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Selected Legal and Poicy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis)use of Investment-Backed Expectations

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Articles

SELECTED LEGAL AND POLICY TRENDS IN TAKINGS LAW: BACKGROUND PRINCIPLES, CUSTOM AND PUBLIC TRUST "EXCEPTIONS" AND THE (MIS) USE OF INVESTMENT-BACKED EXPECTATIONS

David L. Callies* and J. David Breemer**

I. INTRODUCTION: LUCAS AND "BACKGROUND PRINCIPLES"

In the 1992 case of *Lucas v. South Carolina Coastal Council*,[1] the United States Supreme Court created its now famous "categorical rule" for regulatory takings. Pursuant to the Fifth Amendment to the United States Constitution, the rule requires the government to provide just compensation whenever it denies a property owner all "economically beneficial use" of land. Neither the purposes behind the denial nor the circumstances under which the land is acquired can diminish the government's liability.[2]

The *Lucas* Court did, however, establish two exceptions to the otherwise inflexible "categorical rule," declaring that the rule does not apply if: first, the challenged regulation prevents a nuisance or, second, the regulation is grounded in a state's background principles of property law.[3] Because the law of nuisance is full and comprehensive, as well as

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[1] 505 U.S. 1003 (1992).

[2] Palm Beach Isles Assocs. v. United States, 231 F.3d 1354 (Fed. Cir. 2000).

[3] *Lucas*, 505 U.S. at 1020-32.

comprehensible, the first exception presents little difficulty.[4] Leaving nothing to chance, the *Lucas* Court explained that the nuisance exception would allow the government to prohibit the construction of a power plant on an earthquake fault line or the filling of a lakebed that was likely to result in flood damage to a neighbor without incurring takings liability.[5] In contrast, the Court was silent with respect to the meaning of the second, "background principles of state property law," exception.

A major and often unexplored question in takings law is the extent of the background principles exception. The subject is important for two distinct reasons. First, it is not always easy to discern what comprises such background principles. Second, once defined, the principles can, when subject to expansive interpretation, seriously erode the basic *Lucas* doctrine meant to provide compensation for regulatory takings that deprive an owner of all economically beneficial use of land. A related issue is the extent to which background principles analysis overlaps with the continuing discussion of the role of investment-backed expectations in *Lucas* situations (there should be none) and the so-called "notice" rule arguably raised by pre-existing state statutes in either total (*Lucas*) or partial (*Penn Central Transportation*) takings analyses.

II. BACKGROUND PRINCIPLES: AN ANALYSIS OF POTENTIAL LUCAS EXCEPTIONS

Although *Lucas* failed to provide explicit guidance concerning the definition of the background principles exception, it noted that restrictions premised upon such principles "inhere in landowner's title itself."[6] On the basis of this statement, governments[7] and commentators[8]

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[4] *See, e.g.*, M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995) (holding that the coal company had no right to conduct nuisance-like activities while surface mining in West Virginia); Aztec Minerals Corp. v. Romer, 940 P.2d 1025 (Colo. Ct. App. 1996) (holding that a mining company had no right to degrade the environment at one of its mining sites under Colorado nuisance law); *see also* Colo. Dep't of Health v. The Mill, 887 P.2d 993 (Colo. 1994) (en banc) (holding federal statutes restricting the disposition of uranium mine tailings fell within the background principles exception so as to deny a landowner use of a sixty-one-acre parcel, even though the applicable statutes were enacted after the landowner acquired the property). For a collection of recent exemption cases (and a summary of takings law generally), see ROBERT MELTZ ET AL., THE TAKINGS ISSUE 167-95 (1999); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523 (1999).

[5] *Lucas*, 505 U.S. at 1029.

[6] *Id.*

[7] *See* MICHAEL M. BERGER, ANNUAL UPDATE ON INVERSE CONDEMNATION, ALI-ABA COURSE OF STUDY, INVERSE CONDEMNATION AND RELATED GOVERNMENTAL LIABILITY, SB14 PLI-

have turned to state common law property doctrines to identify underlying title limitations and, thus, background principles. From this scrutiny, it is now clear that at least three sources of state property restrictions may qualify as background principles within the meaning of *Lucas*: statutory law existing prior to the acquisition of land,[9] custom, [10] and public trust. This Article explores these potential background principles, reviewing judicial treatment and critiquing their application to the categorical takings rule.

A. Statutory Law and Background Principles

Since *Lucas* was decided, many courts have declared restrictive state environmental legislation to be background principles under which all economically beneficial use of land may be denied.[11] Provided that the relevant statute predates the acquisition of land, it can thus be said to

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ABA 11, 35 (Oct. 1996) (noting that "[s]ince *Lucas*, government agencies have been combing their archives in search of arcane matters that might be said to have been a part of a property owner's title and that severely restrict the use of land").

[8] *See* Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1 (1995) (arguing that the public trust is a "background principle" that allows regulation of barrier beaches without just compensation); Katherine E. Stone, *Sand Rights: A Legal System to Protect the "Shores of the Sea,"* 29 STETSON L. REV. 709 (2000) (arguing that the public trust doctrine can be expanded to restrict development on non-trust lands, for the purpose of preserving public beaches, without triggering a taking).

[9] *See generally* R. S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of "Investment-Backed Expectations" in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449 (2001) (discussing the role of pre-existing statutes in regulatory takings analysis).

[10] *See* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. REP. 10003 (2000); Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawaii*, 20 U. HAW. L. REV. 99 (1999) (discussing the analysis of custom, including its application to takings).

[11] Hunziker v. State, 519 N.W.2d 367 (Iowa 1994) (holding a state statute prohibiting development of lands containing Native American burial grounds as a background principle that defeated a takings claim); Shell Island Homeowners Ass'n v. Tomlinson, 517 S.E.2d 406, 416 (N.C. App. 1999) (quoting *Lucas* in holding that, because a regulatory scheme authorizing such restrictions was on the books at the time a hotel was built, the right to protect the property from natural destruction was "not part of his title to begin with"); Wooten v. S.C. Coastal Council, 510 S.E.2d 716 (S.C. 1999) (holding that the existence of statutes requiring landowners to obtain permits to fill wetlands deprived a landowner of Fifth Amendment relief when a permit was denied); City of Va. Beach v. Bell, 498 S.E.2d 414 (Va. 1998).

"inhere" in the landowner's title.[12] New York's 1997 regulatory "takings quartet" provides an excellent illustration of this trend.[13] In *Gazza v. New York State Department of Environmental Conservation*,[14] the New York Court of Appeals considered whether the denial of a building variance pursuant to a wetlands protection law amounted to a *Lucas* taking. Relying on the *Lucas* Court's observation that a categorical taking is precluded by the background principles exception when a "logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not a part of his title to begin with,"[15] the court declared: "[T]he relevant property interests owned by petitioner are defined by those State laws enacted and in effect at the time he took title and they are not dependent on the timing of State action pursuant to such laws."[16] The simple enactment of a statutory scheme, even without actual application of the relevant regulations, was therefore sufficient to divest the claimant of a property interest that was previously thought to come with the title.[17] Because "the only permissible uses for the subject property were dependent upon those regulations,"[18] there could be no taking.

In *Kim v. City of New York*,[19] a case decided the same day as *Gazza*, the New York court again stressed that "in identifying the background rules of State property law that inhere in an owner's title, a court should look to the law in force, whatever its source, when the owner acquired the property."[20] Providing further insight into the reasons for applying statutes as background principles, the court said, "[i]t would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the pre-existing rules of State

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[12] *See* Glenn P. Sugameli, Lucas v. South Carolina Coastal Council: *The Categorical and Other "Exceptions" to Liability for Fifth Amendment Takings Far Outweigh the "Rule,"* 29 ENVTL. L. 939, 978-99 (1999) (noting that courts reject takings claims on the basis of pre-existing statutes under the background principles exception).

[13] *See* Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997); Gazza v. N.Y. State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997); Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870 (N.Y. 1997); Basile v. Town of Southhampton, 678 N.E.2d 489 (N.Y. 1997); Brotherton v. Dep't of Envtl. Conservation, 675 N.Y.S.2d 121, 122-23 (N.Y. App. Div. 1998); *see also* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345 (1998) (providing an excellent critique of these cases).

[14] 679 N.E.2d 1035 (N.Y. 1997).

[15] *Id.* at 1039 (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992)).

[16] *Id.* at 1040-41.

[17] *See* Radford & Breemer, *supra* note 9, at 490.

[18] *Gazza*, 679 N.E.2d at 1040.

[19] 681 N.E.2d 312 (N.Y. 1997).

