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## Understanding the Public Trust Doctrine Through Due Process

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# UNDERSTANDING THE PUBLIC TRUST DOCTRINE THROUGH DUE PROCESS

**Abstract:** The public trust doctrine (“PTD”) could be a powerful tool for environmental lawyers. It protects the public’s right to use and access resources by placing them in trust with the state and guiding the sovereign’s discretion in their management. Although it lies inherent in sovereignty, the law scatters it across constitutional, statutory, and common law sources, hurting its effectiveness. Understanding the public’s beneficiary interest in this public trust as a due process protected property right would help resolve these failings by placing it under the umbrella of the U.S. Constitution’s guarantee against arbitrary deprivations of “life, liberty, or property.” The enduring history of the doctrine suggests that members of the public can reasonably expect the sovereign to respect its trustee obligations, giving them a protected interest. The similarity between the PTD and the police power lends further support. Understanding the PTD as protected by due process would accord with existing PTD precedent and clarify the doctrine’s application in the future, allowing it to become the bedrock of environmental law that it could be.

## INTRODUCTION

The archives at the Library of Congress can reveal some interesting quirks about the progression of American jurisprudence, particularly unofficial remarks by the Supreme Court justices that never made it into the reported texts.<sup>1</sup> For example, the Blackmun papers reveal that the 1986 case *Nollan v. California Coastal Commission* involved more than the published opinions suggest, including an otherwise hidden discussion of the public trust doctrine (“PTD”)—a doctrine that promotes the public’s interest in certain essential resources against private exploitation by naming the sovereign as trustee of those resources.<sup>2</sup> *Nollan* presented the issue of permitting exactions in land use

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<sup>1</sup> E.g., William Brennan, Associate Supreme Court Justice, First Draft Dissent for *Nollan v. Cal. Coastal Comm’n* (June 3, 1987) (available through the Manuscript Division of the Library of Congress in the Harry A. Blackmun Papers, Box 481) (using the public trust doctrine (“PTD”) as a foundation for upholding an agency decision to require a public access easement along the beach in a construction permit).

<sup>2</sup> See 483 U.S. 825, 827 (1987); Brennan, *supra* note 1, at 1–14; see also Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Blackmun Papers*, 35 ENVTL. L. REP.

law to the United States Supreme Court for the first time.<sup>3</sup> A landowner sought a permit to replace his small, shorefront house with a significantly larger house.<sup>4</sup> The Commission agreed to issue the permit if the landowner agreed to grant a public access easement below his seawall, allowing the public to move between the beaches a distance to the right and left of his property.<sup>5</sup> In reviewing this condition, the Court ultimately held that such exactions require an essential nexus between the requested condition and the public purpose protected by the permit.<sup>6</sup> The Court did not find a rational connection between the Commission's stated purpose—visibility of the beach—and a public access easement, so it invalidated the condition.<sup>7</sup>

Even though the Court seemingly resolved the case on substantive due process rationality grounds, the published majority opinion by Justice Antonin Scalia painted the exaction as a deprivation of property by describing the situation as a "takings" and analogizing to *per se* regulatory takings cases.<sup>8</sup> This had the unfortunate effect of entangling the exactions context with takings jurisprudence.<sup>9</sup> In dissent, Justice William Brennan attacked the scrutiny Justice Scalia seemed to apply in his "essential nexus" analysis and maintained, instead, that the Court should give greater deference to the state agency in its attempts to protect use of such an important resource.<sup>10</sup> Justice Harry Blackmun also dissented, adding the seemingly unprompted comment that the case does not invoke the PTD.<sup>11</sup>

The Blackmun papers reveal, however, that Justice Brennan originally drafted a much longer dissent.<sup>12</sup> The omitted pages discussed the PTD in length, including its history and development, its persistence in common law, the obligations it placed on the states as trustees, the limitations it placed on private holders of trust resources, and the mitigating effect that it had on the

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10,637, 10,653–54 (2005) (describing correspondence, draft opinions, and other documents available in the Blackmun papers relating to environmental law).

<sup>3</sup> *Nollan*, 483 U.S. at 831.

<sup>4</sup> *Id.* at 828.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 837.

<sup>7</sup> *Id.* at 838–39.

<sup>8</sup> *Id.* at 831, 837 (discussing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (a *per se* regulatory takings case) and *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (a case with subsequent negative treatment for confounding due process and takings analysis)); see Zygmunt J.B. Plater & William Lund Norine, *Through the Looking Glass of Eminent Domain: Exploring the "Arbitrary and Capricious" Test and Substantive Rationality Review of Governmental Decisions*, 16 B.C. ENVTL. AFF. L. REV. 661, 709 (1989) (discussing rational-basis due process review).

<sup>9</sup> See *Nollan*, 483 U.S. at 831, 837 (relying on takings case law to portray the proffered condition as extortionate); see also *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005) (attempting to distinguish takings and due process analysis but leaving exactions analysis unchanged).

<sup>10</sup> *Nollan*, 483 U.S. at 842 (Brennan, J., dissenting).

<sup>11</sup> *Id.* at 865 (Blackmun, J., dissenting).

<sup>12</sup> Brennan, *supra* note 1, at 1–14.

deprivation in this case.<sup>13</sup> Justice Blackmun, though, suggested that Justice Brennan remove the PTD discussion out of concern that publishing such an exposition in dissent would associate the PTD with invalidated law and that Justice Scalia may expressly undermine the doctrine in his majority opinion.<sup>14</sup> A back and forth of drafts proceeded between justices Brennan and Scalia, but, as the published opinions make evident, in the end the PTD fell out of the case.<sup>15</sup> The short, precautionary statement that Justice Blackmun inserted into his dissent remains as the only official reference in the case.<sup>16</sup>

Justice Brennan's unpublished opinion invoked a classic formulation of the PTD that numerous federal and state courts have transcribed and applied.<sup>17</sup> Like most similarly longstanding doctrines, much of the debate surrounding the PTD involves its application at the fringes of its scope.<sup>18</sup> Unlike most other doctrines, though, its source remains hazy.<sup>19</sup> Some scholars argue for a single source in federal law—either in federal common law or in the U.S. Constitution through the Commerce Clause, Property Clause, or from reserved-powers implicit in the Tenth Amendment.<sup>20</sup> Others maintain that it exists entirely as a

<sup>13</sup> *Id.*

<sup>14</sup> Ellen Deason, Law Clerk, Memorandum to Justice Blackmun on *Nollan v. Cal. Coastal Comm'n* (June 9, 1987) (available through the Manuscript Division of the Library of Congress in the Harry A. Blackmun Papers, Box 481).

<sup>15</sup> Ellen Deason, Law Clerk, Memorandum to Justice Blackmun on *Nollan v. Cal. Coastal Comm'n* (June 25, 1987) (available through the Manuscript Division of the Library of Congress in the Harry A. Blackmun Papers, Box 481); see *Nollan*, 483 U.S. at 825–64.

<sup>16</sup> See *Nollan*, 483 U.S. at 865 (Blackmun, J., dissenting) (mentioning the PTD briefly to explicitly remove it from the majority's holding).

<sup>17</sup> Brennan, *supra* note 1, at 1–14 (referring to the PTD as outlined in Ill. Cent., Railroad Co. v. Illinois, 146 U.S. 387, 452 (1892) (setting American jurisprudence's preeminent description of the PTD)); see Robin Kundis Craig, *A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries*, 16 PENN. ST. ENVTL. L. REV. 1, 4–6 (2007) [hereinafter *Eastern Public Trust*] (saying that the leading connotation of the PTD is that described in *Illinois Central*).

<sup>18</sup> See, e.g., Hope M. Babcock, *Grotius, Ocean Fish Ranching, and the Public Trust Doctrine: Ride'em Charlie Tuna*, 26 STAN. ENVTL. L.J. 3, 72 (2007) (arguing for application of the PTD to the United States' Exclusive Economic Zone to regulate fish ranching); *Eastern Public Trust*, *supra* note 17, at 21–24 (describing states that expand the PTD to meet changing public needs); Robin Kundis Craig, *A Comparative Guide to the Western State's Public Trust Doctrine: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L. Q. 53, 71–72 (2010) [hereinafter *Western State's Public Trust*] (describing expansion of the PTD to fit the needs of individual states); Jeffrey Thaler & Patrick Lyons, *The Seas Are Changing: It's Time to Use Ocean-Based Renewable Energy, the Public Trust Doctrine, and a Green Thumb to Protect Seas from Our Changing Climate*, 19 OCEAN & COASTAL L. J. 241, 257 (2014) (arguing to use the PTD to promote ocean-based renewable energy).

<sup>19</sup> William Araiza, *The Public Trust Doctrine: 30 Years Later: The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 697 (2012).

<sup>20</sup> See Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENVTL. L. 399, 412 (2015) (arguing that the PTD comes from the powers reserved to the states through the Tenth Amendment); Chrystal C. Chase, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16

matter of state law and thus actually has fifty-one independent sources—the individual states and the federal government.<sup>21</sup> If the PTD stood on firmer ground, Justice Brennan may not have dropped the PTD argument from his *Nollan* dissent, and exactions may not have stumbled into takings jurisprudence.<sup>22</sup>

The discord that surrounds the PTD, which inhibited the Court from relying on it to resolve *Nollan*, stands in stark juxtaposition to the doctrine's widely accepted ancient heritage.<sup>23</sup> This ancient heritage, however, suggests an alternative view of the doctrine, one that would embed it in the U.S. Constitution and many state constitutions and make it applicable to all sovereigns within the United States.<sup>24</sup> Understanding the PTD in trust terms, its heritage paints the beneficiary interest in the public—present and future—as a fundamental right

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HASTINGS W-N.W. J. ENVTL. L. & POL'Y 113, 141 (2010) (arguing that the PTD comes from federal common law); Thaler & Lyons, *supra* note 18, at 287 (suggesting that the PTD could derive from the Commerce Clause or Property Clause).

<sup>21</sup> See Blumm & Schaffer, *supra* note 20, at 402 (calling it a mistake to consider the PTD purely a matter of state law); *Eastern Public Trust*, *supra* note 17, at 3 (calling it a mistake to reduce the fifty state PTDs into a single doctrine). The amount of literature contributing to the debate as to the existence of a PTD applicable to the federal government has increased as the physical, domestic, and international political climates change. E.g., Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 796–97 (2010) [hereinafter *Adapting to Climate Change*] (arguing for use of the PTD to help water resources law adapt to climate change); Thaler & Lyons, *supra* note 18, at 257 (arguing for use of a federal PTD to develop renewable energy sources to combat climate change); Mary Turnipseed et al., *The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust*, 36 ECOLOGY L.Q. 1, 6–8 (2009) (arguing for use of a federal PTD to help regulation of the U.S. Exclusive Economic Zone respond to climate change). Several cases imply that the federal government has PTD obligations, but because many federal statutes include trust language that reflect the common law PTD, courts have not yet applied the common law doctrine to federal public lands. Babcock, *supra* note 18, at 57; see, e.g., *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 125 (D. Mass. 1981) (stating that the federal government has public trust obligations); *In re Complaint of Steuart Transp. Co.*, 495 F. Supp. 38, 40 (E.D. Va. 1980) (stating that the state and federal government have an obligation to protect wildlife resources). Dicta from several United States Supreme Court cases have further stoked the controversy. See *PPL Mont., LLC v. Montana*, 565 U.S. 576, 603 (2012) (“the public trust doctrine remains a matter of state law”); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997) (saying *Illinois Central* was “necessarily a statement of Illinois law” (quoting *Appleby v. City of New York*, 271 U.S. 364, 395 (1926))). But see Blumm & Schaffer, *supra* note 20, at 409 (arguing that these cases do not support the conclusion that there is no federal PTD).

<sup>22</sup> *Nollan*, 483 U.S. at 831, 837 (relying on takings precedent to analyze permitting exactions); see *id.* at 842 (Brennan, J., dissenting) (omitting any discussion of the PTD); Brennan, *supra* note 1, at 1–14 (relying on the PTD to show the rationality of government action).

<sup>23</sup> See, e.g., Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases about the Environment*, 64 CORNELL L. REV. 761, 801 (1979) (describing *res communes* in Roman and English law); Charles F. Wilkins, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 429 (1989) (describing the ancient roots of the PTD around the world).

