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# THE PUBLIC TRUST DOCTRINE AND NATURAL LAW: EMANATIONS WITHIN A PENUMBRA

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MICHAEL W. SWEENEY\*\*

**Abstract:** In American jurisprudence, the public trust doctrine emerged as a means of protecting certain limited environmental interests, such as coastal waterways and fishing areas, which were preserved for the benefit of the public and distinguished from grants of private ownership. However, modern scholars have called for an expansive application of the public trust doctrine, citing the growing inventory of “changing public needs” in the environmental context, such as the need for improved air and water quality, and the conservation of natural landscape. This Article examines the history and scope of the public trust doctrine to determine how modern resource management fits within the doctrine’s development under the Constitution and common law. Such an examination is incomplete without reviewing the important principles of Natural Law underlying the original doctrine. In the end, the Article concludes that modern trust expansion should be limited within the ancient values of principled economic reasoning.

## INTRODUCTION

Joseph Sax once commented, “Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.”<sup>1</sup>

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<sup>1</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970). See generally Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998); Charles F. Wilkinson, *The Headwaters of the*

For centuries, people have utilized some version of this doctrine by preserving portions of the environment for the greater public good, recognizing that the air, water, and seashores were “common to all by natural law.”<sup>2</sup> This act of public preservation is administered by the state on behalf of its populace and seeks to protect natural resources for the benefit of the community at large.

Early American jurisprudence applied this concept to certain limited interests, such as coastal waterways and fishing areas, which were preserved for the benefit of the public and distinguished from grants of private ownership.<sup>3</sup> This has been termed by some as the “classic list of protected [public] interests.”<sup>4</sup> And yet, the doctrine has been cited in response to a growing inventory of “changing public needs” in the environmental context, such as the need for improved air and water quality, and the conservation of natural landscape.<sup>5</sup>

Indeed, the Sax vision is a call to arms for environmentalists to utilize the public trust doctrine as a sword for greater judicial protection and a shield from property rights advocates.<sup>6</sup> But, given the wide array of public interests and competing public rights, should the public trust doctrine be used as such a vehicle for expansive environmental protection?

This Article will examine the history and scope of the public trust doctrine to determine how Sax’s vision for resource management fits

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*Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 426 & n.3 (1989) (citing Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1551–53 (1985)).

<sup>2</sup> Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485, 491 (1989) (citing J. INST. 2.1.1).

<sup>3</sup> See Sax, *supra* note 1, at 475.

<sup>4</sup> See Johnson, *supra* note 2, at 495.

<sup>5</sup> See *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971); Zachary C. Kleinsasser, Note, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENVTL. AFF. L. REV. 421, 433 (2005). One scholar notes that “[s]cholars and practitioners have responded to Sax’s call and have advocated extending public trust protection to wildlife, parks, cemeteries, and even works of fine art.” See Erin Ryan, Comment, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL. L. 477, 480 (2001); see also *Marks*, 491 P.2d at 380 (“[A] use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for [nature] . . .”).

<sup>6</sup> In particular, academic activists have heeded the call. See, e.g., David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public’s Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 378 (1988) (“A more desirable trend would be to switch the debate in public trust cases from a discussion of the doctrine’s historical roots to a discussion of the ecological values that should be protected in the public interest.”).

within the doctrine's development under the Constitution and common law<sup>7</sup>—most notably, how does the influence of Natural Law relate to the function of the public trust doctrine. Once this historical assessment is complete, the Article will shift to an examination of modern public trust application in the environmental and land use arenas and test whether it should be used to expand its traditional coverage under the Natural Law perspective. Although the tenets of the Natural Law are penumbric, they nonetheless provide a foundational bearing—or direction—for legitimizing the application of the public trust doctrine and, as the case may be, restraining its application. In a very real way, then, this doctrine is an emanation within a penumbra, but one that is validated because of this very relationship. It can be correctly thought of as having a *yin-yang*—or positive-negative—relationship with the Natural Law. Although this relationship may also be seen as tenuous, it is far better than unbridled, subjective judicial activism which has no guideposts at all for its voracious appetite.

The thesis of this Article is that rather than continuing to expand the broad reach of the public trust doctrine in the present design of a crazy patch-work quilt, its expansion should be both measured and restrained by the “common good.” Applying this standard—which seeks to balance the legitimate expectations and real interests of individual property owners with the need for enhanced public resource preservation—will normally result in validating the legitimate economic interests of the property owners.

The proposed balancing test is both informed and shaped by the Natural Law. A primary tenet of its recognition and protection of “individual goods” or rights, such as property ownership, is measured against the “common good.”<sup>8</sup> It is for the states to manage the directions that the public trust takes in modern society. In setting the framework for analysis of issues resolving trust expansion, the Natural Law template or test of reasoned balance can be a *vade mecum* or guide for both legislators and judges confronted by this challenging issue.

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<sup>7</sup> See Wilkinson, *supra* note 1, at 426 n.6 (“The public trust doctrine derives from constitutional, statutory, and common-law sources, and has been applied in various contexts to resources other than watercourses navigable for the purposes of title, including wildlife, federal public lands, and drinking water.”).

<sup>8</sup> CHARLES E. RICE, 50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT 56 (1993).

## I. DIGGING FOR THE ANCIENT ROOTS OF THE PUBLIC TRUST

As this Article ventures to examine the breadth of the public trust in American jurisprudence, it is important to investigate the doctrine's historical underpinnings and the purposes which it serves.<sup>9</sup> The American rule of law regarding property rights and the public trust is premised upon an inherited line of reasoning from ancient Roman law and English common law.<sup>10</sup>

Tracing the public trust concept back to its original roots, most scholars look to the Institutes of Justinian, a body of Roman civil law assembled in approximately 530 A.D.<sup>11</sup> This text articulated the "nearly universal notion" that watercourses should be protected from complete private acquisition in order to preserve the lifelines of communal existence.<sup>12</sup> Under a remarkable philosophy of natural resource preservation, the Romans implemented a concept of "common property" and extended public protection to the air, rivers, sea, and seashores, which were unsuited for private ownership and dedicated to the use of the general public.<sup>13</sup> "[While] it remains unclear whether this represented true Roman practice or mere Justinian aspiration," scholars believe the introduction of this public trust concept resonated throughout medieval Europe, infiltrating its common law system.<sup>14</sup>

The English common law system, which directly influenced American thinking on the public trust, made practical use of these communal concepts.<sup>15</sup> In particular, the English system provided a

<sup>9</sup> As Justice Antonin Scalia points out, this is an important process with respect to any legal rule. ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts on Interpreting the Constitution*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 7 (Amy Gutman ed., 1997). Understanding that a legal principle made in one case will be followed in another is "an absolute prerequisite to common-law lawmaking." *Id.*

<sup>10</sup> See Wilkinson, *supra* note 1, at 428-39.

<sup>11</sup> See Johnson, *supra* note 2, at 491-92, 491 n.26; Wilkinson, *supra* note 1, at 429.

<sup>12</sup> Wilkinson, *supra* note 1, at 430.

<sup>13</sup> See Johnson, *supra* note 2, at 491 (quoting Sax, *supra* note 1, at 475). Specifically, Byzantine law stated: "[b]y natural law, common to all these: the air, running water, the sea, and therefore the seashores." J. INST. 2.1.1-6 (Thomas trans.); see Ryan, *supra* note 5, at 481.

<sup>14</sup> See Ryan, *supra* note 5, at 481. It is also important to realize that these concepts extended beyond the borders of Europe. Wilkinson, *supra* note 1, at 429. In the Far East, the protection of water uses on behalf of the greater public was recognized before the birth of Christ. *Id.* Additionally, similar traditions were recognized in ancient Africa where people "enjoyed the right to fish the sea, with its creeks and arms and navigable rivers within the tides." *Id.* (citing T.O. ELIAS, *NIGERIAN LAND LAW* 48 (1971)). In this respect, the concept of the public trust is internationally recognized.

<sup>15</sup> See Wilkinson, *supra* note 1, at 430-31.

sensible framework that emphasized the need to balance community interests with private ownership rights.<sup>16</sup> Consequently, English common law distinguished between property that was transferable to private individuals, *jus privatum*, and property that was held in trust for the public, *jus publicum*.<sup>17</sup>

In many respects, the English view of public ownership was somewhat restrictive when compared to more generous forms of public resource sharing.<sup>18</sup> Such a distinction is easily seen when comparing the English view with the more liberal sharing philosophy of the medieval French, who extended public ownership to other natural resources and placed less emphasis on private ownership rights: “[T]he public highways and byways, running water and springs, meadows, pastures, forest, heaths and rocks . . . are not to be held by lords, . . . nor are they to be maintained . . . in any other way than that their people may always be able to use them.”<sup>19</sup> Nonetheless, the English system remained firmly within the original spirit of public trust, as it favored the ancient public right to access navigable waterways.<sup>20</sup>

Following the Revolutionary War, public trust principles surfaced in the American legal system as well.<sup>21</sup> The demand for these principles was not surprising, given the importance of navigable waterways at the country’s beginning and the inherited influence of English common law.<sup>22</sup> The navigable waterways were a central feature of early public policy, and political leaders understood their significance in

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*; see GEORGE P. SMITH II, RESTRICTING THE CONCEPT OF THE FREE SEAS: MODERN MARITIME LAW RE-EVALUATED 14–20 (1980) (discussing the historical origins of these two theories). See generally Arnold L. Lum, *How Goes the Public Trust Doctrine: Is the Common Law Shaping Environmental Policy?*, NAT. RESOURCES & ENV’T, Fall 2003, at 73.

<sup>18</sup> See Wilkinson, *supra* note 1, at 430–31.

<sup>19</sup> *Id.* at 429 n.22 (quoting Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 189 (1980) (citing M. BLOCH, FRENCH RURAL HISTORY 183 (1966))).

<sup>20</sup> *Id.* at 430. The need for this public right was premised upon public demand. For example, the beds and banks of the navigable rivers were commonly used by the populace for anchoring and mooring. *Id.* at 430 n.29. Moreover, the waterways were utilized for other activities, such as commerce and fishing. *Id.* at 431–33. The public’s need for substantial use of these navigable waterways dictated the establishment of a public right. Such an established right was a powerful tool, as it prevailed over any corresponding private property right. See *id.* at 430 n.29.

<sup>21</sup> See Anna R.C. Caspersen, Comment, *The Public Trust Doctrine and the Impossibility of “Takings” by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 360 (1996).

<sup>22</sup> Wilkinson, *supra* note 1, at 431.

economic terms.<sup>23</sup> Among others, Thomas Jefferson imagined the great benefits that watercourses could provide to commerce as he commissioned the Lewis and Clark expedition to “explore the river Missouri, from its mouth to its source.”<sup>24</sup> Early efforts were made to provide public access to waterways for commercial benefit, and their preservation was viewed as a “unifying factor” in the country’s effort to facilitate trade and “establish[] communication lines among the states.”<sup>25</sup> Moreover, Congress implemented resource legislation that administered rules of water trafficking.<sup>26</sup>

Because of the “intrinsic importance” of this resource legislation, the Supreme Court of the United States moved quickly to resolve a number of constitutional issues related to watercourse regulation.<sup>27</sup> For example, early questions were raised regarding western states’ ownership rights to the lands beneath the waterways.<sup>28</sup> The Court concluded that submerged lands passed by implication to the states at the time of statehood under a principle of “equal footing.”<sup>29</sup> Additionally, the Court examined the scope of Congressional authority under the Commerce Clause and determined that Congress still maintained the power to regulate waterways despite a state’s right to title.<sup>30</sup>

From this rich history regarding governmental control of the waterways, the public trust doctrine officially emerged as an instrument of federal common law to preserve the public’s interest in free navigation and fishing.<sup>31</sup> In *Illinois Central Railroad Co. v. Illinois*, the Supreme Court declared that the nature of a state’s title to submerged lands is

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<sup>23</sup> See *id.* at 431–39. Watercourse transportation caught the eye of business entrepreneurs. *Id.* at 434–35. The rivers furnished routes that avoided both dense forests and expensive road construction. *Id.* Moreover, the need for fishing served both commercial and subsistence purposes. *Id.* at 431–34.