[20] *Id.* at 315-16.

property law, while ignoring statutory law in force when the owner acquired title."[21] Apparently, the irrationality derived from the fact that a background principles doctrine that excluded "newly decreed or legislated" rules would "elevate common law over statutory law."[22] Never mind that such "irrationality" appears to have been openly adopted by a majority of the United States Supreme Court in *Lucas*.[23]

Several other state courts have adopted the rule that pre-existing statutes operate as background principles that defeat a *Lucas* takings claim. The South Carolina Supreme Court, for instance, has held on two occasions that pre-existing environmental regulations defeated the owners' claims to compensation when development was prohibited.[24] In *City of Virginia Beach v. Bell*,[25] the Virginia Supreme Court applied a similar view in considering the constitutionality of a sand dune protection law. There, a corporation partially owned by the Bells purchased two lots seaward of coastal sand dunes for the purpose of erecting residential housing in 1979.[26] After an initial attempt at development failed, title to the lots vested in the Bells as individuals in 1982.[27] The city rejected the Bells' development plans again in 1982.[28] Meanwhile, pursuant to state law, the city passed an ordinance in 1980 that required developers to obtain a permit before using or altering sand dune areas.[29] When, in 1992, the Bells sought permission to build a third time, the local wetlands board denied the necessary dune permit, prompting the Bells to sue for compensation under the Fifth Amendment.[30]

In rejecting the argument that the denial of the permit triggered a *Lucas* taking, the Virginia Supreme Court declared that *Lucas* required South Carolina to justify its development restriction on "fundamental" nuisance and property law only because Lucas had taken title prior to the state's enactment of the challenged statute.[31] In *Bell*, on the other

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[21] *Id.* at 315.
[22] *Id.*
[23] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029-31 (1992).
[24] *See* Wooten v. S.C. Coastal Council, 510 S.E.2d 716, 718 (S.C. 1999); Grant v. S.C. Coastal Council, 461 S.E.2d 388, 391 (S.C. 1995) (holding no taking existed because the landowner's "right to use his property did not alter from when he originally acquired title").
[25] 498 S.E.2d 414 (Va. 1998).
[26] *See id.* at 415.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *See id.* at 415-16.
[31] *Bell*, 498 S.E.2d at 417-18.

hand, the city's dune protection ordinance "predated" the Bells' acquisition of property.[32] Therefore, the city did not have to "prove the existence of any nuisance or property law" to justify its denial of development.[33] Rather, because the Bells took title after passage of the law, they had never possessed the right to develop their land.[34] Therefore, because the property owners could not suffer a taking of rights they never possessed, "the City, by enacting the Ordinance, took no property rights from [the] Bell[s]."[35]

B. Customary Law

Although not as popular a takings refuge as pre-existing statutes seem to be, the ancient doctrine of custom[36] is also increasingly being treated as a *Lucas* exception. Customary law grants rights in specific parcels of land to certain classes of people. Customary rights are difficult to detect until asserted, but, once found, operate to engraft an easement-like encumbrance on the affected land title, regardless of the private or public character of the property. If customary law is to represent a background principle, it is useful to understand the origins, evolution, and application of custom in the United States. An examination of English custom and a review of what United States courts have done when faced with assertions of customary rights provide the necessary background.

1. Blackstonian Custom

Customary law is in derogation of common law possessory property rights, which William Blackstone's *Commentaries on the Laws of England* largely argues to protect.[37] However, in writing what must be considered a polemic in favor of the common law, Blackstone identified

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[32] *Id.* at 417.

[33] *Id.* at 418.

[34] *See id.* at 417.

[35] *Id.* at 418.

[36] Blackstone suggests that customary law had medieval origins. *See* 1 WILLIAM BLACKSTONE COMMENTARIES 246-47 (Bernard C. Gavit ed., 1941). The public trust doctrine, on the other hand, clearly originated in Roman law, where it was understood that the sea, rivers, air, and shoreline were owned by, and accessible to, the people for the purpose of navigation, commerce, and fishing. *See* THE INSTITUTES OF JUSTINIAN 2.1.1, 158-59 (Thomas Collett Sandars trans., William S. Hein & Co. 1984) (1876).

[37] 1 BLACKSTONE, *supra* note 36, at 57. Although there are at least sixteen editions of the *Commentaries*, it is generally recognized that the first edition of 1765-1769 was the most influential in development of common law in the United States. *See* Bederman, *supra* note 10, at 1382.

three forms of customary law: common law ("general custom"), by which he presumably meant common law as we view it today; court (procedural) custom of particular tribunals or courts; and "particular customs," practiced by and affecting the inhabitants of a defined geographical area.[38] Blackstone carefully defined and delimited this third or "particular" branch of custom, setting out seven criteria that a customary right must meet if it is to be a "good" custom. A "good" custom is one that is enforceable against a common law principle, for example, of exclusive possession of private land, a situation in which many of the disputes over custom arose. To be valid, enforceable, and to, therefore, trump common-law principles to the contrary, a custom had to be immemorial,[39] continuous,[40] peaceable,[41] reasonable,[42] certain,[43]

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[38] *See* 1 BLACKSTONE, *supra* note 36, at 76-78.

[39] *See* 1 BLACKSTONE, *supra* note 36, at 76-77. Blackstone defined immemoriality as follows:

> That it have been used so long, that the memory of man runneth not to the contrary. So that if any one can shew the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such a custom did not exist.

Id.

[40] *See* 1 BLACKSTONE, *supra* note 36, at 77. With regard to the requirement of continuity, Blackstone stated:

> It must have been continued. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of a *right*; for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom. As I have a right of way by custom over another's field, the custom is not destroyed, though I do not pass over it for ten years; it only becomes more difficult to prove: but if the *right* be any how discontinued for a day, the custom is quite at an end.

Id.

[41] 1 BLACKSTONE, *supra* note 36, at 77. Blackstone defined the requirement of peacefulness in this manner:

> It must have been peaceable, and acquiesced in; not subject to contention and dispute. For as customs owe their original to common consent, their being immemorially disputed at law or otherwise is proof that such consent was wanting.

Id.

[42] 1 BLACKSTONE, *supra* note 36, at 77. In establishing reasonableness as a requirement for a "good" custom, Blackstone stated:

> Customs must be reasonable; or rather, taken negatively, they must not be unreasonable. Which as always, as Sir Edward Coke says, to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it suffeth, if no good legal reason can be assigned against it . Thus, a custom in a parish, that no man shall put his beasts in the common till

compulsory,[44] and consistent.[45] Even today, the law of custom in England is built around Blackstone's seven criteria.[46]

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the third day of October would be good; and yet it would be hard to shew the reason why that day in particular is fixed upon, rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits.

Id.

[43] 1 BLACKSTONE, *supra* note 36, at 78. Certainty as described by Blackstone:

> Customs ought to be *certain*. A custom, that lands shall descend to the most worthy of the owner's blood is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. A custom, to pay two pence an acre in lieu of tithes, is good; but to pay sometimes two pence and sometimes three pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a years improved value for a fine on a copyhold estate, is good: though the value is a thing uncertain. For the value may be ascertained; and the maxim of the law is, *id. certum est, quod certum reddi potest.*

Id. English cases from Blackstone's time show that the requirement of certainty encompassed certainty of practice, of locale, and of persons. *See* Callies, *supra* note 10, at 10012-14.

[44] 1 BLACKSTONE, *supra* note 36, at 78. The requirement that customs be compulsory is so defined:

> Customs, though established buy consent, must be (when established) compulsory; and not left to the option of every man, whether he will use them or not. Therefore a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd; and, indeed, no custom at all.

Id.

[45] 1 BLACKSTONE, *supra* note 36, at 78. Blackstone describes the requirement of consistency as follows:

> Lastly, customs must be consistent with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that buy custom he has a right to have windows looking into another's garden; the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, not both stand together. He ought rather to deny the existence of the former custom.

Id.

[46] Thus, a recent volume of *Halsbury's Laws of England* describes the essential attributes of custom as follows:

> To be valid, a custom must have four essential attributes: (1) it must be immemorial; (2) it must be reasonable; (3) it must be certain in terms, and in respect both of the locality where it is alleged to obtain and of the persons whom it is alleged to effect; and (4) it must have continued

2. Early United States Decisions

Until recently, one could characterize American judicial treatment of custom as a source of law as decidedly chilly. Dealing primarily with easements said to derive from customary use, the few early cases found little, if any, reason to support the adoption of the English doctrine of custom. Due in part to the prevalence of recording systems early in the history of the country, unrecorded clouds on title based on immemorial custom would be considered an anathema. As John Chipman Gray so aptly commented in his definitive treatise on the rule against perpetuities:

> The objection which exists to allowing profits a pendre by custom really applies, though in a less degree, to allowing easements by custom . . . . [I]n a country like most parts of America, where a population, sparsely scattered at first, has rapidly increased in density, such rights might become very oppressive. The clog that they would put on the use and transfer of land would far outweigh any advantage that could be acquired from them. Especially it should be remembered that they cannot be released, for no inhabitant, or body of inhabitants, is entitled to speak for future inhabitants. Such rights form perpetuities of the most objectionable character. [47]

Courts were especially troubled by the notion that customary rights were immemorial in nature, for it was thought that "[a]t this day and in this age, in a government like ours, there can be little need of a resort to such a source as custom for legal sanction."[48] A Connecticut court thus rejected an attempted assertion of custom in this fashion:

> The political and legal institutions of Connecticut have from the first differed in essential particulars from those

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> as of right and without interruption since its immemorial origin. These characteristics serve a practical purpose as rules of evidence when the existence of a custom is to be established or refuted.

12(1) HALSBURY'S LAWS OF ENGLAND para. 606 (4th ed. 1998) [hereinafter LAWS OF ENGLAND]. This entire section on custom is a superb explanation of custom today, prepared by one of the pre-eminent scholars in legal history, Professor J. H. Baker, Fellow of St. Catherine's College, Cambridge. *See generally id.*

[47] JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 564 (4th ed. 1942).

[48] Delaplane v. Crenshaw, 56 Va. 457, 475 (1860).

