

THE PUBLIC TRUST DOCTRINE: A UNITED STATES AND COMPARATIVE ANALYSIS[±]

David L Callies* and Katie L Smith**

Abstract: The Public Trust Doctrine (PTD or the Doctrine) can be traced back in time as far as the Roman Empire, but it flourished into the modern conception in pre-Colonial England. The Doctrine can apply to any sovereign who holds land for the benefit of the people. This article defines and explores the growth and development of the PTD in the United States — first from the perspective of the federal government as sovereign. The article next turns to the individual state governments and explores the evolution of the Doctrine, comparing the expansion and growth among the states. Finally, the article overviews the use of the PTD intra-nationally and compares the development of the Doctrine outside of the United States. The presence of the Doctrine worldwide largely reflects the broad reach of English colonialism. The article concludes by evaluating the potential benefits and drawbacks of the theoretical expansion of the PTD.

Keywords: *public trust doctrine; property law; water; navigable waterways; submerged and adjacent lands; private use of public land; public access; shoreline; comparative law; common law*

I. Introduction

Government ownership of land has always carried with it a series of public obligations which collectively limit the use of such land (usually for public and not for commercial or other private-like purposes) and its transfer or disposal. Thus, for example, if government holds or acquires a parcel of land, it may broadly use it for park, recreation and government administrative functions (postal service, fire and police stations and other government offices). Also, generally speaking, government may sell or lease such land if it is found to be surplus, often subject to no more than the odd disposal statute or regulation which may require public

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* David L Callies, Benjamin Kudo Chair in Law, William S Richardson School of Law, 2515 Dole Street, Honolulu, Hawaii 96822, USA. D.callies@hawaii.edu. The author is writing a book on the Public Trust Doctrine.

** Katie L Smith, Technical Editor, University of Hawai'i Law Review, JD Candidate, anticipated 2020, University of Hawai'i at Mānoa, William S Richardson School of Law, 2515 Dole Street, Honolulu, Hawaii 96822, USA. Ksmith34@hawaii.edu.

auction or other generalised offer to potential buyers or lessees. An exception is land which the government formally holds in trust for the public: subject to the public trust doctrine (PTD).

Broadly stated, the PTD provides that government holds certain submerged and adjacent land, water and (increasingly) other resources in trust for the benefit of its citizens, establishing the right of the public to fully enjoy them for various public uses and purposes. Implied in this definition are limitations on the private use of such water, land or other resources as well as limitations on government to transfer interests in them to private parties, particularly if such transfer will prevent or hamper use by the public. This article aims to address, in particular: (1) What is the distinction between the application of the PTD and the truism that government always holds land in trust for its citizens? (2) How and to what resources besides the traditional water and land immediately adjacent to water does the PTD apply — inland trails and trailheads, for example? (3) What private uses can government permit on public trust water or land, short of sale or other transfer which is generally prohibited — private wharves for the loading and unloading of passengers or freight from private vessels? (4) Is public access to a public trust resource — like a pathway across private land to a public beach, for example — automatically a part of the public trust, or must that access be separately acquired by government from the private landowner?

The Doctrine — or some version of it — is part of the common or statutory law in other jurisdictions outside the United States. Section VI of this article selectively summarises the use and application in other jurisdictions.

II. Public Trust Doctrine Defined

The PTD may mean many things to many people, but there is at least a sharp divide between the common-law PTD universally associated with water, with roots in Roman Law as it was practiced in England and as it came to the United States, on the one hand, and the notion that certain waters and lands held by government is usually, if not always, held in trust for its citizens. Unfortunately, much literature and many courts confuse the two, with serious consequences for the public and private sector alike. Thus, for example, the PTD has historically been applied only to water and resources directly related to water (riparian land, submerged land and so forth) whereas the latter extends (by state statute and constitution in many cases) to all manner of natural resources “owned” by the government. PTD resources are almost always held by, and are inalienable by, the government and with limited use by the public for purposes such as fishing, fowling and the like. Resources merely held in general trust for the people are usually freely alienable and useable for a variety of private and commercial purposes (often following applicable public procurement law)¹ such as mineral exploration and extraction, with caveats that

¹ Danielle M Conway, *State and Local Government Procurement* (Chicago, IL: American Bar Association, 2012).

holding such resources for the public usually carries with it the need to preserve some semblance of public use and enjoyment. Aside from this critical distinction, this article focuses on the uses of, and access to, PTD resources and the extent to which this formal designation is applicable beyond traditional water and water-related land.

III. The Public Trust beyond Interests in Water

There is no uniform application of the PTD among the states. The Doctrine was first recognised in American law in the early nineteenth century in *Arnold v. Mundy*² holding that, like England, submerged lands belong to the sovereign. Within a few decades, the Doctrine was expanded to include navigable waters.³ Thus, the state owns and holds PTD waters that are navigable-in-fact, and lands submerged beneath non-navigable waters can be owned privately.⁴ The Doctrine has been expanded by some states, as certain courts extended the Doctrine to include non-navigable waters,⁵ ground water⁶ and parklands.⁷

Many states have extended the scope of the PTD beyond its traditional common law application to navigable waterways and tidelands to include non-navigable waters, drinking water, groundwater, wetlands, all submerged or submersible lands and even public ownership of all water found in the state.⁸ In 2007 and 2008, for example, eight Great Lakes states entered the Great Lakes–St Lawrence River Basin Water Resources Compact which established a compact-wide PTD whose scope reaches waters beyond the individual states’ common law doctrines.⁹ Such extensions have generated tensions between state PTDs and pre-existing private water rights, especially in the western United States, where water is generally less plentiful, prior appropriation rights dominate and conveyances including water

2 6 NJL 1, 8, 32 (1821) (SC); *Pollard v Hagan*, 44 US (3 How) 212 (1845) (ruling that the federal government held tidal submerged lands in trust for future states prior to statehood).

3 See, eg, *McManus v Carmichael*, 3 Iowa 1, 18, 30 (1856); *Phillips Petroleum Co v Mississippi*, 484 US 489, 484–485 (1988) (the Supreme Court confirmed that lands beneath both tidal and navigable-in-fact waters were state-owned public trust lands).

4 See generally, Michael C Blumm, “The Public Trust Doctrine and Private Property: The Accommodation Principle” (2010) 27(3) *Pace Environmental Law Review* 649, 650.

5 See, eg, *Montana for Stream Access v Curran*, 682 P 2d 163, 171 (Mont 1984); *State v McIlroy*, 595 SW 2d 659 (Ark 1980); *Parks v Cooper*, 676 NW 2d 823 (SD 2004).

6 See, eg, Hawai‘i and the *Waiahole Ditch* cases (n.23); Vermont has statutes declaring that groundwater resources are held in trust for the public; the Great Lake States hold the lake water in trust for the public.

7 See, eg, *Paepcke v Public Building Commission*, 263 NE 2d 11, 15 (Ill 1970); *Friends of Van Cortland Park v New York*, 750 NE 2d 1050, 1053 (NY 2001).

8 For a meticulous summary of all 50 state PTDs and the several issues they present, see Robin Kundis Craig, “A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries” (2007) 16(1) *Penn State Environmental Law Review* 1 and “A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution toward an Ecological Public Trust” (2010) 37(1) *Ecology Law Quarterly* 53.

9 Bridget Donegan, “The Great Lakes Compact and the Public Trust Doctrine: Beyond Michigan and Wisconsin Common Law” (2009) 24(2) *Journal of Environmental Law and Litigation* 455.

resources and lands underlying them often pre-date states' succession to federal public trust rights at statehood.¹⁰

Very few states, however, have expanded their PTDs to include lands and natural resources beyond water and land beneath it. Although nineteen states might arguably have done so in some fashion through state constitution, statute or case law, few of these have done so by expressly stretching the common law PTD; rather, they vaguely note that some resource is held in "public trust".¹¹ Only the Supreme Courts of California, New Jersey and Vermont have gone so far as to declare the PTDs in their states to be elastic and evolving with needs of the people they benefit.¹² While a few commentators have suggested that the PTD should be applied to some or all natural resources everywhere, no court has accepted this extension when argued. Thus, for example, in *Sanders-Reed v Martinez*, the court held that the PTD did not empower the judicial branch to establish the best way to protect the atmosphere, citing decisions from other jurisdictions refusing to extend the PTD to the atmosphere.¹³ Indeed, some states have refused to extend the PTD from surface water to underground water.¹⁴

A. *Extension to wildlife and other natural resources*

The most common non-water expansions of state PTDs result in coverage of wildlife and other natural resources, such as air and minerals. Those expansions have been mandated by constitutions and statutes as well as declared by appellate courts. In 1998, for example, the Alaska Supreme Court extended its PTD to all naturally occurring wildlife and minerals, based in part on several sections of the state constitution,¹⁵ but it took a half-step back the following year, describing the state's authority over wildlife and minerals to be merely trust-like, not a formal enlargement of the state's PTD.¹⁶ Iowa followed a similar path, first suggesting that the state's PTD extended to public resources beyond water¹⁷ and then narrowing its interpretation so as not to preclude removal of natural timber from public lands

10 Craig, "A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution toward an Ecological Public Trust" (n.8) p.53.

11 *Ibid.* Such states include Alabama, Alaska, California, Colorado, Connecticut, Hawai'i, Illinois, Iowa, Louisiana, Mississippi, New York, Ohio, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington and West Virginia.