<sup>24</sup> *Id.* at 437 (citing P. CUTRIGHT, A HISTORY OF THE LEWIS AND CLARK JOURNALS 12 (1976) (quoting Thomas Jefferson)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 437–38 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)) (“[T]he power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it.”). Professor Wilkinson identifies four other constitutional provisions which emphasize Congress’s paramount concern for the public use of waterways: the Tonnage Duty Clause; the Import-Export Clause; the Ports and Vessels Clause; and the Admiralty Clause. *Id.* at 437 n.53.

<sup>27</sup> See *id.* at 439.

<sup>28</sup> Wilkinson, *supra* note 1, at 439–40.

<sup>29</sup> *Id.* at 443–45.

<sup>30</sup> *Id.* at 449.

<sup>31</sup> See Public Trust Doctrine, [http://law.utoledo.edu/LIGL/public\\_trust\\_doctrine.htm](http://law.utoledo.edu/LIGL/public_trust_doctrine.htm) (last viewed Jan. 5, 2005).

different from that it holds in other lands.<sup>32</sup> “It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein . . . .”<sup>33</sup> In this regard, the Supreme Court placed an affirmative duty on states to assist with protecting the people’s common law right to access waterways.<sup>34</sup>

Although the Supreme Court has never expressly stated so, the concept of the public trust and the resulting affirmative duties seem to emanate from the Constitution.<sup>35</sup> While other interpretations of the public trust source exist, this is the most reasonable explanation considering the “heavy overlay of constitutional doctrine” concerning watercourse regulation.<sup>36</sup>

Commerce Clause decisions have consistently highlighted the Framers’ concern for free trade and navigation, and the Court has cast

<sup>32</sup> 146 U.S. 387, 452 (1892).

<sup>33</sup> *Id.* While *Illinois Central* allows for the severance of lands from the public trust, it is seen as an exception, not the norm, to the rule of inalienability—with no presumption that a mere conveyance of lands within the public trust affects such a severance. A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 8.22 (Marie-Joy Paredes & Susan Maureri eds., 17th release 2005). Any state action which creates a severance may not impair the state’s overall ability to fulfill trust purposes. *Id.*

<sup>34</sup> See Wilkinson, *supra* note 1, at 453–55. It has been argued that the core of the *Illinois Central* case is more properly concerned with the Contract Clause of the Constitution of the United States—with the reserved powers doctrine being used to reduce the ambit of the Clause itself. Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 ARIZ. ST. L.J. 849, 851 (2001). Thus construed, the public trust doctrine should be placed within the broader doctrine of reserved powers, the source of which is commonly found in constitutional provisions on “legislative power” that is supported ultimately by creditable democratic political theory. *Id.*

*Illinois Central* has also been considered to be an ill-reasoned decision—with the public trust analysis being more correctly seen as dictum and “as persuasive, rather than mandatory, authority”—because it lacks a foundation both in the Constitution and the federal common law. Furthermore, the case relies on a misreading of the scope of state power, since “state regulatory power is not lost upon a transfer of property rights to a private entity.” Eric Pearson, *Illinois Central and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713, 740 (1996).

Rather than assessing the validity or invalidity of the public trust doctrine in *Illinois Central*, it is suggested that the case be assessed by probing the “standard narrative” of the case itself. See 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, 803 (2004). This dramatically reveals a rich political history and shows corruption, most probably, by the railroad in getting the Illinois state legislature to pass the Lake Front Act of 1869. See *id.* at 803–04. This Act, which was repealed in 1873, granted the entire Chicago lakefront, including the lake bed, of over one thousand acres to a private entity, Illinois Central, for use and development. See *id.*

<sup>35</sup> See Wilkinson, *supra* note 1, at 458–59.

<sup>36</sup> *Id.* at 458.



a constitutional flavor on both state and federal obligations regarding watercourse preservation.<sup>37</sup> Since the *Illinois Central* decision, the public trust doctrine has flourished as a national value, inherited from an ancient script of human reason and shaped by the words and spirit of the Constitution.

But how far should the public trust extend? The traditional "zone of public trust rights" encompasses only navigable waterways.<sup>38</sup> The significance of the Constitution is that it sets boundaries and a context for state courts and legislatures who must devise remedies for future public trust applications.<sup>39</sup> Thus, it is important to explore the basic constitutional values underlying the public trust doctrine to determine its appropriate reach.

## II. THE NATURAL LAW, THE CONSTITUTION, AND THE PUBLIC TRUST

Whenever a doctrine is said to lie within the basic precepts of the Constitution of the United States, caution must be taken in embracing the validity of the argument.<sup>40</sup> This country is rooted in the ideals and values that are carefully scripted in the words of the Constitution, and as one *Newsweek* writer has noted: "Words matter. . . . [T]he Founding Fathers felt obligated to spell out their reasons for declar-

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<sup>37</sup> See Victor John Yannacone, Jr., *Agricultural Lands, Fertile Soils, Popular Sovereignty, the Trust Doctrine, Environmental Impact Assessment and the Natural Law*, 51 N.D. L. REV. 615, 627-29 (1975). The Court first cast its constitutional light on the principle of public trust in *Martin v. Waddell* "when it construed the early colonial charters as reaffirming public rights." *Id.* at 629 (citing *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842)). The Court would later state in *Illinois Central* that there was no such thing as an "irrevocable conveyance of property," as it violated the public trust. *Id.* Finally, in *Shivley v. Bowlby*, the Court "extended the English common law trust doctrine to a major river in Oregon" and "recognized the trust doctrine as a basic element of equitable jurisprudence." *Id.* (citing *Shivley v. Bowlby*, 152 U.S. 1 (1894)).

<sup>38</sup> JACK H. ARCHER ET AL., *THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS* 15-16 (1994) (internal quotations omitted). See generally Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980).

<sup>39</sup> See Wilkinson, *supra* note 1, at 464. The creation and regulation of property rights within state boundaries is an important power left to the states. See ARCHER ET AL., *supra* note 38, at 7.

<sup>40</sup> See SCALIA, *supra* note 9, at 37-47. Original meaning is a concept that brings strength and stability to the Constitution. *Id.* at 47. Doctrines that are "found" within the Constitution run the risk of bringing new meaning to its once "rock-solid, unchanging" text. *Id.* "If the courts are free to write the Constitution anew, they will, by God, write it the way the majority wants. . . . By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all." *Id.*

ing independence from England, out of what Thomas Jefferson called a 'decent respect to the opinions of mankind.'<sup>41</sup>

This thought is particularly meaningful, since it describes the Framers' desire to put into words those laws that embrace a greater "common good," reached through a process of rational thinking. Thus, any analysis regarding the public trust should begin with the Framers' intention and the words of the Constitution.<sup>42</sup>

Despite the skepticism amongst modern constitutional scholars who reject any Natural Law meaning within the Constitution, the Natural Law elements of the Constitution still matter.<sup>43</sup> The natural rights of human beings are directly referenced within the text that has been referred to as "that anchor, that rock, that unchanging institution that forms the American polity."<sup>44</sup> For the purposes of evaluating the public trust, two important sections of the Constitution appear relevant:<sup>45</sup>

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the *people*."<sup>46</sup>

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the *people*."<sup>47</sup>

One reason for James Madison's submission of the Ninth Amendment was to clarify that an individual's rights were not limited

<sup>41</sup> Michael Barone, *In History's Words*, U.S. NEWS & WORLD REP., Sept. 22, 2003, at 34.

<sup>42</sup> See *infra* notes 51–59 and accompanying text. This is especially important because the public trust doctrine was adopted in *Illinois Central* based upon constitutional values. See Wilkinson, *supra* note 1, at 453–55.

<sup>43</sup> See Douglas W. Kmiec, *Is the American Democracy Compatible with the Catholic Faith?*, 41 AM. J. JURIS. 69, 70–71 (1996) (explaining that because the Declaration of Independence and the Constitution, "as a matter of foundational theory [are] inseparable," and the Declaration references "self-evident truths" both documents are tied to objective truth); see also Terry Brennan, *Natural Rights and the Constitution: The Original "Original Intent,"* 15 HARV. J.L. & PUB. POL'Y 965, 971–72 (1992) (concluding that the Founding Fathers recognized "the principles of natural law and natural rights").

<sup>44</sup> Justice Antonin Scalia, Remarks at The Catholic University of America: A Theory of Constitution Interpretation (Oct. 18, 1996), available at <http://www.courtstv.com/archive/legaldocs/rights/scalia.html>. Ironically, Justice Scalia rejects the use of Natural Law in interpreting the Constitution. *Id.* While he adamantly supports interpreting the Constitution according to its text, he characterizes the use of Natural Law as an unworkable method of interpretation because of its vulnerability to subjective interpretation. *Id.*

<sup>45</sup> See Yannacone, *supra* note 37, at 617–18 (quoting U.S. CONST. amend. IX, X).

<sup>46</sup> *Id.* at 618 (quoting U.S. CONST. amend. IX (emphasis added)).

<sup>47</sup> *Id.* (quoting U.S. CONST. amend. X (emphasis added)).

to the enumerated rights listed in the preceding eight amendments.<sup>48</sup> As a matter of fact, the Ninth Amendment was adopted as a “source of substantive rights” allocated to all citizens by the hand of God “to preserve the existence and dignity of human beings in a free society.”<sup>49</sup> This recognition of a “higher law political philosophy” is crucial to understanding the thinking of the Framers.<sup>50</sup>

Indeed, references to Natural Law authority dominated early writings and served as the imprint of the country’s constitutional soul.<sup>51</sup> In property law terms, the Framers in the Natural Law tradition viewed “God as the ultimate holder in fee simple, with men and women holding possessory, but defeasible, interests in life.”<sup>52</sup> Moreover, Natural Law is premised upon the notion that men have a “duty

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<sup>48</sup> See James Madison, Address Before the First Congress (June 8, 1789), in *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS* 56 (Neil H. Cogan ed., 1997) (“I conclude from this view of the subject, that it will be proper in itself, and highly politic, for the tranquility of the public mind, and the stability of the government, that we should offer something, in the form I have proposed, to be incorporated in the system of government, as a declaration of the rights of the people.”); see also Yannacone, *supra* note 37, at 653 (“Historically, the ninth amendment was included in the Bill of Rights to nullify the argument that the enumerated rights set forth in the preceding eight amendments were intended to be the only rights protected.”).

<sup>49</sup> See Yannacone, *supra* note 37, at 653.

<sup>50</sup> See, e.g., RICE, *supra* note 8, at 22–23. As Professor Charles Rice describes, the Natural Law philosophy is more than an aspiration or theory, it is a workable solution, for all humans, in responding to the day’s challenging issues. See *id.* at 23. Moreover, it exceeds the role of a philosophical background to the Constitution—it is an objective standard that can be measured through reasoned reflection similar to that of the common law. See *id.* at 27. Finally, it serves as a standard for both citizens and states in the creation of new laws. See *id.* at 30. The Ten Commandments and other prescriptions of the divine law address specifically how to apply the Natural Law. *Id.* at 28.

