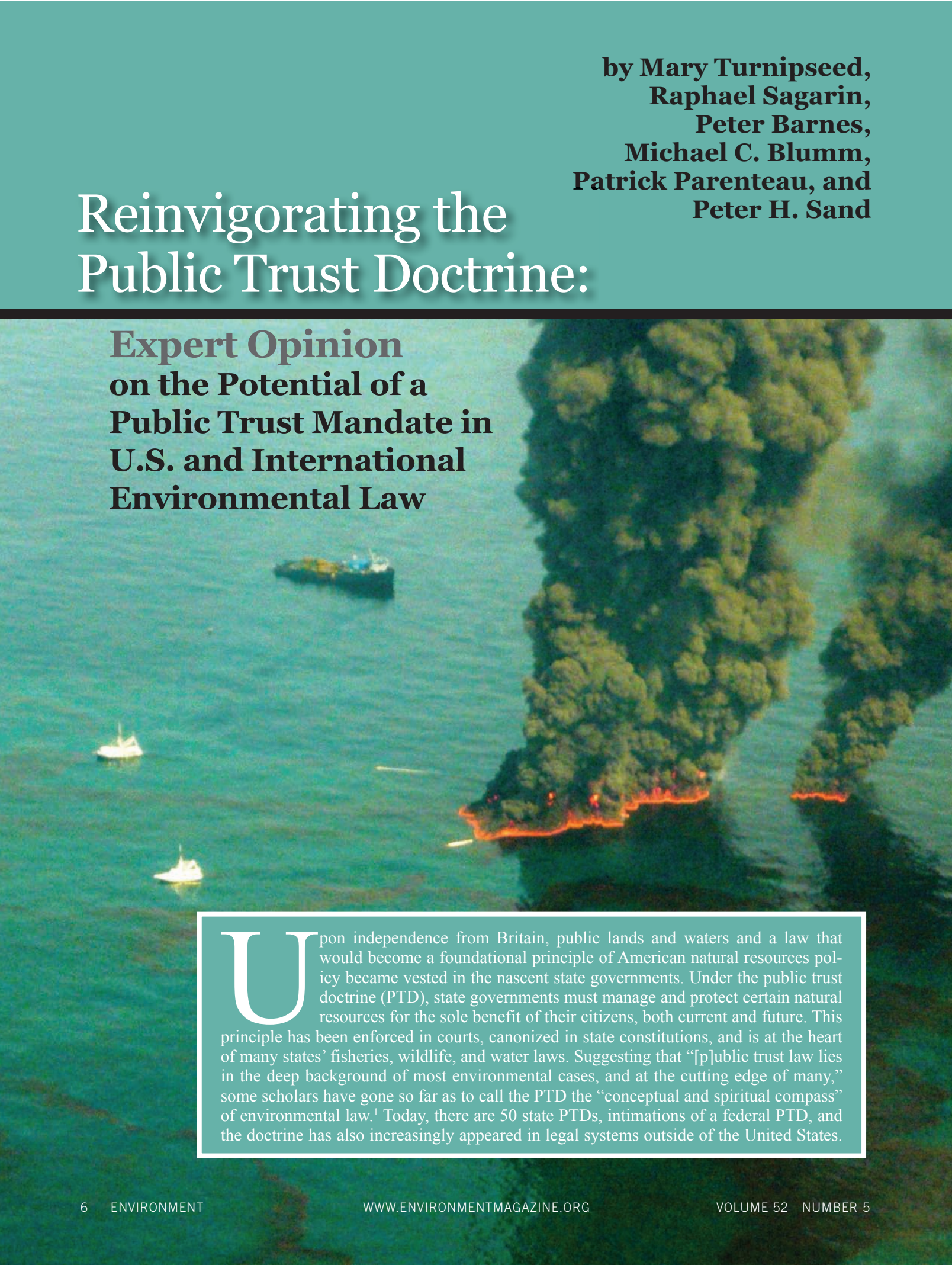


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# Reinvigorating the Public Trust Doctrine:

**Expert Opinion  
on the Potential of a  
Public Trust Mandate in  
U.S. and International  
Environmental Law**

An aerial photograph showing a large, dense forest fire. Thick, dark smoke billows upwards from the burning area, which is visible as a bright orange and red line at the base of the smoke plume. In the foreground, a body of water is visible, with a small boat and several other smaller vessels scattered across the surface. The overall scene is one of environmental destruction and emergency response.