12 *National Audubon Society v Superior Court*, 658 P 2d 256 (Cal 1983); *Borough of Neptune City v Borough of Avon-by-the-Sea*, 294 A 2d 47 (NJ 1972), principle reaff'd in *Raleigh Avenue Beach Association v Atlantis Beach Club*, 879 A 2d 112 (NJ 2005); *State v Central Vermont Railway*, 571 A 2d 1128 (Vt 1989).

13 350 P 3d 1221 (NM Ct App 2015).

14 See *Environmental Law Foundation v State Water Resources Control Board*, 237 Cal Rptr 3d 393 (Ct App 2018).

15 *Baxley v State*, 958 P 2d 422 (Alaska 1998).

16 *Brooks v Wright*, 971 P 2d 1025 (Alaska 1999).

17 *Fencl v City of Harper's Ferry*, 620 NW 2d 808 (Iowa 2000); see also *Larman v State*, 552 NW 2d 158 (Iowa 1996).

administered by the conservation board.¹⁸ The court noted that “[t]he purpose of the public-trust doctrine is to prohibit states from conveying important natural resources to private parties”, not the prevention of forestry management.¹⁹ In Virginia, a federal court extended the PTD “to protect and preserve” the state’s “natural wildlife resources” when the state and federal governments sued for damages in the death of waterfowl following an oil spill in the Chesapeake Bay.²⁰

California in its Fish and Game Code proclaims that “[t]he fish and wildlife resources are held in trust for the people [but not squarely the PTD] of the state by and through the [D]epartment [of Fish and Game]”,²¹ a provision upheld by a California appellate court when it granted summary judgment for private windmill operators in a suit brought by activists over bird death caused by wind turbines.²² The court held that the plaintiffs should have sued the County of Alameda instead as the responsible public agency.²³ Connecticut, by statute, creates a public trust in the state’s air and natural resources and grants private parties the right to sue both governmental and private entities to protect them.²⁴ An Ohio Code section — apparently to justify laws regulating hunting — gives the state “title to all wild animals, not legally confined or held” privately, “in trust for the benefit of all the people”.²⁵ The code in West Virginia does the same and specifically includes fish and amphibians.²⁶ Hawai‘i’s Constitution, after declaring the need to balance conservation with self-sufficiency, states that “[a]ll public natural resources are held in trust by the State for the benefit of the people”.²⁷ Michigan’s Constitution obliquely refers to the “public trust in air ... or other natural resources” when discussing a conservation fund,²⁸ but in practice follows a traditional form of the PTD. None of these decisions specifically reference the PTD, however.

B. Extension to lands not now or formerly submerged

New York arguably represents the high wash of PTD expansion so far. Under its constitution and statutes, New York’s forest preserve lands and specified state parks are forever inalienable and to be kept in a natural state, with timber removal for any reason prohibited.²⁹ The New York Supreme Court since 1871 has held

18 *Bushby v Washington County Conservation Board*, 654 NW 2d 494 (Iowa 2002).

19 *Ibid.*, 497 (internal quotations and citation omitted).

20 *In re Steward Transportation Co*, 498 F Supp 38 (ED Va 1980).

21 Cal Fish & Game § 711.7 (West, Westlaw through Ch 8 of 2014 Reg Sess and all propositions on the 6/3/2014 ballot).

22 *Center for Biological Diversity, Inc v FPL Group, Inc*, 83 Cal Rptr 3d 588 (Ct App 2008).

23 *Ibid.*

24 Conn Gen Stat Ann § 22a-16 (West, Westlaw through the 2014 Supplement).

25 Ohio Rev Code Ann § 1531.02 (West, Westlaw through Files 1 to 76 of the 130th GA (2013–2014)).

26 W Va Code Ann § 20-3-3 (West, Westlaw through the 2014 Reg Sess).

27 Haw Const art.11, § 1 (West, Westlaw through 2013).

28 Mich Const art.11, § 40 (West, Westlaw through 2013).

29 NY Const, art.XIV, § 1 (West, Westlaw through 2013); NY Env'tl Conserv Law § 9-0301 (West, Westlaw through L 2014, Chapters 1 to 17).

that municipalities hold parklands in trust for the public,³⁰ and more recently a host of opinions have reiterated that “[d]edicated park areas in New York State are impressed with a public trust”.³¹ A state appellate court has even held that a municipal parking lot could be within the public trust if dedicated to public use by deed or legislative act but was unwilling to consider use alone in that context:

[w]hile a parcel’s continuous use as a public park or recreational area may impress that parcel with a public trust by implication, the petitioners have cited no authority for the proposition that a parking lot may achieve public trust status through such means”.³²

In Illinois, which also breaks from tradition, the PTD applies not only to submerged lands but also to parks and conservation areas as long as they have been dedicated as such.³³ However, classification of property as a “park” on a village land use plan is insufficient to trigger the PTD.³⁴

To establish a right to a remedy under the [public trust] doctrine, [a] plaintiff must allege facts showing certain property is held by a government body for a given public use; the government body has taken action that would cause or permit the property to be used for purposes inconsistent with its originally intended public use; and such action is arbitrary or unreasonable.³⁵

Much less ambitious than New York or Illinois, Colorado’s concept of “public trust” land extends to state school lands, which are “held in a perpetual, inter-generational public trust for the support of public schools”.³⁶ In Alabama, the state constitution creates a “Forever Wild Land Trust” which buys and holds areas of natural beauty in trust for the people, but the trustee is not the state but an appointment board.³⁷ Unquestionably, the most extreme example of *potentially* expanding the PTD to lands with no relationship to water comes from Hawai‘i, where plaintiffs seeking to block the construction of the world’s largest reflecting telescope just off the summit of the state’s 13,900 foot mountain, Mauna Kea, have challenged its construction in part on PTD grounds. The site is in an “astronomy precinct” on land leased

30 *Brooklyn Park Comm’rs v Armstrong*, 45 NY 234 (1871).

31 *Grayson v Town of Huntington*, 554 NYS 2d 269 (1990); see also *Johnson v Town of Brookhaven*, 646 NYS 2d 180 (2009).

32 *10 E Realty, LLC v Inc Village of Valley Stream*, 854 NYS 2d 461 (App Div 2008), *rev’d on other grounds*, 907 NE2d 274 (NY 2009).

33 *Timothy Christian Schools v Village of Western Springs*, 675 NE 2d 168 (Ill App Ct 1996).

34 *Ibid.*

35 *Ibid.*

36 Colo Const, art.IX, § 10 (West, Westlaw through 2013).

37 Ala Const, art.XI, § 219.07 (West, Westlaw through 13 December 2012).

by the University of Hawai‘i from the state and 13 astronomical telescopes are already built and operating in the precinct. In a concurring opinion dealing with due process, two justices of the state Supreme Court specifically asked for thorough consideration of the application of the PTD to the site, which is dozens of miles from the nearest navigable water, and, of course, at 13,000 feet, never submerged. However, in its subsequent opinion upholding a state department’s granting a permit for the construction, the court failed to address the application of the PTD — as a concurring justice correctly observed — but instead held only that all public lands, like those on Mauna Kea, were held in some sort of trust for the public.³⁸

C. *States with Multiple Public Trusts*

At least three states have recognised or created public trust principles separate from, and as alternatives to, broadening the scope of their existing common law PTDs. In Connecticut, the courts applied two notions of “public trust”: a common law PTD “under which the state holds in trust for public use title in waters and submerged lands waterward of the mean high tide line”,³⁹ and a statutory public trust that:

provides broadly that any person or corporation may maintain an action for declaratory and equitable relief against the state ... for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction.⁴⁰

Moreover, according to the State Supreme Court, both “public trusts” are distinct from the principle that public parks and beaches are held by municipalities “for the benefit of the residents of the state”.⁴¹

As noted by one PTD scholar, “several states have extended the concept of a public trust in waters to environmental protection”, creating what she calls an “ecological public trust. California and Hawai‘i have most extensively developed their ecological public trust doctrines[,]”⁴² and they have done so by making law apart from the traditional common law Doctrine related to waterways and tidelands. In 2008, the California Supreme Court decided there are “two distinct public trust doctrines[:] ... the common law doctrine, which involves the government’s affirmative duty to take the public trust into account in the planning and allocation of water resources ... [and] a public trust duty derived from statute, specifically

³⁸ *In re Contested Case Hearing re Conservation District Use Application*, 431 P 3d 752, 773–775 (Haw 2018) [*Mauna Kea II*].

³⁹ *Fort Trumbull Conservancy, LLC v Alves*, 815 A2d 1188, 1192–1193 fn.4 (Conn 2003) (quoting *Leydon v Greenwich*, 777 A 2d 552 (2001)).

⁴⁰ *Fort Trumbull Conservancy, LLC v City of New London*, 925 A 2d 292 (Conn 2007) (quoting Conn Gen Stat Ann § 22a-16) (internal quotations and ellipses omitted).

⁴¹ *Fort Trumbull Conservancy LLC v Alves* (n.39) 1193 fn.4.

⁴² Craig, “A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution toward an Ecological Public Trust” (n.8) 71.

Fish and Game Code section 711.7, pertaining to fish and wildlife”.⁴³ Arguably, Hawai‘i boasts four public trusts: (1) a navigable waters PTD under traditional common law; (2) a Native Hawaiian “public” trust derived from Hawaiian history and culture under which chiefs and, later, the monarchy held all water in trust for the people; (3) a statutory public trust set out in the State Water Code, which incorporates the other two and, among other things, provides for a Commission on Water Resource Management to regulate uses of both groundwater and surface water via an often contentious permitting process; and (4) a constitutional public trust over the lands returned by the federal government at statehood benefiting Native Hawaiians and the public at large.⁴⁴ All four PTDs are supported under Hawai‘i’s Constitution.⁴⁵

In sum, courts, legislators and state constitutions often declare various lands and other resources to be held in trust for the public. However, they rarely declare such land and resources to be subject to the PTD.