<sup>51</sup> One needs to look no further than the words and deeds of the most influential leaders in early American history. Alexander Hamilton once noted: “The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam, in the whole *volume* of human nature, by the hand of the divinity itself; and can never be erased or obscured by mortal power.” Alexander Hamilton, *The Farmer Refuted*, in 1 *THE FOUNDERS’ CONSTITUTION* 90, 91 (Philip B. Kurland & Ralph Lerner eds., 1987); see also Douglas W. Kmiec, *America’s “Culture War”—The Sinister Denial of Virtue and the Decline of Natural Law*, 13 *ST. LOUIS U. PUB. L. REV.* 183, 188 (1993). Perhaps the most convincing evidence of the higher law political philosophy is Thomas Jefferson’s Declaration of Independence, which makes numerous references to man’s unalienable rights as bestowed by the “Creator.” *THE DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776). “The fact is that the Declaration is the best possible condensation of the natural law—common law doctrines as they were developed and expounded in England and America for hundreds of years prior to the American Revolution.” Clarence E. Manion, *The Natural Law Philosophy of Founding Fathers*, 1 *NAT. L. INST. PROC.* 3, 16 (1949).

<sup>52</sup> Douglas W. Kmiec, *Natural-Law Originalism—Or Why Justice Scalia (Almost) Gets It Right*, 20 *HARV. J.L. & PUB. POL’Y* 627, 650 (1997).

to preserve [them]selves” while maintaining “a correlative right to be free in the performance of that duty.”<sup>53</sup>

Considering this Natural Law template, it is proper to examine the public trust doctrine within its constitutional framework. It is clear that the Natural Law duty to preserve one’s self and duty to others can carry conflicting messages.<sup>54</sup> On the one hand, it seems as if Natural Law promotes the protection of individual rights, such as the right of a property owner to be free in excluding others.<sup>55</sup> At the same time, there seems to be a “common good” that takes priority over all other “individual goods.”<sup>56</sup>

As has been observed, “[t]he human law cannot rightly be directed toward the merely private welfare of one or some of the members of the community.”<sup>57</sup> This “natural tension” is played out within the Constitution’s text as well. For example, the Takings Clause prohibits the government from forcing some individuals to bear burdens which should be rightfully “borne by the public as a whole.”<sup>58</sup> Yet, the language of the Ninth and Tenth Amendments refers to rights and powers that are retained by the “people,” such as the fundamental right of the populace to preserve natural resources.<sup>59</sup> The end result is a Constitution that not only emphasizes individual property rights, but also recognizes the right of “sovereign people” to collectively “determine the highest and best use of land and natural resources.”<sup>60</sup>

Such a balanced approach seems appealing on its face, but difficult to effectuate. Throughout the history of American jurisprudence, this balance has been difficult to maintain as both property and the police power—exercised on behalf of the people—are “indeterminate concepts whose interpretations change over time and from place to place.”<sup>61</sup> As a result, many of the Supreme Court of the United States decisions that have attempted to solve the tension be-

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<sup>53</sup> *Id.* at 651 (emphasis omitted).

<sup>54</sup> See Yannacone, *supra* note 37, at 649 (“The ancient controversy over the nature of law (*ius*)—whether *ius quia iustum* (the law is that which is just) or *ius quia iussum* (the law is that which is commanded)—is more than a mere etymological quibble.”).

<sup>55</sup> See RICE, *supra* note 8, at 56.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 57.

<sup>58</sup> See *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

<sup>59</sup> See Yannacone, *supra* note 37, at 618.

<sup>60</sup> *Id.*

<sup>61</sup> Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL’Y 147, 147 (1995).

tween these two elements have been viewed as “incoherent” or “categorical.”<sup>62</sup>

The public trust doctrine is no stranger to this tension.<sup>63</sup> The doctrine emerged on the idea that title to a state’s land under navigable waters could never be surrendered irrevocably to private interests.<sup>64</sup> *Illinois Central Railroad Co. v. United States* was a significant blow to a private railroad company that sought to capitalize through the state’s absolute grant of title by controlling a substantial part of the waterfront on Lake Michigan.<sup>65</sup> Despite the Constitution’s strong recognition of individual property rights,<sup>66</sup> it was clear “that the Court conceived of a general [public] trust [principle] that applied to all states” at all times.<sup>67</sup>

Can such a decision that creates “public trust” rights be justified? If so, how far can a state government go in mandating public access to natural resources or restricting a private landowner’s rights? The best answer lies within the text of the Constitution and its Natural Law principles.

Marcus Tullius Cicero once stated that law was “the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite.”<sup>68</sup> Without a doubt, the greatest feature of Natural Law is that it attempts to find the right answers through ra-

<sup>62</sup> *Id.*

<sup>63</sup> See ARCHER ET AL., *supra* note 38, at 177 (referencing the existence of historical conflict between public and private interests with respect to the public trust doctrine).

<sup>64</sup> See *Ill. Cent. R.R. Co. v. United States*, 146 U.S. 387, 452–53 (1892).

<sup>65</sup> See Wilkinson, *supra* note 1, at 452–53.

<sup>66</sup> See Yannacone, *supra* note 37, at 618.

<sup>67</sup> See Wilkinson, *supra* note 1, at 454.

<sup>68</sup> Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, WM. & MARY L. REV. 995, 998 n.16 (1997) (quoting MARCUS TULLIUS CICERO, LAWS—BOOK I, reprinted in THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE 42, 44 (Clarence Morris ed., 1959)). Marcus Tullius Cicero (c. 106–43 B.C.), one of the greatest orators and philosophers of politics in ancient Rome, believed that many of the difficulties experienced in the Roman Republic could be attributed to the corruption and lack of virtuous character amongst political leaders. Edward Clayton, *Cicero (c. 106–43 B.C.)*, ch. 3 *Cicero’s Thought*, The Internet Encyclopedia of Philosophy (2005), <http://www.utm.edu/research/iep/c/cicero.htm>. Cicero believed “virtuosity” had been the main attribute to success in the earlier days of Roman history. *Id.* Corruption was particularly rampant in the Senate where social status, fame, wealth, and power took priority. *Id.* Cicero hoped that leaders would self-reform their lack of commitment to individual virtue and then pass legislation enforcing similar standards. *Id.* Unfortunately, most Romans were more interested in practical matters of the law—such as governance and military strategy—than they were in Cicero’s virtuous philosophy. *Id.* In 27 B.C., the Roman Republic was dissolved and the Senate conferred great powers to Caesar Augustus. *Id.*

tional thought and reflection, just as the Common Law has done for hundreds of years.<sup>69</sup>

Coming to a rational conclusion with competing constitutional values can be difficult, but the task must be undertaken.<sup>70</sup> The “common good” is an aspect of Natural Law that would seemingly answer the question at hand. Saint Thomas Aquinas, Natural Law’s greatest proponent, “makes it clear that the human law is not some arbitrary imposition,” but a rule of reason for the “common good” that remains an integral “part of God’s design.”<sup>71</sup> Whether the “common good” favors private property interests or public interests is a matter of Natural Law application and rational deduction. Professor Charles Rice, a Natural Law scholar, describes Natural Law as a “rule of reason, promulgated by God in man’s nature, whereby man can discern how he should act.”<sup>72</sup> In essence, God has instilled “a certain, knowable nature into man to follow if he is to achieve his final end, which is eternal happiness with God in heaven.”<sup>73</sup>

The first major premise of Natural Law is that good should be done and evil should be avoided.<sup>74</sup> People can determine what is good by examining their natural inclinations, which includes seeking

<sup>69</sup> See Kmiec, *supra* note 52, at 650. Professor Kmiec explains appropriately that the common law is “the gradual exposition of natural law in context and over time.” For an in depth explanation of this concept, see DOUGLAS W. KMEIC & STEPHEN B. PRESSER, *THE HISTORY, PHILOSOPHY AND STRUCTURE OF THE AMERICAN CONSTITUTION* 122–26 (1998). “The Common Law thought pattern” has consisted traditionally of three elements: “[the] law of God, [the] law of nature, and [the] law of man.” *Id.* at 122. The application of these elements has been premised on the idea that “reasoned discovery of human nature” would find the answers to challenging questions of the day. *Id.* Following King Henry VIII’s break with the Catholic Church, the belief that a legislature or a King could rule without limit caused many to overlook God in the parliamentary process. *Id.* However, Natural Law’s dedication to the rationality of human nature “refused to die” and passed to America’s Constitution. *Id.*

<sup>70</sup> History has demonstrated that Natural Law is needed to resolve conflicting elements of the Constitution. For example, in *Dred Scott v. Sandford*, the Supreme Court failed to resolve the morally conflicting slavery provisions of the Constitution with the Fifth Amendment right to due process. See generally 60 U.S. (19 How.) 393 (1856). Natural Law resolves this discord for the modern scholar because it unmistakably opposes the treatment of a slave as “sub-human” because of the inseparability of humanity and personhood. See Kmiec, *supra* note 51, at 194; Charles E. Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539, 568–69 (1989). The standard is further explained by Aquinas who stated that “human law . . . may be unjust as ‘contrary to human good’ when ‘burdens are imposed unequally on the community.’” *Id.* at 568 (quoting T. AQUINAS, *SUMMA THEOLOGICA*, I, II, Q. 96, art. 4).

<sup>71</sup> See RICE, *supra* note 8, at 56.

<sup>72</sup> *Id.* at 44.

<sup>73</sup> *Id.* at 44–45.

<sup>74</sup> *Id.* at 45.

good, preserving their own existence, preserving species, living in community with others, and using their intellect to know truth and to make decisions.<sup>75</sup> These Natural Law principles have maintained a continuing validity by virtue of their derivation from human nature, a creation of God.<sup>76</sup>

In property disputes, one must be careful not to automatically equate public sharing with the “common good.”<sup>77</sup> As Aquinas pointed out, “human affairs are conducted in [a] more orderly fashion if each man is charged with taking care of some particular thing himself, whereas there would be confusion if everyone had to look after any one thing indiscriminately.”<sup>78</sup> Therefore, Aquinas spoke of a reasonable method of resolution: “Wherefore laws should take account of many things, as to persons, as to matters, and as to times.”<sup>79</sup> This philosophy neither excludes the rights of individual property owners, nor discounts the validity of the public’s right to access natural resources. Rather, it suggests that all factors be taken into consideration before deciding upon the issue at hand.

As both public and private interests are deemed important in constitutional matters, the most logical method to choosing one course of action over another would be the balancing of private prop-

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> RICE, *supra* note 8, at 62. As Professor Rice explains, the “common good ‘cannot be defined except in reference to the human person. . . . In the name of the common good, the public authorities are bound to respect the fundamental and inalienable rights of the human person.’” *Id.* (quoting AQUINAS, *supra* note 70, at II, II, Q. 66, art. 2). Others have described the “common good” as a social state which:

guarantees to each person that place in the community which belongs to him and in which he can freely develop his God-given talents, so that he can attain his own bodily, spiritual and moral perfection and so that, through his service to the community, he himself can become richer in external and internal goods.

PHILOSOPHICAL DICTIONARY 62–63 (Walter Brugger ed., Kenneth Baker trans., 1972).

