property and aimed at those trust resources could take nothing for which compensation is owed.

Once the public trust doctrine expanded beyond submerged lands under navigable waters³¹ to reach wildlife and its habitat,³² non-navigable tributaries feeding a navigable body containing important species habitat,³³ backfilled wetlands submerged by rising seas,³⁴ or dry sand beach dredged by the state and adjacent to private properties,³⁵ it became unclear where the limits on public trust application begin and valid application of the Takings Clause ends (and indeed perhaps it never begins). As stated by Professor Lazarus, 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.”³⁶ Once the public trust inhered in these resources, then the Takings Clause was rendered moot. The stick that constitutes these resources was not in the bundle of sticks purchased by the property owner, so to speak, and so a property owner cannot claim title to them, and in fact never could. Thus, nothing would be taken from them for which the government would be required to justly compensate.

Perhaps the clearest example of the Takings Clause-public trust paradox is the case of *Lucas v. South Carolina Coastal Council*.³⁷ *Lucas* provides a number of insights about the history of the public trust doctrine and Takings Clause, and their modern application to the coast in a time of climate change. David Lucas, plaintiff in the case, argued for an operation of the Takings Clause that, at least anecdotally, represents the “property as absolute right” Blackstone. Lucas, when faced with prohibitions on the development of his beachfront lots due to regulatory efforts by the state of South Carolina to battle eroding shorelines, stated the following:

There are enemies of the Constitution here right now. There are core values in there that if you get away from you don't have a constitution. And one of them is the protection of private property. That's what America was founded on. An individual person can own, and what he owns is his. And that is under attack ... [I] had one year from the inception of this legislation to apply for a building permit. I looked at those laws and regulations and I said “this isn't fair,” why do I have to do something on their time schedule instead of mine? It's my property. I bought it. I

³¹ Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

³² Geer v. Connecticut, 161 U.S. 519 (1896); 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 Dep't, 385 U.S. 458 (1967); Pullen v. Ulmer, 923 P.2d 54 (Alaska 1996).

³³ National Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983) (holding that public trust doctrine prevented Los Angeles from draining non-tidal streams which fed a lake upon which wildlife depended).

³⁴ McQueen v. S.C. Coastal Council, 580 S.E.2d 116 (2003).

³⁵ Stop the Beach Renourishment, Inc. v. Fl. Dep't Env'tl. Prot., 130 S. Ct. 2592 (2010).

³⁶ 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)).

³⁷ 505 U.S. 1003 (1992).

paid almost \$500,000 a piece for these [lots] ... My goals were to stop government from encroaching on individual liberty ... This was just restricting the American dream ... The individual should not have to sacrifice for the good of the public.³⁸

The statute at issue in *Lucas*, on the other hand, represents the Blackstonian principle of restricting private property owner activities by the passage of “positive laws enacted for reasons of state or for the supposed benefit of the community.” The Beachfront Management Act (BMA) was aimed at protecting the South Carolina coast and a variety of resource values it provided: storm barrier protection, tourism generation, habitat for threatened and endangered species, and protection of vegetation crucial to the survival of the shoreline ecosystem.³⁹ The legislature found that these resource values were increasingly threatened by beachfront development, which had contributed to significant erosion of coastal lands.⁴⁰ Each of these resources has at some time or another and in one jurisdiction or another been subject to public trust protections, notwithstanding takings claims brought by parties like David Lucas.

