

---

---

# Public Trust and Public Nuisance: Common Law Peas in a Pod?

Albert C. Lin\*

*Public trust and public nuisance are doctrines with contrasting origins: the public trust doctrine is rooted in property law, whereas public nuisance is rooted in tort law. Yet, as common law doctrines in an age dominated by statutes and regulations, public trust and public nuisance also have much in common. In recent years, advocates have advanced both theories with growing frequency as means of protecting the environment and natural resources. A comparison of these doctrines, their scope, and purposes reveals instructive similarities and differences that can inform their application to climate change, biodiversity protection, scarce water supplies, and other contemporary challenges.*

## TABLE OF CONTENTS

INTRODUCTION .....	1077
I. PUBLIC TRUST AND PUBLIC NUISANCE DOCTRINES:	
SIMILARITIES.....	1078
A. <i>Public Trust and Public Nuisance Doctrines as</i>	
<i>Communitarian Doctrines</i> .....	1079
B. <i>Public Trust and Public Nuisance Doctrines as Flexible</i>	
<i>Common Law Tools</i> .....	1081
C. <i>Public Trust and Public Nuisance Doctrines as Responses</i>	
<i>to Political Failure</i> .....	1084
II. PUBLIC TRUST AND PUBLIC NUISANCE DOCTRINES:	
DIFFERENCES.....	1088
A. <i>Scope</i> .....	1088
B. <i>Function</i> .....	1091

---

\* Copyright © 2012 Albert C. Lin. Professor of Law, University of California, Davis, School of Law. Thanks to the editors of the UC Davis Law Review and Professor Rick Frank for their work in organizing this symposium, and to Dean Kevin Johnson, Associate Dean Vik Amar, and the UC Davis School of Law for financial support for this project.

*C. Legal Foundation*..... 1093  
CONCLUSION..... 1096

## INTRODUCTION

The public trust doctrine provides that certain resources inherently belong to the people and are to be administered by the state for their benefit.<sup>1</sup> Traditionally, the doctrine applied to tidal and navigable waters and the lands beneath them.<sup>2</sup> In recent decades, however, some courts have held other resources, such as park land and dry sand beaches, to fall within the public trust doctrine's reach as well.<sup>3</sup> The public trust doctrine is a doctrine of property law: described as "a kind of inherent easement for certain public purposes," it declares certain resources to be subject to inalienable public rights, even if those resources are privately owned.<sup>4</sup> The public trust doctrine can serve as a weapon to thwart actions by the government or private parties that violate public trust purposes, or it can function as a shield to protect the government against claims that its actions have taken private property and, thus, require compensation.<sup>5</sup>

The public nuisance doctrine protects the public against unreasonable and substantial interference with a public right.<sup>6</sup> Originating in common law criminal prosecutions, public nuisance is more commonly a source of civil tort liability today.<sup>7</sup> Public nuisance is no ordinary tort, however, as its invocation — typically by public officials<sup>8</sup> — involves an exercise of the state's police power.<sup>9</sup> Whereas

---

<sup>1</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970) [hereinafter *Public Trust Doctrine in Natural Resource Law*].

<sup>2</sup> WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 2.20, at 158-59 (1986).

<sup>3</sup> See Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 707-08 (2006).

<sup>4</sup> Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 351 (1998); see also Klass, *supra* note 3, at 702.

<sup>5</sup> Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 645-46 (1986) [hereinafter *Questioning the Public Trust Doctrine*]; Klass, *supra* note 3, at 727-42.

<sup>6</sup> See RESTATEMENT (SECOND) OF TORTS § 821B(1) & cmt. a (1979); DAN B. DOBBS, *THE LAW OF TORTS* 1334 (2000) (defining public nuisance as "a substantial and unreasonable interference with a right held in common by the general public, in use of public facilities, in health, safety, and convenience"); Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 741, 813-30 (2003) [hereinafter *Public Nuisance*] (outlining "fundamental principles" governing public nuisance).

<sup>7</sup> See Gifford, *Public Nuisance*, *supra* note 6, at 790-809 (providing a historical account of the development of public nuisance doctrine).

<sup>8</sup> See *id.* at 814.

<sup>9</sup> See Albert C. Lin, *Deciphering the Chemical Soup: Using Public Nuisance to*

private nuisance actions require interference with the enjoyment of land, public nuisance protects a broad range of rights in health, safety, and comfort that are not necessarily tied to land or a particular resource.<sup>10</sup> The rights that may be protected by public nuisance can overlap with those subject to the public trust doctrine; courts have deemed obstructed waterways and polluted water, for example, to be public nuisances.<sup>11</sup>

Commentators have characterized the relationship between the doctrines of public trust and public nuisance in various ways. William Rodgers once described public nuisance as an “inland version of public trust doctrine.”<sup>12</sup> Allan Kanner and Mary Ziegler suggest that the public trust doctrine protects “natural resources held for all,” whereas the public nuisance doctrine “protects those held by no one.”<sup>13</sup> These summary characterizations, while acknowledging basic differences between the two, recognize that the doctrines share an underlying goal of protecting communal interests in the environment and natural resources. The doctrines’ differences, however, are relevant in analyzing how the doctrines might apply to various environmental challenges.

#### I. PUBLIC TRUST AND PUBLIC NUISANCE DOCTRINES: SIMILARITIES

The public trust and public nuisance doctrines occupy similar positions within our legal architecture. Namely, they protect collective interests against the excesses of private activity, operating flexibly as common law backstops to political failures.

---

*Compel Chemical Testing*, 85 NOTRE DAME L. REV. 955, 983-84 (2010).

<sup>10</sup> See DOBBS, *supra* note 6, at 1335.

<sup>11</sup> See *Rhode Island v. Lead Indus. Ass’n*, 951 A.2d 428, 453 (R.I. 2008) (describing public right); Gifford, *Public Nuisance*, *supra* note 6, at 815 (describing fact patterns constituting public nuisance under common law); see also CAL. CIV. CODE § 3479 (West 1997) (defining a nuisance as “[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin”).

<sup>12</sup> See Carter H. Strickland, Jr., *The Scope of Authority of Natural Resources Trustees*, 20 COLUM. J. ENVTL. L. 301, 315 (1995) (quoting WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW § 2.16, at 173 (1977)).

<sup>13</sup> Allan Kanner & Mary E. Ziegler, *Understanding and Protecting Natural Resources*, 17 DUKE ENVTL. L. & POL’Y F. 119, 128 (2006).

