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# The Public Trust Doctrine as an Interpretive Canon.

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# The Public Trust Doctrine as an Interpretive Canon

William D. Araiza\*

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## INTRODUCTION

The public trust doctrine is a paradox. The doctrine is of centuries-old vintage,<sup>1</sup> and its obligations have been described as among the most fundamental imposed on government.<sup>2</sup> Commentators explaining the doctrine in modern terms have noted that it also responds to unassailable understandings of how democratic politics works in a liberal democracy.<sup>3</sup> Moreover, the doctrine strikes a deeply resonant chord with Americans, given our national narrative about the common heritage of our nation's natural beauty and abundance.<sup>4</sup> Nor is interest in the doctrine an artifact of the nineteenth century, or even the early, heady days of the environmental movement a generation ago; in May 2011, the press accorded wide coverage<sup>5</sup> to an ambitious

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<sup>1</sup> The doctrine is generally traced back to the laws of the Byzantine emperor Justinian. See, e.g., Charles Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 429 n.18 (1989) (citing Byzantine law recognizing "public values in water"). For a view that the doctrine is of considerably more recent, though still centuries-old, vintage, see Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 728 (1986).

<sup>2</sup> See, e.g., Karl Coplan, *Public Trust Limits on Greenhouse Gas Trading Schemes: A Sustainable Middle Ground?*, 35 COLUM. J. ENVTL. L. 287, 288 (2009) (asserting limitations on government action based on public trust doctrine "are inherent in the nature of sovereignty"); Mary Christina Wood, *You Can't Negotiate With a Beetle: Environmental Law for a New Ecological Age*, 50 NAT. RES. J. 167, 204 (2010) (describing Supreme Court's reliance on public trust doctrine in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892) as grounded in notions of inalienable sovereign power).

<sup>3</sup> The classic statement of the democratic flaws sought to be corrected by the doctrine, and indeed, the classic defense of the doctrine more generally, is Joseph Sax's 1970 article. See Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 495-496 (1970). To state, as this Article does, that the doctrine "responds" to the systematic under-representation of environmental interests in government decision-making is not necessarily to agree that that problem still exists. See, e.g., Richard Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 658-91 (1986) [hereinafter Lazarus, *Changing Conceptions*] (arguing that changes in administrative law since Sax's article have obviated the under-representation concern); see also *infra* Part IV.C.2 (considering Lazarus's critique).

<sup>4</sup> See, e.g., Lazarus, *Changing Conceptions*, *supra* note 3, at 701 (noting doctrine's "mystical and romantic appeal"); Wilkinson, *supra* note 1, at 433 n.37 (1989) (describing inspiration nineteenth century American writers and artists drew from wilderness); WOODY GUTHRIE, *THIS LAND IS YOUR LAND, ON THIS LAND IS YOUR LAND: THE ASCH RECORDINGS, VOL. 1* (Smithsonian Folkways 1997) (describing "golden valleys" and "wheat fields waving").

<sup>5</sup> See Felicity Barringer, *Suit Accuses U.S. Government of Failing to Protect Earth for Generations Unborn*, N.Y. TIMES (May 4, 2011), <http://www.nytimes.com/2011/05/05/science/earth/05climate.html>.

lawsuit filed by climate change activists relying on the public trust doctrine to request wide-ranging limits on climate-modifying activities.<sup>6</sup>

And yet the doctrine raises troubling questions. Its legal source is murky and confined to a subset of resources which modern scholars deem as arbitrarily limited in scope.<sup>7</sup> But when scholars argue in favor of broadening the doctrine's limitation beyond its traditional focus on aquatic resources, critics can readily criticize them for embracing a judicial role for which courts have neither the legal authority nor the expertise,<sup>8</sup> and for seeking a doctrinal expansion that neither legal precedent nor sound policy supports.<sup>9</sup>

Ironically, the doctrine has also suffered from its success. In states where arguments have convinced legislators and state constitution drafters to include protections for public trust assets, the question has arisen whether the doctrine plays any independent role.<sup>10</sup> Attempts to find such a role collide with arguments that positive law enactments either codified the public trust doctrine under common law, and thus superseded it, or that they reflect the same concerns as the doctrine, thus obviating any need for its independent existence. On the other hand, where state constitutions encompass the doctrine, they also arguably incorporate the doctrine's evolution. Under this latter dynamic, the state constitutions have not so much superseded the public trust doctrine as incorporated it, evolution and all, thus justifying the doctrine's continued operation under the authority of the positive law provision. These conflicting understandings illustrate

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<sup>6</sup> Complaint for Declaratory and Injunctive Relief at 15-16, *Alec L. v. Jackson*, No. CV-112203 (N.D. Cal. filed May 4, 2011), 2011 WL 1675203, available at <http://www.ourchildrenstrust.org/sites/default/files/FEDERAL%20FILE%20STAMPED%20COMPLAINT.pdf>. This lawsuit furnished the template for lawsuits filed in state courts throughout the nation. See *Lawsuits, OUR CHILDRENS' TRUST*, <http://www.ourchildrenstrust.org/legal-action/lawsuits> (last visited June 1, 2011) (providing links to lawsuits filed across nation).

<sup>7</sup> See, e.g., Wood, *supra* note 2, at 205 (describing geographic limitations of current doctrine as "superficial"). But see Barton H. Thompson, *The Public Trust Doctrine: A Conservative Reconstruction and Defense*, 15 *SOUTHEASTERN ENVTL. L.J.* 47, 67-68 (2006) (arguing that doctrine's limitation to water-based resources is not arbitrary).

<sup>8</sup> See Lazarus, *Changing Conceptions*, *supra* note 3, at 712-13.

<sup>9</sup> See, e.g., Thompson, *supra* note 7, at 67-68 (noting precedential and policy significance of doctrine's confinement to aquatic resources).

<sup>10</sup> For a recent attempt to find a role for the doctrine as a component of an overall environmental protection structure including positive law enactments, see generally Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 *NOTRE DAME L. REV.* 699, 749-750 (2006).

the difficult question of how codification of natural resource protection affects the continued vitality of the common law principle upon which that protection was originally grounded.<sup>11</sup>

These tensions arise because the public trust doctrine both reflects fundamental instincts about the relationship of government to the nation's natural resource heritage, and also suffers from an incompletely theorized doctrinal foundation and anxiety about judicial policy-making on technically complex and socially important issues. This state of affairs is only exacerbated when one considers advocates' and scholars' suggestions to increase the doctrine's reach.<sup>12</sup>

This Article considers whether these antagonistic characteristics of the doctrine can be partially harmonized by envisioning an expanded version of the doctrine as a canon of construction rather than a freestanding, legally binding, legal principle. Under this proposal, the protected status of public trust values, and government obligation to protect those values, would take the form of a background principle against which positive legislation and administrative actions are construed and reviewed.

As a background principle, this proposed version of the doctrine would lack independent legal effect. Moreover, its character as a background principle means that its influence on actual cases would be limited by the underlying law for which it acts as an interpretive aid. Thus, its influence would be filtered through the types of issues courts are otherwise authorized to decide at the behest of plaintiffs otherwise authorized to sue,<sup>13</sup> the law courts are otherwise mandated to apply, and the types of relief courts are otherwise authorized to provide. Rather than serving as a roving commission to overturn any natural resource allocation decision that a would-be plaintiff may dislike, this version of the doctrine would limit judicial action to those cases where binding law already authorizes such action.

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<sup>11</sup> Compare Klass, *supra* note 10 (arguing for role for public trust doctrine in conjunction with positive law environmental provisions), with Lazarus, *Changing Conceptions*, *supra* note 3, at 676-79 (arguing that increased positive law protection for environmental resources renders the doctrine obsolete).

<sup>12</sup> See, e.g., 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 (2009) (calling for public trust doctrine to be expanded to system of protection for natural resources against threats of climate change and ecological collapse).

<sup>13</sup> Cf. Lazarus, *Changing Conceptions*, *supra* note 3, at 658-60 (arguing that expansions of federal standing law have contributed to obsolescing of the public trust doctrine).

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So understood, this version of the public trust doctrine goes some way toward harmonizing the intuitive attractiveness of a public trust principle with critics' concerns about judicial authority and competence in overseeing natural resource decision-making. This Article seeks to demonstrate that understanding the doctrine as a canon of construction constitutes more than an unprincipled, split-the-difference compromise between a full-blown, legally binding rule and no rule at all. Instead, it argues that this understanding accurately reflects the force of the doctrine as a normatively attractive, deeply rooted, but ambiguously grounded legal principle that raises legitimate concerns about the role of the judiciary. In particular, the doctrine's proposed character as a canon attempts to mitigate those latter concerns by tying its application to situations where firmly grounded law authorizes judicial action.

This Article has modest aspirations. First, it does not call for the extension to dry land resources of a full-blown, substantive version of the public trust doctrine. Rather, it confines itself to proposing that courts interpret positive law enactments against the backdrop of a fundamental principle reflecting the goals of the public trust doctrine.

Second, this Article calls for such an interpretive canon only in the context of judicial interpretation of positive law enactments, such as statutes, administrative regulations and interpretations of those regulations. There may also be good reasons for reading a public trust principle into a variety of common law rules; however, the concept of an interpretive canon fits uneasily with common law adjudication. Consistent with the Article's incremental approach, it leaves for another day the question of the extent to which common law rules should be modified to include consideration of public trust values.

Third, this Article does not purport to resolve some of the difficulties environmental advocates face when calling for an expanded use of the public trust doctrine. For example, critics of an expanded use of the doctrine cite its original emphasis on commercial activity to argue that using the doctrine in pursuit of resource conservation distorts its original focus. By proposing that courts adopt an interpretive canon based on the modern public trust doctrine, this Article avoids ultimate questions about what interests the doctrine should protect; for example, whether the doctrine should protect commercial uses or evolve away from such protection. Instead, because the canon is parasitic on the extant doctrine, it takes the scope of that extant doctrine as a given. Whether that doctrine should evolve, and if so, how, is beyond the scope of this Article.

As a final preliminary point, this Article does not propose "downgrading" the extant, water-based public trust doctrine to the

status of an interpretive aid. Much of the justification for suggesting that we understand the doctrine as a canon of construction rests on the lack of a steady legal foundation for an “amphibian” public trust doctrine. Whatever one might say about the proposal’s ability to resolve that problem, it is unquestionable that the traditional, aquatic doctrine enjoys a long-recognized legal pedigree.<sup>14</sup> This Article addresses only the possibility of extending that doctrine onto dry land<sup>15</sup> in the more limited form of an interpretive canon.