<sup>78</sup> See RICE, *supra* note 8, at 235 (quoting AQUINAS, *supra* note 70, at II, II, Q. 66, art. 2). It should be noted, however, that Aquinas did not intend for an exclusive focus on individual property rights. See *id.* (quoting AQUINAS, *supra* note 70, at II, II, Q. 66, art. 2). In the words of Aquinas, “[A] rich man does not act unlawfully if he anticipates someone in taking possession of something which at first was common property, and gives others a share: but he sins if he excludes others indiscriminately from using it . . . .” *Id.* at 236 (alterations in original). Pope John Paul II has spoken to this issue as well. In *Centesimus Annus*, the Holy Father talks about “the necessity and therefore the legitimacy of private ownership as well as the limits which are imposed on it . . . . God gave the earth to the whole human race for the sustenance of all its members, without excluding or favoring anyone.” *Id.* (citing Pope John Paul II, *Centesimus Annus* (May 1, 1991)).

<sup>79</sup> See *id.* at 57 (quoting AQUINAS, *supra* note 70, at I, II, Q. 96, art. 1).

erty rights against the state's interest in natural resource preservation. After balancing these factors, the means that produces the greatest amount of good for preserving human life would best fulfill Natural Law's demand for the "common good."<sup>80</sup>

It is not hard to justify the limited reach of the public trust doctrine in this respect. A rational person can see how the balancing of constitutional values would implicitly require protection of the navigable waterways. As the *Illinois Central* Court observed, economic exclusion from the navigable waterways would be detrimental to the state's overall commercial interests, and no private interest could conceivably outweigh such a significant economic need.<sup>81</sup> Natural Law itself recognizes that economic freedom is an essential element to realizing personal freedom, and a vast number of citizens have relied upon the freedom to navigate since the country's formative years.<sup>82</sup>

Taking into account the economic lifelines provided by the country's waterways, it is not surprising that the Court adopted the public trust doctrine as a matter of constitutional importance. The doctrine was not founded upon an abstract desire for increased public access, but rather a balanced common law protection of economic rights retained by the people.<sup>83</sup> Since "the ribbons of waterways tied the early

<sup>80</sup> See George P. Smith, II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB. L. REV. 658, 674-75 (1995) [hereinafter Smith, *Nuisance Law*] (linking the "Golden Rule" and ethical conduct to economic well-being and human happiness). See generally George P. Smith, II, *Re-validating the Doctrine of Anticipatory Nuisance*, 29 VT. L. REV. 687 (2005) (arguing that anticipatory nuisance actions provide another flexible environmental remedy to prevent waste and the degradation of the environment).

<sup>81</sup> See Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 454 (1892) ("The harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose . . . is a proposition that cannot be defended.") (emphasis added).

<sup>82</sup> See *supra* note 23 and accompanying text. However, it must be remembered that Natural Law does not view economic freedom as an absolute right. See RICE, *supra* note 8, at 237.

<sup>83</sup> See *Illinois Central*, 146 U.S. at 452. The Court in *Illinois Central* pointed out:

[t]hat the state holds the title to the lands under the navigable waters of Lake Michigan . . . by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. . . . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.



nation together—economically, politically, and symbolically,<sup>84</sup> the public trust doctrine flows naturally from the Constitution's articulated values under the Commerce Clause and the Ninth Amendment, and complements Natural Law's right to self-preservation.

### III. THE EXPANDING TRUST

While *Illinois Central Railroad Co. v. Illinois* and its succeeding cases established that the Constitution of the United States has "minimum requirements" set for the public trust, much of the modern focus remains on the coverage of the public trust beyond traditional navigable waterways.<sup>85</sup> In 1988, the Supreme Court of the United States took on the public trust concept directly. In *Phillips Petroleum Co. v. Mississippi*, the Supreme Court held that Mississippi received ownership of all its lands under waters that were subject to the "ebb and flow" rule, extending the reach of the public trust to the tidelands.<sup>86</sup> Although the case did not directly determine whether the public had a right to access these waters under the public trust doc-

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While some have suggested that the Court's decision in *Illinois Central* supports greater public access, regardless of the common law's economic reasoning, a careful reading uncovers a uniquely economic aspect of the public trust:

The interest of the people in the navigation of the waters and in *commerce* over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants.

*Id.* (emphasis added).

This language suggests that a minor infringement on the trust may be allowed to promote the economic development of the submerged land. Hence, the underlying purpose of the trust would seem to be economics. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 488 (1988) (O'Connor, J., dissenting) ("Because the fundamental purpose of the public trust is to protect commerce, the scope of the public trust should parallel the scope of federal admiralty jurisdiction.").

<sup>84</sup> See Wilkinson, *supra* note 1, at 438. The economic significance of the waterways should not be underestimated. See *id.* Public trust commentators have noted that the nation demanded cheap access to transportation and an end to sectional rivalries in order to preserve the Union and achieve economic welfare. *Id.* (quoting WILLIAM J. HULL & ROBERT W. HULL, *THE ORIGIN AND DEVELOPMENT OF THE WATERWAYS POLICY OF THE UNITED STATES* 8 (1967)).

<sup>85</sup> See ARCHER ET AL., *supra* note 38, at 13 ("[I]t is apparent that a state may increase the universe of public trust uses beyond the traditional areas of navigation, commerce, and fishing, as well as narrow its involvement by granting private rights in these lands."); see also Lum, *supra* note 17.

<sup>86</sup> 484 U.S. 469, 476 (1988).

trine, it held open the possibility that states had “unfettered discretion in administering the trust.”<sup>87</sup>

This case clearly warrants attention because of the implication that protection under the public trust could expand beyond its traditional scope.<sup>88</sup> In her dissenting opinion in *Phillips Petroleum*, Justice O’Connor put the matter in its proper perspective: “[T]his case presents an issue that we never have decided: whether a State holds in public trust all land underlying tidally influenced waters that are neither navigable themselves nor part of any navigable body of water.”<sup>89</sup> As Justice O’Connor’s opinion highlighted, the *Phillips Petroleum* decision could be problematic for the rational thinker: “American cases have developed the public trust doctrine in a way that is consistent with its common-law heritage. Our precedents explain that the public trust extends to navigable waterways because its fundamental purpose is to preserve them for common use for transportation.”<sup>90</sup>

In determining that the public trust should be expanded to reach those tidelands under an “ebb and flow” standard, most would hope that the *Phillips Petroleum* majority found suitable reasons for the expansion. Moreover, it would seem fitting for the Court to explain why its “tidal test” is superior to the traditional “navigability test” in supporting the underlying purpose of the public trust. The Court did mention that lands beneath the tidal waters may be used for fishing,<sup>91</sup> but failed to show how the limited public interest in fishing outweighed the traditional interests associated with private ownership.<sup>92</sup>

Instead of discussing the fundamental purpose of the public trust doctrine in protecting commercial and economic interests, the majority loosely stated that individual states have always enjoyed “the

<sup>87</sup> See Wilkinson, *supra* note 1, at 462.

<sup>88</sup> See ARCHER ET AL., *supra* note 38, at 12 (“The *Phillips Petroleum* decision may have significant implications for future exercises of state authority over public trust lands.”).

<sup>89</sup> *Phillips Petroleum*, 484 U.S. at 485 (O’Connor, J., dissenting). Justice O’Connor noted that the “Court has defined the public trust repeatedly in terms of navigability.” *Id.* at 485–86.

<sup>90</sup> *Id.* at 487. The dissent cites prior decisions as well. “It is, indeed, the susceptibility to use as highways of commerce which gives sanction to the public right of control over navigation upon [navigable waterways], and consequently to the exclusion of private ownership, either of the waters or the soils under them.” *Id.* at 488 (quoting *Packer v. Bird*, 137 U.S. 661, 667 (1891)).

<sup>91</sup> *Id.* at 476 (majority opinion).

<sup>92</sup> *Id.* This failure of showing is quite serious, as there is no precedent for the majority to hang its hat on. As Justice O’Connor properly warns, “[t]he Court’s decision departs from our precedents, and I fear that it may permit grave injustice to be done to innocent property holders in coastal States.” *Id.* at 494 (O’Connor, J., dissenting).

authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.”<sup>93</sup> Counter to common law reasoning, the decision seems “purely artificial and arbitrary as well as unjust.”<sup>94</sup>

The *Phillips Petroleum* recognition of an expanded trust could have profound implications. Not only could it be argued that a property owner must be restricted in using tidelands according to the wishes of the state, but the owner could also be wholly evicted from the area without warning, reasonable expectation, or compensation under the theory that a state holds the tidelands in trust for the people.<sup>95</sup> Constitutionally speaking, the notion that a state should control the scope of the trust is not too offensive so long as it accounts for competing constitutional values.<sup>96</sup>

Undoubtedly, the *Phillips Petroleum* case gave the public trust doctrine a troubling new role in expanding state police power. By recognizing that a state may define the extent of the lands that it holds in public trust, the Court ignored some important features of the original doctrine.

First, the Court empowered the states with the right to determine which submerged lands are reserved under the public trust, but failed to review the underlying principles of the doctrine’s constitutional

<sup>93</sup> See *id.* at 475 (majority opinion). The majority casually rejects the doctrine’s fundamental commercial purpose as being one of many interests that is established by the state in setting the limits for the public trust. See *id.* at 475–76. Ironically, none of the interests the Court refers to are mentioned in the doctrine’s founding case, *Illinois Central*. See generally 146 U.S. 387 (1892). At a minimum, the Court should balance the perceived public interest against those of private property owners when changing the scope of the doctrine.

<sup>94</sup> See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1851).

<sup>95</sup> See *Phillips Petroleum*, 484 U.S. at 493 (O’Connor, J., dissenting). The issue is not one of mere speculation. As the dissent notes:

“Due to this attempted expansion of the [public trust] doctrine, hundreds of properties in New Jersey have been taken and used for state purposes without compensating the record owners or lien holders; prior homeowners of many years are being threatened with loss of tide; prior grants and state deeds are being ignored; properties are being arbitrarily claimed and conveyed by the State to persons other than the record owners; and hundreds of cases remain pending and untried before the state courts awaiting processing with the National Resource Council.”

*Id.* (quoting Alfred A. Porro, Jr. & Lorraine S. Teleky, *Marshland Title Dilemma: A Tidal Phenomenon*, 3 SETON HALL L. REV. 323, 325–26 (1972)) (alteration in original).

<sup>96</sup> See generally ARCHER ET AL., *supra* note 38. “Before attempting to provide access to public trust areas or to protect public trust resources, however, a state must consider the prospective risk that its action will be challenged as a regulatory taking.” *Id.* at 82.

mandate.<sup>97</sup> Moreover, the *Phillips Petroleum* decision allows states to assign private interests more freely, which is a clear contradiction to the Court's philosophy in *Illinois Central* and a potential abuse in takings cases.<sup>98</sup> Finally, the decision opens the door to a vast expansion of state trust authority. As the *Phillips Petroleum* majority noted, "several of our prior decisions have recognized that the States have interests in lands beneath tidal waters which have nothing to do with navigation."<sup>99</sup>

If a state merely needs an interest to expand the limits of the trust, such as fishing or "creat[ing] land for urban expansion,"<sup>100</sup> what is to prevent a state from expanding the trust to avoid a takings claim in any situation?<sup>101</sup> Clearly, a state maintains a wide range of interests in all of its lands, and the potential for authoritative abuse is now greater.<sup>102</sup> It must be remembered that the term "public trust" provides an enormous shield against private interference—a private owner has no takings claim when he owns a "revocable title."<sup>103</sup>

Regardless of future court battles, one thing is certain—the scope of the public trust doctrine will be determined by the states. Like other doctrines, the public trust was created with "a set of minimum [constitutional] standards that can be expanded, but not contracted, by the states."<sup>104</sup> The nature and breadth of that expansion, however, is another matter for consideration.