<sup>24</sup> See Coquillette, *supra* note 23, at 801 (describing the PTD's heritage); Wilkins, *supra* note 23, at 429 (same).

in property that due process should protect.<sup>25</sup> No court has explicitly described it as such, but viewing the PTD in this light accords with its judicial treatment thus far, clarifies it as a useful doctrine moving forwards, and guides the ongoing debate in each sovereign over the corpus of its trust.<sup>26</sup> A due process PTD would also likely have given the dissenting justices in *Nollan* confidence enough to use the doctrine in opposing the questionable majority opinion.<sup>27</sup>

This note argues that courts and practitioners should treat the PTD as an element of due process, and proceeds in five parts.<sup>28</sup> Part I summarizes due process and the protections it offers; Part II presents an overview of the PTD and its tradition; Part III outlines incorporation of the PTD into American law; Part IV explains why the PTD fits within due process; and finally, Part V discusses how judicial treatment of the PTD would proceed under due process.<sup>29</sup>

## I. DUE PROCESS: HISTORY AND OVERVIEW

Analogous to the PTD, the concept of due process has ancient roots that spread throughout the American legal system.<sup>30</sup> Its understanding in that system stems from the thirteenth century and chapter thirty-nine of the Magna Carta.<sup>31</sup> Chapter thirty-nine made the sovereign power of the monarch subject to the “law of the land.”<sup>32</sup> Over a century later, documents describing this limitation began to interchange the phrase “due process” as a synonym for “law of the land.”<sup>33</sup> Together these phrases required the sovereign to recognize the

<sup>25</sup> James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 327 (1999); see *infra* notes 156–175 and accompanying text (describing the PTD beneficiary interest as a protected property right).

<sup>26</sup> See *infra* notes 195–266 and accompanying text.

<sup>27</sup> See *infra* notes 253–257 and accompanying text.

<sup>28</sup> See *infra* notes 30–267 and accompanying text.

<sup>29</sup> See *infra* notes 30–65 and accompanying text (Part I); *infra* notes 66–98 and accompanying text (Part II); *infra* notes 99–153 and accompanying text (Part III); *infra* notes 154–211 and accompanying text (Part IV); *infra* notes 212–267 and accompanying text (Part V).

<sup>30</sup> See Ely, *supra* note 25, at 324 (describing the origins of due process in the Magna Carta); Wilkins, *supra* note 23, at 429 (describing the history of the PTD).

<sup>31</sup> Ely, *supra* note 25, at 321, 324.

<sup>32</sup> *Id.* at 320, 324.

<sup>33</sup> *Id.* at 320–21. This synonymous use continued through the founding of the United States, with several early federal documents and several state constitutions opting to use “law of the land” rather than “due process.” *E.g.*, Northwest Ordinance, ch. 8, 1 Stat. 50, art. 2 (1787) (declaring “no man shall be deprived of his liberty or property but by . . . the law of the land”); MD. CONST. art. XXI (1776), [http://avalon.law.yale.edu/17th\\_century/ma02.asp#1](http://avalon.law.yale.edu/17th_century/ma02.asp#1) [<https://perma.cc/UF8P-BJNY>] (declaring, “no free man ought to be . . . deprived of his life, liberty, or property, but . . . by the law of the land”); N.C. CONST. art. XII (1776), [http://avalon.law.yale.edu/18th\\_century/nc07.asp](http://avalon.law.yale.edu/18th_century/nc07.asp) [<https://perma.cc/XQ5L-KL7T>] (declaring, “no free man ought to be . . . deprived of his life, liberty, or property, but by the law of the land”). All states now offer this protection from one source or another. *E.g.*, U.S. CONST. amend. V, XIV, § 1 (stating no one shall be “deprived of life, liberty, or property without due process of law”); MASS. CONST. art. X (stating, “[e]very individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws”); N.Y.

fundamental rights of the people and restrained arbitrary governance.<sup>34</sup> The United States Supreme Court in its first interpretation of the Fifth Amendment confirmed this notion, saying that the phrase “due process” conveyed the same meaning as the phrase “law of the land” as used in the Magna Carta six and a half centuries earlier.<sup>35</sup>

The idea that certain rights of the people—rights based in reason and natural law<sup>36</sup>—predate the establishment of government and are immune from regulation except for the broader public good, spoke directly to the revolutionary spirit of the Framers.<sup>37</sup> Accordingly, many of the early state constitutions and the U.S. Constitution explicitly included due process, law of the land, or analogous clauses.<sup>38</sup>

From its start, due process and its synonymous phrases have placed both procedural and substantive requirements on government.<sup>39</sup> Procedural due pro-

CONST. art. I, § 6 (stating, “[n]o person shall be deprived of life, liberty or property without due process of law”); N.C. CONST. art. I, § 19 (stating, “[n]o person shall be . . . deprived of his life, liberty, or property, but by the law of the land”); VA. CONST. art. I, § 11 (stating, “no person shall be deprived of his life, liberty, or property without due process of law”).

<sup>34</sup> Ely, *supra* note 25, at 320, 327.

<sup>35</sup> Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856); Ely, *supra* note 25, at 328.

<sup>36</sup> Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 AM. U. L. REV. 351, 381 (1997). Many today abhor resort to natural law, but that does not change the fact that the Framers largely accepted the restraints of natural law and that the Constitution embodies many natural law principles, particularly relevant here, Article IV, § 2, the Fifth Amendment, and the Fourteenth Amendment. See Araiza, *supra* note 19, at 702 (arguing that a natural law view of the PTD goes against modern positivist legal thinking); George P. Smith II & Michael Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307, 316 (2006) (arguing that natural law remains an essential part of constitutional interpretation because of its impact on the Framers).

<sup>37</sup> See Ely, *supra* note 25, at 324 (saying America returned to the concepts of fundamental rights embodied in the Magna Carta upon independence); Smith, *supra* note 36, at 381 (saying that belief in fundamental civil rights were abundant when the Constitution was ratified). The writings of John Locke, which highly influenced the Framers, painted the sovereign as a political body that was granted limited powers through consent of the people to serve certain purposes. John Hilla, *The Library Effect of Sovereignty in International Law*, 14 WIDENER L. REV. 77, 97, 99 (2008).

<sup>38</sup> U.S. CONST. amend. V; MD. CONST. art. XXI (1776), [http://avalon.law.yale.edu/17th\\_century/ma02.asp#1](http://avalon.law.yale.edu/17th_century/ma02.asp#1) [<https://perma.cc/UF8P-BJNY>] (declaring, “no free man ought to be . . . deprived of his life, liberty, or property, but . . . by the law of the land”); Ely, *supra* note 25, at 324. James Madison opted for the phrase “due process,” but he most likely intended the traditional meaning of the phrase. Ely, *supra* note 25, at 325.

<sup>39</sup> Ely, *supra* note 25, at 321. Some criticize substantive due process as an oxymoron or as a tool for judicial activism. *United States v. Carlton*, 512 U.S. 26, 39, (1994) (Scalia, J., concurring) (saying “[i]f I thought that ‘substantive due process’ were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation”); Ely, *supra* note 25, at 315. But irrespective of its merits, due process has long placed substantive limits on government. See Ely, *supra* note 25, at 315–16 (highlighting the growth, trimming, and reemergence of substantive due process through time). Moreover, rather than being doctrinal in and of itself, the phrase “substantive due process” actually originated in twentieth century legal textbooks and derived from commenters who saw it as politically conservative judicial activism. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 256

cess guarantees a measure of judicial or adjudicative procedure prior to deprivation of protected interests.<sup>40</sup> Substantive due process, contrarily, limits law-making and guards against arbitrary or irrational government intrusions into protected rights.<sup>41</sup> As such, it serves as one of the primary checks on state exercise of the police power.<sup>42</sup>

Judicial review of substantive due process's protections against arbitrary or capricious government action considers why the governing body chose to act and how it chose to do so.<sup>43</sup> A proper public purpose, such as serving the public health, safety, morals, or general welfare, justifies the government taking action in most circumstances.<sup>44</sup> Actions that infringe particularly important rights require a more compelling public interest.<sup>45</sup> If the purpose satisfies the court, the court then looks to the rationality of the means chosen to serve that end.<sup>46</sup> Generally, this only involves a deferential review for a reasonable relationship, but, when fundamental rights are at stake, it may involve a deeper inquiry into the least restrictive means.<sup>47</sup> In *Lingle v. Chevron U.S.A. Inc.*, the

(2000); Ely, *supra* note 25, at 319; see *Republic Nat. Gas Co. v. Oklahoma*, 334 U.S. 62, 90 (1948) (Rutledge, J., dissenting) (using the phrase “substantive due process” for the first time in a Supreme Court opinion).

<sup>40</sup> *Mathews v. Edlridge*, 424 U.S. 319, 332–33 (1976). The United States Supreme Court articulated its test for adequate process in *Mathews*, saying that to determine due process the court should balance the private interests at stake, the relative risk of error for the procedure considered, and the government interests. *Id.* at 335.

<sup>41</sup> See *City of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (explaining that the Court has always understood the core of due process “to be protection against arbitrary action”); Ely, *supra* note 25, at 327.

<sup>42</sup> See *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 440 (1934) (explaining that an act of the police power limiting private contracts might not violate the due process or contract clauses); *infra* notes 43–55 and accompanying text (explaining substantive due process rationality review). Some commenters restrict the term police power to only those actions meant to serve public health and safety, but this Note uses the more common meaning, referring to the entire gambit of sovereign powers reserved by the state after its grants to the federal government. See Christopher Supino, *The Police Power and “Public Use”: Balancing the Public Interest Against Private Rights Through Principled Constitutional Distinctions*, 110 W. VA. L. REV. 711, 724 (2008). Lord Hale defined the sovereign power as encompassing the police power but limited by public law. Donna Jalbert Patalano, *Note, Police Power and the Public Trust: Perspective Zoning through the Conflation of Two Ancient Doctrines*, 28 B.C. ENVTL. AFF. L. REV. 683, 705 (2001).

<sup>43</sup> *Plater & Norine, supra* note 8, at 709. Other categories of substantive due process protection include protection against ultra vires action and against unduly burdensome action. See *id.* at 707–11.

<sup>44</sup> See *Euclid v. Ambler*, 272 U.S. 365, 395 (1926) (finding that promoting public health, safety, morals, and general welfare is a legitimate public purpose).

<sup>45</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627–28 (1969).

<sup>46</sup> See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937) (deferentially considering the means chosen to achieve the legitimate purpose of protecting women in the workplace).

<sup>47</sup> Compare *Roe*, 410 U.S. at 155 (requiring a narrowly tailored means, a form of strict scrutiny inquiry) and *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (requiring that means only be as broad as necessary, a form of strict scrutiny analysis), with *W. Coast Hotel*, 300 U.S. at 399 (requiring only that means not be arbitrary or capricious, an articulation of rational-basis inquiry).



Supreme Court explicitly identified such rationality-review as a matter of due process.<sup>48</sup> In that case, the Court sought to remedy confusion in takings jurisprudence caused by *Agins v. City of Tiburon*, which articulated the “substantially advances a legitimate state interest” test.<sup>49</sup> The *Lingle* Court specified that this rationality-based test served due process rather than takings.<sup>50</sup>

Providing substantive due process generally does not pose much of a challenge to legislatures and agencies due to the deference courts tend to give the coequal branches.<sup>51</sup> At least in the area of land use, when reviewing for proper public purpose, courts only look to see if the law serves the judicially described bounds of the police power.<sup>52</sup> For example in *Euclid v. Ambler* the Supreme Court affirmed the imposition of zoning regulations after deciding that the restriction of property rights served public health, safety, and general welfare.<sup>53</sup> Showing rationality, likewise, only requires that the record demonstrate a reasoned connection between the means used and ends desired.<sup>54</sup> In *Agins*, for example, the Supreme Court affirmed the city’s choice to limit a landowner’s ability to subdivide his property because the decision “substantially advanced” the legitimate public purpose of preserving open spaces and preventing urban sprawl.<sup>55</sup>

Due process issues primarily arise when exercises of a sovereign’s power, often in service of public law, conflict with private interests.<sup>56</sup> The Fifth and Fourteenth Amendments describe these protected private interests categorically as “life, liberty, and property.”<sup>57</sup> Thus, land use regulation can raise due pro-

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<sup>48</sup> 544 U.S. 528, 540 (2005).

<sup>49</sup> *Id.*; *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

<sup>50</sup> *Lingle*, 544 U.S. at 540. The jurisprudence surrounding the growth of public utilities before the New Deal expansion of the administrative state also helps demonstrate the substantive protections of due process. *E.g.*, *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (describing the ability of states in compliance with due process to curtail private property rights through the police power if the limitation is not unreasonable, arbitrary, or capricious and relates to the public welfare).

<sup>51</sup> *See W. Coast Hotel*, 300 U.S. at 399 (indicating courts should defer to legislative policy judgments, even if potentially unwise).