This Article proceeds in five parts. Part I briefly examines the foundations of the public trust doctrine, demonstrating that the doctrine has an ambiguous legal foundation. Part II explains that the ambiguity of the doctrine’s foundation makes it a good candidate for vindication in the form of a canon. It examines an analogy from constitutional law — the nondelegation doctrine — that features similar characteristics and has been vindicated as an analogous canon. Part III lays out the contours and operation of a public trust canon. It explains the scope of the proposed canon and offers some preliminary thoughts about its implementation. Part IV considers possible objections; based on those objections, it discerns and considers three criteria that the proposed canon must satisfy to gain acceptance. Finally, Part V considers the ultimate question: does the proposed canon promote the same values as the underlying doctrine? Answering that question requires a return to Part III’s consideration of what the public trust doctrine really means. Only by understanding what the underlying doctrine means can this Article ultimately conclude that a canon is an appropriate way to instantiate the doctrine’s basic principles in a judicially workable fashion.

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<sup>14</sup> See *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 435 (1892).

<sup>15</sup> Even though the traditional doctrine was merely limited to aquatic *resources*, but also to particular *uses* of those resources — fishing, navigation and commerce — the expansion of uses protected by the doctrine has become well recognized by courts. See, e.g., *Wilkinson*, *supra* note 1, at 465 (“[C]ases have extended the trust beyond the traditional purposes of commerce, navigation, and fishing, with the most common ‘new’ purposes being various forms of recreation.”). Moreover, courts have expanded the scope of the water-based resources amenable to the trust beyond those suitable for navigation. See, e.g., *id.* at 465 (“[S]ome states have extended the coverage of the trust beyond those watercourses navigable for title.”). Thus, when this Article refers to an “extension” or “expansion” of the public trust doctrine, it intends to refer only to its extension or expansion to protect dry-land resources and uses. See *infra* text accompanying note 92 (explaining how doubly attenuated nature of preservation (rather than access) rights to non-water-based resources renders that expansion of doctrine a more problematic case for extension of legally binding version of rule).



## I. THE UNSETTLED FOUNDATIONS OF THE PUBLIC TRUST DOCTRINE

The public trust doctrine's legal source remains unsettled. In addition to constituting a theoretical problem in itself, this uncertainty carries with it implications for the doctrine's scope and legitimacy.

As scholars have noted, the seminal cases establishing the doctrine in the United States do not clearly explain its foundations.<sup>16</sup> By the mid-nineteenth century, it was established that the original thirteen states succeeded to the crown's ownership of submerged lands under tidal waters.<sup>17</sup> Soon thereafter the Supreme Court held that the same rule applied to newly admitted states via the "equal footing" doctrine.<sup>18</sup>

With the ownership rule now applied to newly admitted states, the question then became the state's ability to alienate its ownership or control of those lands. While other courts had addressed this question since the first half of the nineteenth century,<sup>19</sup> it was not until the landmark 1892 case *Illinois Central Railroad v. Illinois* that the Supreme Court explicitly held that states were limited in their ability to alienate such lands.<sup>20</sup> *Illinois Central* is notoriously murky as to the foundations of the rule that prevented Illinois from conveying a large part of the Chicago lakefront to a railroad corporation. That decision has been described as resting on state common law,<sup>21</sup> federal common law,<sup>22</sup> the federal navigational servitude,<sup>23</sup> and an inchoate concept of inalienable sovereignty.<sup>24</sup>

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<sup>16</sup> See, e.g., Wilkinson, *supra* note 1, at 453 ("Today, . . . after all of the words on the subject, two foundational issues concerning the traditional doctrine have still not been decided. The first matter is the source of the trust—where does it come from? The second is the scope and definition of the trust—what law defines the trust and what is the content of the trust?").

<sup>17</sup> See *Martin v. Waddell*, 41 U.S. 367, 410 (1842). The idea of royal ownership can be traced to the New Jersey case of *Arnold v. Mundy*, 6 N.J.L. 1 (1821). The *Martin* Court found *Arnold's* reasoning persuasive. See 41 U.S. at 418.

<sup>18</sup> See *Pollard v. Hagan*, 44 U.S. 212, 229 (1845). For a criticism of the equal footing doctrine, see Wilkinson, *supra* note 1, at 445-47. Despite his critique, Wilkinson concedes that the equal footing doctrine is well-settled law. See *id.* at 448. For a general discussion of the equal footing doctrine, see Steven Anderson, *Idaho v. United States: Taking a Wrong Turn in the Jurisprudence of the Equal Footing Doctrine*, 38 IDAHO L. REV. 667, 670-74 (2002).

<sup>19</sup> See *supra* note 17 (citing cases).

<sup>20</sup> *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 452-53 (1892).

<sup>21</sup> *Appelby v. City of New York*, 271 U.S. 364 (1926).

<sup>22</sup> See, e.g., 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, 116 (2010) (concluding that "federal common law provides the strongest explanation" for the public trust doctrine).

The bare fact that *Illinois Central* has been described in so many disparate ways is troubling in itself, because it suggests a fundamental lack of consensus over the doctrine's basis, and thus, its source of legitimacy. As a more practical matter, the confusion about the doctrine's foundations makes it far more difficult — if not impossible — to reach stable, satisfactory conclusions about the precise role of the doctrine as a limit on government decision-making. These legitimacy and implementation issues present serious problems for those advocating its expansion. The doctrine is already subject to criticism for its anti-majoritarian cast, threat to private property, and alleged license to judges to make ad hoc judgments about resource conservation.<sup>25</sup> These criticisms are even more salient when the foundations for that authority are largely opaque.

Scholars struggle to provide a convincing argument about the doctrine's foundations. If the doctrine, at least as expressed in *Illinois Central*, is based on general federal common law, then there is good reason to wonder if it should remain viable after *Erie Railroad v. Tompkins*<sup>26</sup> rejected the concept of federal common law.<sup>27</sup> If the doctrine is based on some broader federal interest, such as the federal navigational servitude, then presumably it exists as a matter of federal law. Yet aside from the fact that the Supreme Court itself has abjured it,<sup>28</sup> the federal-law understanding is starkly inconsistent with state courts' uneven acceptance of the doctrine.

A state law foundation for the doctrine is equally perplexing. If the doctrine is based on state law, then one must investigate the state law source of that rule. A foundation in state common law raises the

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<sup>23</sup> See, e.g., George Smith & Michael Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307, 312-14 (2006) ("From this rich history regarding governmental control of the waterways, the public trust doctrine officially emerged as an instrument of federal common law to preserve the public's interest in free navigation and fishing."); see also Wilkinson, *supra* note 1, at 458-59 (noting relationship between federal navigational servitude and federal constitution).

<sup>24</sup> See, e.g., Wood, *supra* note 2, at 203 (explaining that commentators have discussed the Supreme Court's public trust jurisprudence as based in a concept of inalienable sovereignty).

<sup>25</sup> See generally Lazarus, *Changing Conceptions*, *supra* note 3 (illustrating a classic statement of this critique).

<sup>26</sup> 304 U.S. 64 (1938).

<sup>27</sup> See, e.g., Wilkinson, *supra* note 1, at 455 (noting this criticism).

<sup>28</sup> See *Appelby v. City of New York*, 271 U.S. 364, 394 (1926) (describing *Illinois Central* as based on Illinois law). See generally Chase, *supra* note 22 (arguing that public trust doctrine should be understood as resting on a species of federal common law).

problem of why courts sometimes view the doctrine as trumping legislation, given the principle that legislation can supersede the common law.<sup>29</sup> Yet a state constitutional basis for the doctrine is also troubling because it raises the question of how such an unwritten constitutional doctrine interacts with more explicit state constitutional protections for the environment. Do those more explicit protections supersede the unwritten protections the doctrine provides? Conversely, if the doctrine exists as a matter of unwritten state constitutional law alongside such positive enactments, then what would be the effect (indeed, what would be the point) of enacting the more explicit provisions? Finally, if the doctrine is constitutional, yet unwritten, how did it appear in some state constitutions but not others; and how did it morph to account for the different environmental situations in the various states?<sup>30</sup> None of these objections to the state constitutional foundation of the doctrine is fatal; indeed, I have suggested in earlier writing that state constitutions may provide the most appropriate home for public trust concepts.<sup>31</sup> Nevertheless, these objections raise difficult questions about the doctrine's interaction with explicit state constitutional provisions.

Finally, one might argue that the doctrine is fundamentally based on some inherent attribute of sovereignty. On this theory, the doctrine reflects the idea that public trust assets are such inherent possessions of the citizenry that the very nature of the people as sovereign forbids those assets' alienation.<sup>32</sup> This is, at the very least, an aggressive reading of the doctrine, placing it not only above day-to-day legislation, but also presumably above the ability of the people of a state to provide for the disposition of such assets in the state constitution itself. In a positivist age, such a natural law-type understanding of our constitutional order is jarring.<sup>33</sup>

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<sup>29</sup> See, e.g., *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (Ariz. 1999) (striking down Arizona legislation that attempted to eliminate the public trust doctrine from consideration in water rights adjudication in state).

<sup>30</sup> See, e.g., Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 *ECOLOGY L.Q.* 53, 56 (2010) (noting differences between public trust doctrines in western states and those in eastern states).

<sup>31</sup> 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, 439-52 (1997).

<sup>32</sup> See, e.g., *Complaint for Declaratory and Injunctive Relief* ¶ 131, *Alec L. v. Jackson*, No. CV-112203 (N.D. Cal. filed May 4, 2011), 2011 WL 1675203, available at <http://www.ourchildrenstrust.org/sites/default/files/FEDERAL%20FILE%20STAMPED%20COMPLAINT.pdf>. (making this argument as part of plaintiff's complaint).

<sup>33</sup> Cf. *Strauss v. Horton*, 46 Cal. 4th 364, 465-70 (2010) (rejecting argument that

These problematic foundations mean that we must think carefully before expanding the public trust doctrine. One possible approach is to conceptualize the doctrine as something less than a fully legally binding principle, in particular as an interpretive canon. The next Part considers this intuition — that a canon can legitimately vindicate an insecurely grounded legal principle.

## II. THE PUBLIC TRUST DOCTRINE AS A CANON OF CONSTRUCTION: THE PRELIMINARY ARGUMENT

This Article considers the possibility of understanding the public trust doctrine, at least in part, as a canon of construction. Full consideration of this argument requires beginning with an explanation of the type of canon proposed here.