> of England. Feudalism never existed here. There were no manors or manorial rights. A recording system was early set up, and has been consistently maintained, calculated to put on paper, for perpetual preservation and public knowledge, the sources of all titles to or [e]ncumbrances affecting real estate. Nor have we all the political subdivisions of lands which are found in England. . . . Most of these terms denote forms of communities that are unknown in this state. Under our statute of limitations, also, rights of way may be established by a shorter user than that required by the English law.[49]

Similarly, a New Jersey court refused, based on custom, to permit inhabitants of a town an easement to reach a riverbank:

> [I]f [this] custom . . . is to prevail according to the common law notion of it, these lots must lie open forever to the surprise of unsuspecting owners, and to the curtailing [of] commerce, in its more advanced state, of the accommodation of docks and wharves, when perhaps a tenth part of the lots now open would be all sufficient as watering places; a principle of such extensive operation ought not to be strained beyond the limits assigned to it in law. If [the] public convenience requires highways to church, school, mill, market or water, they are obtainable in a much more direct and rational manner under the statute than by way of immemorial usage and custom.[50]

Not surprisingly, several courts simply found that the "immemorial" feature of custom could not transfer to America.[51]

To be sure, a few states adopted some form of customary law, though a close examination reveals less than a full embrace. For instance, in *Mayor of Galveston v. Menard*,[52] the Texas Supreme Court noted only the possibility of vesting a property right by immemorial custom but refused to apply it to the case before it or extend its

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[49] Graham v. Walker, 61 A. 98, 99 (Conn. 1905).
[50] Ackerman v. Shelp, 8 N.J.L. 125, 130-31 (N.J. 1825).
[51] *See, e.g., id.*; *Delaplane*, 56 Va. at 475; Harris v. Carson, 34 Va. 632, 638 (1836).
[52] 23 Tex. 349, 393-94 (1859).

application in Texas. In *Waters v. Lilley*,[53] the Supreme Judicial Court of Massachusetts noted that the right to fish on another's land, a right claimed by custom, was a profit and not an easement, which would have made it impossible to claim as a custom in England. A subsequent Massachusetts case, however, confirmed the potential existence of customary easements without specifically finding one in that case.[54]

Finally, in two New Hampshire cases, the state's high court initially refused claims of customary rights to enter private property to carry away sand and to collect seaweed, on the grounds that both were profits to which the law of custom did not apply (forcing plaintiffs to rely upon prescriptive rights).[55] But the New Hampshire court eventually directly acknowledged its implied recognition of the possibility of an easement by custom in *Knowles v. Dow*.[56] The court stated: "[U]nexplained and uncontradicted [testimony of usage for more than twenty years] is sufficient to warrant a jury in finding the existence of an immemorial custom."[57]

3. The Rebirth of Custom and Its Rise as a Potential Background Principle

In the latter half of the twentieth century, United States state court judges have been more receptive to the doctrine of custom than their earlier brethren. Thus, in Idaho, the state's high court clearly recognized that the law of custom had acceptance in the state, though it refused to permit the establishment of a customary right unless all of Blackstone's seven criteria were met.[58] In Texas, the courts have upheld state legislation purporting to simply restate existing customary rights to use the beaches of the state, regardless of private "ownership."[59] The most far-reaching and significant treatments come from Oregon and Hawaii. In Oregon, the courts "found" a customary right to traverse private sand beaches without any fact-finding and have extended it to the entire

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[53] 21 Mass. 145 (1826).

[54] Jones v. Percival, 22 Mass. 485, 486-87 (1827).

[55] Nudd v. Hobbs, 17 N.H. 524, 527 (1845); Perley v. Langley, 7 N.H. 233, 236-37 (1834).

[56] 22 N.H. 387, 409 (1851).

[57] *Id.*

[58] Idaho *ex rel* Haman v. Fox, 594 P.2d 1093, 1101 (Idaho 1979). The court found six of the seven missing. *Id.* Additionally, the court further noted that over half a century of use was not "time immemorial" for the purpose of custom. *Id.*

[59] *See* Arrington v. Mattox, 767 S.W.2d 957, 958 (Tex. App. 1989), *cert. denied*, 493 U.S. 1073 (1989); Moody v. White, 593 S.W.2d 372, 379-80 (Tex. App. 1979); *see also* United States v. St. Thomas Beach Resorts, Inc., 386 F. Supp. 769, 772-73 (D.V.I. 1974), *aff'd*, 529 F.2d 513 (3d Cir. 1974).

Oregon coast on behalf of the public-at-large. Hawaiian courts, by comparison, have ignored much of their own precedent on the rights of native Hawaiians and extended undetermined rights of access, worship, and gathering over much of the state.

The cases that established customary law and changed property rights in Oregon were decided against a backdrop of legislation that declared any easement that the public had in, or on, the beach was vested in the state.[60] In *Oregon ex rel. Thornton v. Hay*,[61] the state sought to prevent the landowners, the Hays, from constructing improvements on the dry-sand beach portion of their lot between the high-water line and the upland vegetation line based largely on theories of prescriptive rights. The Hays appealed an adverse judgment below to the state supreme court. Ignoring the grounds on which it was previously decided, the *Thornton* court, *sua sponte*, decided the case on the basis of custom, stating:

> Because many elements of prescription are present in this case, the state has relied upon the doctrine in support of the decree below. We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the court for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.[62]

The court cited Blackstone as a basis for its decision and claimed that the decision "meets every one of Blackstone's requirements."[63] The court, therefore, held that custom was a valid basis for allowing all the citizens of the state to go upon all dry-sand areas along the Pacific coast of Oregon, private or not.[64] This decision resulted in the inability of landowners in the affected areas to build anything that would obstruct

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[60] 16 OR. REV. STAT. § 390.610 (1999).
[61] 462 P.2d 671 (Or. 1969).
[62] *Id.* at 676.
[63] *Id.* at 677.
[64] *Id.* at 673.

such access.[65] The court was unmoved by claims of hardship, noting that "[t]he rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had legitimate reason to regard as exclusively his."[66]

Twenty-five years later, the Oregon Supreme Court revisited customary law in *Stevens v. Cannon Beach*,[67] this time explicitly holding custom to be a *Lucas* background principle of state law. There, the Town of Cannon Beach refused to issue a seawall permit because it would block access to the dry-sand beach in derogation of the customary public rights established by *Thornton*. To the Stevens' Fifth Amendment takings claim, the court responded that the customary law of Oregon was a background principle under *Lucas* and, therefore, an exception to the *Lucas* categorical rule governing takings of all economically beneficial use.[68] In both *Thornton* and *Cannon Beach*, therefore, the right to exclude the public was never part of the landowners' titles. Of course, the court does not say exactly when and how the Hays and other similarly situated landowners were to apprehend that their dry-sand beach land was subject to a customary easement given that they purchased the land prior to *Thornton*.

Recent decisions in Hawaii have also recognized and expanded customary rights, though the situation is more complex because some tradition of customary rights exists, associated with native Hawaiians from the days of the various kingdoms. This tradition predates not only statehood, but also territorial days and annexation toward the end of the nineteenth century. Nevertheless, for much of its history, the state's high court issued opinions limiting the scope of native Hawaiian customary rights. In the early case of *Oni v. Meek*,[69] the Hawaii Supreme Court rejected a claim of pasturage based on pre-1850 customary rights on the ground that an 1850 statute, later codified in principle as Hawaii Revised Statutes (H.R.S.) 7-1, enumerated all the rights that tenants had in lands that they did not "own." A logical conclusion from this decision was that all other rights - traditional, customary, and otherwise - were terminated.[70]

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[65] *Id.*

[66] *Id.* at 678.

[67] 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994).

[68] *Id.* at 456.

[69] 2 Haw. 87 (1858).

[70] *See id.* at 90. Of the asserted custom of pasturage, the court stated: "It is obvious to us that the custom contended for is so unreasonable, so uncertain, and so repugnant to the

Both before and after statehood, courts mainly limited customary law in Hawaii to statutory rights to gather natural products listed in H.R.S. 7-1. An attempt to expand such rights by the state supreme court, by permitting Kamaaina testimony (verbal history by indigenous people) to modify seaward land boundaries of private landowners,[71] was soundly rejected by the federal district court in *Sotomura v. County of Hawaii*.[72] Finding no credible evidence justifying relocation of the seaward boundary, the court observed:

> This Court fails to find any legal, historical, factual or other precedent or basis for the conclusions of the Hawaii Supreme Court that, following erosion, the monument by which the seaward boundary of seashore land in Hawaii is to be fixed is the upper reaches of the waves. To the contrary, the evidence introduced in this case firmly establishes that the common law, followed by both legal precedent and historical practice, fixes the high water mark and seaward boundaries with reference to the tides, as opposed to the run or reach of waves on the shore.[73]

The district court thus found that there was no evidence of the public use that the state argued ripened into a customary right.

Almost twenty years after *Sotomura*, a sea change occurred when the Hawaii Supreme Court declared in the 1995 case of *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*[74] (*PASH*) that traditional and customary rights of native Hawaiians may be practiced on public and private land, both undeveloped and substantially developed, anywhere in the state.[75] The court also held that government agencies must consider the effect on such customary rights in deciding on applications for development permits. Claiming to build on previous decisions first limiting rights to those enumerated in a statute,[76] the court suggested in dicta that courts could go beyond the statutory enumeration on the ground of custom where the Hawaiian practice does

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spirit of the present laws, that it ought not to be sustained by judicial authority." *Id.*; *see also* Sullivan, *supra* note 10.

[71] *See* Application of Ashford, 440 P.2d 76 (Haw. 1968).

[72] 460 F. Supp. 473 (D. Haw. 1978).

[73] *Id.* at 480.

[74] 903 P.2d 1246 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996).

[75] *Id.* at 1272.

[76] *See* Kalipi v. Hawaiian Trust Co., 656 P.2d 745 (Haw. 1982).

no harm and can be demonstrably shown to be continued within a certain land division. This extension is arguably contrary to the express holding in *Oni*. The court later found such customary rights could, in certain circumstances, be exercised outside such a land division if the custom to do so is proven.

With respect to the potential conflict between the newly minted customary rights regime and traditional property rights, the court opined that Western notions of property law, particularly exclusivity, might not be applicable in Hawaii, particularly when they collide with custom: "[W]e hold that common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state."[77] As to whether the "finding" of such rights in derogation of fundamental "Western" concepts of property could be a taking of property without compensation, best to let the court speak for itself:

> [The property owner] argues that the recognition of traditional Hawaiian rights beyond those established in *Kalipi* and *Pele* would fundamentally alter its property rights. However, [the property owner's] argument places *undue reliance on western understandings of property law that are not universally applicable in Hawaii*. Moreover, Hawaiian custom and usage have always been a part of the laws of this State. Therefore, our recognition of customary and traditional Hawaiian rights . . . does not constitute a judicial taking.[78]

The Hawaii Supreme Court recently clarified some of its *PASH* conclusions in *Hawaii v. Hanapi*.[79] Alapai Hanapi, a native Hawaiian, was arrested for trespassing on the oceanfront land of his neighbor (a well-known trial lawyer). The land was improved with a single-family residence. The neighbor was engaged in removing illegally deposited fill from the shore and water. Hanapi entered the property, without permission, to "monitor" the subsequent restoration of the beach and wetland, claiming he was exercising native Hawaiian rights. Hanapi had initiated the original complaint against his neighbor partly on the basis that the fill was adversely affecting native fishponds adjoining his property, at which he and his family claimed to practice traditional religious, gathering, and sustenance activities. When Hanapi refused to

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[77] *PASH*, 903 P.2d at 1269.
[78] *Id.* at 1272 (emphasis added).
[79] 970 P.2d 485 (Haw. 1998).

leave, the foreman supervising the restoration called the police, and Hanapi was arrested for criminal trespass. Hanapi, appearing *pro se*, was convicted.

