MODERN PUBLIC TRUST PRINCIPLES: RECOGNIZING RIGHTS AND INTEGRATING STANDARDS

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ABSTRACT

The public trust doctrine has a long history from its beginnings as an obligation on states to hold lands submerged under navigable waters in trust for the public, to its resurgence in the 1970s as a protector of natural resources, to its influence on state statutory and constitutional law as the public embraced environmental protection principles. However, many have argued that the public trust doctrine has not lived up to its potential as a major player in environmental and natural resources law. This article proposes a new framework for the public trust doctrine as a state tool for environmental protection that relies heavily on state constitutional law and environmental statutes to give additional content and power to this ancient common law doctrine. By using this new theoretical framework based on recent judicial trends, the statutory, constitutional, and common law manifestations of public trust principles can all become mutually reinforcing rather than remain trapped in the "either-or" dichotomy engrained in prior scholarship.

INTRODUCTION

Throughout its existence, the public trust doctrine has been pulled in different directions and assigned different meanings. At its core, the public trust doctrine is the idea that there are some resources, notably tidal and navigable waters and the lands under them that are forever subject to state ownership and protection in trust for the use and benefit of the public. To some, the doctrine is a vehicle for public access to water, beaches, or fishing in a world otherwise dominated by private ownership. To others it is a check on government attempts to give away or sell such resources for short-term economic gain. To yet others, it is a back-door mechanism for judicial taking of private property without just compensation through a clever argument that the property was never "private" in the first place. In general, however, it has been lauded as a doctrine full of potential for environmental and natural resources protection, but also has been subject to significant criticism since its resurgence in its modern form in the 1970s.

Criticisms of the modern public trust doctrine include that it is an anachronistic, property-based doctrine that prevents a rethinking of how humans relate to the world

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from a holistic or ecological perspective;[1] that it places emphasis on the judiciary and the common law rather than more powerful and comprehensive legislative efforts to protect the environment;[2] or that it is a doctrine devoid of standards that encourages judicial takings of private property without just compensation.[3] As William Rodgers stated in the 1980s, ten years after the modern doctrine burst on the scene, "[i]t is a doctrine with both a radical potential and indifferent prospects."[4] Regardless of its alleged problems and limitations, this historic and amorphous doctrine continues to be studied by students and scholars of property law, constitutional law, environmental law, natural resources law and public lands law.

The purpose of this article is to create a new theoretical framework for a modern public trust doctrine grounded in state common law that can be used broadly for environmental protection purposes and is responsive to the various criticisms of the doctrine set out above. Most scholarly treatment of the public trust doctrine has explored the doctrine only in its common law form, or in its manifestation in state constitutions, or in the statutory forms that exist in some states. By contrast, the proposal set forth here refuses to look at the common law public trust doctrine separate and apart from state constitutional and statutory provisions expressly incorporating the doctrine, as well as the numerous and powerful state and federal environmental and natural resources protection laws. This proposal draws on recent developments in the state courts and attempts to develop a coherent framework states can adopt to both recognize environmental rights and provide substantive standards for applying the public trust doctrine today.

Under this new approach, there need not be a struggle between common law public trust principles on the one hand or strong environmental statutes and regulations on the other—it is not an "either-or" proposition. Instead, this framework integrates public trust principles in all of its forms, allowing the common law doctrine and legislatively enacted environmental protection provisions to be mutually-reinforcing and, thus, more powerful. Moreover, by grounding the doctrine

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[1] *See, e.g.,* Richard Delgado*, Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209 (1991) (arguing that public trust doctrine is a wrong or flawed solution to the nation's environmental crisis and has impaired the development of more ambitious reform movements).

[2] *See, e.g.,* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986) (arguing that by being based on a private property rights conception of natural resources law, the public trust doctrine is an anachronism which impedes more progressive legislative developments to protect natural resources and the environment).

[3] *See, e.g.,* James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) (arguing that public trust doctrine is an unworkable doctrine and is incompatible with the values of a constitutional democracy); Barton H. Thompson, Jr.*, Judicial Takings*, 76 VA. L. REV. 1449 (1990) (arguing that judicial changes in the law impacting private property rights should not be immune from a takings analysis); George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra,* 33 B.C. ENVTL. AFF. L. REV. 307 (2006) (arguing that expansion of the public trust doctrine to protect modern environmental protection needs not grounded in natural law traditions would unreasonably interfere with private property rights and result in improper judicial activism). *See also* Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994) (Scalia, J. dissenting) (dissenting from denial of certiorari in Oregon case denying development rights to owners of certain dry sand beaches because of public's interest in those beaches and arguing that "[n]o more by judicial decree than by legislative fiat may a State transform private property into public property without compensation.").

[4] WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 2.16 (1977 & 1984 Supp.).

in state law, rather than a confusing mix of state and federal common law, the doctrine avoids the criticism that it is based on an outdated, pre-"Erie doctrine" view of federal common law. Throughout this article I will make reference to "public trust principles" to stand for this new and consolidated framework for natural resources protection that courts can use to develop their own state public trust doctrine.

A reorientation of the public trust doctrine is particularly timely now when, just in the past few years, there have been new and significant shifts in ideas by the government and the public regarding the scope of private property rights, the role of government regulation, and the relationship between the state and federal governments in protecting natural resources and the environment. In such times, familiar methods of addressing longstanding issues of economic development, private property, constitutional law, and resource conservation are being called into question. Indeed, in recent years, the environmental regulatory state that has been building since the 1970s often seems unable to even begin to address current issues of global warming, energy needs, water pollution, and preservation of species and open space. As a result, there has been a renewed focus on state law, including state common law, and modern public trust principles should be part of that focus.

Part I provides a very brief history of the common law public trust doctrine with a focus on its use and implementation after it was revitalized for environmental protection purposes following Joseph Sax's influential law review article on the topic in 1970.[5] This Part looks not only at the doctrine's modern common law scope, but how the doctrine has been integrated into many states' constitutions and statutory law beginning in the 1970s. Part II reviews recent case law that has made efforts to integrate developments in the common law public trust doctrine, state and federal statutes, and state constitutions in order to support decisions protecting natural resources where any one of those legal doctrines on their own might be insufficient. Part III explains the significance of these judicial developments in today's world and presents a framework grounded in state law to expand and strengthen this holistic and mutually reinforcing public trust approach to protect and preserve natural resources and the environment.

I. HISTORIC ORIGINS AND MODERN CONCEPTIONS

The common law public trust doctrine is often described as elusive or vague as a result of its ancient and diffuse origins and variations in scope among the states.[6] Briefly though, the idea behind the public trust doctrine is that while private ownership of land and resources dominates American property law, there are some resources, notably navigable and tidal waters and the lands under them that are forever subject to state ownership and protection in trust for the use and benefit of

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[5] *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

[6] *See* WILLIAM H. RODGERS, JR., 1 ENVIRONMENTAL LAW § 2.20, at 155-56 (1986) (stating that the public trust doctrine is "resoundingly vague, obscure in origin and uncertain of purpose" and that "its theoretical underpinnings have not been adequately clarified."); Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 355-56 (stating that the "general concept" of the public trust has been "widely cited" in cases and scholarship, "the doctrine itself remained vague.").

the public.[7] Although the origins of the doctrine may be in some dispute, most scholars trace it back to Roman and English law, which held that property rights in the rivers, seas and seashore were to be preserved for the benefit of the public for navigation, fishing or other purposes. In other words, unlike other types of public property, such lands could never be granted or sold into private ownership.[8]

As applied in the United States, the Supreme Court held in the 1840s that the original colonies succeeded to the English crown the ownership of submerged lands under tidal waters and that after independence, the newly formed state governments held title to such lands.[9] The Court also held that states later admitted to the Union obtained the same ownership rights to submerged lands under tidal waters as the original 13 states under the "equal footing" doctrine.[10]

With this significant ownership granted to states came limitations as well. First, under the Commerce Clause, Congress had express authority to regulate those navigable waterways subject to state ownership and exercise a "navigational servitude" over such waters without paying compensation.[11] Second, and more significantly, the Supreme Court confirmed in 1892 in the significant case of *Illinois Central v. Illinois,*[12] that the historic public trust doctrine was an independent limitation on the state's power to sell or otherwise relinquish control over submerged lands that instead must always be held "in trust" for the public.

Illinois Central involved state legislation in 1869 which granted to the Illinois Central Railroad more than 1000 acres along the shores of Lake Michigan in the Chicago Harbor, extending for a mile out from the coast and for a mile in length across the city's central business district.[13] A few years later, the state had a change of heart, revoked the earlier grant, and brought a lawsuit to have the original grant

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[7] RODGERS, *supra* note 4, § 2.16, at 171; Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799, 800 (2004);

[8] *See* Sax, *supra* note 5, at 475-76; JOSEPH L. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 163-65 (1970) (discussing origins of American public trust doctrine in Roman and English law); Lazarus, *supra* note 2, at 633-35. In Justinian's compendium of Roman law, he declared as part of natural law that there were communal rights in the air, running water, the sea and the shores of the sea. *See* Lazarus, *supra* note 2, at 633 & n.10 (citing THE INSTITUTES OF JUSTINIAN bk. 2, tit. 1, pts. 1-6 at 65 (J. Thomas trans. 1975)).

[9] *See* Martin v. Waddell, 41 U.S. (16 Pet) 367 (1842); Kearney & Merrill, *supra* note 7, at 828.

[10] *See* Pollard v. Hagan, 44 U.S. (3 How) 212, 229 (1845) (holding that the statehood clause of the U.S. Constitution, article 4, section 3, clause 1, required that new states enter the Union on grounds of full political equality with the other states); Kearney & Merrill, *supra* note 7, at 828; Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Scope and Source of the Traditional Doctrine*, 19 ENVTL. L. 425, 443 (1989); Kearney & Merrill, *supra* note 7, at 823-33 (discussing history of state ownership of lands under tidal and navigable-in-fact waters).

[11] *See* Wilkinson, *supra* note 10, at 449-50 (citing United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) (denying compensation for lost power-generating value of hydro-electric site taken under condemnation by Congress); United States v. Twin City Power Co., 350 U.S. 222, 227 (1956); United States v. Rands, 389 U.S. 121 (1967)). *See also* Gibson v. United States, 166 U.S. 269 (1897) (although state holds title to navigable waters and lands underlying them, such title is subject to a federal navigational servitude for the purpose of regulating and improving navigation); Glass v. Goeckel, 703 N.W.2d 58, 64 at n.7 (Mich. 2005) (same).

[12] 146 U.S. 387 (1892).

[13] *Illinois Central*, 146 U.S. at 433-44, 54; JOSEPH L. SAX, DEFENDING THE ENVIRONMENT 170-71 (Alfred A. Knopf ed. 1971).

declared invalid. The Supreme Court upheld the state's claim on grounds that the original grant of submerged lands was invalid under the public trust doctrine.[14]

The Court confirmed that the state held title to the submerged lands in Lake Michigan,[15] but also held that the title was "different in character" from other state lands which could be sold into private ownership.[16] Although the Court acknowledged that it could not cite any authority where a grant like this had been held invalid, it stated there were numerous decisions stating that that such property is held by the state, by virtue of its sovereignty, in trust for the public. As a result, the state's control of such lands, for purposes of the trust, "can never be lost," unless conveyed for uses promoting the interest of the public.[17] The Court went on to recognize that the Chicago Harbor was of significant value to the people of Illinois, and was to be held in trust for them so they could enjoy navigation, carry on commerce and enjoy the liberty of fishing free from obstruction or interference by private parties.[18]

The Court was not at all clear regarding the legal basis for this restriction on state power and subsequent Court opinions have not provided additional clarity.[19] Some scholars have proposed that the public trust doctrine is a product of congressional preemption resulting from a comprehensive program to keep the major watercourses free for navigation, or constitutionally founded in the commerce clause.[20] Others have argued it may be grounded in the Due Process or Equal Protection Clauses.[21] The Court in *Illinois Central* was also elusive as to whether state law or federal law defined the scope of the trust and whether it was in any way based on federal common law. Indeed, it was perhaps less crucial that the Court define the precise basis for its holding because the case predated its 1938 decision in *Erie Railroad Co. v. Tompkins*, where the Court held that "[t]here is no federal general common law."[22] *Illinois Central* certainly implies that federal law governs in the sense that that Illinois or any other state cannot override trust obligations by statute.[23] However, in 1988, in *Phillips Petroleum Co. v. Mississippi*,[24] the Supreme Court held that each state could decide how broadly it wished to define its trust

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[14] *Id*., 146 U.S. at 454. For a detailed history of the fact of the *Illinois Central* case, see Kearney & Merrill, *supra* note 7.

[15] The Court held expressly that the submerged lands to which the state automatically held title were not limited to tidelands but also include the Great Lakes and other major inland waterbodies. *Illinois Central*, 146 U.S. at 435-37.

[16] *Id.* at 452.

[17] *Id.* at 453.

[18] *Id.* at 452, 454.

[19] *See, e.g.,* Kearney & Merrill, *supra* note 7, at 803, 928 (referring to ambiguities in *Illinois Central* opinion on source of the public trust doctrine in state or federal law).

[20] *See* Wilkinson, *supra* note 10, at 445-46. Wilkinson also raised the possibility that the doctrine could be based either on federal common law or the guarantee clause of the U.S. Constitution, but rejected those possibilities on grounds that it was unlikely a modern court would employ either basis to support the doctrine. *Id.*

[21] *See* Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO. J. 411, 426-28 (1987).

[22] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[23] *See Illinois Central*, 146 U.S. at 453, 455 (broad references to "a State" and that "[a]ny grant of the kind is necessarily revocable . . . ."); Wilkinson, *supra* note 10, at 460.

[24] 484 U.S. 469 (1988).

lands, even in the face of competing private property interests.[25] Significantly, no state court has attempted to do away entirely with the public trust doctrine within its borders, the Supreme Court has never indicated that a state would have a right to do so,[26] and at least one state court has invalidated legislative attempts to do so.[27] Thus, one can consider the doctrine as containing a federal prohibition on any state efforts to abrogate the doctrine entirely, but allowing states a wide berth to expand the doctrine's protection beyond a federal minimum.[28]

Putting aside its legal groundings, *Illinois Central* stands as an early invocation of the public trust doctrine to prevent a state from placing public trust lands into private hands for short-term economic gain to the detriment of the long-term preservation of the resource for the public. As Joseph Sax detailed in his groundbreaking 1970 law review article,[29] courts in several states prior to 1970 had relied on some version of public trust principles to prevent states from compromising public trust resources in the name of economic development or to benefit private interests.[30] Based on this authority, Sax argued that the public trust doctrine as implemented by the judiciary had the potential to become a powerful mechanism to protect the public interest in access, navigation, and recreation against state action that would attempt to privatize or limit those resources. In doing so, Sax summarized the doctrine as applying where there was a legal right vested in the public, the right was enforceable against the government, and the substance of the right was harmonious with environmental concerns.[31]

More importantly, Sax argued that although the doctrine had historically been limited to lands underlying navigable waters and situations involving state action that would convey or destroy those lands, "the judicial techniques developed in public trust cases need not be limited either to these few conventional interests or to questions of disposition of public properties."[32] Instead, Sax posited that the mixture of procedural and substantive protection applied in traditional public trust cases

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[25] *Phillips Petroleum Co.*, 484 U.S. at 475-76, 482-83.

[26] *See* Wilkinson, *supra* note 10, at 463-64.

[27] *See* San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 199 (Ariz. 1999) (holding as a matter of state constitutional law that state cannot abrogate the public trust doctrine by statute); *infra* notes 166-69 and accompanying text (discussing case).