IV. The Public Trust Doctrine Applied to Private Property

While it is true that often public property held in trust for the public is subject to the PTD, the situation is somewhat different with respect to private property. There are two major lines of cases: (1) cases where a state was allowed to convey public trust lands to a private property owner because a public purpose was still being met and the public trust lands were not adversely affected by the conveyance and (2) cases where the state conveyed lands held in the trust for the public. However, private owners can only use such water and lands insofar as the use is consistent with the PTD. Regardless of which line of reasoning the courts adopted, the main point appears to be that use of public trusts lands whether or not clearly subject to the PTD is allowed, *so long as it furthers the purpose of the public trust*.

A. *Illinois central and private interests*

In the landmark 1892 case, *Illinois Central Railroad Co v Illinois*, the United States Supreme Court provided that a State:

⁴³ *Environmental Protection & Information Center v California Department of Forestry and Fire Protection*, 187 P 3d 888, 926 (Cal 2008).

⁴⁴ See Craig, “A Comparative Guide to the Western States’ Public Trust Doctrines: Public Values, Private Rights, and the Evolution toward an Ecological Public Trust” (n.8) 86–88, 118–127 (discussing the complex nature and history of water, land and the public trust in Hawai‘i); see also Joseph D Kearney and Thomas W Merrill, “The Origins of the American Public Trust Doctrine: What Really Happened in *Illinois Central*” (2004) 71(3) *University of Chicago Law Review* 799. Hawai‘i’s State Water Code is found at Haw Rev Stat §§ 174C-1–101 (West, Westlaw through Act 247 of the 2013 Reg Sess).

⁴⁵ Haw Const, art.XI, §§ 1, 7 and art.XII, § 4 (West, Westlaw through Act 247 of the 2013 Reg Sess).

can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties, ... than it can abdicate its police powers in the administration of government and the preservation of the peace.⁴⁶

Illinois Central provided that privatisation of PTD resources could occur if (1) the conveyance furthered a public purpose and (2) there was no substantial effect on remaining trust resources.⁴⁷ Many cases have adopted these *Illinois Central* exceptions, notably in *California in Boone v Kinsbury* (though this case has not been cited by any other case, California or elsewhere).⁴⁸ There, the California Supreme Court upheld leases given to private parties to drill oil on trust lands, concluding that it would not substantially interfere with the trust and noting that the state could revoke the leases if there was substantial interference.⁴⁹ In *Wisconsin*, the State Supreme Court upheld the conveyance of submerged lands of Lake Michigan to a private party because it was part of a larger public scheme.⁵⁰

Generally, in cases where a state has conveyed a public trust interest, private parties are still burdened by the PTD. After *Illinois Central*, the PTD did not require full public ownership of lands; privatisation was (and is) allowed as long as the PTD is maintained. Almost a century later, the Supreme Court recognised that individual states may define the lands held in public trust and recognise private rights in such lands.⁵¹

B. Examples of private interests in public trust doctrine property

Generally, as long as the property is not placed beyond the state's control and the private party is upholding the public interests of the PTD, private use is allowed. Essentially, the private party becomes the trustee for that particular parcel. Should the private party cease to use the property in a way that benefits the public trust, the state can reclaim that land, even if it appears to be held by the private property in fee simple.

46 146 US 387, 453–454 (1892).

47 *Ibid.*

48 273 P 797 (Cal 1928).

49 *Ibid.*, 816.

50 *City of Milwaukee v Wisconsin*, 214 NW 820, 830 (Wis 1923), accord *State v Lake Delton*, 286 NW 2d 622 (Wis Ct App 1979), *West Indian Co v Government of Virgin Island*, 643 F Supp 869 (3rd Cir 1986). See also *Arkansas v Southern Sand and Material Co*, 167 SW 854, 856 (Ark 1914) (upholding legislative authority to sell sand and gravel as it did not impair the right of common enjoyment).

51 *Phillips Petroleum Co v Mississippi*, 484 US 469, 475 (1988).

(i) Alaska

A corporation and caretaker filed an action against a fisherman for trespass in *CWC Fisheries v Bunker*.⁵² There, the Alaska Supreme Court found that the corporation could not maintain the action against the fisherman because, while the property had been conveyed by the State to the private corporation, it was still subject to the public trust. Thus, there was a continued public easement across the property.⁵³

(ii) California

In 1971, the California Supreme Court decided *Marks v Whitney*,⁵⁴ recognising that a landowner could have private interests (possession and alienation) in public trust land, but that interest was burdened by the public's rights. Thus, private development/use was restrained if it was inconsistent with the public's rights.⁵⁵ This has been followed by *New York*,⁵⁶ *South Carolina*⁵⁷ and *Michigan*.⁵⁸

In a more recent California decision,⁵⁹ the Supreme Court of California found that there was continuous state supervision of public trust resources, regardless of whether the property was in public or private ownership. This principle has been followed by several other districts, for example, in the *Vermont* cases cited below, as well as *New Jersey*⁶⁰ and *Hawai'i*.⁶¹ Courts following this Doctrine do not *eliminate* private property, but rather place conditions on it,⁶² (ie, should the property no longer be used for the public trust, the state has a right of re-entry). Thus, while private property interests are not eliminated, they can be affected, especially with development rights.⁶³

52 755 P 2d 1115 (Alaska 1988).

53 *Ibid.*

54 491 P 2d 374 (Cal 1971).

55 *Ibid.*, 380–381.

56 *Arnolds Inn, Inc v Morgan*, 310 NYS 2d 541, 547 (Sup Ct 1970) (ordering a landowner to remove fill he put in a bay).

57 *McQueen v S.C. Coastal Council*, 580 SE 2d 116, 119 (SC 2003) (denying a takings claim concerning denial of a fill permit for Myrtle Beach).

58 *Glass v Goeckel*, 703 NW 2d 58, 65 (Mich 2005) (public trust gave the public access on privately owned lands along the Great Lakes below mean high water mark).

59 *National Audubon Society v Superior Court*, 658 P 2d 709, 712 (Cal 1983) [*Mono Lake*].

60 *Raleigh Avenue Beach Association v Atlantis Beach Club, Inc* (n.12) (requiring upland private owner to provide public access to the water even though public use of the upland are subject to an accommodation of interest of the owner).

61 *In re Water Use Permit Applications*, 9 P 3d 409, 452, 454 (Haw 2000) (citing *Mono Lake* as instructive and indicating a preference to accommodate both instream and off-stream uses where feasible) [*Waiahole I*]; *In re Water Use Permit Applications*, 93 P 3d 643, 658 (Haw 2004) (noting that public and private water uses should be evaluated on a case-by-case basis in considering the public trust) [*Waiahole II*].

62 *Ibid.* (affirming authority of the state to grant non-vested usufructuary rights to appropriate water even if the diversions harm public trust uses. Courts and agencies are required to approve such diversions and to minimise harm to the trust). See also *Center for Biological Diversity, Inc v FPL Group, Inc*, 83 Cal Rptr 3d 588, 601 (Cal App 1st Dist 2008).

63 See generally, Michael C Blumm, "The Public Trust Doctrine and Private Property: The Accommodation Principle" (n.4).

Also, in *World Business Academy v California State Lands Commission*, the court held that building and operating a nuclear power plant intake and discharge coolant system on state submerged and tidal lands subject to the PTD did not violate the PTD.⁶⁴

(iii) Idaho

In *Kootenai Environmental Alliance v Panhandle Yacht Club*,⁶⁵ the plaintiff environmental group sued to stop a private dock from being built on a lake. The court ultimately held that the grant to build the dock was *subject to the PTD*, but did not violate it because there was a navigational or economic necessity to justify the permit.⁶⁶ Moreover, the court found there would be no adverse effect on the property, navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty or water quality.⁶⁷

In another case, the state attempted to construct a public beach, docks and parking lot on property the landowner allegedly owned in fee simple. Ultimately, the court concluded that the state failed to demonstrate the property in question was covered by the PTD; therefore, the state was enjoined from its construction because the plan exceeded the district's rights under the easement over the property.⁶⁸

(iv) Illinois

A century ago, in *People ex rel Attorney General v Kirk*,⁶⁹ the Illinois Supreme Court found that the legislature had the power to convey lands held under the PTD in order to build boulevards and driveways, because the public interest was not impaired. Similarly, in a 2003 case, the Illinois Supreme Court found that collecting an admission fee did not *ipso facto* diminish or impair the rights of the public in the trust.⁷⁰ Although in that case it was determined that there were no private interests at issue, presumably a private use/management of public lands charging a nominal fee would likely be upheld, so long as the public interest was served and the rights of the public were not harmed.

(v) New Jersey

In *Raleigh Avenue Beach Association*,⁷¹ a private beach club charged its members a fee to access the private beach. Basing its decision on *Matthews v Bay Head*

64 234 Cal Rptr 3d 277 (Ct App 2018).

65 671 P 2d 1085 (Idaho 1983).

66 *Ibid.*, 1095.

67 *Ibid.*, 1095–1096.

68 See *Idaho Forest Industries v Hayden Lake Watershed Improvement District*, 733 P 2d 733 (Idaho 1987) further reviewed in *ibid.*, 17 P 3d 260 (Idaho 2000).