Interpretive canons are well known in law. Such canons — for example, that statutes in derogation of the common law are narrowly construed — have long been a standard tool for courts engaged in statutory interpretation.<sup>34</sup> Still, canons' usefulness is clearly limited. Most notably, half a century ago Karl Llewellyn famously demonstrated their lack of determinate meaning when he highlighted pairs of canons that directly contradicted each other.<sup>35</sup> Similarly, recent studies suggest that judges may use canons to reach their preferred outcome rather than as true aids to the interpretive task.<sup>36</sup> For his part, Justice Scalia has also expressed doubts about canons, on both judicial legitimacy<sup>37</sup> and indeterminacy grounds.<sup>38</sup> Nevertheless, courts continue to employ canons as useful interpretive tools, even if not decisive ones.<sup>39</sup>

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“inalienable” rights trump an otherwise proper amendment to state constitution).

<sup>34</sup> See, e.g., Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 344 (2010) (“Canons are integral to the process of interpretation. They have been used since antiquity, and their general contours have been remarkably stable over time.”).

<sup>35</sup> See generally Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950) (noting several juxtaposed canons).

<sup>36</sup> See generally James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) (studying six hundred Supreme Court workplace law cases from 1969–2003 and concluding that canons were used by justices to support statutory interpretations consistent with their pre-existing preferences).

<sup>37</sup> See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17–18 (1997).

<sup>38</sup> See *id.* at 25–27, 29.

<sup>39</sup> See Scott, *supra* note 34, at 345 (noting increased use of interpretive canons in

This Article considers whether the foundational nature of the principle underlying the public trust doctrine justifies considering that principle as a background principle, or canon, which influences how a court understands more firmly grounded law. The argument is that the principle underlying the public trust doctrine — that “social” uses of natural resources generate benefits that merit protection<sup>40</sup> — is so important that it warrants consideration when courts construe laws or review government actions that affect those uses. As such, the public trust principle constitutes a background principle, or canon, against which those laws should be construed.

A. *The Ambiguous Legal Foundation for the Public Trust Doctrine*

Of course, if the principle underlying the public trust doctrine is so important, the obvious question is why it does not operate as a freestanding legal rule rather than a canon. And indeed it does operate as a freestanding legal rule, at least as applied to particular uses of certain resources, i.e., fishing, commerce, and navigation uses of water resources. As noted in Part I, this limited version of the rule is well established in American law, even if its precise grounding is unclear. Moreover, since Joseph Sax’s path-breaking 1970 article,<sup>41</sup> courts, often following commentators’ suggestions, have expanded the doctrine’s scope to protect more uses and more resources.<sup>42</sup> As a result, scholars today can point to a large number of states with vibrant public trust doctrines, some of which extend significantly beyond the scope of the traditional doctrine.<sup>43</sup>

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Supreme Court majority opinions over last decade).

<sup>40</sup> See text accompanying *infra* notes 85-89.

<sup>41</sup> Sax, *supra* note 3.

<sup>42</sup> See, e.g., Marc Poirier, *Modified Private Property: New Jersey’s Public Trust Doctrine, Private Development and Exclusion, and Shared Public Uses of Natural Resources*, 15 SOUTHEASTERN ENVTL. L.J. 71, 84-91 (2006) (discussing New Jersey caselaw regarding recreation-based public trust claims for access to privately-owned beach property).

<sup>43</sup> See, e.g., Mackenzie Keith, *Judicial Protection for Beaches and Parks: The Public Trust Doctrine Above the High Water Mark*, 16 HASTINGS W.-N.W. J. ENVTL. L. & POL’Y 165, 173-87 (2010) (discussing cases applying the public trust doctrine to dry-land resources); Deborah G. Musiker, Tom France & Lisa A. Hallenbeck, *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87 (1995) (arguing that public trust duties apply to wildlife conservation); Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. & TECH. L. REV. 285 (2004) (arguing that electromagnetic spectrum is public resource capable of protection under public trust doctrine); Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 UC DAVIS L. REV. 269 (1980) (arguing that

Still, problems remain. As Part I explained, the legal foundation for the doctrine remains murky. This murkiness is far less problematic in the context of water-based resources because, regardless of the confusion about its provenance, it is at least clear that some longstanding legal foundation justifies a judicially enforceable rule against alienation of at least some aquatic resources.<sup>44</sup> Yet even here the vagueness of the rule's underlying foundation creates confusion about the intensity and the nature of judicial review. For example, should courts simply ensure that government considered public trust values in its decision-making,<sup>45</sup> or should they impose substantive limits on the impairment of those values?<sup>46</sup> Does the rule apply solely to administrative agencies, or does the rule limit legislatures as well?<sup>47</sup> Or is the reverse true?<sup>48</sup> Indeed, is the rule somehow so foundational that it limits the ability of the people of a state to impair public trust values by enacting state constitutional provisions?

The problems associated with the doctrine's unclear foundations become even more acute when one moves beyond water and onto dry-land applications. While early state court cases and *Illinois Central* provide an explicit limit on alienation of water-based resources, those cases fail to provide a solid legal foundation for judicial protection of

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public trust doctrine applies to federal parklands).

<sup>44</sup> See Wilkinson, *supra* note 1, at 428-39 (noting particular importance of watercourses to uses that eventually came to be protected under public trust doctrine). See generally *supra* Part I (noting both the venerability of the public trust principle in American law and also the variety of possible foundations for that principle).

<sup>45</sup> See, e.g., *In re Contested Case on Water Use Permit Application*, 174 P.3d 320 (Haw. 2007) (requiring careful, open deliberation before water use permit would be given).

<sup>46</sup> See, e.g., *Brooks v. Wright*, 971 P.2d 1025, 1031 (Alaska 1999) (“[t]he purpose of the public trust doctrine was not to *grant* the legislature ultimate authority over natural resource management, but rather to *prevent* the state from giving out ‘exclusive grants or special privilege as was so frequently the case in ancient royal tradition.’”) (emphasis in original); *Citizens For Responsible Wildlife Mgmt. v. State*, 103 P.3d 203, 205 (Wash. 2004) (noting that legislation affecting public trust values requires “heightened” judicial scrutiny).

<sup>47</sup> See *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 199 (Ariz. 1999) (striking down Arizona legislation that attempted to eliminate public trust doctrine from consideration in water rights adjudication in the state).

<sup>48</sup> See, e.g., *Jurisich v. Jenkins*, 749 So. 2d 597 (La. 1999) (holding state constitutional provision enshrining public trust-type obligation on state was aimed at legislature, not executive branch); *Conservation Law Found. v. LaPointe*, No. Civ.A. AP-2003-21, 2004 WL 1598922 (Me. Super. Ct. Jun. 14, 2004) (finding “more demanding” standard required of government action by Maine public trust doctrine applies only to legislation, not administrative action pursuant to legislation).

dry-land public trust values. It is true that scholars have made compelling arguments analogizing aquatic and dry-land interests for purposes of their public trust values, and noting the doctrine's inherent flexibility.<sup>49</sup> However, scholars have noted that, taken to their logical conclusion, these arguments would give courts wide-ranging power to balance public trust values and other values, such as private ownership, economic development, and even preservation of the public trust asset itself.<sup>50</sup> These objections create a serious legitimacy problem for courts considering whether to bring the public trust doctrine onto shore. The result, then, is a principle with deep resonance in American law, only partially enforced as a legally binding rule, and whose legal foundation is seriously under-determined.

### B. *The Non-Delegation Analogy*

#### 1. The General Argument

In such a case where a fundamental principle is under-enforced because of legitimacy concerns and practical difficulties, it may be appropriate for courts to rely on a substantive interpretive canon.<sup>51</sup> As one scholar noted, it is no great innovation to suggest that courts rely on substantive canons as tools in giving effect to otherwise under-enforced legal values.<sup>52</sup>

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<sup>49</sup> See, e.g., Keith, *supra* note 43 (discussing cases expanding the public trust doctrine to new resource uses).

<sup>50</sup> Cf. Marc Poirier, *Natural Resources, Congestion, and the Feminist Future: Aspects of Frischmann's Theory of Infrastructure Resources*, 35 *ECOL. L.Q.* 179, 189-192 (2008) (explaining that New Jersey cases finding a public trust-based right to beach access had to consider various factors, including congestion and preservation of natural resource values, when delineating the contours of the right).

<sup>51</sup> Two scholars have defined "substantive canons" as follows:

Substantive canons, unlike their linguistic counterparts, are generally meant to reflect a judicially preferred policy position. They are not predicated on what the words of a statute should be presumed to mean, or what a rational Congress presumptively must have meant when it chose to use them. Rather, substantive canons reflect judicially-based concerns, grounded in the courts' understanding of how to treat statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies.

Brudney & Corey, *supra* note 36, at 13.

<sup>52</sup> See Richard Hasen, *The Democracy Canon*, 62 *STAN. L. REV.* 69, 96 (2009) ("Legislation scholars have long recognized that substantive canons can serve as a backdoor mechanism to enforce 'underenforced' constitutional norms through statutory interpretation.").

An example of a substantive interpretive canon is the non-delegation principle in constitutional law. As a judicially enforceable rule, the prohibition on Congress delegating its legislative powers is largely moribund. No Supreme Court case since 1935 has found a violation of the non-delegation rule.<sup>53</sup> In addition, more flexible (and potentially more meaningful) versions of the doctrine have also been rejected by the Court in favor of the formalistic “intelligible principle” test that makes legislation almost impervious to judicial strike-downs.<sup>54</sup> Even Justices who express skepticism about important components of the modern administrative state, such as Justice Scalia, have also acquiesced in the doctrine’s disuse.<sup>55</sup> At the same time, the federal rule against delegation of legislative power appears, at best, only as an implication of the statement in the Constitution’s preamble announcing “We the People’s” establishment of the federal government.<sup>56</sup> Yet the principle that Congress, not administrative agencies, should make the fundamental policy choices for the federal government remains a basic assumption firmly embedded in our law.

In response, the Supreme Court has used different methods to apply the non-delegation principle. First, it has used the specter of the formal non-delegation rule (which has never been officially discarded) as a general justification for construing broad delegations more narrowly.<sup>57</sup> Second, and relatedly, the Court has employed the principle underlying the doctrine to craft a set of interpretive canons that give narrow constructions to particular types of congressional grants of power. Cass Sunstein has identified several such canons; for

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<sup>53</sup> See, e.g., *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 420 (1935) (striking down a section of the National Industrial Recovery Act as violating the non-delegation doctrine); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537 (1935) (same).