**U**pon independence from Britain, public lands and waters and a law that would become a foundational principle of American natural resources policy became vested in the nascent state governments. Under the public trust doctrine (PTD), state governments must manage and protect certain natural resources for the sole benefit of their citizens, both current and future. This principle has been enforced in courts, canonized in state constitutions, and is at the heart of many states' fisheries, wildlife, and water laws. Suggesting that “[p]ublic trust law lies in the deep background of most environmental cases, and at the cutting edge of many,” some scholars have gone so far as to call the PTD the “conceptual and spiritual compass” of environmental law.<sup>1</sup> Today, there are 50 state PTDs, intimations of a federal PTD, and the doctrine has also increasingly appeared in legal systems outside of the United States.

*Clouds of smoke billow up from controlled burns taking place in the Gulf of Mexico on May 19, 2010. The Deepwater Horizon oil spill represents a catastrophic failure to abide by the PTD.*



U.S. Coast Guard/John Kepsimelis

Originally the PTD protected the American public's rights to fishing, navigation, and commerce over and in rivers, lakes, and coastal areas. During the 20th century, the doctrine was increasingly invoked to protect fish and other wildlife, coastal ecosystems, and even groundwater, preserving public access but also mandating the long-term preservation of these resources.<sup>2</sup> However, since the beginning of the modern environmental era in the early 1970s, the use of the PTD as a legal tool to fight broad-scale environmental degradation has generally been overshadowed by reliance on statutory and regulatory solutions. As Clifford Rechtschaffen and Denise Antolini attest, "after a flurry of environmental legislation was adopted in the early 1970s, common law theories [such as the PTD] were often relegated to an afterthought and hardly used at all by the rising national cadre of environmental advocates and public interest lawyers."<sup>3</sup>

Unfortunately, the copious environmental statutes and regulations enacted in the last 40 years have not proven to be uniformly adept at preventing the degradation of ecosystems and ecosystem services. Significant gaps in the "web of protection woven by environmental statutes" persist; as Alexandra Klass argues, "the environmental regulatory state that has been building since the 1970s often seems unable to even begin to address current issues of global warming, energy needs, water pollution, and preservation of species and open space."<sup>4</sup> Today, legal scholars are calling for a greater mobilization of common law (or, "court-made") remedies such as the PTD to strengthen the ability of policymakers, agency staff, and environmental lawyers to address these ills.

The last 40 years have been host to a rich debate among legal experts regarding broader use of the doctrine at the state level, expansion of the doctrine to natural resources under federal jurisdiction, and adoption of the doctrine into international contexts.<sup>5</sup> In this article, we bring six experts on the PTD to clarify its current role in both the United States

and abroad, and the potential for greater application as societies transition towards greater sustainability. **Mary Turnipseed** is a Ph.D. student in ecology at Duke University. **Raphael Sagarin**, an Assistant Research Scientist at University of Arizona's Institute of the Environment, is a marine ecologist and U.S. ocean policy expert. **Peter Barnes** is a Senior Fellow at the Tomales Bay Institute. **Michael C. Blumm** is a professor at Lewis & Clark Law School. **Patrick Parenteau** is a professor at Vermont Law School and formerly served as regional counsel for the Environmental Protection Agency, Region I. **Peter H. Sand** is a lecturer in international environmental law at the University of Munich, Germany, and formerly served as a legal advisor for the United Nations Environment Programme and the World Bank.

