UNPACKING THE PUBLIC TRUST DOCTRINE: A JOURNEY INTO FOREIGN TERRITORY

E van der Schyff*  

*I keep six honest serving men (they taught me all I knew);  
Their names are What and Why and When and How and Where and Who.  
Rudyard Kipling, The Elephant's Child

1 Introduction

The past decade has borne witness to the transformation of South Africa's natural resources law with the introduction of a new legal concept to South African jurisprudence. The table for transformation was set with Section 3 of the *National Water Act*,¹ in which the concept of "public trusteeship" was formally introduced into South African law without great fanfare. Then followed the *National Environmental Management Act*,² the *Mineral and Petroleum Resources Development Act*³ and the *National Environmental Management: Biodiversity Act*,⁴ each ingraining this novel concept of "public trusteeship" more firmly into South African jurisprudence. With the promulgation of these pieces of legislation, the state has had conferred upon it the obligation to act as either trustee or custodian of the environment or a specific natural resource, whilst the environment or that particular natural resource has been bequeathed to the people of South Africa.

In the quest to demystify the incorporation of the concept of "public trusteeship" in South Africa, this article, as a first tentative step, proposes focusing solely on the public trust doctrine as it functions in American jurisprudence. It is the aim of the article to give a thorough theoretical exposition of the development and application of the public trust doctrine in American jurisprudence in order to provide the South

---

*Elmarie van der Schyff. BA LLB LLM LLD (NWU). Associate Professor in Law, North-West University, South Africa (Elmarie.VanderSchyff@nwu.ac.za). *Soli Deo gratia.* A note of gratitude to all my colleagues who were burdened with reading the first drafts of this work and, in particular, Profs Gerrit Pienaar, Andre van der Walt and Hanri Mostert, for their valuable comments.

1 36 of 1998.
2 107 of 1998.
3 28 of 2002.
4 10 of 2004.
African scholar with a perspective on a legal construct founded on the philosophical notion that governments exercise a "fiduciary trust" on behalf of their people.

The concept of "public trusteeship", as it is embodied in South African legislation, encapsulates the sovereign's duty to act as guardian of certain interests to the benefit of the nation as a whole. This concept is founded securely in legal philosophy. Locke stated in his Second Treatise on Civil Government⁵ (1685) that governments merely exercise a "fiduciary trust" on behalf of their people. Pound⁶ suggests that the role of states in the management of common natural resources must be limited to "a sort of guardianship for social purposes" and Marx⁷ voices the opinion that:

> From the standpoint of a higher socio-economic formation, the private property of particular individuals in the earth will appear just as absurd as private property of one man in other men. Even an entire society, a nation, or all simultaneously existing societies taken together, are not owners of the earth. They are simply its possessors, its beneficiaries, and have to bequeath it in an improved state to succeeding generations as boni patres familias.

Through the concept of "public trusteeship", a stewardship ethic has been incorporated into South African natural resources law.⁸

It is important to realise that public trusteeship is more that the embodiment of a philosophical thought. It is a concept that forms the core of respectable foreign legal constructs. In this regard, one can refer to the Anglo-American public trust doctrine, the notion found in French jurisprudence in which a clear distinction is made between le domain public and propriété (private ownership), and the concept applicable in German jurisprudence in which a "certain category of property can be removed from the sphere of private property altogether"⁹ or in which "a certain category of property rights can be transformed into public-law rights for the sake of

---

⁶ Pound Introduction 111.
⁹ Van der Walt Constitutional Property Clause 130.
more effective control".\textsuperscript{10} All of these are examples of legal constructs founded on a variation of the same philosophy – that in some defined instances, governments act solely as guardians or custodians on behalf of the people they represent. Although based on the same philosophical foundation, the application and consequences of each of these foreign legal constructs differ substantially.

Therefore, it would be much too simplistic to summarily equate public trusteeship as it is found in South African legislation with the embodiment of either a philosophical idea or a complicated foreign legal doctrine. The mystery that surrounds the concept of "public trusteeship", as it has been introduced through legislation into South African jurisprudence, demands that it be unravelled in the course of time. This process will necessitate comparative analysis and innovative thinking, but it is a process in which we shall inevitably have to engage, for the incorporation of the concept of "public trusteeship" has profoundly influenced property theory and the law of property in particular, given that the notion challenges the known concepts of "ownership" and "property" in South African jurisprudence. In the South African context, the way in which any "thing" can belong to the "nation" or the "people of South Africa" must firstly be determined, should neither the nation nor the "people of South Africa" be entities (or an entity) clothed with legal personality enabling them to acquire or hold property. Whilst South African courts have referred to "the State fulfilling its role as custodian holding the environment in public trust for the people",\textsuperscript{11} there has been no attempt in reported cases to give a thorough exposition of the notion.

\textsuperscript{10} BVerfGE 58, 300 (339) 15 July 1981 1 BvL 77/78 (Naßauskiesung case).
\textsuperscript{11} Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pels Products 2004 1 All SA 636 (E) 658. See also De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd Case 3215/06 (unreported).
This article intends to give an account of the historical development and application of the public trust doctrine in American jurisprudence with specific reference to the nature and scope of the doctrine, whilst highlighting the consequences of the application of the doctrine for both environmental and property law.

2 The American public trust doctrine

The modern public trust doctrine is controversial and complex.\(^{12}\) It has been hailed as the **ultimate environmental protection tool** by many ecologists and environmentalists,\(^{13}\) yet others have criticised it.\(^{14}\) Some perceive the doctrine as ground-breaking, yet others feel it destroys the basic fabric of property law.\(^{15}\)

As a distinction is made in literature between the traditional public trust doctrine and the modern public trust doctrine, the discussion begins with a brief view of the traditional public trust doctrine and the legal nature of the doctrine, and then describes the public trust doctrine as a contemporary legal construct.

2.1 The traditional public trust doctrine

2.1.1 The essence of the traditional public trust doctrine

The public trust doctrine was developed in the American legal system in response to the desire to determine the ownership of the beds of navigable waters.\(^{16}\) It was the product of an effort to reconcile the opposing concepts of "common ownership",

---

14 Lazarus 1986 *Iowa L Rev* 656–691; Huffman 1986 *Denv U L Rev* 583, who describes the public trust doctrine as a "tool for political losers or for those seeking to avoid the costs of becoming political winners".
16 Stevens 1980 *UC Davis LR* 200.
dating back as far as the Roman Empire, and the development of the notion that virtually everything has an owner.

The public trust doctrine essentially recognises that certain public uses ought to be specifically protected. It entails the distinction between private title and public rights and recognises that the state, as sovereign, acts as trustee of public rights in certain natural resources. As such, the public trust doctrine embodies the arguments of Marx, Pound and Locke referred to in the introduction of this article.

The legal consequences of applying this line of thought to a legal system culminated in the drawing of a distinction between property that could be owned privately or granted to private entities and property incapable of ordinary and private occupation,

---

17 Fernandez 1998 Alb L Rev 627 states that the Roman concepts of "common property" and "public rights" were incorporated by the English into both the Magna Charta and the English common law. Coquille 1979 Cornell L Rev 800 names the public trust doctrine the res communes doctrine. See also Scott 1998 Fordham Envtl LJ 24–36 and Sax 1980 UC Davis LR 185.


Different writers have defined the public trust doctrine subjectively, but the essence of the doctrine boils down to the protection of certain public uses. Casey 1984 Nat Resources J 812 defines the public trust doctrine as the right of the individual state to regulate and control its navigable waters and the lands underlying them on behalf of its citizens' interests in certain public uses, namely navigation, commerce and fisheries. Sax 1980 UC Davis LR 188–189 describes the central idea of the public trust doctrine as:

"[P]reventing the destabilising disappointment of expectations held in common but without formal recognition such as title. The function of the public trust as a legal doctrine is to protect such public expectations against destabilising changes, just as we protect conventional private property from such changes."

According to Lazarus 1986 Iowa L Rev 633, "the historical function of the public trust doctrine has been to provide a public property basis for resisting the exercise of private property rights in natural resources deemed contrary to the public interest". Searle 1990 SC L Rev 898 concisely describes the concept as "state ownership of property held exclusively for the benefit of and use by the general public". Rasband 1998 U Colo L Rev 331 holds that the doctrine described the state's fiduciary responsibilities with respect to land under navigable water and certain associated resources. See also Williams 2002 SC Envtl LJ 31.

reserved to be accessed by and used to the benefit of the public. Because certain interests such as navigation and fishing were sought to be preserved for the benefit of public use in the early American society, property used for those purposes was distinguished from public property. The latter could be granted to private owners by the sovereign. The former was subject to the state’s dominium and could not be relinquished. Initially, only land covered by tidal waters was subject to the protection of the doctrine. Gradually, the geographical reach of the doctrine was extended to cover all navigable waters and the land beneath them, without reducing the scope of the public trust in tidelands.

