

UNPACKING THE PUBLIC TRUST DOCTRINE: A JOURNEY INTO FOREIGN TERRITORY

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*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

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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 Government*⁵ (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 than 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 domaine 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

5 Chp 11, S 139 Locke 1690 <http://bit.ly/D1Fvi>. See Dunn "The concept of trust in the politics of John Locke" in this regard.

6 Pound *Introduction* 111.

7 Marx *Capital* 911. This passage is frequently quoted. See, *inter alia*, Foster 2006 AJS 385; Foster 2002 <http://bit.ly/huO54I>.

8 Brady 1990 *BC Envtl Aff L Rev* 633.

9 Van der Walt *Constitutional Property Clause* 130.

more effective control".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",¹¹ there has been no attempt in reported cases to give a thorough exposition of the notion.

10 BVerfGE 58, 300 (339) 15 July 1981 1 BvL 77/78 (Naßauskiesung case).

11 *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts 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",

12 Wilkinson 1989 *Envtl L* 425; Kearney and Merrill 2004 *U Chi L Rev* 800.

13 Brooks *et al* *Law and Ecology* 182; Blumm 1989 *Envtl L* 573; Scott 1998 *Fordham Envtl LJ* 3.

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".

15 Scott 1998 *Fordham Envtl LJ* 4; Kearney and Merrill 2004 *U Chi L Rev* 800.

16 Stevens 1980 *UC Davis LR* 200.

dating back as far as the Roman Empire,¹⁷ and the development of the notion that virtually everything has an owner.¹⁸

The public trust doctrine essentially recognises that certain public uses ought to be specifically protected.¹⁹ 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.²⁰ 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. Coquillette 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.

18 Stevens 1980 *UC Davis LR* 195,197–198.

19 *Martin v Waddell's Lessee* 41 US 367 (Pet) (1842) – hereafter *Martin*; *Illinois Central Railroad Company v Illinois* 146 US 387 (1892) – hereafter *Illinois Central*. Cognisance must be taken of the fact that *Arnold v Mundy* 6 NJL 1 (1821) – hereafter *Arnold* – is another leading case in public trust law. In this case, an American court formulated the traditional public trust doctrine. In the 1988 Supreme Court decision of *Phillips Petroleum Company v Mississippi* 484 US 469 (1988) 473 (hereafter *Phillips Petroleum Company*), the court expressed the view that *Shively v Bowly* 152 US 1 (1894) – hereafter *Shively* – is in fact the seminal case in American public trust jurisprudence. The *Shively* case rested on prior decisions of the US Supreme Court, eg the *Illinois Central* case and *Knight v United States Land Association* 142 US 161 (1891) – hereafter *Knight*.

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.

20 *Glass v Goeckel* 473 Mich 667 (2005) 673 – hereafter *Glass*.

reserved to be accessed by and used to the benefit of the public.²¹ 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.²² The former was subject to the state's *dominium* and could not be relinquished.²³ Initially, only land covered by tidal waters was subject to the protection of the doctrine.²⁴ Gradually, the geographical reach of the doctrine was extended²⁵ to cover all navigable waters and the land beneath them, without reducing the scope of the public trust in tidelands.²⁶

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.²⁷ 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.

22 Sax 1970 *Mich L Rev* 476.

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.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.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.³⁰ The state lacked the power to diminish public trust rights when trust property was conveyed to private parties.³¹ Thus, when a private party acquired property burdened with the public trust, it acquired only the *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.³²

Scrutiny of the traditional public trust doctrine highlights the following features: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

28 Sax 1970 *Mich L Rev* 476.

29 *Martin* case 411; *Shively* case 10.

30 Sax 1970 *Mich L Rev* 487. This principle is confirmed in a 2005 decision by the Supreme Court of Michigan in the *Glass* case 679.

31 *Glass* case 673.

32 *Casey* 1984 *Nat Resources J* 814.

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, Stevens³⁴ 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".

36 Bracton *On the Laws and Customs of England* 39–40 as cited by Stevens 1980 *UC Davis LR* 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, Huffman⁴² 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.

the creator define the relationship between the parties holding legal and equitable title. In attempting to determine which parties are the creator, trustee and beneficiary of the alleged trust of the public trust doctrine, Huffman points out that the public can be identified as the beneficiary and the state as the trustee. However, a single entity cannot be both the trustee and beneficiary of a trust:

The democratic state is the agent of the people. It acts at the behest of the people and, therefore, for the benefit of the people. The people cannot act as fiduciary, through the state, for themselves.

The question as to the identity of the creator can also not be answered.

41 Huffman 1989 *Envnl L* 527.

42 Huffman 1989 *Envnl 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 Envnl 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.⁴⁷ 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 Sax⁴⁸ has widely been acknowledged as the father of the modern public trust doctrine.⁴⁹ From the introductory comments made in his seminal work,⁵⁰ 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.