A. *Public Trust and Public Nuisance Doctrines as Communitarian Doctrines*

It is no accident that the public trust and public nuisance doctrines both include the word “public” in their titles, for these doctrines are steeped in communitarian values. These doctrines stand as bulwarks of society’s broader interests within a political, legal, and cultural framework that jealously protects private property rights and individuals’ freedom of action. They declare specifically that private property cannot be used in complete disregard of the interests of others and, more generally, that individual rights are necessarily bounded in a civil society.

The public trust doctrine, as Barton Thompson explains, is primarily concerned with “privatization of property and resources [that] has gone too far.”<sup>14</sup> Modern liberal societies protect private property ownership out of recognition of a fundamental connection between private property and individual liberty.<sup>15</sup> The underlying rationale for the public trust doctrine is that certain resources are so essential to social well-being that they ought not to be privatized, notwithstanding this connection.<sup>16</sup> In particular, ensuring public access to oceans and waterways has been vital to protecting commerce, navigation, and fishing since ancient times.<sup>17</sup> Indeed, the public trust doctrine, by preserving public rights to certain critical resources, can actually provide support for private property regimes.<sup>18</sup> Ensuring that waterways are open to all, for instance, facilitates trade and economic activity that might be impossible under a system of more absolute private ownership and control.<sup>19</sup> Of course, the purposes of the public trust doctrine are not limited to commercial objectives: public trust concerns have come to include recreational and ecological purposes as well.<sup>20</sup> These broader objectives underscore the fundamental premise that the state holds public trust resources as a trustee for the general

---

<sup>14</sup> Barton H. Thompson, *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SOUTHEASTERN ENVTL. L.J. 47, 59 (2006).

<sup>15</sup> See JOSEPH SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 23 (2000); see also Eric T. Freyfogle, *Property and Liberty*, 34 HARV. ENVTL. L. REV. 75 (2010) (contending that private property regimes can both promote and restrict liberty).

<sup>16</sup> Sax, *Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 484.

<sup>17</sup> See Thompson, *supra* note 14, at 67.

<sup>18</sup> *Id.* at 59.

<sup>19</sup> *Id.* at 62-63.

<sup>20</sup> See Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719 (Cal. 1983).

public, and as trustee, the state has a duty to act in the interest of current and future generations.<sup>21</sup>

The public nuisance doctrine likewise serves as an instrument for protecting collective interests. In contrast to private nuisance doctrine, which seeks to resolve conflicts between individual rights and interests, the public nuisance doctrine directly governs activity that interferes with public rights. More than a mere aggregation of private rights,<sup>22</sup> public rights are distinct from the “individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.”<sup>23</sup> “Collective in nature” and “common to all members of the general public,”<sup>24</sup> public rights include common law rights in unobstructed highways and waterways and the right to unpolluted air and water,<sup>25</sup> as well as rights identified by statute.<sup>26</sup> The public nuisance doctrine constrains individuals from using private property or taking other actions that interfere with these rights in a substantial way.<sup>27</sup>

The doctrines of public trust and public nuisance share a common goal of safeguarding community interests. With the increasing recognition of resource conflicts and environmental problems, community interests have come to include protection of the environment and natural resources. The role of the doctrines in safeguarding such interests is poised to grow as climate change becomes more severe, water conflicts worsen, and fisheries continue to

---

<sup>21</sup> Hope M. Babcock, *The Public Trust Doctrine: What a Tall Tale They Tell*, 61 S.C. L. REV. 393, 408 (2009).

<sup>22</sup> See *Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 448 (R.I. 2008); Gifford, *Public Nuisance*, *supra* note 6, at 817. *But cf.* RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979) (noting that “no public right as such need be involved” in those states where public nuisance is defined to include interference with “any considerable number of persons”).

<sup>23</sup> RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979).

<sup>24</sup> *Id.*

<sup>25</sup> See *Lead Indus. Ass'n*, 951 A.2d at 453 (describing public right); DOBBS, *supra* note 6, at 1335; Gifford, *Public Nuisance*, *supra* note 6, at 815 (describing fact patterns constituting public nuisance under common law).

<sup>26</sup> See, e.g., CAL. CIV. CODE §§ 3479, 3480 (West 2010) (defining nuisance as “[a]nything which is injurious to health, . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway” and public nuisance as a nuisance that “affects at the same time an entire community or neighborhood, or any considerable number of persons”).

<sup>27</sup> See sources cited *supra* note 6.

decline. Both doctrines, for instance, have been invoked in the battle against climate change.<sup>28</sup> It is worth keeping in mind, however, that neither doctrine offers a comprehensive solution to environmental challenges. The interests protected by the doctrines are wholly anthropocentric, not ecocentric, and primarily involve the use of environmental amenities. Ultimately, the doctrines presume the existence of strong private property regimes and, thus, are unlikely to catalyze a reconceptualization of humanity's relationship with nature. Nevertheless, the doctrines are important common law avenues for balancing private and public interests in the environment.<sup>29</sup>

B. *Public Trust and Public Nuisance Doctrines as Flexible Common Law Tools*

Notwithstanding their ancient lineage, the public trust and public nuisance doctrines are relevant even in an age of statutory dominance. Both doctrines have sufficient flexibility to play a role in addressing contemporary concerns.

The public trust doctrine's origins lie in Roman law, which recognized communal rights in the air and waters, at least as an abstract ideal.<sup>30</sup> The geographical reach of the doctrine has expanded slowly with time,<sup>31</sup> but public trust cases have consistently reflected three basic concerns as identified by Joseph Sax, whose groundbreaking 1970 article revitalized the modern public trust doctrine. First, "certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs."<sup>32</sup> Second, "certain interests are so particularly the gifts of nature's bounty that they ought to be reserved

---

<sup>28</sup> See Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 83-87 (2009) (advocating application of public trust to climate change); Felicity Barringer, *Suit Accuses U.S. Government of Failing to Protect Earth for Generations Unborn*, N.Y. TIMES, May 4, 2011, at A22 (reporting on filing of climate change lawsuits against federal and state governments based on public trust doctrine); *infra* note 63 and accompanying text (citing public nuisance climate change cases).

<sup>29</sup> See RESTATEMENT (SECOND) OF TORTS § 821B cmt. e (1979) (explaining that public nuisance element of "unreasonable interference" weighs the gravity of the harm against the utility of the conduct); Thompson, *supra* note 14, at 64.

<sup>30</sup> Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 633-34.

<sup>31</sup> See Klass, *supra* note 3, at 707-08; Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 647-50.