Although states could exercise their dominium only in a way that would ensure freedom in the use of property subject to the doctrine – a use consistent with the public interest – the use of lands subject to the public trust doctrine could be modified or altered. Any modification of existing use was permissible as long as the public interest was not substantially impaired. In both the Martin and Shively cases, it was held that since the suit property was held in trust for the public, property clothed with this perpetual public right of user could not easily be alienated

21 Shively case.
23 It is stated in the Knight case 183 that it is the settled rule of law in this court that absolute property in, and dominium and sovereignty over, the soils under the tidewaters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original states possess within their respective borders.

In the Shively case 11–12, Justice Gray explained the common law perspective on the nature of the sovereign’s claim when dealing with navigable waters and the sea:

Such waters, and the land which they cover, either at all times, or at least when the tide is in, are incapable of ordinary and private occupation, cultivation, and improvement; and their natural and primary uses are public in their nature … Therefore the title, jus privatum, in such lands … belongs to the king, as the sovereign; and the dominium thereof, jus publicum, is vested in him, as the representative of the nation for the public benefit.

See also the Illinois Central case 452.
24 The “public common of piscary” is included in the dominium of navigable water. It is stated in the Illinois Central case 436 that the English notion of dominium and ownership by the crown of land within the realm under tidewaters were equated with the requirement of navigability.
25 In the Illinois Central case, the court confirmed the principle stated in The Propeller Genesee Chief v Fitzhugh 12 How 443 (1852) 457 and Barney v City of Keokuk 94 US 324 (1877) 338, extending the doctrine to waters that were non-tidal but navigable.
26 This statement is in principle supported in California Earth Corps v California State Lands Commission 27 Cal Rptr 3d 476 (2005) 480, in which the court stated in 2005: “Though the rule applies generally to all navigable waters, it had its first application to tidelands.”
27 Illinois Central case 452.
by the sovereign. \textsuperscript{28} Courts found that a stricter standard than usual was to be applied in instances in which conveyances were scrutinised. There was a presumption against the sovereign's intention to part with any portion of the public domain, unless clear and specific words to that effect were used. \textsuperscript{29} It was also held that whatever title the grantee took was burdened by the public trust and would be read in conformity with it. \textsuperscript{30} The state lacked the power to diminish public trust rights when trust property was conveyed to private parties. \textsuperscript{31} Thus, when a private party acquired property burdened with the public trust, it acquired only the \textit{jus privatum}. The test to determine the validity of alienation would, therefore, lie in the question of whether the grant was of such magnitude that the state would effectively have given up its authority to govern the property to protect the public's rights in the property. \textsuperscript{32}

Scrutiny of the traditional public trust doctrine highlights the following features: \textsuperscript{33}

(a) the doctrine applied to tidal and navigable waters and the soil covered by these waters;
(b) original state ownership of these resources was confirmed;
(c) this state ownership was not unrestricted but was subject to the public's right of use for purposes of navigation, fishing and commerce;
(d) the uses of navigation, fishing and commerce were the only protected uses, and it can be inferred that it was not the broad public interest in the resources that was protected but the public interest in relation to these specific uses. These interests were deemed protectable in accordance with the societal values of the era in which they originated;
(e) public uses could be diminished or altered so long as the public interest was not substantially impaired;
(f) the courts could apply public trust reasoning when scrutinising government dealings in connection with trust resources, and could even put an end to and reverse government actions not in line with the principles of the trust; and

\textsuperscript{28} Sax 1970 \textit{Mich L Rev} 476.
\textsuperscript{29} Martin case 411; Shively case 10.
\textsuperscript{30} Sax 1970 \textit{Mich L Rev} 487. This principle is confirmed in a 2005 decision by the Supreme Court of Michigan in the \textit{Glass} case 679.
\textsuperscript{31} \textit{Glass} case 673.
\textsuperscript{32} Casey 1984 \textit{Nat Resources J} 814.
\textsuperscript{33} This summary is a condensation of information extracted from all the sources referred to in the footnotes above.
(g) on the rare occasions that trust property was alienated, the property received by
the new owner would be subject to the conditions of the trust.

2.1.2 The classification of the traditional public trust doctrine

The classification of the "public trust" as a true legal trust has been supported and
opposed. On the one hand, Stevens\(^{34}\) suggests that American law adopted the trust
analogy to satisfy the need to identify an owner of at least the legal title to the
resources in which people had a common right.\(^{35}\) Ownership of these resources
was then burdened with "the rule of law that public rights, and such things as are
materially related to them, are inalienable"\(^ {36}\) and could consequently not be
separated from the sovereign. Huffman,\(^ {37}\) on the other hand, argues convincingly
that the use of the word "trust" in the name of the doctrine is misleading. He
maintains that only in the original English law formulation could the notion possibly
be described as a trust.\(^ {38}\)

In a legal regime that recognised title to waters and submerged lands in the
King, it was possible to describe the rights held in common by the members
of the public either as an easement or as an equitable interest in property in
which the King had legal title. Because the King was clearly distinct from the
people (that is, the trustees and the beneficiary were not the same), the trust
model is applicable. Nevertheless, the questions of who created the trust,
and thus its purpose, remain unanswered.

In the American context, this explanation would not suffice. To position the notion
within the trust concept, more is needed than the mere acknowledgement that legal
title can be said to vest in the state whilst the equitable title vests in the public.\(^ {39}\) The
tripartite nature of the creation and operation of trusts disqualifies the traditional
American public trust from being classified as a true legal trust.\(^ {40}\)

\(^{34}\) Stevens 1980 UC Davis LR 195, 197–198; Huffman 1989 Envtl L 544.
\(^{35}\) Bader 1992 BC Envtl Aff L Rev 751 holds the opinion that the English adopted the Roman
principle of res omnium communes but replaced the notion of "common ownership" with that of
"state ownership".
197.
\(^{37}\) Huffman 1989 Envtl L 534.
\(^{38}\) Huffman 1989 Envtl L 561.
\(^{39}\) Huffman 1989 Envtl L 535.
\(^{40}\) Huffman 1989 Envtl L 535, 538 points out that three parties are needed to create a trust in
American law: the creator or settler of the trust, the trustee and the beneficiary. The purposes of
It appears that the word "trust" refers to the fiduciary responsibility of the sovereign rather than to the legal nature of the doctrine. The state fulfils the duty imposed on it by the public trust doctrine, by honouring the restraint on alienation and protecting the public's right of use. The public trust right exists not at the grace of the sovereign, but despite it. In its traditional, common-law formulation, the traditional public trust doctrine is therefore best understood as an easement that members of the public hold in common.\(^{41}\) Drawing from the earliest origins of the public trust doctrine, Huffman\(^{42}\) indicates that the doctrine was the basis of private rather than public rights: "The private rights were held in common by all members of the public, but they were exercised privately." As such, it falls within the sphere of property law.\(^{43}\)

### 2.2 The modern public trust doctrine

Considering the law has no life of its own and that property, like any other social institution, has a social function to fulfil,\(^{44}\) it is not remarkable to find that the traditional public trust doctrine has evolved into a modern public trust doctrine. It has been stated that the public trust doctrine "perseveres as a value system and an ethic as its expression in law mutates and evolves."\(^{45}\) Development began once the doctrine's reach was expanded from tidewaters to navigable waters,\(^{46}\) and changing public needs created by growth and progress have since stimulated further development. What was formerly a common-law principle has evolved into a modern doctrine with interests in constitutional and statutory law.

\(^{41}\) Huffman 1989 *Envtl L* 527.
\(^{42}\) Huffman 1989 *Envtl L* 550.
\(^{43}\) Coquillette 1979 *Cornell L Rev* 811–813; Hannig 1983 *Santa Clara L Rev* 211.
\(^{44}\) Stevens 1980 *UC Davis LR* 199.
\(^{45}\) Takacs 2008 *NYU Envtl LJ* 711.
\(^{46}\) In the *Shively* case 20 the state's rights in navigable water and the soil beneath it is confirmed..
The development and principles underlying this development will be scrutinised in the following section. The development concerns mainly the codification of the doctrine and the expansion of its scope. The underlying principles described above remained unchanged. Through incorporating a wider genre of objects under the public trust, the doctrine has expanded to protect more than navigation and fishing rights from both individual exploiters and corrupt or incompetent governments. By placing public trust property in a unique property regime in which it is neither susceptible to unlimited private ownership nor unrestricted state ownership, and by binding the state with the responsibility of guarding the public’s interest in that specific object, a unique property interest was vested in each member of the public purported to be protected by the public trust – normally the citizens of the country.