<sup>52</sup> *See Euclid*, 272 U.S. at 395 (upholding zoning regulations provided they have a substantial relation to a proper public purpose). The *Euclid* Court gave an enduring statement of proper purposes for exercise of the police power, namely those that “substantially relate to public health, safety, morals, or general welfare.” *Id.*

<sup>53</sup> *Id.* at 389–90, 395.

<sup>54</sup> *See, e.g.*, *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488 (1955) (finding a regulation limiting opticians to operate only under prescriptions as a reasonable means of freeing the profession from commercialism); *W. Coast Hotel*, 300 U.S. at 398 (finding a minimum wage law for women and minors a reasonable means of promoting health and safety).

<sup>55</sup> *Agins*, 447 U.S. at 261. Decades later in *Lingle*, the Court clarified that this reasoning spoke to due process not takings analysis. 544 U.S. at 540.

<sup>56</sup> *E.g.*, *W. Coast Hotel*, 300 U.S. at 391 (discussing a possible conflict between state law and the right to contract); *Euclid*, 272 U.S. at 384 (discussing a possible conflict between state law and the free use of property).

<sup>57</sup> U.S. CONST. amend. V, XIV, § 1.

cess concerns because it affects interests in real property.<sup>58</sup> Other clauses of the Constitution shed some light on the meaning of these categories, but they have taken shape largely through the common law process and outside the realm of land use and real and private property law.<sup>59</sup>

Central to understanding the PTD, courts have identified property interests beyond private real and personal property that warrants due process through entitlement theory.<sup>60</sup> Essentially, entitlement theory says that a protected interest exists where antecedent sources of law limit governing discretion towards a particular right to the effect that a person can reasonably expect a certain outcome or have legitimate expectations as to its treatment.<sup>61</sup> Courts have applied this same reasoning to extend due process protection to liberty interests created by regulation.<sup>62</sup> In that context, courts look for the text of the regulation to contain directives guiding the administrator's exercise of discretion, ideally expressed by explicit language mandating a particular outcome should certain triggering criteria be met.<sup>63</sup> This language reinforces the principle that property and liberty interests, though protected by the Constitution, do not come from the Constitution.<sup>64</sup> Instead, due process protected interests derive from preexisting notions of the law.<sup>65</sup>

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<sup>58</sup> See, e.g., *Euclid*, 272 U.S. at 384 (considering the constitutionality of zoning regulations that limit private property rights).

<sup>59</sup> E.g., U.S. CONST. amends. I, III, V, VI (providing for the freedom of speech and religion; freedom from unconsented quarter and taking of private property without just compensation; and rights prior to criminal punishment); see *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (saying that property interests come from existing, independent sources of law rather than the Constitution). Fundamental liberty interests, including the right to marry and reproduce, have also emerged through the common law process, particularly where the Court has found the rights engrained in the nation's history and tradition or essential to the pursuit of happiness. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding that freedom to marry is essential to the pursuit of happiness); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding that the right to procreate is fundamental to the survival of the species); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (describing liberty as the freedom to partake in activities "essential to the orderly pursuit of happiness").

<sup>60</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970) (stating that a recipient's interest in welfare benefits is protected by due process); *Property*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("[c]ollectively, the rights in a valued resource such as land, chattel, or an intangible").

<sup>61</sup> See *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756 (2005) (finding that failure to expediently enforce a restraining order was not deprivation of a reasonably expected property interest); *Roth*, 408 U.S. at 578 (finding that an employee was not entitled to renewal of his contract, so it was not a property interest).

<sup>62</sup> See *Ky. Dep't of Corrs. v. Thompson*, 490 U.S. 454, 462–63 (1989) (reviewing whether substantive limitations on official discretion created liberty interests for prisoners).

<sup>63</sup> *Id.*

<sup>64</sup> *Roth*, 408 U.S. at 577; see *Ky. Dep't of Corrs.*, 490 U.S. at 462–63 (saying that the Court will look for mandatory language limiting discretion to identify liberty interests).

<sup>65</sup> *Roth*, 408 U.S. at 577.

## II. PUBLIC TRUST DOCTRINE: HISTORY AND OVERVIEW

The PTD affirms the value society holds in certain resources and requires that government distinguish these resources under law from other forms of real or personal property.<sup>66</sup> These resources comprise the corpus of a trust managed by the sovereign as trustee for its people—present and future—as beneficiaries.<sup>67</sup> The traditional PTD identifies navigable waters, tidal waters, submerged lands, and riverbanks necessary for access as the trust resources; however, some states, recognizing the finite nature and public value of other resources, have extended their trust's corpus.<sup>68</sup> Regardless of the scope of resources a sovereign protects, the PTD foremost protects the intergenerational public interest in access and use of those resources.<sup>69</sup>

In recognizing the evolving public interest, it additionally serves as an anti-monopoly and anti-majoritarian check on resource management.<sup>70</sup> Because the PTD protects public use and access, it places title in a perennial trust with the sovereign as trustee and limits alienation of that control to private parties, thus opposing monopolization of the resource.<sup>71</sup> Because the PTD operates in support of intergenerational interests, it requires legislators and administrators to consider both present and future interests, thus hindering the political caprice of the sitting majority.<sup>72</sup>

The PTD, though, does not require absolute preservation or even absolute public access.<sup>73</sup> Rather, it demands that any regulation, conservation, or alienation of trust resources serves the public's beneficiary interest.<sup>74</sup> From this perspective, some describe the PTD as protecting administrative or procedural rather than substantive interests, requiring regulators to account for the its heightened public purpose requirement and design the means of regulation to

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<sup>66</sup> J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 U.C. DAVIS L. REV. 915, 916 (2012); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 69 MICH. L. REV. 471, 485 (1970).

<sup>67</sup> Chase, *supra* note 20, at 136; Turnipseed, *supra* note 21, at 17–18.

<sup>68</sup> *Adapting to Climate Change*, *supra* note 21, at 831 (discussing expansion of the PTD to include ecological protection); *Western States' Public Trust*, *supra* note 18, at 71–72 (discussing the individualization of state PTDs).

<sup>69</sup> See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) (saying the trust obligates government to preserve waters for public use).

<sup>70</sup> See *Adapting to Climate Change*, *supra* note 21, at 784 (saying the PTD restricts government's ability to undermine public interests and allows democratization of natural resource allocation); Lyn S. Schaffer, Note & Comment, *Pulled from Thin Air: The (Mis)application of Statutory Displacement to a Public Trust Claim in Alec L. v. Jackson*, 19 LEWIS & CLARK L. REV. 169, 190 (2015) (saying the PTD protects the public from monopoly control and the interests of a few).

<sup>71</sup> *Ill. Cent.*, 146 U.S. at 453; Schaffer, *supra* note 70, at 190–91.

<sup>72</sup> Schaffer, *supra* note 70, at 190–91; see Turnipseed, *supra* note 21, at 17–18 (describing the multi-generation nature of the PTD).

<sup>73</sup> *Ill. Cent.*, 146 U.S. at 453, 455 (saying government can alienate trust resources in certain circumstances).

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

serve that end.<sup>75</sup> Undoubtedly, the PTD does impose such procedural obligations in practice.<sup>76</sup> But, the doctrine's history reveals that those obligations attend a substantive property right.<sup>77</sup>

Sovereigns around the world recognize a restraint on their authority akin to the PTD.<sup>78</sup> The American PTD, specifically, traces its origins back through English common law to Roman law, particularly Book II of the Justinian Institutes.<sup>79</sup> The Romans classified and applied law differently based on its source, similar to how the American legal system does today.<sup>80</sup> Initially, they classified law by whom it served, with public law—which protects the welfare of the state—outweighing private law—which protects individual interests—when in conflict.<sup>81</sup> In regards to private law, the Romans acknowledged the limitations set by the irrefragable laws of the physical world, such as gravity and the tides, as laws of nature applicable to all.<sup>82</sup> They termed the laws that civilized societies would generally share, which either augmented or limited private interests, laws of nations and considered them, likewise, applicable to citizens and noncitizens alike.<sup>83</sup> The Romans termed the final category civil law and included in it all the positive laws unique to the state and applicable only to citizens.<sup>84</sup>

Continuing this systematic approach, according to the Justinian Institutes the Romans also divided 'things' into multiple discrete categories of property, several of which have persisted into modern law.<sup>85</sup> Foremost, they distinguished property wholly capable of private ownership—private property—and property imbued with a public interest and correspondingly incapable of complete private control.<sup>86</sup> They recognized five different categories of property

<sup>75</sup> See Coquillette, *supra* note 23, at 811 (arguing against reducing the PTD to an administrative law); Sax, *supra* note 66, at 490 (describing the PTD as a model of judicial review).

<sup>76</sup> See, e.g., *Nat'l Audubon Soc'y v. Superior Court*, 658 P. 2d 709, 728 (Cal. 1983) (holding that the state has an affirmative duty to account for trust responsibilities in allocating water resources); *Paepcke v. Pub. Bldg. Comm'n.*, 263 N.E.2d 11, 19 (Ill. 1970) (describing conditions necessary to approve diversion of trust property).

<sup>77</sup> Coquillette, *supra* note 23, at 811.

<sup>78</sup> Wilkins, *supra* note 23, at 429.

<sup>79</sup> J. INST. 2.1; Coquillette, *supra* note 23, at 801; Wilkins, *supra* note 23, at 429.

<sup>80</sup> Robert Haskell Abrams, *Walking the Beach to the Core of Sovereignty: The Historic Basis for the Public Trust Doctrine Applied in Glass v. Goeckel*, 40 U. MICH. J.L. REFORM 861, 871 (2007); Coquillette, *supra* note 23, at 800–01.

<sup>81</sup> J. INST. 1.1.4; Abrams, *supra* note 80, at 871; Coquillette, *supra* note 23, at 802–03.

<sup>82</sup> See J. INST. 1.2, 1.2.11 (describing the law of nature as that governing all animals, not just humans, those immutable laws established by providence).

<sup>83</sup> J. INST. 1.1–2; Smith, *supra* note 36, at 366. The term "law of nations" also described a separate bank of law governing the relationship between nations, making it the precursor to international law. Smith, *supra* note 36 at 366.

<sup>84</sup> J. INST. 1.2.1–2; Smith, *supra* note 36, at 368.

<sup>85</sup> J. INST. 2.1.1; Abrams, *supra* note 80, at 871.

<sup>86</sup> J. INST. 2.1.1; Abrams, *supra* note 80, at 871.

incapable of exclusive ownership, including sacred property and property belonging to societies or corporations.<sup>87</sup> The most important of these five categories for PTD purposes were what the Romans termed *res communes* and *res publicae*.<sup>88</sup> *Res communes*, or common property, belonged to no one as a matter of natural law and included “the air, running water, the sea, and consequently the sea shore.”<sup>89</sup> *Res publicae*, or public property, referred to that property which, although possibly capable of exclusive ownership, the public had a right to access and use under the law of nations.<sup>90</sup> Examples included rivers, harbors, and their banks for access and mooring as the public needed.<sup>91</sup>

Centuries later, as the medieval period came to its end, scholars and jurists referred to this Roman tradition in shaping what would become English common law.<sup>92</sup> This early English writing maintained that as a matter of public law, the private interests in both common property and public property had to yield to that of the public.<sup>93</sup> Jurists and scholars of the time described title to this property as resting with the sovereign for the benefit of the public, in part to establish the authority of the reigning monarchs and to express the emerging notion of inalienability of sovereignty.<sup>94</sup> They described the sovereign as trustee of the state’s natural resources, with the public law limiting sovereign power.<sup>95</sup>

Some scholars question the practical truth of this description.<sup>96</sup> Lord Chief Justice Hale, however, propounded it as the state of the law, describing title to the soil between the mean high tide and low tide marks as presumptive-

<sup>87</sup> J. INST. 2.1.1; Coquillette, *supra* note 23, at 802–03.

<sup>88</sup> See Abrams, *supra* note 80, at 871 (describing the use of classifications in Roman jurisprudence); Coquillette, *supra* note 23, at 804 (indicating that *res publicae* and *res communes* are the precursors of the PTD). This concept is extremely similar to but not synonymous with the English concept of a commons, land held in trust by the local government for service of the city or town’s citizens. See Coquillette, *supra* note 23, at 809 nn.229–30 (discussing Massachusetts commons); see also *United States v. Walker*, No. 07-10176-DPW, 2007 U.S. Dist. LEXIS 94666, at 6 (D. Mass. Dec. 21, 2007) (describing the history of the Boston commons).

<sup>89</sup> J. INST. 2.1.1; Coquillette, *supra* note 23, at 801–02.

<sup>90</sup> J. INST. 2.1.2; Coquillette, *supra* note 23, at 802 n.195.

<sup>91</sup> J. INST. 2.1.4; Coquillette, *supra* note 23, at 802 n.195.