48 As a Professor of Law, first at Michigan Law School then at California, Berkeley, Sax completed meticulous research in the field of Public Trust Law. His seminal work, *The Public Trust Doctrine in Natural Resource Law: Effective in Judicial Intervention*, published in 1970, sparked the usage and development of the public trust doctrine in American environmental law.

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 *Envnl 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 Envnl Aff L Rev* 622. Bader 1994 *Hamline LR* 52 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.

50 Sax 1970 *Mich L Rev* 473.

environmental management problems.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".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.⁵³

Sax⁵⁴ 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,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".⁵⁶ The most important of these

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.

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."

53 Sax 1970 *Mich L Rev* 474.

54 Sax 1970 *Mich L Rev* 474.

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.

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".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".⁵⁸

Then there was also the recognition "that certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate".⁵⁹ Von Tigerstrom⁶⁰ 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.⁶¹

2.2.1.2 Judicial expansion of the doctrine

Olson⁶² 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

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.

57 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".

58 Sax 1970 *Mich L Rev* 484.

59 Sax 1970 *Mich L Rev* 485.

60 Von Tigerstrom 1998 *J Env L & P* 382.

61 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.

62 Olson 1975 *Det CLR* 178.

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 resources⁶⁴ 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 *Env'l 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.⁷¹ 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".⁷²

This reasoning resulted in the extension of trust protection to public uses including sailing, rowing, fishing, fowling, bathing and skating.⁷³ 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.⁷⁴ 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".

71 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".

72 *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.

73 *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.

74 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.⁷⁵ Stevens⁷⁶ 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*,⁷⁷ 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.⁷⁸ In 2004, a decision to the same effect was made by the Supreme Court of South Dakota in *Parks v Cooper*.⁷⁹ 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.⁸⁰ This diversity in approach emphasises the uniqueness of the application of the doctrine in the different states. It is apparent that expansive

recognised. See also Pearson 2004 *J Land Resources & Envtl L* 174 and Connolly 2009 *BC Envtl Aff L Rev* 148, 150.

75 It is interesting to note that the Supreme Court of Michigan confirmed in 2005 in the *Glass* case 674 and 698 that the right to walk along a sea or lakeshore is inherent in 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.

77 658 P 2d 709 (Cal 1983) – hereafter *National Audubon Society*.

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

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.⁸¹

The development that took place in individual states illustrates the evolutionary character of the law.⁸² Dunning,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."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,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 seekers⁸⁶ 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

Huffman⁸⁷ criticises the public trust doctrine for making it possible for the judiciary to intervene and annihilate government action. He argues that the doctrine undermined

81 Smith and Sweeney 2006 *BC Envtl Aff L Rev* 334.

82 Reed 1986 *J Env L & P* 107.

83 Dunning 1989 *Envnl L* 517.

84 Dunning 1989 *Envnl L* 522.

85 Dunning 1989 *Envnl L* 522; Maguire 1997 *J Env L & P* 11.

86 Sax 1970 *Mich L Rev* 537; Casey 1984 *Nat Resources J* 812.

87 Huffman 1986 *Denv U L Rev* 582–584.

democracy⁸⁸ and constituted a remedy for the perceived failure of public allocation.⁸⁹ Huffman objects to the fact that judicial review under the doctrine has taken over the role appropriately played by the political branches of government. Lazarus⁹⁰ 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".⁹¹

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,⁹² Sax's work motivated the legislature to take action,⁹³ thus protecting the flexibility and vitality of the doctrine because the active management of the

88 Contrary to Huffman, Blumm 1989 *Env'l 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 *Env'l L* 461 hold the opposite opinion of the doctrine, thinking it to be mainly federally and constitutionally imposed.

93 Blumm 1989 *Env'l 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 *Env'l 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.⁹⁴

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 Amendment⁹⁵ 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.⁹⁶ 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.⁹⁷ 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.⁹⁸ Callies and Breemer⁹⁹ 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;¹⁰⁰ 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.¹⁰¹ It is only limited public rights that are protected.¹⁰²

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.

94 Dunphy 1976 *Marq L Rev* 802.

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 *Envnl 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*¹⁰³

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".¹⁰⁴ 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"¹⁰⁵ and that each case should be judged on its own facts¹⁰⁶ when conducting the takings analysis. It is made clear in *Lucas v South Carolina*¹⁰⁷ 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".¹⁰⁸ 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.

¹⁰⁴ *Penn Central Transportation Company v New York City* 438 US 104 (1978) 124 – hereafter *Penn Central*.

¹⁰⁵ *Penn Central* case 130–131.

¹⁰⁶ *Penn Central* case 124.

¹⁰⁷ 505 US 1003 (1992) – hereafter *Lucas*.

¹⁰⁸ *Lucas* case 1027.