69 45 NE 830 (Ill 1896).

70 *Friends of the Parks v Chicago Park District*, 786 NE2d 161, 168 (Ill 2003).

71 *Raleigh Avenue Beach Association v Atlantis Beach Club, Inc* (n.12), 124.

Improvement Association,⁷² the New Jersey Supreme Court found that the private beach had to be opened to the public for a reasonable fee (the amount to be determined later by the state).⁷³ In a round-about way, this could be construed as an example of private use/benefit of public trust land, especially if the members paid a different fee structure than the public.

More directly relevant is *In Re Shipyards Associates LP Waterfront Development Permit*.⁷⁴ A proposed pier to be extended by a private corporation into the Hudson River and shoreland (which is subject to the PTD) was held to be an appropriate private use of PTD land because it would “enhance public access by providing access to the tidal waterways and shore where access is not currently provided”.

(vi) Rhode Island

In a Rhode Island case, a town sought to enjoin a ferry boat from docking over a pond.⁷⁵ The Rhode Island Supreme Court held that while the state had transferred all “right title and interest” of the pond to the town, the state did not relinquish its public trust responsibilities.⁷⁶ Because there was a state statute allowing the ferry boat company exclusive jurisdiction over development and operations,⁷⁷ the court ruled that the town could not enjoin the company’s activities despite violations of the town’s zoning laws.

(vii) Texas

In *City of Galveston v Menard*⁷⁸ the Supreme Court of Texas upheld the validity of a patent for submerged lands, noting that while ordinarily it is best to devote the State’s interest in water to public use, sometimes the public’s use and enjoyment of property can best be fulfilled by allowing portions to be used for wharves and docks.⁷⁹

In a case a century later, the state argued that it owned certain submerged land as part of the public trust despite a patent conveying that land to a private owner.⁸⁰ Based on earlier decisions, the court noted that where the grant was explicit as to its reservations (and did not include an encumbrance based on the PTD), the state could not later assert an interest. The lands were *not* encumbered by the PTD.⁸¹

72 471 A 2d 355 (NJ 1984).

73 *Raleigh Avenue Beach Association v Atlantis Beach Club, Inc* (n.12).

74 2017 WL 461300 (NJ Super Ct App Div 2017).

75 *Champlin’s Realty Associates, L.P., v Tillson*, 823 A 2d 1162 (RI 2003).

76 *Ibid.*, 1167.

77 *Ibid.*, 1169.

78 23 Tex 349 (1859).

79 *Ibid.*

80 *Natland Corp v Baker’s Port*, 865 SW 2d 52, 59.

81 *Ibid.*

(viii) Vermont

In Vermont, the Supreme Court held that although a railroad company had fee simple title to filled lands along the city's waterfront, it did not hold title free of the PTD; and the lands thus could only be used for purposes approved by the legislature as public uses.⁸² Should the company use the lands for anything but railroad, wharf or storage purposes, the state would have a right of re-entry.⁸³ Quoting the *California Mono Lake* case,⁸⁴ Vermont's high court stated:

“the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and lands underlying those waters. ... The corollary rule which evolved in tideland and lakeshore cases bar[s] conveyance rights free of the trust except to serve trust purposes. ... [P]arties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no vested right to use those rights in a manner harmful to the trust”.⁸⁵

The Vermont court also cited a *Massachusetts* case involving early nineteenth-century statutes granting a wharf company the right to construct wharves in Boston Harbor and hold them in fee simple.⁸⁶ In 1964, a development company that had obtained the rights to the wharves attempted to confirm the title of the lands beneath them. The Massachusetts court ultimately decided that the development corporation had title to the property “but subject to the condition subsequent that it be used for the public purposes for which it was granted”.⁸⁷

In a 2001 case, the Vermont Supreme Court ruled in favour of the state over a bank and condominium association.⁸⁸ A project held in condominium ownership had been developed over land that had once been part of a lake (it had been filled in the 1800s). The project was constructed on the property, and ultimately it was determined that the land over which it was constructed was part of the public trust. The bank and condominium association argued that the PTD should be modified to recognise the power of the legislature to convey public trust lands to private ownership.⁸⁹ While recognising that this power does technically exist, the court did not find that the state clearly intended to convey the land free of the public trust obligations.⁹⁰ Thus, the court affirmed that the bank and association

82 *State v Central Vermont Railway* (n.12).

83 *Ibid.*, 351.

84 *Mono Lake* (n.59), 712.

85 *State v Central Vermont Railway* (n.12), 1132.

86 *Boston Waterfront Development Corp v Commonwealth*, 393 NE2d 356 (Mass 1979).

87 *Ibid.*, 367.

88 *Community National Bank v State*, 782 A 2d 1195 (Vt 2001).

89 *Ibid.*, 1197.

90 *Ibid.*, 1198.

held the property subject to the state's PTD interest. While the property values decreased,⁹¹ presumably some private use still existed (though the case is not clear).

In sum, private ownership and use of public resources impressed with the PTD is allowed, so long as the private use conforms to the public trust purposes.

V. Access to the Public Trust Doctrine Resource

Above the mean high water mark, several theories have been applied to give public access to privately owned beach areas, including prescriptive easements, implied dedication, custom, and extension of the PTD.⁹² This section focuses only on the PTD, specifically those cases and secondary sources discussing access⁹³ to PTD resources. Such resources are often surrounded by privately owned property, raising questions of the public's ability to reach the resource.⁹⁴ While some jurisdictions hold that access to the resource is part of the PTD, this access is limited.⁹⁵ Government agencies employ the police power to regulate access.⁹⁶

PTD resource access also has an equal protection component: state and local governments cannot allow some members of the public to use the resource and

91 *Ibid.*, 1197.

92 Linda A Malone, "Public Rights in Beach Areas" (2019) 1 Environmental Regulation of Land Use § 3:4.

93 See, eg, A Dan Tarlock, "Access to Public Waters-Beach Access" (2019) Law of Water Rights and Resources § 8:32:

Because there is no privilege to trespass on private land to exercise a public right, the public may not enter on privately owned upland to reach public rights. Access must either be over public land open to the public or by the permission of the upland owner. . . . [T]he line between public rights and exclusive private property is eroding. There are two primary reasons. One is the practical problem that a citizen exercising a public right to use water cannot easily determine the water boundary. Also, some temporary upland use may be necessary to enjoy the public right. Second, in addition to these practical problems, there are pressures to expand access to public waters caused by a growing population with an increasing taste for leisure. Courts and legislatures have responded both to the practical problems and to the pressures by creating new public rights of access. These public rights extend mainly to beaches, but limited rights to use the uplands bordering navigable recreational streams exist in some states.

94 Richard G Hildreth and Ralph W Johnson, *Ocean and Coastal Law* (London: Pearson College Division, 1st ed., 1983) p.94 ("Preserving public recreational access rights in navigable waters has become one of the principal uses of the public trust doctrine.").

95 See, eg, *Township of Neptune v State, Department of Environmental Protection*, 41 A 3d 792, 802 (NJ App Div 2012) (holding that the state is under no obligation to dredge channels in a body of water to ensure access).

96 See, eg, *State v Oliver*, 727 A 2d 491, 497 (NJ App Div 1999) (upholding conviction of defendants for surfing when beach had been closed due to a hurricane and stating "[w]e need not, on these facts, determine the outer limits of such jurisdiction [of the Borough] or the further relationship between the Public Trust Doctrine and territorial jurisdiction"); *Sea Watch, Inc., v Manasquan*, 451 A 2d 192 (NJ 1982) (municipality could charge a reasonable fee to use a walkway).

deny others access without a rational basis.⁹⁷ Issues regarding equal access most often arise when a PTD resource is conveyed or leased to private parties which may deprive other members of the public of access.⁹⁸ The public's right to use PTD resources bars owners of property contiguous to the resource from interfering with lawful access.⁹⁹

States are increasingly equating the PTD with the protection of public access to navigable waters and the protection of environmental quality.¹⁰⁰ In a series of cases, the New Jersey Supreme Court has broadly defined public access rights, requiring adjacent property owners to provide that

97 *Capano v Borough of Stone Harbor*, 530 F Supp 1254 (DNJ 1982). Applying New Jersey law, the court held that the public trust doctrine did not require defendants to permit swimming on all of the beach areas of a city. The city could not, however, allow a group of nuns to use a particular beach while denying access to other members of the public. *Cf Secure Heritage, Inc v City of Cape May*, 825 A 2d 534, 548 (NJ App Div 2003) (limits on numbers of beach passes and on transferability of passes were non-discriminatory and did not violate the public trust doctrine); *Jersey City v State Department of Environmental Protection*, 545 A 2d 774, 783 (NJ App Div 1988) (finding no violation of the public trust doctrine where a marina was to be open to the general public on a non-discriminatory, first-come-first-serve basis and commending that “[u]nsubsidized market-mechanism price determination for berthing service does not alone imply invidious discrimination”).

98 *ABKA Ltd P'ship v Wisconsin Department of Natural Resources*, 635 NW 2d 168, 182 (Wis 2001) (“In essence, a dockminium development attempts to offer a small class of boat owners the exclusive and permanent right to own and to occupy a portion of public trust waters and provides access to the waters to a select group of the public, which fails to satisfy the purpose of the public trust doctrine.”); *Kootenai Environmental Alliance, Inc v Panhandle Yacht Club, Inc* (n.65), 1098 (a private yacht club “is not a public purpose which is within the power of the state to grant under its trust duties to the public which it serves” (Blistine, J., concurring)).