In sustaining Hanapi's conviction, the Hawaii Supreme Court initially noted that one limitation on private property "would be that constitutionally protected native Hawaiian rights, reasonably exercised, qualify as a privilege for purposes of enforcing criminal trespass statutes."[80] However, the court held that Hanapi had failed to establish, as required, that his claimed native Hawaiian right was a customary and traditional practice. The court set out three "factors" that Hanapi and others claiming such rights are required to establish: first, qualify as a native Hawaiian within the *PASH* guidelines (descendents of native Hawaiians who inhabited the islands prior to 1778); second, establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice (however, it need not be enumerated in a statute or constitution); and third, demonstrate that exercise of the right occurred on undeveloped or less than fully developed property (not further defined in *PASH*).[81] In applying these factors to Hanapi, the court held that if property is zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is "always inconsistent" to permit the practice of traditional and customary native Hawaiian rights on such property. Indeed, the court additionally noted that "[t]here may be other examples of 'fully developed' property as well where the existing uses of the property may be inconsistent with the exercise of protected native Hawaiian rights."[82]

Hanapi represents a retreat from the broader language in *PASH*, but it is a relatively minor one. In Hawaii, as in Oregon and a few other states, the doctrine is generally on the rise. Further, though it is not always expressed in such terms, customary law is posed as a defense to the categorical takings rule announced in *Lucas* and takings claims in general by way of the *Lucas* background principles exception. Custom is not, however, the only common law doctrine that is being thrust forward to give meaning to the otherwise vague background principles concept.

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[80] *Id.* at 492.
[81] *Id.* at 494.
[82] *Id.* at 495 n.10.

C. The Public Trust

Broadly stated, the public trust doctrine provides that a state holds public trust lands, waters, and resources for the benefit of its citizens, establishing the right of the public to fully enjoy them for a variety of public uses and purposes.[83] Implied in this definition are limitations on the private use of such waters and lands, as well as limitations on the ability of the state to transfer interests in them, particularly if such transfer will prevent public use. Such definitions and duties flow from the dual nature of title in public trust lands and waters. On the one hand, the public has the right to use and enjoy the land and water - the res of the trust - for purposes such as commerce, navigation, fishing, bathing, and related activities. This is the so-called *jus publicum*. On the other hand, since fully one-third of public trust property is in private rather than public hands, private property rights also exist in many such lands and waters.[84] This is called the *jus privatum*.[85] The principal problem is, of course, the extent to which the public trust doctrine can eliminate private property rights without Fifth Amendment compensation.

1. The Origins of the Modern Public Trust Doctrine

The undisputed source of the modern public trust doctrine is *Illinois Central Railroad Co. v. Illinois*.[86] The railroad claimed title to 1000 acres of submerged lands under Lake Michigan, stretching for nearly a mile along Chicago's shoreline, which it proposed to fill and develop. The railroad obtained title under a specific fee simple grant from the Illinois legislature. Finding that navigable waters and lands under them were held by the state in trust for the public, the United States Supreme Court held that the state could not convey or otherwise alienate them in fee simple, free of the public trust. The state could, however, sell small parcels of public trust land, the use of which would promote the public interest (e.g., docks, piers, and wharves), so long as this could be done without impairing the public's right to make use of the remaining submerged land and water.[87]

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[83] COASTAL STATES ORG., INC., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 1 (2d ed. 1997) [hereinafter COASTAL STATES].

[84] COASTAL STATES, *supra* note 83, at 230.

[85] COASTAL STATES, *supra* note 83, at 1.

[86] 146 U.S. 387 (1892).

[87] *Id.* at 450-64.

Because the Illinois legislature conveyed the land in fee simple in apparent disregard of the public trust, the sale was void. The case now stands for the proposition that only the *jus privatum*, as compared with the *jus publicum*, can be transferred by the state and that, inversely, the *jus publicum* can never be part of a private title to trust lands. An example of the type of private use that is permissible under the doctrine comes from *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club, Inc.*[88] There, the Idaho Supreme Court approved a lease of state lands impressed with the trust to a private club for the construction, maintenance, and use of private dock facilities on a bay in a navigable lake. The court specifically held that the lease (not a fee simple transfer) was not incompatible with the public trust imposed on the property "at this time."[89]

Nearly a century after *Illinois Central*, the United States Supreme Court expanded the reach of the public trust doctrine from submerged lands to all lands under waters influenced by the ebb and flow of the tides in *Phillips Petroleum Co. v. Mississippi*.[90] In so doing, the Court rejected private fee simple titles extending back to pre-statehood Spanish land grantees that were held by Phillips and its predecessors for over one hundred years and upon which the company had paid taxes as if held in fee simple. Instead, the Court held that title to these lands, which were often exposed for long periods of time, passed to the State of Mississippi upon its entry into the union under the "equal footing" doctrine.[91] According to the Court, "[s]tates have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."[92]

A strong three-justice dissent, comprised of Justices O'Connor, Scalia, and Stevens, expressed alarm that the Court's holding will "disrupt the settled expectations of landowners not only in Mississippi but in every coastal State."[93] By substantially expanding traditional public trust rights beyond navigable waters and bays immediately adjoining them, the decision, argued the dissent, would extend the state's public trust interests to tidal, non-navigable waters, including bodies remote and only indirectly connected to the ocean or navigable

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[88] 671 P.2d 1085 (Idaho 1983).
[89] *Id.* at 1094.
[90] 484 U.S. 469 (1988).
[91] *Id.* at 479-82.
[92] *Id.* at 475.
[93] *Id.* at 485 (O'Connor, J., dissenting).

tidal waters. The practical effect was that thousands of leaseholders of tidal lands could be displaced because over nine million acres of land were classified as fresh or saline wetlands, arguably now subject to the state's control under the public trust doctrine.[94]

2. Recent Expansions of the Trust Doctrine: Selected State Cases

In the last thirty years, many state courts have expanded the geographical reach and substantive scope of the public trust doctrine. In particular, a spate of recent decisions have extended it to cover resources beyond navigable waterways, while also finding that the trust protects public uses in such resources other than the traditional triad of commerce, navigation, and fishing. This trend has precipitated a collision between the newfound rights of the public under the trust doctrine and private rights traditionally flowing from private property. Significantly, many courts have rejected the takings claims resulting from this collision.

Perhaps the most far-reaching extensions of the public trust doctrine come from the Hawaii Supreme Court. In *In re Water Use Permit Applications*,[95] the court impressed a broad version of the public trust onto the state's fresh water supply, rewriting Hawaii's legislatively crafted water code and ignoring precedent that limited the role of the public trust in the state's water regime. Finding a distinct public trust encompassing all the water resources of the state, the court held that "resource protection" was a protected public trust use of such resources. It concluded that the state's water commission was bound by an "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[96] Given the "distinct" nature of the Hawaii public trust doctrine, this meant that "any balancing between public and private purposes begins with a presumption in favor of public use, access, and enjoyment."[97]

The court found a basis for its expansive interpretation and application of the trust doctrine to non-navigable Hawaiian waters in Article XI, Section 1, of the Hawaii Constitution, which provides:

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[94] *Id.* at 493-94.
[95] 9 P.3d 409 (Haw. 2000).
[96] *Id.* at 453 (quoting *Nat'l Audubon Soc'y v. Super. Ct. of Alpine County*, 658 P.2d 709, 728 (1983)).
[97] *Id.* at 454.

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.[98]

Section 1 further mandates that "all public natural resources are held in trust by the State for the benefit of the people."[99] In the court's view, these statements "adopt the public trust doctrine as a fundamental principle of constitutional law in Hawaii,"[100] and, therefore, prohibit any derogation from the trust through statutory law. Significantly, the court refused to "define the full extent of Article XI, section 1's reference to 'all public resources,'"[101] arguably leaving open the possibility of further extensions of the physical reach of the doctrine in Hawaii.

In response to a takings objection initiated by private Hawaiian interests concerned that the public trust-based water regime prevented them from utilizing ground water traditionally considered private property, the court stated:

> [T]he reserved sovereign prerogatives over the waters of the state precludes the assertion of vested rights to water contrary to public trust purposes. This restriction preceded the formation of property rights in this jurisdiction; in other words, the right to absolute ownership of water exclusive of the public trust never accompanied the "bundle of rights" conferred in the Māhele.[102]

Since the "original limitation of the public trust defeats [the plaintiff's] claims of absolute entitlement to water," there could be no unconstitutional taking.[103] The court's implicit recognition of its public trust doctrine as a background principle is unmistakable, if unspoken.

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[98] HAW. CONST. art. XI, § 1.
[99] *Id.*
[100] *In re* Water Use Permit Application, 9 P.3d 409, 444 (Haw. 2000).
[101] *Id.* at 445.
[102] *Id.* at 494.
[103] *Id.*

The extension of the public trust in Hawaii built upon an earlier water rights case out of California, *National Audubon Society v. Superior Court of Alpine County.*[104] In that case, the California Supreme Court impressed the state's public trust doctrine to non-navigable tributaries of Mono Lake. The court also dismissed the ensuing takings claim, stating:

> Once again we rejected the claim that establishment of the public trust constituted a taking of property for which compensation was required: "We do not divest anyone of title to property; the consequence of our decision will be only that some landowners whose predecessors in interest acquired property under the 1870 act will, like the grantees in [People v.] California Fish, [166 Cal. 576 (Cal. 1913),] hold it subject to the public trust.[105]

A more recent Wisconsin court decision followed the same path. In *R.W. Docks & Slips v. Wisconsin,*[106] the Wisconsin Supreme Court upheld the denial of a state fill permit to complete the last phase of a lakeside marina. In upholding the decision of a state agency to thus protect an "emergent weedbed" that literally surfaced during (and due to) construction of the earlier phases of the project, the court held that the public trust doctrine required state ownership of the subject property, leaving the landowner with riparian rights of use and access only, subject to the public's "superior rights."