## CONTEXT

**Q: Where does the PTD fit into the body of U.S. environmental law and regulation? Is it a black sheep, one tool of many in the legal toolbox, or an underlying principle?**

**Blumm:** Some people think that the PTD is an outlier, a fringe element of environmental law. As a result, it doesn't get much coverage in law courses. This is a mistake. The PTD is an integral part of American property law and should be taught in every first-year law school property course (as it is in mine). The bias against the PTD is culturally ingrained: Most property law teachers and editors of casebooks think that property is fundamentally about individual rights. This notion of property as based in individual sovereignty dominates, and does so at the expense of greater recognition and improved management of inherently common resources.

**Parenteau:** The great thing about the PTD is that it refuses to be pigeonholed. It is flexible, dynamic, and highly adaptive. It is a doctrine of necessity that courts turn to when confronted with

outrageous claims to privatize inherently public resources such as water and wildlife. Its overarching principle, as articulated by Joseph Sax in his seminal 1970 article, is that certain gifts of nature—pure air, clean water, a stable climate, and healthy ecosystems—belong to everyone and cannot be appropriated for exclusively private use.<sup>6</sup> The PTD provides government with both the authority and the duty to act as trustee to conserve these resources for the benefit of current and future generations. It empowers the public to participate in, and hold the government accountable to, reasoned decision-making that affects public resources. It promotes decisions based on sound science, comprehensive planning, sustainable economics, and equitable sharing of nature's bounty. And, yet, the PTD remains an evolving doctrine with emergent properties that are not yet fully recognized or incorporated into American jurisprudence.

**Q: What about the PTD is different from the commonly interchanged ideas of stewardship, custodianship, and guardianship?**

**Sand:** To the extent that fiduciary metaphors of trusteeship, stewardship, custodianship, and guardianship are used in a legal sense (rather than as sheer rhetoric, which is often the case!), they all express the common “altruistic” concept of agency, or, acting on behalf and for the benefit of another. What seems to distinguish public trusteeship from the rest is the existence of a “settlor” who creates the trust. The question in the case of public trusteeship is who is the settlor? Presumably, it is the community (the nation, or, in the case of international public trusteeship, the international community) that designates governmental authorities as public trustees to manage the *corpus* (the body) of the trust for the benefit of “the people” (including the yet-unborn beneficiaries of an intergenerational trust), and which then empowers the beneficiaries to enforce the terms of the trust against the trustees.<sup>7</sup>



*In a 1983 court case over California's Mono Lake, the California Supreme Court ruled that the PTD “is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands...”. The ruling resulted in the restoration of the lake's ecosystem and significant changes to California's water management regime.*

**Parenteau:** The PTD incorporates all of these concepts and extends them to ecological considerations. The PTD provides an ethical coda that transcends utilitarian values. It incorporates the rights of future generations by empowering the present generation to articulate actions necessary to preserve options for the future. The PTD can provide an actionable claim when these principles are not being met, and it informs the actions of courts charged with making decisions that will lead to systemic changes in the ways resources are managed.

The outcome of the 1983 Mono Lake case illustrates how this works. As the California Supreme Court stated, the PTD “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.”<sup>8</sup> Thanks largely to the PTD, which required the state to balance the ecological needs of the lake against Los Angeles' need to consume water, the ecosystem was restored, and significant changes were made to California's water management regime.