<sup>54</sup> See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472-73 (2001) (rejecting Court of Appeals’ approach to non-delegation, in which overly-broad statute’s non-delegation problem could be cured by agency itself promulgating regulations limiting its discretion).

<sup>55</sup> See *id.* at 459; see also *Printz v. United States*, 521 U.S. 898, 927 (1997) (“This Court has not been notably successful in describing [the line between “making” and “enforcing” law]”).

<sup>56</sup> U.S. CONST. pmb; see also Cass Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 331 (1999) [hereinafter Sunstein, *Clean Air*] (arguing that the “standard view” of the nondelegation doctrine as a “core part of the original constitution” is inconsistent with the constitutional text).

<sup>57</sup> See *Indus. Union Dep’t AFL-CIO v. Am. Petro. Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion); *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 342 (1974).



example, the canon against construing statutes to apply extraterritorially absent clear congressional authority.<sup>58</sup>

Sunstein's analysis responds to concerns that find reasonably close analogues in the public trust context. Sunstein notes several traits that characterize the non-delegation doctrine. He argues that the non-delegation doctrine suffers from questions about its legal pedigree,<sup>59</sup> its democratic basis,<sup>60</sup> and judicial competence to implement it.<sup>61</sup> Nevertheless, he notes that the principle underlying the doctrine is valuable and deeply rooted in American law. Therefore he seeks to identify interpretive canons that implement that principle at the more judicially manageable and legitimate level of statutory interpretation.

These traits also characterize the public trust doctrine. Part I already noted the concerns about the public trust doctrine's legal foundation, its antidemocratic nature, and the difficulty courts encounter in implementing it. Yet the doctrine — at least in its water-based form — is an accepted part of American law. Indeed, the public trust doctrine is a fundamental part of American law; so fundamental that it is sometimes thought to inhere in the very notion of sovereignty.<sup>62</sup> Moreover, the general principle underlying the public trust doctrine — that the public, qua public, benefits from certain resources held in common — is not just deeply ingrained in American law, but also present across broadly different subject-areas. For example, First Amendment jurisprudence insists on a mythic story in which certain types of government property, known as “public forums”, are maintained “in trust” for the people to exercise their speech rights.<sup>63</sup> Given the inherently communal nature of speech, the First

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<sup>58</sup> See Cass Sunstein, *Nondelegation Canons*, 67 U. CHI.L. REV. 315, 333 (2000) [hereinafter Sunstein, *Nondelegation*].

<sup>59</sup> *Id.* at 322-23.

<sup>60</sup> *Id.* at 323-26.

<sup>61</sup> *Id.* at 326-28.

<sup>62</sup> See sources cited in *supra* note 2.

<sup>63</sup> See, e.g., *Hague v. Cong. of Indus. Orgs.*, 307 U.S. 496, 515 (1939) (“[S]treets and parks. . . have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”). *But see Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 692, 696 (1992) (Kennedy, J., concurring) (“The Court's analysis [confining “traditional public forums” to the established categories of streets, sidewalks and parks] rests on an inaccurate view of history. The notion that traditional public forums are properties that have public discourse as their principal purpose is a most doubtful fiction.”). See generally Karl Baker & Dwight Merriam, *Indelible Public Interests in Property: The Public Trust and the Public Forum*, 32 B.C. ENVTL. AFF. L. REV. 275 (2005) (discussing relationship between public trust doctrine and First Amendment public forum doctrine).

Amendment analogy is more resonant than it might seem at first blush. Just as “traditional public forums” allow social interaction via speech, resources protected by the public trust doctrine also enable sociability by encouraging commerce.<sup>64</sup>

## 2. Non-Delegation as Non-Alienation

An even closer analogy unites the public trust and non-delegation principles. At base, both restrict the alienability of a resource thought to reside most appropriately with the public as a whole.<sup>65</sup> The public trust doctrine restricts government from alienating public trust assets and destroying public trust uses. Similarly, the non-delegation principle restricts Congress’s ability to alienate its authority to legislate. In both cases, the ultimate theoretical foundation for the restriction rests on the concept of popular sovereignty. In the case of the public trust doctrine, the public’s sovereignty is thought to rest in the public’s “ownership” of the trust asset (with the government merely acting as trustee).<sup>66</sup> In the case of the non-delegation principle, the concept rests on “We the People’s” possession of sovereign power and, thus, the imperative to respect our decision to vest a part of that power in Congress, without further alienation.<sup>67</sup>

The anti-alienation analogy goes further. While the non-delegation doctrine is usually viewed as a limitation on Congress’s power to delegate decision-making authority to administrative agencies, an important strain of the doctrine addresses limits on congressional power to delegate such authority to *private* parties.<sup>68</sup> While the Supreme Court has not struck down a statute on non-delegation grounds since 1935, it has occasionally noted that the statute it was

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<sup>64</sup> See *infra* note 87.

<sup>65</sup> Thanks to Chris Serkin for suggesting that I explore this point further.

<sup>66</sup> The concept of trusteeship is more than a legal fiction with no bite. Indeed, commentators have seized on the trustee concept to argue for expansions of the doctrine. See, e.g., Wood, *supra* note 2, at 205 (calling for extension of doctrine’s geographic scope via expansion of government’s “fiduciary duty” to protect “all natural assets”).

<sup>67</sup> See U.S. CONST. art. I, § 1, cl. 1 (“All legislative powers herein granted shall be vested in a Congress of the United States.”); see also J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 141, at 380 (P. Laslett ed., 2d ed. 1967) (“The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others.”).

<sup>68</sup> See, e.g., Cass Sunstein, *Interest Groups in American Law*, 38 STAN. L. REV. 29, 53 (1985) [hereinafter Sunstein, *Interest Groups*] (noting importance of this feature of statute struck down in *Schechter Poultry*).

upholding did not delegate government authority to private parties.<sup>69</sup> The Court's apparent concern with delegation to private parties mirrors the public trust doctrine's concern with government alienating the public's interest in public trust assets. In this sense, the concern underlying the non-delegation doctrine goes beyond the agency-based theory under which "We the People" vested federal legislative power in Congress. Rather, the Court has expressed special concern about delegating legislative power to private parties. This suggests an imperative that the People retain sovereign control over legislative power. If Congress delegated power to non-accountable private parties, this would frustrate the People's sovereign control.<sup>70</sup>

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<sup>69</sup> See, e.g., *United States v. Rock Royal Coop.*, 307 U.S. 533, 577-78 (1939) ("The objection is made that [the legislative scheme, in which approval of agricultural marketing orders turns in part on the approval of the relevant producing community] is an unlawful delegation to producers of the legislative power to put an order into effect in a market. In considering this question, we must assume that the Congress had the power to put this Order into effect without the approval of anyone. Whether producer approval by election is necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation."); *Currin v. Wallace*, 306 U.S. 1, 15-16 (1939) ("This is not a case where a group of producers may make the law and force it upon a minority or where a prohibition of an inoffensive and legitimate use of property is imposed not by the legislature but by other property owners.") (citations omitted). It should be pointed out that the Court's reasoning here is not as precise as one might wish. *Currin*, upon which *Rock Royal* relies, explains that when Congress has made the fundamental decision, it does not violate the non-delegation doctrine for the statute to make the effectiveness of any such decision turn on the actions of a private group (such as a group of voters or a group of commodities producers who will be subject to a marketing order). See *Rock Royal Coop.*, 307 U.S. at 578 n.64. According to the Court, this is because "it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application." *Currin*, 306 U.S. at 16. The Court then continued, "The required favorable vote [of the commodities growers] is one of these conditions." *Id.* Ultimately, this simply reduces to the same argument that is made in the context of delegations to administrative agencies: there is no non-delegation problem because Congress itself has provided the fundamental value choice — the intelligible principle required of all delegations. Indeed, the case setting forth the "intelligible principle" standard, while doing so in the context of a delegation to the President, nevertheless cited the example of state legislative decisions to enact certain policies upon the approval of a sub-group of the electorate. See *id.* (quoting *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 407 (1928)).

<sup>70</sup> Indeed, to widen the analogy to again include speech resources, one might note that government is similarly limited in its power to alienate traditional public forums. See, e.g., *United States v. Grace*, 461 U.S. 171, 180 (1983) ("[T]he destruction of public forum status . . . is at least presumptively impermissible."); *ACLU v. City of Las Vegas*, 333 F.3d 1092, 1105 (9th Cir. 2003). The government-owned property in both of these cases was described by the relevant courts as a traditional public forum. See *Grace*, 461 U.S. at 179-80 (concluding that sidewalk in front of Supreme Court building, the property at issue, is traditional public forum); *ACLU*, 333 F.3d at 1105

Like the non-delegation principle, the public trust doctrine reflects a deep legal principle limiting government power to alienate the relevant resource out of public ownership.<sup>71</sup> But also like non-delegation, the public trust doctrine suffers from concerns about its precise legal foundation, its democratic legitimacy, and judicial competence to implement it. Therefore, it is appropriate to at least consider the possibility of treating the public trust doctrine similarly, i.e., as a canon of construction.

C. *A Word of Caution on the Importation of the Under-Enforcement Rationale*

Despite the parallels between the non-delegation canons and the public trust canon, one should remain cautious about the uncritical importation of the under-enforcement rationale for an interpretive canon.<sup>72</sup> Despite its lack of novelty,<sup>73</sup> the claim that interpretive canons are appropriate to implement under-enforced legal values needs to be considered carefully before one moves on to considering the specifics of the proposed public trust canon. In particular, this justification for canons, while attractive, nevertheless raises a difficult question: what is the relationship between a legal doctrine and its underlying principles? In other words, if the underlying legal rule is, for some reason, incapable of competent and legitimate judicial implementation, then does enforcement of what Judge Posner has derided as a “penumbral” canon<sup>74</sup> reflect legitimate judicial flexibility? Or does use of such a canon constitute an *ultra vires* substitution of an enforceable, but illegitimate, rule for a legitimate rule that courts lack the competence to enforce?

The answer to these questions turn on the characteristics of the underlying legal principle. For example, Sunstein’s approval of interpretive canons construing legislation to avoid excessive delegations turns in large part on the theory that those canons vindicate what he called “the framers’ basic project of linking

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(noting that Fremont Street in Las Vegas, the property at issue, is traditional public forum).