Though the *Lucas* case, for reasons discussed below, ultimately elevated “absolute right” Blackstone over “benefit of the community” Blackstone, the case has come to be understood as opening the door wide for public trust application to overcome takings claims. In *Lucas*, the U.S. Supreme Court, through the very medium of its takings jurisprudence, provided a mechanism for the public trust doctrine to eviscerate regulatory takings based upon the total economic deprivation rule (a rule that the Court has argued makes a regulation the virtual equivalent to a physical appropriation of property by the government). The Court held that regulations reducing all of the economic value of property were categorically takings, *unless* background principles of the state’s law of property inhered in the title. These background principles would include, for example, limitations that nuisance law might have already placed upon the property. In fact, the *Lucas* case has had an “unlikely legacy,”⁴¹ since a number of “background principles” of property law have since been utilized to completely skirt Takings Clause protections, including the natural use doctrine; the navigational servitude; customary rights (like native gathering rights); water rights; Indian treaty rights; certain statutes, regulations, and constitutional provisions; and, of course, the public and wildlife trust doctrines.⁴² Thus, “[i]nstead of increasing the likelihood of either land-owner compensation or deregulation, *Lucas*’s principal legacy lies in affording government defendants numerous effective categorical defenses with which to defeat takings claims.”⁴³ As noted by Professor Babcock,

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

³⁸ DVD: *Lucas v. South Carolina Coastal Council*, Duke University School of Law, Distinctive Aspects of American Law (Duke Law 2005), available at <http://web.law.duke.edu/voices/lucas>.

³⁹ See S.C. CODE ANN. §§ 48-39-20 (Legislative Declaration of Findings).

⁴⁰ *Id.*; see also *Lucas*, 505 U.S. at 1022 n.10.

⁴¹ 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). The authors further assert that “Adding to the unanticipated consequences of the *Lucas* opinion was the fact that the categorical takings rule concerning economic wipeouts it established turned out to apply only to a very narrow class of takings cases, while the categorical defenses authorized by the decision are quite expansive in scope. In effect, the *Lucas* decision fundamentally revised all takings analysis by making the nature of the landowner’s property rights a threshold issue in every takings case.” *Id.* at 322.

⁴² *Id.* at 341-60.

⁴³ *Id.* at 321.

uses to which private property can be put when they threaten wildlife, and thus potentially created an exception much wider than intended.⁴⁴

Notwithstanding cases after *Lucas*, the *Lucas* case itself is largely a missed opportunity in the context of the Takings Clause-public trust doctrine debate. The story of the *Lucas* case often ends with the Supreme Court ruling. The charge given by the U.S. Supreme Court to the state on remand to the South Carolina Supreme Court was to formulate arguments as to whether there were any background principles of nuisance or property law that applied and that could avoid takings liability.⁴⁵ The only documentation that arose out of the remand was an order on remand declaring that there were no such background principles. Yet the *Lucas* story provides a far more instructive and rich lesson than the documentation would suggest.

This lesson comes alive when one listens to the oral arguments made on remand, which were neither transcribed nor documented in any fashion.⁴⁶ During oral argument, the South Carolina Supreme Court noted that proving that a background principle of nuisance law could overcome the takings claim would be a difficult if not impossible task for the state⁴⁷—how would David Lucas building a beach home on his property be a nuisance to neighbors who also maintained beach homes? Yet, notwithstanding the difficulty of proving nuisance, the state of South Carolina missed an opportunity to argue one of the many other background principles of property law noted above, and in particular the public trust doctrine. Beyond the fact that the state utterly failed to understand what the U.S. Supreme Court required it to prove on remand, even when invited by the South Carolina Supreme Court to argue the public trust doctrine as a background principle of property law that might overcome the takings claim, the state failed to do so.⁴⁸ Remarkably, Justice Toal *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.*⁴⁹

Even so, the State of South Carolina was unprepared to make a public trust argument that would expand public trust protection to these resources. About ten years after *Lucas*, the state upheld the public trust doctrine as a means of protecting a more traditional public trust resource than upland

⁴⁴ Babcock, *supra* note 27, at 855.

⁴⁵ *Lucas*, 505 U.S. at 1031.

⁴⁶ See Hudson, *supra* note 20.

⁴⁷ The South Carolina Supreme Court noted that there were "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..." 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* (Nov. 18, 1992) (on file with South Carolina Supreme Court Library).