[28] *Id.* at 464.

[29] *See* Sax, *supra* note 5.

[30] *See* Sax, *supra* note 5, at 491-546 (citing, *e.g.,* Gould v. Greylock, 215 N.E.2d 114 (Mass. 1966) (invalidating state lease and management agreement issued to private party to create commercial development on 4,000 acres in public park); Sacco v. Department of Public Works, 227 N.E.2d 478 (Mass. 1967) (invalidating legislation authorizing filling of pond for highway construction); Robbins v. Department of Public Works, 224 N.E.2d 577 (Mass. 1969) (invalidating statute authorizing transfer of wetlands "of considerable beauty" that were "often used for nature study and recreation" to public works department for highway development); Priewe v. Wisconsin State Land & Improvement Co., 67 N.W. 918 (1896) (invalidating legislation authorizing a private individual to drain a lake); In re Trempeleau Drainage Dist., 131 N.W. 838 (1911) (invalidating state action taken to drain swamplands); In re Crawford County Levee & Draining Dist. No. 1, 196 N.W. 874 (1924) (invalidating action to drain wetlands)).

[31] *See* Sax, *supra* note 5, at 491-531; Lazarus, *supra* note 2, at 642 (summarizing Sax's views of the doctrine).

[32] Sax, *supra* note 5, at 556.

would be equally applicable in cases involving air pollution, pesticides, strip mining, utility rights of way, or wetland filling on private land that requires a permit.[33]

Sax's article became a significant force that converged with other political and social developments in the 1960s and early 1970s to establish the modern field of environmental law and completely transform how the government and the public responded to issues of natural resources, conservation, environmental protection and economic development.[34] Moreover, since 1970, court decisions have reflected a growing awareness of environmental issues in developing the public trust doctrine as a matter of common law, while state legislatures have acted in kind by adopting state environmental protection provisions in their state constitutions and statutes often based expressly on public trust principles. A brief review of this common law, constitutional and statutory history follows. This review sets the stage for the analysis in Parts II and III, which creates a framework to integrate the developments in each of these areas.

A. Common Law Developments

Since Sax's article in 1970, courts have decided hundreds of cases involving the public trust doctrine and cited Sax's article in many of them.[35] These cases include not only private parties suing the government for allegedly breaching public trust duties (the most common situation in cases prior to 1970), but also private parties suing other private parties and the government suing private parties.[36] Not only have the types of actions under the doctrine expanded but the reach of the doctrine itself has expanded.

In certain states, court have expanded the doctrine from its historic domain of ensuring public access to navigable waters to protecting use, access to, and

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[33] *Id.* at 557. Sax discussed many of these issues in more detail in his book *Defending the Environment*, also published in 1970. *See* SAX, *supra* note 13.

[34] *See* Rose, *supra* note 6, at 354 (placing Sax's article in the context of the beginning of modern environmentalism); Peter Manus, *To the Candidate in Search of a Theme: Promote the Public Trust*, 19 STAN. ENVTL. L.J. 315, 331 (2000) (stating that Sax articulated his public trust thesis "at a moment in history—perhaps the only moment in modern American history—when it appeared that the country's political and legal institutions might fully embrace environmental values."); Delgado, *supra* note 1, at 1210 (stating that the time was "exactly right" for Sax's article in light of the growing environmental movement and efforts of scholars, activists and ordinary citizens calling "for greater attention to the problems of decreasing quality of life, increasing pollution, and overdevelopment of the nation's farm and wilderness lands."). *See also* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY 1065-66, 1068 (3rd ed. 2005) (discussing impact of modern public trust doctrine on statutory protection of endangered species, air quality, water quality, as well as all settings where human actors threaten to destroy public trust resources, the state attempts to sell public trust resources, or governments attempt to exploit public trust resources), Delgado, *supra* note 1, at 1213 (recognizing Sax's influence on federal environmental statutes); Manus, *supra* note 34, at 331 (same).

[35] *See* PLATER, *supra* note 34, at 1073 (stating that Sax's article has been cited extensively and can claim the majority of credit for the active presence of the public trust doctrine in U.S. environmental law); Lazarus, *supra* note 2, at 644 (stating that between 1970 and 1985, in half of the states, approximately 100 cases were reported involving the public trust doctrine, many of which cite Sax's article); Michael C. Blumm & Lucas Ritchie, *Lucas's Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 342 & n.125 (2005) (noting that Sax's article had been cited in at least thirty-three judicial opinions by 1989 and in six additional opinions by 2005).

[36] *See* Lazarus, *supra* note 2, at 645-46 (collecting cases).

preservation of all waters usable for recreational purposes,[37] the dry sand area of beaches for public recreation purposes,[38] parklands,[39] wildlife and wildlife habitat connected to navigable waters,[40] drinking water resources,[41] and inland wetlands.[42] Courts have also used the doctrine to resolve water appropriation issues and have held that even preexisting water rights may be curtailed if necessary to prevent reduction of water in inland streams or lakes that provides aesthetic values or habitat for animal and plant species or other natural resources.[43]

These more recent public trust decisions show how the environmental movement of the 1970s began to influence state courts' conceptions of the role of the common law public trust doctrine in our modern world. Indeed, the supreme courts of California, Wisconsin and Illinois and lower courts in other jurisdictions issued strong public trust opinions in the 1970s that expressly recognized society's growing concern regarding environmental issues and the need for common law legal doctrines to evolve to meet those needs.

For instance, in 1972 in *Just v. Marinette County*,[44] the Wisconsin Supreme Court held that a shoreland zoning ordinance prohibiting landowners from filling wetlands abutting navigable waters was not a taking subject to compensation. In reaching its decision, the court framed the issue as "a conflict between the public interest in stopping the despoliation of natural resources, which our citizens until recently have taken as inevitable and for granted, and an owner's asserted right to use his property as he wishes."[45] The court further stated that while swamps and wetlands were once considered "wasteland, undesirable, and not picturesque," as people have become "more sophisticated" they now appreciate that swamps and wetlands "serve a vital role in nature, are part of the balance of nature and are essential to the purity of the water in our lakes and streams."[46] The court continued

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[37] *See* Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984) (extending public trust doctrine to all waters capable of recreational use by the public).

[38] *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363-66 (N.J. 1984) (public trust doctrine requires public access to dry sand beaches between high water mark and vegetation line in both public or quasi-public ownership).

[39] *See* Paepcke v. Public Bldg. Comm'n, 263 N.E.2d 11, 15 (Ill. 1970) (public trust applies to parkland); Friends of Van Cortlandt Park v. New York 750 N.E.2d 1050 (N.Y. Ct. App. 2001) (common law public trust doctrine in New York extends to parkland and such land cannot be alienated without express legislative authorization).

[40] *See* Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (holding trust purposes are broader than traditional uses of navigation, commerce and fishing and include use as open space, for wildlife habitat, scientific study and swimming); Pullen v. Ullmer, 923 P.2d 54 (Alaska 1996) (doctrine applies to salmon and other fish).

[41] Mayor v. Passaic Valley Water Comm'n, 539 A.2d 760 (N.J. Super. Ct. 1987) (public trust doctrine applies to drinking water resources)

[42] *See* Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972); Lazarus, *supra* note 2, at 649-50. *See also* RODGERS, *supra* note 4, at 172-73.

[43] *See, e.g.,* National Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983); Shokal v. Dunn, 707 P.2d 441 (Idaho 1985); CWC Fisheries v. Bunker, 755 P.2d 1115 (Alaska 1988); United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976); In re Water Use Permit Applications, 83 P.3d 664 (Haw. 2004); Wilkinson, *supra* note 10, at 465-66 (discussing court decisions since 1970 extending the doctrine beyond its historic origins).

[44] 201 N.W.2d 761 (Wis. 1972).

[45] *Just*, 201 N.W.2d at 767.

[46] *Id*. at 768.

by stating that wetlands are a necessary part of "the ecological creation and now, even to the uninitiated, possess their own beauty in nature."[47]

The court concluded that the state's "active public trust duty" respecting navigable waters required the state to not only promote navigation but also preserve and protect those waters for fishing, recreation, and scenic beauty.[48] Because these background trust principles were an inherent limitation on the landowner's property rights, the ordinance preventing the fill did not "improve the public condition" but instead "preserves nature from the despoilage and harm resulting from the unrestricted activities of humans."[49]

A New York state court expressed a similar sentiment in 1972 in *Smithtown v. Poveromo*,[50] where the court provided a historical summary of the public trust doctrine and stated that the entire ecological system supporting the waterways is an integral part of those waterways and must be included within the purview of the trust.[51] The court continued by stressing the existence of new knowledge on the useful functions wetlands perform such as acting as a buffer against potentially dangerous waters, as a filtering system of the incoming tide, as a base for the marine food chain, and as a nesting ground for birds and other endangered species.[52]

Likewise, in 1971, the California Supreme Court held in *Marks v. Whitney*,[53] that a private owner of tidelands did not have the right to fill the tidelands as a result of the public trust doctrine. The court noted that the matter was of great importance because of population pressures, demands for recreational property, and the increasing development of seashore and waterfront property.[54] The court stated that although the public trust doctrine historically was defined in terms of navigation, commerce and fisheries, the doctrine was "sufficiently flexible" to encompass changing public needs.[55] The court went on to note that there is a growing recognition that one of the most important uses of tidelands is preservation of those lands in their natural state, to serve as ecological units for scientific study, as open space, and to provide environments which provide food and habitat for birds and marine life.[56]

Finally, in 1977, the Illinois Supreme Court held in *Scott v. Chicago Park District*,[57] that a state senate bill conveying nearly 200 acres under Lake Michigan to a steel company was void under the public trust doctrine. The court recognized that the industrial plant to be built would create public benefits in the form of jobs and an improved economy, but that the state could not satisfy its public trust doctrine obligations through such economic benefits.[58] As a counterweight to the economic

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[47] *Id.*
[48] *Id*. at 768.
[49] *Id.* at 771.
[50] 336 N.Y.S.2d 764 (N.Y. App. Div. 1972), *rev'd on other grounds*, 359 N.Y.S.2d 848 (N.Y. App. Div. 1973).
[51] *Smithtown*, 336 N.Y.S.2d at 775.
[52] *Id*.
[53] 491 P.2d 374 (Cal. 1971).
[54] *Marks*, 491 P.2d at 378.
[55] *Id*. at 380.
[56] *Id.*
[57] 360 N.E.2d 773 (Ill. 1977).
[58] *Scott*, 360 N.E.2d at 781.

public benefit, the court focused on the fact that Lake Michigan is a valuable natural resource that belongs to the people of the state, and that "there has developed a strong, though belated interest in conserving natural resources and in protecting and improving our physical environment."[59]

These cases from the 1970s show at least some state courts recognizing the nation's awakening to environmental issues and incorporating those principles into public trust decisions in a major way. This phenomenon did not end with the 1970s. In 1983, the California Supreme Court in the famous "Mono Lake" case held that the public trust doctrine applied to inland, navigable lakes and required the state to take into account ecological and aesthetic interests in making water allocation decisions even where state statutes did not appear to allow consideration of such concerns.[60] In reaching its holding, the court stated that Mono Lake was "a scenic and ecological treasure of national significance, imperiled by continued diversion of water," and that the state's public trust values require those concerns be integrated into the state's water appropriation scheme.[61] The court's decision detailed the lake's steadily increasing salinity which would impact the food chain, the adverse effects on millions of local and migratory birds using the lake, and the lake's value as an aesthetic, recreational and scientific resource.[62]

In 1998, the New York Supreme Court held that a state law restricting development in a natural area of Long Island was not an unconstitutional taking of private property without just compensation.[63] The court began its discussion in a manner nearly identical to the Wisconsin Supreme Court's opinion in *Just*, by stating that the case was "a clash between two dynamic impulses, the collective right to preserve natural resources and the individual right of property."[64] In holding that the public trust doctrine limited the plaintiff's property rights so as to render the law not a taking, the court provided a history of the public trust doctrine and argued that the early common law in England and America spoke to the subject of environmental regulation, and provided a common law custom that supported the law in question.[65] In response to the plaintiffs' contention that development would not result in environmental harm, the court looked back all the way to Roman law for the proposition that the "conservation of resources is intrinsically good and necessary for the continuation of society."[66] Thus, the court concluded that in enacting environmental laws, the government is simply meeting its requirement to preserve resources for future generations.[67]

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[59] *Id.* at 780.
[60] Nat'l Audubon Society v. Superior Court, 658 P.2d 709 (Cal. 1983).
[61] *Nat'l Audubon Society*, 658 P.2d at 712.
[62] *Id*. at 715-16.
[63] W.J.F. Realty Corp. v. State, 672 N.Y.S.2d 1007 (N.Y. App. Div. 1998).
[64] *W.J.F. Realty*, 672 N.Y.S.2d at 1007.
[65] *Id.* at 1009.
[66] *Id. See also* Glisson v. City of Marion, 720 N.E.2d 1034, 1045-47 (Ill. 1999) (Harrison J., dissenting) (arguing for citizen standing to challenge dam on a creek that would impact endangered species and focusing on the "well-documented importance of biodiversity to human welfare," and that we protected threatened and endangered species "because, in doing so, we protect ourselves and the welfare of Illinoisans who will inherit this land when we are gone.").
[67] *Id.* at 1011-12.

In 2004, the Louisiana Supreme Court expressly recognized environmental protection values in finding that a diversion project that would impact private interests in oyster beds was not a taking based in part on the common law public trust doctrine.[68] The court stated that the implementation of the project "fits precisely within the public trust doctrine" because the public resource at issue "is our very coastline, the loss of which is occurring at an alarming rate."[69] The court went on to describe the threat to the resource as "not just environmental" but also the health, safety, and welfare of the people as coastal erosion removes an important barrier between large populations and hurricanes and storms.[70] The court warned that left unchecked this erosion would result in the loss of land, jobs and corridors critical to businesses that rely on the coastal region for transportation.[71] Thus the court held that the interference with oyster beds must be allowed under the public trust doctrine to address erosion concerns.[72] The court's concerns, of course, were later born out by the massive disaster resulting from Hurricane Katrina in 2005.[73]

These cases provide only a few recent examples of state courts incorporating environmental values into their discussions of the common law public doctrine as a matter of state law, and using the doctrine to ensure that public trust resources are protected and preserved. However, despite the fact that at least some courts have been able to incorporate contemporary environmental values into the common law public trust doctrine, the critics are correct that the common law doctrine on its own remains limited. First, very few, if any courts, have extended the common law doctrine beyond tidal or navigable waters, thus leaving unprotected inland resources that are unconnected to navigable lakes or rivers.[74]

More important, relying exclusively on common law as the primary mechanism to protect natural resources and the environment (whether in the form of the public trust doctrine or in the form of more familiar doctrines such as nuisance or negligence) has always had limitations which still exist today. As a general matter, the common law tends to operate retrospectively rather than prospectively; it is sporadic and case-specific; it develops slowly in multiple jurisdictions, making a national and more immediate solution to a problem nearly impossible; it must abide by common law burdens of proof and is administered by judges who often lack specialized or scientific expertise in the area.[75] These limitations of common law generally are exacerbated in the public trust area where, unlike doctrines of nuisance or negligence that exist in virtually every state jurisdiction, the public trust doctrine

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[68] Avenal v. State, 886 So. 2d 1085 (La. 2004).

[69] *Avenal*, 886 So. 2d at 1101.

[70] *Id*.

[71] *Id.* at 1101-02.