Expansions of the public trust have not been limited to water resources. In New Jersey, for instance, courts have expanded the reach of the doctrine to dry-sand areas, in much the same way as the Oregon courts did in *Thornton* and *Cannon Beach,* but this time relying on the public trust instead of custom.[107] The most well-known example is *Matthews v. Bay Head Improvement Ass'n,*[108] in which the New Jersey Supreme Court held that the public trust doctrine extends to dry-sand beach areas for both access to and limited use of the ocean and foreshore (traditional trust areas):

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[104] 658 P.2d 709 (Cal. 1983).
[105] *Id.* at 723.
[106] 628 N.W.2d 781 (Wis. 2001).
[107] *See, e.g.,* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984); Lusardi v. Curtis Point Prop. Owners Ass'n, 430 A.2d 881 (N.J. 1981); Van Ness v. Borough of Deal, 393 A.2d 571 (N.J. 1978); Hyland v. Borough of Allenhurst, 372 A.2d 1133 (N.J. 1977).
[108] 471 A.2d 355 (N.J. 1984).

> The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. . . . The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean . . . where use of dry sand is essential or reasonably necessary for enjoyment of the ocean, the [public trust] doctrine warrants the public's use of the upland dry sand area subject to an accommodation of the interests of the owner.[109]

Although *Matthews* did not consider the takings issue, the question arose in a more recent attempt by the State of New Jersey to secure public access to the Hudson River across non-trust lands.[110] In *National Ass'n of Home Builders v. New Jersey Department of Environmental Protection*,[111] the court considered whether a taking arose from a state law requiring landowners to permit a public path along a 17.4-mile long piece of land bordering the river, 11.3% of which was "non-public trust property." Reaffirming the vitality of *Matthews*, the federal district court concluded that the *Matthews* "reasonableness" test,[112] rather than the stricter federal standards enunciated in *Dolan v. City of Tigard*,[113] governed the takings claim.[114]

The Washington Supreme Court applied the state's public trust doctrine to privately held tidelands, part of which were no longer under water, in *Orion Corp. v. Washington*.[115] There, the landowner planned to build a residential community on dredged and filled tidelands and other submerged lands. However, after the land was purchased, the state adopted a series of coastal and tideland laws limiting the landowner's

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[109] *Id.* at 365.

[110] *See* Nat'l Ass'n of Home Builders v. N.J. Dep't of Envtl. Prot., 64 F. Supp. 2d 354 (D.N.J. 1999).

[111] 64 F. Supp. 2d 354 (D.N.J. 1999).

[112] *See id.* at 359-60.

[113] 512 U.S. 374 (1994).

[114] *Nat'l Ass'n of Home Builders*, 64 F. Supp. 2d at 359. Specifically, the court remanded the case for examination of the following factors: "1) location of the [private] dry sand area in relation to the foreshore; 2) extent and availability of publicly-owned upland sand area; 3) nature and extent of the public demand; and 4) usage of the upland area by the owner." *Id.*

[115] 747 P.2d 1062 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988).

use to recreation and aquaculture. The landowner claimed that the restrictions amounted to a regulatory taking. The *Orion* court applied the then-current federal takings test set out in *Penn Central Transportation Co. v. New York*[116] and held that Orion could have no investment-backed expectations for development. Specifically, it stated that, because the state held original title to all of Washington's shoreline, any transfer of shoreline property was impressed with the public trust doctrine, which was inalienable. The court did note that the state's restrictions were more prohibitive than would result from a reasonable application of the public trust doctrine. Therefore, to the extent the regulations only prohibited uses that would be prohibited under the public trust, no taking could occur. On the other hand, to the extent the regulations were more restrictive, a regulatory taking could occur if they denied all economically viable use.

III. A CRITICAL LOOK AT THE PARAMETERS OF THE PRINCIPLES

The notion that pre-existing statutes are background principles per se has always been troublesome, but in the aftermath of *Palazzolo v. Rhode Island*,[117] it is an impossible position to maintain. With respect to traditional public trust and custom, there is much to be said in favor of their apparent status as "background principles." Significant difficulties arise, however, in categorically characterizing each of these concepts as *Lucas* exceptions, at least as they are currently applied. The following Subparts critique the courts' use of statutory law, custom, and public trust, suggesting that conceptual modifications are required if the emerging law of background principles is to retain logical and precedential consistency.

A. The Limits of Statutory Law

1. *Lucas*'s Emphasis on the Common Law

In contrast to the lower courts' eager adoption of statutes as "background principles," the *Lucas* Court itself leaned heavily toward the common law when discussing the meaning of the background principles exception. Most significantly, the Court stressed that land use restrictions that deprive a landowner of all economically beneficial use of land cannot be "newly decreed or legislated," stating:

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[116] 438 U.S. 104 (1978).
[117] 121 S. Ct. 2448 (2001).

> A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts-by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.[118]

Thus, the only concrete examples of property rules that the Court sanctioned as outside the categorical takings rule were nuisance principles that clearly emanate from the common law.[119] Furthermore, in detailing the circumstances in which the principles could be applied to defeat a takings claim, the Court stated that "[t]he fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any *common-law* prohibition."[120] Finally, the dissenting Justices clearly understood that the majority opinion limited background principles to common law principles, stating: "The Court's holding today effectively freezes the State's *common law*, denying the legislature much of its traditional power to revise the law governing the rights and uses of property."[121] Lower state and federal courts have, of course, interpreted the *Lucas* majority opinion as quite a bit less restrictive than either the majority or dissenting Justices intended.

2. *Palazzolo* and the "New" Role of Statutory Law

The recent case of *Palazzolo v. Rhode Island*[122] sheds some light on the background principles question, making it clear that an otherwise unconstitutional regulation (absent compensation) does not become a background principle merely because it precedes the current owner's acquisition of title. The decision failed, however, to close the door on the notion that a statute may become such a principle at some point. If *Palazzolo* can be read to give any support to the statutory background principles concept, the decision departs from the more traditional view that statutes are, by nature, not background principles, as Justice Scalia clearly implied in *Lucas*.

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[118] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).
[119] *See id.*
[120] *Id.* at 1031 (emphasis added).
[121] *Id.* at 1068-69 (Stevens, J., dissenting) (emphasis added).
[122] 121 S. Ct. 2448 (2001).

a. Mere Passage of Time Does Not Convert a Statute into a Background Principle of a State's Law of Property

As the Court observed, "[t]he first holding [of the Rhode Island Supreme Court] was couched in terms of background principles of state property law."[123] That is, the state court decided that the coastal protection statute at issue in the case was a background principle, so that even if the regulatory effect was to deprive Palazzolo of all economically beneficial use, Palazzolo was entitled to no relief because the statute fell within the *Lucas* exception for state background principles of property law.

In addressing the Rhode Island court's initial holding, the *Palazzolo* Court reviewed the pertinent parts of its landmark *Lucas* decision:

> In *Lucas* the Court observed that a landowner's ability to recover for a government deprivation of all economically beneficial use of property is not absolute but instead is confined by limitations on the use of land which "inhere in the title itself." This is so, the Court reasoned, because the landowner is constrained by those "restrictions that background principles of the State's law of property and nuisance already place upon land ownership." It is asserted here that *Lucas* stands for the proposition that any new regulation, once enacted, becomes a background principle of property law which cannot be challenged by those who acquire title after the enactment.[124]

Having set out the rules for the background principles exception, the *Palazzolo* Court proceeded to put its own mark on the concept: "It suffices to say that a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title."[125] The Court then reinforced the limits on statutory enactments as background principles as described in *Lucas*:

> This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in

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[123] *Id.* at 2462.
[124] *Id.* at 2464 (citations omitted).
[125] *Id.*

> terms of those common, shared understandings of permissible limitations derived from a State's legal tradition. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed. A law does not become a background principle for subsequent owners by enactment itself.[126]

b. Common Law Codification Statutes as Background Principles Exceptions

Given the foregoing statements from *Palazzolo*, cases such as *Bell* that reject takings claims because of pre-existing statutes must be considered wrongly decided, at least to the extent they purport to be based upon the background principles exception to the *Lucas* per se rule. In fact, if the Court had said nothing more, one would be left with the clear impression that statutory enactments can never represent background principles. However, the Court preceded its application of the background principles concept to the relevant statute in this case with the following enigmatic statement: "We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."[127]

Does this mean that there are circumstances when such an enactment can be a background principle, insulating the regulating government from the *Lucas* categorical rule with respect to total regulatory takings? Consider that the Court has, in the same paragraph: first, refused to confer background principle status on the Rhode Island statute that was so characterized by that state's highest court and, second, reiterated the *Lucas* concept of background principles as "common, shared understandings of permissible limitations derived from a State's legal tradition."[128] There is a way to resolve the Court's seemingly conflicting statements on background principles: a statute is a background principle of a state's law of property if, and only if, it

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[126] *Id.* (citations omitted).