In the *National Audubon Society* case, the public trust doctrine was formulated to allow the state to reconsider¹⁰⁹ 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".

110 *National Audubon Society* case 558–559.

111 *National Audubon Society* case 447. Arnold and Jewel 2008 *Hastings W-Nw J Envt'l L & Pol'y* 1190.

112 *National Audubon Society* case 440.

113 747 P 2d 1062 (Wash 1987) – hereafter *Orion Corporation*.

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*.¹¹⁵ 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:¹¹⁶

[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 ...

Manzanetti¹¹⁷ indicates that the public trust doctrine avoids the takings issue by claiming a pre-existing title¹¹⁸ 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.¹¹⁹ 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.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.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 *Phillips Petroleum Company* case.¹²² The court found that:

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.¹²³

The importance of the decision of the *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.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.¹²⁵

120 Manzanetti 1984 *Pac LJ* 1296. See also Blumm 1989 *Env'l L* 586. Neither Manzanetti nor Blumm refers to the majority opinion of Field J in the *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 *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.

121 Manzanetti 1984 *Pac LJ* 1310. He is supported by Huffman 1989 *Env'l 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 *Constitution* and evade the taking limits on police power.

122 481–485.

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.

124 Lazarus 1986 *Iowa L Rev* 655.

125 Searle 1990 *SC L Rev* 916.

Reed¹²⁶ 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".¹²⁷

2.3.3 *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.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.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.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.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

126 Reed 1986 *J Env L & P* 118.

127 Reed 1986 *J Env L & P* 119.

128 Dunphy 1976 *Marq L Rev* 796.

129 Dunphy 1976 *Marq L Rev* 797; Blumm 1989 *Envnl L* 585.

130 Dunphy 1976 *Marq L Rev* 798. Stevens 1980 *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 *J Land Resources & Envnl L* 173 remarks: "While the doctrine can originate in constitutional or statutory law, typically its genesis is judicial decision". See also Turnipseed *et al* 2009 *ELQ* 56.

131 Olson 1975 *Det CLR* 164.

safeguard the use of the resource by the public.¹³² Bader¹³³ 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.¹³⁴

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.¹³⁵ 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.¹³⁶ 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 *Envnl 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 Envnl 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.¹³⁷ This test also consists of five weighted factors:

¹³⁷ Hannig 1983 *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.

Hannig¹³⁸ 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.¹³⁹ It can thus be described as a public easement¹⁴⁰ or servitude.¹⁴¹

Whilst no suggestion can be found that the traditional public trust doctrine had any relation with constitutional law,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.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

138 Hannig 1983 *Santa Clara L Rev* 232–236.

139 Blumm 1989 *Envnl L* 581; Dunning 1989 *Envnl L* 519. Scott 1998 *Fordham Envnl LJ* 15 describes the basic doctrine in its simplest sense as a principle of sovereignty.

140 Blumm 1989 *Envnl L* 580.

141 Wilkinson 1989 *Envnl L* 450; Huffman 1989 *Envnl L* 527; Dunning 1989 *Envnl L* 515.

142 Huffman 1989 *Envnl L* 545–555.

143 See Government of Florida 1968 <http://bit.ly/gzVerk> and Government of Pennsylvania 1874 <http://bit.ly/ig90Pd>.

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.

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List of abbreviations

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|--------------------|---|
| 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 |

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|----------------------------------|---|
| Cornell L Rev | Cornell Law Review |
| Denv U L Rev | Denver University Law Review |
| Det CLR | Detroit College of Law Review |
| ELQ | Ecology Law Quarterly |
| Envtl L | Environmental Law |
| Fordham Envtl LJ | Fordham Environmental Law Journal |
| Hamline LR | Hamline Law Review |
| Hastings W-Nw J Envt'l L & Pol'y | Hastings West-Northwest Journal of Environmental Law and Policy |
| Iowa L Rev | Iowa Law Review |
| J Env L & P | Journal of Environmental Law and Practice |
| J Land Resources & Envtl L | Journal of Land, Resources and Environmental Law |
| Marq L Rev | Marquette Law Review |
| Mich L Rev | Michigan Law Review |
| Nat Resources J | Natural Resources Journal |
| NYU Envtl LJ | New York University Environmental Law Journal |
| Pac LJ | Pacific Law Journal |
| Santa Clara L Rev | Santa Clara Law Review |
| SC Envtl LJ | South Carolina Environmental Law Journal |
| SC L Rev | South Carolina Law Review |
| UC Davis LR | UC Davis Law Review |
| U Chi L Rev | University of Chicago Law Review |
| UCLA LR | UCLA Law Review |
| U Colo L Rev | University of Colorado Law Review |
| ULR | Utah Law Review |
| Val U LR | Valparaiso University Law Review |
| Wash LR | Washington Law Review |

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*.

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