<sup>92</sup> See *Ill. Cent.*, 146 U.S. at 458 (referring to the writings of Sir Matthew Hale, an influential seventeenth century English jurist, that discuss rights over trust resources); Abrams, *supra* note 80, at 878 (discussing the PTD at the end of the Middle Ages); Coquillette, *supra* note 23, at 804 (discussing the Roman influence on Henry de Bracton, an influential thirteen century English jurist).

<sup>93</sup> See *Shively v. Bowbly*, 152 U.S. 1, 12 (1894) (discussing the relation of private and public law by quoting Sir Matthew Hale, *De Portibus Maris* (1670)); Patalano, *supra* note 42, at 705 (discussing Hale’s interpretation of public and private law).

<sup>94</sup> Abrams, *supra* note 80, at 878–79.

<sup>95</sup> See Coquillette, *supra* note 23, at 804 (referring to Henry de Bracton, whose writings helped preserve Roman categories of property in English common law); Patalano, *supra* note 42, at 705 (referring specifically to Sir Matthew Hale, whose writings described the sovereign’s trustee responsibilities).

<sup>96</sup> Abrams, *supra* note 80, at 882.

ly held by the sovereign.<sup>97</sup> Because his writings had a marked influence on the forming American States, it follows that American jurisprudence started with expansive public ownership of shore lands, a presumption against grant of those lands to private ownership, and the imposition of trustee obligations on those who hold title.<sup>98</sup>

### III. INCORPORATION AND EVOLUTION OF THE PUBLIC TRUST IN AMERICAN LAW

From the start, the colonies that would go on to become the American states assumed the sovereign responsibilities of the monarch and recognized the public interest in certain resources, most notably tidal lands.<sup>99</sup> The Massachusetts Bay Colony did so explicitly in its ordinance of 1641, amended in 1647, recognizing the public rights to fish, hunt, and navigate below the high water mark.<sup>100</sup> The other colonies followed suit recognizing the public interest in tidal waters and the sovereign obligation to serve that interest either by ordinance or common law.<sup>101</sup> Upon achieving independence, the original states adopted this sovereign responsibility, often affirming the public right in the face of prior land grants.<sup>102</sup> Although their legal concepts of sovereignty and property derived from English common law, the states made clear that English law did not bind them.<sup>103</sup> As such, several states independently moved away from the tidal influence test used at common law to identify lands held in trust by the sovereign to protect all waters navigable-in-fact in addition to those af-

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 882–83.

<sup>99</sup> *Id.* at 883, 888.

<sup>100</sup> Jose L. Fernandez, *Untwisting the Common Law: Public Trust and Massachusetts Colonial Ordinance*, 62 ALB. L. REV. 623, 629–30 (1998). In 1647, the colony amended this ordinance to allow private littoral rights down to the low water mark, restrained only by a guarantee of public access for fishing, fowling, and navigation. *Id.* at 630. The colony did so, however, to serve what it saw as a public end, allowing private ownership to promote construction of wharfs to encourage navigation and commerce in public water generally. *Commonwealth v. Alger*, 61 Mass. 53, 89 (1851); Fernandez, *supra*, at 631. Extending this ordinance through common law, Massachusetts and Maine still allow private ownership down to the low water mark. *Eastern Public Trust*, *supra* note 17, at 15, 62. Other states and the United States Supreme Court have endorsed the threshold set by English common law, the mean high tide mark or focus on navigability. *See id.* at 7, 15 (describing the default federal position that the state holds all tidally affected lands in trust).

<sup>101</sup> *See Abrams*, *supra* note 80, at 883 (describing extensive public ownership of the foreshore as the starting point for American law); *Eastern Public Trust*, *supra* note 17, at 4 (describing the PTD of eastern states forming before statehood).

<sup>102</sup> *Abrams*, *supra* note 80, at 884–85. The antecedent land grants came from the English sovereign and many of those receiving such grants remained loyal to the crown through the revolution, which may have added political incentive to invalidate those grants after independence. *Id.* at 885.

<sup>103</sup> *Id.* at 889.

fectured by the tides.<sup>104</sup> The system of dual sovereignty embraced by the emerging nation, however, meant that the PTD developed at both the federal and state levels.<sup>105</sup>

### A. The Public Trust Doctrine in the Federal System

During the nineteenth century, the PTD grew as one of several related doctrines speaking to control of useful waters between the nation's respective sovereigns.<sup>106</sup> These include the equal-footing doctrine, which speaks to state control, and the navigational servitude, which speaks to federal control.<sup>107</sup> Accordingly, the United States Supreme Court's first discussion of the PTD occurs in cases focusing on state sovereignty and federalism rather than private and public property rights.<sup>108</sup> For example, in the 1842 case *Martin v. Waddell*, which focused on the right to harvest oysters from submerged tidal lands, the Supreme Court used trust language to describe state held resources for the first time.<sup>109</sup> In that case, the Court stated that the King had held title to these lands in trust for the public, that this responsibility passed to the Duke upon colonization, and that it subsequently vested in the state upon independence.<sup>110</sup>

*Pollard v. Hagan*, which involved competing claims to the submerged lands under an Alabama river, followed just three years later and stands as the formative case for the equal-footing doctrine.<sup>111</sup> There, the Court invalidated a federal land grant to the submerged lands, holding that when Alabama entered the union on equal-footing with the original states, all the rights of sovereignty passed to it from the ceding sovereign, including title to submerged lands.<sup>112</sup> Through this series of cases, the Court established that the states held title to submerged lands.<sup>113</sup>

<sup>104</sup> *Navigable-in-fact*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("naturally useable for travel or commerce in the present condition"); Abrams, *supra* note 80, at 890; *Adapting to Climate Change*, *supra* note 21, at 809–10. The reasons for the United States, a large nation with many landlocked states, expanding on the tidal influence test originating in England, a relatively small island, seem relatively apparent. *Adapting to Climate Change*, *supra* note 21, at 809–10.

<sup>105</sup> See *infra* notes 106–153.

<sup>106</sup> Wilkins, *supra* note 23, at 439.

<sup>107</sup> *Equal-footing doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014) (all states admitted to the union enter with the same rights as the original thirteen, including title to beds and banks of navigable waters); *Navigational servitude*, BLACK'S LAW DICTIONARY (10th ed. 2014) (the federal government has an easement over navigable waters allowing it to regulate commerce without paying compensation for interference with private rights); Wilkins, *supra* note 23, at 439.

<sup>108</sup> E.g., *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 411–14 (1842) (discussing the English and colonial basis for shore lands as held in trust by the sovereign).

<sup>109</sup> *Id.* at 407.

<sup>110</sup> *Id.* at 411, 416.

<sup>111</sup> 44 U.S. (3 How.) 212, 219 (1845); see Chase, *supra* note 20, at 121 (describing *Pollard* as the foundation of the equal-footing doctrine).

<sup>112</sup> *Pollard*, 44 U.S. at 423.

<sup>113</sup> *Id.*; *Martin*, 41 U.S. at 416.

Because the early PTD only focused on tidal and navigable waters and the states independently recognized the public's rights to these lands, the Supreme Court actually did not directly address the PTD until 1892 in *Illinois Central Railroad Co. v. Illinois*.<sup>114</sup> In that case, the Court gave what persists as the seminal statement of the public trust in navigable and tidal waters and their submerged lands, which this Note refers to as the traditional public trust doctrine.<sup>115</sup> The case arose when the state of Illinois sought to invalidate a grant of title in a large portion of Lake Michigan off the Chicago coast by an earlier legislature to a private railroad.<sup>116</sup> Justice Fields, writing for the majority, built on the existing precedent establishing state sovereignty over submerged lands to maintain that the state's title to those lands is "different in character" from the title it holds in lands intended for sale.<sup>117</sup> He described it as "held in trust for the people of the state" to allow the public to use the waters freely for navigation, commerce, and fishing free from impediments or meddling by private parties.<sup>118</sup> The state could only abdicate control over these resources if doing so promoted the interests of the public therein or would not substantially impair the public interest in the remaining lands and waters.<sup>119</sup>

Later in his *Illinois Central* opinion, Justice Fields compared the trust responsibilities to the police power, saying that "the state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers . . ." <sup>120</sup> He proceeded to describe given grants as "necessarily revocable" to allow the state to resume its trust responsibilities and to avoid placing the resources at the mercy of the legislature's majority.<sup>121</sup> Because the PTD barred the state from abdicating control of trust resources as wholly as the at-issue grant did, the Court ultimately found the grant invalid.<sup>122</sup>

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<sup>114</sup> *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 433 (1892); see *Eastern Public Trust*, *supra* note 17, at 4 (describing early adoption of the PTD by the states).

<sup>115</sup> *Ill. Cent.*, 146 U.S. at 452–56; see Sax, *supra* note 66, at 489 (describing *Illinois Central* as the lodestar of PTD doctrine). Compare this restricted PTD to the more expansive versions of some states. See *Adapting to Climate Change*, *supra* note 21, at 846–50; *Eastern Public Trust*, *supra* note 17, at 11; *Western States' Public Trust*, *supra* note 18, at 83–84.

<sup>116</sup> *Ill. Cent.*, 146 U.S. at 433.

<sup>117</sup> *Id.* at 435, 452. Just a few years later in *Geer v. Connecticut*, Justice Fields dissented from an opinion that reduced animals in the commons to property of the state subject to its police power without becoming articles of commerce subject to the federal government's control over interstate commerce. 161 U.S. 519, 539 (1896). Justice Fields would have held that animals in the commons did not become property subject to exclusive control until someone took possession, at which point they became items of commerce. *Id.* at 539, 541. Neither he nor the majority appeared to endorse exploitation of the commons, but he seemed to see the state's sovereign authority over that property as limited. See *id.* at 539 (allowing private parties to claim exclusive control).

<sup>118</sup> *Ill. Cent.*, 146 U.S. at 452.

<sup>119</sup> *Id.* at 453.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 455.

<sup>122</sup> *Id.* at 460.



The Supreme Court reiterated this position two years later in *Shively v. Bowlby*, quoting Lord Chief Justice Hale extensively and tethering the doctrine more explicitly in its English common law heritage.<sup>123</sup>

The Court's pronouncement of the PTD in *Illinois Central* remained largely static over the next century until *Phillips Petroleum Co. v. Mississippi* in 1988, when the Supreme Court considered title to non-navigable segments of tidal rivers.<sup>124</sup> There, the Court held that the expansion of the American PTD to include lands submerged under all navigable-in-fact waters did not mean an abandonment of the common law tidal influence test.<sup>125</sup> Thus, title to the disputed tidal lands vested in the state as trustee upon admission to the union, regardless of navigability.<sup>126</sup>

This statement, that the PTD extends to lands submerged under both navigable-in-fact and tidally influenced waters, stands as the Court's last major articulation of the scope of the doctrine.<sup>127</sup> Moreover, the Court has commented only once on the PTD in recent years.<sup>128</sup> In 2012, the Court mentioned the PTD in *PPL Montana, LLC v. Montana*, a dispute over the state's title to non-navigable river segments.<sup>129</sup> The state of Montana raised the PTD as part of its argument for title, so the Court addressed it to highlight the distinction between the PTD and the doctrine actually controlling the case, the equal-footing doctrine.<sup>130</sup> Considering this sparse treatment, in terms of Supreme Court precedent, the descriptions of the PTD by Justice Fields in *Illinois Central* remain largely controlling.<sup>131</sup>

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<sup>123</sup> See 152 U.S. 1, 11–12, 14–15 (1894) (discussing the King's sovereignty over submerged lands for the public's use and benefit under English law and the continuation of this tradition through the colonies to the states).

<sup>124</sup> *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472 (1988); *Ill. Cent.*, 146 U.S. at 452–55.

<sup>125</sup> *Phillips Petroleum Co.*, 484 U.S. at 481.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See *PPL Mont. LLC, v. Montana*, 565 U.S. 576, 580 (2012) (representing the only opinion by sitting members of the Court referencing the PTD as of this Note's publication).

<sup>129</sup> *Id.* at 580, 603–04.

<sup>130</sup> See *id.* at 603–04 (discussing the PTD in dicta). Unfortunately, the Court, in dicta, meant to express the deference given states in interpreting their PTDs but not the equal-footing doctrine, and the Court reiterated questionable precedent describing the PTD as state law. *Id.* at 603. *But see* Blumm & Schaffer, *supra* note 20, at 409 (arguing that this precedent does not make the PTD inapplicable to the federal government).

<sup>131</sup> See Blumm & Schaffer, *supra* note 20, at 402 (referring to *Illinois Central* as the lodestar PTD case, using the term coined by Professor Joseph Sax, Sax, *supra* note 66, at 489).