<sup>97</sup> *Id.* at 50 n.111 ("As a matter of both sound public policy and legal precedent, the fate of the public trust doctrine is in any event placed in the state courts.")

<sup>98</sup> *Id.* at 57 ("The Supreme Court's ruling permits conveyance of ownership of public trust lands to private parties . . .").

<sup>99</sup> *Phillips Petroleum*, 484 U.S. at 476.

<sup>100</sup> *Id.*

<sup>101</sup> One can see the danger in allowing the states to expand the trust according to "interests" alone. Once the rationale for commerce or economics is taken away, there is little to hold the state back from asserting its "interests" in other lands that passed by title upon admission to the union.

<sup>102</sup> See James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 548 (1989). As one skeptic points out, the Supreme Court has never articulated constitutional environmental rights simply by linking the Constitution to such claims. See *id.* "The courts would [then be free to] argue that because these public rights are protected under the public trust doctrine, they predate any private claims of right." *Id.*

<sup>103</sup> See ROGER W. FINDLEY ET AL., *CASES AND MATERIALS ON ENVIRONMENTAL LAW* 921 (6th ed. 2003). Perhaps a showdown is yet to come. The Court's recent opinion in *Lucas v. South Carolina Coastal Council* offered strong support for takings claims, particularly when an owner is totally deprived of using his land. 505 U.S. 1003, 1027–31 (1992). However, it does not mention the public trust doctrine as a "categorical exception" to the deprivation rule. *Id.* at 1030–31 (listing relevant factors in applying the deprivation rule).

<sup>104</sup> See Wilkinson, *supra* note 1, at 464 n.164.

#### IV. EVALUATING STATE PUBLIC TRUST TRENDS

Now that there is wide recognition of the public trust doctrine, much of the modern focus lies with the states who have attempted “to expand the doctrine as it applies to the resources in their jurisdiction[s].”<sup>105</sup> In this respect, several states have contributed significantly to the doctrine’s application and expansion in recent years.<sup>106</sup> Although the public trust doctrine is a creature of the common law, its growth can be attributed to both legislative and judicial efforts.<sup>107</sup>

##### A. Legislative Perspective

Examining the public trust concept in the legislative arena is an important aspect of trust evaluation. As Justice Antonin Scalia notes, “the main business of government, and therefore of law, [is] legislative.”<sup>108</sup> The purpose of this section is to discuss the appropriate means for a legislature to approach the public trust concept.

Some states have incorporated public trust rights directly within the text of their state constitutions.<sup>109</sup> Article I, Section 27 of the Penn-

<sup>105</sup> Fred R. Jensen, Comment, *Developing the Future of Michigan Environmental Law: Expanding and Blending MEPA with the Public Trust*, 1989 DETROIT C. L. REV. 65, 69.

<sup>106</sup> ARCHER ET AL., *supra* note 38, at 15–17, 15 n.1. In recent years, more attention has been given to the landward extension of the public trust doctrine. See TARLOCK, *supra* note 33, § 8.20. With respect to the traditional doctrine, ten states have statutes that specifically address the seaward limit of the doctrine: Alabama, Alaska, Florida, Illinois, Louisiana, Maine, Massachusetts, Michigan, Mississippi, and Pennsylvania. ARCHER ET AL., *supra* note 38, at 15 n.1. Nine states have statutes that define the seaward limit of the doctrine somewhat vaguely: California, Delaware, Hawaii, Indiana, North Carolina, Ohio, South Carolina, and Wisconsin. *Id.* One state, California, has even undertaken public trust land mapping. *Id.* at 17–18. Case law has been developing under the doctrine as well. See *id.* at 16 n.1. There are twenty-two states that have applied the doctrine consistently to the three nautical mile limit, while five states have developed “less certain” case law with respect to the seaward limit. *Id.* For a comprehensive listing of state judicial postures on the ever expanding accommodations of the public trust, see TARLOCK, *supra* note 33, § 8.20.

<sup>107</sup> See ARCHER ET AL., *supra* note 38, at 16.

<sup>108</sup> SCALIA, *supra* note 9, at 13 (alteration in original) (quoting LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 590 (1973)).

<sup>109</sup> Article XI, Section 1, of the Hawaii Constitution states: “[A]ll public natural resources are held in trust by the State for the benefit of the people.” See David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust “Exceptions” and the (Mis)use of Investment-Backed Expectations*, 36 VAL. U. L. REV. 339, 358 (2002) (quoting HAW. CONST. art. XI, § 1). Water rights have been expressly granted in other state constitutions. See ALASKA CONST. art. VIII, § 3 (reserving the right of the people to use waters in their natural state); COLO. CONST. art. XVI, § 5 (declaring the “waters of every natural stream . . . to be the property of the public”); MONT. CONST. art. II, § 3 (providing for a “clean and healthful environment” as an “inalienable right”); N.D. CONST. art. XI, § 3 (stating that the waters are retained by the state for “min-

sylvania Constitution states that “[t]he people [of the state] have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”<sup>110</sup> Moreover, Pennsylvania has declared its “public natural resources are the common property of all the people, including generations yet to come,”<sup>111</sup> an extraordinary emphasis on natural resource preservation and extension of public resource rights.<sup>112</sup>

While this direct naming of broad public trust rights puts the Pennsylvania property owner on edge, the citizens of Pennsylvania can take some comfort knowing the state legislature passed this resource provision under its “traditional authority” to “set public policy on problematic uses of land.”<sup>113</sup> After all, there is something reassuring about the right of a populace to determine its destiny through the “nation’s democratically-driven processes.”<sup>114</sup>

However, it is equally important that legislatures utilizing the public trust doctrine do so within a set of principled limits.<sup>115</sup> Those

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ing, irrigating and manufacturing purposes”); WYO. CONST. art. VIII, § 1 (stating that water is the property of the state); see also Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 576 n.12 (1989) (elaborating on the various state statutory provisions). Additionally, some states use constitutional language that infers state ownership. For example, California proscribes obstructing public access to navigable waters. CAL. CONST. art. X, § 4.

<sup>110</sup> Andrew H. Shaw, Comment, *The Public Trust Doctrine: Protector of Pennsylvania’s Public Natural Resources?*, 9 DICK. J. ENVTL. L. & POL’Y 383, 389 (2000) (quoting PA. CONST. art. I, § 27).

<sup>111</sup> *Id.* (quoting PA. CONST. art. I, § 27).

<sup>112</sup> See Ryan, *supra* note 5, at 478 (“Article I, section 27 of the Pennsylvania State Constitution represents an ambitious modern vision of the ancient common law doctrine of the public trust . . .”).

<sup>113</sup> John A. Humbach, *“Taking” the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771, 772 (1993).

<sup>114</sup> *Id.* Other state legislatures have invoked the public trust doctrine as well. In Mississippi, the state legislature has described the public policy of the trust as follows:

“[p]reservation of the natural state of the public trust tidelands and their ecosystems and to prevent the despoliation and destruction of them, except where a specific alternation of specific public trust tidelands would serve a higher public interest in compliance with the public purposes of the public trust in which such tidelands are held.”

Columbia Land Dev., LLC v. Sec’y of State, 868 So.2d 1006, 1012 (Miss. 2004) (quoting MISS. CODE ANN. § 29-15-3 (Rev. 2000) (alterations in original)).

<sup>115</sup> See Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 275 (1992). In arguing for an economic approach, Professor Lloyd R. Cohen points out why principled limits are needed with respect to the public trust doctrine:

Any body of law will be fuzzy around the edges; that [cannot] be helped. But the notion of an evolving unbounded set of communal rights—whether

limits are established within the laws of human nature.<sup>116</sup> Such human nature is consistent with the constitutional values that respect both individual rights and public benefit, and thus show a definite grounding in the tenets of Natural Law.<sup>117</sup>

In setting appropriate legislative limits, Natural Law provides a sound philosophy for determining what is best for the “common good.”<sup>118</sup> Recognizing that economic freedom is a key to personal freedom, but that all human beings have a right to “part of God’s gift,” Natural Law supports the balancing perspective between property rights and public rights.<sup>119</sup> Moreover, Natural Law focuses on the welfare of the human person and how an integrated “society of [human] persons” can improve the efficiency and productivity of land use that preserves human life.<sup>120</sup>

When choosing resources that should be protected under the public trust doctrine, legislatures should proceed cautiously and consider all factors affecting both individual property owners and the public at large. If such a refined balance is achieved, public trust preservation is likely to prove “a more amenable result,” and the constitutionality of the action will not likely be challenged.<sup>121</sup>

But what is the deciding element at the end of the day? In the spirit of the original doctrine and the Constitution’s Natural Law principles, it means that public preservation of a natural resource can be made insofar as it retains an economic benefit for the greater common good.<sup>122</sup> Indeed, a public trust preservation that increases profit can

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they are constitutional or common law, procedural or substantive, in all public and private property strips clarity, certainty, and predictability from the very core of the public trust doctrine.

*Id.*

<sup>116</sup> See *id.* The public trust doctrine should be seen as granting equitable relief in three cases: where inappropriate attempts are made by governmental agencies to sell or alienate public trust resources to private individuals; where governmental agencies attempt to shift or divert a trust resource from one specific public use to a new and inappropriate one; and where a course of agency action is being pursued in derogation of the trust use which has the effect of either destroying the resource or giving rise to its pollution. ZYGMUNT J. B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW & SOCIETY 26–27 (3d ed. 2004).

<sup>117</sup> See KMIEC & PRESSER, *supra* note 69, at 121–71.

<sup>118</sup> See RICE, *supra* note 8, at 46.

<sup>119</sup> *Id.* at 236–37 (quoting Pope John Paul II, *supra* note 78, at Nos. 30, 31).

<sup>120</sup> *Id.* at 242 (quoting Pope John Paul II, *Laborem Exercens*, No. 43 (1981)).

<sup>121</sup> See Humbach, *supra* note 113, at 780.

<sup>122</sup> See RICE, *supra* note 8, at 238 (quoting Pope John Paul II, *supra* note 120, at No.35).

better serve a society that endeavors to best “satisfy their basic needs” while simultaneously serving the whole of humanity.<sup>123</sup>

However, the public trust debate cannot rest entirely upon finding natural resources to protect. If that were the case, environmental advocates could simply accumulate any number of arguments that would provide support for an economic benefit.<sup>124</sup>

A proper balancing equation also requires an evaluation of the effects to be endured by the individual property owner. As St. Thomas Aquinas observed, it is perfectly “lawful for man to possess property.”<sup>125</sup> These aspects of personal ownership are vital for several reasons. First, people are more careful and efficient when procuring for themselves than for the community at large.<sup>126</sup> Second, “human affairs are conducted in [a] more orderly fashion” when people take charge of their own property.<sup>127</sup> Finally, “a more peaceful state” of affairs is likely to endure when people are secure in their private property.<sup>128</sup>

Aquinas wisely proffered that “human agreement” on these competing public and private issues must come from the positive law.<sup>129</sup> Accordingly, the best application of the public trust in the legislative arena occurs when decisions are made to benefit the common good through longstanding principles of human reasoning.

Natural Law reasoning is not difficult in application. The Natural Law approach recognizes that the preservation of human life is good.<sup>130</sup> In support of human life, “God gave the earth to the whole human race for the sustenance of all its members, without excluding or favoring anyone . . . .”<sup>131</sup> The conquering of the earth by human beings is the means by which they provide a “fitting home” and “makes part of

<sup>123</sup> *Id.* (quoting Pope John Paul II, *supra* note 120, at No. 35).