<sup>71</sup> See *supra* notes 68-70 and accompanying text.

<sup>72</sup> See *supra* Part II.B (explaining that difficult-to-enforce legal principle is sometimes best implemented as interpretive canon rather than substantive rule).

<sup>73</sup> See Hasen, *supra* note 52, at 96.

<sup>74</sup> Cf. RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 285 (Harvard 1985) (complaining about enforcement of “penumbral Constitution” in which courts enforce, not given constitutional provision *per se*, but penumbral version of it, which itself is not constitutional requirement).

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individual rights and interests to institutional design.”<sup>75</sup> This is a goal he described as “a central aspiration of the constitutional structure.”<sup>76</sup> But this justification simply raises another question: are courts legitimately in the business of enforcing “basic project[s]” and “central aspiration[s]” rather than law?

That question returns our focus to the underlying legal rule the canon proposes to enforce. For example, perhaps Sunstein is correct in justifying his non-delegation canons by reference to an overall understanding of what the framers were hoping to accomplish with the Constitution. As a matter of history or appropriate interpretive method, perhaps the framers are best understood as having attempted to protect rights by means of institutional design.<sup>77</sup> If so, then perhaps that underlying goal is appropriate for judges to pursue, even if they have to implement it via canons rather than whatever non-delegation rule is textually grounded.

But does a similar justification warrant judicial use of an interpretive canon enforcing the public trust doctrine? To what “project” and to whose “aspirations” would we look in determining whether a public trust canon is justifiable? If the public trust principle is a rule of common law, or even a rule of unwritten state constitutional law (in the sense that it inheres in the very notion of sovereignty), then what force is there to the argument that a canon helps implement an overall coherent picture of the law, analogous to Sunstein’s “basic project” or “central aspiration” of the Constitution?

A similar concern arises when considering a much more pedestrian question: what value does a given canon vindicate when it is justified as an implementation of a broader legal principle? Leaving aside talk of “basic projects” and “central aspirations,” Sunstein’s non-delegation canons implement a text — the statements in the Preamble and Article I in which “We the People”<sup>78</sup> vest “all [federal] legislative powers” in Congress.<sup>79</sup> By contrast, the canon proposed here implements a non-textual principle — the idea, of uncertain provenance, scope, and legal

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<sup>75</sup> Sunstein, *Nondelegation*, supra note 58, at 339.

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., *New York v. United States*, 505 U.S. 144 (1992) (observing that federalism is designed, at base, to protect liberties of people, not for state officials themselves); *Immigration and Naturalization Serv. v. Chadha*, 416 U.S. 919, 959-67 (1983) (Powell, J., concurring) (concluding that legislative veto that singled out named individuals for adverse treatment constituted adjudication by Congress, which was inappropriate given Congress’s lack of capacity to protect the rights of single individuals).

<sup>78</sup> U.S. CONST., PREAMBLE.

<sup>79</sup> U.S. CONST., art. I, § 1.

effect, that certain resources are inherently public and, thus, that government is limited in its ability to alienate them. This difference reflects the same insight as that developed in the previous paragraph: namely, that one cannot uncritically cite concerns about judicial manageability of underlying principles to justify any interpretive canon that points in the same direction as that underlying principle. Rather, context — in particular, the nature and status of the underlying principle — matters.

Realizing that context matters means that we are confronting a bigger question than the (difficult enough) one of whether a public trust interpretive canon is justified by judicial manageability and legitimacy concerns with the underlying doctrine itself. That original problem remains, of course, and this Article will address it. However, the answer may provide raw material for broader examinations of other canons that are justified on similar judicial competence and legitimacy grounds. Thus, this Article's analysis may provide a case study of the circumstances under which a "penumbral canon"<sup>80</sup> may be justified on the ground that enforcement of the actual legal rule lies beyond the judicial ken. As explained above, such justifications must rely heavily on the context of the underlying legal principle, and how the proposed canon relates to that principle.

This Article seeks to provide this context while illuminating the canon itself. In other words, as Part III examines how the public trust canon would operate, it also considers how the nature of the underlying public trust principle influences the canon's outlines. Thus, Part III aspires to justify the public trust canon not just by explaining how it would work in practice, but also by revealing how the canon's outlines are influenced by, and compliment, the underlying principle it seeks to implement. In so doing, this argument attempts to provide a template for more nuanced application of the standard judicial manageability and legitimacy arguments for analogous canons. After a pause in Part IV to consider some practical questions about the canon's legitimacy, workability, and actual impact, the Article returns, in Part V, to the ultimate question of how the public trust doctrine should be understood. Only by understanding that underlying legal doctrine can we truly determine whether the proposed canon is sound, both as a matter of practicality and deeper legal coherence.

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<sup>80</sup> See POSNER, *supra* note 74, at 285.

## III. A PUBLIC TRUST CANON IN ACTION

This Article proposes that courts construe statutes and review administrative action threatening public trust values against the backdrop of a commitment to the protection of those values. This proposal requires delineation of both the canon's scope — the interests and resources to which it applies — and the canon's operation — the mechanism by which it would be applied.

Understanding the canon's proper scope and operation requires understanding the underlying public trust doctrine. This insight may be counter-intuitive: at first blush, applying a canon requiring a softer, less authoritative application of a legal rule should not demand that we have a deep understanding of that rule, as long as we know enough about it to apply its principles as a background interpretive aid. As will become clear, however, the proper operation and, indeed, the legitimacy of a public trust canon ultimately turn on a deeper understanding of the public trust doctrine itself.

For this reason, this Part begins with a brief examination of the theoretical foundations of the modern public trust doctrine in American law. This examination is necessarily incomplete; volumes have been written about the doctrine's foundations, and a comprehensive examination of that question would distort this Article's focus on the canon proposal. Nevertheless, the argument for the interpretive canon requires at least some preliminary understanding of the underlying doctrine. After providing that understanding, this Part then turns to the canon's scope and operation.

A. *Groundings for the Public Trust Doctrine*

The primary impetus behind the public trust doctrine, both in its more traditional<sup>81</sup> and expanded<sup>82</sup> forms, is to keep certain property as a common. As Carol Rose demonstrated a quarter-century ago, certain stories of commonly held property are not “tragedies” of unfettered, every-man-for-himself resource exploitation,<sup>83</sup> but instead, comedies — in the sense of having positive, not negative, outcomes.<sup>84</sup> In other

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<sup>81</sup> See Rose, *supra* note 1, at 762-74.

<sup>82</sup> See, e.g., Keith, *supra* note 43 (applying Carol Rose's explanations for historical identification of some water-based resources as public trust property to dry-land resources).

<sup>83</sup> See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968) (explaining the concept of “the tragedy of the commons”).

<sup>84</sup> See Rose, *supra* note 1, at 721-23.

words, the story of the commons is not a story of inevitable spoliation of assets held in common; rather, sometimes society thrives when property is held in common.

In explaining the benefits of common ownership of certain property, Rose identified two criteria that historically justified judicial elevation of the public's use rights in an asset over private property exclusion rights: (1) the existence of "holdout" problems, where one landowner can frustrate the completion of a project promoting public trust values; and (2) the superior value of the property when made available for public uses, rather than reduced to private control and public exclusion.<sup>85</sup> Thus, for example, Rose traces the centrality of rivers as public trust resources based on her understanding of the holdout problems inherent in private ownership of a resource that, like a river, cannot be moved.<sup>86</sup> Similarly, she explains how commerce emerged as a socializing activity that created net benefits to the public at large.<sup>87</sup> Rose's explanation explicitly acknowledges the evolving nature of these factors, in particular, the characteristic of a type of property as conducive to sociability.<sup>88</sup> Thus, while these factors provide the foundation for the traditional doctrine's geographic scope and set of protected uses, their application over time may lead to different results and an expanded – or at least a different – set of protected resources and uses.<sup>89</sup>

Over the last third of the twentieth century a second set of protected interests, the public interest in natural resource management (including management of dry-land resources), came to be accepted as legitimate objects of the doctrine. These interests are related to those grounded in the historical version of the public trust doctrine because they refer back to a similar (though not identical) set of resources – natural resources – that today perform the socializing function Rose

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<sup>85</sup> See *id.* at 749-50, 774-81, (explaining nature of "holdout" problems).

<sup>86</sup> See *id.* at 749-61.

<sup>87</sup> See *id.* at 775-77. For a related, but more theoretical, discussion of this issue, see generally Benedict Kingsbury & Benjamin Straumann, *The State of Nature and Commercial Sociability in Early Modern International Legal Thought*, 2011 available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1753021](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753021).

<sup>88</sup> See Rose, *supra* note 1 at 777-81.

<sup>89</sup> With regard to commerce, for example, it may well be that commerce has become so prevalent and performed in so many physical and virtual venues that that holdout problems have been rendered moot. However, Rose herself suggests that the sociability effects of commerce remain, given her observation that "[c]ommerce still seems to be our quintessential mode of sociability," because "[d]espite its appeal to self-interest, it also inculcates rules, understandings, and standards of behavior enforced by reciprocity of advantage." *Id.* at 776.



identified as underpinning the classic doctrine.<sup>90</sup> But they are different in that they play an additional, distinct, role, as objects of preservation rather than of exploitation. This preservative use, while capable of being shoehorned into Rose's socializing role, is fundamentally different.<sup>91</sup> The connection between these modern interests and the traditional interests the doctrine protects is thus doubly attenuated: the class of protected resources is expanded to dry-land resources, and the public trust use is altered from public access to preservation, with or without public access.<sup>92</sup>

Despite these differences between the traditional and modern versions of the doctrine, a unifying thread exists in the argument that, because both conservation and some access uses accrue to the public generally, they both tend to be systematically undervalued in the political process.<sup>93</sup> The political weakness of diffuse interests is well known. In constitutional law, courts have sometimes described the phenomenon of small harms accruing to a large number of persons as

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<sup>90</sup> See, e.g., Keith, *supra* note 43 (applying sociability idea to call for public trust doctrine protection for dry-land resources).

<sup>91</sup> For example, the recent climate change lawsuits relying on the public trust doctrine apply a pure resource conservation/management theory of the doctrine, which at one level conflicts squarely with the use-based theories offered by Rose. *Cf. supra* note 6, at 15-16. An often-cited example of the differing foci of these two theories is the concurring opinion by an Oregon Supreme Court justice who agreed with the decision to uphold an airport expansion plan against a public trust-based challenge on the ground that aviation constituted "commerce" and was thus a legitimate public trust use. *Morse v. Or. Div. of State Lands*, 590 P.2d 709, 711, 716 (Or. 1979) (Bryson, J., concurring) (reasoning that airport expansion is consistent with the public trust doctrine because it promotes commerce and possible air "navigation").