2.2.1  The development of the traditional public trust doctrine into the modern public trust doctrine

2.2.1.1 First tentative steps towards expansion

Joseph L Sax has widely been acknowledged as the father of the modern public trust doctrine. From the introductory comments made in his seminal work, it is clear that Sax considered the application and expansion of the public trust doctrine in an attempt to find one norm that could apply throughout the spectrum of

47 Martin case 411; Shively case 10.
49 Olson 1975 *Det CLR* 162 refers to Sax’s seminal work as the leading treatment on the public trust doctrine and emphasises that Sax’s article is mandatory reading for a comprehensive understanding of the public trust doctrine. Huffman 1986 *Denv U L Rev* 566 states: "the rebirth and dramatic growth of the public trust doctrine is in no small part the product of a classic article on the subject by Jonathan Sax". Dunning 1989 *Envtl L* 524 voices a more balanced opinion in stating that Prof Sax’s work drew the attention of environmental law students to the public doctrine during a period of heightened public interest in environmental protection, and states that interest and attention have remained high amongst environmental law scholars. Brady 1990 *BC Envtl Aff L Rev* 622 contends that Sax resuscitated the public trust doctrine and applied it to modern environmental problems. Grant 1995 *Ariz St LJ* 443 describes Sax as "the nation’s leading public trust doctrine scholar". See Araiza 1997 *UCLA LR* 385, 397 and Kearney and Merrill 2004 *U Chi L Rev* 806.
environmental management problems.\textsuperscript{51} Inconsistency in legislative response and administrative action and the enormous disparity in legal standards, whereby different resource problems were managed, necessitated the search for "a broad legal approach which would make the opportunity to obtain effective judicial intervention more likely".\textsuperscript{52} In order to be an effective tool in the trade of environmental protection, the public trust doctrine had to possess three characteristics. It had to create an obligation that could be enforceable against the government, it had to vest some concept of a legal right in the general public, and it had to be capable of being interpreted consistent with contemporary concerns for environmental quality.\textsuperscript{53}

Sax\textsuperscript{54} believed that the public trust doctrine possessed all three of the required attributes, and that this therefore rendered it "useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems".

Sax understood the principle underlying the Roman concepts of "res omnium communes" and "res publicae" and valued the protection given to certain public uses in the English common law. He found that those same principles underlie the American law of navigable waters and the sea. The potential this doctrine held for environmental protection did not escape his attention. Initially,\textsuperscript{55} Sax found conceptual support for the doctrine in a combination of ideas "which have floated rather freely in and out of American public trust law".\textsuperscript{56} The most important of these

\textsuperscript{51} Sax 1970 Mich L Rev 474 – Sax considered the doctrine because it is apparent from earlier case law, eg City of Milwaukee v State 193 Wis 423 (1927) 451–452, that the doctrine existed specifically with reference to navigable water. Sax merely intended to indicate that the doctrine could be applied to other environmental issues. Searle 1990 SC L Rev 897 indicates that the doctrine was "re-discovered" in response to the twentieth century's environmental crisis.

\textsuperscript{52} Sax 1970 Mich L Rev 474. Sax was not alone in this search. Another article published on the public trust doctrine in 1970 indicates the urgency of finding a constructive tool to prevent environmental degradation. Cohen 1970 ULR 388–394 states: "In order that the great increase of public concern for our environment may be made an effective force in protecting the environment, a viable legal theory which can be used by private litigants is urgently needed."


\textsuperscript{55} Whilst Sax initially chose to describe the doctrine as not substantive and rejected the property rationale as too inflexible – Sax 1970 Mich L Rev 478–483 – he later described the doctrine's operation in terms of property rights and did not refrain from attaching substantive standards to judicial application of the doctrine – Sax 1980 UC Davis LR 185, 189–193.

\textsuperscript{56} Sax 1970 Mich L Rev 484. Sax does not support the idea that the public should be viewed as a property holder in the same sense that an individual can be the owner of a specific tract of land.
theories was that "certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs".\textsuperscript{57}

It was, therefore, unthinkable that any person could claim a private property interest to the detriment of the community. A related principle was that "certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace".\textsuperscript{58}

Then there was also the recognition "that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate".\textsuperscript{59} Von Tigerstrom\textsuperscript{60} indicates that the key elements in all these ideas appear to be access and conservation: preserving public access to important resources and conserving those resources for the use of the public. The public trust concept provided a point of intersection for these notions.\textsuperscript{61}

2.2.1.2 Judicial expansion of the doctrine

Olson\textsuperscript{62} is one of many commentators who argue that the public trust doctrine was sufficiently flexible not to be confined by traditional boundaries. He contends that the doctrine could be used to protect other unique natural resources to which the public asserts a special claim. He found support for his argument in the *locus classicus* of

\begin{itemize}
  \item His view is explained in Sax 1970 *Mich L Rev* 478–483. Coquillette 1979 *Cornell L Rev* 811–813 holds a different opinion and states that the true origins of the public trust doctrine lie in a property doctrine, namely the *res communes* property doctrine. He declines to interpret the public trust doctrine as a principle of administrative law and states that his approach would ensure greater protection for the public. Coquillette states that *res communes* could well be alienated, should the beneficial interest of the public be protected. In my opinion, this is a flaw in his argument, as *res omnium communes* clearly indicates "things common to all". Use could be restricted, but *res communes* could not be permanently alienated. Hannig 1983 *Santa Clara L Rev* 211 supports Coquillette's view that conceptual support for the public trust doctrine is to be found in a property notion.
  \item Sax 1970 *Mich L Rev* 484; Casey 1984 *Nat Resources J* 812. In the Arnold case 78, New Jersey's Chief Justice stated that a grant purporting to divest citizens of their common rights in navigable rivers would be a grievance "which never could be long borne by a free people".
  \item Sax 1970 *Mich L Rev* 484.
  \item Von Tigerstrom 1998 *J Env L & P* 382.
  \item This is illustrated by the remark of the court in the *Illinois Central* case 436, that the doctrine is founded upon the necessity of preserving the use of navigable waters from private interruption and encroachment to the public. All three underlying theories find application in this reasoning.
  \item Olson 1975 *Det CLR* 178.
\end{itemize}
public trust law, the *Illinois Central* case.\(^{63}\) He points out that the *Illinois Central* case explicitly noted that submerged lands were just one example of public trust resources\(^{64}\) and that the court allowed for future development by stating:\(^{65}\)

So with trusts connected with public property, or property of a special character *like lands under navigable waters*, they cannot be entirely beyond the direction and control of the state. [own emphasis]

Recognising that public rights' protection was thus being accorded not only to traditional trust objects, but also to "other areas of special public importance farther inland",\(^{66}\) Olson analysed the courts' *ratio decidendi*, which is binding on courts in lower jurisdictions owing to the application of the *stare decisis* rule. He wished to find an underlying principle that would indicate the extent to which the doctrine could be expanded.\(^{67}\) The common principle he found in all the cases he referred to is aptly encapsulated in the following citation:\(^{68}\)

The public trust doctrine – like all common law principles – should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.

The area of application of the doctrine could be expanded in terms of the same principle that governed the first expansion from tidewaters to navigable waters.\(^{69}\) This illustrates that law in a democratic society reflects society’s values. Although it was established that the range of public purposes protected by the trust is dictated by the "public need for continued protection of a public benefit related and attached to the land",\(^{70}\) the parameters of the "public need" were not finally determined by the

\(^{63}\) *Illinois Central* case.

\(^{64}\) Olson 1975 *Det CLR* 179.

\(^{65}\) *Illinois Central* case 454.

\(^{66}\) Olson 1975 *Det CLR* 177 specifically refers to the protection given to natural resources by legislation.

\(^{67}\) Olson 1975 *Det CLR* 179–183. Wilkinson 1989 *Envtl L* 427 is one of many commentators who indicate that different courts have extended the public trust doctrine to many kinds of resources.

\(^{68}\) *Borough of Neptune City v Borough of Avon-by-the-Sea* 61 NJ 296 (1972) 309.

\(^{69}\) A more subtle approach than Cohen’s proposition 1970 *ULR* was followed in expanding the doctrine.