<sup>124</sup> It may be possible to support any environmental cause with an economic argument. See Cohen, *supra* note 115, at 273.

In many areas of economic life it is easy to contrive a theory of why a particular market failure or political failure will result. However, if one is clever enough, one can also contrive a theory of precisely why the opposite failure is likely to occur. Each can seem, in isolation, a persuasive explanation. If supported by empirical evidence it can appear as ordained truth.

*Id.*

<sup>125</sup> RICE, *supra* note 8, at 235 (quoting AQUINAS, *supra* note 70, at II, II, Q. 66, art.1).

<sup>126</sup> *Id.* (quoting AQUINAS, *supra* note 70, at II, II, Q. 66, art.1).

<sup>127</sup> *Id.* (quoting AQUINAS, *supra* note 70, at II, II, Q. 66, art.1).

<sup>128</sup> *Id.* (quoting AQUINAS, *supra* note 70, at II, II, Q. 66, art.1).

<sup>129</sup> *Id.* (quoting AQUINAS, *supra* note 70, at II, II, Q. 66, art.1).

<sup>130</sup> See *supra* text accompanying note 77.

<sup>131</sup> See RICE, *supra* note 8, at 236 (quoting Pope John Paul II, *supra* note 78, at Nos. 30, 31).



the earth his own.”<sup>132</sup> At the same time, human beings should not obstruct others from sharing in “part of God’s gift.”<sup>133</sup>

As discussed before, Natural Law reasoning can be used to justify the limited application of the public trust doctrine to watercourses.<sup>134</sup> Just as God’s earth was provided for the sustenance of its members, not even the private property owner can justify controlling the navigable waterways to the economic detriment of so many people.<sup>135</sup> The public trust doctrine is based upon the principled reasoning that protecting the vital economic interests of the community outweighs any barrier to free commerce.<sup>136</sup> Similarly, any legislative enactment that sets aside a public trust resource should take a balancing approach.

It is hard to imagine another natural resource that supports as many people in such a significant way.<sup>137</sup> More importantly, what principle could justify the impairment of private landowners’ rights to efficiently develop their own portion of God’s earth?<sup>138</sup> In supporting life, Natural Law advocates find that “[t]he right to own and dispose of property” is a basic human right.<sup>139</sup> Any limitations will have to be

<sup>132</sup> *Id.* (quoting Pope John Paul II, *supra* note 78, at Nos. 30, 31).

<sup>133</sup> *Id.* (quoting Pope John Paul II, *supra* note 78, at Nos. 30, 31). The public trust, embodying as it does, fundamental conservative principles, seeks to recognize that “[t]he ultimate measure of a society” is to be found outside “physical needs for survival” and should include “the full quality of its people’s lives, and the legacy of ideas, accomplishments, resources, and potentials it seeks to pass on to successor generations.” PLATER ET AL., *supra* note 116, at 102.

<sup>134</sup> *See supra* Part II.

<sup>135</sup> *See* Yannacone, *supra* note 37, at 653.

<sup>136</sup> Even Pope John Paul II recognizes that “the free market is the most effective instrument for utilizing resources and responding to needs.” RICE, *supra* note 8, at 237 (quoting Pope John Paul II, *supra* note 78, at Nos. 30, 31).

<sup>137</sup> While environmental activists may argue that the demand for greater environmental protection over the years demonstrates a greater concern for resource preservation, it does not follow that these values should be preserved as communal property rights. *See* Cohen, *supra* note 115, at 255. When considering the opportunity costs associated with inhibiting commercial development, it is hard to imagine that the continued existence of the waterfowl or preservation of wetlands will outweigh the cost of economic development. *See id.* “In a well functioning market economy, property will usually be put to its most valuable use because that is what is most profitable to the property owner.” *Id.*

<sup>138</sup> *Id.* at 261. It is imperative to realize the cost of impairing the private landowner. As Professor Cohen notes, the uncertainties created by an uninhibited and unpredictable public trust expansion “fall[s] squarely on the shoulders of the property owner.” *Id.* The property owner’s ability to predict the market also creates an incentive for him to anticipate future events and use his property in a productive manner. *See id.* “[I]n that anticipation he is serving the community at large.” *Id.* Unlike watercourse application, applying the public trust to other natural resources is likely to “make property ownership more risky and thereby diminish the value of investing in property in ways that increase its value.” *Id.*

<sup>139</sup> *See* RICE, *supra* note 8, at 237.

established through sound principles that outweigh this right. Of course, this Article has argued that the most logical principle is economics.<sup>140</sup>

Legislative public trust application outside the watercourses, however, may be economically feasible or reasonable. While public trust legislation may prove controversial outside the traditional watercourse context, there are still creative ways to invoke a public trust concept that is congruous with its economic roots.

Land trusts are being utilized increasingly to provide federal tax breaks to developers of private property.<sup>141</sup> These are not the traditional public trust mandates, however, but rather are legislative incentives to increase resource preservation. Commonly referred to as "conservation easements," landowners agree to restrict development on their land and "donate" the easement to a nonprofit land trust or a government agency.<sup>142</sup> In exchange, the landowner is afforded a tax break to compensate "for the reduction in the land's market value."<sup>143</sup>

These "land trust" initiatives may not only prove to be economically sound, but also to fit squarely within the original public trust doctrine's constitutional values of respecting both "*jus publicum*" and "*jus privatum*" rights.<sup>144</sup> The land trust sets aside an ecological interest for the benefit of the public at large.<sup>145</sup> In most cases, the conservation easement results in preserving wildlife and natural landscape while preventing urban sprawl.<sup>146</sup> At the same time, the burden of the land trust is not forced upon the unwilling landowner.

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<sup>140</sup> It has been observed that, "[l]aw is forward looking' and 'pragmatic' and should be as but a servant of human needs. One of the most basic human needs is to be secure economically; for from that security comes an ability to purchase goods in the market place (e.g., food, clothing, shelter) which are necessary to sustain life at a level of enjoyment and thus promote individual happiness." See Smith, *Nuisance Law*, *supra* note 80, at 739.

<sup>141</sup> Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation; Donors Reap Tax Incentive by Giving to Land Trusts, but Critics Fear Abuse of System*, WASH. POST, Dec. 21, 2003, at A1.

<sup>142</sup> *Id.* at A20. In turn, these organizations certify that the restrictions are "meaningful and provide some public benefit, such as preserving open space or protecting wildlife." *Id.* at A1.

<sup>143</sup> *Id.*

<sup>144</sup> See *supra* Part II.

<sup>145</sup> See Stephens & Ottaway, *supra* note 141, at A20. Many conservationists are reporting positive results. This initiative has been credited with being the "fastest-growing arm of the environmental movement, fueling a boom in land conservation and helping to protect more than 6 million acres nationwide." *Id.*

<sup>146</sup> *Id.*

While such trust applications may seem limited in nature, they could provide even greater benefits than a mandatory trust. Not only can land trusts increase the amount of resources preserved on behalf of the public, but they also can increase the profitability margin that serves the community. Some researchers believe that the easements could increase property values by making the “neighborhoods more exclusive and scenic, with less density.”<sup>147</sup>

This creative approach is anchored firmly within the principled reasons of the public trust doctrine—preserving a natural resource to provide an economic benefit to the greatest number of people. At the same time, it respects the Natural Law balancing approach toward the common good. Land trusts increase the profitability of the whole by respecting the rights of the individual. In the end, it might just achieve Aquinas’s ideal of a harmonized community.

### B. *Environmental Enhancement*

The public trust doctrine—far from being curtailed—should be seen as an “affirmative instrument,” linking environmental protection of the biotic community with resource utilization.<sup>148</sup> This linkage will perhaps validate what Dworkin termed an “equality of resources.”<sup>149</sup> Heretofore, the central focus of the American version of the doctrine has been broad public access to multiple natural resources. These resources have expanded greatly from protecting shorelines and waters to include boating, swimming, fishing, hunting, preserving wildlife habitat, undertaking scientific studies, aesthetic beauty, maintaining ecological integrity, and retaining open spaces, which are all seen today as part of “legitimate public expectations.”<sup>150</sup> Depending upon viewpoints, the doctrine’s major advantage, or disadvantage, is its “immunity . . . from Fifth Amendment ‘takings’ claims.”<sup>151</sup> This becomes an especially complex and volatile issue upon realizing that “fully one-third of public trust property is in private rather than public hands, [and that] private

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<sup>147</sup> *Id.*

<sup>148</sup> Harry R. Bader, *Anteaus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law*, 19 B.C. ENVTL. AFF. L. REV. 749, 750 (1992).

<sup>149</sup> See JOHN E. ROEMER, *THEORIES OF DISTRIBUTIVE JUSTICE* 245–46 (1996). See generally Sax, *supra* note 19.

<sup>150</sup> Bader, *supra* note 148, at 751, 753; see also Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 649 (1986) (detailing a number of other applications including “archaeological remains, and even a downtown area”).

<sup>151</sup> Bader, *supra* note 148, at 754. See generally Callies & Breemer, *supra* note 109, at 355–61.

property rights also exist in many such lands and waters.”<sup>152</sup> The core issue then becomes the extent to which private property rights are either compromised or eliminated altogether without any Fifth Amendment compensation—all to satisfy the voracious appetite of the contemporary public trust doctrine.<sup>153</sup>

Seen as a tool to maintain the health of natural systems rather than as a general environmental tool, a “new,” revised public trust doctrine would require an initial determination by a reviewing court as to whether the health of a specific ecological system would be impaired by a particular activity. This inquiry would be met by surveying the impact on the diversity and the stability of the threatened biotic community. Accordingly, the planned use would be deemed judicially acceptable, if found to present little, if any, threat to the biotic community. Additionally, the proposed project activity would have to meet the statutory conditions imposed by the Clean Water Act,<sup>154</sup> the National Environmental Policy Act,<sup>155</sup> and the Administrative Procedure Act.<sup>156</sup> These statutory considerations would be independent of the public trust doctrine’s common law principles.

Conversely, if the activity were judicially determined to be a threat to environmental health, it would be either modified or enjoined. In making such a determination, no balancing of social policies or cost benefit analyses would be allowed. The “new” doctrine would be recognized as “an inviolable shield protecting the environment.”<sup>157</sup> However, making this an effective judicial inquiry would require that the court evaluate the cumulative and “synergistic effects” of any proposed activity in light of other long-term projects.<sup>158</sup> The uncertainty that would unavoidably be associated with such subjective assessments of this nature perhaps dooms the notion of expanding the public trust doctrine under this analysis.

<sup>152</sup> Callies & Breemer, *supra* note 109, at 355.

<sup>153</sup> *Id.* See generally Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

<sup>154</sup> 33 U.S.C. §§ 1251–1387 (2000 & West Supp. 2005).

<sup>155</sup> 42 U.S.C. §§ 4321–4370(c) (2000).

<sup>156</sup> 5 U.S.C. §§ 551–559 (2000 & West Supp. 2005).

<sup>157</sup> Bader, *supra* note 148, at 757–58.

<sup>158</sup> *Id.* at 758; see William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 452 (1997) (suggesting the need for a process justification for the judiciary in cases of this nature as well as a process-based methodology for implementing such a review).