### B. The Public Trust Doctrine at the State Level

In comparison, the PTD has developed more decidedly at the state level.<sup>132</sup> The majority of states have cited *Illinois Central* in describing their own doctrines, with many of those seemingly recognizing it as a binding statement of federal law.<sup>133</sup> Many, however, have gone beyond the scope of the traditional doctrine, most prevalently by expanding the protected public uses to include recreation.<sup>134</sup> Others have treated it even more progressively, expanding the protected values to include environmental protection or openly describing their PTDs as adaptive or evolving to meet the changing needs of their people.<sup>135</sup> Where states have so expanded their PTDs, they have done so in recognition of the perennial value of the state's resources to the public.<sup>136</sup>

For example, in the 1995 case *Sierra Club v. Kiawah Resort Association*, the South Carolina Supreme Court considered whether an agency decision to permit private construction of a series of docks violated the PTD.<sup>137</sup> In finding that the permit neither conveyed interest in trust resources nor would substantially impair them, the court described the PTD beneficiary interest as an "inalienable right."<sup>138</sup> Many states have gone beyond common law and have expressly incorporated the PTD into their constitutions or into the public rights they protect.<sup>139</sup> Hawaii, the state with the most progressive PTD, for instance, declares in its constitution that the state "shall conserve and protect Hawaii's natural beauty and all natural resources" for all generations.<sup>140</sup> The Hawaii Supreme Court considered this language, amongst several other supporting provi-

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<sup>132</sup> See *Phillips Petroleum Co.*, 484 U.S. at 484 ("We see no reason to disturb the general proposition that the law of real property is . . . left to the individual states to develop and administer."); *Eastern Public Trust*, *supra* note 17, at 11 (outlining ways in which the states can expand upon the traditional PTD).

<sup>133</sup> Chase, *supra* note 20, at 151.

<sup>134</sup> *Eastern Public Trust*, *supra* note 17, at 11.

<sup>135</sup> *Adapting to Climate Change*, *supra* note 21, at 846–50; *Western States' Public Trust*, *supra* note 18, at 83–84.

<sup>136</sup> See *Adapting to Climate Change*, *supra* note 21, at 846–50 (describing states that anticipate their PTD evolving alongside public values); see, e.g., *State v. Cent. Vt. Ry. Inc.*, 571 A.2d 1128, 1130 (Vt. 1990) (describing the PTD as "molded and extended to meet the changing conditions and needs of the public it was created to benefit") (quoting Matthews Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984)).

<sup>137</sup> 456 S.E.2d 397, 399, 402 (S.C. 1995) (holding that permitting dock construction would not violate the PTD).

<sup>138</sup> *Id.*

<sup>139</sup> E.g., ALASKA CONST. art. VIII, §§ 13–15; HAW CONST. art. XI, § 1; N.M. CONST. art. XX, § 21; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 16; S.C. CONST. art. XIV, §§ 1, 4; see *Eastern Public Trust*, *supra* note 17, at 26–113 (describing the PTD for each eastern state); *Western States' Public Trust*, *supra* note 18, at 93–197 (describing the PTD for each western state).

<sup>140</sup> HAW. CONST. art. XI, § 1; see *Western States' Public Trust*, *supra* note 18, at 58, 71 (describing the breadth of Hawaii's PTD compared to other states).

sions of the state constitution, in *In re Water Use Permit Application*.<sup>141</sup> In interpreting this language, it found that the state's PTD applied to both surface and ground water and kept both within the state's sovereign authority.<sup>142</sup>

That case raises another interesting development of the American PTD, namely that it lies inherent in the sovereignty of states, so subverting the PTD, accordingly, undermines the state's sovereignty.<sup>143</sup> This conclusion draws support from the doctrine's centuries of common law persistence, but judicial opinions also urge this conclusion.<sup>144</sup> Most notably, the Supreme Court's treatment of the PTD, particularly in the doctrine's development alongside the equal-footing doctrine in the nineteenth century, implies its fundamental tie to sovereign power.<sup>145</sup> As the *Illinois Central* Court declared, "such property is held by the State, by virtue of its sovereignty, in trust for the public."<sup>146</sup> Many state courts also maintain that the PTD involves innate elements of sovereignty.<sup>147</sup> For example, in *Parks v. Cooper*, the South Dakota Supreme Court stated, quite plainly, that tradition established the PTD as "an inherent attribute of sovereign authority."<sup>148</sup> There the court contemplated title to new lakes formed by flooding on private property.<sup>149</sup> It found that the PTD existed independent of any positive law and held that the doctrine required the sovereign state to protect use of those waters for the public.<sup>150</sup>

Under this view, if the several states are sovereigns and if the federal government represents a sovereign nation, then each must accept and uphold its fi-

<sup>141</sup> 9 P.3d 409, 442 (Haw. 2000).

<sup>142</sup> *Id.* at 447 (considering the apportionment of water from a ditch-system containing both fresh surface water and groundwater to private irrigation and natural streams).

<sup>143</sup> See Blumm & Schaffer, *supra* note 20, at 411, 419 (describing the PTD as inherent in sovereignty and part of the state's reserved powers).

<sup>144</sup> *Id.*; see Wilkins, *supra* note 23, at 429 (discussing the PTD's heritage).

<sup>145</sup> See *Pollard*, 44 U.S. at 223 (describing the sovereign's trust responsibilities in outlining the equal-footing doctrine); *Martin*, 41 U.S. at 416 (describing the sovereign's responsibilities over lands vested with the public interests).

<sup>146</sup> *Ill. Cent.*, 146 U.S. at 455; see also *Martin*, 41 U.S. at 416 (explaining that the obligations and responsibilities of the English government vested in the state when the people assumed the sovereign power); *id.* at 420 (Thompson, J., dissenting) (explaining that the power vested in the state is the *jus regium*, the power to regulate for the benefit of the people, and asserting that this obligation prohibits divesting complete control in public resources and thus depriving the people of a "common right").

<sup>147</sup> Blumm & Schaffer, *supra* note 20, at 419; see, e.g., *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981) (saying neither the federal nor state governments can convey trust lands free of the sovereign's *jus publicum*); *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999) (saying the PTD is a constitutional limitation on legislature); *In re Water Use Permit Application*, 9 P.3d at 443 (saying history has established the PTD as inherent in sovereign authority); *Lawrence v. Clarke Cnty.*, 254 P.3d 606, 613 (Nev. 2011) (saying the PTD arises from inherent limitations on state power); *Robinson Township v. Commonwealth*, 83 A.3d 901, 948 (Pa. 2013) (saying PTD rights are preserved rather than created by the state constitution).

<sup>148</sup> 676 N.W.2d 823, 837 (S.D. 2004).

<sup>149</sup> *Id.* at 824.

<sup>150</sup> *Id.* at 838–39.

duciary relationship towards its people and manage the resources held in trust for their benefit.<sup>151</sup> This means that the individual sovereigns that comprise the United States, as fiduciaries, each must manage the navigable-in-fact and tidally effected waters within their jurisdiction as well as any additional resources that their respective constitutional, statutory, or common laws have recognized as held in trust.<sup>152</sup> Nevertheless, despite how powerful these statements may seem, establishing the PTD as inherent in sovereign authority still leaves unresolved how the various branches of government should apply it as a legal concept.<sup>153</sup>

#### IV. THE PUBLIC TRUST DOCTRINE AND DUE PROCESS

Recognizing the public's beneficiary interest as a due process protected fundamental right would help guide the PTD's treatment by the separate powers of government and would build on the dual notions that the doctrine lies inherent in sovereignty and that sovereign states must fulfill their trustee obligations.<sup>154</sup> Several points support the argument that sovereigns should treat the PTD as a matter of due process: first, the PTD's longstanding tradition and treatment by courts as a source of standing suggests that it qualifies as a protected property interest; second, the PTD's similarity to the police power suggests that it would fit well within due process jurisprudence; and third, viewing the PTD as a matter of due process accords with its judicial treatment to date.<sup>155</sup>

##### *A. The Public Trust Doctrine's History Makes Its Beneficiary Interest a Protected Property Right*

The PTD's beneficiary interest should qualify as a protected property right because individual members of the public can reasonably expect the sovereign to respect it, making the PTD, if not a core property interest, at least an

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<sup>151</sup> See *Ill. Cent.*, 146 U.S. at 457–58, 460 (saying the state holds title to trust resources for the public); Blumm & Schaffer, *supra* note 20, at 418 (saying states as sovereigns have an obligation to protect trust resources for the present and future public).

<sup>152</sup> See Blumm & Schaffer, *supra* note 20, at 418 (saying sovereigns have a duty to protect trust resources); see, e.g., *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981) (saying neither the federal nor state governments can convey trust lands free of the sovereign's *jus publicum*); *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999) (saying the PTD is a constitutional limitation on legislature); *In re Water Use Permit Application*, 9 P.3d at 443 (saying history has established the PTD as inherent in sovereign authority); *Lawrence v. Clarke Cnty.*, 254 P.3d 606, 613 (Nev. 2011) (saying the PTD arises from inherent limitations on state power); *Robinson Township v. Commonwealth*, 83 A.3d 901, 948 (Pa. 2013) (saying PTD rights are preserved rather than created by the state constitution).

<sup>153</sup> See *infra* notes 212–251 and accompanying text. Cf. Blumm & Schaffer, *supra* note 20, at 412 (explaining that because the PTD is inherent in sovereignty, the Tenth Amendment's reserved-powers doctrine embodies it in the federal constitution but not discussing the implication of this conclusion on application).

<sup>154</sup> See *supra* notes 151–152 and accompanying text; *infra* notes 219–251 and accompanying text.

<sup>155</sup> See *infra* notes 156–209 and accompanying text.

entitlement.<sup>156</sup> To qualify as a protected interest under entitlement theory, the existing law must so limit the governing body's discretion toward a particular interest that an individual can reasonably expect a certain treatment or outcome.<sup>157</sup> When dealing with statutes or regulations, courts look for explicit textual language in the law obliging administrators in certain circumstances to conduct themselves a specific way.<sup>158</sup> Akin to this analysis, when identifying fundamental liberty interests that merit protection, courts look to tradition and the nation's history to identify those interests that Americans recognize as vital to their pursuit of happiness.<sup>159</sup> Together, these suggest that the basis for entitlements to property for a primarily common law doctrine like the PTD would have to come from limitations placed on official discretion by precedent protected by *stare decisis*.<sup>160</sup>

The individual sense of entitlement derived from precedent should, logically, become stronger and more reasonable the more enduring and uniform the judicial statements of law.<sup>161</sup> The numerous examples of courts applying shifts in the common law prospectively, rather than in the at-hand case, demonstrates the judiciary's respect for such reasonable expectations of the public.<sup>162</sup> Fairness urges against holding people retrospectively responsible for conduct that accorded with the law at the time of the actions because people tend to tailor their conduct to the bounds of the law.<sup>163</sup> They have expectations in the state of

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<sup>156</sup> See *Ky. Dep't of Corrs. v. Thompson*, 490 U.S. 454, 465 (1989) (finding no liberty interest because regulations did not create a reasonable expectation); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (saying that a legitimate claim of entitlement, not a unilateral expectation creates a property interest).

<sup>157</sup> See *Ky. Dep't of Corrs.*, 490 U.S. at 462 (saying that law creates a liberty interest by placing limits on official discretion); *Roth*, 408 U.S. at 577 (saying that existing rules and understandings create property interests when they support claims of entitlement).

<sup>158</sup> See *Ky. Dep't of Corrs.*, 490 U.S. at 462–63 (reviewing prison regulations for language creating liberty interests).

<sup>159</sup> *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>160</sup> See *Moore*, 431 U.S. at 503 (saying that the Constitution protects an interest because that interest is rooted in the Nation's history and tradition); *Roth*, 408 U.S. at 577 (saying that claims of entitlement come from existing understandings of law); see also *Stare decisis*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“[T]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.”).

<sup>161</sup> See *supra* notes 157–160 and accompanying text.

<sup>162</sup> *E.g.*, *Marks v. United States*, 430 U.S. 188, 191 (1977) (holding that to apply a new standard of jury instructions retroactively violates due process); *Commonwealth v. Cass*, 467 N.E.2d 1324, 1327 (Mass. 1984) (holding that the statutory term “person” includes viable fetuses but applying the change prospectively); *Commonwealth v. Klein*, 363 N.E.2d 1313, 1320 (Mass. 1977) (holding that the first statement within the jurisdiction of a particular standard at common law should only be applied prospectively).