<sup>32</sup> Sax, *Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 484.

for the whole of the populace.”<sup>33</sup> Third, “certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate.”<sup>34</sup> These core concerns of the public trust doctrine are timeless. The doctrine retains vitality and appeal, even as the specific interests meriting public trust protection — navigation, commerce, recreation, or otherwise — or the particular uses that those interests implicate, might vary with time. In a world that is increasingly dominated by human activity, the public trust doctrine serves as a reminder that human flourishing is contingent on the health and accessibility of the natural world. The incorporation of the doctrine into constitutional or statutory provisions in a number of states<sup>35</sup> reflects recognition of our dependence on the natural world, as well as the need for public trust interests to reflect contemporary societal concerns.

The doctrine of public nuisance has similarly demonstrated continuing relevance and adaptability over time. Public nuisance originated in common law criminal prosecutions by the King to address encroachments upon the royal domain.<sup>36</sup> Described by one court as the “dust bin [] of the law,”<sup>37</sup> public nuisance may encompass a wide variety of conduct ranging from actions harmful to public health to behavior deemed damaging to public morals.<sup>38</sup> Litigants have asserted public nuisance claims successfully in response to various environmental problems, including dust, smoke, noise, odors, and hazardous chemical releases.<sup>39</sup> At the root of these varying factual

---

<sup>33</sup> *Id.* at 484.

<sup>34</sup> *Id.* at 485.

<sup>35</sup> See Klass, *supra* note 3, at 714-27.

<sup>36</sup> Gifford, *Public Nuisance*, *supra* note 6, at 790-99.

<sup>37</sup> *Awad v. McColgan*, 98 N.W.2d 571, 573 (Mich. 1959) (characterizing nuisance, both public and private, as such).

<sup>38</sup> See William L. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998-99 (1966) (describing public nuisance as “a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure”).

<sup>39</sup> See RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1979); Denise E. Antolini & Clifford L. Rechtschaffen, *Common Law Remedies: A Refresher*, 38 ENVTL. L. REP. 10,114, at 10,120-21 (2008) (listing examples of circumstances in which environmental harms have been found to be public nuisances); see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 643-45 (5th ed. 1984) (listing wide range of factual circumstances in which courts have found public nuisance). In contrast to private nuisance, public nuisance does not require proof of interference with use and enjoyment of land. See RESTATEMENT (SECOND) OF TORTS § 821B cmt. h (1979); Antolini & Rechtschaffen, *supra*, at 10,120.



circumstances is the notion of public harm: the public nuisance doctrine addresses general harm resulting from the conduct of others.<sup>40</sup> Recent litigation seeking to apply public nuisance to lead paint, handgun violence, and climate change underscores the malleability of the doctrine.<sup>41</sup> Although plaintiffs pursuing these cases have struggled to overcome issues of causation, preemption, displacement, and justiciability,<sup>42</sup> the public nuisance doctrine remains a viable tool for addressing new public harms in addition to the harms to which it has typically been applied.

The public trust and public nuisance doctrines do face important limitations in their common law forms. These limitations result from the fact that, in applying the doctrines, judges are making decisions with policy implications.

First, like other common law doctrines, the public trust and public nuisance doctrines develop slowly and sporadically through individual cases.<sup>43</sup> This sort of lawmaking is well-suited for resolving individual disputes but is generally an inadequate substitute for comprehensive regulation. Statutes and regulations to protect the environment offer a more systematic and directed approach. By themselves, however, these sources of law are incomplete and imperfect, leaving common law doctrines to serve as important gap-filling and corrective devices.

Second, because the public trust and public nuisance doctrines are applied by generalist judges who often lack expertise in addressing resource conflicts, the resulting solutions are likely to differ from

---

<sup>40</sup> See Prosser, *supra* note 38, at 997.

<sup>41</sup> See Gifford, *Public Nuisance*, *supra* note 6, at 749-74; Matthew F. Pawa, *Global Warming: The Ultimate Public Nuisance*, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 107, 107-08 (Clifford Rechtschaffen & Denise Antolini eds., 2007); Katie J. Zoglin, *Getting the Lead Out: The Potential of Public Nuisance in Lead-Based Paint Litigation*, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT, *supra*, at 339-40.

<sup>42</sup> See, e.g., *Am. Elec. & Power v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (holding that “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants”); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871, at \*16 (N.D. Cal. Sept. 17, 2007) (finding that common law global warming nuisance claim presented a nonjusticiable political question); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1136-37 (Ill. 2004) (holding that lawful sale of guns by manufacturers was too remote from resulting injury to satisfy proximate cause requirement of public nuisance, in light of intervening criminal activity of third parties); *In re Lead Paint Litig.*, 924 A.2d 484, 501-02 (N.J. 2007) (rejecting application of public nuisance in litigation against paint manufacturers based on reasoning that hazards associated with flaking lead paint are due to poor maintenance of premises by owners).

<sup>43</sup> Klass, *supra* note 3, at 713.

those that expert agencies might devise.<sup>44</sup> Relatedly, both doctrines set out general standards whose application in specific instances can be uncertain. Courts prescribe the duties and limitations of the public trust doctrine, just as they determine in public nuisance cases what comprises a substantial and unreasonable interference with a public right. Neither of these objections is fatal to use of the common law, but they may warrant a preference for comprehensive regulation by expert agencies.

Third, the wide scope that courts potentially have in applying the public trust and public nuisance doctrines has led to criticism of their use as anti-majoritarian.<sup>45</sup> James Huffman contends, for example, that expansive interpretations of common law doctrines, including public trust and public nuisance, threaten to undermine democratic choices made by elected officials.<sup>46</sup> Similarly, Richard Lazarus argues that the expansion of regulatory power to address environmental harms through modern administrative procedures provides a better assurance of accountability than the application of the public trust doctrine.<sup>47</sup> These arguments correctly take note of the historical limitations of the public trust doctrine and the importance of the administrative state today. But they express too much confidence that without further prodding, the political process will reflect the interests of the public at large and regulators will be able to address environmental problems effectively. As discussed below, the doctrines of public trust and public nuisance are better understood as corrective responses to political failures in the democratic process than as undemocratic or unaccountable interventions.

### C. *Public Trust and Public Nuisance Doctrines as Responses to Political Failure*

The public trust and public nuisance doctrines increasingly serve as means of addressing political failures, most commonly legislative failures. This is an important function at a time of complex environmental challenges, environmental policy gridlock, and corporate dominance of legislative agendas. The public trust and

---

<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 555-56, 565-66 (1989).

<sup>46</sup> James L. Huffman, *Beware of Greens in Praise of the Common Law*, 58 CASE W. RES. L. REV. 813, 828-29 (2008); James L. Huffman, *Speaking of Inconvenient Truths — A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 61-62, 102-03 (2007) [hereinafter *Speaking of Inconvenient Truths*].