One might try to shoehorn the conservation/management idea of the doctrine into a use-based theory by viewing climate resource conservation as a "use" that, literally, helps preserve humanity's continued existence. But this appears to stretch the concept of use quite far. A more justifiable connection might focus on the superior value of these resources in their natural state, given the role they play in that condition in ensuring the supreme public good of continued survival.

<sup>92</sup> Indeed, public access may well pose a stark conflict with preservation values. See Poirier, *supra* note 50 at 189-192 (noting one scholar's explanation of how a state court considering expansion of the public trust doctrine to dry sand beaches had to balance traditional public trust values with preservation of the resource itself).

<sup>93</sup> See generally Sax, *supra* note 3, at 561 (noting this phenomenon). I have written about the connection between this understanding of the public trust doctrine and classic process-based equal protection review. See Araiza, *supra* note 31, at 403-30. This is not to say that Sax's view reflects modern realities; that issue is considered later. See *infra* Part IV.C.2. At this point, the argument is simply that if Sax's view is still accurate, then it presumably applies to conservation uses of trust resources as much as to access uses.

an exception to the general rule that a democratic political process can generally be trusted to reflect the public's preferences.<sup>94</sup> Bruce Ackerman relied on a similar understanding of politics when he called for a reworking of the famous *Carolene Products*<sup>95</sup> formula for strict scrutiny.<sup>96</sup> Ackerman called for courts to recognize the relative political weakness suffered not by "discrete and insular" minorities, as the formula originally stated, but by *diffuse* minorities, which he argued suffer special handicaps when organizing politically.<sup>97</sup> Similarly, in its path-breaking decision in *Citizens to Preserve Overton Park v. Volpe*,<sup>98</sup> the Supreme Court acknowledged the ease with which publicly-held assets, such as parkland, would be sacrificed when the alternative was impairment of privately held assets.<sup>99</sup>

Public trust values are similarly diffuse and, thus, susceptible to the same sort of political weakness.<sup>100</sup> To the extent that the public trust doctrine constitutes a species of political process-based judicial review,<sup>101</sup> it helps explain both Rose's theory that that the traditional doctrine flowed from the net gains that flowed from putting certain property to public uses, and the modern doctrine's focus on recreation and conservation.

For these reasons, one fundamental characteristic of the public trust principle informing the proposed interpretive canon is the idea that public trust values are at risk of being systematically undervalued in the political and administrative process. This dynamic may be somewhat less salient today than it was a generation ago, given the rise of a vibrant environmental movement and increased public awareness of the importance of public trust assets. But these developments have not progressed to the point where courts can describe the special risks

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<sup>94</sup> See, e.g., *West Lynn Creamery v. Healy*, 512 U.S. 186, 201 n.18 (1994) (discounting, for dormant commerce clause purposes, fact that price increase in milk caused by discriminatory tax and subsidy scheme would be felt by in-state consumers, concluding that effect would be too small to be noticed and provoke political opposition).

<sup>95</sup> *United States v. Carolene Prod.*, 304 U.S. 144 (1938).

<sup>96</sup> See *id.* at 152 n.4; Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 717-18 (1985).

<sup>97</sup> See Ackerman, *supra* note 96, at 723-24.

<sup>98</sup> *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

<sup>99</sup> *Id.* at 412-13.

<sup>100</sup> Whether and to what degree statutory and administrative law developments have obviated this problem is addressed later in this Article. See *infra* Part IV.C.2.

<sup>101</sup> See generally Araiza, *supra* note 31, at 403-430 (considering this claim).

those assets run in the political-administrative process as a mere historical artifact.<sup>102</sup>

### B. *The Scope of the Canon*

At one level, the scope of the proposed canon presents a straightforward issue. The proposal calls for the canon to apply to dry-land resources, a fact that seems to answer the question about its scope. But bringing all non-aquatic assets within the scope of the proposed canon would make the canon exceptionally broad. Such a broad reading is neither essential nor a logical outgrowth of the canon idea. Because the canon is parasitic on the underlying doctrine, the limits that inhere in the underlying doctrine curb the canon itself.

For the purposes of this Article, the most important limits on the underlying doctrine relate not to its geographic scope, but to the scope of protected uses. The traditional doctrine protects fishing, navigation, and commerce.<sup>103</sup> While many of these uses do not find obvious analogues in dry-land resources, the recreational and conservation uses that the doctrine protects surely do. Similarly, the political under-representation theory that undergirds the doctrine in both its more traditional and modern versions<sup>104</sup> provides yet another appropriate limitation on the canon's scope.

For these reasons, a defensible case can be made for demarcating the scope of the proposed canon by reference to particular protected uses and the likelihood that those uses may be systematically ignored in the legislative-administrative process. This scope is not laid out with perfect detail. But this should not disqualify the canon from consideration. The very idea of a penumbral canon protecting a broad but vague underlying legal value necessarily implies some vagueness with regard to the canon's operational scope.

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<sup>102</sup> Compare Lazarus, *Changing Conceptions*, *supra* note 3, at 658-91 (arguing legal developments over last 40 years obviated need for relying on public trust doctrine to correct political dysfunction), with *infra* Part IV.C.2 (considering Lazarus's argument).

<sup>103</sup> E.g., Tim Eichenberg, *Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay*, 3 GOLDEN GATE U. ENVTL. L.J. 243, 247 (2010) (noting those traditional uses).

<sup>104</sup> See Araiza, *supra* note 31, at 413-30 (examining the political under-representation argument for judicial protection of public trust resources).

C. *Implementing the Canon*

1. Introduction

With the canon's scope generally laid out, the question then becomes its operation — the mechanism by which it would be applied. At first blush, one might think that this question raises the longstanding issue of whether the public trust doctrine provides substantive protection or simply requires government to consider public trust values when making a decision.<sup>105</sup> However, this approach misses the point of applying the doctrine as a canon. When functioning as a canon, the doctrine does not have independent meaning; instead, it operates to influence the interpretation of other independent legal sources.

In one sense, this insight simply means that the substantive/procedural decision is pushed down to the level of the particular legal rule for which the canon acts as an interpretive aid. Rather than the doctrine acting on its own as a particular type of check on government action, a canon implementing the doctrine might be understood as placing a thumb on the scale in favor of the public trust value, in whatever form the underlying legal rule prescribes. For example, a substantive legal rule (say, a water rights rule) would be interpreted with at least some additional weight on the public trust side of whatever balancing the rule mandates. Similarly, a procedural requirement would be interpreted as mandating an especially probing inquiry into whether the government actor carefully considered the public trust values at stake in the underlying substantive decision.

However, even this approach is too simplistic. Implementation of the proposed canon may require more nuanced consideration by a court. For example, applying a public trust canon does not inevitably mean that a court required to balance public trust and other interests would simply place a thumb on the scale of the public trust value. Rather, a court could deploy the canon in the manner it thought most appropriate to vindicate the public trust value at issue, consistent with the policy choices the construed law imposes.

The model for this approach is federal administrative law as it developed in the 1970s. During that era, courts struggling to vindicate the Administrative Procedure Act's ("APA's")<sup>106</sup> promise of reasoned decision-making focused both on holding agencies to a strict reading

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<sup>105</sup> See, e.g., Coplan, *supra* note 2, at 304 (citing cases taking both approaches).

<sup>106</sup> 5 U.S.C. § 551, et. seq. (2011).

of the APA's procedural requirements and ensuring that the final agency decisions were carefully reasoned.<sup>107</sup> Thus, rather than rigidly confining their review to either process or substance, these courts recognized the effects each had on the other and performed their review functions accordingly.<sup>108</sup> In particular, procedural fairness was considered crucial to reasoned decision-making, while reasoned decision-making was, in large part, equated with procedurally careful decision-making.<sup>109</sup> Similarly, if courts apply the proposed canon, they can act creatively to vindicate the underlying public trust principle, using the means that best correspond to the underlying legal duties found in the construed law.

The key to implementing such a canon lies in the nature of the underlying public trust principle, the nature of the construed legal rule, and the identity of the government actor prescribing that legal rule. Canons have no independent legal stature; their effect lies solely in influencing how binding legal rules are construed and implemented. Understanding that influence requires understanding both inputs — the principle promoted by the canon and the legal rule upon which the canon acts. It also requires an awareness of the nature of the actor enacting that rule. This latter factor helps courts stay within their appropriate bounds when applying the canon, since the appropriateness of a court's method turns, in part, on the proper relationship between the court and the entity promulgating the particular legal rule at issue.<sup>110</sup>

The previous subsection briefly set forth a preliminary understanding of the public trust doctrine in American law. Part V will revisit this understanding, but for now, it will serve for purposes of the following analysis. The next subsection considers the other two

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<sup>107</sup> See, e.g., *United States v. Nova Scotia Food Prod. Corp.*, 568 F.2d 240, 251-52 (2d Cir. 1977) (connecting agency's procedural duties under Administrative Procedure Act's rulemaking requirements to requirement that agency action be substantively rational).

<sup>108</sup> See, e.g., *id.* (finding the agency to have employed a less than full rulemaking process and recognizing that that failure also impacted the substantive reasonableness of the final agency regulation).

<sup>109</sup> Perhaps this latter relationship is most clear in the idea that "substantive" review under Step 2 of the *Chevron* test appears at times to be quite similar to the requirement of procedurally careful decision-making in "arbitrary and capricious" review of agency action. See, e.g., Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 CHI.-KENT L. REV. 1253, 1254 (1997) (proposing that Step 2 of *Chevron* and the "arbitrary and capricious" test be considered as identical tests).

<sup>110</sup> Cf. *Bd. of Trs. v. Garrett*, 531 U.S. 356, 376, 376 (2001) (Breyer, J., dissenting) (criticizing majority for allegedly reviewing federal statute as if it were regulation promulgated by administrative agency).

relevant factors identified above – the nature of the legal rule that is the subject of the canon, and the identity of the government actor promulgating that rule.