**Blumm:** In a word, enforceability. The PTD is enforceable in court. That makes a big difference.

## DOMESTIC APPLICATIONS

**Q: In regard to what issues does the PTD most strongly manifest?**

**Turnipseed:** Although the core purpose of state PTDs has endured through two centuries of American history; today, many states protect a variety of resources and lands considered “public.” Perhaps most poetic in describing the need to protect a diversity of uses of trust lands was a 1971 California court:

There is growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect they scenery and climate of the area.<sup>9</sup>

In North Carolina, courts and the legislature have also extended the doctrine to protect the public's rights to "navigate, swim, hunt, fish and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches."<sup>10</sup>

**Blumm:** How the doctrine manifests in state law can have a significant effect on how it is interpreted. The PTD is a common law doctrine in some states, and a statutory or constitutional doctrine in others. Courts seem more willing to scrutinize an administrative decision that affects trust resources if the PTD has a statutory or constitutional basis rather than just a common law basis.<sup>11</sup>

However, the origins of the PTD do not lie in environmental protection. For those states that have not recognized that the PTD's purposes include ecological maintenance or restoration, the PTD is simply a public ownership and access doctrine only.<sup>12</sup> As a result, in these states the PTD is not really an environmental doctrine at all.

**Q: Who decides which public trust uses become valued over other uses, and on what basis?**

**Parenteau:** Traditionally this has been the role of state legislatures, the elected representatives of the public; it is not the role of the courts to decide such policy questions. In practice, the responsibility for making determinations of public trust uses often falls to state agencies, which are only sometimes given clear guidance on how to do so. For an agency to successfully make these determinations, the criteria they are to use should be clearly stipulated by statute; the process for making the determinations must be transparent and fair; the public should have a meaningful opportunity to participate in the decisions; a written record of the comments and responses must be created; and there should be access to judicial review.

**Turnipseed:** The PTD provides the stipulation that governmental trustees must balance the needs of current citizens with those of future citizens. At first pass, this notion of intergenerational fiduciary responsibility may seem vague, but courts have used it as a substantive standard against which to evaluate agency decision-making. For example, as the North Dakota Supreme Court determined: "The Doctrine confirms the State's role as trustee of the public waters. It permits alienation and allocation

of such precious state resources only after an analysis of present supply and future need."<sup>13</sup>

**Blumm:** Reviewing courts ultimately decide whether the government reached a proper balance between trust uses and preservation. Under the landmark *Illinois Central Railroad* case, the Supreme Court in 1892 said that trust resources could be privatized if doing so furthered trust purposes or would not substantially impair remaining trust uses.<sup>14</sup> So, it seems that some privatization of trust resources may take place so long as the *corpus* of the trust is largely publicly maintained.

**Q: Does the PTD prevent or impede the creation and implementation of market-based conservation efforts, such as ecosystem-services markets or fisheries catch shares programs?**

**Sagarin:** To the contrary, some scholars have argued that the utilitarian roots of the PTD align well with ecologists' recent focus on protecting ecosystem services.<sup>15</sup> Ecosystem services refer to the many goods and services provided by functioning ecological systems to humans: for example, provisioning of food, water, and wood fiber; nutrient cycling, soil formation, crop pollination, climate and flood regulation, and cultural services, such as recreational opportunities and aesthetic value. Though many of these ecosystem services have traditionally been viewed as valueless in economic models, they are now becoming integrated in the marketplace as stocks and flows of "natural capital." Viewing the many goods and services provided by ecosystems in this context is an attempt to demonstrate that these resources have measurable value to humans. Under this view, what was considered a weakness of the PTD for conservation—its focus on utilitarian values—can now be seen as a strength.

**Blumm:** The PTD does not necessarily impede the creation or implementation of market-based conservation measures. However, to the extent that market participants desire complete ownership of



*Originally the PTD protected the American public's rights to fishing, navigation, and commerce over and in rivers, lakes, and coastal areas. Since the early 1970s, the doctrine has been increasingly applied to protecting ecosystems, not just access to them. However, the use of the PTD as a legal tool to fight broad-scale environmental degradation has generally been overshadowed by reliance on statutory and regulatory solutions.*

trust resources, application of the PTD prevents this by making all private claims on trust resources conditional on the public's prevailing interest in them.