\(^{70}\) Olson 1975 *Det CLR* 182. Dunphy 1976 *Marq L Rev* 794 indicates that even the definition of "navigability" has been proved sufficiently flexible to accommodate the changing needs of the public and contributed to the expansion of the application of the public trust doctrine. Stevens 1980 *UC Davis LR* 196 supports this assertion and Hannig 1983 *Santa Clara L Rev* indicates that the redefining of "navigable water" was one of the methods used to expand the public trust doctrine. Manzanetti 1984 *Pac LJ* 1309 also refers to the fact that the development indicated
different decisions to which Olson referred. He believed that the concept appeared to be sufficiently broad to fit prima facie showings of public need through past use and activities, as well as current legislative declarations of intent concerning natural resources. Because the public's needs were regarded as an important factor in determining the interests and uses protected under the trust, American case law states that "the servitude of public interest depends rather upon the purpose for which the public requires the use of its streams, than upon any particular mode of use." This reasoning resulted in the extension of trust protection to public uses including sailing, rowing, fishing, fowling, bathing and skating. It also resulted in the recognition that one of the most important public requirements relating to tidelands is the preservation of these lands in their natural state, so that they may serve as ecological units, inter alia, for scientific studies, as open spaces, and as environments that provide food and habitat for birds and marine life and affect the scenery and climate of areas. In 2005, the Supreme Court of Michigan held that the uses that the state must protect are defined by the "ebb and flow" of "changing public needs".

Olson 1975 Det CLR 183. The truth of his assertion is proved by continued expansion of the doctrine, despite criticism that it had outlived its purpose. Bader 1994 Hamline LR 53 states that the public trust doctrine is not a "fixed or static" concept, but rather that it is dynamic, meeting the changing conditions and needs of the public it was created to benefit. Turnipseed et al 2009 ELQ 12 confirm that the doctrine has "steadily evolved to fit the perceived needs of society". Moore v Sanborne 2 Mich 519 (1853) 525 as cited by Stevens 1980 UC Davis LR 221. Walston 1982 Santa Clara L Rev 81 explains that the function of the public trust doctrine is to ensure that the people retain a sovereign interest in their water resources so that they can adapt their resources to changing public needs. This view is in conformity with the development that has taken place.

Caminiti v Boyle 107 Wn 2d 662 (1987) 669; Washington State Geoduck Harvest Association v Washington State Department of Natural Resources 124 Wn App 441 (2004) 448. The doctrine has been applied in New Jersey to ensure access by the public to areas of the beach – The Times of Trenton Publishing Corporation v Lafayette Yard Community Development Corporation 183 NJ 519 (2005) 532. The Supreme Court of New York, New York County, held on 1 September 2005 in Landmark West!, Board of Managers of the Parc Vendome Condominium v City of New York and New York City Economic Development Corporation 2005 NY Slip Op 25362 Part v that the public trust doctrine has no application with reference to buildings, as the doctrine historically applied to natural resources.

Stevens 1980 UC Davis LR 221, 222. Walston 1982 Santa Clara L Rev 66 supports this view and states that the trust is a dynamic rather than a static concept and appears destined to expand with the development and recognition of new public uses. Hannig 1983 Santa Clara L Rev 226; Manzanetti 1984 Pac LJ 1308. Lazarus 1986 Iowa L Rev 652 states that because of the flexibility of the doctrine, "highways, driving ranges and shopping malls have passed the public muster". Bader 1992 BC Envtl Aff L Rev 755 attributes the extension of the doctrine by the courts to the courts beginning to realise the importance of certain natural resources in sustaining the human species. Thereby, the anthropo-solipsistic nature of the doctrine was
through Corrigan J that traditional public rights under the public trust doctrine can be protected only by simultaneously safeguarding activities inherent in the exercise of those rights. Stevens indicates that the development of oil and other mineral resources discovered under tidelands also emerged as a public trust use in response to the felt necessities of the twentieth century.

In National Audubon Society v Superior Court of Alpine County, the court expanded the reach of the doctrine to non-navigable tributaries of navigable waters, in which government-approved conduct on the tributaries affected the public trust values in the protected water source. This development is consistent with public trust reasoning because it would be illogical to expect the court, as watchdog, to ensure that public trust values are protected by focusing only on the resource itself but not on the surrounding circumstances that impact on and influence the status of that resource. A year later, in 1984, the Supreme Court of Montana decided that the navigability of water was immaterial in determining whether the state held waters in trust for the public. In 2004, a decision to the same effect was made by the Supreme Court of South Dakota in Parks v Cooper. However, this development did not take place in all the states. In 1990, the Supreme Court of Kansas concluded that a non-navigable body of water overlying private beds was not subject to the public trust.

This diversity in approach emphasises the uniqueness of the application of the doctrine in the different states. It is apparent that expansive

75 It is interesting to note that the Supreme Court of Michigan confirmed in 2005 in the Glass case that the right to walk along a sea or lakeshore is inherently linked to the exercise of traditionally protected public rights of fishing, hunting and navigation. This principle was also confirmed in Raleigh Avenue Beach Association v Atlantis Beach Club, Inc 185 NJ 40 (2005) 46–54, in which the court stated: “It follows then, that use of the dry sand has long been a correlate to use of the ocean and is a component part of the rights associated with the public trust doctrine.”

76 Stevens 1980 UC Davis LR 223. Walston 1982 Santa Clara L Rev 70 also refers to this extension of the public trust corpus. The principle to be extrapolated is that navigation will not always be regarded as the most important public use. Commerce can effectively compete with it. See also Lazarus 1986 Iowa L Rev 649–650, in which it is pointed out that a historical battlefield, archaeological remains, a downtown area and all natural resources, including air and water, are regarded by different courts as being protected by the public trust doctrine.

79 Parks v Cooper 676 NW 2d 823 (SD 2004).
80 Kansas ex rel Meek v Hays 785 P 2d 1356 (Kan 1990).
developments of the public trust doctrine had occurred and in all likelihood will occur in state courts.\textsuperscript{81}

The development that took place in individual states illustrates the evolutionary character of the law.\textsuperscript{82} Dunning,\textsuperscript{83} however, returns our attention to the historical classification of the resources covered by the doctrine. He emphasises that the two most important characteristics that a resource must possess before it can be regarded as protected by the doctrine are scarcity and natural suitability for common use: "Common use by the general population serves as the basis to characterise these natural resources as common heritage or public trust assets."\textsuperscript{84}

The sovereign's responsibility lies within this parameter as the government has an obligation to preserve the people's historic freedom of access. This, argues Dunning,\textsuperscript{85} is what justifies the demand that the state recognise a public property right and that the courts limit legislative abolition or modification of that property right.

The initial aim of using the public trust doctrine as a device for ensuring that valuable government-controlled resources are not diverted to the sole benefit of private profit seekers\textsuperscript{86} has exploded into an all-embracing environmental protection mechanism. In cases in which the traditional doctrine evolved to protect common rights of access for commercial purposes, the modern public trust doctrine proclaims conservationist principles. It is this expansion of the doctrine to cover property not previously subsumed by the doctrine that elicits criticism.

2.2.1.3 Criticism against the modern public trust doctrine

Huffman\textsuperscript{87} criticises the public trust doctrine for making it possible for the judiciary to intervene and annihilate government action. He argues that the doctrine undermined

\textsuperscript{81} Smith and Sweeney 2006 BC Envtl Aff L Rev 334.
\textsuperscript{82} Reed 1986 J Env L & P 107.
\textsuperscript{83} Dunning 1989 Envtl L 517.
\textsuperscript{84} Dunning 1989 Envtl L 522.
\textsuperscript{85} Dunning 1989 Envtl L 522; Maguire 1997 J Env L & P 11.
\textsuperscript{87} Huffman 1986 Denv U L Rev 582–584.
democracy and constituted a remedy for the perceived failure of public allocation. Huffman objects to the fact that judicial review under the doctrine has taken over the role appropriately played by the political branches of government. Lazarus argues that the public trust doctrine rests on legal fictions created to avoid judicially perceived limitations or the consequences of existing rules of law. He describes the notions of "sovereign ownership" of certain natural resources and the "duties of the sovereign as trustee" of natural resources as "judicially created shorthand methods to justify treating differently governmental transactions that involve those resources".