## 2. The Legal Rule and the Actor Promulgating It

It is impossible to describe with any specificity the types of legal rules whose application might be influenced by a public trust canon. Such rules come in all shapes and sizes, from water rights statutes to organic statutes authorizing conservation agencies to manage natural resources, to municipal ordinances governing access to town beaches. Beyond the differences in subject matter, legal rules vary by type: from *per se* rules, to presumptions, to requirements that a subordinate official consider a set of factors, to vague requirements of fairness, equity, or the public interest.<sup>111</sup> The enormous variation among the legal rules subject to a public trust interpretive canon means that this Article can describe them only through the examples that follow, with the caveat that such examples are only illustrative. These examples also illustrate how the identity of the decision-maker appropriately influences the analysis.

First, consider a legislative decision to alienate a public trust resource or otherwise impact a public trust value. In that situation, the canon would likely take the form of a clear statement requirement<sup>112</sup> and a rule of narrow construction. These two interpretive rules are related, in that they both rest on the principle that legislatures must act consciously when they alienate a resource that warrants protection under the canon. This principle limits alienations to those that are intentional — those effects on public trust values that the statute in question inescapably requires. At the same time, the fact that courts would apply a canon, rather than a substantive rule of law, means that the legislature enjoys the ultimate authority to alienate public trust resources, without having to satisfy any more demanding judicial standard beyond drafting precision.<sup>113</sup>

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<sup>111</sup> *E.g.*, 47 U.S.C § 307(a) (“The [Federal Communications] Commission, if public convenience, interest, or necessity will be served thereby . . . shall grant to any applicant therefor a station license provided for by this chapter.”).

<sup>112</sup> In the words of one scholar, a “plain statement” or “clear statement” requirement is a requirement that, “(in its strongest) version rejects interpretation of a statute that overrides substantive values embodied in the rule, unless the statute explicitly so provides.” William Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 *IND. L.J.* 865, 880-81 (1993).

<sup>113</sup> *Compare, e.g., Opinion of the Justices*, 437 A.2d 597, 607 (Me.1981) (requiring “high and demanding standard of reasonableness” to legislation alienating public trust

As noted above,<sup>114</sup> statutes can vary greatly in terms of the specificity of the rule they impose. A given statute's level of specificity obviously matters when a court considers the canon's impact. All other things being equal, a more specific statutory provision would be more resistant to construction in favor of public trust values than a more general one, because the former would more likely satisfy a clear statement requirement. Other characteristics would also matter if a court applies either a clear statement or narrow construction interpretive approach. For example, a mandatory provision would be more resistant to a public-trust-favorable reading than a permissive one, and one espousing a single clear policy value would be more resistant than one that seeks to accommodate a variety of values.

Consider now an administrative agency's alienation decision. Presumably an agency would reach such a decision either by using the discretion the statute granted it, or by carrying out a precise legislative directive. In the former case, the canon would operate primarily as a process-based requirement of administrative rationality, assuming that the legislature did in fact clearly grant this authority.<sup>115</sup> The goal, as it usually is when courts review discretionary agency action, would be to ensure that the agency carefully considered the factors relevant to its decision. In this situation, courts could apply the canon by ensuring that the agency considered the public trust values at stake as one of the relevant decisional factors.<sup>116</sup> If, by contrast, the agency acted in response to an explicit legislative mandate, administrative law principles<sup>117</sup> suggest a shift in the inquiry. If the statute really

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resources), and *Jackvony v. Powell*, 21 A.2d 554 (R.I. 1941) (holding that traditional beach access rights protected under Rhode Island law and incorporated into 1843 state constitution forbade city's construction of fence limiting access to municipal beach).

<sup>114</sup> See *supra* note 111 and accompanying text.

<sup>115</sup> Compare *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255 (R.I. 1999) (requiring explicit statutory language before concluding that legislature authorized municipalities to regulate construction on waterways), with *Moot v. Dep't of Env'tl. Prot.*, 861 N.E.2d 410 (Mass. 2007) (holding that legislature did not give agency authority to relinquish state ownership interests in tidelands when it gave it authority to "preserve and protect" them).

<sup>116</sup> In terms of the identity of the decision-maker, it bears noting that the procedural rationality review described here would likely be considered an illegitimate approach for judicial review of legislative action, given the separation of powers problems inherent in a court reviewing the legislature's work product for adequate deliberation.

<sup>117</sup> At the federal level, the most notable principle here is the so-called *Chevron* "two-step" for judicial review of agency statutory interpretations. See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (holding that courts do not defer to agency interpretations when statute provides clear answer

compelled the agency to alienate the resource, then the judicial inquiry would shift up the ladder, to judicial construction of the statute.

Admittedly, these examples are couched at a high level of generality. However, even this brief, abstract examination of the different forms of legislative and administrative action illustrates the wide variety of criteria that would affect how a government action would be construed pursuant to the canon. Should the canon concept be accepted as a general matter, more work would be needed to flesh out its actual operation.

#### IV. OBJECTIONS

The above analysis may elicit objections from all sides: those who object to any expansion of the public trust doctrine beyond water-based resources, those who favor an explicit expansion of a legally binding public trust doctrine beyond its current water-based focus, and those who simply question the legal analysis offered so far. These objections identify three general criteria that must be satisfied for the proposed canon to be acceptable. First, the proposed canon must be legitimate. Second, it must be workable. Third, its effects must be meaningful, yet appropriately limited.

##### A. *Legitimacy*

Perhaps the most obvious objection to the proposed public trust canon is that it is legally unprincipled. This objection maintains, reasonably enough, that a substantive interpretive canon<sup>118</sup> must be justified by some underlying legal principle reflecting that substantive preference. It argues that a public trust value that extends beyond water-based resources lacks that foundation. Thus, even in its less binding form as a canon, it is illegitimate. This objection restates the argument against extension of a legally binding public trust doctrine to dry-land resources, and applies it to this Article's proposal for a canon. It forces us to confront the question of whether a canon is justifiable, even if a legally binding rule of the same sort is not.

It is not uncommon for a basic legal principle to lack a firm legal foundation.<sup>119</sup> Basic structural components of our system, such as

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to interpretive question presented, but defer to any reasonable agency interpretation when statute is ambiguous as to answer).

<sup>118</sup> See *supra*, note 51 (defining "substantive" canons).

<sup>119</sup> See, e.g., sources cited *infra* note 121.



federalism, are sometimes expressed only by implication.<sup>120</sup> Other basic principles have an even more obscure formal foundation. For example, the requirement that government act only in pursuance of a public purpose is thought to be fundamental to our conception of republican government, but is nowhere explicitly guaranteed in the Constitution.<sup>121</sup> These high level examples illustrate that the lack of a firm textual foundation does not necessarily defeat an argument that a legal principle functions as a legally binding rule.

Nevertheless, the legitimacy argument against a public trust canon maintains that such a canon lacks even the implicit foundations we can discern for principles such as federalism. In considering that objection, it is necessary to examine the two foundations cited for the public trust doctrine: precedent, most notably the Supreme Court's decision in *Illinois Central* and state court decisions finding the public trust doctrine to apply as a matter of state law, and the policy arguments offered to justify expanding that doctrine beyond its traditional limits. The question is whether these sources provide an adequate legal foundation, not for a legally binding expanded public trust doctrine, but for a principle that would adequately support the proposed canon.

So posed, the question seems to elicit a fairly clear answer in favor of the canon's legitimacy. The public trust doctrine unquestionably exists as a legally binding rule and has existed for centuries.<sup>122</sup> Moreover, the traditional doctrine responds to concerns about the political vulnerability of diffusely held public resources that transfer, with more or less ease, to a wider set of resources and uses. As the "more or less" qualifier suggests, the transfer is not trouble-free. Bringing the doctrine onto dry land would represent a major expansion in its scope, as would embracing uses grounded in

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<sup>120</sup> See, e.g., LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 114 (1978) ("The Constitution presumes the existence of the states as lawmakers and governmental institutions distinct from the federal government."); *New York v. United States*, 505 U.S. 144, 187 (1992) (referring to federalism as follows: "Some truths are so basic that, like the air around us, they are easily overlooked."); see also, e.g., *Webster v. Doe*, 486 U.S. 592, 606, 608 (1988) (Scalia, J., dissenting) (describing as a "fundamental constraint" on government action the requirement that such action be taken in pursuit of a public, rather than a private, purpose).

<sup>121</sup> See RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 61 (2001) ("[T]he American constitutional tradition has long recognized a judicial authority, not necessarily linked to any specifically enumerated guarantee, to invalidate truly arbitrary legislation."); see also *Webster*, 486 U.S. at 608 (Scalia, J., dissenting) (noting the fundamental nature of the rule against government action in pursuit of purely private interests).

<sup>122</sup> See *supra* note 1.

conservation rather than access.<sup>123</sup> As explained earlier, because these expansions would involve the judiciary in a wide-ranging set of policy issues, there is reason for concern about these moves. This is especially the case when legislatures and constitution drafters have begun to embrace these values in positive law.

However, these conceded problems with an expansion of the judicially enforceable doctrine do not affect the relevant conclusion: a legally binding rule protecting public resources exists and finds support in modern understandings of politics in a liberal democracy. The rule itself may lack a clear legal foundation.<sup>124</sup> The modern rule may also bear only partial resemblance to its earlier focus on commerce promotion.<sup>125</sup> Nevertheless, the modern resource-protecting version of the rule is well established in American law. The argument for a canon relies simply on the existence of a supporting legal rule, *not* on whether that rule itself is unambiguously grounded and has remained in its original form for centuries.

Thus, the existence of that rule opens the possibility for a wider, but penumbral, principle that takes the form of an interpretive canon. It does not prove the argument; the bare fact that a legal principle exists does not by itself make the case for a broader penumbral interpretive canon. But it does furnish a foundation for such a canon should the rest of the argument be made.

### B. *Workability*

Another objection to this proposal argues that a canon protecting public trust values is unworkable. At its base, this argument is grounded on Karl Llewellyn's and others' critiques of canons as radically indeterminate,<sup>126</sup> although the argument here points in a slightly different direction. As applied to a public trust canon, the

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<sup>123</sup> See, e.g., Niki Pace, *Wetlands or Seawalls? Adopting Shoreland Regulation to Address Sea Level Rise and Wetland Regulation in the Gulf of Mexico*, 26 J. LAND USE & ENVTL. L. 327, 344 (2011) (noting how "some states have expanded the public trust doctrine to encompass recreation"); Margaret Poloso & Margaret Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 STAN. ENVTL. L.J. 51, 52 (2011) ("[p]rovid[ing]. . . a theoretical explanation of how common law doctrines can expand the regulatory authority of the public trust onto dry land.").