<sup>47</sup> Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 665-88.

public nuisance doctrines can help redress the inability of environmental law to take effective action — or any action, in some instances — on pressing problems such as climate change, toxic substances,<sup>48</sup> and declining fisheries.<sup>49</sup>

Under U.S. law, the public trust doctrine emerged as a bulwark against the appropriation of public resources by private parties.<sup>50</sup> Modern applications of the doctrine, however, have tended to reflect a concern with the potential for democratic failure in the political branches. Such failure might involve simple corruption on the part of state legislatures or executive agencies, as suggested by the factual circumstances of the pivotal public trust decision, *Illinois Central Railroad Co. v. Illinois*.<sup>51</sup> In that case, the U.S. Supreme Court held that the State of Illinois's transfer of Lake Michigan shoreline along Chicago's business district to a private railroad violated the public trust doctrine.<sup>52</sup> The transfer, seemingly a sweetheart deal for the railroad, produced little obvious benefit for the public.<sup>53</sup>

Democratic failure can also occur in the absence of outright corruption, and here too, the public trust doctrine can fulfill a vital corrective function. As Joseph Sax observes, “imperfections in the legislative and administrative process,” including dynamics identified by public choice theorists, can skew resource allocation decisions.<sup>54</sup> The public trust doctrine, Sax argues, is a critical tool for protecting “a diffuse majority” against the “undue influence” of minority interests on the public resource decisions of legislative and administrative

---

<sup>48</sup> See Lin, *supra* note 9, at 958-71 (discussing problem of toxic ignorance).

<sup>49</sup> See L.B. Crowder et al., *Resolving Mismatches in U.S. Ocean Governance*, 313 SCIENCE 617, 618 (2006); Benjamin S. Halpern et al., *Evaluating and Ranking the Vulnerability of Global Marine Ecosystems to Anthropogenic Threats*, 21 CONSERVATION BIOLOGY 1301 (2007).

<sup>50</sup> See Thompson, *supra* note 14, at 51 (discussing 19th century attempts by riparian landowners to assert private control of river fisheries).

<sup>51</sup> Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892); see Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 656.

<sup>52</sup> Ill. Cent., 146 U.S. at 455.

<sup>53</sup> See *id.* at 451; Sax, *Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 490. *But cf.* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 881-94 (2004) (concluding that corruption probably played a role in passing the legislation that transferred the property, but that the legislation could also be viewed as a reasonable means of bringing about development of the harbor).

<sup>54</sup> Sax, *Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 509; see also Rose, *supra* note 4, at 353; Sax, *Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 495.

bodies.<sup>55</sup> Environmental concerns may especially require protection because private concessions involving resource extraction often are granted with limited public visibility.<sup>56</sup> More generally, industry groups that tend to favor weak environmental regulation can act cohesively to overwhelm the more widespread yet diffuse preferences of the public for greater environmental protection.<sup>57</sup>

The role of the courts in addressing democratic failures through the public trust doctrine is, nonetheless, a constrained one. The remedy for a public trust violation is largely procedural in that courts generally leave the substantive determinations regarding management of public trust resources to legislatures and executive agencies.<sup>58</sup> Indeed, “[n]o public trust case has ever directly overturned a legislative decision.”<sup>59</sup> In *Illinois Central*, for instance, the U.S. Supreme Court upheld the state legislature’s ability to revoke its earlier grant of title to the submerged lands along the shore.<sup>60</sup> And in the public trust litigation involving Mono Lake, the California Supreme Court made clear the State Water Board’s discretion to consider environmental concerns in the course of reviewing Los Angeles’s prior appropriations.<sup>61</sup> Ultimately, the State Water Board, and not the courts, resolved the disposition of the waters that feed Mono Lake.<sup>62</sup>

Recent litigation has highlighted a role for public nuisance doctrine akin to that of the public trust doctrine in responding to the failure of legislative and regulatory processes. Public nuisance suits in relation

---

<sup>55</sup> Sax, *Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 560.

<sup>56</sup> *Id.* at 495-96. *But see* William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 424-29 (1997) (questioning whether public trust doctrine is warranted in light of statutory and political attention to environmental concerns).

<sup>57</sup> See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 5-65 (1971); *see also* Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 744-48 (2000) (describing recurring features of environmental problems, many of which hinder redress by law).

<sup>58</sup> Sax, *Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 558-59.

<sup>59</sup> Thompson, *supra* note 14, at 65.

<sup>60</sup> Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452-55 (1892).

<sup>61</sup> Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709, 726-28 (Cal. 1983).

<sup>62</sup> *In re* Amendment of the City of Los Angeles’ Water Right Licenses for Diversion of Water From Streams Tributary to Mono Lake, Cal. State Water Resources Control Bd., Decision No. 1631 (Cal. Water Res. Control Bd. Sept. 28, 1994), [http://www.swrcb.ca.gov/waterrights/board\\_decisions/adopted\\_orders/decisions/d1600\\_d1649/wrd1631.pdf](http://www.swrcb.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1600_d1649/wrd1631.pdf).

to climate change most clearly illustrate this phenomenon. In these cases, state attorneys general and other officials have sought mandatory reductions in greenhouse gas emissions from utilities, motor vehicle manufacturers, and the petroleum industry.<sup>63</sup> The federal government's inaction on climate change has been the primary catalyst for this litigation: Congress has failed to enact legislation aimed directly at climate change,<sup>64</sup> the George W. Bush Administration made little effort to mandate carbon emissions reductions through existing or proposed regulatory authority,<sup>65</sup> and the Obama Administration has just begun to use the Clean Air Act to regulate carbon emissions from motor vehicles and large stationary sources.<sup>66</sup> Admittedly, state-initiated public nuisance claims are a less than ideal mechanism for imposing regulatory controls on a handful of polluters where hundreds of thousands of sources are contributing to a global pollution problem.<sup>67</sup> But, in the absence of comprehensive regulation, executive agency officials subject to judicial oversight are creatively using public nuisance actions in an effort to address regulatory gaps, prompt legislative action, encourage more environmentally responsible corporate behavior, and raise public awareness.<sup>68</sup>

---

<sup>63</sup> See, e.g., *Native Vill. of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871, at \*16 (N.D. Cal. Sept. 17, 2007); *Connecticut v. Am. Elec. Power Co.*, 406 F. Supp. 2d 265, 274 (S.D.N.Y. 2005), *vacated*, 582 F.3d 309 (2d Cir. 2009), *reversed and remanded*, 131 S. Ct. 2527 (2011).