99 *In re Sanders Beach*, 147 P 3d 75, 85 (Idaho 2006) (rejecting argument by landowners of lakeside property that, as part of their littoral rights, they could exclude the public from the area between the high and low water mark during periods when water did not cover that area on the grounds that this suggested littoral right “would be contrary to the central substantive thought in public trust litigation”); *South Dakota Wildlife Federation v Water Management Board*, 382 NW 2d 26, 30 (SD 1986) (“the riparian owner may not interfere with or prevent the public's use or lawful access”).

100 *Eg, State v Sorensen*, 436 NW 2d 358 (Iowa 1989). In holding that the public trust applied to land formed by accretion from the Missouri River, the court noted that the land was suited for public access to the river and took judicial notice “of the expanding involvement of Iowans in recreational activities on or near navigable waters such as the Missouri River”; *ibid*. For a comprehensive analysis of this development see Craig, “A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution toward an Ecological Public Trust” (n.8); *DeWolf v Apovian*, 2012 WL 3139702 (Mass Land Ct 2012), *adhered to on reconsideration*, 2012 WL 6684766 (Mass Land Ct 2012), holds that the owner of a lot adjacent to a lot on which a jetty is located had no easement to use the jetty, but that “the structure and land between the mean high and mean low water marks remain subject to the rights of the public encompassed within the Public Trust Doctrine.” See also A Dan Tarlock, “The Public Trust” (2013) *Law of Water Rights and Resources* § 8.18:

Because the doctrine is almost entirely judge-made, in the early years of the environmental movements, lawyers seized upon the trust as a basis for judicial review of all resource choices. As a result, the classic public trust is being merged with the traditionally unrelated assertion of state ownership of water in trust for the people to produce judicial limitations on the exercise of all water rights. (citations omitted).

access.¹⁰¹ In *Neptune City*,¹⁰² the New Jersey Supreme Court held that a municipality could not discriminate between residents and non-residents by charging a fee for the use of a municipally owned beach. The issue raised was a right to ocean access under the PTD. The Court concluded that the Doctrine “dictates that the beach and the ocean waters must be open to all on equal terms”.¹⁰³ The court reasoned that the PTD required use of municipally owned dry sand beaches to facilitate access to trust resources.¹⁰⁴

In 2003, *Neptune City* was affirmed when an appellate court held that a provision of an ordinance banning the sale and transferability of seasonable beach tags to the lodging industry “does not discriminate against non-residents nor does it offend the public trust doctrine”.¹⁰⁵ However, the section of the ordinance banning the sale of seasonable beach tags to hotels, motels, inns and the like, but allowing individuals to purchase transferable beach tags, violated equal protection.¹⁰⁶

The decision in *Neptune City* raises the issue of whether the same access would be required if the dry sand beach had not been publicly held.¹⁰⁷ In *Matthews*, the court answered this question affirmatively.¹⁰⁸ There, an association of property owners sought to restrict the public’s access to beaches controlled by the Association. Further expanding the PTD and access rights, the court held that the public must be afforded reasonable access to the shore and a suitable area for recreation on the dry sand, even if the public’s rights in private beaches are not coextensive with the rights enjoyed in municipal beaches.¹⁰⁹ Ultimately, the court required the owners association to open its beach by offering membership in the association to the public.¹¹⁰

In *Raleigh Avenue Beach Association v Atlantis Beach Club*,¹¹¹ an appellate court clarified *Matthews*, holding liberally in favour of public access, requiring that owners of a private beach provide access across the dry sand for the public to enjoy trust resources.¹¹² The court ignored the landowner’s claims that public access

101 For a complete overview of all New Jersey cases, see Fellig, “Pursuit of the Public Trust: Beach Access in New Jersey from Neptune v. Avon to Matthews v. Bay Head Improvement Association” (1985) 10 *Columbia Journal of Environmental Law* 35.

102 *Borough of Neptune City v Borough of Avon-by-the Sea* (n.12).

103 *Ibid.*, 54.

104 See, eg, *Van Ness v Borough of Deal*, 393 A 2d 571, 573 (1978) (holding that its holding in Avon did not apply only to the wet beach area between low and high water). See also *Lusardi v Curtis Point Property Owners Association*, 430 A 2d 881 (1981).

105 *Secure Heritage, Inc. v City of Cape May* (n.97).

106 *Ibid.*, 549.

107 “Access to Trust Resources” (2013) 1 *State Environmental Law* § 4:19.

108 *Matthews v Bayhead Improvement Association* (n.72).

109 *Ibid.*, 365–366.

110 *Ibid.*, 369.

111 851 A 2d 19 (NJ App Div 2004).

112 *Ibid.*, 29 (rejecting the argument that no access was required because the public had other means of reaching the sea, in part because of “the inconvenience associated with the nearest available perpendicular access to the north”).

would prevent the owner from generating a profit from serving its own clientele, required the landowner to provide lifeguard services without charge and addressed the fee that the landowner could charge.¹¹³

On the other hand, some jurisdictions are adamant that access across private land to reach a public trust resource is the equivalent of an easement requiring compensation to the affected private landowner. Maine, Massachusetts and New Hampshire so require. Perhaps the clearest such judicial declaration comes from *Opinion of the Justices*¹¹⁴ in which the Supreme Court of New Hampshire rejected a statutory attempt to legislate access to public beaches across private property. Liberally citing the Maine case of *Bell v Town of Wells*¹¹⁵ (decided on the Constitutional right to exclude the public from private property¹¹⁶), the New Hampshire Court held that “[a]lthough the State has the power to permit a comprehensive beach access and use program by using its power of eminent domain, it may not take property rights without compensation through legislative decree”.¹¹⁷ The court closed by noting that “if the work is one of great public benefit, the public can afford to pay for it”.¹¹⁸

VI. The Public Trust Doctrine Outside the United States: A Comparative Analysis

With its roots in the Roman Empire and early adoption in England, the PTD is used in countries throughout the world. The Doctrine has developed in different ways and with different uses internationally. The spread of the PTD largely mirrors the effects of Colonialism.¹¹⁹

A. Canada

The first mention of the PTD in Canadian case law occurred in 1852 when a court ruled that a grant of the soil of a river was invalid if the use interfered with the public’s ability to navigate the river, and therefore the title holder was prevented from building a dam.¹²⁰ Without using the term “public trust doctrine”, the court alludes to the Doctrine when it says that navigable water

113 *Ibid.*, 29–30, 33.

114 649 A 2d 604 (1994).

115 557 A 2d 168 (ME 1989).

116 *Ibid.*, 178 (“the interference with private property here involves a wholesale denial of an owner’s right to exclude the public”).

117 *Opinion of the Justices* (n.144), 94.

118 *Ibid.* (quoting *Eaton v Boston Concord and Montreal Rail Road*, 51 NH 504, 518 (1872)).

119 See Michael C Blumm and Rachel D Guthrie, “Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision” (2012) 44 *UC Davis Law Review* 741.

120 *R v Meyers*, 3 UCCP 305 (1852).

“must be regarded as vested in the Crown in trust for the public uses for which nature intended them” and that the Crown does not have the power to alienate these rights.¹²¹

Then, in 1866, a Canadian court found that debris emitted by a sawmill constituted both a public nuisance and a violation of the “doctrine” where it interfered with the navigability of the stream on which it was built.¹²² Twenty years later, another dispute arose about the use of timber slides down tributaries of the Mississippi river.¹²³ The tributaries were completely contained within private land, and the land owners attempted to keep the use of the slides private.¹²⁴ A provincial regulation, the Ontario Rivers and Streams Act of 1881, was at issue in the case.¹²⁵ The Act required that passage of logs and timber not be obstructed in their flow down any waterway.¹²⁶ The federal government of Canada and the provincial government of Ontario were at odds over this regulation. While the Supreme Court of Canada ruled that use of the stream could be prevented by the land owner, the Privy Council¹²⁷ held that the Act applied to all streams, regardless of whether they could, at all points, be navigable in their natural state, so long as they were naturally navigable at some point.¹²⁸

In response, the legislature of Ontario passed the Rivers and Streams Act of 1884,¹²⁹ and the Canadian Parliament passed the Navigable Waters Protection Act. In accordance with these laws, navigable waterways were open to use for the public, and any improvements on navigable waterways needed to be approved by a governmental entity.¹³⁰ Those who made improvements to waterways could charge to use their improvements, but they could not prohibit use.

More recently, the courts have addressed other resources and their relationship to the PTD. In 1932, the Supreme Court of Canada ruled that the government holds streets in fee simple, but, they do not own them as the government, but rather as a

121 Harry Wruck, “The Time Has Come for a Canadian Public Trust Doctrine Based Upon the Unwritten Constitution” (2018) GW Environmental Law Symposium (quoting *R v Meyers* (n.120)).

122 *Attorney General v Harrison*, 12 Gr. 466 (Ct Ch Upper Can, 1866).

123 *McLaren v Caldwell*, 8 SCR 435 (1882).

124 *Ibid.*

125 *Ibid.*

126 *Ibid.*

127 In Canada, as in many Commonwealth countries, the Privy Council was the highest court of appeal until 1949. See PA Howell, *The Judicial Committee of the Privy Council, 1833–1876: Its Origins, Structure, and Development* (Cambridge UK: Cambridge University Press, 1979).

128 *Caldwell v McLaren*, UKPC 21, 9 AC 392 (1884).

129 Ontario Heritage Trust, “Rivers and Streams Act of 1884”, available at <https://www.heritagetrust.on.ca/en/plaques/rivers-and-streams-act-of-1884> (visited 25 June 2019).