Despite this critique, the public trust doctrine remains part of American jurisprudence. Although the modern public trust doctrine is primarily a creation of state courts, Sax's work motivated the legislature to take action, thus protecting the flexibility and vitality of the doctrine because the active management of the

---

88 Contrary to Huffman, Blumm 1989 Envtl L 580 considers the doctrine "a democratising force by (1) preventing monopolisation of trust resources and (2) promoting natural resource decision making that involves and is accountable to the public".
89 Huffman 1986 Denv U L Rev 584.
90 Lazarus 1986 Iowa L Rev 656.
91 Lazarus 1986 Iowa L Rev 656.
92 Reed 1986 J Env L & P 117 and Wilkinson 1989 Envtl L 461 hold the opposite opinion of the doctrine, thinking it to be mainly federally and constitutionally imposed.
93 Blumm 1989 Envtl L 574 aptly states that judges have found "this deeply conservative doctrine in state constitutions, state statutes and in the common law". The Supreme Court of Hawaii confirmed in Morimoto and Yamada v Board of Land and Natural Resources State of Hawaii 107 Haw 296 (2005) 301 that the public trust doctrine has been adopted in Hawaii as a fundamental principle of constitutional law. A XI, S 1 of the Constitution of the State of Hawai'i 1995 provides that:

For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilisation of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

In Florida, the public trust doctrine is incorporated in the Constitution of the State of Florida, 1968, A X, Ss 11 and 16 (Government of Florida 1968 http://bit.ly/gzVerk). Stevens 1980 UC Davis LR 228, inter alia, indicates that the wording of the Constitution of the Commonwealth of Pennsylvania, 1874 (Government of Pennsylvania 1874 http://bit.ly/ig90Pd) that reads as follows was taken to state a public trust: "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." His view is shared by Ryan 2001 Envtl L 477. Hannig 1983 Santa Clara L Rev 215 identifies constitutional and statutory provisions as a source whereby the public trust is expanded.
corpus of the trust remains the responsibility of the elected representatives of the public.  

### 2.3 Infringement of vested private property rights

The public trust doctrine interferes with private property rights. In American jurisprudence, it has been asked whether the Fifth Amendment can be regarded as a limitation on the public trust doctrine. The principal problem is the extent to which the public trust doctrine can eliminate property rights without Fifth Amendment compensation. Should a vested right be reduced or extinguished because of incompatibility with public trust uses, the question is whether the deprived person is entitled to be compensated for the loss. It is on this specific aspect that the expansion of the doctrine to new fields not historically germane to the doctrine provokes the most criticism. Callies and Breemer correctly state that the expansion of the doctrine has precipitated a collision between the newfound rights of the public under the modern public trust doctrine and private rights traditionally flowing from private property. In evaluating the effect of the public trust doctrine on any given resource, it should, however, be kept in mind that the doctrine does by no means permit every use of trust lands and waters; neither does the status of trustee permit the state, through any of its branches of government, to secure to itself property rights held by private owners. It is only limited public rights that are protected.

In order to contextualise the extent to which the doctrine interferes with private property rights, it is necessary to cast a bird’s eye view over relevant aspects of American takings law.

---

95 Constitution of the United States of America, 1787.
96 Callies and Breemer 2002 Val U LR 355.
97 This question is relevant in the South African mining dispensation context.
98 Huffman 1989 Envtl L 554 states that whilst the doctrine was historically focused on protecting individual liberties from the abuses of monarchical power, the doctrine is today employed to limit the acquisition and exercise of private rights, inter alia, in water and water-related resources, often through the abuse of sovereign power.
99 Callies and Breemer 2002 Val U LR 357.
100 Glass case 698.
101 Glass case 694.
102 Glass case 698.
2.3.1 The takings analysis

In American jurisprudence, the Takings Clause of the Fifth Amendment prevents the government from taking "private property ... for public use without just compensation". However, a "taking" need not arise from an actual physical occupation of land by the government. The Supreme Court has held that "if a regulation goes too far it will be recognised as a taking". In order to prove a compensable taking not arising from the physical appropriation or occupation of private property, the Penn Central case analysis applies. The American Supreme Court set out a three-part analysis in the Penn Central case to determine whether a compensable taking has occurred. The main factors that provide the framework for the analysis are: (a) the character of government action; (b) the economic impact of the action on the claimant; and (c) the extent to which the action interfered with the claimant's reasonable investment-backed expectations. The court stressed that the focus must be on the "parcel as a whole" and that each case should be judged on its own facts when conducting the takings analysis. It is made clear in Lucas v South Carolina that for purposes of the takings analysis, the title one takes to property is subject to the background principles of state law. In the Lucas case, the Supreme Court stated that the government need not compensate the property owner should the regulated or prohibited use not have been "part of his title to begin with". This perspective should be kept in mind when the issue of the extent to which the application of the doctrine interferes with private property rights is evaluated.

2.3.2 Perspectives from practice

103 For a thorough exposition of the US federal constitutional property clause, see Van der Walt Constitutional Property Clause 398–458.
105 Penn Central case 130–131.
106 Penn Central case 124.
108 Lucas case 1027.
In the *National Audubon Society* case, the public trust doctrine was formulated to allow the state to reconsider\(^{109}\) water allocation decisions that permitted harm to come to the *corpus* of the trust, even though the initial allocation decisions were made after due consideration of their effect on the public trust. The purpose of the modern trust doctrine was defined by the court as follows:\(^{110}\)

The public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.

The court confirmed that the public trust doctrine preserves the continuing sovereign power of the state to protect uses for water deemed to be in the public interest, as there are no "vested rights" in trust property.\(^{111}\) Although the decision in this case was merely advisory because no vested rights had been affected directly, the California Supreme Court suggested that it would reject a claim that these reductions constitute takings for which compensation is required, as no one is divested of any title to property. However, this could result in the total annihilation of owners’ rights towards their property or exclude current right holders.\(^{112}\)

The Washington Supreme Court expressed a similar opinion in *Orion Corporation v State of Washington*.\(^{113}\) The Court held that the public trust precludes a constitutional claim for taking without compensation because title to trust resources is acquired subject to whatever state action may be deemed necessary to protect the public’s interest in the trust resources.\(^{114}\)

---

109 According to Manzanetti 1984 *Pac LJ* 1291, this power to reconsider vested water rights was a new facet to the public trust doctrine. However, Casey 1984 *Nat Resources J* 815 states that the principles set forth in the *Illinois Central* case decision illustrated that the power of the state in administering the trust resource extended to revocation of previously granted rights and the "enforcement of the trust against resources long thought free of the trust".


112 *National Audubon Society* case 440.


114 *Orion Corporation* case 1081–1082.
Perhaps the most far-reaching extension of the public trust doctrine is illustrated by the Hawaiian case *In re Water Use Permit Applications.* Here, the court imposed a broad version of the doctrine onto the state’s fresh water supply, thereby rewriting Hawaii’s legislative water code. The court held that “resource protection” was a protected public trust use of such resources. In response to a taking objection, the court stated:

[T]he reserved sovereign prerogatives over the waters of the state precludes the assertion of vested rights to water contrary to public trust purposes. This restriction preceded the formation of property rights in this jurisdiction; in other words, the right to absolute ownership of water exclusive of the public trust never accompanied the 'bundle of rights' conferred …

Manzanetti indicates that the public trust doctrine avoids the takings issue by claiming a pre-existing title in the property in favour of the state. He argues that the compensation requirement may be dispensed with only if the property holder had actual or constructive prior notice that the state was obliged to protect public trust uses. Manzanetti continues by stating that the doctrine would be applicable as a means of avoiding the compensation requirement only if it could be shown that the right holder had prior notice of expectations by the public that are incompatible with

---

115 9 P 3d 409 (Hawa 2000) – hereafter *Water Use Permit Applications.*
116 *Water Use Permit Applications* case 494.
117 Manzanetti 1984 *Pac LJ* 1305. This view is shared by Bader 1994 *Hamline LR* 54, who contends that explicit notice of the public trust interest in land is not necessary and is assumed to run with trust resources from the moment of statehood. His view does not explain the inclusion of non-traditional resources within the scope of the doctrine. See also Grant 1995 *Ariz St LJ* 427.
118 Manzanetti 1984 *Pac LJ* 1306 explains that according to the theory of pre-existing title, the state has always had a title in the property. Property holders should therefore have known that the state had pre-existing title when they acquired their property; and when the state acts to reassert title to the detriment of the property holder, compensation is not required. The need for compensation under the Fifth Amendment is obviated by the prior knowledge of the pre-existing title. The reason for this contention is that should the property holder have had notice of the pre-existing title in the state, the reassertion of the rights in the title would have caused neither a change in the law, nor a change in the structural rules under which the property holder was to make choices regarding expectations in his property rights. Should, however, announcement by the state that a pre-existing title clouded the property holder’s title constitute “a sudden change in state law, unpredicted in terms of relevant precedents”, government action pursuant to that announcement would constitute a deprivation of property for which compensation is required. Lazarus 1986 *Iowa L Rev* 673 supports Manzanetti’s argument that parties who engage in economic activities in an area that they know is of public concern and regulated by government are on notice that the government may regulate in the future. For that reason, they cannot complain when their investments are adversely affected by subsequent regulations.
119 Manzanetti 1984 *Pac LJ* 1307. Grant 1995 *Ariz St LJ* 427 confirms that an owner is entitled to compensation if the government action “goes beyond what the relevant background principles would dictate".
his expectations regarding his right as owner or holder.\textsuperscript{120} He researched the development of the scope of the public trust doctrine and confirmed that although the uses protected by the public trust remained linked to navigation, commerce and fishing for several decades, the "changing public needs" dictated the extension of such protection. He contends that the retroactive application of this expanded definition of the public trust in derogation of exercised property rights constituted a taking requiring compensation.\textsuperscript{121} Determining the existence of prior notice would remain a factual question to be answered in every individual case.