<sup>64</sup> See David A. Fahrenthold & Juliet Eilperin, *GOP Win Dims Prospects for Climate Bill, but Obama Eyes Plan B Ahead of U.N. Talks*, WASH. POST, Nov. 21, 2010, at A5.

<sup>65</sup> See Michele Estrin Gilman, *The President as Scientist in Chief*, 45 WILLAMETTE L. REV. 565, 570-73 (2009); Nathan Alexander Sales & Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 U. ILL. L. REV. 1497, 1504.

<sup>66</sup> See Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324-01 (May 7, 2010) (codified at 40 C.F.R. pts. 85, 86, 600); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (codified at 40 C.F.R. pts. 51, 52, 70, 71); Robert B. McKinstry Jr., *The Clean Air Act: A Suitable Tool for Addressing the Challenges of Climate Change*, 41 ENVTL. L. REP. 10,301, at 10,302-03 (2011).

<sup>67</sup> Douglas A. Kysar & Benjamin Ewing, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L. REV. 350, 404-05 (2011).

<sup>68</sup> *Id.* at 354 (suggesting that common law tort claims can serve as “prods and pleas” that signal to other institutional actors who possess greater regulatory power the need to attend to and act on a problem).

## II. PUBLIC TRUST AND PUBLIC NUISANCE DOCTRINES: DIFFERENCES

Although the public trust doctrine and the public nuisance doctrine have similar roles in our primarily statutory legal system, differences in their scope, function, and legal bases have various implications for applying these doctrines to current and future environmental challenges.

A. *Scope*

Perhaps the most obvious difference between public trust and public nuisance doctrines is in their scope. Historically, the public trust doctrine concerned “property rights in rivers, the sea, and the seashore.”<sup>69</sup> The core principle behind the doctrine was that the activities tied to these resources — commerce, navigation, and fishing — were “so intrinsically important to every citizen” and “so particularly the gifts of nature’s bounty” that they merited special recognition and protection as public rights.<sup>70</sup> Thus, in *Illinois Central*, the Court deemed the Chicago harbor too essential to commerce to be privatized completely.<sup>71</sup> The geographic scope of the public trust doctrine has since expanded to encompass parks, wildlife, and public lands.<sup>72</sup> In addition, courts have applied the doctrine to advance a wider range of purposes, including recreation and ecological protection.<sup>73</sup> In the leading modern cases, courts nevertheless have continued to require that the resource in question be connected in some way to waters.<sup>74</sup> Holding that the public trust doctrine protects non-navigable tributaries to navigable waterways, the California Supreme Court declared in the *Mono Lake* litigation that “the core of

---

<sup>69</sup> Sax, *Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 475.

<sup>70</sup> *Id.* at 484; *see also* Klass, *supra* note 3, at 708; Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 647.

<sup>71</sup> Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452-55 (1892).

<sup>72</sup> *See* Klass, *supra* note 3, at 707-08; Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 640, 649-50.

<sup>73</sup> *E.g.*, Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709, 719 (Cal. 1983) (holding that public trust encompasses protection of recreational and ecological values); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (recognizing ecological function of tidelands); Just v. Marinette Cnty., 201 N.W.2d 761, 768 (Wis. 1972) (holding that public trust duty includes protection of wetlands for recreation and scenic purposes); *see also* Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 829-46 (2010) (discussing “increasing willingness of states to connect public trust principles to environmental conservation”).

<sup>74</sup> *See* Klass, *supra* note 3, at 712; Thompson, *supra* note 14, at 67.

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 the lands underlying those waters."<sup>75</sup> Insisting on such a connection provides a customary grounding for courts and reflects the special value to society of particular natural resources.<sup>76</sup> It also suggests that the optimal management of certain resources "requires a kind of blend of open access and exclusion rights."<sup>77</sup>

The courts' reluctance to expand the public trust doctrine far beyond waterways and tidal lands has not deterred commentators from calling for its broader application. Four decades ago, Joseph Sax suggested that application of the procedural and substantive protections developed in public trust cases may be "equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling on private lands."<sup>78</sup> Others have advocated an understanding of public trust resources that would embrace all natural resources, including the global atmosphere, soils, and forests.<sup>79</sup> One difficulty with adopting a broader understanding of the public trust doctrine is the lack of a readily defensible stopping point.<sup>80</sup> The public trust doctrine has the potential to reach — and to lead to restrictions on the behavior of — all parties that contribute collectively to an ecological problem, even if the causal link of any individual party to the problem is attenuated. This concern apparently has not been lost on the courts, which have generally rejected expansive interpretations of the doctrine.<sup>81</sup>

In contrast, the public nuisance doctrine is not subject to geographic constraints analogous to those traditionally associated with the public trust doctrine. Public nuisance encompasses pollution of land, air, and

---

<sup>75</sup> *Nat'l Audubon Soc'y*, 658 P.2d at 712.

<sup>76</sup> Thompson, *supra* note 14, at 68.

<sup>77</sup> Kearney & Merrill, *supra* note 53, at 928-29.

<sup>78</sup> Sax, *Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 556-57.

<sup>79</sup> See Wood, *supra* note 28, at 83-87.

<sup>80</sup> See Araiza, *supra* note 56, at 437 (underscoring Sax's acknowledgement that process-based rationale for public trust could also apply to consumer protection and legislation affecting the poor); Thompson, *supra* note 14, at 58.

<sup>81</sup> See, e.g., *Golden Feather Cmty. Assn. v. Thermalito Irrigation Dist.*, 209 Cal. App. 3d 1276, 1284-87 (Ct. App. 1989) (rejecting attempt to apply public trust to nonnavigable artificial body of water); *10 E. Realty, L.L.C. v. Inc. Vill. of Valley Stream*, 854 N.Y.S.2d 461, 464 (App. Div. 2008) (declining to apply public trust doctrine to municipally owned parking lot); *Evans v. City of Johnstown*, 410 N.Y.S.2d 199, 206-08 (App. Div. 1978) (refusing to apply public trust principles to atmosphere and to nonnavigable waterway).

water insofar as public interests are affected, as well as a wide range of interferences with public health and safety.<sup>82</sup> The primary substantive constraint on the application of the public nuisance doctrine is the requirement that there be interference with a public right. However, the concept of public right is somewhat ill-defined; the *Restatement (Second) of Torts* describes a public right as “one common to all members of the general public,” as opposed to an individual right against tortious action by others.<sup>83</sup> Attempting to distill the mind-boggling variety of situations in which courts have found a public nuisance, the Wisconsin Supreme Court has suggested that public nuisance involves interference “with the use of a public place or with the activities of an entire community.”<sup>84</sup> Given the breadth of conduct that might fall within the scope of public nuisance doctrine, it is not surprising that plaintiffs’ efforts to invoke the doctrine in mass products liability cases against handgun manufacturers,<sup>85</sup> lead paint manufacturers,<sup>86</sup> tobacco companies,<sup>87</sup> and the subprime mortgage industry<sup>88</sup> have fueled criticism of the doctrine as lacking meaningful boundaries.<sup>89</sup> Nonetheless, courts’ rejection of claims in many of these cases on issues such as causation and control of the instrumentality causing the alleged harm offers a forceful rebuttal to concerns that defendants could be subjected to inequitable obligations.<sup>90</sup>

Regardless of the merits of specific cases, the critical point for purposes of the present analysis is that courts have not hesitated to

---

<sup>82</sup> KEETON ET AL., *supra* note 39, § 90, at 643-45.