130 *The Navigation Protection Act*, RSC, 1985, c N-22.

“trustee for the public”.¹³¹ The purposes of the PTD have also been considered in relation to mining,¹³² forests¹³³ and wildlife.¹³⁴

There is a debate among scholars whether, and to what extent, the PTD truly exists in Canada as it has been established in other jurisdictions.¹³⁵ Some scholars argue that there is a very rudimentary version of the Doctrine in force in the country,¹³⁶ while others argue that it is becoming more prevalent with the rise of environmental issues,¹³⁷ and still others argue that there is not a real PTD, but that there should be.¹³⁸ Even if the Canadian courts have not expressly adopted the PTD, there are public trust principles at play in Canadian law, and there is the idea of resources being held in a trust, by the government, for the benefit of the public.

B. South Africa

The 1996 Constitution of South Africa guarantees the right to a clean environment, as well as the right to have the environment protected on behalf of citizens through legislation.¹³⁹ The Constitution also charges the government with the responsibility of protecting the environment.¹⁴⁰ In the National Environmental Management Act, the legislature declares that the environment is held in a public trust for the people¹⁴¹

131 *Vancouver v Burchill*, SCR 620 (Can 1932).

132 *Labrador Inuit Association v Newfoundland*, 155 Nfld. & PEIR 93 (Can 1997).

133 *British Columbia v Canadian Forest Products, Ltd.*, 2 SCR 74 (Can 2004); see A Koehl, “Question of Trust: The Public Trust Doctrine Holds Hope for Protecting Canada’s Ecosystems” (2006) 32 *Alternatives Journal* 40.

134 See Gordon R Batcheller *et al.*, “The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada” (2010) *The Wildlife Society, Technical Review* 10-01.

135 See Wruck, “The Time Has Come for a Canadian Public Trust Doctrine Based Upon the Unwritten Constitution” (n.121); Batcheller *et al.*, “The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada” (n.134); Kate P Smallwood, “Coming Out of Hibernation: The Canadian Public Trust Doctrine” (September 1993) (unpublished master of Law Thesis, University of British Columbia) (on file with the UBC Library); Ralph Pentland, “Public Trust Doctrine — Potential in Canadian Water and Environmental Management” (June 2009) POLIS Project on Ecological Governance Discussion Paper 09-03; JW Henquinet and T Dobson, “The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study” (2006) 14(2) *New York University Environmental Law Journal* 322; Koehl, “Question of Trust: The Public Trust Doctrine Holds Hope for Protecting Canada’s Ecosystems” (n.133).

136 See Henquinet and Dobson, “The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study” (n.135).

137 See Koehl, “Question of Trust: The Public Trust Doctrine Holds Hope for Protecting Canada’s Ecosystems” (n.133).

138 See Batcheller *et al.*, “The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada” (n.134); Wruck, “The Time Has Come for a Canadian Public Trust Doctrine Based Upon the Unwritten Constitution” (n.121); Pentland, “Public Trust Doctrine — Potential in Canadian Water and Environmental Management” (n.135).

139 S Afr Const, 1996, § 11, as quoted in Blumm and Guthrie, “Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision” (n.119).

140 S Afr Const, § 152.

141 National Environmental Management Act 107 of 1998 § 2(4)(o) (S Afr).

and that the state is the custodian that holds the environment in a public trust for the people.¹⁴² Similarly, the National Water Act outlines the government's duties as the public trustee of the nation's water.¹⁴³

While the language of the country's Constitution and statutes sounds similar to the modern understanding of the PTD, scholars are divided on whether the government has explicitly adopted the Doctrine or if it has created its own doctrinal framework.¹⁴⁴ Those who believe that there is a distinction between the PTD and the public trusteeship created by the South African government argue that while founded on the same philosophy, the legal construction and application differs, and that the only way to untangle the true definition of the South African public trusteeship is time and trial.¹⁴⁵ On the other hand, there are many who think the differences are just semantic, with one scholar repeatedly asserting that the Doctrine has "remained wholly unchanged from its Roman origins".¹⁴⁶ While there are constitutional roots of the South African PTD, the consensus is that the National Water Act is the strongest foundation for the Doctrine with its framework for the government roles and responsibilities.¹⁴⁷

Even though the Doctrine was not referenced by name in the South African legislation, it has, to some extent, been discussed by the courts, thus reaffirming the common law roots of the Doctrine.¹⁴⁸ The courts have gone further to say that "the present generation holds the earth in trust for the benefit of the present and future generations".¹⁴⁹ In South Africa, the trusteeship has been extended beyond the environment and the traditional water resources and the government also holds minerals,¹⁵⁰ coastal zones¹⁵¹ and biodiversity¹⁵² in trusts for the benefit of the public.

142 *Ibid.*, § 28(5)(e).

143 National Water Act 36 of 1998 § 3(1) (S Afr).

144 See Blumm and Guthrie, "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision" (n.119); Andrew C Blackmore, "Rediscovering the Origins and Inclusion of the Public Trust Doctrine in South African Environmental Law: A Speculative Analysis" (2018) 27 *Review of European, Comparative & International Environmental Law* 187; but see Elmarie van der Schyff, "Unpacking the Public Trust Doctrine: A Journey into Foreign Territory" (2010) 13 *Potchefstroom Electronic Law Journal* 122; E van der Schyff and G Viljoen, "Water and the Public Trust Doctrine — A South African Perspective" (2008) 4(2) *Journal for Transdisciplinary Research in Southern Africa* 339.

145 van der Schyff, "Unpacking the Public Trust Doctrine: A Journey into Foreign Territory" (n.144).

146 Blackmore, "Rediscovering the Origins and Inclusion of the Public Trust Doctrine in South African Environmental Law: A Speculative Analysis" (n.144).

147 *Ibid.*; van der Schyff and Viljoen, "Water and the Public Trust Doctrine — A South African Perspective" (n.144).

148 See *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products* 2004 1 All SA 636 (E) 658; *Fuel Retailers Association of Southern Africa v Director-General Environmental Management* 2007 (6) SA 4 (CC) (7 June 2007).

149 *Fuel Retailers Association of Southern Africa v Director-General Environmental Management* 2007 (6) SA 4 (CC) (7 June 2007).

150 Mineral and Petroleum Resources Development Act 28 of 2002 (S Afr).

151 National Environment Management: Integrated Coastal Management Act 24 of 2008 §§ 11–13 (S Afr).

152 Andrew C. Blackmore, "Getting to Grips with the Public Trust Doctrine in Biodiversity Conservation: A Brief Overview" (2018) 48 *Bothalia* 1.

C. Uganda

While lands held under the PTD cannot be alienated, there are differing opinions as to permitting and leasing the lands. In Uganda, the law says that while the lands cannot be alienated, use and development permits may be granted to private parties, but, the government must obtain community assent to the use.¹⁵³ The roots of the PTD in Uganda are found in the Constitution's mandate that the government protect natural resources, like water, minerals, wetlands and wildlife for the benefit of the people, which is listed in the National Objectives and Directive Principles of State Policy.¹⁵⁴ This mandate is furthered by a later article in the Constitution, stating that "The government or a local government ... shall hold in trust for the people and protect, natural lakes, rivers, wetlands, forest reserves, game reserves, National parks, and any land to be reserved for ecological and tourist purposes for the common good of all citizens".¹⁵⁵ The Land Act reinforces the Doctrine in s.44 where the language in the constitution is repeated and expanded to include provisions such as, "the Government ... shall not lease out or otherwise alienate any natural resources referred to in this section" and "government may grant concessions or licenses or permits in respect of any natural resources referred to in this section".¹⁵⁶ Common law reads all of these constitutional and statutory provisions together so as to create the PTD in Uganda.¹⁵⁷

In the foundational case that discusses the Ugandan PTD, the court found that the forest in controversy belonged to the local community and that the connection of the people to the forest was protected by Ugandan law.¹⁵⁸ Because of this law, the government and the leasing party were required to conduct a study similar to an environmental impact study and to consult the local community.¹⁵⁹ Because the government had not done this, the court held that the permit that had been granted to alter the use of the forest violated the PTD and the government's constitutional duty to protect the environment.¹⁶⁰ The court also emphasised that the government's right to grant private use of the property held under the Doctrine was subservient to the public's right to use public trust lands.¹⁶¹ Here, the attempt by a private party to turn the forest land into a sugar cane plantation was ruled to be contrary to the government's duties under the Doctrine.¹⁶²

153 Blumm and Guthrie, "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision" (n.119).

154 Const of the Rep of Uganda art.13.

155 *Ibid.*, art.237(2)(b).

156 The Land Act (Act No 16, § 44 1988) (Uganda).

157 *Advocates Coalition for Development and Environment (ACODE) v Attorney General*, Misc Cause No 0100 of 2004 (11 July 2005) (Uganda), 15–16.

158 *Ibid.*

159 *Ibid.*

160 *Ibid.*, 16.

161 *Ibid.*, 14.