Manzanetti's line of reasoning was echoed in the US Supreme Court's decision of the \textit{Phillips Petroleum Company} case.\textsuperscript{122} The court found that:

\begin{quote}
The fact that certain private claimants have long been the record title holders of lands in the state of Mississippi that lie under nonnavigable waters, or that such claimants have long paid taxes on such lands, does not divest the state of its ownership of those lands under the public trust given to the state upon its entry into the Union ... the state's ownership of those lands could not be lost via adverse possession, laches, or any other equitable doctrine.\textsuperscript{123}
\end{quote}

The importance of the decision of the \textit{National Audubon Society} case is the government's greater reliance on the public trust doctrine as a tool to expand sovereign authority and enhance state enforcement efforts over natural resources covered by the doctrine.\textsuperscript{124} A natural result of the expansion of the doctrine that compromises previously privately held property is the blurring of traditional boundaries between public and private property.\textsuperscript{125}

\begin{footnotes}
\item[120] Manzanetti 1984 \textit{Pac LJ} 1296. See also Blumm 1989 \textit{Envtl L} 586. Neither Manzanetti nor Blumm refers to the majority opinion of Field J in the \textit{Illinois Central} case 455, in which he expressed the opinion that in a case in which a state resumes control over previously granted trust resources, the state "ought to pay" for any "expenses incurred in improvements made under such a grant". Rasband 1998 \textit{U Colo L Rev} 333 argues that this remark indicates that although the state exercise of a public easement might not require just compensation under the Fifth and Fourteenth Amendments, it may merit some compensation as a matter of equity. He relies on "mistaken improver law", a concept dealt with in South Africa under enrichment law, and argues that equitable compensation should be regarded as being an essential element of the public trust doctrine.
\item[121] Manzanetti 1984 \textit{Pac LJ} 1310. He is supported by Huffman 1989 \textit{Envtl L} 559, who contends that by expanding the scope of public trust rights, the state will expand its ability to regulate beyond the constraints of the \textit{Constitution} and evade the taking limits on police power.\textsuperscript{122}
\item[122] 481–485.
\item[123] Dissenting judges argued that this finding broke a chain of title of more than 150 years. They thought that settled expectations of landowners would be disrupted.
\item[124] Lazarus 1986 \textit{Iowa L Rev} 655.
\item[125] Searle 1990 \textit{SC L Rev} 916.
\end{footnotes}
Reed\textsuperscript{126} warns that the public trust doctrine should not be regarded as creating a reversionary right by which the public can reclaim trust property long lost. In cases in which the public uses secured by the doctrine are lost for any significant period of time, the doctrine should cease to apply. He emphasises the importance of the law's interest in the stability of land title and argues that the "re-emergence of an ancient doctrine should not be allowed to upset titles created and relied upon previous to the doctrine's rediscovery".\textsuperscript{127}

2.3.3 \textit{Impairment of the public trust and limitation on government activities}

The limitations placed on government's activities, strictly speaking, determine the scope of the public trust doctrine. The state is regarded as the trustee of property impressed with the public trust doctrine, and the legislature is charged with the task of managing the trust.\textsuperscript{128} As such, an affirmative duty is imposed on the legislature to act in all circumstances in which action is necessary, be it to preserve or promote that which is held in trust.\textsuperscript{129} The judiciary is to act as a watchdog of the trust, and existing precedents have indicated that the judiciary would go beyond form to substance to ensure that the legislative authority fulfils its duty in administering the trust.\textsuperscript{130}

The broadest parameter of the public trust doctrine, therefore, has its origin in the state's valid exercise of the police power and the power of eminent domain in the reallocation and disposition of natural resources.\textsuperscript{131} The public trust doctrine is also an additional limitation on the exercise of the police power and the power of eminent domain in relation to the reallocation of natural resources. In a sense, this doctrine expands the exercise of police power because stricter regulation may be required to

\textsuperscript{126} Reed 1986 \textit{J Env L & P} 118.
\textsuperscript{127} Reed 1986 \textit{J Env L & P} 119.
\textsuperscript{128} Dunphy 1976 \textit{Marq L Rev} 796.
\textsuperscript{129} Dunphy 1976 \textit{Marq L Rev} 797; Blumm 1989 \textit{Envtl L} 585.
\textsuperscript{130} Dunphy 1976 \textit{Marq L Rev} 798. Stevens 1980 \textit{UC Davis LR} 217 supports this contention and states that the courts would not be bound by patently inaccurate declarations of public purpose for legislation having as its goal the destruction of public waters for private profit. This role suits the judiciary well, for as Pearson 2004 \textit{J Land Resources & Envtl L} 173 remarks: "While the doctrine can originate in constitutional or statutory law, typically its genesis is judicial decision". See also Turnipseed \textit{et al} 2009 \textit{ELQ} 56.
\textsuperscript{131} Olson 1975 \textit{Det CLR} 164.
safeguard the use of the resource by the public. Bader appropriately states that "unlike most property, real estate containing public trust resources is subject to far more restrictive regulation in its use than other private lands". This stems from the unique value trust resources have to society as a whole.

However, the view that the doctrine is a source of authority for state regulation is viewed by some commentators as a distortion of the historical purpose of the public trust doctrine:

The problem with the equation of public trust and police power is that the public trust doctrine purports to be the basis of a rights claim rather than a source of governmental power. Because public trust rights are understood to predate other property rights, their status in relation to those rights claims is always prior in time, and therefore, superior in right. There can be no claim that enforcement of public trust right results in a taking because individual property rights are by definition subject to the prior public rights.

The public trust doctrine simultaneously provides a basis for the state to retain continuing jurisdiction over the trust corpus so that continuing choices dictated by the public need can be made. However, the power of eminent domain may be limited in cases in which a public trust is shown to be present in the resource, as the taking needs to be proved consistent with the public's right to use the resource.

Five elements have been identified on the basis of case law as the criteria that must be applied when the factual determination of justified impairment of the trust corpus is to be made. The application of the following five basic concepts will indicate the extent and validity of the impairment:

(a) some retention of governmental control;

132 Lazarus 1986 Iowa L Rev 655 states that developments in the public trust arena in the early 1980s were confined to suits in which the private citizen was the plaintiff asserting the doctrine and the government was the unwilling defendant resisting the trust's application. Government argued that the public trust doctrine expands sovereign authority over natural resources covered by the doctrine, limiting the nature of valid private property rights in those resources whilst rendering permissible governmental measures that impinge on those private interests.

133 Bader 1994 Hamline LR 54.

134 Huffman 1989 Envtl L 558.

135 With reference to the allocation of water rights, Walston 1982 Santa Clara L Rev 64, 85 states that the public trust doctrine enables the state to allocate and, if necessary, reallocate its water supply for the protection of important public interests.

136 Olson 1975 Det CLR 184; Williams 2002 SC Envtl LJ 42.
(b) continued public use and availability;
(c) relative diminution of size;
(d) non-interference with past or existing public uses; and
(e) a subjective test of public reaction to the new or proposed use.

In instances in which proposed dealings with trust resources are being evaluated, these five elements will indicate whether the proposed action honours public trust values. In cases in which courts have to resolve conflict between public trust use rights and other current or future uses of trust resources by private landowners and public entities, a similar but extended balancing test has been proposed.\textsuperscript{137} This test also consists of five weighted factors:

\textsuperscript{137} Hannig 1983 \textit{Santa Clara L Rev} 232–236.
(a) current public trust uses should be accorded the greatest weight;
(b) potential public trust uses should be considered;
(c) compatibility of new uses with public trust rights should be investigated;
(d) the reasonable expectations of all concerned parties and the public should be considered; and
(e) whether appropriation or private use of trust property would constitute a significant diminution in the amount of land or water locally available upon which the public could exercise its trust rights should be considered.

Hannig\textsuperscript{138} concedes that this test might be a more equitable test for resolving conflicts between public and private uses of trust lands.

2.4 Classification of the modern public trust doctrine

There appears to be no unanimity on the nature of the modern public trust doctrine. American courts have treated the doctrine largely as a public property right of access to certain public trust resources for various public purposes.\textsuperscript{139} It can thus be described as a public easement\textsuperscript{140} or servitude.\textsuperscript{141}

Whilst no suggestion can be found that the traditional public trust doctrine had any relation with constitutional law,\textsuperscript{142} the codification and reception of the doctrine into state constitutions and statutes warrant a present-day classification of the doctrine as constitutional law in relevant circumstances.\textsuperscript{143} In cases in which the doctrine is applicable only as a common-law doctrine and was judicially expanded, it will be difficult to classify it under constitutional law. Although the doctrine originated from the common law, it can be viewed today as a body of legal thought incorporating both common and statutory law protecting natural resources.