### C. *The Judicial Perspective*

The most expansive development of the public trust doctrine will likely occur in state courts.<sup>159</sup> Given the U.S. Supreme Court's deference to the states for controlling the scope of the trust in *Phillips Petroleum v. Mississippi*, it is not surprising that a number of state courts have taken the initiative to expand constitutional guarantees.<sup>160</sup> While state court opinions do not always indicate the source of expanding trust law, many have cited *Illinois Central Railroad Co. v. Illinois* and its tenet for creating public access to the watercourses as "a rule of general applicability."<sup>161</sup> This standard is understood as having broad parameters, allowing states an incredible leeway for fashioning their own individual bodies of trust law.<sup>162</sup>

Several western states have pursued actively the idea, as water rights beyond the traditional watercourses have been declared public trust resources through judicial opinions and legislative declaration.<sup>163</sup> The Arizona Supreme Court has declared that water rights are a protected resource under the state constitution and cannot be abdicated through legislative action.<sup>164</sup> The Montana Supreme Court has relied on the public trust doctrine to guarantee access to all waters that may be used recreationally.<sup>165</sup> Finally, the Washington Supreme Court has extended its protection of trust resources to include "tidelands, shorelands and beds of navigable waters."<sup>166</sup>

The expansion of the public trust has not been limited to mere water resources. In New Jersey, courts have cited the public trust doctrine as a means of extending the public protection of dry-sand areas.<sup>167</sup> In *Matthews v. Bay Head Improvement Ass'n*, the Supreme Court of New Jersey recognized that swimmers had a right to passage and access to upland sands so that they could enjoy the traditional use of the ocean and foreshore.<sup>168</sup>

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<sup>159</sup> See Cathy J. Lewis, *The Timid Approach of the Federal Courts to the Public Trust Doctrine: Justified Reluctance or Dereliction of Duty?*, 19 PUB. LAND & RESOURCES L. REV. 51, 55-60 (1998); *supra* Part III.

<sup>160</sup> See Wilkinson, *supra* note 1, at 462, 463 n.163.

<sup>161</sup> *Id.* at 463 n.163.

<sup>162</sup> *Id.* at 461-62.

<sup>163</sup> See Blumm, *supra* note 109, at 599-600.

<sup>164</sup> See Stephen D. Osborne et al., *Laws Governing Recreational Access to Waters of the Columbia Basin: A Survey and Analysis*, 33 ENVTL. L. 399, 429 (2003).

<sup>165</sup> See *id.* at 435.

<sup>166</sup> *Id.* at 439-40.

<sup>167</sup> Callies & Breemer, *supra* note 109, at 359-60.

<sup>168</sup> 471 A.2d 355, 363-66 (N.J. 1984).

The Supreme Court of California has become especially creative and expanded the public trust doctrine to include "food and habitat for fish and wildlife, open space, and use for scientific study."<sup>169</sup> This is a significant departure from the reasoning of traditional public trust application, as the California precedent recognizes protection for "environmental resources in their own right, not simply because humans use them."<sup>170</sup>

Much of the expansion regarding the public trust can be attributed to changing perceptions regarding property and the state police power.<sup>171</sup> Assigning responsibility to the states for determining the scope of the public trust is not necessarily a bad idea, so long as state judges are influenced by sound reasoning and balanced decisionmaking.<sup>172</sup> In its constructive role, Natural Law's rational thinking can benefit court decisions by serving as "a reasonable guide to principles and general objectives" that promote the "common good" through a balanced approach, much like the operation of common law.<sup>173</sup>

Even the Supreme Court's most recent takings cases have emphasized that state common law is the best means for determining the proper balance between individual property rights and police power because "state courts are in the best position to monitor the evolution of these two concepts."<sup>174</sup> Be that as it may, judges have a specific responsibility to linking their extensions of the public trust doctrine to principled economic reasoning.<sup>175</sup> Without it, they would not be abiding by a "precedent-bound common-law system."<sup>176</sup> As the Natural Law demonstrates, such systems provide the stability, predictability, and

<sup>169</sup> See Deborah Beaumont Schmidt, *The Public Trust Doctrine in Montana: Conflict at the Headwaters*, 19 ENVTL. L. 675, 693 (1989) (citing *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971)).

<sup>170</sup> *Id.*

<sup>171</sup> See Kmiec, *supra* note 61, at 147.

<sup>172</sup> See *supra* note 96 and accompanying text.

<sup>173</sup> See RICE, *supra* note 8, at 55.

<sup>174</sup> Kmiec, *supra* note 61, at 154. Two state courts—as early as 1957—presented a construct or, at least, a *vade mecum* for state judicial forays into public trust emanations, where diversions in use of public trust lands are validated when: they are supervised and controlled by public bodies; the areas in question are both devoted and open to the public; in comparing the area of original use, the diminished use is smaller than the entirety; the public uses within the original area are neither impaired significantly nor destroyed; and "the disappointment of those wanting to use the area of new use for former purposes was negligible when compared to the greater convenience to be afforded those members of the public using the new facility." *Paepke v. Pub. Bldg. Comm'n*, 263 N.E.2d 11, 19 (Ill. 1970); see *State v. Pub. Serv. Comm'n*, 81 N.W.2d 71, 73–74 (Wis. 1957).

<sup>175</sup> See *supra* Part II.

<sup>176</sup> See SCALIA, *supra* note 9, at 7.

efficiency that are essential to promoting the greatest amount of human happiness.

Certainly the common law may be an appropriate method for determining specific trust applications because of the “common sense of [its] ancient (yet dynamic) principle[s].”<sup>177</sup> However, state courts and legislatures should be guided by exactly that—common sense principles that were known to the Framers. Just as the public trust doctrine was borne of a principled economic purpose to promote the common good, so too should it grow within the natural bounds of that purpose. If the public trust doctrine pushes the limits of this reason, it may find itself in the middle of a “takings puzzle.”<sup>178</sup>

#### D. *New, Unbridled Expansion or Reasoned Application?*

On April 23, 2004, the U.S. Court of Appeals for the Seventh Circuit held in *United States v. Snook* that violations of the public trust—recognized normally as applicable to violations of environmental law by public officials—could be broadened to justify increased sentences for industry officials.<sup>179</sup> More specifically, Ronald Snook—at various times in his career classified as an “Environmental Manager” or “Environmental Specialist”—was found guilty of violating the Clean Water Act<sup>180</sup> and of concealing material information.<sup>181</sup>

As Environmental Manager at Clark Refining and Marketing, Inc., a petroleum refinery in Blue Island, Illinois, Snook was responsible for maintaining the refinery’s compliance with pertinent environmental regulations and managing its waste water treatment system.<sup>182</sup> A local waste control ordinance prohibited the discharge of various pollutants with stated levels of concentration into a sewer system which, in turn, flowed into a municipal water treatment plant.<sup>183</sup> It also required dischargers, such as Clark Refining, to submit reports of their self-monitoring compliance activities.<sup>184</sup> Snook and an associate were found guilty by a jury of not only selectively reporting testing

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<sup>177</sup> Kmiec, *supra* note 61, at 158.

<sup>178</sup> See generally *id.* at 147–159.

<sup>179</sup> 366 F.3d 439, 445–46 (7th Cir. 2004).

<sup>180</sup> *Id.* at 441–42 (citing 18 U.S.C. § 371; 33 U.S.C. §§ 1317(d), 1319(c)(2)(A)).

<sup>181</sup> *Id.* at 442 (citing 18 U.S.C. § 1001(a)(1)).

<sup>182</sup> *Id.*

<sup>183</sup> See *id.*

<sup>184</sup> *Id.*

results of their discharges, but also—and perhaps more importantly—of the numerous violations that occurred on several occasions.<sup>185</sup>

In his appeal, Snook argued that any position of trust which he held was not to the local municipality where the wastewater facility was situated nor to the public it served; rather, it was to Clark Refining.<sup>186</sup> The court rejected this contention altogether and stated, “[t]he Clean Water Act is public-welfare legislation and the victims of violations are the public.”<sup>187</sup> Further, the court stated that “the regulations here apply to matters that directly and significantly affect the public’s health and safety.”<sup>188</sup>

Similar current cases have strengthened and, indeed, enhanced the mandate of *Snook*,<sup>189</sup> leading to the conclusion that a trend which elevates every environmental violation as an abuse of the public trust doctrine is developing. This, in turn, may be taken to mean that other health and welfare statutes will be seen as affecting public health and safety.

In a strong dissent to the majority opinion in *Snook*, Circuit Judge Coffey emphasized several points to curtail the forward thrust of the public trust doctrine. First, Snook was not a government employee, but rather a private one selected by his employer, Clark Refining. Second, because of this relationship, it was his employer, “not the public, who reposed its confidence in Snook such that a fiduciary relationship may have been created,”<sup>190</sup> and while perhaps trusting Snook to conform to existing environmental regulations, “the public did not entrust Snook (in the sense of placing a fiduciary obligation on Snook) with the duty of protecting its health and welfare interests in the environment.”<sup>191</sup> Third, if any fiduciary duty existed, it was to be found in municipal or district officers—and not with either Clark Refining or Snook—whose responsibility it was to ensure compliance with water regulations by inspections.<sup>192</sup> Even though an employee of

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<sup>185</sup> *Snook*, 366 F.3d at 442.

<sup>186</sup> *Id.* at 445.

<sup>187</sup> *Id.* (citing *United States v. Technic Servs., Inc.*, 314 F.3d 1031, 1049 (9th Cir. 2002)).

<sup>188</sup> *Id.* at 446.

<sup>189</sup> See, e.g., *United States v. Perez*, 366 F.3d 1178, 1185–86 (11th Cir. 2004); *Technic Servs.*, 314 F.3d at 1049–52; *United States v. Gonzalez-Alvarez*, 277 F.3d 73, 81–82 (1st Cir. 2002).

<sup>190</sup> *Snook*, 366 F.3d at 447–48 (emphasis omitted).

<sup>191</sup> *Id.* at 448 (emphasis omitted).

<sup>192</sup> *Id.* at 450 (citing *United States v. Kuhn*, 345 F.3d 431, 437 (6th Cir. 2003); *United States v. White*, 270 F.3d 356, 372–73 (6th Cir. 2001)).



a private corporation may act in a manner that significantly harms the public, as in *Snook*, it is absurd to conclude that that an employee is acting as a fiduciary or agent of the public.<sup>193</sup>

Judge Coffey's dissent is, by far, the more reasoned approach to follow in public trust cases. If unfettered judicial discretion is not curbed, then—absent strict legislative direction—what was, at best, always seen as a penumbral emanation within the Natural Law will rise to an unjustified level of legal recognition and a usurpation of state action. If legislatures do not act decisively in setting limits for applications of the public trust doctrine, this lethargy will surely result in further unbridled expansions of the doctrine by the judiciary—bereft of its foundational framework in the Natural Law, a framework tied to the realization that individual property rights should only be compromised when the “common good” is truly advanced.

The reality and “application” of the *Snook* court for attaining an equilibrium between state legislative action and judicial interpretation is very dubious, because it is always the judiciary which not only determines the doctrine's content, but also applies it to the facts of each case and ultimately enforces it against the legislature and state administrative agencies.<sup>194</sup> “The legislature has no power to abolish or modify the doctrine, either across the board or in particular situations. Consequently, the judiciary has the final say on the validity of legislative and administrative grants of public trust resources into private ownership.”<sup>195</sup>

The principle of majoritarian democracy is violated by this judicial posture, since the freedom of state legislatures to determine state policy “except when its choices run afoul of the state constitution, the federal constitution, or other federal law” is not only compromised, but actually destroyed.<sup>196</sup> Unfortunately, there is no settled answer or formula to mapping the validity of the judicial source for action here which empowers the courts “to reject legislative decisions regarding private grants of public trust resources.”<sup>197</sup> Thus, it is incumbent upon the courts to impose judicial self-restraint and follow the canons of strict construction which should, in turn, give rise to a framework for principled decisionmaking which is tied to a reasonable, common-sense balancing of the issues. The tenets of Natural Law can be of

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<sup>193</sup> *Id.* at 451.