[127] *Id.*

[128] *Palazzolo*, 121 S. Ct. at 2464.

codifies or embodies a common-law rule that is "shared" by all of the citizens of the state.[129]

The common law doctrines of custom and public trust may well be examples of such rules, so long as they are not suddenly discovered and applied as self-serving rationales to save an otherwise illegal regulatory taking but are truly long and well established.[130] By way of analogy, the Supreme Judicial Court of Maine in *Bell v. Town of Wells*[131] recently observed that a statute conferring rights on all of a state's citizens to cross private dry-sand beach in order to reach public trust waters and adjacent beaches for recreation can be defended against a regulatory taking challenge only if the statute embodies public rights already available under the said public trust doctrine. To the extent that the statute attempts to confer additional rights on citizens to cross private property without the permission of the affected landowners, the state exceeds its authority and must compensate the private owner for such intrusions.[132]

3. The Recognition of Statutory Background Principles Infects the Categorical Takings Rule with a Partial Takings Standard

The notion that pre-existing statutes defeat a takings claim must be discarded not only because it ignores the Court's characterization of background principles in *Lucas* and *Palazzolo*, but also because it engrafts a general regulatory takings standard onto the unique and inflexible categorical rule. Specifically, the statutory background principles trend borrows the notice rule from the modern doctrine of "reasonable investment-backed expectations," which has been held irrelevant to the economically beneficial use standard applied to total or per se takings.[133]

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[129] *See* Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147, 152 (1995) (stating that *Lucas* "accepted the property definition implicit in state common law, while rejecting (or at least limiting) its redefinition by state or local legislation").

[130] *See generally* Callies, *supra* note 10, at 10003.

[131] 557 A.2d 168 (Me. 1989).

[132] *See* Purdie v. Att'y Gen., 732 A.2d 442 (N.H. 1999); Opinion of the Justices, 649 A.2d 604 (N.H. 1994).

[133] *See* Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1363-64 (Fed. Cir. 2000). The court held:

> In the initial analysis of whether a takings has occurred, when it is determined that the effect of the regulatory imposition is to eliminate all economically viability of the property alleged to have been taken, the owner's expectations regarding future use of the property are not a factor in deciding whether the imposition requires a remedy.

In *Penn Central Transportation Co. v. New York City*,[134] the Court established the "ad-hoc inquiry" for regulatory takings claims. This inquiry focuses on three factors, with specific emphasis placed on the extent to which a regulation interferes with a landowner's investment-backed expectations.[135] In the last decade, courts have applied the concept of investment-backed expectations by asking whether the claimant's property is restricted pursuant to regulations that predate the purchase of property. If the answer is yes, the constructive notice implicit in the pre-existing regulations is said to preclude the formation of "reasonable" investment-backed expectations, and therefore, defeats the claim.[136]

As acknowledged by the Court of Federal Claims in *Forest Properties, Inc. v. United States*,[137] and implicitly recognized in several recent federal[138] and state cases,[139] an application of the background principles concept that includes statutes conflates the *Lucas* exception with the notice-based expectations doctrine.[140] Both concepts preclude landowners from establishing a taking when regulation predates the

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Id. (footnote omitted).

[134] 438 U.S. 104 (1978).

[135] *Id.* at 124. The other factors were, of course, the economic impact of the regulation and the "character of the governmental action." *Id.*

[136] *See* Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, 27 URB. LAW. 215, 244-45 (1995) (reviewing cases in which landowner expectations are undermined by constructive notice of regulation).

[137] 39 Fed. Cl. 56 (Fed. Cl. 1997).

[138] *See* Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 287 (4th Cir. 1998) (holding land development rules at time of purchase established that property owner did not have either expectations or property interests sufficient to establish a takings claim); Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 694 (8th Cir. 1996) (holding landowner did not have a protected property interest in maintaining billboards as a nonconforming use because he had no expectation of the use in light of pre-existing restrictions).

[139] *See* Gazza v. N.Y. State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1041 (N.Y. 1997) (holding that pre-existing wetlands statute undermined expectations and operated as a background principle); Accord Agric. v. Tex. Natural Res. Conservation Comm'n, No. 03-98-00340-CV, 1999 Tex. App. LEXIS 6898, at *13 (Tex. Ct. App. Sept. 10, 1999) (citing *Lucas* for the proposition that "owner's reasonable expectations are shaped by uses permitted by state law"); Hansen v. Snohomish County, No. 43463-1-I, 1999 Wash. App. LEXIS 1915, at *7 (Wash. Ct. App. Nov. 8, 1999) (citing the *Lucas* Court's background principles discussion for the conclusion that, under existing zoning, landowners had no "rightful" expectation in commercial development).

[140] *Forest Props., Inc.*, 39 Fed. Cl. at 71; *see* Radford & Breemer, *supra* note 9 (discussing the conflation of background principles and "reasonable investment-backed expectations").

purchase of property.[141] In *Gazza v. New York State Department of Environmental Conservation*,[142] this conflation was clearly evident when the New York Court of Appeals held that, in light of pre-existing wetlands regulations, a landowner "never owned an absolute right to build on his land without a variance,"[143] and, in the alternative, that his "reasonable expectations were not affected when the property remained restricted."[144]

The problem is that the circumstances under which a landowner acquires land (and, thus, the notice rule) may be "keenly relevant to takings law generally" but are inapposite to *Lucas* cases where a landowner is denied all economically viable use. This was made abundantly clear in *Palm Beach Isles Associates v. United States*.[145] In *Palm Beach Isles*, a group of investors (PBIA) bought a 311.7-acre parcel of property in 1956, 50.7 acres of which was inundated with wetlands or submerged under shallow water.[146] After years of negotiation with government authorities, the Army Corps of Engineers rejected PBIA's application for a fill permit "on environmental grounds and the requirements of the Clean Water Act,"[147] which was enacted in 1971, long after the property was earmarked for development. The Court of Federal Claims rejected the ensuing takings claim, in part because "the existing statutory regime precluded any reasonable investment-backed expectation of being able to develop the property."[148]

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[141] *See* Sugameli, *supra* note 12, at 979 (noting that courts reject takings claims on the basis of pre-existing statutes under the background principles exception and the reasonable expectations doctrine).

[142] 679 N.E.2d 1035 (N.Y. 1997).

[143] *Id.* at 1040. Observing that "[t]he relevant property interests owned by the petitioner are defined by those State laws enacted and in effect at the time he took title," the court concluded that "the only permissible uses for the subject property were dependent upon those [wetlands] regulations." *Id.*

[144] *Id.* at 1043. The court explained that reasonable expectations are "examined in light of the level of interference with permissible uses of the land by the subject regulation." *Id.* at 1042 (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978)).

[145] 208 F.3d 1374 (Fed. Cir. 2000).

[146] *Id.* at 1377. The 261-acre and 50.7-acre parcels were split by a road. *Id.* Of the 50.7 acres, 1.4 acres was "shoreline wetlands adjacent to the road, and 49.3 acres [was] submerged land adjacent to the wetlands." *Id.*

[147] *Id.* at 1378. The Corps also considered the effect of PBIA's application on navigation, but concluded that "the project should not have a significant adverse effect on navigation, in general." *Id.*

[148] *Id.* at 1379. The Court of Federal Claims also held that there was no taking of the submerged 49.3-acre parcel because it was subject to a federal navigational servitude that was a "pre-existing limitation upon the landowner's title." *Id.* at 1378. The court

On appeal, the Federal Circuit reversed, holding that the reasonable investment-backed expectations factor and, thus, the nature of the underlying regulatory regime were irrelevant to a denial of all economic use claims.[149] Then, in rejecting a petition for a rehearing by the panel en banc, the original panel issued a supplemental opinion[150] that exhaustively reviewed *Lucas* and emphatically concluded that landowner expectations and, therefore, regulatory regimes predating the acquisition or attempted development of land are irrelevant to total takings: "When the government seizes the entire estate for government purposes, whether by physical occupation or categorical regulatory taking, it is not necessary to explore what those [landowner] expectations may have been."[151] The court continued:

> This does not mean that use restrictions are irrelevant to the takings calculus, even in categorical takings cases. Once a taking has been found, the use restrictions on the property are one of the factors that are taken into account in determining damages due the owner. It does mean that in the initial analysis of whether a taking has occurred, when it is determined that the effect of the regulatory imposition is to eliminate all economic viability of the property alleged to have been taken, the owner's expectations regarding future use of the property are not a factor in deciding whether the imposition requires a remedy.[152]

Or, as another court put it, "[t]he [expectations] concept is useless where . . . the alleged taking is categorical, i.e., physical or involves the denial of all economically viable uses of the property."[153] It is not surprising then that *Palazzolo* jettisoned the expectations/notice rule from the per se

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concluded that this limitation meant that "the proscribed use interests were not part of the owner's title to begin with." *Id.*

[149] *Id.* at 1379. In reaching the conclusion that expectations are irrelevant to a *Lucas* claim, the court relied on an early post-*Lucas* Federal Circuit decision, *Florida Rock Industries v. United States*, 18 F.3d 1560 (Fed. Cir. 1994). *Id.* It noted that *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), appeared to arrive at the contrary conclusion but concluded that statements of takings law after *Florida Rock* "cannot, of course, change the law (absent a decision *en banc*), under the doctrine of South Corp. v. United States, 690 F.2d 1368 (Fed. Cir. 1982)." *Id.* at 1379 n.3.

[150] Palm Beach Isles Assocs. v. United States, 231 F.3d 1354 (Fed. Cir. 2000) (en banc).

[151] *Id.* at 1363.

[152] *Id.* at 1363-64 (citation omitted).

[153] Ultimate Sportsbar Inc. v. United States, 48 Fed. Cl. 540, 547 (Fed. Cl. 2001).

takings standard by returning the background principles concept to the common law limits established in *Lucas*.

B. The Limits of Custom and the Public Trust

If otherwise confiscatory regulations avoid the compensation requirement as should common law limitations, traditional custom and public trust are clearly appropriate candidates for identification as categorical takings exceptions. Public rights emanating from these doctrines stand on a footing similar to an easement, leasehold, covenant burden, license, or other recognized private property right in the land of another: a limitation or restriction on the title of and, usually, use by the landowner. Yet, the same legal tradition that thrusts these rights forward also hinges their applicability as background principles on the existence of several prerequisites.