[72] *See also* Parker v. Hanover County, 619 S.E.2d 868, 75-76 (2005) (holding that special assessment for inlet relocation project was not unconstitutional based in part on the public trust doctrine and noting the importance of North Carolina's coastal areas and the concerns related to recent hurricanes).

[73] *See, e.g.,* Oliver Houck, *Can We Save New Orleans?*, 19 TUL. ENVTL. L.J. 1 (2006) (discussing impact of historic development and erosion as part of the physical challenges facing New Orleans after Hurricane Katrina); John P. Manard et al., *Katrina's Tort Litigation: An Imperfect Storm*, 20 NAT. RES. & ENVT. 31, 31-32, 36 (Spring 2006) (discussing man's modifications of natural barriers in Louisiana and destruction of protective marshland and wetlands for development).

[74] *See e.g.*, RODGERS, *supra* note 6, § 2.20, at 158-160 (stating that "for the time being, the public trust doctrine remains confined restlessly" to submerged lands, the foreshore and other navigable waters).

[75] *See* PLATER, ET AL., *supra* note 34, at 283-84.

is hardly recognized or used in many jurisdictions. For instance, the common law doctrine has never been used for environmental protection purposes in Minnesota, a state otherwise historically known for its progressive environmental protection policies.[76]

As a result, the common law public trust doctrine is clearly nowhere near a global solution to advancing protection for natural resources and the environment, whether threatened by state action or private action. However, the public trust doctrine can still play an important role in ensuring judicial review of actions that threaten natural resources and the environment where an environmental statute does not apply or is not being enforced, or where state constitutional provisions to protect natural resources do not exist or are ineffective. In the cases described in this Section, the public trust doctrine was often available as a last resort for judicial review where there was simply no other statutory law, constitutional law or common law available for relief. Thus, to the extent the common law public trust doctrine can provide support to or be supported by environmental policies in state statutes or constitutions, the doctrine will be in a position to play a more important role in state environmental protection efforts.

B. State Constitutional Developments: Empty Rhetoric or Aspirational Guidance?

The environmental movement of the 1970s and Sax's article led not only to a resurgence in use of the common law public trust doctrine to protect natural resources and the environment but also to efforts to amend state constitutions to codify the public trust doctrine or create new constitutional rights to a clean or healthful environment.[77] Indeed, all state constitutions drafted since 1959 address environmental and natural resources preservation issues, and several states with constitutions enacted prior to that date have amended their constitutions to address environmental issues, resulting in 42 states with constitutions that at least mention environmental protection or natural resources.[78] While some state constitutional provisions do no more than authorize the legislature to enact environmental laws (which it already has authority to do under its inherent police power), others codify the common law public trust doctrine or set out a constitutional policy to protect the

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[76] A Westlaw search of "public trust doctrine" in Minnesota gives a result of only one case applying the doctrine in Minnesota, and in that case the court found that the doctrine applied only to navigable waterways and did not extend to state parkland. *See* Larson v. Sando, 508 N.W.2d 782, 787 (Minn. Ct. App. 1994) (public trust doctrine did not prevent department of natural resources from selling state land that had been designated as a wildlife management area to a private party). As noted below, while Minnesota courts have rarely discussed the common law public trust doctrine, they have interpreted expansively the Minnesota Environmental Rights Act, Minn. Stat. ch. 116B, which is based on public trust principles.

[77] *See, e.g.,* J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 247 (1999) (stating that environmental quality amendments "first surfaced at the national level in the late 1960s and had they heyday in the early 1970s, on the coat-tails of the environmentalism euphoria that culminated in the first Earth Day.").

[78] *See* Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 160 (2003).

environment. Yet others grant rights to all citizens for a "clean and healthful environment" or place mandatory duties on the state to protect the environment.[79]

Not surprisingly, the most powerful state constitutional provisions were enacted in the 1970s at the height of the environmental movement.[80] For instance, Article I, Section 27 of the Pennsylvania Constitution, approved in 1971 states that:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people.[81]

Similarly, Montana's 1972 Constitution provides an "inalienable" right to a "clean and healthful environment" and creates a duty upon both the state and private persons to "maintain and improve a clean and healthful environment in Montana for present and future generations."[82] The same provision goes on to require that the legislature provide for the administration and enforcement of this duty and provide adequate remedies "for the protection of the environmental life support system from degredation and provide adequate remedies to prevent unreasonable depletion and degredation of natural resources."[83]

Both the Pennsylvania and Montana constitutions thus not only codify certain public trust principles regarding the state's obligation to preserve natural resources for present and future generations, but also go one step further and provide a right of action for citizens or the state to enforce those rights.[84] Moreover, unlike the

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[79] *Id*. at 160-61 (providing examples of states falling into each of the categories). *See also* Robert J. Klee*, What's Good for School Finance Should be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENVTL. L. 135, 167-70 (2005) (stating that forty-two state constitutions at least mention the environment or natural resource conservation, eight states have clear language granting citizens environmental rights, eleven states include public policy statements on environmental protection, and the remaining twenty-three states at least refer to natural resources or environmental protection); Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863 (1996) (study of environmental and natural resource provisions in state constitutions and providing tables classifying the various types of constitutional provisions); Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169, 1173 (1997) (arguing that the most successful constitutional environmental protection provisions invokes "some combination of the concepts undergirding the public trust doctrine: conservation, public access and trusteeship.").

[80] *See, e.g.,* Kirsch, *supra* note 79, at 1169-70 (stating that just after this country's first "Earth Day," many states began the process of attempting to amend their state constitutions to "reflect a new premium on environmental protection.").

[81] PA. CONST. art I, § 27.

[82] MONT. CONST. art. II, §. 3 and art. IX, § 1.

[83] *Id*. at art. IX, Sec. 1

[84] Other states which incorporate strong public trust and environmental protection provisions include Alaska, Hawaii and Louisiana. *See* ALASKA CONST. art. VIII, § 3 ("Wherever occurring in their natural state, fish, wildlife and waters and reserved to the people for common use."); HAW. CONST. art. XI, § 1 ("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. All public natural resources are held in trust by the state for the benefit of the people."); LA. CONST. art. IX, § 1 ("The natural resources of the state, including air and water, and the healthful, scenic, historic and

common law public trust doctrine which applies in most states only to navigable waters and trust resources dependent on navigable waters (such as fish or migratory birds), these state constitutional provisions extend protection to a much broader array of resources and species.

While provisions like those in the Pennsylvania and Montana constitutions would appear on their face to provide the solution to the limitations of the common law public trust doctrine, appearances can be deceiving. For instance, the Montana courts have interpreted the constitutional right to a clean and healthful environment quite broadly to allow a range of actions based on the provision. In 1999, in *Montana Environmental Information Center (MEIC) v. Department of Environmental Quality*,[85] the Montana Supreme Court held that the state's right to a clean and healthful environment is a fundamental right triggering strict scrutiny and is not limited to health-based standards. In that case, the court held a nonprofit group could sue the state environmental agency and a mining company to prevent discharge of contaminants to a river that would adversely impact water quality and species even though the agency's rules allowed such a discharge.[86]

In reaching its decision, the court found that the amendment's intention was not to create a health-based standard but to permit no degredation from the present environment and affirmatively require enhancement of that environment.[87] The court also implicitly found that the right to a clean and healthful environment was "self-executing" meaning that it was not dependent on or limited to legislative action or violation of regulatory standards.[88] Two years later, in 2001, the Montana Supreme Court recognized that the right to a clean and healthful environment imposed requirements not only on state action, but also private action, when it held that the provision required rescission of a private contract for a well installation that would result in groundwater contamination.[89]

However, in contrast to the expansive interpretation Montana courts have given their constitutional environmental provisions, courts in other states have not generally followed suit. Illinois has a constitutional provision enacted in 1970 which states that "the public policy of the state and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations."[90] In 1999, the Illinois Supreme Court interpreted this provision to allow a private party standing to seek to enjoin construction of a dam on a creek that allegedly would impact state endangered species. However, the court dismissed the complaint on grounds that the constitutional provision was to protect public health,

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aesthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety and welfare of the people.").

[85] 988 P.2d 1236 (Mont. 1999).

[86] *MEIC*, 988 P.2d at 1249.

[87] *Id.* at 1247 (quoting from delegate statement at constitutional convention).

[88] *Id*. The environmental provisions in the Illinois, Hawaii and New York constitutions are explicitly self-executing. Courts have reached varying decisions on whether other state environmental provisions are self-executing where the provision itself is silent. *See, e.g.*, Payne v. Kassab, 361 A.2d 263, 272 (Pa. 1976) (holding provision in Pennsylvania constitution is self-executing); Robb v. Shockoe Slip Found., 324 S.E.2d 674, 676 (Va. 1985) (holding environmental protection provision in Virginia constitution is not self-executing); Klee, *supra* note 79, at 175-78 (discussing issue of self-execution in various state constitutions).

[89] Cape-Francis Enter. v. Peed, 29 P.3d 1011 (Mont. 2001).

[90] ILL. CONST. art. XI, § 1.

which does not include protection of species.[91] Although the decision was subject to a strong dissent citing the growing knowledge of the interrelatedness between the human condition and plant and animal species,[92] the case means that the Illinois constitution likely cannot be used in situations where the plaintiff cannot prove the action or inaction will directly affect human health, as opposed to the environment generally.

Moreover, the Pennsylvania Supreme Court has not given much teeth to the aspirational language contained in Section 27 of its constitution quoted earlier in this Section. Although Pennsylvania courts have held that Section 27 is self-executing, they have also held expressly that in evaluating development projects, the constitution does not require consideration of any environmental factors not already required by statute.[93] As a result, despite its broad language, Section 27 on its own provides no substantive check on actions that may harm the environment.[94]

Even in those states with more directive environmental rights language, such as Montana, state supreme courts in only four of the eight states with such language in their constitutions have addressed the nature of these rights (Montana, Illinois, Louisiana and Hawaii) and many other courts have found that their provisions are not self-executing.[95] As a result, there are very few cases where state courts have held on the merits that a state constitutional provision provides singular authority to prevent or require state or private action and most commentators have concluded that the provisions are largely ineffective in most states.[96] This ineffectiveness has been attributed to various factors, including state court decisions holding that the

[91] Glisson v. Marion, 720 N.E.2d 1034 (Ill. 1999).

[92] *Glisson*, 720 N.E.2d at 1046 (Harrison, J. dissenting) ("We protect threatened and endangered species because, in doing so, we protect ourselves and the welfare of Illinoisans who will inherit this land when we are gone. . . . To suggest, as my colleagues do, that the only environmental threats implicated by our Constitution are those that emanate from a smoke stack, drain pip or car exhaust ignores wisdom, science and the plain language of the law.").

[93] *See* Borough of Moosic v. Pennsylvania Pub. Util. Comm'n, 429 A.2d 1237, 1240 (Pa. Commw. Ct. 1981) (Section 27 does not require considering of factors beyond those in existing statutes when considering actions harmful to the environment); Community College of Delaware County v. Fox, 342 A.2d 468, 480-82 (Pa. Commw. Ct. 1975) (same). *See also* Snelling v. Dept. of Transp., 366 A.2d 1298, 1305 (Pa. Commw. Ct. 1976); Commonwealth v. Nat'l Gettysburg Battlefield Tower, 302 A.2d 886 (Pa. Commw. Ct. 1973), *aff'd*, 311 A.2d 588 (Pa. 1973); Payne v. Kassab, 312 A.2d 86 (Pa. Commw. Ct. 1973).

[94] *See* Kirsch, *supra* note 79, at 1200-02 (describing Pennsylvania courts' interpretation of Section 27 and concluding that courts "have undermined the intent of Pennsylvanians who adopted the state constitution's environmental protection provision."). *See also* Pennsylvania v. National Gettysburg Battlefield Tower, 311 A.2d 588, 596, 599 (Pa. 1973) (Jones, C.J, dissenting) ("This Court has been given the mandate of the public empowering the Commonwealth to prevent environmental abuses; instead, the Court has chosen to emasculate a constitutional amendment by declaring it not to be self-executing. . . .In one swift stroke the Court has disemboweled a constitutional provision which seems, by unequivocal language, to establish environmental control by public trust and, in so doing consequently sanctions the desecration of a unique national monument.").

[95] *See* Klee, *supra* note 79, at 171-78.

[96] *See, e.g.*, Kirsch, *supra* note 79, at 1171 (stating that "commentators have almost universally lamented the ineffectiveness" of state constitution environmental provisions); Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 865 (1996) ("courts have seldom involved substantial environmental [constitutional] provisions to constrain or dictate state policy . . . ."); Thompson, *supra* note 79, at 158 (state constitution environmental provisions "have had little consequence in most of the state that have adopted them).

provisions are not self-executing and the rise of federal and state environmental statutes beginning in the 1970s which have provided easier vehicles to pursue environmental rights than the general provisions in state constitutions.[97] Commentators have also criticized the use of such constitutional provisions to drive environmental policy, arguing that they should not be a substitute for the direct legislative process,[98] result in cluttered state constitutions,[99] and inappropriately inject complicated social policy issues into state constitutions where they do not belong.[100]

Thus, lobbying for new and improved state constitutional provisions expanding the scope of public trust resources or providing additional environmental rights is likely not the best path toward creating an improved structure to protect natural resources. One problem that is inherent in state environmental constitutional provisions is that they by necessity contain broad, aspirational language usually devoid of the specific standards necessary to implement concrete measures to protect the environment in a complex world.[101] Indeed, the critics are correct that the type of clarity and detail needed to implement environmental policy is better suited to legislative and administrative pronouncements (or even common law) and is not at home in constitutional documents.

However this does not mean existing and future state constitutional provisions expressing public trust principles or creating environmental rights need remain merely aspirational statements devoid of any real legal significance. Instead, the question remains whether these constitutional provisions can work together with other more detailed environmental policy directives in legislation or developed in the common law to protect public trust resources. Indeed, a vision of environmental protection for future generations embedded in a state constitution may be just what it takes to provide needed support for state implementation of a controversial environmental protection program that adversely impacts private property rights. It may also be just what it takes to cause a court to give additional scrutiny to state action or inaction that may result in destruction of natural resources. Finally it may be just what it takes to cause a court to strengthen its historic, common law public trust doctrine and apply it to new situations not contemplated at the time of the doctrine's inception.

C. Statutory and Regulatory Developments: Standards, Direction and Precision

The most significant and tangible result of the environmental movement of the 1970s was not the development of the modern public trust doctrine or the adoption of state constitutional provisions on the environment but the creation of comprehensive federal environmental statutes and the agencies to implement them through

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[97] *See* Thompson, *supra* note 79, at 158.
[98] *See* Thompson, *supra* note 79, at 158.
[99] *Id.*
[100] See Ruhl, *supra* note 77.
[101] *See, e.g.,* Ruhl, *supra* note 77, at 254-55 (discussing difficulty of creating a constitutional environmental quality provision that could attract broad social support while still being drafted with sufficient precision to avoid ambiguity and result in binding legal principles).

regulation and enforcement.[102] These developments at the federal level led to a similar explosion of laws, regulations and agencies at the state level, as the states began to implement federal mandates through the concept of "cooperative federalism."[103] These new federal and state statutes in the 1970s and 1980s thus set legislative policy and enforcement mechanisms on a national and state level in areas of air pollution, water pollution, pesticides, toxic substances, soil and groundwater contamination and remediation techniques.[104] These federal and state environmental protection statutes form the basis of the environmental regulatory state that exists today. Many of these statutes, particularly the National Environmental Policy Act,[105] the Clean Water Act,[106] and the Endangered Species Act,[107] are based on public trust principles in the sense that they set out a policy of protecting and preserving the environment for its own sake and for future generations.[108]

In addition to these federal and state environmental protection statutes, however, there also exist a different type of environmental statute based expressly on public trust principles, described here as state "environmental rights" statutes. Once again, Sax is responsible for this development and his vision for incorporating public trust principles into statutory law now becomes the third of three public trust forms discussed in this Article.