**Parenteau:** The PTD complements a market-based approach to conservation of public resources such as fish populations by helping to define the content and limits of property interests in them. The market cannot price all the values and ecosystem services provided by a fully functioning and healthy marine ecosystem. Nor can the market deal with externalities such as pollution, habitat destruction, and the potentially devastating consequences of climate change including ocean acidification. The PTD provides a legal mechanism for the government to value and protect the ecosystem services that markets fail to recognize.<sup>16</sup>

#### Q: Why has the PTD remained largely limited to U.S. state uses?

**Blumm:** The simple answer is due to its origins, which lay in the English Crown's sovereign ownership of trust resources. As a result of the American Revolution, the 13 original states—as well as all subsequently established states—inherited this sovereign ownership.<sup>17</sup>

There is some evidence that the PTD applies to the federal government in its management of federal lands. In 1911, the Supreme Court referred to the federal government as a trustee of these lands, but the Court was upholding a government action in that case, not imposing a judicially enforceable duty on the government.<sup>18</sup> While there might be trust duties imposed on the federal government, they are imposed by statutes containing trust language and, to date, not imposed by the courts.

**Turnipseed:** Though rarely acknowledged, there are several federal statutes that contain clear public trust language. For instance, the Comprehensive Response, Compensation, and Liability Act of 1980 (the "Superfund Act") describes the President as "trustee" of "natural resources over which the United States has sovereign rights, or

natural resources within the territory or the [EEZ] of the United States" and mandates that in instances of harm to "land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources," governmental trustees shall recover damages.<sup>19</sup> Similar language exists in the Clean Water Act and the Oil Pollution Act of 1990.<sup>20</sup>

Additionally, federal lands statutes and the National Environmental Protection Act (NEPA) invoke duties to future generations of Americans. The National Park Service Organic Act of 1916 and the Wilderness Act of 1964 both declare that national parks and other federal preservation lands should be managed so that their enjoyment by future generations is not impaired.<sup>21</sup> NEPA includes some of the clearest PTD language of any federal statute, directing the federal government to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."<sup>22</sup>

**Parenteau:** The short answer is because no one has forced the issue at the national level in the way that it has been pushed at the state level. Much of PTD law has been forged through litigation and legislative initiatives aimed at state management of, and protecting the public's interest in, surface waters, groundwater, tidelands, shorelines, parklands, wildlife, and other trust resources. By contrast, there are very few federal statutes and judicial decisions that explicitly deal with the application of the PTD to natural resources under the control of the federal government, either in its proprietary (i.e., land-owning) or sovereign (i.e., regulatory) capacity. This reflects both a lack of imagination on the part of the Congress and the Executive Branch and perhaps some reluctance on the part of conservation interests to press the issue through litigation or legislative action. There is no constitutional or legal reason why the federal government could not use the PTD as a rationale for more enlightened and ecologically sound management of federally controlled natural resources.

**Q: Many conservation problems in the U.S. stem from mismatches in the missions of and lack of collaboration between the multiple state and federal resource agencies involved. Would greater recognition of the PTD at the federal level ameliorate this situation in any way?**

**Sagarin:** Yes, I think so. Greater recognition of the PTD would allow agencies to maintain their autonomy in terms of expected tasks, expertise, and culture, but for once they would all be united by a common mission—to protect, grow, and repair the *corpus* of the trust. This would compel agencies to work with one another proactively to ensure that their actions are consistent with stewardship of the trust. And, in the case of a failure to protect the trust, it would remove the ability to simply pass the buck to another agency ("it's their jurisdiction not ours"), because the responsibility to steward the trust would be spread among all agencies. In essence, resource agencies would have to act like fund managers who each control a part of the portfolio but at the same time are responsible for ensuring that the performance of the entire fund is improving as a whole.