<sup>194</sup> See Grant, *supra* note 34, at 849–50.

<sup>195</sup> *Id.* at 850.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

great value in illuminating the judicial pathway to achieve the point of equilibrium in the balancing test.

### E. *Tempering the Future*

While a level of skepticism may well persist regarding the contemporary value of Natural Law theory—especially with the recent push for expansive trust rights under the rubric of a flexible Constitution<sup>198</sup>—it is submitted here that the theory has a level of useful application in future public trust cases. Even given the recent deferral by the Supreme Court to state jurisdictions in deciding disputations regarding property issues,<sup>199</sup> it remains highly unlikely that the Supreme Court will allow the public trust doctrine to “emerge[] from the water and march across the land.”<sup>200</sup>

No matter what environmental activists claim regarding the growth of the doctrine, the road to a broader public trust will be tempered by competing property values that are mentioned specifically within the text of the Constitution.<sup>201</sup> By referencing the logic of these competing values, the Natural Law originalist may successfully defend the public trust stance.

In *Lucas v. South Carolina Coastal Council*, the Supreme Court announced some constitutional limits that could inhibit the public trust application.<sup>202</sup> Specifically, the Court stated that governmental restrictions that seek validation upon the “‘background principles’ exception ‘cannot be newly legislated or decreed.’”<sup>203</sup> This means that newly developed policies of state public trust cannot find validity through mere judicial or legislative declaration.<sup>204</sup> “Yet *Lucas* and *Palazzolo* [*v. Rhode Island*] make clear that the dispositive question is whether the land use restriction itself is part of shared and traditional limitations or, instead, a novel interpretation of state law.”<sup>205</sup>

Additionally, the *Lucas* Court enunciated a working principle which holds that any elimination of all beneficial use of land can be

<sup>198</sup> See Hunter, *supra* note 6, at 383.

<sup>199</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).

<sup>200</sup> See Cohen, *supra* note 115, at 256.

<sup>201</sup> See ARCHER ET AL., *supra* note 38, at 73–84.

<sup>202</sup> 505 U.S. at 1029.

<sup>203</sup> Callies & Breemer, *supra* note 109, at 375 (quoting *Lucas*, 505 U.S. at 1029); see Joseph L. Sax, *Rights That “Inhere in the Title Itself”: The Impact of the Lucas Case on Western Water Law*, 26 LOY. L.A. L. REV. 943, 943 (1993).

<sup>204</sup> See Callies & Breemer, *supra* note 109, at 375.

<sup>205</sup> *Id.*

defended only upon “an objectively reasonable application of relevant precedents” in the jurisdiction where the land is situated.<sup>206</sup> The Natural Law originalist can accept this premise because the Natural Law philosophy is anchored in history, precedent, economic reasoning, and a balancing of interests.<sup>207</sup>

The 2003 case of *Champlain’s Realty Associates v. Tillson*<sup>208</sup> is illustrative of a modern and reasoned application of the public trust doctrine. An owner of a Rhode Island marina was subjected to a regulation that prevented the docking of commercial ferries.<sup>209</sup> Passed by the Town of New Shoreham, the regulations directed that a cease and desist order be issued against the local owner of the marina.<sup>210</sup>

Referencing the long history of the doctrine, a Rhode Island Superior Court declared the local restrictive ordinance invalid and announced that the state agency was responsible, primarily for ensuring that the waters of the state are utilized in the most appropriate and beneficial fashion for the general public.<sup>211</sup>

In *Champlain*, the use of the public trust doctrine falls directly within its own reasonable application by supporting the state’s right to protect commercial interests in a valuable natural resource.<sup>212</sup> In addition, by relying upon the historical underpinnings of the doctrine, the *Champlain* court stabilized further the very concept of the public trust and tied it to a firm foundation in principles of Natural Law. This, in turn, arguably supports the ultimate conclusion that when *not fol-*

<sup>206</sup> *Id.* (quoting *Lucas*, 505 U.S. at 1032 n.18) (emphasis omitted). *But see* Daniel A. Nussbaum, Note, *McQueen v. South Carolina Coastal Council: Presenting the Question of the Relevance of the Public Trust Doctrine to the Total Regulatory Takings Analysis*, 53 S.C. L. REV. 509 (2002) (arguing that the state can successfully defend a regulatory takings claim by utilizing the public trust doctrine).

<sup>207</sup> The Court emphasizes that property law regulations, no matter what their origin, must be reasonable in their application and established precedents. *See Callies & Bremer, supra* note 109, at 375. In other words, a state’s declaration of public trust will not attain automatic immunity. *See id.*

<sup>208</sup> *Champlain’s Realty Assocs. v. Tillson*, C.A. No. 01-0330, 2001 R.I. Super. LEXIS 78 (July 10, 2001).

<sup>209</sup> *Id.* at \*2–4.

<sup>210</sup> *Id.* at \*3–4.

<sup>211</sup> *See id.* at \*19–20. Earlier, the Rhode Island Supreme Court determined—consistent with past precedent—that “[t]he public-trust doctrine holds that the state holds title to all land below the high-water mark in a proprietary capacity for the benefit of the public.” *Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1041 (R.I. 1995). By benefiting the public, the doctrine, in turn, “preserves the public rights of fishery, commerce, and navigation in these waters.” *Id.* As well, each state must apply its own public trust doctrine without regard to positions taken by other sister states. *Id.* at 1042; *see Hall v. Nascimento*, 594 A.2d 874, 876–78 (R.I. 1991).

<sup>212</sup> *See Champlain*, 2001 R.I. Super. LEXIS 78 at \*8–15.

lowed, any substitute legal analysis for the Natural Law framework will prove to be an “unstable . . . base on which to erect an edifice of useful positive law.”<sup>213</sup>

### CONCLUSION

The public trust is an ancient concept that has retained validity throughout the centuries. In American constitutional law, the public trust doctrine emerged from the idea that commercially protected interests enjoyed the right to free navigation on the watercourses.<sup>214</sup> While the original doctrine was somewhat simplistic, it was rooted in ancient values and inherited from a line of principled economic reasoning. This critical reasoning can be credited in part to the Natural Law foundation of the American Constitution.<sup>215</sup>

Regardless of whether the public trust is made law by the legislature, exists within the common law or is structured and enlightened in application by the tenets of Natural Law, the doctrine has an impact. The doctrine must be seen as representing and giving legal force to innumerable “unmarketized present and future social values” that are oftentimes ignored or overlooked in daily life—values that shape the total life experience.<sup>216</sup>

Although the common law affecting “rivers, lakes, oceans, dunes, air, streams (surface and subterranean), [and] beaches,” for example, may not be seen as the same law affecting other “typical environmental object[s],” some of these resources come within the protection of the public trust doctrine.<sup>217</sup> As such, they could be developed in such a manner to achieve a broad ranging environmental protective base.<sup>218</sup> Liberalizing legal standing for offenses against environmental resources would have the added effect of supplementing conventional moralities<sup>219</sup> by engrafting an environmental ethic onto the public trust doctrine. Accordingly, this reconstruction could well be

<sup>213</sup> See Cohen, *supra* note 115, at 240.

<sup>214</sup> See generally SMITH, *supra* note 17; Sax, *supra* note 19.

<sup>215</sup> See *supra* notes 50–81 and accompanying text; see also Brennan, *supra* note 43, at 971–72.

<sup>216</sup> PLATER ET AL., *supra* note 116, at 102.

<sup>217</sup> CHRISTOPHER D. STONE, *Should Trees Have Standing? Towards Legal Rights for Natural Objects*, in *SHOULD TREES HAVE STANDING? AND OTHER ESSAYS IN LAW, MORALS AND THE ENVIRONMENT* 1, 11–12 (1996).

<sup>218</sup> See *id.* But see Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 *FORDHAM ENVTL. L.J.* 1 (1998).

<sup>219</sup> CHRISTOPHER D. STONE, *An Environmental Ethic for the Twenty-First Century*, in *SHOULD TREES HAVE STANDING?*, *supra* note 217, at 135, 141.

seen as yet another sound emanation within the penumbra of Natural Law—one that not only takes a renewed legitimacy from this relationship but consequently undergirds or validates the contemporary relevance of the very doctrine itself by showing its practical outreach to contemporary issues of environmental management and enhancing the legal status of the environment by giving it legal voice.<sup>220</sup>

However, any expansion of an environmental ethic or engraftment of it onto the public trust doctrine should be tethered to a Natural Law template which seeks a reasoned balance in decisionmaking between the rights of individual property ownership with the need for expanded protection of public environmental resources. In this way, the doctrine is given both a directional focus and a level of needed restraint.

Judicial activism has the effect of preempting a full and balanced discourse both to test and to shape society's relationship with the natural environment.<sup>221</sup> Instead of continuing to broaden the base of judicial latitude for intervening, and thereby second-guessing the administrative decisionmaking process, technically incompetent courts should despise efforts to make themselves balancing artists that are intent on finding balancing points of environmental protection with competing social values.<sup>222</sup> The role of the judiciary in resource decisionmaking then becomes one of interpreting, rather than designing, judicial enforcement powers being used to safeguard state legislative policies—adopted by state constitutional provisions—directed toward the protection of the vast resources within the public trust and thereby setting a standard for environmental conservation.<sup>223</sup>

Expansion of the public trust doctrine for no other reason than to protect the environment simply ignores the economic precedent established by the original doctrine itself. Any furtherance of the doctrine must be based upon rational thinking and advancing the “com-

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<sup>220</sup> CHRISTOPHER D. STONE, “Trees” at *Twenty-Five*, in *SHOULD TREES HAVE STANDING?*, *supra* note 217, at 159, 171.

<sup>221</sup> See Araiza, *supra* note 158, at 387–88.

<sup>222</sup> *Id.* at 402–03. See generally Lazarus, *supra* note 150, at 712–13 (expressing concern over the wide latitude of courts in second-guessing administrative decision makers in dealing with public trust issues).

<sup>223</sup> See Araiza, *supra* note 158, at 452; see also Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 *RUTGERS L.J.* 863, 911–912 (1996) (expressing concern that the intrusiveness of judicial activism here is having the effect of overvaluing public trust uses to the detriment of preserving private property rights). See generally James L. Huffman, *supra* note 102.

mon good."<sup>224</sup> As this Article has discussed, the most principled approach to advancing the common good is balancing the legitimate economic interests of individual property owners against public resource preservation. When this is executed, rarely can it be shown that the benefits of resource preservation outweigh the economic concerns of property owners. Thus, any expansion of the doctrine should be slow and scrutinized to the highest degree and with a spirit of judicial restraint.

Regardless of the Constitution's limited mandate for the public trust, the U.S. Supreme Court's decision in *Phillips Petroleum Co. v. Mississippi* has placed the burden of developing the public trust concept with the states.<sup>225</sup> Nevertheless, Natural Law still plays a valuable constructive role to legislators and judges who must implement the doctrine. Once again, proper reasoning and principled economic decisionmaking can develop a contemporary public trust concept that is aligned with the Constitution's Natural Law values. However, any application that exceeds these principled limits is improper and lacks a stable foundation. Thus, the Natural Law advocate should strive to keep public servants from wandering outside the confines of balanced reasoning.

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<sup>224</sup> See RICE, *supra* note 8, at 56.

<sup>225</sup> See 484 U.S. 469, 484 (1988); cases cited *supra* note 174 (providing a framework for developing a practical state public trust concept).