<sup>163</sup> See *Marks*, 430 U.S. at 191–92 (saying that the principles of the Ex Post Facto Clause apply to the judiciary as a matter of due process liberty).

the law, and the legal system respects their expectations by requiring fair warning before a change.<sup>164</sup> Due process protects such expectations.<sup>165</sup>

With the PTD, even though it has evolved and expanded since its inception in American law, its fundamental statement in the 1892 Supreme Court case *Illinois Central Railroad Co. v. Illinois*, has remained relatively static for over a century and that statement itself builds on half a millennia of English common law.<sup>166</sup> This longstanding precedent further portrays the PTD as inherent in sovereignty and accordingly irrevocable.<sup>167</sup> As an inherent and irrevocable element of sovereignty that has persisted since the Nation's inception, courts should view the PTD as an enduring aspect of the Nation's history and tradition and find expectations that a government adhere to the PTD as reasonable.<sup>168</sup>

The eminence of the *Illinois Central* opinion also makes it possible to look for explicit language cordoning state discretion as entitlement theory would require.<sup>169</sup> That opinion states that the trust "requires" the government to preserve its waters, that the legislature "must" use its powers to execute its trust obligations, and that the state "cannot" fully abdicate control over the trust.<sup>170</sup> Strong language pervades the opinion all to the effect that the state has an obligation to uphold its trust responsibilities, therefore limiting and directing its use of discretion towards trust resources.<sup>171</sup>

Finally, when a proposed government action threatens public access or use of a protected resource, some courts have treated the PTD as presumptive

<sup>164</sup> See *id.* (saying that fair notice of what amounts to criminal conduct is a matter of constitutional liberty).

<sup>165</sup> *Id.* at 192 (requiring fair notice of changes in the law as a matter of due process).

<sup>166</sup> *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 458 (1892); *Eastern Public Trust*, *supra* note 17, at 9; see *supra* notes 78–134 and accompanying text.

<sup>167</sup> *Ill. Cent.*, 146 U.S. at 455–56; Blumm & Schaffer, *supra* note 20, at 418; see Coquillette, *supra* note 23, at 801; Wilkins, *supra* note 23, at 429.

<sup>168</sup> See *supra* notes 158–160 and accompanying text. Additionally, Justice Fields in *Illinois Central* quotes an earlier state opinion, which the *Martin v. Waddell* Court similarly relied upon, that describes the public interest in state waters as a common right. *Ill. Cent.*, 146 U.S. at 456 ("The sovereign power, itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right.") (quoting *Arnold v. Mundy*, 1 Halsted, 1, 13 (N.J. 1821)); *Martin*, 415 U.S. at 419. In the alternative, as a right with deep foundation in American tradition, the PTD beneficiary interest may also satisfy the Supreme Court's test applied to the incorporation of liberty interests into due process. See *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (describing fundamental liberty interests as those embedded in the nation's history and tradition).

<sup>169</sup> *Ill. Cent.*, 146 U.S. at 452; Chase, *supra* note 20, at 150; see *Ky. Dep't of Corrs.*, 490 U.S. at 462–63 (reviewing prison regulations for explicit language creating a liberty interest).

<sup>170</sup> *Ill. Cent.*, 146 U.S. at 452, 454, 460.

<sup>171</sup> See *id.* (describing the state's trustee responsibilities as mandatory and prohibiting complete divestiture of control).

grounds for standing for any member of the public.<sup>172</sup> Such treatment suggests that courts already see the beneficiary interest as an entitlement.<sup>173</sup> Building on this and respecting the obligations imposed on sovereigns by the PTD's persistent precedent, courts should take the next step and acknowledge the PTD's beneficiary interest as an entitled property interest.<sup>174</sup> Such an acknowledgement would push the PTD squarely within the broad jurisprudence of due process.<sup>175</sup>

### B. The Public Trust Doctrine's Similarity to the Police Power

Shifting the focus to the states, the PTD's similarity to the police power suggests that, like the police power, sovereign states should treat the PTD as a matter of due process.<sup>176</sup> Both concepts predate American or even English law.<sup>177</sup> The police power stems from the authority described in the Justinian Institutes as *jus regium*, or the authority of the sovereign to legislate for the welfare of the people.<sup>178</sup> Under both Roman and English law, the *jus publicae*, or public law, from which the PTD stems, subjugated this sovereign power.<sup>179</sup> The police power and PTD also both emerge from the relationship between the state and its governed people, so they speak directly to how a particular state understands the concept of sovereignty.<sup>180</sup> The concept of the police power first appeared in American jurisprudence in *Gibbons v. Ogden*, when Chief Justice Marshall in resolving control over navigation rights, described the residual powers retained by the states.<sup>181</sup> In *Illinois Central*, which itself drew on navigation and federalism precedent, Justice Fields used an analogy to the police power to describe the PTD, asserting that a state could no more abdicate its trust responsibilities than it could abdicate its police powers.<sup>182</sup> This paints

<sup>172</sup> *Paepcke v. Pub. Bldg. Comm'n.*, 263 N.E.2d 11, 18 (Ill. 1970); Turnipseed, *supra* note 21, at 17, 19.

<sup>173</sup> See *Paepcke*, 263 N.E.2d at 18 (describing the PTD as grounds for standing); Turnipseed, *supra* note 21, at 17, 19 (describing the PTD as presumptive grounds for standing).

<sup>174</sup> See *supra* notes 151–152, 156–172 and accompanying text.

<sup>175</sup> See U.S. CONST. amends. V, XIV, § 1 (indicating that deprivations of property require due process) *Roth*, 408 U.S. at 577 (indicating that entitlement property interests come from preexisting law).

<sup>176</sup> See *infra* notes 177–191 and accompanying text.

<sup>177</sup> Patalano, *supra* note 42, at 702; see Coquillette, *supra* note 23, at 801 (describing the PTD's origins in Roman law).

<sup>178</sup> Patalano, *supra* note 42, at 705.

<sup>179</sup> *Id.*

<sup>180</sup> See Byrne, *supra* note 66, at 917 (saying the PTD can provide an alternative to the police power); Hilla, *supra* note 37, at 99 (discussing sovereignty as understood by John Locke—granted in limited form by consent of the people to serve the people).

<sup>181</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 50 (1824).

<sup>182</sup> *Ill. Cent.*, 146 U.S. at 453.

both the PTD and police power as inherent attributes of sovereignty and sources of authority to govern for the people.<sup>183</sup>

Although both doctrines grew as sources of authority for state action, simultaneously, they both limit its power when the public welfare or good of the state requires.<sup>184</sup> Both cordon the state's exercise of its sovereign powers to the appropriate purposes and means identified by their respective jurisprudence.<sup>185</sup> In reviewing an exercise of the police power, a court will first look to see if the act serves a proper public purpose, or, less deferentially, a compelling public interest.<sup>186</sup> Then, it will look to whether the chosen means rationally relates to that end, with the level of scrutiny depending on the interest at stake.<sup>187</sup> Similarly, in reviewing an action relating to public trust resources, a court will consider the purpose, asking if the action serves the trustee's obligations of preserving intergenerational public use and access to the resource.<sup>188</sup> In reviewing the rationality of that action, a court will ask if it promotes the public interests in the resource or at least does not substantially impair those interests.<sup>189</sup>

Based on these standards, the levels of scrutiny applied in reviewing an exercise of the police power or the public trust differ, but the review asks essentially the same questions.<sup>190</sup> They both seek to stave off capricious government action that violates the obligations inherent in the state's sovereignty by considering the purposes, means, and various public and private interests at stake.<sup>191</sup> Due process restrains government action in just this way.<sup>192</sup> The case law establishes that a review for proper exercise of the police power often falls

<sup>183</sup> See *id.* (portraying the police power and PTD as analogous obligations of the state to the people).

<sup>184</sup> See *infra* notes 185–192 and accompanying text.

<sup>185</sup> See *Euclid v. Ambler*, 272 U.S. 365, 395 (saying due process requires that regulations serve public health, safety, morals, or general welfare); *Ill. Cent.*, 146 U.S. at 453 (saying the PTD requires alienations of trust resources to serve or not substantially impair the public interest).

<sup>186</sup> See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (saying that it requires a compelling public purpose to infringe a fundamental right); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627–28 (1969) (saying statutes generally only need a rational basis); *Euclid*, 272 U.S. at 387 (saying exercises must be justified by a proper public purpose).

<sup>187</sup> See *United States v. Carolene Prods., Inc.*, 304 U.S. 144, 152 n.4 (1938) (indicating that deprivation of certain interests requires a higher level of scrutiny).

<sup>188</sup> *Ill. Cent.*, 146 U.S. at 453; Turnipseed, *supra* note 21, at 17.

<sup>189</sup> *Ill. Cent.*, 146 U.S. at 453.

<sup>190</sup> Compare *Carolene Prods., Inc.*, 304 U.S. at 152 n.4 (discussing the level of deference given exercise of the police power and the higher scrutiny given when abridging fundamental rights), with *Ill. Cent.*, 146 U.S. at 453 (explaining when a state can alienate its trust responsibilities).

<sup>191</sup> See Blumm & Schaffer, *supra* note 20, at 411 (describing the police power and due process as inherent in sovereignty); Ely, *supra* note 25, at 324 (saying due process protects against arbitrary government action); Plater & Norine, *supra* note 8, at 709 (describing means end analysis); Sax, *supra* note 66, at 488–89 (describing the PTD as a restraint on the states).

<sup>192</sup> See Ely, *supra* note 25, at 320, 338 (saying due process requires a rational nexus between a government's means and its desired ends).



under due process.<sup>193</sup> Therefore, based on the similarities between the police power and the PTD, due process should also provide the framework for review of a state's public trust obligations.<sup>194</sup>

### *C. A Due Process Public Trust Doctrine Fits with Existing Precedent*

Furthermore, viewing the PTD as a matter of due process would not upset its common law tradition.<sup>195</sup> The leading federal case, *Illinois Central*, and two notable state cases, *Boston Waterfront Development Corp. v. Commonwealth* and *National Audubon v. Superior Court* (“*Mono Lake*”) demonstrate how a due process PTD fits within existing precedent.<sup>196</sup> In *Illinois Central*, the Court stated that the legislature's earlier grant of a large section of Chicago's harbor to the private railroad violated its trust obligations to retain control and manage that resource for the public's access and use.<sup>197</sup> Hypothetically infusing this holding with due process language, the legislature arbitrarily or capriciously exercised its sovereign power over the lake and lakeshore because the grant would inhibit its ability to protect the public interests in the property.<sup>198</sup> Thus, the Court used the PTD as the law of the land to outline the perimeter of acceptable exercises of sovereign authority and invalidated the legislative grant for overstepping it.<sup>199</sup>

In *Boston Waterfront*, the Massachusetts Supreme Judicial Court considered whether a statutory grant permitting a private corporation to build wharves into Boston Harbor below the low water mark conveyed fee simple absolute title to the land below the wharves.<sup>200</sup> After reciting a thorough history of the shore law of Massachusetts from its colonial founding to the present, the court found that the statute did grant fee simple title but on the condition that the grant continue to serve the public purpose that initially induced the

<sup>193</sup> See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540, 542 (2005) (identifying reasonableness review of the police power as a due process review); *Euclid*, 272 U.S. at 397 (identifying zoning regulations that serve a valid public purpose as a proper exercise of the police power under due process).

<sup>194</sup> See Blumm & Schaffer, *supra* note 20, at 411 (comparing the PTD and police power); *supra* notes 178–193 and accompanying text.

<sup>195</sup> See *infra* notes 196–209 and accompanying text.

<sup>196</sup> *Ill. Cent.*, 146 U.S. at 433; *Nat'l Audubon Soc'y v. Superior Court (Mono Lake)*, 658 P.2d 709, 711 (Cal. 1983); *Bos. Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 357 (Mass. 1979); see *infra* notes 197–209 and accompanying text.

<sup>197</sup> *Ill. Cent.*, 146 U.S. at 453, 460.

<sup>198</sup> See *id.*; *supra* notes 30–65 and accompanying text.

<sup>199</sup> See *Ill. Cent.*, 146 U.S. at 453, 460; *supra* notes 30–65 and accompanying text.