The failure to manage in this manner was clearly demonstrated in BP's Deepwater Horizon oil disaster in the Gulf of Mexico. Over more than 100 days, the well released an estimated 4.9 billion barrels of crude oil, amounting to the largest spill ever in US waters. Up until mid-June, the spill is estimated to be leaking 35,000 to 60,000 barrels of crude oil per day. The agency with primary jurisdiction, the former Minerals Management Service (now renamed the Bureau of Ocean Energy Management, Regulation, and Enforcement), having succumbed to regulatory capture by the oil and gas industry, did not compel the industry to develop adequate mitigation and containment technologies to reduce the risk and consequences of a deep well blowout. Additionally, federal agencies with conservation- and safety-oriented missions had little input into MMS's





Walter Michot/Miami Herald/CT

Oyster fishermen in Apalachicola, Florida, on June 23, 2010. Apalachicola oysters were fortunately not affected by the Deepwater Horizon oil spill, but many Gulf oyster beds were closed due to oil contamination. Sustainable livelihoods derived from public trust resources should also be seen as falling under the PTD domain.

decisions, which compromised public trust resources.

**Blumm:** Statutory codification of a federal PTD would presumably provide more stringent judicial review of federal government actions. The prospect of likely judicial review would no doubt induce agencies to take greater care in their management of trust resources, and this in turn would probably promote interagency cooperation. Interagency cooperation then might be a beneficial consequence of statutory trust directives that encourage courts to scrutinize agency actions.

## INTERNATIONAL MANIFESTATIONS

**Q: In what other countries and in what international treaties is the PTD invoked as a matter of law or common practice?**

**Parenteau:** Several countries, such as Australia, Eritrea, India, Pakistan, South Africa, Sri Lanka, Tanzania,

and Uganda, invoke public trust responsibilities in some part of their legal system. For, example, in 1997, the Supreme Court of India handed down the landmark decision in *M.C. Mehta vs. Kamal Nath*, which recognized that the public has the right to expect that certain lands and natural areas retain their natural character and not be converted to private use.<sup>23</sup> In addition, the Court recently applied the PTD to natural gas, declaring it to be “an essential natural resource” held “as a trust for the people of the country.”<sup>24</sup> Both decisions drew heavily upon American law and scholarship on the PTD.

In 1998, South Africa passed the National Water Act, which recognized that the National Government is the “public trustee of the nation’s water resources” and that it must “ensure that water is protected, used, developed, managed and controlled in a sustainable and equitable manner.”<sup>25</sup> In addition, South Africa’s National Environmental Management Act of 1998 proclaimed, “The environment is held in the public trust for the people, the beneficial use of environmental resources must serve

the public interest and the environment must be protected as the people’s common heritage.”<sup>26</sup> Again, American law played a significant role in shaping this legislation.

**Sand:** As a concept of national law, the PTD has remained limited mostly to countries with legal systems based on Anglo-Saxon common law, such as India.<sup>27</sup> By contrast, most contemporary legal systems based on European civil law or other legal traditions do not recognize the concept of private or charitable trusteeship. These countries simply do not have private-law “trusts.”<sup>28</sup> When it comes to public trusteeship, the difference is even more prominent, as illustrated by the notorious impossibility of translating Woodrow Wilson’s concept of the “sacred trust of civilization” in article 22 of the League of Nations Covenant (Versailles, 1919) and article 73 of the United Nations Charter (San Francisco, 1945) into either French or German. The official French text now reads *mission sacrée*, and the German text *heilige Aufgabe*, both of which literally mean “sacred mission.”<sup>29</sup>



## THE FUTURE OF THE PTD

**Q: Should we regulate U.S.-based industry carbon emissions using laws grounded in the PTD? What would the Doctrine offer to highly complex climate policies like those currently being discussed?**

**Barnes:** The air is a common-pool resource, and therefore an appropriate subject of the PTD. If the PTD were taken as a basis for addressing climate change, the federal government would be obliged to limit economy-wide emissions of greenhouse gases to levels that are safe for future generations—or, that preserve the climate stability that each generation up to now has enjoyed. If the climate bills currently being considered in Washington were measured against this trust obligation, they would fail to meet it.