In the same year as his famous article on the public trust doctrine, 1970, Sax also published a book titled *Defending the Environment*, in which he set out in more detail the potential for the public trust doctrine as well as other mechanisms for judicial review of actions that may harm the environment.[109] He ended the book with a discussion of a "model law" that, at the book's publication, had just come into existence in the state of Michigan. Sax assisted in drafting this law, known as the Michigan Environmental Policy Act ("MEPA"),[110] which Sax stated had three purposes. He described these purposes as recognizing the public right to a decent

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[102] *See* PERCIVAL ET AL., ENVIRONMENTAL REGULATION 88 (4th ed. 2003) (describing time period from 1970-1980 as containing an "explosion" of federal legislation and creating an era of "federal regulatory infrastructure."); *id.* at 88-89 (providing chronology of significant federal environmental legislation between 1970 and 1980 including the National Environmental Policy Act, the Clean Air Amendments of 1970, the Federal Water Pollution Control Act (Clean Water Act), the 1972 Federal Environmental Pesticide Control Act, the Endangered Species Act, the Safe Drinking Water Act, the Toxic Substantives Control Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation and Liability Act); Ruhl, *supra* note 77, at 247 ("By the mid-1970s, however, the command-and-control regime of federal environmental protection legislation had evolved with unprecedented speed into a juggernaut of the administrative state.").

[103] *See* PERCIVAL, *supra* note 102, at 101 (stating that the predominant approach to federal-state relations under the environmental statutes today is "cooperative federalism" where federal agencies establish national environmental standards and states may opt to assume responsibility for administering them).

[104] *See, e.g.,* PERCIVAL, *supra* note 102, at 88-95 (describing federal environmental laws setting policy directives and comprehensive regulatory framework); Richard Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 626-30 (2001) (describing increased expertise and competence in environmental area at state level).

[105] 42 U.S.C. §§ 4321-4347.

[106] 33 U.S.C. §§ 1251-1387.

[107] 16 U.S.C. §§ 1531-1544.

[108] *See, e.g.,* Delgado, *supra* note 1, at 1213 (recognizing Sax's influence on federal environmental statutes); Manus, *supra* note 34, at 331 (same).

[109] *See* SAX, *supra* note 13 at 149-92.

[110] MICH. COMP. LAWS ANN. §§ 324.1701-.1706.

environment as an enforceable legal right; making it enforceable by private citizens suing as members of the public; and setting the stage for the development of a common law of environmental quality.[111] As to the third consideration, Sax stated that the bill purposefully did not define pollution, environmental quality or the public trust in order to allow the courts to develop a common law approach to environmental problems. In this way courts have ability to address problems as they are identified and formulate a flexible solution for the occasion.[112]

These state statutes providing for citizen standing to protect the environment and more aggressive judicial review of state and private action have, just like state constitutional environmental provisions, met with mixed results. For instance, the Minnesota legislature enacted the Minnesota Environmental Rights Act ("MERA") in 1971 and substantially modeled it after Michigan's law. MERA gives any natural person, corporation, state agency or municipality the right to bring a civil action in district court for declaratory or equitable relief against any person "for the protection of the air, water, land or other natural resources" within the state, whether publicly or privately owned, "from pollution, impairment or destruction."[113] "Natural resources" include, but are not limited to "all mineral, botanical, air, water, land, timber, soil, quietude, recreational and historical resources" as well as scenic and esthetic resources when owned by the government.[114] A plaintiff can establish "pollution, impairment or destruction" of natural resources either by showing the conduct at issue will violate an environmental standard or permit or by showing that the conduct at issue "materially adversely affects or is likely to materially adversely affect the environment."[115]

Minnesota courts have interpreted MERA very expansively, broadly granting citizens standing to challenge state, local and private actions, and concluding that the "natural resources" protected under the law include birds and the trees they nest in,[116] historic buildings,[117] marsh and wildlife areas,[118] the view from a state forest

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[111] SAX, *supra* note 33, at 248.

[112] *Id.*

[113] *See* MINN. STAT. § 116B.03 (right of civil action); Minn. Stat. § 116B.02 (definitions). *See also* State ex rel. Wacouta Twp. V. Brunkow Hardwood Corp., 510 N.W.2d 27, 30 (Minn. Ct. App. 1993) (stating that MERA was modeled after Michigan's Environmental Protection Act and adopting Michigan courts' four-factor test to determine whether an action's effect on natural resources is sufficient to justify judicial intervention).

[114] MINN. STAT. § 116B.02, subd. 4.

[115] *See* Minn. Stat. § 116B.02, subd. 5. The law is subject to some exceptions, namely that a plaintiff cannot show violation of a standard solely because of the introduction of the odor into the air and no action is allowed for conduct taken pursuant to any environmental quality standard, license, stipulation agreement or permit issued by the Minnesota Pollution Control Agency or the Minnesota Department of Natural Resources. Moreover, if the plaintiff establishes a prima facie case, the defendant has the opportunity to present an affirmative defense that there is no feasible or prudent alternative to the action. Economic considerations alone are not a defense. *See* MINN. STAT. § 116B.02, subd. 5; MINN. STAT. § 116B.03; MINN. STAT. § 116B.04.

[116] State ex rel. Wacouta Twp. v. Brunkow Hardwood Corp., 510 N.W.2d 27 (Minn. Ct. App. 1993) (bald eagles and trees in which they roost are "natural resources" under MERA).

[117] State by Archabal v. Hennepin County, 495 N.W.2d 416 (Minn. 1993) (MERA action available to enjoin county from demolishing historic armory building to build a jail); State by Powderly v. Erickson, 285 N.W.2d 84 (Minn. 1979) (row houses were historical resources protected by MERA and defendant did not sustain burden of proving no feasible and prudent alternative to demolition).

and the wilderness experience in visiting the forest,[119] quietude in residential areas,[120] drinking water wells and wetlands.[121] Actions that have been enjoined under the law include a gravel pit,[122] a shooting range,[123] tree harvesting,[124] a private radio tower on private land[125] and condemnations for highway and jail projects.[126]

The law's most significant impact on protection of natural resources and the environment can be seen in the automatic standing given to all persons and the fact that the law can protect natural resources where existing state statutory or regulatory law is silent or state regulators decline to take action.[127] For instance, in a case involving a shooting range that was disturbing residential neighbors, the court found a MERA violation for impairment of "quietude" and enjoined the range's operation despite the fact that there were no local or state noise standards in place. Indeed, state statutory law prohibited state agencies from even enacting such standards.[128]

By contrast, Michigan courts have been less generous on standing issues in interpreting the Michigan Environmental Policy Act ("MEPA")[129] than have Minnesota courts in interpreting the Minnesota law. As noted above, Michigan enacted MEPA as the first environmental rights statute in 1970 after Sax worked with state citizen organizations and the state legislature to help draft the law. MEPA subsequently served as model for other states.[130] Like the Minnesota law, Michigan courts have interpreted MEPA to provide for declaratory and injunctive relief to prevent harm to natural resources even where the action at issue does not violate a statute or regulation. As a result, MEPA empowers the judiciary to create a common law of environmental quality that goes beyond existing state statutes or regulatory

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118 Freeborn County v. Bryson, 210 N.W.2d 290 (Minn. 1973) (marsh area is a "natural resource" within the statute, plaintiff met prima facie case of showing pollution, impairment and destruction, and case remanded for state to present affirmative defense of no feasible and prudent alternative).

119 Drabik v. Martz, 451 N.W.2d 893 (Minn. Ct. App. 1990) (affirming district court order temporarily enjoining construction of private radio tower on private land that abutted state forest based on allegations that the tower would spoil the view and the wilderness experience in the park and would pose a risk for birds).

120 Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, 624 N.W.2d 796 (Minn. Ct. App. 2001) (quietude was a natural resource under MERA and evidence was sufficient to show gun club violated MERA).

121 State by Shakopee Mdwakanton Sioux Community v. City of Prior Lake, Case No. C-01-05286 (Scott County Dist. Ct., Nov. 22, 2002) (finding proposed gravel pit would interfere with tribe's drinking water well and a DNR-protected wetland and enjoining gravel pit in the absence of significant modifications).

122 *Id.*

123 *Citizens for a Safe Grant*, 624 N.W.2d 796.

124 State ex rel. Wacouta Twp. v. Brunkow Hardwood Corp., 510 N.W.2d 27 (Minn. Ct. App. 1993).

125 Drabik v. Martz, 451 N.W.2d 893 (Minn. Ct. App. 1990).

126 County of Freeborn v. Bryson, 210 N.W.2d 290 (Minn. 1973) (condemnation for highway); State by Archabal v. Hennepin County, 495 N.W.2d 416 (Minn. 1993) (condemnation for jail).

127 *See, e.g., Citizens for a Safe Grant*, 624 N.W.2d at 806 (rejecting argument that MERA is invalid without the existence of state or local noise standards); *State by Shakopee Mdwakanton Sioux*, *supra* note 122 (finding evidence to support MERA claim to protect wetland even though DNR had taken no action against gravel pit and did not testify at the trial).

128 *Citizens for a Safe Grant*, 624 N.W.2d at 806.

129 MICH. COMP. LAWS ANN. §§ 324.1701-.1706.

130 *See* Susan George, et al., *The Public in Action: Using State Citizen Suit Statutes to Protect Biodiversity*, 6 U. BALT. J. ENVTL. L. 1, 14-20 and App. A (1997) (summarizing citizen suit laws).

requirements in a manner similar to that developed under the common law of nuisance or other torts.[131]

Also similar to the Minnesota law, courts have interpreted the scope of the Michigan law quite broadly to apply to toxic substances control, sand dune mining, wetlands protection, park management and leasing of Great Lakes bottomlands.[132] As in Minnesota, the Michigan legislature created broad coverage for the law, allowing for action to protect "the air, water, and other natural resources and the public trust in those resources from pollution, impairment or destruction."[133] Thus, as Sax envisioned, the law gives the judicial branch the authority as a matter of common law to prevent the impairment of natural resources where the government cannot or will not act pursuant to state or local legislative policy.[134]

However, Michigan courts have been fairly restrictive on the issue of citizen standing to enforce the law. Like the Minnesota law, MEPA contains a broad citizen suit provision which states that "*any person* may maintain an action . . . for the protection of the air, water, and other natural resources and the public trust in these resources from pollution, impairment or destruction."[135] However, in a 2006 decision, the Michigan Supreme Court held that a water conservation organization and plaintiffs residing along a stream and lake could not sue under MEPA to prevent a water bottling company from pumping water that would allegedly adversely impact the lake and wetlands.[136] In reaching this decision, the court held that MEPA could not confer standing on citizens that was any broader than allowed under the state constitution's separation of powers doctrine.[137] As result, in order to bring suit under MEPA, the plaintiffs needed to show that they used the areas in question and thus, with regard to certain of the areas at issue in the lawsuit, the plaintiffs lacked standing under MEPA.[138]

In all, by the late 1990s only fifteen states had environmental rights statutes on the books (as opposed to citizen suit provisions contained in state environmental laws for the purpose of enforcing those laws), and most state environmental rights statutes are much more limited than those in Minnesota and Michigan, allowing only for actions against the state, or only for actions to enforce violations of existing

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[131] *See* Ray v. Mason County Drain Comm'r, 224 N.W.2d 883, 888 (Mich. 1975).

[132] *See* Jeffrey K. Haynes, *Michigan's Environmental Protection Act in its Sixth Year: Substantive Environmental Law from Citizen Suits*, 53 J. URB. L. 589, 594 (1976); George, et al., *supra* note 130, at 17.

[133] MICH. COMP. LAWS ANN. § 324.1701(1).

[134] *See, e.g.,* Michigan Citizens for Water Conservation v. Nestle Waters North America, 709 N.W.2d 174, 211 (Mich. 2006) (stating that MEPA provides for *de novo* review for "judicial development of a common law standard of environmental quality") (quoting Ray v. Mason Co. Drain Comm'r, 224 N.W.2d 883 (Mich. 1975)). *See also* Joseph L. Sax & Roger L. Conner, Michigan's Environmental Protection Act of 1970: A Progress Report, 70 MICH. L. REV. 1003, 1005 (1972) (noting that significance of MEPA is that it "reduced the broad discretion" of regulatory agencies and now those agencies must be prepared to defend themselves "against charges that their decisions fail to protect natural resources from pollution, impairment or destruction.").

[135] MICH. COMP. LAWS ANN. § 324.1701(1) (emphasis added).

[136] Michigan Citizens for Water Conservation v. Nestle Waters North America, 709 N.W.2d 174, 211 (Mich. 2006).

[137] *Michigan Citizens for Water Conservation*, 709 N.W.2d at 211-12 (stating that to the extent the state legislature in MEPA attempted to confer standing broader than that allowed under the state constitution, such attempts were unconstitutional).

[138] *Id.*

law.[139] In addition, environmental rights lawsuits are expensive and the few statutes that allow recovery of attorneys fees are within the category of laws that provide for a right of action only for violation of existing law.[140] Indeed, the strength of such laws is that the court conducts a *de novo* review of evidence rather than an on-the-record review with great deference to the government agency making the decision. However, it is just this type of *de novo* review that requires discovery and expert testimony which is too expensive for most plaintiffs to contemplate.[141] Thus, just as was concluded earlier with regard to the common law public trust doctrine and state constitutional provisions, state environmental rights statutes on their own are not a complete solution to better preservation of natural resources where federal, state or local protection efforts break down.

The same is true to a lesser extent with federal and state environmental protection statutes. Although such laws and the enforcement mechanisms that go with them form the bulk of our environmental protection efforts today, even these powerful statutes have their limitations. For instance, some statutes do not allow private parties to obtain injunctive relief or damages, others do not allow private rights of action at all, and there can also be significant delays in statutory authority to address controversial problems such today's concerns over as greenhouse gas emissions.[142]

As a whole, however, federal and state environmental protection laws coupled with state environmental rights statutes where they exist serve an important role not

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[139] *See* George, et al., *supra* note 130, at 15-16.

[140] *See id.* at App. A.

[141] *See, e.g.,* Haynes, *supra* note 132, at 634 (stating that MEPA suits are "not a panacea," are not meant to supplant existing administrative regulation, and are hampered "by the critical lack of public interest law firms and well-financed, permanent environmental groups with a defined target of environmental degredation.").