1. Custom Must Be Returned to the Blackstonian Framework

It may very well be possible to interpret the common law of the several states (particularly that of Hawaii) to create rights of access in land without reference to Blackstonian custom (though it is doubtful such creativity could withstand federal takings scrutiny), but the fact remains that courts do not. Instead, Blackstonian custom becomes the ultimate bedrock, the last defense, of each decision. One suspects that the courts understand they are on thin ice in breaching the fundamental right to exclude others from private property.[154] Though they are to be commended for attempting to ground such a breach in the valid doctrine of custom, the courts' application of, and reliance on, Blackstone leaves much to be desired.

As we have seen, for a valid custom to exist it must be immemorial, continuous, peaceable, reasonable, certain, compulsory, and consistent. It is these criteria, applicable to a particular custom (land rights in derogation of common law specific to a particular and limited jurisdiction and definite population) that courts have dealt with and that still form the basis for discussion and categorization of customary law.[155] Unfortunately, while courts that find customary rights have gone through the motions of considering these criteria, they have also, for the most part, failed to apply all of them or to apply them in the sense they

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[154] *See generally* Kaiser-Aetna v. United States, 444 U.S. 164 (1979); David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. UNIV. J.L. & POL'Y 39 (2000).

[155] *See generally* LAWS OF ENGLAND, *supra* note 46.

were intended.[156] Thus, in *Oregon ex rel. Thornton v. Hay*,[157] the Oregon Supreme Court attempted to apply Blackstone's criteria but mistook the critical requirements of reasonableness and certainty. The court stated:

> The fourth requirement, that of reasonableness, is satisfied by the evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community. . . . The fifth requirement, certainty, is satisfied by the visible boundaries of the dry-sand area and by the character of the land, which limits that use thereof to recreational uses connected with the foreshore.[158]

This is not, by any means, what Blackstone meant, nor did cases before, contemporary with, or after his time support such an interpretation. Rather, English cases from Blackstone's time (which presumably he had in mind when writing the *Commentaries*), and those soon after, measure the reasonableness of a custom by gauging its impact on private property rights. Thus, one of the most common bases for declaring a custom unreasonable - and these outnumber the reasonable cases by a fair margin - is that the custom had an unusually burdensome effect on the land over, or upon which, it is exercised.[159] Certainty, on the other hand, was comprised of three distinct components: certainty of practice, certainty of locale, and certainty of persons. With respect to the latter two, English cases consistently held that when a specific customary practice is established, certainty requires limitation to a particular place

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[156] In the United States, some of the criteria - such as immemoriality as Blackstone would define it - must be, and have been, modified to fit a country whose common-law experience makes the application of certain criteria difficult. Historical distinctions cannot, however, justify the alterations to Blackstonian "reasonableness" and "certainty" advanced by the Oregon and Hawaii courts.

[157] 462 P.2d 671 (Or. 1969).

[158] *Id.* at 677.

[159] *See* Broadbent v. Wilkes, Willes 360, 125 Eng. Rep. 1214 (K.B. 1742) (rejecting as unreasonable alleged customary right of land tenants to sink pits and mine coal beneath the lands of other tenants because it would "deprive the tenant of the whole benefit of the land"); *see also* Bastard v. Smith, 2 M & Rob 129, 174 Eng. Rep. 238 (Q.B. 1837) (instructing a jury that it could not sanction the reasonableness of an alleged customary right of tin miners to direct water into their mines "unless you find repeated acts of exercise of the custom on the one hand, and of acquiescence on the other"); Wilkes v. Broadbent, 2 Strange 1224, Eng. Rep. 1145 (K.B. 1745) (upholding *Broadbent* with particular emphasis on the great burden on private land). *See generally* Mercer v. Denne, 2 Ch. 534 (1904), *aff'd*, 2 Ch. 538 (Eng. C.A. 1905) (upholding custom of fishermen to use a piece of land covered with a shingle to spread and dry their nets "so long as they do not thereby throw an unreasonable burden on the landowner").

or locale, like a county, parish, or village (otherwise, it approaches the general application and usage that is the hallmark of the common law) and exercise by "individuals of a particular description."[160] It was inconceivable that "all the inhabitants of England" could exercise a custom.

In light of the traditional criteria for custom, the *Thornton* court adopted a version of customary law utterly disconnected from the Blackstonian concept. In particular, by failing to consider the impact of the customary beach use on private property and by eagerly extending customary beach rights to all Oregonians on all parts of the coast, the court applied standards of reasonableness and certainty that cannot be attributed to Blackstone, though that is exactly what the court did. Indeed, since reasonableness is not a matter of present use but of original legal fairness, the court's statement that reasonableness "is satisfied by the evidence that the public has always made use of the land in a manner appropriate to the land and to the usages of the community"[161] is beside the point and irrelevant.

The Oregon court is not alone in misapplying Blackstone's criteria. In *PASH*, the Hawaii Supreme Court also chose among elements of traditional custom and similarly misapplied the elements of certainty and reasonableness. In "finding" customary rights in twenty percent of Hawaii's citizens over every square foot of land in the state, whether or not developed, and with scant regard for the impact of the rights on private landowners, the Hawaii court followed firmly in the footsteps of *Thornton*, not those of Blackstone.

Therefore, while custom may indeed be a background principle as a general matter, it is critical that courts comply with specific and certain criteria when relying on customary rights as a takings exception. Blackstone provided such criteria, not only as a matter of reason, but also as a matter of law, as he is almost always cited in the reported American

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[160] Parker v. Combleford, Cro. Eliz. 726, 78 Eng. Rep. 959 (K.B. 1599) (rejecting custom of lord of a manor to take the best beast of any person dying within the manor as a tribute of goods and chattels payable to the lord at death because the custom was thus extended to those living outside the geographical area of the manor); *see* Arthur v. Bokenham, 11 Mod. 148, 88 Eng. Rep. 957 (C.P. 1709) (stating that "the law allows usage in particular places to supercede the common law, and it is the local law, which is never to be extended further than the usage and practice, which is the only thing that makes it law"); *see also* Anglo-Hellenic S.S. Co. v. Louis Dreyfus & Co., 108 L.T.R. 36 (K.B. 1913) (stating that a custom is only good because it "is in effect the common law *within that place* to which it extends, although contrary to the law of the realm") (emphasis added).

[161] *Thornton*, 462 P.2d at 677.

cases on custom and customary law. Unfortunately, up to this point the modern doctrine of custom bears little resemblance to Blackstone's law of custom. If it remains unrestrained by those traditional bonds, this "background principle" could completely swallow important and historical private rights in land, including the fundamental right to exclude others from private property.

2. The Public Trust Should Be Restricted to Its Traditional Scope

When presented in traditional terms, as a state-controlled public easement over tidal waters and their lands, it is increasingly clear that the public trust is a "background principle." This is not surprising given that the tidal public trust is a "settled rule of law"[162] and, therefore, part of "existing rules and understandings"[163] that comprise "background principles."[164] Indeed, the Federal Circuit has explicitly recognized that the federal navigation servitude - the federal expression of the public trust[165] - is a background principle under *Lucas*.[166] It is fair to say that states can, therefore, prohibit land uses inconsistent with the traditional public trust without paying just compensation.[167] The problem is that there is no uniform public trust doctrine and often no clear doctrinal limits. Thus, as we have seen, the takings issue frequently arises in the context of the public trust when a state court or legislature extends the public's trust "rights" on private property. This occurs when a state:

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[162] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 474 (1988). The Court stated:

> [I]t is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders.

Id. (citation omitted).

[163] Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972). In that case, the Court concluded that "property" is defined for the purposes of the Fifth Amendment by "existing rules or understandings that stem from an independent source such as state law." *Id.*

[164] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030 (1992).

[165] *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 636-37 (1986).

[166] Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1384 (Fed. Cir. 2000). The court stated, "[i]n light of our understanding of *Lucas* and other cases we have considered, we hold that the navigational servitude may constitute part of the background principles to which a property owner's rights are subject, and thus may provide the Government with a defense to a takings claim." *Id.*

[167] *See, e.g.*, Lechuza Villas W. v. Cal. Coastal Comm'n, 70 Cal. Rptr. 2d 399, 418 (Cal. Ct. App. 1997) (holding that the Coastal Commission could rely on the public trust to prohibit coastal development that intrudes into areas below the high-water mark without causing a taking).

first, imposes restrictions on privately held trust lands; second, requires public access across private land for access to trust lands or water; and third, expands the scope of public activities permitted under the guise of public trust rights.[168] The critical public trust question is how far courts can go in redefining the doctrine at the expense of private property rights while still escaping the just compensation requirement.

It is difficult to identify a bright line beyond which interferences with private property can no longer be legitimately premised upon the public trust doctrine. However, with some certainty, one can say that the fit between the public trust and the background principles exception fades as the doctrine drifts from its historical moorings. In contrast to most customary law cases, state courts are often reluctant to reject takings claims simply because a land use restriction is premised on an expanded version of the public trust doctrine.[169] For instance, in *Bell v. Town of Wells*,[170] the Maine Supreme Judicial Court held that an attempt to expand the state's public trust doctrine to allow the public to traverse private lands to reach public land for recreational purposes resulted in a taking of private property. In the court's view, traditional and permissible access purposes were limited to fishing, fowling, and navigation. To the same effect is the Massachusetts Supreme Judicial Court's decision in *Opinion of the Justices*.[171] There, the court refused to expand statutory declarations of public trust to permit so much as access across private land to reach intertidal lands. In holding the proposal to reserve such rights-of-way a probable taking, the court stated:

> The permanent physical intrusion into the property of private persons, which the bill would establish, is a taking of property within even the most narrow construction of that phrase possible under the

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[168] *See generally* DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK, 101-02 (1994).

[169] *See* Douglaston Manor, Inc. v. Bahrakis, 89 N.Y.2d 472 (1997) (refusing to extend the public trust to waters not navigable in fact because it would "precipitate serious destabilizing effects on property ownership principles and precedents"); W.J.F. Realty Corp. v. New York, 672 N.Y.S.2d 1007, 1010 (App. Div. 1998) (holding that the Long Island Pine Barrens Protection Act, which was premised on a form of the public trust, was constitutional because it provided a mechanism for compensating property owners whose use of land was restricted under the Act); *see also* Bell v. Town of Wells, 557 A.2d 168 (Me. 1989) (holding that an act allowing public recreation on private intertidal lands amounted to a taking); Purdie v. Att'y Gen., 732 A.2d 442 (N.H. 1999) (holding that a legislative extension of the public trust to dry-sand areas would cause a taking).