⁴⁸ Hudson, *supra* note 20, at 130-36; 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* (Nov. 18, 1992) (on file with South Carolina Supreme Court Library).

⁴⁹ 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* (Nov. 18, 1992) (on file with South Carolina Supreme Court Library) (emphasis added).

coastal resources—that is, navigable waters and tidal lands. In *McQueen v. S.C. Coastal Council*,⁵⁰ a landowner claimed that he was deprived of all economically beneficial use of his property by regulations that forbid him from backfilling wetlands to regain property lost to rising tides. McQueen's takings claim was denied by the court, which noted the longstanding South Carolina common law tradition of applying public trust principles to navigable waters and tidal lands.

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.⁵¹

Despite the fact that *McQueen* dealt with more traditional public trust resources, those linked to navigable waters, *Lucas* does appear to be an important missed opportunity to refine understandings of the intersection of the public trust doctrine and Takings Clause along the coast, especially since another South Carolina Supreme Court case, decided over four years prior to *Lucas*, applied the public trust doctrine to protect upland streams and marshland from impoundment by the South Carolina Coastal Council.⁵²

Ultimately, the historical drivers of tension between the public trust doctrine and Takings Clause along the coast in a time of climate change provides an opportunity to explore three important implications of U.S. jurisprudence and constitutional law in these two areas. The first implication regards the fact-specific inquiries that will arise as legal disputes stem from climate-induced changes in the coastal zone. None of the examples outlined here are particularly novel, as scholars have highlighted the interplay between the Takings Clause and public trust doctrine for most (if not all) of them in the literature.⁵³ Nonetheless, when it comes to climate change impacts on the coast there are "easy" cases and there are "hard" cases. Here, the descriptors "easy" and "hard" are used to simply signify that there are areas that have been jurisprudentially explored and developed fairly well and those that have not, though these areas differ by state of course. For example, cases like *McQueen* provide guidance for resolving the balance between the public trust doctrine and Takings Clause in cases where private property owners seek to backfill land that has become submerged due to sea level rise. *Stop the Beach Renourishment* does the same for disputes over who owns dry sand beach when the government undertakes beach renourishment or restoration projects.⁵⁴ *Medlock* indicates that some states consider the public trust doctrine to apply to upland marshes connected to navigable streams and rivers, which could avoid takings claims for the regulatory preservation of such resources.⁵⁵

⁵⁰ 580 S.E.2d 116 (2003).

⁵¹ *Id.* at 119 (internal citations omitted).

⁵² State ex rel. *Medlock v. S.C. Coastal Council*, 346 S.E.2d 716 (1986).

⁵³ See, e.g., Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENV. L.J. 51 (2011); Michael Hiatt, *Come Hell or High Water: Reexamining the Takings Clause in a Climate Changed Future*, 18 DUKE ENVTL. L. & POL'Y F. 371 (2008); James G. Titus, *Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners*, 57 MD. L. REV. 1279 (1998); Niki L. Pace, *Wetlands or Seawalls? Adapting Shoreline Regulations to Sea Level Rise and Wetland Preservation in the Gulf of Mexico*, 26 J. LAND USE & ENVTL. L. 327 (2011); Meg Caldwell & Craig Holt Segall, *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, 34 ECOLOGY L.Q. 533 (2007).

⁵⁴ *Stop the Beach Renourishment, Inc. v. Fl. Dep't Env'tl. Prot.*, 130 S. Ct. 2592 (2010).

⁵⁵ State ex rel. *Medlock v. S.C. Coastal Council*, 346 S.E.2d 716 (1986).