<sup>83</sup> RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (1979).

<sup>84</sup> Gifford, *Public Nuisance*, *supra* note 6, at 815 (quoting *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 646 N.W.2d 777, 788 (Wis. 2002)).

<sup>85</sup> *E.g.*, *Ileto v. Glock Inc.*, 349 F.3d 1191 (9th Cir. 2003); *City of Phila. v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536 (3d Cir. 2001); *City of Chi. v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004).

<sup>86</sup> *E.g.*, *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *Rhode Island v. Lead Indus. Ass’n*, 951 A.2d 428, 449 (R.I. 2008).

<sup>87</sup> See Donald G. Gifford, *Impersonating the Legislature: State Attorney General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 921-23 (2008) (discussing tobacco public nuisance litigation).

<sup>88</sup> *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 621 F. Supp. 2d 513, *passim* (N.D. Ohio 2009).

<sup>89</sup> See, *e.g.*, Gifford, *Public Nuisance*, *supra* note 6, at 834 (contending that public nuisance should not be a means of recovering damages from product manufacturers).

<sup>90</sup> Kysar & Ewing, *supra* note 67, at 418 (“The widespread failure of public nuisance claims in the handgun, lead paint, and subprime mortgage industry contexts suggests that courts have means readily available to manage nuisance doctrine from within.”).



apply public nuisance to a much broader range of environmental concerns than the public trust doctrine. Rooted in the state's police power, public nuisance provides a general common law option for addressing pollution, land use, and other environmental conflicts on a case-by-case basis. The public trust doctrine, in contrast, serves as more of a quasi-constitutional constraint on the state's trust management of a narrower subclass of resources.

### B. Function

The function of the public trust doctrine has varied over time. In U.S. law, the doctrine served initially as a bar to ownership of water-related resources by private interests.<sup>91</sup> In cases from the nineteenth century, for instance, courts rejected claims by riparian landowners to private fisheries in navigable waters.<sup>92</sup> The doctrine subsequently manifested itself as a restriction on the government's ability to manage or dispose of trust resources in a manner contrary to the public interest.<sup>93</sup> Thus, in *Illinois Central*, the doctrine functioned as an inherent limitation on the state's ability to grant lake-bed rights to a private party. At the time, the doctrine served primarily as a protective shield against the corrupt or short-sighted exercise of state authority.

More recent cases have recognized that the public trust doctrine also can be a source of government power.<sup>94</sup> Thus the government may invoke the public trust doctrine in litigation against private owners of trust resources in order to protect the public interest.<sup>95</sup> The public trust doctrine also can be a viable defense to claims by private landowners that government action has resulted in a taking of their property without just compensation.<sup>96</sup> And, critically, the public trust

---

<sup>91</sup> Thompson, *supra* note 14, at 50-51; see also Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 636-37.

<sup>92</sup> See *Arnold v. Mundy*, 6 N.J.L. 1, *passim* (N.J. 1821); *Carson v. Blazer*, 2 Binn. 475, *passim* (Pa. 1810).

<sup>93</sup> See Thompson, *supra* note 14, at 50-51; see also Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 637-38.

<sup>94</sup> Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 655.

<sup>95</sup> See *id.*, at 646; see, e.g., *People ex rel. Scott v. Chi. Park Dist.*, 360 N.E.2d 773, 775 (Ill. 1976) (action by attorney general for declaratory judgment that conveyance of submerged lands invalid); *Bos. Waterfront Dev't Corp. v. Commonwealth*, 393 N.E.2d 356, 365-67 (Mass. 1979) (holding in proceeding to confirm title to waterfront property that private ownership was subject to condition subsequent that property be used for the public purpose for which it was granted); *State v. Trudeau*, 408 N.W.2d 337, 343 (Wis. 2006) (action by state against condominium developers and local zoning officials).

<sup>96</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992); Michael

doctrine can even serve as a source of affirmative government obligations that the public may enforce.<sup>97</sup> In the Mono Lake litigation, for example, the California Supreme Court held that the state had not only the authority to supervise and reconsider water allocations, but also an “affirmative duty to take the public trust into account in the planning and allocation of water resources.”<sup>98</sup> Similarly, the Hawaii Supreme Court recently decided that the public trust doctrine obligated the state not only to include in water pollution discharge permits any measures needed to comply with state regulations, “but also to ensure that the prescribed measures are actually being implemented after a thorough assessment of the possible adverse impacts the development would have on the State’s natural resources.”<sup>99</sup> States ultimately retain some discretion in the exercise of such duties, of course. Nonetheless, this affirmative aspect of the public trust doctrine suggests an important role for public and judicial oversight in ensuring their proper discharge.<sup>100</sup>

Whereas the public trust doctrine has been deployed by, as well as against, the government, the public nuisance doctrine has functioned almost exclusively as a tool of the government to enjoin private conduct that interferes with public interests.<sup>101</sup> At common law, only public authorities could bring public nuisance actions, a reflection of the doctrine’s roots in criminal proceedings.<sup>102</sup> Today, private plaintiffs may bring public nuisance claims, but only if they have suffered a

---

Blumm, Lucas’ *Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 341-44 (2005); see, e.g., W.J.F. Realty Corp. v. State, 672 N.Y.S.2d 1007, 1008, 1012 (App. Div. 1998); Just v. Marinette Cnty., 201 N.W.2d 761, 768-69 (Wis. 1972).

<sup>97</sup> See Nat’l Audubon Soc’y v. Superior Court, 658 P.2d 709, 716 n.11 (Cal. 1983); Ctr. for Biological Diversity, Inc. v. FPL Group, Inc., 83 Cal. Rptr. 3d 588, 599-601 (Ct. App. 2008).