That said, the safe upper limit of CO<sub>2</sub> emissions is a matter of probabilities and risk tolerance, both of which are hard to pin down. This raises the question of how the PTD can be enforced in areas where the science is complex and contentious. Perhaps what is needed is a series of guidelines that courts can use to measure the fulfillment of trust duties. For example, is the trustee making “best efforts” to protect the interests of future generations? Is it applying the Precautionary Principle? Are the enforcement measures that are being used transparent?

**Parenteau:** A common law PTD is probably not the best way to regulate greenhouse emissions or deal with a global problem like climate change. For that we need strong, national legislation as well as a new international treaty that involves all the nations of the world. Domestic legislation will almost certainly preempt federal common law and, depending on the final text of the statute, may or may not preempt state common laws.

However, some of the provisions of the current climate bills do address

*The Philippines Supreme Court has recognized a fundamental legal right to a balanced and healthy ecology and applied the concept in ordering a cleanup of Manila Bay, stating “[a]nything less would be a betrayal of the trust.”*

This does not mean, however, that the French and German legal systems cannot deal with some of the practical uses to which the PTD is put in U.S. environmental law. The functional equivalents of public trusteeship may be found in the French *domaine public* over shoreline areas, and in the German constitutional principle that all private property is subject to overriding social obligations, which may manifest as public servitudes or easements.<sup>30</sup> In addition, there are Swiss laws that provide for uninhibited public access to all lakeshore property, and the customary Scandinavian *allemansrätt*, which guarantees public access to all wildlife and wildland resources, regardless of private property rights.

Public trust concepts have also found their way into a few international treaties, including the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage and the 2001 FAO International Treaty on Plant Genetic Resources for Food and Agriculture.<sup>31</sup> The 1982 Convention on the Law of the Sea expressly designates the International Seabed Authority as trustee “for the benefit of mankind” with regard to the high-seas seabed.<sup>32</sup>

**Blumm:** The PTD has also been constitutionally proclaimed in the Philippines, with the constitution announc-

ing in 1987 that the nation owns and cannot alienate natural resources, including those in the offshore marine environment.<sup>33</sup> In addition, the Philippines Supreme Court has recognized a fundamental legal right to a balanced and healthy ecology, and it applied the concept in ordering a cleanup of Manila Bay, stating “[a]nything less would be a betrayal of the trust [in the water].”<sup>34</sup>

In Kenya, the High Court has held that the state has a fiduciary responsibility to manage trust resources such as waterways, wetlands, and forests in a manner that benefits the general public.<sup>35</sup> And, in Ecuador the PTD was adopted by a 2008 constitutional referendum, which gave “inalienable” existence rights to tropical forests, islands, rivers, and air.<sup>36</sup>

**Sagarin:** Though not invoking any legal mandate, citizen activists in Mexico recently responded to a government effort to create a mega-tourist development on Baja, California’s Balandra beach by declaring a campaign built around the slogan, “Balandra es Nuestra” (“Balandra Is Ours”). This slogan asserts that certain public lands should belong to all members of the public and be protected by the government. In an unusual reversal, the government ultimately relented to citizen pressure and declared the area to be a protected park under both state and federal jurisdiction.<sup>37</sup>

principles of the PTD. For example, under the “cap-and-dividend” approach proposed by Senator Maria Cantwell (D, WA), carbon permits would be auctioned off monthly. Of the revenue generated from these auctions, 75 percent would be returned to consumers, and 25 percent would go to a Clean Energy Reinvestment Trust Fund to invest in, among other things, low-carbon energy technology and climate change adaptation.<sup>39</sup>