[170] 557 A.2d 168 (Me. 1989).

[171] 313 N.E.2d 561 (Mass. 1974).

> Constitution of the Commonwealth and of the United States. . . . The interference with private property here involves a wholesale denial of an owner's right to exclude the public. If a possessory interest in real property has any meaning at all it must include the general right to exclude others.[172]

Several opinions of the New Hampshire Supreme Court exhibit similar skepticism toward expansions of the public trust that intrude on private property. In *Opinion of the Justices*,[173] the court responded to a new statute that provided for access to tide-flowed public trust shoreline across abutting private land with the following declaration:

> When the government unilaterally authorized a permanent, public easement across private lands, this constitutes a taking requiring just compensation. . . . Because the bill provides no compensation for the landowners whose property may be burdened by the general recreational easement established for public use, it violates the prohibition contained in our State and Federal Constitutions against the taking of private property for public use without just compensation. Although the State has the power to permit a comprehensive beach access and use program by using its eminent domain power and compensating private property owners, it may not take property rights without compensation through legislative decree.[174]

The court drove home the same points in the more recent case of *Purdie v. Attorney General*.[175] There, forty beachfront property owners sued the state, alleging a taking of their property when the state established a statutory boundary line defining public trust lands further inland from the mean high-water mark. The language of the court is instructive:

> Having determined that New Hampshire common law limits public ownership of the shorelands to the mean high water mark, we conclude that the legislature went

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[172] *Id.* at 568.
[173] 649 A.2d 604 (N.H. 1994).
[174] *Id.* at 611.
[175] 732 A.2d 442 (N.H. 1999).

> beyond these common law limits by extending public trust rights to the highest water mark. . . . [P]roperty rights created by the common law may not be taken away legislatively without due process of law. Because [the state statute] unilaterally authorizes the taking of private shoreland for public use and provides no compensation for landowners whose property has been appropriated, it violates . . . the Fifth Amendment of the Federal Constitution against the taking of property for public use without just compensation. . . . *Although it may be desirable for the State to expand public beaches to cope with increasing crowds, the State may not do so without compensating the affected landowners.*[176]

3. Supreme Court Precedent Precludes Expansive, Retroactive Redefinitions of Property from the Background Principles Exception

Constitutional limits on extensions of public trust and custom flow not only from state decisions upholding the fundamental right to exclude others, but also from several Supreme Court decisions, not the least of which is *Lucas* itself. Of particular interest is the *Lucas* Court's emphatic statement that land use restrictions premised on the "background principles" exception "cannot be newly legislated or decreed."[177] Given their long history, the general doctrines of public trust and custom cannot, of course, be newly decreed. Yet *Lucas* and *Palazzolo* make clear that the dispositive question is whether the land use restriction itself is part of shared and traditional limitations or, instead, a novel interpretation of state law.[178] As stated by the *Lucas* Court, "[a]n affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found."[179] The objective nature of the background principles inquiry was briefly affirmed by Justices Rehnquist, Scalia, and Thomas in their concurring opinion in *Bush v. Gore*:[180]

> Similarly, our jurisprudence requires us to analyze the background principles of state property law to determine whether there has been a taking of property

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[176] *Id.* at 447 (emphasis added) (citing *Opinion of the Justices*, 649 A.2d 604 (N.H. 1994)).
[177] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).
[178] *See* Palazzolo v. Rhode Island, 121 S. Ct. 2248 (2001); *Lucas*, 505 U.S. at 1003.
[179] *Lucas*, 505 U.S. at 1032 n.18.
[180] 531 U.S. 98 (2000).

> in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights.[181]

In his 1994 dissent to certiorari denial in *Stevens v. City of Cannon Beach*,[182] Justice Scalia showed how the objective background principle limits expansive applications of both custom and the public trust. In *Cannon Beach*, coastal landowners in Oregon brought a takings suit against the City of Cannon after it refused to grant them a permit to build a seawall.[183] In rejecting the claims, the state's supreme court stressed that the owners had no right to build on the dry-sand area of their property in a way that would undermine public beach access.[184] This conclusion was premised on the 1969 case of *State of Oregon ex rel. Thornton v. Hay*,[185] which held that the public had a customary right to traverse over dry-sand areas previously considered private.[186] In *Cannon Beach*, the court concluded that, under *Thornton*, the doctrine of custom was a "background principle" of Oregon property law that precluded the Stevens' takings claim.[187]

When the case was appealed to the United States Supreme Court, Justice O'Connor joined Justice Scalia in strongly dissenting to a denial of certiorari.[188] Initially, Scalia emphasized that while a state is generally free to define property rights under state and not federal law, nevertheless:

> A State may not deny rights protected under the Federal Constitution . . . by invoking nonexistent rules of state substantive law. Our opinion in *Lucas* . . . would be a nullity if anything that a state court chooses to

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[181] *Id.* at 115 n.1.
[182] 510 U.S. 1207 (1994).
[183] Stevens v. City of Cannon Beach, 854 P.2d 449, 450 (Or. 1993).
[184] *Id.* at 456.
[185] 462 P.2d 671 (Or. 1969).
[186] *Id.* at 676-77. In *Thornton*, the court concluded that its decision opening up private beaches took "from no man anything which he has a legitimate right to regard as his," because the right of access was based on ancient practice. *Id.* at 678.
[187] *Cannon Beach*, 854 P.2d at 456.
[188] Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994).

> denominate "background law" - regardless of whether it is really such - could eliminate property rights.[189]

To support the proposition that a state cannot avoid a taking simply by asserting that property never existed,[190] Scalia cited to an instructive concurring opinion by Justice Stewart in *Hughes v. Washington*.[191] In awarding natural accretions to a beachfront landowner who took by federal grant, despite a state rule to the contrary, Justice Stewart's *Hughes* opinion emphasized that a retroactive judicial (re)interpretation of riparian rights did not preclude a takings claim:

> Like any other property owner, . . . Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation. . . . To the extent that the decision of the Supreme Court of Washington . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of retroactively asserting that the property it has taken never existed at all.[192]

Justice Stewart's opinion in *Hughes* and its sanction in the dissent to denial of certiorari thus signal that the creative construction of custom (or public trust for that matter) will not constitute a background principle if it is clearly out of line with state precedent.[193]

Scalia's dissent raised several points that further illustrate the point at which custom or public trust becomes a retroactive alteration of private property rights rather than an application of a "background

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[189] *Id.* at 1207-14.

[190] *Id.* at 1211. The dissent stated: "A State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Id.* at 1211-12 (quoting *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring)).

[191] 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

[192] *Id.* at 295-97.

[193] *See* Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 FORDHAM ENVTL. L.J. 1, 57-58 (1998) (discussing the implications of *Hughes v. Washington* with respect to the public trust doctrine).

principle." In concluding that the Oregon court's rejection of the Stevens' takings claim on custom principles was not an "objectively reasonable"[194] application of Oregon precedent,[195] Scalia stressed that the court ignored precedent between *Thornton* and *Cannon Beach* that appeared to limit the doctrine of custom.[196] Additionally, he noted that the Oregon court improperly interpreted *Thornton*, the underlying basis for the *Cannon Beach* decision,[197] and observed that the Oregon court's "vacillations on the scope of the doctrine of custom . . . reinforce a sense that the court is creating the doctrine rather than describing it."[198]

Similar problems are likely to arise if state courts continue to expand the public trust to new areas or to "find" new trust rights (such as environmental preservation) on traditionally impressed lands because the bulk of state precedent limits the public trust to tidal areas for the interests of commerce, as well as for navigation and recreational activities.[199] Indeed, several recent state decisions exhibit judicial skepticism of sudden changes in public trust law that infringe on private property. For example, in the 1999 case of *Anderson Columbia Co., Inc. v. Board of Trustees*,[200] a Florida court rejected a state agency's attempt to assert public trust control over filled lands previously granted to private owners in fee simple by the legislature. In so doing, the court emphasized that "[t]he state cannot now by rule or refusal to issue an unqualified disclaimer [of public trust rights] regain or reclaim any interest in the affected lands. To permit such state action would constitute an unlawful forfeiture of private property rights without just compensation."[201] Similarly, in *Douglaston Manor, Inc. v. Bahrakis*,[202] the New York Court of Appeals refused entreaties to extend the public trust to waters not navigable in fact because of the sudden and unstable impact such a decision would have on private property.[203]

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[194] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1032 n.18 (1992).
[195] Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994).
[196] *Id.* at 1209-10.
[197] *Id.* at 1212 n.4.
[198] *Id.*
[199] *See* Lazarus, *supra* note 164, at 710-16.
[200] 748 So. 2d 1061 (Fla. Dist. Ct. App. 1999).
[201] *Id.* at 1067.
[202] 89 N.Y.2d 472 (1997).
[203] *Id.* at 483.

IV. CONCLUSION

As *Palazzolo* recognized, background principles are just that: firmly embedded and long-established principles of property law, clearly and unambiguously recognized, and universally acknowledged by the citizens of the state in which they are claimed. Thus, when they are restricted to their traditional and well-understood scope, custom and public trust can help to frame those rights as background principles of a state's property law. However, newly discovering or expanding such principles in order to protect resources now deemed valuable and in the public interest to preserve is inconsistent and irreconcilable with the protection of private rights in land traditionally associated with our system of government in the United States. As one recent court has stated: "the desirable definiteness attendant upon discrete property rights and principles, along with reliable, predictable expectations *built upon centuries of precedent, ought not be sacrificed to the vicissitudes of unsupportable legal theories.*"[204]

[204] *Id.* at 483 (emphasis added).