<sup>98</sup> Nat’l Audubon Soc’y, 658 P.2d at 728; see also Craig, *supra* note 73, at 829 (contending that public trust “limit[s] the government’s ability to allow further degradation of the trust resources”).

<sup>99</sup> Kelly v. 1250 Oceanside Partners, 140 P.3d 985, 1011 (Haw. 2006) (discussing obligations of public trust, as found in state constitution); see also *In re* Water Use Permit Applications, 9 P.3d 409, 455 (Haw. 2000) (holding that public trust compels state to consider cumulative impacts of water diversions, implement reasonable measures to mitigate such impacts, and follow open public processes in doing so).

<sup>100</sup> See Kelly, 140 P.3d at 1010-11 (rejecting state’s claim of absolute discretion in exercising public trust duties); Ctr. for Biological Diversity, 83 Cal. Rptr. 3d at 599; see also United Plainsmen Ass’n v. N.D. State Water Conservation Comm’n, 247 N.W.2d 457, 460-61 (N.D. 1976) (holding that public trust doctrine constrains discretionary authority of state officials to allocate vital state resources).

<sup>101</sup> See KEETON ET AL., *supra* note 39, § 90, at 643.

<sup>102</sup> See Gifford, *Public Nuisance*, *supra* note 6, at 814.

“special injury” — an injury different in kind from the public’s general injury.<sup>103</sup> In most instances, public nuisance ultimately rests on the willingness of authorities, particularly attorneys general and prosecutors, to exercise their police powers.

The difference in how the two doctrines can be used is an important one. Public nuisance presupposes trust in executive branch officials to exercise the police power appropriately to protect public rights, subject to judicial oversight. It presumes that officials will bring public nuisance actions when circumstances warrant. It further presumes that they will not wield their broad authority in such a way as to repress individual freedom.<sup>104</sup> Within this construct, the public’s role is limited. Individual citizens may not compel the government to enforce against public nuisances, although the public certainly can and does bring nuisances to the government’s attention. Absent special injury or statutory authorization to serve as private attorneys general, members of the public may not assert public nuisance claims on their own.<sup>105</sup>

Public trust, in contrast, recognizes the role of a wider range of actors in protecting public trust resources. The legislative and executive branches have not only the authority to manage trust resources for the public good, but also the affirmative duty to do so. Should they abuse that authority or neglect that duty, the public may step in to enforce that duty through the courts. This ability to compel government action to protect trust resources in the face of inaction or even resistance by the political branches reflects a modern understanding of the potentially important role of the public and the courts in prompting democratic conversation and action.<sup>106</sup>

### C. Legal Foundation

Finally, a comparison of the legal foundations of the public trust doctrine and public nuisance doctrine suggests distinct legal statuses

---

<sup>103</sup> See RESTATEMENT (SECOND) OF TORTS § 821C (1979); DOBBS, *supra* note 6, at 1335; KEETON ET AL., *supra* note 39, § 90, at 646; Gifford, *Public Nuisance*, *supra* note 6, at 814. See generally Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGY L.Q.* 755 (2001) (suggesting an “actual community injury” standard to revitalize public nuisance as a broad remedy).

<sup>104</sup> Cf. Gifford, *Public Nuisance*, *supra* note 6, at 777-78 (noting that “[t]he open-ended and amorphous nature of public nuisance . . . has facilitated its use as a weapon of public officials against the exercise of civil liberties and other conduct found to be distasteful”).

<sup>105</sup> DOBBS, *supra* note 6, § 467, at 1335.

<sup>106</sup> Cf. Kysar & Ewing, *supra* note 67, at 353-54.

and, thus, differing abilities to withstand efforts to displace them. The precise legal basis for the public trust doctrine is murky. Its roots harken back to Roman law, which recognized communal rights in certain natural resources.<sup>107</sup> The doctrine appeared in English common law, though it was understood primarily as a right controlled by the sovereign, subject to the navigational rights of the public.<sup>108</sup> In early U.S. law, the public trust concept reflected both a sovereign interest, held by the federal and state governments, as well as a communal interest.<sup>109</sup> As the U.S. Supreme Court has repeatedly observed, the scope and content of the public trust doctrine is primarily a matter of state law.<sup>110</sup> In some states, the doctrine has been incorporated explicitly into the state constitution or state statutes.<sup>111</sup> In the absence of such explicit provisions, the public trust doctrine has been recognized as an implicit state limitation on legislative authority to relinquish essential sovereign powers.<sup>112</sup>

Notwithstanding the primarily state law character of the public trust doctrine, the *Illinois Central* opinion hints at a federal common law or even quasi-constitutional basis for the doctrine as well.<sup>113</sup> The holding of that case — that the state legislature could undo its earlier conveyance of lake-bed without committing a taking — rested on the premise that the legislature simply lacked the authority to make such a conveyance.<sup>114</sup> As the Supreme Court stated: “The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can

---

<sup>107</sup> See Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 633-34. *But cf.* Huffman, *Speaking of Inconvenient Truths*, *supra* note 46, at 12-19 (contending that Roman law recognized the sea and seashore as common to all in the sense that they had not been appropriated, but that it did not guarantee an inalienable public right or use or access).

<sup>108</sup> See Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 635; Huffman, *Speaking of Inconvenient Truths*, *supra* note 46, at 26.

<sup>109</sup> See Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 636.

<sup>110</sup> See, e.g., *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988); see also *Appleby v. City of New York*, 271 U.S. 364, 395 (1926).

<sup>111</sup> See *Klass*, *supra* note 3, at 714-27.

<sup>112</sup> Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from Illinois Central Railroad*, 33 ARIZ. ST. L.J. 849, 854, 872-74 (2001); see also Araiza, *supra* note 56, at 438 (contending that “state constitutional provisions dealing with the environment can furnish the substantive commitment to resource conservation that, in turn, justifies judicial application of the public trust doctrine”).

<sup>113</sup> See Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 640 (suggesting that “the tone of [*Illinois Central*] nearly strikes constitutional chords”).