**Barnes:** I agree that reducing greenhouse gas emissions is ultimately a job for Congress rather than the courts. However, it is extremely difficult to get Congress to pass strong emissions reduction legislation because polluting industries are so powerful. If a court threatened to impose a PTD-based solution if Congress failed to act by a certain date, the PTD could be a potent spur to legislation. The threatened court-ordered solution could be to create a simple “sky trust” in which the court imposes a science-based descending emissions cap with all permits auctioned and all revenues returned to U.S. citizens on a one-person, one-share basis.<sup>40</sup>

**Q: In a perfect world, what role would the PTD play in shaping environmental law and policy?**

**Parenteau:** In a perfect world, the PTD would be the central organizing principle for how government manages natural resources for long-term ecological and economic sustainability. It would represent a paradigm shift in legal regimes that currently fail to take the rights of future generations into account when decisions are made that commit the globe to irreversible and potentially catastrophic consequences such as climate change.

**Blumm:** The Supreme Court would interpret NEPA, with its language that establishes the federal government as a trustee and its express concern for future generations, as placing a clear public trust burden on the U.S. federal government. As a result, NEPA would require agencies to focus on the long-term and on intergenerational equity.

On the state level, all state courts, not just select courts, would interpret the PTD to embrace ecological values, to apply to private property as well as state administrative decision-making, and to provide the public with greater judicial standing with which to challenge agency decisions. Courts and legislators would also recognize that the PTD is not in conflict with private property, but instead seeks an accommodation between trust resources and individual property rights.<sup>41</sup>

**Sand:** With regard to the management of common natural resources, Roscoe Pound once suggested limiting the role of states to “a sort of guardianship for social purposes.”<sup>42</sup> This comes remarkably close to the famous statement in John Locke’s *Second Treatise on Civil Government* (1685), asserting that governments merely exercise a “fiduciary trust” on behalf of their people.<sup>43</sup> That statement remains valid for future global resource management.

## THE PTD AS INTEGRAL PRINCIPLE AND TOOL

Of all the concepts that fall under the wide umbrella of environmental law, the PTD stands apart. At its core, the PTD provides a framework for structuring the relationship among natural resources, the current and future citizens who own these resources, and the governments they elect to manage them. To date, public trust responsibilities have generally been haphazardly acknowledged and only opportunistically fulfilled. In some U.S. states, the PTD appears in constitutional and statutory law, as well as common law, and is employed broadly to questions of beach access, wildlife, groundwater, and coastal ecosystems. In other states, courts have limited its scope and apply the doctrine in only narrow circumstances. At the federal level, public trust language appears in NEPA and many statutes that pertain to terrestrial and submerged fed-

eral lands, but no court has expressly held that this language provides a federal public trust mandate.

That the doctrine exists only at the state level seems illogical, given the enormous expanse of ocean waters outside of coastal states’ jurisdictions, the large area of terrestrial lands under the jurisdiction of the federal government, and the unequivocal evidence that ecosystem functions and connections cross the artificial boundaries set by state and federal jurisdictions.<sup>44</sup> If the federal government is not managing activities affecting federal waters and lands for the benefit of the public, for whom are these areas being managed? Bringing public trust law more fully into the management of federal natural resources would help clarify that ultimately the controlling duty of the government in these matters is to act as a long-term steward. Natural resources on and in federal lands and waters would constitute the *corpus* of the federal public trust.

In other countries, as well as in international agreements, the PTD has been increasingly employed and has particular potential to steer governments of global coastal countries towards sustainable ocean management, both in their waters and in the high seas.<sup>45</sup> This potential largely concerns the intrinsic linkages between the PTD and the concepts of intergenerational equity and sustainable development. By requiring governmental trustees to treat the interests of current and future citizens equally, the notion of intergenerational equity is inherent to the PTD.<sup>46</sup> Further, protecting the rights of future generations to natural resources is a key aspect of sustainable development, which has been widely defined as fulfilling the needs of the current generation without sacrificing the ability of future generations to meet their needs.

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## NOTES

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