[142] *See, e.g.,* 42 U.S.C. §§ 7002-7006 (enforcement, citizen suit and judicial review provisions of RCRA allowing private parties to seek injunctive relief but not damages for action contributing to imminent and substantial endangerment to health or the environment for violation of law's hazardous waste requirements); 42 U.S.C. § 9607 (providing for the recovery of response costs but not for injunctive relief or compensatory damages for releases of hazardous substances); 42 U.S.C. § 7604 (providing right of action to seek civil penalties and injunctive relief for violation of Clean Air Act statutory provisions but no right to seek compensatory damages); 33 U.S.C. § 1365 (allowing citizen suits under Clean Water Act for assessment of civil penalties or imposition of injunctive relief for violation of effluent standards or limitations but no right to seek compensatory damages). *See also* Bates v. Dow Agrosciences, 125 S. Ct. 1788 (2005) (confirming that there is no private right of action under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136a, et seq. (FIFRA) but holding that FIFRA does not preempt state common law claims that do not challenge the pesticide label). As an example of limitations on state actions, CERCLA does not provide states with the authority to seek an injunction to force a responsible private party to remediate a hazardous waste site even if there is an imminent threat to human health and the environment. Instead, that authority is limited to the federal government. As a result, a state seeking to force a cleanup must resort to the common law of nuisance to obtain injunctive relief. *See* New York v. Shore Realty, 759 F.2d 1032, 1049-52 (2d Cir. 1985) (holding injunctive relief under CERCLA was not available to state but that injunction could issue against defendant under New York public nuisance law). *See also* PLATER ET AL., *supra* note 34, at 165-75 (discussing equitable relief, compensatory damages and punitive damages available for environmental harms under the common law); Alexandra B. Klass, *From Reservoirs to Remediation: The Impact of CERCLA on Common Law Strict Liability Environmental Claims*, 39 WAKE FOREST L. REV. 903, 905 (2004) (noting that common law claims are necessary to recover for property damage, personal injury and punitive damages stemming from actions contamination soil and groundwater). For a discussion of the current inability of federal statutory law to address greenhouse gas emissions and other modern environmental issues, see *infra* notes 254-55 and accompanying text.

only in their own right but also in setting forth legislative policy on protection of natural resources, public trust principles and the environment for use in common law or constitutional development. In the majority of cases where such resources are threatened, federal, state, and/or local enforcement agencies will use federal and state environmental protection laws to address the problem. However, as Sax and many others have documented, government regulation and enforcement can break down because of lack of political will, time, money or other resources, or competing legal concerns such as constitutional takings arguments. The question then remains in those situations whether the policy directives in these laws can be used in conjunction with the common law public trust doctrine and/or state constitutional provisions. In other words, can these seemingly discrete sources of law work together to either support state or local action to protect the environment when there are competing private property principles, or allow citizen protection of resources in the face of governmental indifference or opposition? The next Section explores recent judicial efforts to adopt such a mutually-reinforcing approach to state natural resource protection using public trust principles.

II. RECENT JUDICIAL TRENDS: EXPANDING THE SCOPE OF AUTHORITY TO IMPLEMENT PUBLIC TRUST PRINCIPLES

Most of the scholarly work to date on the public trust doctrine focuses almost exclusively on either the common law doctrine *or* its state constitutional manifestations *or* its codification into state statutes. Although a study of one form of the doctrine on those topics may often make a brief reference to one of the other forms, there has not been any real effort to consider what the public trust might look like as a cohesive whole where all three forms mutually reinforce each other.[143] A review of the case law shows, however, that while scholars have largely ignored this approach, courts have not. Just like lawyers, judges must frequently look beyond the direct authority available to support a legal principle to related authority in order to build a strong legal basis for a position. It is precisely this type crafting of legal opinions that gives the judicial branch its unique and important role in our federalist system of law built on constitutions, statutes and the common law.[144]

Notably, the judicial opinions that utilize this mutually reinforcing approach to public trust principles for environmental protection purposes have been issued primarily in the last ten years. One explanation for this recent trend is that the field of environmental law is now, after 30 years, reaching maturity and there is a strong body of state constitutional law and, more importantly, federal and state

[143] One exception is Kirsch, *supra* note 79, where the author focused on environmental provisions in state constitutions but also discussed in some detail the relationship between those provisions and the common law public trust doctrine to argue that courts were able to give the most meaning to the state constitutional provisions when they were interpreted as "evocations" of the public trust doctrine. *Id.* at 1174.

[144] *See, e.g.,* OLIVER WENDELL HOLMES, THE COMMON LAW 37-37 (Little Brown & Co. ed. 1938) (1881) (urging courts to create a "more conscious recognition" of legislation in developing the common law); ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 174-75 (Hamilton & Jaren eds. 1999) (focusing on the necessity of the common law despite the growth of statutes and stating that the role of the courts is not just to interpret statutes but to "incorporate" legislation into the growing body of common law tradition); Harlan F. Stone*, The Common Law in the United States*, 50 HARV. L. REV. 4, 14 (1936) (stating that judges should recognize the "social policy and judgment expressed in legislation" in forming the common law).

environmental statutes that courts can rely on not only in implementing those constitutional provisions and statutes, but also in developing public trust principles. Moreover, as the modern common law public trust doctrine has developed since the 1970s, courts can now rely on that body of law to inform their interpretations of state constitutional law and statutory law.

This shift in judicial treatment of public trust principles to broaden the range of authority is an exciting development that addresses many of the concerns of the critics and, as discussed below, can bring the doctrine to a new level of relevance today. This is particularly important in states that historically have not had a strong public trust doctrine or do not have constitutional provisions or statutes codifying the doctrine in some manner. Because *Illinois Central* appears to impose the public trust doctrine nationwide (i.e., states can interpret it narrowly but not abolish it),[145] states or citizens in those states can use the public trust doctrine where appropriate and rely on general state or federal environmental statutes to provide standards for development.

Certainly, one might argue that the *Erie* doctrine[146] implicitly overruled *Illinois Central*'s efforts to mandate the public trust doctrine nationwide because the Court did not expressly ground the doctrine in any particular constitutional provision or federal statute. However, in its most recent consideration of the public trust doctrine in 1988,[147] the Court did not question the vitality of the doctrine, simply stating that the scope of the doctrine was a matter of state law.[148] Moreover, even if the doctrine is now wholly a matter of state law, no state has taken steps to abolish it and at least one state court has invalidated legislative efforts to abolish it.[149] Indeed, all of the precedent supporting an expansion of the public trust doctrine consistent with the framework set forth here is found in state law, not federal law. As a result, even if states could refuse to recognize the doctrine entirely, that theoretical possibility does not detract from present opportunities to give new life to the doctrine as a matter of state law in those states that have the tools (i.e., state constitutions, statutes and policy directives) and are inclined to move in that direction.

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[145] *See* Illinois Central R. Co. v. Illinois, 146 U.S. 387, 452-53 (1892) (holding states are not authorized to abdicate control over trust lands); Wilkinson, *supra* note 10, at 453-55 (stating that the parties in *Illinois Central* were arguing principles of general applicability, not just Illinois law, and the opinion leaves "little doubt that the Court conceived of a general trust that applied to all states"); Lazarus, *supra* note 2, at 639 & n. 37 (stating there is no language in *Illinois Central* limiting the decision to Illinois law and majority "most likely assumed its decision applied to all states"). Although the decision imposes the public trust obligation on all states, the decision is less than clear on the source of that obligation. *See* Wilkinson, *supra* note 10, at 453-457 (noting that the Supreme Court has never explicitly stated the source of law that mandates the public trust obligation in the states but raising the possibility that it may be based on federal preemption through Congress's authority over navigable watercourses in the Commerce Clause); Lazarus, *supra* note 2, at 639-40 (stating some language in the opinion suggests Court was announcing a rule based on federal law, that tone of the opinion "nearly strikes "constitutional chords" but subsequent Supreme Court decisions imply that the case rested on state law) (citing Appelby v. City of New York, 271 U.S. 364, 395 (1926)). *See also supra* notes 24-28 and accompanying text.

[146] *See* Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (rejecting the idea of a federal common law outside specialized contexts); LAURENCE H. TRIBE 1 AMERICAN CONSTITUTIONAL LAW 470-72 (3rd ed. 2000) (discussing scope and impact of *Erie*).

[147] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988).

[148] *Id. See also supra* notes 24-25 and accompanying text.

[149] *See* San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 199 (Ariz. 1999) (holding as a matter of state constitutional law that state cannot abrogate the public trust doctrine by statute).

The recent cases that provide examples of this new public trust framework tend to fall into two general categories. The first category is where courts rely on a combination of the public trust doctrine, state constitutional provisions, or state environmental statutes to invalidate state action (whether administrative or legislative) that may place state public resources in jeopardy. The second category is where courts rely on a combination of the public trust doctrine, state constitutional provisions, and state environmental statutes to uphold governmental actions that prevent development of private property without finding such government action constitutes a taking. These cases usually involve governmental entities refusing to grant a development permit or enacting a regulation to protect natural resources on the grounds that the private property in question is subject to and thus inherently limited by public trust principles.

The decisions in both categories of cases show the courts looking at the idea of the public trust and the preservation of resources broadly, and using various strands of authority to create support for protection of such resources. Notably, these decisions are primarily in jurisdictions that do not have a history of recognizing a "strong" common law public trust doctrine (such as exists in California, New Jersey, or Wisconsin), and thus shows how the common law public trust doctrine can be used in conjunction with other authority when common law authority on its own may be lacking.

A. *Judicial Use of Public Trust Principles to Prevent State Action*

The cases that follow are all recent examples of courts invoking a combination of authority related to protection of natural resources and the environment in situations where the state is alleged to be relinquishing or compromising the resources or the public's interest in those resources. In all these cases, courts look to some combination of common law, state constitutional law and/or statutory environmental law to invalidate the state action.

For instance, in 2004, the Hawaii Supreme Court considered whether a reservation of water for instream use was protected by the public trust, and whether the state water commission sufficiently considered public trust principles in granting a water permit.[150] The court held that the commission failed to take those principles into account, expressly holding that "a reservation of water constitutes a public trust purpose with respect to the state's continuing trust obligation" to ensure water resources for present and future generations.[151] In reaching this decision, the court looked to the common law public trust doctrine, the state constitution, and the statutory water code as support for its decision. The court held that failure to protect such water reservations "would undermine the public trust doctrine, which is a state constitutional doctrine, and the relevant policy declarations set forth in the Code."[152] Thus, the court broadened its base of authority with regard to natural resources within the state in order to provide the maximum protection for such resources.

Similarly, in *Save Ourselves v. Louisiana Environmental Control Commission*,[153] the Louisiana Supreme Court held that a state agency decision

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[150] In re Contested Case Hearing on Water Use, 83 P.3d 664 (Hawaii 2004).

[151] *Id.*, 83 P.3d. at 694.

[152] *Id.*

[153] 452 So. 2d 1152 (La. 1984).

allowing construction and operation of a hazardous waste disposal facility was contrary to state statutory law, constitutional law and the public trust doctrine. In reaching this decision, the court expressly addressed the "interrelationship of constitutional, statutory and regulatory requirements" beginning with the state constitution's environmental provision enacted in 1974, placing obligations on state agencies and officials.[154] The court then went on to consider various state environmental statutes setting forth a policy of environmental protection. These policies set out not only substantive requirements but "very important procedural provisions" designed to ensure agencies exercise appropriate discretion in all cases.[155] The court concluded this discussion by stating that the state regulatory framework was based not only on the state constitutional provisions related to environmental protection, but also the "public trust doctrine," and referred to Sax's article and other commentators setting forth an expansive vision of the doctrine.[156]

Likewise, in 1996, in *Pullen v. Ulmer*,[157] the Alaska Supreme Court addressed whether a ballot initiative to give salmon harvest preference to subsistence, personal use and sport fisheries was valid. The court held that the initiative was an unconstitutional appropriation of state resources.[158] First, the court looked to Article VIII, section 2 of the Alaska Constitution which reserves fish, wildlife and waters to the people for common use.[159] The court then turned to the common law, noting that the relevant constitutional provision was intended to codify "historic common law principles" over management of fish, wildlife, water resources, and impose a trust on those resources.[160] Interestingly, this case highlights the conflict that can occur between the public trust doctrine as a protector of public access rights and the public trust doctrine as a protector of the resource. Arguably, the court's decision limited the state's ability to preserve fishing resources from overuse, thus favoring the doctrine's traditional purpose of preserving public access to resources over its more modern purpose of preserving the resource itself.

Finally, two cases from Arizona illustrate the state judiciary relying on the public trust doctrine to prevent the state legislature from interfering with public trust resources. In the first case, *Arizona Center for Law in the Public Interest v. Hassell*,[161] the Arizona Court of Appeals addressed whether legislation substantially relinquishing the state's interests in riverbed lands violated the public trust doctrine. The court cited first to *Illinois Central* in support of the doctrine, then to various statutory and constitutional provisions in other states for the proposition that states

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[154] *Save Ourselves*, 452 So. 2d at 1156-57.

[155] *Id*. at 1156-57.

[156] *Id.* at 1158.

[157] 923 P.2d 54 (Alaska 1996).

[158] *Pullen*, 923 P.2d at 60-61.

[159] *Id.* at 59-60.

[160] *Id.* at 60. A few years later, in Brooks v. Wright, 971 P.2d 1025 (Alaska 1999), the Alaska Supreme Court had occasion to revisit the concept of a state public trust over resources and rejected the argument that a public trust over resources must follow private trust principles. The court explained that private trusts generally require the trustee to maximize economic yield from the trust property, but the state constitution requires that natural resources be managed for the benefit of all people "under the assumption that both development and preservation may be necessary to provide for future generations, and that income generation is not the sole purpose of the trust relationship. *Id.* at 1032.

[161] 837 P.2d 158 (Ariz. Ct. App. 1991).

are required to hold such lands in trust for the public.[162] The court then looked to Arizona precedent, recognized that the doctrine had not yet been applied in Arizona, but stated that in order to resolve the case "we need not weave a jurisprudence out of air."[163] The court relied not only on *Illinois Central*, Sax's article, and authority from other states, but also the state's "constitutional commitment to the checks and balances of a government of divided powers."[164] Thus, the court stated it would scrutinize closely any state action that might violate the public trust doctrine and, applying such scrutiny, found the legislation violated the state's public trust principles.[165] Here, the court had very little in the way of state common law authority to rely upon, but reached a decision based on its own constitutional separation of powers principles as well as statutory, constitutional and common law precedent in other jurisdictions.

In the second Arizona case, *San Carlos Apache Tribe v. Superior Court*,[166] the Arizona Supreme Court in 1999 reviewed a state statute enacted in 1995 which stated that "[t]he public trust is not an element of a water right" and that in adjudicating water rights, "the court shall not make a determination as to whether public trust values are associated with any or all of the river system or source."[167] The supreme court invalidated the provision, stating that the public trust doctrine in Arizona is a constitutional limitation on legislative power to give away resources in trust for the public.[168] The court went on to state that it was "for the courts to decide whether the public trust is applicable to the facts" and that the legislature cannot by statute destroy the constitutional limitations on its authority.[169]

These cases all show courts utilizing common law, state constitutional law, and state statutes to support a critical review of state action that has the potential to interfere with public trust principles. As such, the analysis contained in these cases is quite different from that found in the opinions issued in the 1970s, such as *Just v. Marinette County*[170] and *Marks v. Whitney*.[171] In those cases, the courts had little to draw upon at a doctrinal level other than a vague idea of public trust principles and belief that the courts can and should play a role in natural resources protection.

By contrast, a review of the more recent cases shows that courts have more to work with since the environmental movement of the 1970s, which brought with it state constitutional provisions and statutes containing strong policy statements with regard to protection of natural resources for future generations. As a result, these increased statements of authority and policy statements provide substantive content to public trust principles and at least a partial response to those who would criticize close judicial review of legislative action. Indeed, Sax himself acknowledged that "public trust law is not so much a substantive set of standards" as it is a technique for

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[162] *Arizona Center for Law in the Public Interest*, 837 P.2d at 166-67 & n.13.
[163] *Id.* at 168.
[164] *Id.* at 168.
[165] *Id.* at 169, 173.
[166] 972 P.2d 179 (Ariz. 1999).
[167] *San Carlos Apache Tribe*, 972 P.2d at 199 (citing A.R.S. § 45-263(B)).
[168] *Id.* at 199.
[169] *Id.*
[170] 201 N.W.2d 761 (Wis. 1972).
[171] 491 P.2d 374 (Cal. 1971).

courts to mend "perceived imperfections" in the legislative and administrative process.[172]

The need for the increased authority courts are amassing from various sources is just as great in cases where the state is attempting to protect natural resources in the face of private property claims. As shown below, courts in this second category of cases use techniques similar to the cases in the first category, resulting in a stronger and more comprehensive legal foundation to protect natural resources and the environment.