<sup>200</sup> 393 N.E.2d at 358. If due process does protect the public trust beneficiary interest, then the U.S. Supreme Court's recognition that states hold lands submerged under tidal and navigable water in trust calls the position of Massachusetts, which extends private ownership to the mean low tide line, into question. See Fernandez, *supra* note 100, at 655–56 (questioning Massachusetts's continued adherence to the colonial ordinance of 1647).

legislation.<sup>201</sup> The state held these lands in trust for the public, so it could only grant title to serve a public purpose, and the land's use had to continue to serve the grant's original public purpose because the land remained subject to the public trust after the grant.<sup>202</sup> To phrase this as a due process analysis, the public trust requires a heightened public purpose that accounts for intergenerational public interests in the property, therefore a grant of fee simple absolute title abolishing those interests would be an irrational means of achieving the public end.<sup>203</sup> On the other hand, a grant with the condition subsequent that it continues to serve its public purpose would rationally promote that end and accordingly satisfy due process.<sup>204</sup>

In *Mono Lake*, the California Supreme Court reviewed the City of Los Angeles's decision to withdraw water from mountain streams feeding an ecologically unique salt lake.<sup>205</sup> The court, initially, recognized the lake as a public trust resource based on its ecological and scenic value, which put the state's prior appropriation law and the PTD in direct conflict.<sup>206</sup> The court then held that the state had an obligation to consider its public trust obligations in allocating its water resources and ordered a study to determine the impact of water withdrawal on the lake.<sup>207</sup> Applying it as a demonstration of a due process PTD, because the court recognized the lake as a trust resource, the state had to reconcile its actions with the public purpose requirements of the PTD.<sup>208</sup> Not doing so would be arbitrary or capricious action, thus the court ordered a study to clarify the reasoning of the state.<sup>209</sup>

These examples demonstrate that reinterpreting the PTD as a matter of due process would not undermine the existing precedent.<sup>210</sup> Further, the endurance and fundamental recognition of the PTD's beneficiary interest and the doctrine's role as both a source and stricture on sovereign power complementary to the police power suggest that courts should treat it as such.<sup>211</sup>

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<sup>201</sup> *Bos. Waterfront*, 393 N.E.2d at 367.

<sup>202</sup> *Id.* at 366–67.

<sup>203</sup> *See id.* (holding that grants of trust resources included the public purpose as a condition subsequent); *supra* notes 30–65 and accompanying text.

<sup>204</sup> *See Bos. Waterfront*, 393 N.E.2d at 367 (requiring continued support of the public purpose as a condition subsequent); *supra* notes 30–65 and accompanying text.

<sup>205</sup> 658 P.2d at 711.

<sup>206</sup> *Id.* at 712, 727. California water use law incorporates common law appropriation, which allows private parties to appropriate and divert natural water channels under certain circumstances. *Id.* at 724. Of the fifty states, California carries one of the most expansive PTDs. *See Western States Public Trust*, *supra* note 18, at 83.

<sup>207</sup> *Mono Lake*, 658 P.2d at 728.

<sup>208</sup> *Id.*; *see supra* notes 30–65 and accompanying text.

<sup>209</sup> *See Mono Lake*, 658 P.2d at 729 (requiring consideration of the PTD's environmental protections); *supra* notes 30–65 and accompanying text.

<sup>210</sup> *See supra* notes 196–209 and accompanying text.

<sup>211</sup> *See supra* notes 156–193 and accompanying text.

## V. JUDICIAL TREATMENT OF A DUE PROCESS PROTECTED PUBLIC TRUST DOCTRINE

Some may argue that understanding the PTD as a condition of due process would unnecessarily expand due process or undermine the PTD's protections.<sup>212</sup> But understanding the PTD through due process does not change the obligations or rights the doctrine creates and would ease, rather than perplex the judicial role.<sup>213</sup> Individual members of the public would retain an interest in access and use of designated resources, and the state would remain obligated to act as trustee of those resources to promote the public interests of present and future generations.<sup>214</sup> The doctrine, however, would now have a constitutional foundation, and courts could review both police power and public trust exercises of authority through the same analysis.<sup>215</sup> This would simplify judicial review of both legislative and administrative action, ease some of the confusion in takings law, and provide a framework for the ongoing debate regarding the PTD's scope.<sup>216</sup>

### A. Applying the Due Process Protected Public Trust Doctrine to Review of Government Action

As with exercises of the police power, people could challenge legislative and administrative action involving the trust.<sup>217</sup> Such statutory or regulatory challenges would proceed along the same lines whether under the PTD or police power.<sup>218</sup> The standards of scrutiny applied would simply change when a government decision involves property held in trust.<sup>219</sup> First, a court would ask if the state has sovereignty over the property in question, and secondly, if the public trust burdens the property.<sup>220</sup> Thirdly, if the property were a public trust resource, then a court would ask if the state undertook its action to serve the

<sup>212</sup> See *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (criticizing the extension of due process into substantive realms); Coquillette, *supra* note 23, at 811–12 (arguing against reducing the PTD to an administrative law).

<sup>213</sup> See *infra* notes 214–252 and accompanying text.

<sup>214</sup> See *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892) (discussing the public's interest in access and use); *Byrne*, *supra* note 66, at 916 (discussing the trustee's obligations); *Turnipseed*, *supra* note 21, at 17–18 (discussing the intergenerational public interest).

<sup>215</sup> See U.S. CONST. amend. XIV, § 1 (requiring due process prior to deprivation of life, liberty, or property); *infra* notes 218–224 and accompanying text.

<sup>216</sup> See *infra* notes 219–267 and accompanying text.

<sup>217</sup> See *supra* notes 185–193 and accompanying text.

<sup>218</sup> See *supra* notes 185–190 and accompanying text.

<sup>219</sup> Compare *Ill. Cent.*, 146 U.S. at 453 (determining proper public purpose by whether it promotes or does not substantially impairing the public's interest in access and use), with *Euclid v. Ambler*, 272 U.S. 365, 395 (1926) (determining proper public purpose by deciding if it substantially relates to public health, safety, morals, or general welfare).

<sup>220</sup> See *Ill. Cent.*, 146 U.S. at 433–35, 452 (describing the property at issue and identifying it as a trust resource).

proper public purpose of intergenerational use and access.<sup>221</sup> Alternatively, if the property were not a trust resource, the court would ask if the state undertook its action to serve another standard of proper public purpose, such as public health, safety, morals, or general welfare.<sup>222</sup> Finally, the court would ask if the means chosen rationally relate to that proper purpose.<sup>223</sup> If dealing with a trust resource, meeting this rationality requirement would require the action either to promote or not substantially impair public interests in the resource.<sup>224</sup> If not dealing with a trust resource, then the court would either require the deferential rational connection generally given to state exercises of the police power or the higher standard applied to fundamental liberty interests.<sup>225</sup>

In administrative law, courts tend to give agencies considerable deference in interpreting and executing their statutory mandates.<sup>226</sup> Many statutes include explicit language conveying trust obligations, but for those that do not, such deference theoretically could conflict with proper PTD due process review as described.<sup>227</sup> But, understanding the PTD as grounded in the due process clause also facilitates its use as a canon of construction, similar to the canon against constitutional conflict.<sup>228</sup> This would in turn allow courts to incorporate

<sup>221</sup> See *id.* at 453 (saying trust resources can only be alienated if doing so advances or does not impair the public's interest); Turnipseed, *supra* note 21, at 17–18 (discussing the intergenerational public interest).

<sup>222</sup> See *Euclid*, 272 U.S. at 395 (saying regulation of property that serves a proper public purpose is not arbitrary or capricious).

<sup>223</sup> See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (asserting reasonable regulations do not violate due process).

<sup>224</sup> See *Ill. Cent.*, 146 U.S. at 453 (asserting the trustee can alienate trust property if it properly protects the public interest).

<sup>225</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973) (applying strict scrutiny review to a regulation inhibiting abortion); *United States v. Carolene Prods., Inc.*, 304 U.S. 144, 152 (1938) (applying a deferential standard of review to a regulation interfering with commerce of “filled milk”); *W. Coast Hotel*, 300 U.S. at 391 (applying a deferential standard of review to a regulation interfering with the right to contract).

<sup>226</sup> See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984) (saying courts should give agencies deference in interpreting statutes they enforce).

<sup>227</sup> E.g., Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(f) (2016) (saying that the federal government and states “shall act on behalf of the public as trustee of such natural resources”). A due process PTD would infuse PTD trustee obligations and their associated limitations of government discretion with the review process, thus narrowing what would qualify as a reasonable interpretation under *Chevron*. See *Chevron*, 467 U.S. 842–43 (indicating that courts should defer to an agency's reasonable statutory interpretations).

<sup>228</sup> See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (stating that when possible, courts should interpret statutes to avoid constitutional doubt); *Ill. Cent.*, 146 U.S. at 452–53 (discussing the PTD obligations and interests); *Canon of Construction*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“A rule used in construing legal instruments . . .”); Araiza, *supra* note 19, at 697 (presenting the PTD as a canon of statutory construction). Backing the PTD with the Constitution and grounding it in the familiar terms of due process would make it easier to identify potentially conflicting statutory interpretations. See Araiza, *supra* note 19, at 697 (outlining how to use the PTD as a canon of statutory construction).

respect for the interests and obligations of the PTD into the various forms of administrative review.<sup>229</sup>

Recent court decisions and responding commenters have also begun to debate statutory displacement of the PTD.<sup>230</sup> Some assert that, because the PTD comes from common law, statutes that speak directly to the issue displace it as a cause of action.<sup>231</sup> Others reiterate that the PTD lies inherent in sovereignty, so legislative law could fulfill public trust obligations but cannot displace them.<sup>232</sup> Understanding the PTD as incorporated in due process helps clarify this debate.<sup>233</sup> Because due process constitutionally protects PTD beneficiary interests and obligates the sovereign as trustee, a state cannot abrogate its responsibilities through statutory displacement without causing a deprivation of property.<sup>234</sup> But, should the state choose to fulfill its trustee responsibilities by legislation, a court would still likely dismiss a general PTD challenge for failure to state a claim.<sup>235</sup> The state has acted as trustee, but possibly arbitrarily or capriciously.<sup>236</sup> In that scenario, a claim that the state has not fulfilled its responsibilities as trustee should actually come as a statutory challenge, asserting the inadequacy of the statute as a violation of a due process protected property interest.<sup>237</sup>

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<sup>229</sup> *E.g.*, *Chevron*, 467 U.S. at 842–43 (describing the appropriate way to review agency interpretations of administered statutes); *see Araiza, supra* note 19, at 697 (describing use of the PTD as a canon of statutory interpretation).

<sup>230</sup> *E.g.*, *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15–16 (D.D.C. 2012) (finding that the Clean Air Act, 42 U.S.C. §§ 7401–7671, preempts the PTD as applied to the atmosphere); Blumm & Schaffer, *supra* note 20, at 418 (arguing that statutes cannot displace the PTD); Schaffer, *supra* note 70, at 174–75 (arguing that *Alec L.* mistakenly found preemption).

<sup>231</sup> *Alec L.*, 863 F. Supp. 2d at 15–16.

<sup>232</sup> Blumm & Schaffer, *supra* note 20, at 418.

<sup>233</sup> *See infra* note 234 and accompanying text.

<sup>234</sup> U.S. CONST. amends. V, XIV; *see* Blumm & Schaffer, *supra* note 20, at 411, 418–19 (arguing that states cannot displace the PTD without breaching their responsibilities as sovereigns).

<sup>235</sup> *See* 42 U.S.C. § 9607(f) (allowing states to collect natural resource damages as trustee for the public); *Alec L.*, 863 F. Supp. 2d at 17 (finding federal statute preempted a PTD for climate change).

<sup>236</sup> *See Nebbia v. New York*, 291 U.S. 502, 525 (1934) (stating that regulations can affect property interests but not in an arbitrary or capricious manner).

<sup>237</sup> *See supra* notes 219–225 and accompanying text. Another interesting aspect of the PTD, it imposes affirmative obligations on the sovereign, so it not only limits discretion in acting but also in choosing when not to act. *See Paepcke v. Pub. Bldg. Comm'n.*, 263 N.E.2d 11, 18 (Ill. 1970) (saying members of the public do not have to await government action to have standing). As such, an individual or group could choose to challenge government inaction as a violation of their due process protected beneficiary interest. *See id.* But without affirmative statements from the court or legislature that the resource at risk falls within the corpus of the trust, such suits would pose challenges to plaintiffs. *See, e.g.*, *Juliana v. United States*, No. 6:15-cv-01517-TC, 2016 U.S. Dist. LEXIS 156014, at 5 (D. Or. Nov. 10, 2016) (deciding that plaintiffs cannot use the PTD to force affirmative action in combat of climate change).