162 *Ibid.*

More recently, a group of citizens attempted to use the PTD to protect the atmosphere and hold the government accountable for climate change and greenhouse gases; however, the court did not reach the public trust issue in their decision.¹⁶³

D. Kenya

While the PTD is not explicitly codified in the Kenyan constitution or statutes, the concept was raised by the court *sua sponte*,¹⁶⁴ in response to an appeal of a criminal charge of discharging raw sewage into the public water supply and a river.¹⁶⁵ The criminal case was ultimately dismissed due to a procedural defect in service, but the court made it clear that the offenders were not off the hook for fixing the issues that brought this case about.¹⁶⁶ The court also took this opportunity to expound upon the PTD as it pertains to Kenyan law.¹⁶⁷ They root the foundation of the Doctrine in the constitutional guarantee of the right to life, which they interpret as including a right to a clean environment and water.¹⁶⁸ They also find the PTD rooted in the Environmental Management and Coordination Act (EMCA) which ensures citizens' rights to a clean environment and charges both the citizens and the government with maintaining that clean environment, and providing access for the public to designated lands and resources.¹⁶⁹ While the court acknowledges that the PTD is not explicit in the EMCA, they suggest that it is something that the court needs to consider, moving forward.¹⁷⁰ In response to this specific case, the court holds that, as a trustee of the public lands under the Doctrine, the county is responsible for creating a solution to the waste water problem, and that the government is required to provide adequate land and resources for the establishment of a treatment plant.¹⁷¹ More generally, the court asserts that "land resources, forests, wetlands and waterways [are] some examples the government and its agencies are under a public trust to manage ..."¹⁷²

When Kenya adopted its new constitution in 2010, many of the ideals of the PTD were incorporated into various sections of the constitution, including expanding on the right to life and a clean environment as well as enumerating the public lands held in trust by the government.¹⁷³ However, the PTD was not

163 *Mbabzi v Attorney General*, Civil Suit No 283 of 2012 (Uganda, 2012).

164 See *Waweru v Republic*, Misc Civ Application 118 of 2004, High Court of Kenya at Nairobi (2006); see also Blumm and Guthrie, "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision" (n.119).

165 *Waweru v Republic*, Misc Civ Application 118 of 2004, High Court of Kenya at Nairobi (2006).

166 *Ibid.*, 5 p.12.

167 *Ibid.*, 9 p.25.

168 *Ibid.*, 8 p.26(1).

169 *Ibid.*, 8 p. 26(2).

170 *Ibid.*, 10 p.31.

171 *Ibid.*, 12–13 p.41.

172 *Ibid.*, 13 p.42.

173 Const arts.42, 68–70 (2010) (Kenya); Blumm and Guthrie, "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision" (n.119).

explicitly adopted under the new constitution, though it does still explicitly remain part of the common law of the country.¹⁷⁴

E. Nigeria

Nigeria, like many other countries, has not explicitly recognised the PTD in statutory, constitutional or even in common law. Some scholars, however, urge that the Doctrine is implicit in the constitutional protection of the environment and its charge that the government safeguards the water, air, land, forest and wildlife, as well as its prevention of the exploitation of human or natural resources.¹⁷⁵ Other scholars assert that Nigeria, along with other countries,¹⁷⁶ have an alternative PTD-like system.¹⁷⁷

F. Tanzania

The government of Tanzania has not fully embraced the concept of the PTD but rather views itself as the fee simple owner of all natural resources.¹⁷⁸ However, scholars argue that the court has adopted the PTD in some form.¹⁷⁹ For example, the court has declared that the president holds public land in a trust for the people, and that the president is a trustee of public lands.¹⁸⁰ The courts have used this construction to limit the government's power over public land and exclude the government as a beneficiary of the land.¹⁸¹ The Land Act further codifies the principle that the government holds the land in a public trust.¹⁸² While the government has yet to explicitly adopt the Doctrine, scholars claim that the PTD is a part of Tanzanian law and that the government is violating the rights of the public by restricting use of the land.¹⁸³ During the colonial era, the British implemented the Doctrine and claimed to hold public land under the Doctrine for the people of Tanzania. However, once

174 Patricia Kameri-Mbote, "The Use of the Public Trust Doctrine in Environmental Law" (2007) 3(2) *Law Environment and Development Journal* 195.

175 Blumm and Guthrie, "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision" (n.119).

176 In this case Brazil, France, Germany, Sweden, Pakistan, and Australia.

177 Raphael D Sagarin and Mary Turnipseed, "The Public Trust Doctrine: Where Ecology Meets Natural Resources Management" (2012) 37 *Annual Review of Environment and Resources* 473.

178 Rugemeleza Nshala, "Management of Natural Resources in Tanzania: Is the Public Trust Doctrine of Any Relevance?" (2000) Unpublished Conference Paper, on file with Indiana University, Digital Library of the Commons.

179 *Ibid.*, see also Ernest Uzia, "Challenges in the Application of the Public Trust Doctrine in Environmental Laws in Tanzania" (July 2013) (unpublished Research Report, The University of Iringa), available at https://www.academia.edu/6656971/Challenges_in_application_of_public_trust_doctrine_in_environmental_laws_in_Tanzania.

180 *AG v Lohay Akoonay*, [1995 TLR 80] (AC).

181 *Ibid.*

182 The Land Act [Cap113 RE 2002] (Tanzania).

183 Ernest Uzia, "Challenges In the Application of the Public Trust Doctrine in Environmental Laws in Tanzania" (n.179); Rugemeleza Nshala, "Management of Natural Resources in Tanzania: Is the Public Trust Doctrine of Any Relevance?"(n.178).

Tanzania was established as an independent country, the Doctrine was not fully incorporated into the law.¹⁸⁴ While many elements and concepts inherent in the Doctrine are echoed throughout the Tanzanian constitution and other legislation, it has not been explicitly expressed.¹⁸⁵

G. Ecuador

In Ecuador, there has yet to be a case that addresses the PTD, though some scholars argue that it should be applied in the Quimsacocha region where mining developments threaten to disrupt recreational nature areas as well as several lakes and rivers.¹⁸⁶

While the PTD has not been explicitly adopted by the Ecuadorian government, the principles are fully incorporated into the constitution.¹⁸⁷ The Ecuadorian constitution recognises a universal right to water for all citizens.¹⁸⁸ It also entrusts the environment to the government for its protection.¹⁸⁹ Further, the constitution gives all citizens standing to require that the government enforces their rights to nature,¹⁹⁰ and recognises the autonomous rights of nature as an entity to respect, maintenance, regeneration and restoration.¹⁹¹

The PTD in Ecuador is young and vastly unexplored, but the groundwork and foundations for the expansion and exploration of the Doctrine are available to the people.¹⁹² Ecuador is likely a country to watch for upcoming PTD developments.

H. Brazil

Like Ecuador, Brazilian courts have yet to really explore the PTD and to use it for any decision-making. The Brazilian constitution declares that the government is a trustee for the environment and other public assets.¹⁹³ The government also has a duty to protect the environment for the people.¹⁹⁴ Furthermore, all beaches, oceans,

184 Ernest Uzia, "Challenges In the Application of the Public Trust Doctrine in Environmental Laws in Tanzania" (n.179).

185 *Ibid.*

186 See Tyler Johnson, "The Public Trust Doctrine in Ecuador — A Legal Claim to Halt the Quimsacocha Mining Project" (unpublished research paper) (on file at academia.edu) (last accessed 15 July 2019). *I have contacted the author to see if this was ever formally published and the date information and am waiting on a response.

187 *Ibid.*, 9; Blumm and Guthrie, "internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision" (n.119).

188 Constitución Política De 2008 [CP] art.12 (Ecuador).

189 *Ibid.*, art.14 (Ecuador).

190 *Ibid.*, art.71 (Ecuador).

191 *Ibid.*, art.71-2.

192 Johnson, "The Public Trust Doctrine in Ecuador — A Legal Claim to Halt the Quimsacocha Mining Project" (n.186).

193 Constituição Federal [CF] [Const] art.225 (Brazil).

194 *Ibid.*

territorial waters and tidelands are declared public property.¹⁹⁵ Again, like Ecuador, the foundation for the use of the PTD is present and available in Brazil.

I. India

The PTD in India is arguably more established and fleshed out than anywhere else in the world, including the United States.¹⁹⁶ The PTD was first embraced by the Supreme Court of India in the landmark case, *MC Mehta v Kamal Nath*, where the Court declared that the PTD is a part of the law of the land.¹⁹⁷

The case arose after the 1990 construction of a motel caused a nearby river to swell and change course, flooding the land on which it sat as well as the adjacent properties.¹⁹⁸ The motel partially forested land, that was owned by the government and leased to a private corporation, to which the Minister of the Environment had family ties.¹⁹⁹ The motel had applied for a permit to dredge the river to prevent future flooding and damage.²⁰⁰ One of the main points of contention involved the lease of the forest and land on the riverbank.²⁰¹ The court declared that the land never should have been conveyed for private use because the public has the right for certain lands and natural resources to remain in their natural state.²⁰² The Court cited the Supreme Court of California's ruling in the *Mono Lake* case,²⁰³ reaffirming that the Doctrine is not just the public's ownership of the land, but also poses an affirmative duty on the government to protect those lands and resources.²⁰⁴ The Court also referred to *Illinois Central* and the Saxion interpretation of the Doctrine.²⁰⁵ Under the PTD, the court ruled that the lease was void from the outset.²⁰⁶ The court found the roots of the Doctrine in their inheritance of English common law.²⁰⁷

The PTD was expanded a few years later when the Supreme Court of India invoked it to prevent the construction of a shopping mall underneath a public park.²⁰⁸ The Court cited art.21 of the Constitution which ensures each citizen the right to life.²⁰⁹ Not only did the court declare the permits that had been issued to the

195 *Ibid.*, art.20.

196 Blumm and Guthrie, "internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision" (n.119).

197 1 SCC 388 (India 1997).