<sup>114</sup> *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 452-55 (1892).

abdicate its police powers in the administration of government and the preservation of the peace . . . .”<sup>115</sup> The Court did not cite specific authority for this statement, but the opinion’s broad language and the Court’s discussion of cases from various jurisdictions other than Illinois arguably imply a federal basis.<sup>116</sup> Using this language as a point of departure, various scholars have suggested several potential theoretical foundations for the public trust doctrine rooted in federal law. These theories, which have invoked the Commerce Clause,<sup>117</sup> the equal footing doctrine,<sup>118</sup> and grants of statehood,<sup>119</sup> support the notion that the public trust doctrine incorporates a “federal floor” that constrains a state’s management and disposition of public trust resources, with the possibility of further constraints as a matter of state law.<sup>120</sup> Regardless of its precise basis, the public trust doctrine functions in a quasi-constitutional way: it establishes overarching fiduciary principles regarding trust resources that may not be overridden by legislative or executive action.<sup>121</sup>

In a manner akin to the public trust doctrine, the public nuisance doctrine has been described as “vaguely defined [and] poorly understood,” and courts differ regarding the precise elements required

---

<sup>115</sup> *Id.* at 453.

<sup>116</sup> See Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 639 & n.37. But see Grant, *supra* note 112, at 864-66 (contending that Court’s discussion of cases from various jurisdictions reflected an attempt to discern Illinois law).

<sup>117</sup> See Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 456, 458 (1989) (suggesting that public trust is “an implied component of the commerce clause”).

<sup>118</sup> See Crystal S. Chase, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 113, 140-42 (2010).

<sup>119</sup> See Wilkinson, *supra* note 117, at 456, 458 (characterizing the public trust doctrine as “the product of [implied] congressional preemption resulting from a comprehensive legislative program [in the statehood acts] to keep the major watercourses open and free”).

<sup>120</sup> See Chase, *supra* note 118, at 150 & n.230. Joseph Sax has shied away from characterizing public trust as constitutional in nature. See Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 UC DAVIS L. REV. 185, 193-94 (1980) [hereinafter *Liberating the Public Trust Doctrine*]; Sax, *Public Trust Doctrine in Natural Resource Law*, *supra* note 1, at 560. Nonetheless, his understanding of public trust doctrine as a judicial restraint on undemocratic action by the political branches and as a means of “preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title” reflect a view that the doctrine is something more than ordinary state common law. Sax, *Liberating the Public Trust Doctrine*, *supra*, at 188.

<sup>121</sup> See generally Robert G. Natelson, *The Constitution and the Public Trust*, 52 BUFF. L. REV. 1077 (2004) (contending that the Founders intended to impose fiduciary standards on the federal government).

for liability.<sup>122</sup> But in contrast to the public trust doctrine, the bases for the public nuisance doctrine are not in dispute. The public nuisance doctrine is firmly rooted in the common law and has long been recognized as an element of both federal law and state law.<sup>123</sup> In an effort to give more definite form to the doctrine, many states now define public nuisance by statute.<sup>124</sup> In addition, courts in some instances have held that the enactment of comprehensive regulatory schemes displaced common law nuisance claims.<sup>125</sup> In this regard, public nuisance is no different than any other common law cause of action. The vulnerability of public nuisance to displacement does suggest, however, that the doctrine may be a less potent weapon than the public trust doctrine. Unlike the public nuisance doctrine, the quasi-constitutional doctrine of public trust may not be displaced by statute, nor may it be preempted by federal law.

#### CONCLUSION

Both the public trust and public nuisance doctrines can play important roles in addressing current and future environmental challenges, particularly in cases of regulatory inadequacies or failure. Such is the case even though the relief available through these doctrines in their common law forms is often less than comprehensive. In applying these doctrines incrementally and avoiding dramatic distortions of legal requirements that might upset settled expectations, courts have respected the rule of law. Indeed, adjudication of these common law claims is useful even where individual plaintiffs are unsuccessful, as these cases can serve as a “vital source of information-gathering and intra-governmental feedback.”<sup>126</sup> The very process of

---

<sup>122</sup> Gifford, *Public Nuisance*, *supra* note 6, at 774-75, 778-86; Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison with Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 359 (1990).

<sup>123</sup> *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907); HOLLY DOREMUS ET AL., ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS 57-59 (5th ed. 2008).

<sup>124</sup> Gifford, *Public Nuisance*, *supra* note 6, at 775.

<sup>125</sup> See, e.g., *Int'l Paper v. Ouellette*, 479 U.S. 481, 497 (1987) (holding that the Clean Water Act precludes application of Vermont nuisance law against pollution source located in New York); *Milwaukee v. Illinois*, 451 U.S. 304, 317-26 (1981) (holding that the Clean Water Act preempts federal common law nuisance claims for failure to adequately treat sewage). Most recently, the Supreme Court determined that incipient efforts by the Environmental Protection Agency to regulate greenhouse gas emissions under the Clean Air Act are sufficient to displace federal common law nuisance actions seeking to compel reductions in those emissions. *Am. Elec. & Power v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).

<sup>126</sup> Kysar & Ewing, *supra* note 67, at 375.

deciding such claims on the merits can identify important issues and raise their public profile, provide public articulations regarding the matters and values at stake, and highlight shortcomings in applicable legal regimes.<sup>127</sup>

The public trust doctrine is a potentially more powerful weapon than the public nuisance doctrine because it is quasi-constitutional, not subject to displacement, and more open to assertion by members of the public. Moreover, the public trust doctrine more fully captures the fundamental idea that government has an obligation to protect the environment for the benefit of the public, now and into the future. The public trust doctrine is, nonetheless, more constrained by its common law origins, and it is likely that courts will expand its scope only gradually from its common law core of tidal waterways and tidal lands, if at all.

The public trust and public nuisance doctrines have many similarities. Both are adaptable common law doctrines that protect communal interests against individual abuse and redress failures in the political process. Given these commonalities, Richard Lazarus suggests that reliance on the public trust doctrine is “unnecessary.”<sup>128</sup> Nuisance law, in Lazarus’s view, can better achieve communal objectives than the public trust doctrine because it has rejected the rigid property-based rules that underlie public trust in favor of a more flexible approach that balances individual and societal concerns.<sup>129</sup> Such arguments give insufficient weight to the quasi-constitutional nature of the trust and to the role that citizens can have in enforcing trust principles. Ultimately, we need not choose between the public trust and public nuisance doctrines: the public trust doctrine sets out limits to private property rights (at least with respect to trust resources), whereas the public nuisance doctrine sets out limits in tort to freedom of action. As long as property law and tort law continue to serve as organizing principles for society, both doctrines will be critical in defining and reminding the government of its role as a fiduciary and guarantor for the interests of the public.<sup>130</sup>

---

<sup>127</sup> *Id.* at 358-59.

<sup>128</sup> Lazarus, *Questioning the Public Trust Doctrine*, *supra* note 5, at 664.

<sup>129</sup> *Id.* at 663-64.

<sup>130</sup> David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 UC DAVIS L. REV. 619, 698-700 (1994).