On the other hand, the outer bounds of the public trust doctrine's scope and its ability to overcome takings claims in the context of climate change and the coast are woefully underdeveloped jurisprudentially. Will the public trust doctrine expand to overcome takings claims for the protection of upland resources like wetlands that act as preventative coastal land loss mitigation or adaptation measures (buffer zones for storm surge) notwithstanding questions of navigability?⁵⁶ In addition to *Medlock*, the U.S. Supreme Court, in *Phillips Petroleum Co. v. Mississippi*,⁵⁷ considered whether the state of Mississippi could invoke the public trust doctrine to protect *non-navigable* tidelands. The Court noted the long line of cases upholding "State[] dominion over lands beneath tidal waters."⁵⁸ 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."⁵⁹ Yet state courts may expand the doctrine beyond lands covered by the tides or that are navigable-in-fact, as California did in protecting non-navigable tributaries feeding a navigable body containing important species habitat in *National Audubon Soc'y v. Superior Court*.⁶⁰

As Hurricanes Isaac and Sandy recently demonstrated, storm surge disasters will become more frequent with sea level rise and increased hurricane activity. As a result, protection of non-traditional landscapes will be needed to adapt to climate change impacts in an optimal manner. Also consider wetland restoration programs like those recently put forth in the state of Louisiana's *Comprehensive Master Plan for a Sustainable Coast* (Master Plan), which plans to invest \$50 billion over upcoming decades to restore the Louisiana coast and mitigate coastal land loss by fighting the encroaching sea.⁶¹ The plan seeks the cooperation of private property owners to put such projects into place,⁶² but it remains to be seen whether states will be able to prescribe more stringent requirements on property owners to achieve coastal land loss mitigation goals without takings limitations in the event that landowners do not voluntarily cooperate. The same might be said for sediment diversions, levee removal projects that may flood properties to build up land and avoid subsidence, levee construction projects that send water to neighboring properties, or other similar land building and coastal armoring projects.⁶³ Even government choices *not* to protect certain lands from sea level rise in favor of others or *not* to re-establish public and private access to "marooned" property could conceptually lead to takings claims.⁶⁴ What about outright prohibitions on development in particularly vulnerable areas? Can governments undertake these measures and be free of takings claims? Each of these questions needs to be explored and developed in the case law in order to provide governments in coastal areas the tools needed to adequately protect human and natural capital as sea levels rise and other climate change impacts become more severe.

The second implication is that the future manifestation of the Takings Clause-public trust tension along the coast provides an opportunity to further understand the original intent of the Takings Clause in balancing public and private interests, such as those the public trust doctrine was intended to preserve. Perhaps nowhere will we see such a clash between these interests over such a short time scale,

⁵⁶ See Blake Hudson, *Coastal Land Loss and the Mitigation-Adaptation Dilemma: Between Scylla and Charybdis*, 73 LA. L. REV. 31 (2012).

⁵⁷ 484 U.S. 469 (1988).

⁵⁸ *Id.* at 474.

⁵⁹ *Id.* at 484.

⁶⁰ 658 P.2d 709 (Cal. 1983).

⁶¹ LA COASTAL PROT. & RESTORATION AUTH., LOUISIANA'S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST 24 (2012), available at <http://www.coastalmasterplan.la.gov/>.

⁶² *Id.* at 167.

⁶³ For a discussion of these and other potential takings issues in the coastal zone, see J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69 (2012).

⁶⁴ *Id.*

both on the ground and in the courtroom, as along the coast in the face of rising seas. The ways in which the above-described conflicts play out will provide a potential opportunity to understand the Takings Clause in a way more consistent with historical precedent. Some scholars have argued that the Takings Clause was intended to focus on the physical taking of property rather than on regulations (the latter being Blackstone's "positive laws enacted for reasons of state or for the supposed benefit of the community"⁶⁵). Indeed, regulatory takings jurisprudence has become quite a morass, creating a high degree of regulatory and property rights uncertainty given its ad hoc approach to resolving takings questions. Professor Treanor has argued that regulatory takings are inappropriate as a matter of historical record, indicating that Framers' conceptions of the Takings Clause might actually align quite well with the purpose of the public trust doctrine at common law. So, an opportunity to explore these arguments might provide a window to reconciling the American takings revolution with the public trust preservation.