3 Conclusion

\textsuperscript{138} Hannig 1983 Santa Clara L Rev 232–236.
\textsuperscript{139} Blumm 1989 Envil L 581; Dunning 1989 Envil L 519. Scott 1998 Fordham Envil LJ 15 describes the basic doctrine in its simplest sense as a principle of sovereignty.
\textsuperscript{140} Blumm 1989 Envil L 580.
\textsuperscript{141} Wilkinson 1989 Envil L 450; Huffman 1989 Envil L 527; Dunning 1989 Envil L 515.
\textsuperscript{142} Huffman 1989 Envil L 545–555.
The article aimed to give a thorough theoretical exposition of the development and application of the public trust doctrine in American jurisprudence in order to provide the South African scholar with a perspective on a legal construct founded on the philosophical notion that governments merely exercise a "fiduciary trust" on behalf of their people. As it falls outside the scope of the article to compare the American public trust doctrine with the concept of "public trusteeship" as it is embodied in South African legislation (a comparison that could be made only after more legal constructs founded on the same line of thought have been researched), I conclude with a summary of the doctrine as it finds application in American jurisprudence.

The contemporary American public trust doctrine can be characterised as a public right in property. As against a private easement or servitude, it can be described as a public servitude. Through the application of the doctrine, certain rights vest in the citizens of America as an entity, but American citizens can demand the realisation and protection of that interest as individuals. The government is compelled to deal with the objects that are regarded as public trust property in such a way that the public's right in that property is promoted and enhanced. Simultaneously, the government must refrain from actions that would negate the interest of the public in the trust property. The government's ability to deal freely with public trust property is thus definitely curtailed by the purpose of the public trust and restricted to custodianship or guardianship of the relevant property.

Individuals' rights in public trust property are likewise curtailed. No individual can attain unrestricted private title in public trust property, as the property is bound by the public easement. Individuals must, however, ensure that their rights in public trust property are realised. As the judiciary is the watchdog of the public trust with the power to annihilate government actions that go against the aim and purpose of the public trust, individuals must not refrain from insisting on protection in instances in which the need arises.

The concept of a "public trust" should not be confused with the concept of "public interest". "Public interest" is a broad concept and basically every action that has public value or generates economic gain is in the public interest. The term "public
trust" refers to matters of common property that are held in trust by the state for the use and benefit of present and future generations of citizens. There is a nuanced difference between protecting public uses and "ensuring that environmental resources are beneficially used in the public interest". As indicated above, property subject to the trust may not be used for any and every public purpose. The property must be held available for use by the public, but it must be maintained for certain types of uses, which include traditional uses or uses that are in some sense related to or compatible with the natural uses peculiar to that resource.

The public trust doctrine is a common-law doctrine of American jurisprudence. Its field of application can be and has been expanded according to public need. The expansion of both the geographical scope of the doctrine and the range of interests protected by the doctrine is a result of the recognition that "public need" dictates the direction of growth, as in any other field of the law. The possibility of conflict generated by the expansion of the doctrine is inevitable. In a society in which the divide between rich and poor is constantly growing, in an overpopulated world in which the most needy have already lost the race for the use of resources, the public trust doctrine is a mechanism that guards against the exploitation of a country's natural treasures.
Bibliography

Araiza 1997 *UCLA LR*
Araiza WD "Democracy, distrust and the public trust: Process-based constitutional theory, the public trust doctrine and the search for a substantive environmental value" 1997 *UCLA LR* 45 385–452

Arnold and Jewel 2008 *Hastings W-Nw J Envt’l L & Pol’y*
Arnold CA and Jewel LA "Litigation's bounded effectiveness and the real public trust doctrine: The aftermath of the Mono Lake case" 2008 *Hastings W-Nw J Envt’l L & Pol’y* 14 1177–1210

Bader 1992 *BC Envtl Aff L Rev*

Bader 1994 *Hamline LR*
Bader HR "An analysis of the potential impact of the public trust doctrine on the Sovereign's use of its eminent domain" 1994 *Hamline LR* 50–63

Blumm 1989 *Envt’l L*

Brady 1990 *BC Envtl Aff L Rev*
Brady TP "But most of it belongs to those yet to be born': The public trust doctrine, NEPA and the Stewardship Ethic" 1990 *BC Envtl Aff L Rev* 17 621–646

Brooks *et al Law and Ecology*

Callies and Breemer 2002 *Val U LR*
Callies DL and Breemer D "Selected legal and policy trends in takings law: Background principles, custom and public trust 'exceptions' and the (mis)use of investment-backed expectations" 2002 Val U LR 36 339–379

Casey 1984 Nat Resources J
Casey ES "Water law: Public trust doctrine" 1984 Nat Resources J 809–825

Cohen 1970 ULR
Cohen BS "The Constitution, the public trust doctrine and the environment" 1970 ULR 388–394

Connolly 2009 BC Envtl Aff L Rev
Connolly PJ "Saving fish to save the Bay: Public trust doctrine protection for Menhaden’s Foundational Ecosystem Services in the Chesapeake Bay" 2009 BC Envtl Aff L Rev 135–169

Coquillette 1979 Cornell L Rev
Coquillette DR "Mosses from an Old Manse: Another look at some historic property cases about the environment" 1979 Cornell L Rev 64 761–821

Dunn "The concept of trust in the politics of John Locke"

Dunning 1989 Envtl L
Dunphy 1976 *Marq L Rev*
Dunphy PO "Comments: The public trust doctrine" 1976 *Marq L Rev* 59(4) 787–808

Fernandez 1998 *Alb L Rev*

Foster 2006 *AJS*
Foster JB "Marx’s 'Theory of Metabolic Rift': Classical Foundations for Environmental Sociology" 2006 *AJS* 366–405

Grant 1995 *Ariz St LJ*
Grant DL "Western water rights and the public trust doctrine: Some realism about the takings issue" 1995 *Ariz St LJ* 423–468

Hannig 1983 *Santa Clara L Rev*
Hannig TJ "The public trust doctrine expansion and integration: A proposed balancing test" 1983 *Santa Clara L Rev* 211–236

Huffman 1986 *Denv U L Rev*
Huffman JL "Trusting the public interest to judges: A comment on the public trust writings of Professors Sax, Wilkinson, Dunning and Johnson" 1986 *Denv U L Rev* 63(3) 565–584

Huffman 1989 *Envtl L*
Huffman JL "A fish out of water: The public trust doctrine in a constitutional democracy" 1989 *Envtl L* 527–572

Kearney and Merrill 2004 *U Chi L Rev*

Lazarus 1986 *Iowa L Rev*
Lazarus RJ "Changing conceptions of property and sovereignty in natural resources: Questioning the public trust doctrine" 1986 *Iowa L Rev* 71 631–716

Maguire 1997 *J Env L & P*

Maguire JC "Fashioning an equitable vision for public resource protection and development in Canada: The public trust doctrine revisited and reconceptualized" 1997 *J Env L & P* 7 1–42

Manzanetti 1984 *Pac LJ*

Manzanetti AB "The Fifth Amendment as a limitation on the public trust doctrine in water law" 1984 *Pac LJ* 15 1291–1319

*Marx Capital*


Olson 1975 *Det CLR*

Olson J "The public trust doctrine: Procedural and substantive limitations on the governmental reallocation of natural resources in Michigan" 1975 *Det CLR* 2 161–209

Pearson 2004 *J Land Resources & Envtl L*


*Pound Introduction*

Pound R 1954 *An Introduction to the Philosophy of Law* Revised ed (Yale University Press New Haven 1992)

Rasband 1998 *U Colo L Rev*

Rasband JR "Equitable compensation for public trust takings" 1998 *U Colo L Rev* 69 331–405

Reed 1986 *J Env L & P*
Reed SW "The public trust doctrine: Is it amphibious?" 1986 J Env L & P 1 107–122

Ryan 2001 Envtl L
Ryan E "Public trust and distrust: The theoretical implications of the public trust doctrine for natural resources management" 2001 Envtl L 477–496

Sax 1970 Mich L Rev

Sax 1980 UC Davis LR
Sax JL "Liberating the public trust doctrine from its historical shackles" 1980 UC Davis LR 14(2) 185–232

Scott 1998 Fordham Envtl LJ
Scott GR "The expanding of the public trust doctrine: A warning to environmentalists and policy makers" 1998 Fordham Envtl LJ 10 1–70