### B. The Due Process Public Trust Doctrine and the Takings Clause

Because the PTD involves a balance of public rights, private rights, and sovereign authority, it also finds its way into eminent domain and regulatory takings cases.<sup>238</sup> Viewing the PTD as a matter of due process simplifies both such proceedings.<sup>239</sup> In the regulatory takings context, the PTD represents the public interest weighed against the private burden of the regulation.<sup>240</sup> In this sense, some scholars have even described it as immune from takings claims.<sup>241</sup> As *Boston Waterfront Development Corp. v. Commonwealth* demonstrates, this idea stems from the PTD notion that when the state alienates trust property to private holders for the public benefit, the act does not squelch the public interest.<sup>242</sup> Instead, the public interest persists in the form of an access easement or condition subsequent.<sup>243</sup> Whatever burdens a regulation imposes lessen when the private party lacks absolute title, especially when lacking the right to exclude.<sup>244</sup> Thus, a court is unlikely to see the burden as a taking when weighed against the strong public interest in trust resources.<sup>245</sup> The public interest persists because it is a right, which, under the Fifth and Fourteenth Amendments,

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<sup>238</sup> See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 865 (1987) (deciding the constitutionality of land use exactions and mentioning the PTD in dissent); *United States v. 32.42 Acres of Land*, 683 F.3d 1030, 1039 (9th Cir. 2012) (deciding the federal government's ability to take state trust land in eminent domain); *Palazzolo v. State (Palazzolo II)*, No. WM 88-0297, 2005 R.I. Super. LEXIS 108, at 48–56 (R.I. Super. Ct. July 5, 2005) (deciding that the PTD weighed heavily against finding a regulatory taking), *on remand from Palazzolo v. R.I.*, 533 U.S. 606, 632 (2001).

<sup>239</sup> See *infra* notes 240–253 and accompanying text.

<sup>240</sup> See *Palazzolo II*, 2005 R.I. Super. LEXIS 108 at 48–56 (using the PTD as part of regulatory takings analysis). Justice Sandra Day O'Connor's concurrence in *Palazzolo* effectively opened the door for such use of the PTD. See 533 U.S. at 633–36 (O'Connor, J., concurring) (clarifying the factors considered in regulatory takings analysis). In brief terms, whether a regulation affects a taking or not involves balancing a number of factors surrounding the burden imposed on the private property owner by the regulation. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (indicating that takings analysis involves considering economic impact on the property owner, their investment backed expectations, and the character of the government action).

<sup>241</sup> *Smith & Sweeney*, *supra* note 36, at 332 (describing regulation of trust resources as immune from takings claims).

<sup>242</sup> See 393 N.E.2d 356, 366–67 (Mass. 1979) (finding that the obligation to serve the public interest survives grant of title).

<sup>243</sup> See *id.* (finding that the public interest persists as a condition subsequent).

<sup>244</sup> See *Nollan*, 483 U.S. at 861 (Brennan, J., dissenting) (saying it is reasonable to weigh public and private interests in permitting property development); *R.W. Docks & Slips v. State*, 628 N.W.2d 781, 787, 791 (Wis. 2001) (describing the right to exclude as the hallmark of property rights but saying the PTD reduces its weight).

<sup>245</sup> See *Nollan*, 483 U.S. at 861 (Brennan, J., dissenting) (arguing against invalidating an inhibition of private property rights done in the public's interest); *Armstrong v. United States*, 364 U.S. 40, 48 (1960) (saying impact on private property rights as a consequence of serving the public may not effect a taking).

legislatures and regulators can regulate or restrict in service of the public good but cannot entirely abrogate.<sup>246</sup>

In the eminent domain context, the PTD could find its way into proceedings in three different ways.<sup>247</sup> First, if the state takes a large plot of trust property previously granted, according to *Illinois Central Railroad Co. v. Illinois*, that grant was necessarily revocable, so reacquisition of that property by the state may not qualify as a taking.<sup>248</sup> Second, if dealing with a smaller plot of trust property, the weight of the enduring public interest would reduce what the state owes as just compensation for taking the private owner's remaining property rights.<sup>249</sup> Third, if the federal government takes state land, the state's trustee responsibilities should pass to the federal government.<sup>250</sup> Whether transferring title in trust property from state to private owner, from private owner to state, or from state to federal government, in each scenario, characterizing the public's beneficiary interest as a protected right explains why it persists.<sup>251</sup> That the PTD persists, subsequently affects the fair value of the title transferred, speaking to just compensation.<sup>252</sup> Regardless of how one views the relationship between the takings and due process clauses, when public trust resources stand at issue, understanding the beneficiary interest as a fundamental right helps simplify the analysis.<sup>253</sup>

The Blackmun papers reveal that Justice Brennan's position in the 1986 case *Nollan v. California Coastal Commission* would have benefited from such an understanding.<sup>254</sup> In analyzing the access easement conditioning the at-issue permit in that case, Justice Brennan originally wanted to explain in his dissent that title to shore land comes burdened with the public interest.<sup>255</sup> He saw this as weighing against any imposition of private rights amounting to a taking,

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<sup>246</sup> U.S. CONST. amends. V, XIV § 1; *Ill. Cent.*, 146 U.S. at 453; see Byrne, *supra* note 66, at 917 (saying the PTD affects what qualifies as valid legislation of property rights).

<sup>247</sup> See *infra* notes 247–249 and accompanying text.

<sup>248</sup> See *Ill. Cent.*, 146 U.S. at 455 (saying that enduring trustee obligations make any grant of trust property revocable).

<sup>249</sup> See *Palazzolo II*, 2005 R.I. Super. LEXIS 108 at 48–56 (using the PTD in regulatory takings analysis and saying it limits investment-backed expectations).

<sup>250</sup> See *Ill. Cent.*, 146 U.S. at 455 (implying that trustee obligations survive divestiture); *Bos. Waterfront*, 393 N.E.2d at 366–7 (implying that trustee obligations survive divestiture). *But cf.* *34.42 Acres of Land*, 683 F.3d at 1039 n.2 (holding that the state public trust did not pass to the federal government when it took state land through eminent domain but leaving in place the district court conclusion that a federal trust arose in those areas that remained tidelands).

<sup>251</sup> U.S. CONST. amends. V, XIV § 1; *Ill. Cent.*, 146 U.S. at 453; see Byrne, *supra* note 66, at 917 (saying the PTD affects what qualifies as valid legislation of property rights).

<sup>252</sup> See *Palazzolo II*, 2005 R.I. Super. LEXIS 108 at 48 (finding that the PTD mitigated the economic impact a regulation had on private property).

<sup>253</sup> See *supra* notes 238–252 and accompanying text.

<sup>254</sup> See Brennan, *supra* note 1, at 1–14 (using the PTD to argue that requiring an access easement was neither a taking nor unreasonable).

<sup>255</sup> *Id.*

particularly an optional condition as that case involved.<sup>256</sup> Alternatively, any government act done for the PTD beneficiary interest inexorably qualifies as a valid public purpose, and any regulation or condition that promotes that purpose, such as securing an access easement, qualifies as a rational exercise of sovereign power.<sup>257</sup> As a condition, a public access easement would certainly serve the trustee's purpose of guaranteeing use and access of the shore.<sup>258</sup>

### C. The Scope of the Due Process Public Trust Doctrine's Corpus

*Nollan* involved the California PTD, which, though still restricted to water resources, has expanded to protect traditional uses, recreation, and ecology.<sup>259</sup> Understanding the PTD as under due process would also affect how courts treat this contentious aspect of the doctrine, the scope of the trust's corpus.<sup>260</sup> The country would continue to manage fifty-one different public trusts, but the Supreme Court's pronouncements in *Illinois Central* and *Phillips Petroleum Co. v. Mississippi* would set a minimum threshold guaranteed by the federal Constitution.<sup>261</sup> Like all fundamental rights recognized by the Supreme Court, the federal Constitution would invalidate any efforts by states to ignore or subvert that right.<sup>262</sup> Consistent with the Supreme Court's statements that property rights and the scope of their PTDs remain largely with the states, states would still hold the authority to expand or alter their trusts, provided

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<sup>256</sup> See *Nollan*, 483 U.S. at 842 (Brennan, J., dissenting) (arguing that public access was a legitimate purpose and an easement a reasonable means); Brennan, *supra* note 1, at 1–14 (using the PTD to reinforce his position).

<sup>257</sup> See Brennan, *supra* note 1, at 1–14 (using the PTD to justify a permitting condition).

<sup>258</sup> See *Nollan*, 483 U.S. at 828 (describing the public access easement permitting condition at issue); Brennan, *supra* note 1, at 1–14 (using the PTD to demonstrate the rationality of a permitting condition).

<sup>259</sup> See *Nollan*, 483 U.S. at 828 (discussing access to coastal lands); Nat'l Audubon Soc'y v. Superior Court (*Mono Lake*), 658 P.2d 709, 719 (Cal. 1983) (expanding the California public trust to include ecological resources); *Western States' Public Trust*, *supra* note 18, at 71 (discussing expansion of the California PTD).

<sup>260</sup> See *infra* notes 261–267 and accompanying text.

<sup>261</sup> See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 481 (1988) (saying the PTD protects lands under navigable waters and lands affected by the tides); *Ill. Cent.*, 146 U.S. at 453 (saying the state holds title to certain resources as a trustee for the public); Blumm & Schaffer, *supra* note 20, at 402 (calling it a mistake to consider the PTD purely a matter of state law); Chase, *supra* note 20, at 150 (saying the federal PTD represents a minimum threshold); *Eastern Public Trust*, *supra* note 17, at 3, 5 (calling it a mistake to reduce the fifty state PTDs into a single doctrine and saying the federal PTD sets a minimum standard for the states).

<sup>262</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating a state law subverting the right to marry); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (invalidating a state law subverting parent's right to control the education of their children). Only Idaho has tried to abdicate its trustee responsibilities fully, but the Supreme Court invalidated this attempt. *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 283 (1997); Schaffer, *supra* note 70, at 176.



they uphold this federal minimum.<sup>263</sup> In California, where the state's highest court has recognized ecological uses within its PTD, citizens have a protected right to expect that the state will account for the ecological value of water resources in developing regulations.<sup>264</sup> Likewise, in the multitude of states that recognize recreation as a PTD protected use, the public's protected property interest in trust resources includes that right.<sup>265</sup>

Where states have incorporated the traditional public trust into their state constitutions, that enumeration stands as a pronouncement of the pre-existing, fundamental right guaranteed by the PTD.<sup>266</sup> Where states have incorporated expanded trusts, they establish a due process protected property interest in each citizen in the expanded corpus of that trust.<sup>267</sup>

### CONCLUSION

Following its reemergence in late twentieth century legal writing, the public trust doctrine ("PTD") has the potential to be a powerful tool for environmental lawyers. It protects the public's right to use and access vital natural resources by placing them in trust with the sovereign and guiding the sovereign's discretion in their management. Even though it lies inherent in sovereignty, the positive law of the country spatters it across constitutional, statutory, and common law sources. Its effectiveness suffers from this undefined foundation. The unfortunate omission of the doctrine from *Nollan v. California Coastal* and the resulting incoherence surrounding exactions-takings jurisprudence stands as just one example of this weakness.

Understanding the PTD's beneficiary interest as a due process protected property right helps resolve these failings. The U.S. Constitution requires due process of all state action that deprives "life, liberty, or property," guaranteeing that arbitrary or capricious governance will not interfere with these rights. Because the state's trusteeship under the PTD comes inherent in its sovereignty, it follows that individual members of the public can expect their beneficiary interests as rights deserving such protection. This argument draws support foremost from the enduring history of the doctrine, which starts in the Justinian Institutes of Rome, continues through twenty-first century law, and embeds in the tradition of the American legal system. It garners further support, however,

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<sup>263</sup> PPL Mont., LLC v. Montana, 565 U.S. 576, 604 (2012); see *Eastern Public Trust*, *supra* note 17, at 5 (saying when states expand their PTD, they generally do so above the federal minimum).

<sup>264</sup> See *Mono Lake*, 658 P.2d at 719 (recognizing the public interest in ecological resources).

<sup>265</sup> See *Eastern Public Trust*, *supra* note 17, at 11 (describing access for recreation as the most common PTD expansion).

<sup>266</sup> See *supra* notes 139, 174–175 and accompanying text.

<sup>267</sup> See *Eastern Public Trust*, *supra* note 17, at 5, 11 (describing ways states expand their trusts); see, e.g., HAW. CONST. art. XI, § 1 (protecting "Hawaii's natural beauty and all natural resources"); S.C. CONST. art. XIV, §§ 1, 4 (protecting rivers and navigable waters).

from the similarity between the PTD and the police power—another ancient concept—and the PTD’s agreement with existing precedent.

Rather than muddling doctrines and perplexing judicial review, viewing the PTD as a matter of due process should help clarify its application. This understanding would allow courts to review actions by the sovereign trustee under the familiar framework of due process and to invoke it with the confidence a constitutional foundation allows. Such a framework should subsequently secure the sovereign responsibilities that the PTD calls for and give the public both a clear basis for standing and a legal platform from which they can challenge actions by the trustee. Treating the PTD as a matter of constitutional due process should comprehensively improve its efficacy as a doctrine and allow it to emerge as the bedrock of environmental law that it could be.

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