B. Judicial Use of Public Trust Principles to Defend State or Local Governmental Action

The cases that follow show courts invoking a combination of authority related to protection of natural resources and the environment to support state actions to protect those resources in the face of competing private property claims. In doing so, courts are utilizing public trust principles to address modern problems without being limited by the various forms in which these principles are found. Thus, courts are relying on the common law doctrine but infusing it with policies and standards contained in more contemporary environmental legislation or state constitutional provisions. As shown below, courts have used these mutually-reinforcing methods to reject attempts to invalidate government environmental protection efforts and also to reject takings claims.

1. Public trust principles in support of government action

In several recent cases, courts have drawn upon multiple sources of public trust principles to support governmental efforts to protect natural resources or the environment. For instance, in 2005, the Louisiana Court of Appeals relied on the *Save Ourselves*[173] decision discussed above to hold that a state agency decision to lower lake levels to reduce organic matter and improve the lake's ecology was supported by the public trust doctrine.[174] In response to allegations that the proposed action would interfere with property rights by adversely impacting commercial marinas, the court found that the state's action was consistent with the public trust doctrine and its manifestation in the state's constitution.[175] The court recognized that "[e]nvironmental amenities will often be in conflict with economic and social considerations," but that under the public trust doctrine, the agency has an obligation to protect the state's environment.[176]

In 2000, the Hawaii Supreme Court addressed a challenge to a decision by the state Commission on Water Resource Management to amend instream flow

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[172] *See* Sax, *supra* note 5, at 509, 521.

[173] 452 So. 2d 1152 (La. 1984) (discussed at *supra* notes 153-56 and accompanying text).

[174] Lake Bistineau Preservation Soc'y v. Wildlife and Fisheries Comm'n, 895 So. 2d 821 (La. Ct. App. 2005).

[175] *Id*. at 826.

[176] *Id.* at 826-27. *See also* Avenal v. State, 886 So. 2d 1085, 1101-02 (La. 2004) (holding state coastal restoration project that interfered with private oyster leases was not an unconstitutional taking because state was obligated to protect its coastline resources for present and future generations under the state constitution and the public trust doctrine).

standards.[177] As part of its proceedings, the Commission relied in part on its responsibility under the public trust doctrine and applied the doctrine to both surface and groundwater resources. In reviewing the Commission's various standards, the court provided a detailed history of the public trust doctrine and its application in the state. The court then turned to the state water code and rejected arguments that the code displaced or abrogated public trust principles. Rather, instead of abolishing the common law public trust doctrine, "the legislature appears to have engrafted the doctrine wholesale into the Code."[178] Finally, the court turned to its own constitution and held that the people of the state had "elevated the public trust doctrine to the level of a constitutional mandate." Thus, the court found that the doctrine was a "fundamental principle" of constitutional law in the state. Moreover, the court held that mere compliance by agencies under the water code is not sufficient to determine whether their actions comport with the public trust doctrine. Instead, the doctrine "continues to inform the Code's interpretation, define its permissible 'outer limits' and justify its existence."[179]

With regard to the scope and purpose of the trust (embodied in common law, statutory and constitutional form), the court relied on holdings in California and other states that the purposes and uses of the trust "have evolved with changing public values and needs."[180] Thus, the state has both an authority and duty to preserve the rights of present and future generations in the waters of the state, and must take its duty into account when allocating water resources.[181] The court held that these trust principles applied equally to both surface water and groundwater, stating that "[m]odern science and technology have discredited the surface-ground dichotomy."[182] The court went on to reason that in determining the scope of public trust resources, "we see little sense in adhering to artificial distinctions neither recognized by the ancient system nor borne out in the present practical realities of the state."[183]

Another example of a court relying on all forms of public trust principles to support government action is the North Carolina Court of Appeals' 2005 decision in *Parker v. New Hanover County*.[184] In that case, a landowner challenged a special assessment for an inlet relocation project to address coastal erosion and damage. In holding the assessment was not unconstitutional, the court relied on the state's common law, statutory and constitutional authority to protect natural resources. The court stated first that the public trust doctrine applied to the waters and lands at issue.[185] It then shifted focus to the state's constitutional provision setting forth a policy that the state:

> conserve and protect all its lands and waters for the benefit of all its citizenry . . . and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other

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[177] In re Water Use Permit Applications, 9 P.3d 409 (Hawaii. 2000).
[178] *Id.* at 442.
[179] *Id.* at 444-45.
[180] *Id.* at 448 (citing public trust decisions from California and New Jersey).
[181] *Id*. at 453.
[182] *Id*. at 447.
[183] *Id.* at 447.
[184] 619 S.E.2d 868 (N.C. Ct. App. 2005).
[185] *Parker*, 619 S.E.2d at 875.

> appropriate way to preserve as a part of the common heritage of this State its forest, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.[186]

The court found these policies consistent with those in the state's Coastal Management Act, emphasizing the value of North Carolina's coastal resources, including its estuaries which are "among the most biologically productive regions of this State and of this Nation. . . ."[187] Thus, the court found that the county had authority to levy the assessments for erosion and other preservation purposes.[188] The court concluded this discussion by stating that its constitution, the public trust doctrine and state statutes all support taking "proactive steps" to protect property from hurricanes and other storms, and that the importance of these activities had been "brought home particularly keenly by recent hurricanes and their devastating impact along the Gulf Coast of the United States."[189]

Likewise, the Washington Supreme Court in 1998 upheld a county ordinance banning personal watercraft use on all marine waters and one lake in the county based on both the public trust doctrine as well as "the goals of statewide environmental protection statutes."[190] Thus, although the plaintiffs argued that the ban interfered with the public's ability to use the waters and thus violated the public trust doctrine, the court held that "it would be an odd use of the public trust doctrine to sanction an activity that actually harms and damages the waters and wildlife of this state."[191] As a result, the court was able to rely on statewide environmental statutory policy to use the public trust doctrine to protect natural resources, even if it conflicted with public access rights that were historically protected under the doctrine.

Similarly the Virginia Court of Appeals held in 2006 that the state's marine resources commission was justified in denying a permit to construct a storage shed on a pier located along a creek based on public trust principles.[192] In reaching its decision, the court cited the applicable state law, which directed the agency to consider preservation of public trust resources in reviewing applications for permits to build structures over state owned lands.[193] The court cited not only the common law doctrine as support for the agency's action, but also the Virginia Constitution setting forth a policy to protect the state's "atmosphere, lands, and waters from pollution, impairment or destruction, for the benefit, enjoyment and welfare of the people of the Commonwealth."[194]

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[186] *Id.* (citing N.C. CONST. art. XIV, § 5).
[187] *Id.* (citing N.C. Gen. Stat. § 113A-102(a) (2003)).
[188] *Id.*
[189] *Id.* at 875-76. *See also* Parks v. Cooper, 676 N.W.2d 823 (S.D. 2004) (holding lakes newly-created in recent years by climate change were subject to public trust doctrine based on common law doctrine in South Dakota as well as Water Resources Act which codifies public trust principles and evinces a legislative intent to allocate and regulate water resources).
[190] Weden v. San Juan County, 985 P.2d 273, 283-84 (Wash. 1998).
[191] *Weden*, 985 P.2d at 284.
[192] Palmer v. Virginia, 628 S.E.2d 84 (Va. Ct. App. 2006).
[193] *Palmer*, 628 S.E.2d at 89-90.
[194] *Id.* at 89. *See also* Evelyn v. Virginia, 621 S.E.2d 130, 137 at n.3 (Va. Ct. App. 2005) (holding it "entirely appropriate" for the state environmental agency and judiciary to consider the legislature's express duty to safeguard the public right of subaqueous lands held in trust for the benefit of the public

2. Public trust principles as a defense against takings claims

Courts in many jurisdictions have relied upon public trust principles to support state environmental regulations in the face of constitutional takings claims. As students and scholars of property and land use well know, regulatory takings is a "hot" issue these days, with several Supreme Court decisions in a short period of time and significant commentary.[195] However, the use of public trust principles as a counterbalance to takings claims for public interest purposes has a strong history going all the way back to *Illinois Central*[196] and continuing up to the present. As a result there is strong precedent for courts to use public trust principles to promote protection of natural resources without running afoul of takings claims that would cripple environmental protection efforts.

For instance, in *Illinois Central*, the issue over whether Illinois had the power to convey the land under Lake Michigan to the railroad is really a question of whether, once the state conveyed the land, it had to proceed by eminent domain to get it back, or whether it could simply invalidate the original conveyance. That is precisely how Justice Shiras in his dissenting opinion saw the issue. In his opinion, Justice Shiras reviewed the contract conveying the land to the railroad and found that the contract conveyed the ownership of land but prevented the railroad from impairing public rights of navigation or obstructing the harbor in any way.[197] As a result, Justice Shiras posited that there was no impairment of any public trust rights until and unless the railroad attempted to infringe upon those limitations contained in the initial grant.[198] In the meantime, if Illinois wanted to take back the lands it had granted, it could do so only "by a constitutional condemnation of them."[199]

The majority, of course, rejected this analysis, holding instead that the public trust prevented the conveyance of land in the first place. On the takings issue, the Court found that the arguments on that issues were "not parallel" to the current case.[200] Instead, the Court stated simply that common law and public policy applied a different source of law when the issue was lands under navigable waters historically held in trust for the public.[201] Thus, *Illinois Central* itself embraced the

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under the common law doctrine and the state constitution "in applying *all* legislative enactments") (emphasis in original).

[195] *See, e.g.,* Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003 (1992) (state coastal zone management act that prevents all development of beachfront property a taking unless background, common law principles of property and nuisance would have prevented the development); Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (property owner can challenge development restrictions on waterfront property even if restrictions predate his ownership); Tahoe-Sierra Preserv. Council v. Tahoe Reg. Planning Agency, 535 U.S. 302 (2002) (moratorium on developed imposed as part of land use planning not a per se taking); First Evangelical Lutheran Church v. Los Angeles, 482 U.S. 304 (1987) (if a government regulation results in a taking, the government must pay just compensation from the time the regulation is enacted until it is rescinded). *See also* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 178, 184-85, 193 (3rd ed. 2005) (discussing recent scholarly commentary on regulatory takings).

[196] Illinois Central R. Co. v. Illinois, 146 U.S. 387 (1892).

[197] *Illinois Central,* 146 U.S. at 469-73 (Shiras, J. dissenting).

[198] *Id.* at 474.

[199] *Id.*

[200] *Id.* at 455-58.

[201] *Id.*

concept that public trust principles were historic common law limitations on the ability of private parties to develop public trust lands.

This idea of the public trust as a background limitation on private property rights continues through the Wisconsin Supreme Court's decisions in *Just v. Marinette County*[202] in 1972 and California Supreme Court decisions from the early 1900s into the 1980s. In *Just,* the landowners argued that government regulations restricting them from filling the wetlands on their property required payment of just compensation.[203] In rejecting that argument, the Wisconsin Supreme Court held that public trust principles not only required the state to promote navigation but also protect and preserve waters for fishing, recreation and scenic beauty.[204] As a result, based on public trust principles, a landowner has "no absolute and unlimited right" to change the "essential character of his land" or use if for a purpose "unsuited to its natural state and which injures the rights of others."[205]

Likewise, the California Supreme Court several times expressly rejected claims that exercise of the public trust to prevent development of private property constituted a taking of property which required just compensation. These cases arose in situations where the state sought to improve navigation and take other actions to promote the public trust in private tidelands,[206] where the state sought to limit the development of tidelands that had been sold to private parties many years prior,[207] and where nonprofit groups challenged the continuation of prior appropriated water diversions from inland streams that would impact natural resources in navigable waters.[208] In the last case, the "Mono Lake" decision discussed *supra* in Section I.A., the supreme court summarized its precedent in this area as being based on *Illinois Central*, which "remains the primary authority even today, almost nine decades after it was decided."[209] Based on that authority, the court confirmed that use of public trust principles did not constitute a taking of property, even where the lands had long been thought free of any interference or restriction from the public trust.[210] Thus, *Illinois Central* and the various state court decisions show the public trust as a long-standing common law principle limiting private development without resulting in a constitutional taking requiring just compensation.

More recently, historic common law doctrines such as the public trust doctrine have played a central role in the regulatory takings debate as a result of the Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council*.[211] In *Lucas*, the issue was whether the state's beachfront management act restricting development of coastal areas was a taking of private property. The Court, in an opinion by Justice Scalia, announced what appeared to be a new "per se" rule of regulatory takings.

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[202] 201 N.W.2d 761 (Wis. 1972).
[203] *Just*, 201 N.W.2d at 767.
[204] *Id.* at 768-69.
[205] *Id.* at 768.
[206] *See* People v. California Fish, 138 P. 79 (Cal. 1913).
[207] City of Berkeley v. Superior Court, 606 P.2d 362 (Cal. 1980).
[208] National Audubon Society v. Superior Court, 658 P.2d 709 (Cal. 1983).
[209] *National Audubon Society*, 658 P.2d at 721 (quoting City of Berkeley v. Superior Court, 606 P.2d 362, 365 (Cal. 1980)).
[210] *Id.* at 723.
[211] 505 U.S. 1003 (1992).

Under this new rule, if the government denies all economic use of property (i.e., a complete "wipe-out"), the action is a taking of private property that must be compensated under the Fifth and Fourteenth Amendments of the U.S. Constitution *unless* "background principles" of state nuisance and property law would have precluded the development in question.[212] As a result, since 1992, courts and scholars have grappled with which state laws constitute the sort of "background principles" sufficient to prevent an unconstitutional taking of private property.[213] Not surprisingly, one background principle of property law courts have looked to is the longstanding public trust doctrine, which predates the existence of the United States itself and has been used a defense to takings cases as far back at *Illinois Central*.[214]

For instance, the Court of Appeals for the Ninth Circuit held in 2002 that a city's denial of a shoreline development permit application was not a taking based on the "background principles" of Washington law which restricted the type of development at issue.[215] The court stated that the public trust doctrine had always existed in Washington, and the doctrine was also reflected in the state's Shoreline Management Act.[216] The court found that the Shoreline Management Act was made necessary after a long history of sale of tidelands and shoreland resulted in the privatization of a vast majority of these lands, and unrestricted construction was not in the public interest.[217] Thus, because development in the tideland areas at issue would have interfered with public trust uses, the development plans were never a legally permissible use and the restriction of such development was not a taking.[218] Here, instead of relying on the more amorphous common law public trust doctrine, the court used the common law doctrine as a base but used the more specific policy directives in the state's shoreline management act to provide standards to flesh out public trust principles.

Likewise, the New York Superior Court in 1998 upheld the constitutionality of a state law restricting development in an area of Long Island in large part because of the important principles of the public trust doctrine, provisions of the New York Constitution and "the assumption that the conservation of resources is intrinsically good and necessary for the continuance of society."[219] Finally, the Rhode Island Superior Court in 2005, in *Palazzolo v. Rhode Island*,[220] found that the state's denial of a permit to fill eighteen acres of salt marsh was not a taking, after the U.S. Supreme Court had remanded the case for a takings analysis.[221] The court described

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[212] *See Lucas*, 505 U.S. at 1029.