Treanor argues that the Framers' belief in democratic self-governance was the driver of the Takings Clause, and that the Framers considered that, "given the proper institutional framework, the people of this country could govern themselves wisely and well."⁶⁶ Treanor argues that the Takings Clause was drafted narrowly, contrary to its broad understanding today, "not because the founding fathers cared too little about property rights, but because they cared so much about representative democracy," and that the Framers "did not bring regulations within the ambit of the Takings Clause because they believed it was the appropriate responsibility of democratic decision-makers to balance individual property interests against other community interests."⁶⁷ Given the Framers' foundation in a republican world view, which "contends that the essential role of the state is to promote individual virtue and commitment to the common good," the Framers "treasured the institution of private property," but "[b]ecause property was valued as a means, rather than as the end of the state, however, republicans believed that legislators could limit property interests in order to advance the common good."⁶⁸ Ultimately, Treanor provides a compelling argument that:

It is thus wrong to read the Takings Clause as embodying a fundamental rejection of majoritarian decision-making or republicanism. Its adoption reflected, instead, a congruence of concerns relating to the perceived need to protect particular forms of real property from state seizure. While it is true, as proponents of a broad reading of the Takings Clause often point out, that some of the actions of revolutionary era state governments—such as their confiscation of loyalist land—caused many of the founders to fear what unconstrained majorities, in the absence of appropriate checks and balances, might do, the founders were also worried about what wealthy property-owners might do if they were not controlled.⁶⁹

The public trust doctrine may very well be the legal tool that can rebalance a modern Takings jurisprudence that has arguably unbalanced private property protections and the public good. Perhaps we cannot undo the regulatory takings morass, but the public trust doctrine as a categorical defense to takings claims brought against regulations aimed at protecting the wider public from climate change impacts might be able to achieve the same goal. This would provide a way to work within the current and seemingly flawed regulatory takings framework in order to draw closer to both Framers' conceptions of the Takings Clause and what is needed to effectively combat climate change impacts along the coast.

⁶⁵ BLACKSTONE COMMENTARIES, *supra* note 2, at * 410.

⁶⁶ Treanor, *supra* note 7, at 7.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 8.

The third and final implication is that the historical and precedential drivers of the Takings Clause-public trust doctrine tension raise some important, broader reaching questions of institutional and constitutional design. Either the Framers did not consider the implications of preserving within state law a common law doctrine like public trust that could render meaningless a constitutional provision like the Takings Clause, or perhaps Professor Treanor's arguments are correct and they did consider the possibility, but concluded no tension would result because the Takings Clause would not apply to government regulations. Either way, beyond the Takings Clause-public trust case study, the identification and study of other examples of our melding of English common law and American constitutional law in potentially inapposite ways is crucial to understanding not only the resolution of the legal conflicts we see today, but also how to make congruous presently incongruous principles from distinct and important bodies of U.S. law. While some might consider the historical currents to be too deep for such study to be fruitful, in a free society institutions are what we make them, and ultimately may be freed from the flow of historical currents. Recognizing institutional flaws such as the adoption of seemingly irreconcilable principles of law within one constitutional system is the first step to understanding what must be done to remedy the institutional mishap. Given that the political climate changes almost as rapidly as the actual climate over longer time scales, to lose hope in the development or adoption of new approaches to takings or public trust jurisprudence—or perhaps even overall constitutional structure—would be a mistake.

Ultimately, the takings revolution and public trust preservation in America will lead to increased legal conflicts in the coming decades as climate change affects the U.S. coastal zone, as well as inland areas. As a result, the many implications of the intersection between the Takings Clause and public trust doctrine need to be further explored if we are to develop the most robust responses to a climate-changed coast. Because if the government and its citizens are not able to "take" these properties through historical property doctrines like the public trust doctrine, then the sea may very well do so.