198 *Ibid.*

199 *Ibid.*

200 *Ibid.*

201 *Ibid.*

202 *Ibid.*

203 Discussed *supra* Section III(B)(ii).

204 *MC Mehta v Kamal Nath* (n.197).

205 *Ibid.*

206 *Ibid.*

207 B Jayant Kumar, "Notion of Doctrine of Public Trust in India" *Legal Services India*, available at <http://www.legalservicesindia.com/article/1429/Notion-of-Docctrine-of-Public-Trust-In-India.html> (last visited 29 July 2019).

208 *MI Builders Pvt Ltd v Radhey Shyam Sahu*, 6 SCC 464 (India 1999).

209 *Ibid.*

developer null and void, they also compelled the developer to restore the park to its natural state from any developments that had already begun.²¹⁰

The Court has found that the PTD extends not only to rivers, forestlands and public parks, but also to all natural resources.²¹¹ For example, the court ruled that the Doctrine applies to beaches and access way to beaches when it compelled a hotel to demolish part of their construction that prevented public access to the beach.²¹² It has also applied the PTD to groundwater,²¹³ natural gas,²¹⁴ air, wildlife and the environment.²¹⁵

The PTD in India is one of the most robust and expansive.²¹⁶ It is firmly entrenched in both common law and the Constitution of India and has been repeatedly reinforced by the courts, with the courts even establishing the PTD as a “natural law” that can never be overruled by legislation.²¹⁷ The Doctrine is rooted in European colonialism, and thus, while the Indian PTD law is newer than that in the United States and has borrowed many concepts from the US law, it is its own unique interpretation, passed down from English and Roman common law.²¹⁸

J. Pakistan

Like many other countries, there is no explicit mention of the PTD in the Pakistani Constitution, statutes or common law.²¹⁹ While some scholars urge that PTD principles are present in some case law, and there has been international recognition of the environmental law in Pakistan, the PTD is not as unequivocal in Pakistani law as it is in other countries.²²⁰

Pakistan seems to be PTD adjacent, both citing to cases that reaffirm the PTD as well as being cited by cases in other countries that have established the Doctrine.²²¹ The Supreme Court of Pakistan has cited Indian cases that establish the PTD and has interpreted the Constitutional right to life in the same manner as India, which is part of India’s foundation for their version of the Doctrine.²²² The Supreme Court

210 *Ibid.*

211 See, eg, *KM Chinnappa v Union of India*, SC 724 (India 2003); *Intellectual Forum v State of AP*, 3 SCC 549 (2006).

212 *Formento Resorts & Hotels v Minguel Martins*, INSC 100 (India 2009).

213 See, eg, *Perumatty Grama Panchayat v State*, 1 KLT 731 (India 2003); *State of West Bengal v Kesoram Industries Ltd*, 10 SCC 201 (India 2004).

214 *Reliance Natural Resources, Ltd v Reliance Industries, Ltd*, INSC 374 (India 2010).

215 *Th Majra Singh v Indian Oil Corp*, JK 81 (India 1999).

216 Shyam Divan and Armin Rosencranz, *Environmental Law and Policy in India* (Oxford UK: Oxford University Press, 2nd ed., 2001).

217 Blumm and Guthrie, “internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision” (n.119).

218 Kumar, “Notion of Doctrine of Public Trust in India” (n.207).

219 See, eg, Nigeria, Ecuador, Brazil

220 Blumm and Guthrie, “internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision” (n.119).

221 *Ibid.*, 767.

222 *Shehla Zia v WAPDA*, 46 PLD SC 693 (Pakistan 1994).

of Kenya has also cited Pakistani case law in its discussion of the PTD, which it raised and adopted *sua sponte*.²²³ The United Nations has also recognised that there are public trust principles at play in Pakistani law.²²⁴ Despite the lack of explicit mention of the Doctrine, the Pakistani government does have an affirmative duty to the people of Pakistan to protect the health of the environment.²²⁵

K. *The Philippines*

While scholars strongly assert that there is a PTD in the Philippines, there is no specific, explicit mention of the PTD in Filipino law.²²⁶ While PTD principles run through the history of the Philippines, the Doctrine has never been unequivocally adopted. The phrase “public trust doctrine” is not found anywhere in the common law, statutes or Constitution of the Philippines. There is however, mention of land in the public domain, with the Supreme Court quoting an executive order of a former president that declared that the Department of Environment and Natural Resources was charged with ““conservation, management, development and proper use of the country’s environment and natural resources, specifically forest and grazing lands, mineral, resources, including those in reservation and watershed areas, and lands of the public domain ...””.²²⁷

Also, the Water Code proclaims that all water belongs to the state and that the public has usage rights to the banks of rivers and streams and lake and sea shores.²²⁸ There is also language in Filipino governmental policy that designates the people of the Philippines as a trustee of the environment for the next generation.²²⁹

In *Metropolitan Manila Development Authority v Concerned Residents of Manila Bay*, citizens alleged that the government’s failure to stop the pollution of the Manila Bay violated “the Trust Doctrine and the Principle of Guardianship”, but the court did not decide on the issue.²³⁰ The Court has held that the right to a healthy environment is a natural right,²³¹ but it has not explicitly adopted the PTD. Despite the presence of themes and similarities to the PTD, it is not currently present in Filipino law.

223 *Waweru v Republic* (n.165).

224 Blumm and Guthrie, “internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision” (n.119).

225 *Ibid.*, 769.

226 See *ibid.*

227 *Oposa v Factoran*, GR 101083, 224 SCRA 792 (Philippines 1993).

228 Water Code of the Philippines, Pres Dec No 1067, art.3 (Philippines 1976).

229 Philippine Environmental Policy, Pres Dec No 1151, § 2 (Philippines 1977)

230 GR No 171947-48, 574 SCRA 661, 11 (Philippines 2008).

231 *Ibid.*

L. Sri Lanka

The Supreme Court of Sri Lanka has used the PTD without explicitly adopting it.²³² Early cases have invalidated land transfers from the government to private parties when they don't serve the public interest.²³³ Unlike the PTD in America and India, where land cannot be alienated for any reason, the Sri Lankan courts have implied that there is some sort of public purpose exception to this rule.²³⁴ The Sri Lankan court has referenced American, French and British Law in making its decisions related to lands held under the public trust.²³⁵ Indeed, the court references the *Illinois Central* case and calls the Doctrine, as it stands in the United States, too restrictive and rejects it in favour of a more expansive framework.²³⁶ Unlike India's expansion of the traditional PTD, as seen in the United States, for example, Sri Lanka does not explicitly adopt and expand the traditional PTD but rather creates its own concept of "shared responsibility".²³⁷ The concept of shared responsibility incorporates many concepts and ideals of the PTD, but it also places the responsibility and the duty onto the individual people in addition to all agencies of the government.²³⁸ The court based this new, expansive Doctrine on the local and traditional history of Sri Lanka.²³⁹ The court later uses the common law history to adopt their own form of the PTD in addition to their shared responsibility concept.²⁴⁰ The court repeats that government has a duty under the PTD, to protect natural resources for the benefit of the people.²⁴¹ In a case about the arbitrary denial of a mining permit, in which a similar one had been granted in similar circumstances, the court invalidated both permits under the PTD.²⁴² Scholars suggest that the PTD has been expanded even farther in Sri Lanka to include public utilities as well.²⁴³

VII. Conclusion

In sum, there continues to be a lot of confusion between the common law PTD and the simple holding of property/resources by government in trust for its citizens. The former carries a lot more public responsibilities with it, and the latter does or does not depending on the language of the constitution or legislation establishing either

232 Dinesha Samararatne, "The Public Trust Doctrine: The Sri Lankan Version" (2010) Democracy and Equality Programme Occasional Paper 1.

233 See *De Silva v Atukorale* [1993] 1 Sri LR 283.

234 Samararatne, "The Public Trust Doctrine: The Sri Lankan Version" (n.232).

235 *Ibid.*

236 *Bulankulama v Secretary, Ministry of Industrial Development* [2000] 3 Sri LR 243, 256.

237 *Ibid.*; see also Samararatne, "The Public Trust Doctrine: The Sri Lankan Version" (n.232).

238 Samararatne, "The Public Trust Doctrine: The Sri Lankan Version" (n.232).

239 *Ibid.*

240 *Watte Gedara Wijebanda v Conservator General of Forests*, SC Application No 118/2004, at 358.

241 *Ibid.*

242 *Ibid.*

243 Samararatne, "The Public Trust Doctrine: The Sri Lankan Version" (n.232).

a different kind of trust or no trust at all. It is also clear that despite suggestion and commentary to the contrary, there is virtually no movement to extend the, certainty of common law and mostly with respect to constitutional public trusts, PTD beyond its traditional association with and application to water and water resources, submerged lands and shoreland.²⁴⁴ The only true exception appears to be New York, the courts of which extend the PTD to public parks. Moreover, it is abundantly clear that many private uses of public trust resources are routinely permitted so long as the *jus publicum* of the PTD is preserved and there is some public benefit to the private use. Finally, most state courts that have considered the matter do not extend the PTD to access to the PTD resource. Courts in New England are particularly clear that if the public wants free access to a PTD resource across private land, the public must pay for it.

244 For further criticism of the expansion of the scope of the Public Trust Doctrine, see David A Thomas, “Why the Public Plundering of Private Property Rights Is Still a Very Bad Idea” (2006) 41(1) *Real Property, Probate, & Trust Journal* 25, 64–65; James L Huffman, “Speaking of Inconvenient Truths: A History of the Public Trust Doctrine” (2007) 18 *Duke Environmental Law & Policy Forum* 1.