[213] *See, e.g.,* Blumm & Ritchie, *supra* note 35 (discussing *Lucas* and arguing that court have expansively interpreted the "background principles" of nuisance and property law which foreclose a claim for compensation under the takings clause).

[214] *See id.* at 341-44 (discussing courts' recent use of public trust doctrine to deny takings claims under *Lucas*). *But see* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1438-39 (1993) (suggesting that *Lucas* may be viewed as a rejection of the ecological worldview expressed in *Just v. Marinette County*).

[215] Esplanade Properties v. City of Seattle, 307 F.3d 978 (9th Cir. 2002).

[216] *Esplanade Properties*, 307 F.3d at 985-86.

[217] *Id.*

[218] *Id.* at 986-87.

[219] W.J.F. Realty v. State, 672 N.Y.S.2d 1007, 765-71 (N.Y. App. Div. 1998).

[220] 2005 WL 1645974 (R.I. Super. Ct., July 5, 2005).

[221] *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

the tidal pond adjoining the salt marsh as a "particularly fragile ecosystem," and the salt marsh itself as a "valuable filtering system" for runoff and pollutants, and integral, and necessary to wildlife habitat.[222] In rejecting the takings claim, the lower court held the plaintiff's proposal to fill the salt marsh would constitute a nuisance and was also limited by the state public trust doctrine, which was incorporated into the state's constitution.[223] Indeed, the court cited prior Rhode Island case law stating that any system of regulation of tidal land in the state must be viewed in the context of the public trust doctrine.[224]

These more recent cases show courts following in the tradition of *Illinois Central* and *Just* with regard to regulatory takings cases, but using a more structured and mutually-reinforcing approach to public trust principles. In these cases, the courts are drawing on well-founded background principles of property law in the form of the public trust doctrine, but giving these principles new life and standards by integrating the new policies and legal standards to protect natural resources created since the 1970s. Such an approach is not only consistent with *Illinois Central* but is also consistent with *Lucas's* requirement that modern day environmental protection regulations be based on background principles of property law to avoid takings claims in complete "wipe-out" situations.

III. CREATING A MODERN FRAMEWORK TO PROTECT NATURAL RESOURCES

So we see in Section II that there is a trend among at least a small group of courts in recent years to integrate the common law public trust doctrine, state constitutional environmental protection provisions, and state statutes to protect natural resources and the environment as a matter of state law. What does this trend mean and why is it important? Why are we seeing more of this since the 1990s than in prior years when environmental statutes and constitutional provisions have been around since the 1970s? The remainder of this Article attempts to address these questions.

A. Utilizing Public Trust Principles In Conjunction with Constitutional, Statutory and Regulatory Policy

First, the new federal and state environmental statutes of the 1970s and 1980s brought with them the creation of expert agencies and funding for vast numbers of studies and data collection opportunities in areas of air pollution, water pollution, toxic substances, remediation and pollution control techniques. Richard Revesz has documented how this growth in expertise has resulted in a marked increase in the competence and experience of state and local environmental officials who establish and implement state statutory and regulatory policy.[225]

There is no reason these statutory standards and policies cannot be used to inform development of state public trust principles and the decisions cited in earlier Sections show courts doing so. This trend goes well beyond public trust

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[222] *Palazzolo*, 2005 WL at *3.

[223] *Id.* at *5, 7 (CITING R.I. CONST. art. 1, sec. 17).

[224] *Id.* at *7 (citing Champlin's Realty Assocs. V. Tillson, 823 A.2d 1162, 1165 (R.I. 2003); Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1259 (R.I. 1999)).

[225] Revesz, *supra* note 104, at 626-30.

developments and has permeated related areas such as tort claims seeking relief for environmental harm. For instance, since the explosion of federal and state environmental statutes beginning in the 1970s, courts have used a growing number of statutory and regulatory standards to develop their state common law of tort on issues of liability, damages, and injunctive relief in cases involving environmental harm. These judicial techniques find support in the proposed final draft of the Restatement (Third) of Torts on the topic of "statutory violations as negligence per se," which states that an actor is negligent if he or she violates a statute designed to protect against the type of accident the actor's conduct causes and if the victim is within the class of persons the statute is designed to protect.[226] Thus, if a plaintiff meets these requirements she may recover damages or obtain an injunction for violation of a federal, state or local statute or ordinance[227] under the doctrine of negligence per se even if the statute itself does not provide a private right of action.[228] These same principles apply to claims for nuisance, often cited as the foundation for modern environmental law, which also can be based on statutory or regulatory violations.[229]

Courts have used statutory standards to develop the common law in areas beyond establishing liability for negligence and nuisance. Indeed, courts have regularly used statutory policies and standards in recent years to inform the common law in environmental cases through expansive interpretations of common law strict liability for environmental harm[230] and the growing concept of "stigma damages" for contaminated property under common law tort claims.[231] Both of these developments can be tied to the enactment in 1980 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), which revolutionized how the government and the public deals with contaminated property.[232] The same analysis can be applied to public trust principles, which can and should develop in response to statutory and constitutional developments that

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[226] RESTATEMENT (THIRD) OF TORTS § 14 (Proposed Final Draft No. 1, 2005).

[227] *See* RESTATEMENT (THIRD) OF TORTS § 14, cmt. a (Proposed Final Draft No. 1, 2005) (stating that the section applies equally to regulations adopted by state administrative bodies, ordinances adopted by local councils, and federal statutes as well as regulations promulgated by federal administrative agencies).

[228] *Id.* at cmt. a.

[229] WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 415 (3rd ed. 2000) (noting that violation of a statute is one way to establish a nuisance). *See also* RESTATEMENT (SECOND) OF TORTS § 874A (in section entitled "tort liability for legislative provision," stating that at common law, violations of statutes and regulations can be used to establish both negligence per se and nuisance.). At common law, a "public nuisance" is activity that involves an "unreasonable interference with a right common to the general public." *See* RESTATEMENT (SECOND) OF TORTS § 821B. Conduct is deemed "unreasonable" if (1) it involves a significant interference with public health, safety, public peace, public comfort or public convenience, or (2) it is prohibited by statute, ordinance or administration regulation, or (3) it is of a continuing nature or has produced a permanent, long-lasting effect and the actor knows or has reason to know the conduct has a significant effect on a public right. *See* RESTATEMENT (SECOND) OF TORTS § 821B(2). A private nuisance is action that is (1) intentional and unreasonable or (2) unintentional and otherwise negligent, reckless or based on conduct that is abnormally dangerous. *See* RESTATEMENT (SECOND) OF TORTS §§ 821D, 822.

[230] *See* Klass*, supra* note 142, at 905 (documenting a trend among courts to impose common law strict liability in cases involving environmental contamination because of the influence of CERCLA).

[231] *See* Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. __ (forthcoming 2007).

[232] *See id.*

supply necessary standards and policies to address today's natural resources issues.[233]

Certainly the common law public trust doctrine in many states is narrower in scope that general doctrines of negligence, nuisance and strict liability. However, it remains a doctrine that has developed with changing societal needs, and, like other common law doctrines, can look to policy statements and standards contained in state constitutions and environmental statutes. What courts using a mutually-reinforcing approach to public trust principles are doing is really no different from what courts have been doing for years in the context of negligence per se and nuisance per se.

As stated earlier, the common law public trust doctrine cannot and should not substitute for strong federal and state legislation and regulation, which can control pollution more broadly without many of the scope limitations inherent in the public trust doctrine. However, by integrating constitutional, statutory and regulatory standards into the public trust law of any particular state, the doctrine can work side by side with the statutory and regulatory framework to provide incentives to protect natural resources and the environment.

This is particularly true in states that historically have not had a strong common law public trust doctrine or do not have an environmental rights statute. First, *Illinois Central* arguably imposes at least minimal public trust obligations on all states[234] and, more recently, the Supreme Court has held that the *scope* of the doctrine is a function of state law.[235] Thus, courts in jurisdictions that have not as of yet relied on the public trust doctrine for environmental protection purposes can and should develop their common law doctrine to protect resources based on standards and policy statements in the numerous federal and state environmental statutes and regulations placing a premium on environmental protection. Whether or not those statutes have private rights of action is irrelevant; following the development of the doctrines of negligence per se and nuisance per se, the public trust doctrine can be a vehicle for enforcing these statutory and regulatory standards. Indeed, there is a rich history of legal theory and Supreme Court precedent supporting the idea that statutes should inform the common law, just as common law has always informed statutes.[236]

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[233] Indian Law provides a non-Environmental Law example where courts have created a framework in which statutes and non-statutory doctrines are mutually reinforcing. *See, e.g.*, McClanahan v. State Tax Comm'n, 411 U.S. 164, 172 (1973) ("The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read.").

[234] Illinois Central R. Co. v. Illinois, 146 U.S. 387, 452-53 (1892) (holding states are not authorized to abdicate control over trust lands). *See also* Wilkinson, *supra* note 10, at 453-55 (stating that the parties were arguing principles of general applicability, not just Illinois law, and the opinion leaves "little doubt that the Court conceived of a general trust that applied to all states"). *See also supra* notes 22-28 and accompanying text for a discussion of potential interplay between *Illinois Central* and the *Erie* doctrine.

[235] Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 475 (1987) (holding that "individual states 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.")

[236] *See, e.g.,* Moragne v. States Marine Lines, 398 U.S. 375, 392 (1970) (stating that "[i]t has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles – many of them deriving from earlier legislative exertions."); Frank E. Horack, Jr., *The Common Law of Legislation,* 23 IOWA L. REV. 41, 54 (1973) (arguing that courts should "use statutory development as a guide in determining shifting social policy and shifting administrative demands."); James McCauley Landis, *Statutes and the Sources of Common Law*, HARVARD LEGAL ESSAYS 213, 230 (1934) (arguing

B. A Contemporary Response to the Critics

Viewing public trust principles in this more holistic and mutually-reinforcing manner addresses many of the criticisms lodged against the doctrine. First, scholars have criticized the doctrine for relying on a property-based paradigm of natural resources protection that has foreclosed a more ecological or holistic vision of our relationship with the environment.[237] These critics argue that the nation was poised to rethink the importance of private property rights in a radical and progressive way, rendering the public trust doctrine an anachronism.[238]

However, as is shown in the judicial decisions described in the prior sections of this article, when courts rely on broad state constitutional environmental provisions or policy statements in environmental protection statutes in discussing public trust principles, the rhetoric conveys a strong sense of the need for an ecology-based approach to resource protection, and often recognizes the close relationship between humans and their environment.[239] Moreover, while a revolution in favor of ecological protection over property rights may have seemed to be a potential trend in the 1980s or early 1990s when these arguments were made, the trend appears to be much the opposite now. One manifestation of this reversal can be seen in the Supreme Court's 1992 decision in *Lucas*,[240] which Sax saw as a rejection of an "ecological worldview" challenge to private property rights.[241] Indeed, in recent years, we seem to be in the midst of a property rights revolution as bipartisan in some areas of the country as the earlier bipartisan push for environmental regulation in the 1970s.[242]

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that common law courts should look to the legislative process to "strike a more favorable balance between legislative and judicial development of the law."). *See also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 81-92 (1982) (citing Landis and taking his position one step further to argue that courts should be able to exercise their common law powers over statutes by revising statutes where appropriate or forcing legislatures to act, rather than being limited to interpreting existing statutory language or invalidating statutes based on constitutional grounds); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 398-416 (2d ed. 1995) (presenting *Moragne*, and the Landis and Calabresi proposals in the context of discussing statutes as a source of policy norms). *See also* Klass, *supra* note 231 (tracing theoretical basis for developing environmental common law against the backdrop of existing federal and state environmental statutes).

[237] *See, e.g.*, Delgado, *supra* note 1.

[238] *See, e.g.*, Lazarus, *supra* note 2 at 633 (stating the trends in trends in the late 1970s and early 1980s have eroded traditional concepts of private property rights in natural resources and public trust doctrine obscures analysis and makes more difficult the process of reworking natural resources law in light of these trends); Delgado, *supra* note 1, at 1214 (stating that one problem with the public trust approach "is that the model is inherently antagonistic to the promotion of innovative environmental thought.").

[239] *See, e.g.*, Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); W.J.F. Realty Corp. v. State, 672 N.Y.S.2d 1007, 1011-12 (N.Y. App. Div. 1998); Avenal v. State, 886 So. 2d 1085, 1101-02 (La. 2004). *See also supra* Section I.A.

[240] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[241] *See* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1439 (1993) ("The Court correctly perceives that an ecological worldview presents a fundamental challenge to established property rights, but the Court incorrectly rejects the challenge.").

[242] *See, e.g.,* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 274-79 (3rd ed. 2005) (discussing contemporary property rights movement and legislative and executive branch activity at the federal and state levels to provide greater protection for private property rights); JESSE DUKEMINIER ET AL., PROPERTY 1024 (6th ed. 2006) (same).

One very recent example of this trend is the overwhelming legislative response to the Supreme Court's 2005 approval of economic development takings in *Kelo v. City of New London*.[243] Although the decision can be seen as merely reaffirming the Court's earlier expansive interpretation of the "public use" clause of the Fifth Amendment of the U.S. Constitution, as of April 2006, forty-five states had proposed legislation, constitutional amendments, or ballot initiatives aimed at restricting the use of eminent domain for the purpose of economic development.[244] Legislation in many of these states has passed, radically changing the ability of governments to take private property for public use projects if they involve private actors.[245]

Likewise, state ballot initiatives like Measure 37 in Oregon requiring state and local governments to compensate landowners for most environmental or land use regulations that diminish the value of their properties show a general distrust of government regulation in the public interest and more protection of private property rights.[246] The Oregon Supreme Court recently held that Measure 37 was constitutional,[247] and similar ballot initiatives may be presented to voters in 2006 in Arizona, California, Colorado, Montana, South Carolina, Washington and other states.[248] These trends do not mean that environmentalists should despair of ever reaching a point in this country where there would be a real revolution in conceptions of humanity's relationship with the environment. That day may still come. But it may not come soon, and in the interim, public trust principles allow the courts to participate appropriately in the law of natural resources protection particularly during times where legislative efforts are not a driving force in this area.

Another criticism of the common law public trust doctrine, expressed most forcefully by Richard Lazarus, is that it draws attention away from the enactment of strong environmental legislation, which is a more comprehensive and democratic

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[243] 125 S. Ct. 2655 (2005).

[244] *See* Castle Coalition, State Legislative Actions, available at http://maps.castlecoalition.org/legislation.html (listing states with pending legislation). *See also* John M. Broder, *States Curbing Right to Seize Private Homes*, N.Y. TIMES, Sec. A, Col. 5, p. 1 (Feb. 21, 2006); Steven Greenhut, *Cross Country: The Anti-Kelo*, WALL ST. J. A14 (April 6, 2006) (stating that Kelo "incited a national property-rights mutiny"); Terry Pristin, *Developers Can't Imagine a World Without Eminent Domain*, N.Y. TIMES Sec. C, Col. 2, p. 5 (Jan. 18, 2006) (stating that outcry against Kelo decision has "given heart" to property-rights advocates and even city planners and developers "have been loath to speak up.").