Searle 1990 SC L Rev
Searle J "Private property rights yield to the environmental crisis: Perspectives on the public trust doctrine" 1990 SC L Rev 41(4) 897–918

Smith and Sweeney 2006 BC Envtl Aff L Rev

Stevens 1980 UC Davis LR
Stevens JS "The Public Trust: A sovereign's ancient prerogative becomes the people's environmental right" 1980 UC Davis LR 14(2) 195–232

Takacs 2008 NYU Envtl LJ
Turnipseed et al 2009 ELQ

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 doctrine” 2009 ELQ 36(1) 1–70

Van der Walt Constitutional Property Clause


Von Tigerstrom 1998 J Env L & P

Von Tigerstrom B "The public trust doctrine in Canada" 1998 J Env L & P 7 379–401

Walston 1982 Santa Clara L Rev


Wilkinson 1989 Envtl L

Wilkinson CF "The headwaters of the Public Trust: Some thoughts on the source and scope of the traditional doctrine" 1989 Envtl L 425–472

Williams 2002 SC Envtl LJ

Williams SM "Sustaining urban green spaces: Can public parks be protected under the public trust doctrine?" 2002 SC Envtl LJ 10 23–52
Register of legislation

American legislation

Constitution of the United States of America, 1787
Constitution of the Commonwealth of Pennsylvania, 1874
Constitution of the State of Hawai‘i, 1995

South African legislation

National Environmental Management Act 107 of 1998
National Environmental Management: Biodiversity Act 10 of 2004
National Water Act 36 of 1998
Mineral and Petroleum Resources Development Act 28 of 2002

Register of cases

Register of American cases

Arnold v Mundy 6 NJL 1 (1821)
Barney v City of Keokuk 94 US 324 (1877)
Borough of Neptune City v Borough of Avon-by-the-Sea 61 NJ 296 A 2d 47 (1972)
California Earth Corps v California State Lands Commission 27 Cal Rptr 3d 476 (2005); 2005 Cal LEXIS 625
Caminiti v Boyle 107 Wn 2d 662; 732 P 2d 989 (1987)
City of Milwaukee v State 193 Wis 423; 214 NW 820 (1927)
Glass v Goeckel 473 Mich 667 (2005); 2005 Mich LEXIS 1314
Illinois Central Railroad Company v Illinois 146 US 387 (1892)
In re Water Use Permit Applications 9 P 3d 409 (Hawa 2000)
Kansas ex rel Meek v Hays 785 P 2d 1356 (Kan 1990)
Knight v United States Land Association 142 US 161 (1891)
Landmark West!, Board of Managers of the Parc Vendome Condominium v City of New York and New York City Economic Development Corporation 2005 NY Slip Op 25362; 2005 NY Misc. LEXIS 1853

Lucas v South Carolina 505 US 1003, 112 S Ct 2886 (1992)

Martin v Waddell's Lessee 41 US 367 (Pet) (1842)

Montana Coalition for Stream Access Inc v Curran 682 P 2d 163 (Mont 1984)

Morimoto and Yamada v Board of Land and Natural Resources State of Hawaii 107 Haw 296 (2005)

National Audubon Society v Superior Court of Alpine County 33 Cal 3d 419, 658 P 2d 709, 189 Cal Rptr 346, modified, 33 Cal 3d 726a, cert denied, 104 S Ct 413 (1983)

Orion Corporation v State of Washington 747 P 2d 1062 (Wash 1987)

Parks v Cooper 676 NW 2d 823 (SD 2004)

Penn Central Transportation Company v New York City 438 US 104; 57 L Ed 2d 631 (1978)


Raleigh Avenue Beach Association v Atlantis Beach Club, Inc 185 NJ 40 (2005); 2005 NJ LEXIS 932

Shively v Bowlby 152 US 1 (1894)

The Propeller Genesee Chief v Fitzhugh 12 How 443 (1852)

The Times of Trenton Publishing Corporation v Lafayette Yard Community Development Corporation 183 NJ 519 (2005)

Washington State Geoduck Harvest Association v Washington State Department of Natural Resources 124 Wn App 441 (2004); 2004 Wah App LEXIS 2919

Register of German cases

BVerfGE 58, 300 15 July 1981 1 BvL 77/78 (Naßauskiesung case)
Register of South African cases

*De Beers Consolidated Mines Ltd v Ataqua Mining (Pty) Ltd* High Court of South Africa Orange Free State Provincial Division Case 3215/06 13 December 2007 (unreported)

*Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products* 2004 1 All SA 636 (E)

Register of Internet sources


List of abbreviations

AJS American Journal of Sociology

Alb L Rev Albany Law Review

Ariz St LJ Arizona State Law Journal

BC Envtl Aff L Rev Boston College Environmental Affairs Law Review
<table>
<thead>
<tr>
<th>Journal Name</th>
<th>Full Name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cornell L Rev</td>
<td>Cornell Law Review</td>
</tr>
<tr>
<td>Denv U L Rev</td>
<td>Denver University Law Review</td>
</tr>
<tr>
<td>Det CLR</td>
<td>Detroit College of Law Review</td>
</tr>
<tr>
<td>ELQ</td>
<td>Ecology Law Quarterly</td>
</tr>
<tr>
<td>Envtl L</td>
<td>Environmental Law</td>
</tr>
<tr>
<td>Fordham Envtl LJ</td>
<td>Fordham Environmental Law Journal</td>
</tr>
<tr>
<td>Hamline LR</td>
<td>Hamline Law Review</td>
</tr>
<tr>
<td>Hastings W-Nw J Envt'l L &amp; Pol'y</td>
<td>Hastings West-Northwest Journal of Environmental Law and Policy</td>
</tr>
<tr>
<td>Iowa L Rev</td>
<td>Iowa Law Review</td>
</tr>
<tr>
<td>J Env L &amp; P</td>
<td>Journal of Environmental Law and Practice</td>
</tr>
<tr>
<td>J Land Resources &amp; Envtl L</td>
<td>Journal of Land, Resources and Environmental Law</td>
</tr>
<tr>
<td>Marq L Rev</td>
<td>Marquette Law Review</td>
</tr>
<tr>
<td>Nat Resources J</td>
<td>Natural Resources Journal</td>
</tr>
<tr>
<td>NYU Envtl LJ</td>
<td>New York University Environmental Law Journal</td>
</tr>
<tr>
<td>Pac LJ</td>
<td>Pacific Law Journal</td>
</tr>
<tr>
<td>Santa Clara L Rev</td>
<td>Santa Clara Law Review</td>
</tr>
<tr>
<td>SC Envtl LJ</td>
<td>South Carolina Environmental Law Journal</td>
</tr>
<tr>
<td>SC L Rev</td>
<td>South Carolina Law Review</td>
</tr>
<tr>
<td>UC Davis LR</td>
<td>UC Davis Law Review</td>
</tr>
<tr>
<td>U Chi L Rev</td>
<td>University of Chicago Law Review</td>
</tr>
<tr>
<td>UCLA LR</td>
<td>UCLA Law Review</td>
</tr>
<tr>
<td>U Colo L Rev</td>
<td>University of Colorado Law Review</td>
</tr>
<tr>
<td>ULR</td>
<td>Utah Law Review</td>
</tr>
<tr>
<td>Val U LR</td>
<td>Valparaiso University Law Review</td>
</tr>
<tr>
<td>Wash LR</td>
<td>Washington Law Review</td>
</tr>
</tbody>
</table>
UNPACKING THE PUBLIC TRUST DOCTRINE: A JOURNEY INTO FOREIGN TERRITORY

E van der Schyff

Summary

The past decade has borne witness to the transformation of South Africa’s natural resources law with the introduction of a new legal concept, that of "public trusteeship", to South African jurisprudence. The concept of "public trusteeship" as it is embodied in South African legislation encapsulates the sovereign’s duty to act as guardian of certain interests to the benefit of the nation as a whole. In the quest to demystify the incorporation of the concept of "public trusteeship" in South Africa, this article, as a first tentative step, focuses solely on the public trust doctrine as it functions in American jurisprudence. It is the aim of this article to give a thorough theoretical exposition of the development and application of the public trust doctrine in American jurisprudence in order to provide the South African scholar with a perspective on a legal construct founded on the philosophical notion that governments exercise a "fiduciary trust" on behalf of their people.

Keywords

Environment; environmental protection; natural resources; ownership; American public trust doctrine; private property; public rights; takings; South African public trusteeship; fiduciary trust; stewardship ethic; res omnium communes; res publicae.

* Elmarie van der Schyff. BA LLB LLM LLD (NWU). Professor in Law, North-West University, South Africa (Elmarie.VanderSchyff@nwu.ac.za).