[245] *See id.* Recently, Richard Epstein has argued that the "public use" issues in *Kelo* and other Fifth Amendment cases are related to the public trust doctrine cases in that both types of cases require answering whether the transaction is "just a giveaway to a private party, or is there some just compensation to the state which gives it an appropriate public purpose." Richard A. Epstein, *The Public Use, Public Trust & Public Benefit*, 9 GREENBAG 2d 125, 131 (2006). He argues that both types of cases should be subject to the same standard which scrutinizes public purpose in takings case more closely than was done in *Kelo,* and also considers more carefully whether conveyances of public trust land might have large components of public value that constitute just compensation for the public at large. *Id.*

[246] See Ballot Measure 37 (Or. 2004); Symposium, *Ballot Measure 37: The Redrafting of Oregon's Landscape*, 36 ENVTL. L. No. 1 (2006) (discussing ramifications of Measure 37); Editorial, WALL. ST. J. A16 (Feb. 23, 2006) (reporting on Measure 37 and expressing hope that laws like Measure 37 and legislative responses to *Kelo* decision "may well inspire more Americans to continue defending that most basic of Constitutional rights: owning property.").

[247] *See* MacPherson v. Dept. of Admin. Serv., 130 P.3d 308, 311-12 (Or. 2006) (upholding constitutionality of Measure 37).

[248] *See, e.g*., American Planning Assoc., Regulatory Takings Ballot Measures Across America, available at http://www.planning.org/legislation/measure37/.

method of protecting natural resources.[249] However, the thesis set forth in this article is that common law public trust principles and strong environmental legislation are not an "either-or" proposition. With the approach set out here, strong environmental legislation is crucial to providing policy direction and standards to the development of new public trust principles. In this way, the public trust doctrine can provide the vehicle for state judicial review in cases where the statute does not provide its own right of action.[250]

Moreover, it does not appear that the public trust doctrine had any detrimental impact on the development of federal and state statutory environmental and regulatory law in earlier years. Congress and the states created the massive statutory and regulatory framework that currently exists for environmental protection at precisely the same time that the modern public trust doctrine was also on the rise.[251] Indeed, if anything, Sax's revitalization of the common law public trust doctrine had an extremely positive impact on the shaping of federal environmental law through the emphasis on citizen suit provisions and the focus on protection of endangered species and other environmental resources for the benefit of the public and future generations.[252]

Despite these early potential synergies, state common law has been little more than a sideline for scholars and students of environmental law since the creation of the federal environmental regulatory system.[253] However, today we find ourselves in an era where there is significant public concern over the failure of the federal executive and legislative branches to take strong action on today's environmental challenges, whether they are automobile emissions, global warming, water pollution, or regulation of toxic substances.[254] Much of this concern is expressed by state and

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[249] *See, e.g.*, Lazarus, *supra* note 2.

[250] For instance, the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y ("FIFRA") does not allow private parties to sue for violation of statutory provisions, leaving plaintiffs to resort to common law claims for injunctive relief or damages. *See, e.g.,* Bates v. Dow Agrosciences, 125 S. Ct. 1788, 1801 (2005) (FIFRA does not provide a federal remedy for persons injured as a result of a manufacturer's violation of FIFRA's labeling requirements); No Spray Coalition v. City of New York, 351 F.3d 602, 605 (2d Cir. 2003) (discussing absence of private right of action in FIFRA).

[251] *See* PERCIVAL ET AL., *supra* note 102, at 88-90 (providing chronology of significant federal environmental legislation).

[252] *See, e.g.,* PLATER ET AL., *supra* note 34, at 1066 (noting that "public trust concepts can be found in the protection of endangered species, prevention of significant deterioration (PSD) in air quality far cleaner than necessary for health, restoration of mined lands despite low locations values, safeguards for groundwater purity even where no one uses the groundwater resources, and so on."). SAX, *supra* note 13, at 173-74 (stating that implementation of public trust as a public right will, among other things, force consideration of alternatives that might harm the environment, recognize legitimacy of public rights and help create "an effective body of environment law.").

[253] *See, e.g.,* PERCIVAL ET AL., *supra* note 102, at 101 (noting that common law in the environmental area remains important for compensation purposes but the more innovative environmental protection measures are the product of state regulation); *id.* at 72 (stating there is "wide agreement" that private nuisance actions along are insufficient to resolve more typical pollution problems); PLATER ET AL., *supra* note 34, at 283 (citing various limitations of common law in addressing environmental problems).

[254] *See, e.g.,* Richard Oppel, Jr. and Christopher Drew, *States Planning Lawsuits Over Pollution*, N.Y. TIMES, Nov. 9, 2003, at A1 (discussing proposed lawsuit but attorneys general of several northeastern states to sue electric utilities for violations of the Clean Air Act after EPA dropped its investigations and dismissed lawsuits pursuing the utilities); Katharine Q. Seelye, *Administration Adopts Rule on Antipollution Exemption*, N. Y. TIMES, Aug. 28, 2003, at A20 (discussing Bush administration relaxation of clean air rules to allow thousands of industrial plants to make upgrades without installing pollution controls); *Mr. Bush Reverses Course*, N.Y. TIMES, March 15, 2001, at A24 (criticizing

local governments who have taken matters into their own hands to attempt to fill what they see as a "void" left by inadequate federal regulations and inadequate enforcement of existing regulations.[255] State efforts to rely on state common law to fill this void are most obvious in the area of global warming, where some states are looking to common law nuisance claims to address greenhouse gas emissions in the face of the federal government's refusal to regulate strongly in this area. For instance, in 2006, North Carolina filed a lawsuit against the Tennessee Valley Authority claiming greenhouse gas emissions from plants owned by the federal power authority in several states were harming North Carolina citizens and the state's economy.[256] The suit is being brought under the source states' public nuisance laws as there is no federal statute available to address greenhouse gas emissions. This perceived federal inaction and recent state responses present the perfect opportunity to seriously consider the renewed role state public trust principles can play in new environmental protection efforts.

Moreover, the Supreme Court's "new federalism" revolution in the 1990s may call into question the ability of federal environmental statutes to continue to be the

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President Bush's decision not to regulate emissions of carbon dioxide despite campaign promise to the contrary); Francis X. Clines, *Judge Takes On the White House on Mountaintop Mining*, N. Y. TIMES, May 19, 2002, at A18 (discussing lawsuit over the ability of mining companies to engage in "mountaintop mining," blasting mountaintop rock and depositing it into nearby streams, and Bush Administration's rule change to allow such practices); Christopher Drew and Richard A. Oppel, Jr., *How the Power Lobby Won Battle of Pollution Control at E.P.A.*, N. Y. TIMES, March 6, 2004, at A1 (discussing Bush Administration dismissal of Clean Air Act lawsuits against power plant initiated during the Clinton Administration and departures within EPA); Katharine Q. Seelye, *U.S. Seeks to Limit Environmental Law's Reach Over Coastal Waters*, N.Y. TIMES, Aug. 10, 2002, at A10 (discussing Bush Administration's new position that the National Environmental Policy Act does not apply to the vast majority of oceans under United States control); Douglas Jehl, *E.P.A. to Abandon New Arsenic Limits for Water Supply*, N. Y. TIMES, March 21, 2001, at A1 (discussing Bush Administration's withdrawal of new arsenic standards enacted during Clinton Administration to protect drinking water); Marty Coyne, *Enforcement: Polluters Have Benefited from Lax EPA Enforcement*, ENVIRONMENTAL AND ENERGY PUBLISHING, LLC, GREENWIRE, FEDERAL AGENCIES, Vol. 10, No. 9 (October 13, 2004) (stating that EPA's use of lawsuits to address violations of the Clean Air Act, Clean Water Act and other laws dropped 75 percent between the last there years of the Clinton Administration and the first three years of the Bush Administration);

[255] *See, e.g.,* Connecticut v. American Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y., Sept. 22, 2005) (dismissing action by several states against Midwestern power plants for failure to reduce greenhouse gas emissions under federal common law of nuisance on "political question" grounds); Symposium, *The Role of State Attorneys General in National Environmental Policy, Groundwater Pollution Panel*, 30 COLUM. J. ENVTL. L. 403, 404 (2005) (comments by Thomas McGarity about actions by state or local governments to address MTBE contamination and stating that "[a]s the federal agencies have grown more or less moribund, one of the few progressive forces left today is a small group of state AG's filing innovative suits."); David R. Hodas, *State Law Responses to Global Warming: Is it Constitutional to Think Globally and Act Locally?,* 21 PACE ENVTL. L. REV. 53, 53-54, 59 (2003) (discussing absence of federal leadership on issue of global warming, federal administration opposition to control of greenhouse gases, and state and local policy initiatives to adopt laws and regulations to regulate greenhouse gases); Richard Oppel, Jr. and Christopher Drew, *States Planning Lawsuits Over Pollution*, N. Y. TIMES, Nov. 9, 2003, at A1 (discussing proposed lawsuit by attorneys general of several northeastern states to sue electric utilities for violations of the Clean Air Act after EPA dropped its investigations and dismissed lawsuits pursuing the utilities).

[256] *See* North Carolina v. Tennessee Valley Authority, No. 1:06-CV-20 (W.D.N.C., Jan. 30, 2006); Andrew M. Ballard, *North Carolina Lawsuit Against TVA Alleges Harm from Power Plant Emissions*, 37 Envtl. Rep. No. 5, at 221).

driving force to protect the environment.[257] The Supreme Court's decisions in *United States v. Lopez*[258] and *United States v. Morrison*[259] put limits on the prior limitless reach of Congress's authority to regulate under the Commerce Clause. Because nearly all federal environmental statutes are enacted pursuant to commerce clause authority, blind reliance on the ability of Congress to regulate nationwide to protect natural resources and the environment may not be wise.[260] As a result, public trust principles as implemented by state courts can be developed to be part of the new and innovative efforts states are undertaking in our federalist system both as a matter of legislation and of common law.[261]

Finally, the public trust doctrine has been subject to criticism by those who see it as simply another unconstitutional deprivation of private property without just compensation.[262] In other words, if the judiciary chooses to apply public trust principles in an expansive way, it is a taking of private property and just compensation is due. This argument is based upon the idea that there should be no difference between state and local regulations that deprive a landowner of her land's economic use and judicial application of the public trust doctrine that deprives a landowner of her land's economic use.[263]

However, the idea of the public trust doctrine as a limit on private property rights is as old as the founding of the nation. This is not some "new" land grab for environmental protection, but finds its authority starting with *Illinois Central* which certainly predated the current debates on regulatory takings.[264] Moreover, the idea that there is something fundamentally different between statutes and regulations restricting land use on the one hand, and common law on the other has been

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[257] *See, e.g.,* Klass, *supra* note 231 (discussing impact of "new federalism" principles on environmental law).

[258] 514 U.S. 549 (1995) (invalidating Gun Free School Zones Act of 1990 on grounds it regulated a local activity beyond Congress's reach under the Commerce Clause).

[259] 529 U.S. 598 (2000) (invalidating Violence Against Women Act holding that it had too tenuous a relationship to interstate commerce to be within Congress's authority to regulate).

[260] For examples of Commerce Clause challenges to federal environmental statutes, see Allied Local & Reg'l Mfrs. Caucus v. EPA, 215 F.3d 61 (D.C. Cir. 2001) (Clean Air Act); United States v. Deaton, 332 F.3d 698 (4th Cir. 2003) (Clean Water Act); GDF Realty Invs., Ltd. v. Norton, 326 F.3d 622 (5th Cir. 2003) (Endangered Species Act); Rancho Viejo, LLC v. Norton, 323 F.3d 1062 (D.C. Cir. 2003) (Endangered Species Act); Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) (Endangered Species Act); Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) (Endangered Species Act); Frier v. Westinghouse Elec. Corp. 303 F.3d 176 (2d Cir. 2002) (CERCLA); United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997) (CERCLA). *See also* Solid Waste Agency v. United States Army Corp of Eng'rs, 531 U.S. 159, 172-73 (2001) (addressing Clean Water Act's authority over intrastate wetlands but deciding the case on statutory rather than constitutional grounds); Rapanos v. United States, 126 S. Ct. 2208 (2006) (same).

[261] *See* Klass, *supra* note 231 (summarizing various state common law and legislative efforts to fill federal void); Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 577-78 (1989) (stating that "the public trust doctrine represents a working example of federalism.").

[262] *See, e.g.*, Huffman, *supra* note 3 (public trust doctrine is out of place in a constitutional democracy); Thompson, *supra* note 3 (common law rules can result in takings in the same manner as regulatory restrictions); James R. Rasband, *Equitable Compensation for Public Trust Takings*, 69 U. COLO. L. REV. 331 (1998) (compensation should be provided to private property owners if their property rights are limited by the public trust doctrine).

[263] *See, e.g.,* Thompson, *supra* note 3.

[264] *See supra* notes 196-201 and accompanying text.

cemented into federal constitutional law for over ten years. In *Lucas*,[265] Justice Scalia stated that the only defense to a denial of all beneficial or economic use of land was if the regulation was merely forbidding uses that would be prohibited by "background principles of the state's law of nuisance and property."[266] As has always been the case, state common law principles of nuisance and property by definition expand, and the Court's decision does not expressly state that state common law doctrines were set in stone at any particular date. Indeed, Justice Scalia noted in determining whether common law principles would prevent the use at issue, "changed circumstances or new knowledge may make what was previously permissible no longer so[.]"[267] As Michael Blumm has shown in his recent article on the topic, courts in various jurisdictions have applied modern conceptions of nuisance, public trust, the natural use doctrine, customary rights, water rights, and wildlife trusts to avoid finding a taking consistent with *Lucas*.[268] That these background principles are now applied in modern ways to modern issues is simply a function of the development of state common law and does not run afoul of *Lucas* or constitutional takings jurisprudence.[269]

In the end, state public trust principles will not and should not be a substitute for strong legislative protection for natural resources and the environment. Our current regulatory state surely provides far more protection for natural resources and the environment than the system in place prior to the 1970s. However, there are many gaps in the system resulting from lack of enforcement, lack of political will, lack of resources and a host of other impediments to the enactment and enforcement of strong environmental protection laws. Public trust principles as implemented by state courts can play a significant role in filling those gaps, if scholars expand their view of these principles and more lawyers and judges follow the lead of the decisions discussed in Section II. In this way, those in the legal academy and the legal profession can begin the process of creating a more comprehensive approach to natural resources protection that relies upon the public trust doctrine along with statutory and constitutional policies and standards. Such an approach goes beyond the formalistic distinctions in the law to see that all these sources of law form a cohesive whole and, in the process, move the legal doctrine to the next level in addressing contemporary environmental and natural resource issues.

CONCLUSION

This article proposes a new framework for using public trust principles to protect natural resources and the environment that creates a mutually-reinforcing relationship between the common law doctrine and environmental protection provisions contained in state statutes and constitutions. Such a framework builds on

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[265] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).
[266] *Lucas*, 505 U.S. at 1029.
[267] *Id.* at 1030-31.
[268] Blumm & Ritchie, *supra* note 35. *See also* Section II.B.2 (recent cases in which courts denied takings claims based on the modern applications of the public trust doctrine).
[269] *But see* Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994) (Scalia, J. dissenting) (dissenting from denial of certiorari in Oregon case denying development rights to owners of certain dry sand beaches because of public's interest in those beaches and arguing that "[n]o more by judicial decree than by legislative fiat may a State transform private property into public property without compensation.").

recent developments in the state courts that can begin to establish a cohesive jurisprudence of natural resources protection in contrast to prior scholarship that has assumed an "either-or" dichotomy between the common law and statutes. Scholars, courts and lawyers can work toward this goal by reaching out beyond the common law precedent of the doctrine and incorporating policy statements and standards from the current codifications of these principles found in state constitutions and statutes. Doing so will strengthen state public trust principles and provide protection for state natural resources in situations where other branches of the government cannot or will not act. Moreover, this process also has the potential to create a new dialogue in the area of environmental law focusing on principles of ecology and interconnectedness in a way that has been difficult to achieve so far.