<sup>124</sup> See *supra* Part I.

<sup>125</sup> *But see, e.g.,* *Morse v. Or. Div. of State Lands*, 590 P.2d 709 (Or. 1979) (relying on commerce-promotion goals of public trust doctrine); Rose, *supra* note 1 at 776 (arguing for the continued vitality of the commerce-promotion justification for the public trust doctrine).

<sup>126</sup> See *supra* notes 35-39 and accompanying text.

basic thesis is that such a canon, however applied,<sup>127</sup> amounts to a call to judges to place a thumb on the scales in favor of public trust assets. The criticism here centers on the idea that the very notion of a “thumb on the scales” is incapable of providing a determinate standard by which judges could decide whether the public trust asset has been accorded sufficient protection.<sup>128</sup>

### 1. Workability as Analytical Coherence

To the extent this objection amounts to a general indictment of standards of review, it proves too much. Courts go to great lengths to delineate standards of review, both of legislative and administrative action and the decisions of lower courts. It is true enough that at times these standards appear to determine less than one might think. For example, studies demonstrate that the (in)famous distinction between *Chevron* and *Skidmore* deference to federal administrative agency statutory interpretations does not translate into radically different affirmance rates for those interpretations.<sup>129</sup> On the other hand, while it is easy to criticize the Supreme Court’s inconsistent applications of review standards in constitutional cases, lurking behind those exceptions is the mine run of constitutional cases where, for example, rational basis review really is exceptionally deferential, and strict scrutiny really is searching.<sup>130</sup> One can find similar real world effects of

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<sup>127</sup> See *supra* Part III.C. (discussing possibility of both substantive and procedural applications of such canon).

<sup>128</sup> Cf. Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1785 (1975) (casting doubt on judicial practice of narrowly construing agency-authorization statutes to ensure consideration of under-represented interests, based on concern that such practice “tends to multiply the issues for decision in a way that diminishes the odds of finding a clear statutory directive to resolve the controversy”).

<sup>129</sup> See, e.g., Richard Pierce, *What Do the Studies of Judicial Review of Agency Action Mean?* 63 ADMIN. L. REV. 77 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1604701](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1604701) (finding difference in affirmation rate of less than 3%). On the other hand, a recent study does suggest that, at least the Supreme Court level, the difference between these standards and the *Seminole Rock/Auer* standard for reviewing agency interpretations of their own regulations does translate into significantly different affirmance rates. See *generally id.* (analyzing court cases applying these two standards and reaching this conclusion).

<sup>130</sup> See, e.g., Edward Lyons, *Reason’s Freedom and the Dialectic of Ordered Liberty*, 55 CLEV. ST. L. REV. 157, 160 (2007) (“In default cases involving regulation of “garden variety” social or economic activity, a deferential “rational basis” standard is applied.”); Kathleen Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 60 (1992) (arguing that strict scrutiny and rational basis standards were designed to prevent courts from falling into temptation to engage in ad-hoc balancing).

standards of review in the area of appellate court review of lower court fact-findings and legal conclusions.<sup>131</sup> Simply put, standards matter.

But this objection goes deeper, questioning whether the very nature of a canon requiring consideration of public trust values can ever be expressed so precisely as to provide a workable standard. So understood, the objection here is not so much an allegation that “standards don’t matter,” but rather, that a standard in this area is incapable of providing courts with a precise and workable guide. Thus, the objection goes, it may be one thing to require an appellate court to consider whether an agency’s statutory interpretation decision is “reasonable,”<sup>132</sup> to review a lower court’s fact-findings for “clear error,”<sup>133</sup> or to review a statute to determine whether it was narrowly tailored to serve a compelling government interest,<sup>134</sup> but quite another thing to direct a court simply to consider public trust values whenever a decision implicates those values.

This is a fair objection. However, it bears repeating that the proposed canon is not as terse or simplistic as the prior paragraph suggests. Rather, the characteristics of the underlying public trust principle — the nature of public trust assets in our political and legal system, and their role in society — help shape how courts should implement this canon. Recall those characteristics: the inherently public nature of these goods, both in terms of the uses that are made of them and, in light of those uses, the net losses that flow from recognizing private ownership rights; and the implications of such publicness for their protection in our liberal, pluralistic political system. These characteristics help shape the scope and intensity of the consideration courts should give to protecting public trust resources via an interpretive canon.

Further, as explained earlier,<sup>135</sup> an important input into the interpretive task would be a judge’s understanding of the particular requirements of the construed legal source. Because the protection for

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<sup>131</sup> See, e.g., Joshua Fischman & Max Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, Va. Pub. Law & Legal Theory, Working Paper No. 2010-23, (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1434123](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1434123) (suggesting that standards of review in federal criminal sentencing context do exercise some constraining effect on judges).

<sup>132</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 845 (1984) (requiring that courts review agency interpretations of ambiguous statutory provisions for reasonableness).

<sup>133</sup> See FED. R. CIV. P. 52.

<sup>134</sup> See, e.g., *Simon & Schuster, Inc. v. N.Y. State Crime Victims Comp. Bd.*, 502 U.S. 105 (1991) (applying this standard).

<sup>135</sup> See *supra*. Part III(C)(2).

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public trust values this Article proposes takes the form of influence on a court's construction of a separate and distinct legal requirement (such as a statute), the application of the proposed canon would necessarily vary with the characteristics of that legal rule.

Thus, implementing the canon amounts to far more than a judge placing an inchoate, generalized "thumb on the scale." Rather, when properly understood, it responds to the particular position of public trust assets in the given case, considering the identity of the relevant parties (e.g., a legislature as opposed to an agency) and the nature of the legal provision being construed. This understanding of the canon refutes criticism that the proposal is analytically incoherent. It may be difficult to apply — a matter taken up by the next section — but not conceptually incoherent.

## 2. Workability as Judicial Competence

One might concede the theoretical coherence of the approach sketched out above, but still object to the canon on the ground that it imposes insurmountable practical difficulties on courts. This objection centers on concerns about judicial competence. It reflects the fact that the canon would require courts to determine how to apply a relatively vague presumption in favor of public trust uses, and then factor that presumption in to what is often an already complex set of legal standards governing the challenged action. Unquestionably, the combination of these steps adds to the complexity of cases involving the proposed canon. Inevitably, adding another factor to a court's consideration of any legal issue increases the issue's complexity. But this additional difficulty is not so different in type or degree as to justify rejecting this canon on judicial competence grounds.

First, as explained earlier,<sup>136</sup> applications of substantive presumptions and standards of review are part and parcel of courts' work. Judicial experience with this task includes both steps outlined here: determining what a particular presumption or review standard requires in a given case and then applying it.<sup>137</sup> On its face, nothing about the public trust canon makes its application different, either in

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<sup>136</sup> See *supra* Part IV.B.1.

<sup>137</sup> Compare *United States v. Mead Corp.*, 533 U.S. 218 (2001) (determining, as matter preliminary to applying applicable standard of review to agency's statutory interpretation decision, what that standard should be), with *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984) (en banc) (determining appropriate standard of review for mixed questions of law and fact, which in turn requires distinguishing between law and fact, before applying that resulting standard).

type or degree, from other glosses that courts must apply when interpreting legal texts.

Second, particular applications of the canon are quite analogous to other requirements that are widely present in American law. For example, the requirement that agencies evaluating policy options consider all the relevant factors exists in most, if not all, administrative law systems.<sup>138</sup> Applying the canon to situations where an agency makes a discretionary decision that impacts public trust resources would entail the same type of review, adding public trust values to the factors the agency must consider. Similarly, substantive canons abound in American law.<sup>139</sup> Whether called clear statement rules, presumptions, or interpretive canons, these guides are familiar to American judges.

Third, nothing in the rationales underlying the public trust canon makes the canon particularly resistant to competent judicial application. For example, when a statute requires an administrative agency to consider diffuse interests, such as public health, reviewing courts will necessarily examine the resulting administrative rule to confirm that the agency considered that interest.<sup>140</sup> Nothing about the diffuseness of public trust values makes it more difficult for a court to apply this canon's procedural version. Nor is there anything unique about a substantive presumption in favor of public trust assets that renders that version of the canon any more difficult to apply than the myriad of clear statement rules, presumptions, and canons that exist elsewhere in American law. Courts may sometimes find it difficult to determine whether a statute has satisfied such a rule.<sup>141</sup> But there is no reason to think that a substantive presumption in favor of public trust resources is any harder for courts to manage than presumptions

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<sup>138</sup> In the federal system, this requirement has been explicated in a series of foundational Supreme Court cases. See *FCC v. Fox Television Stations v.*, 129 S.Ct. 1800, 1810-1812 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 55 (1983); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

<sup>139</sup> See, e.g., *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976) (describing canon that disfavors reading statute as impliedly repealing an earlier statute).

<sup>140</sup> See, e.g., *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001) (holding that it does not violate non-delegation doctrine for Congress to require the EPA to promulgate air quality standards "requisite to protect the public health" and then reviewing whether agency's implementation of that mandate was reasonable).

<sup>141</sup> See, e.g., *Pennsylvania v. Union Gas Co.* 491 U.S. 1 (1989) (reflecting disagreement between Justices as to whether CERCLA statute clearly abrogated state sovereign immunity).

against federal intrusions into the federal-state balance<sup>142</sup> or authorizations to agencies to act retroactively,<sup>143</sup> or narrow constructions of statutes in derogation of the common law.<sup>144</sup> It may be true that cases involving public trust assets would arise more frequently than cases implicating other types of presumptions – though this is by no means self-evident. But even if that were true, there is no reason to think that this additional volume of cases translates into a more difficult inquiry for courts on a case-by-case basis, or even that it in the aggregate it adds to courts’ burdens so much as to justify rejecting such a presumption as beyond judicial capacity.

### C. *Meaningfulness*

The foregoing objections flow from concerns about the canon’s legitimacy and practical workability. Another set of objections turn on the canon’s real world effects. An objection coming from public trust protection sympathizers argues that the canon is largely superfluous. This objection argues that legal protections for environmental interests, most notably state constitutional provisions and so-called “little NEPAs,”<sup>145</sup> provide both the substantive and procedural protection that this canon would deliver. At the other end of the spectrum, one might object that the canon effectively expands to dry-land resources the full-blown version of the public trust doctrine.

#### 1. The Comparative Scopes of the Canon and Positive Law

The first response to the objection about superfluity is that a public trust canon may cover situations that are not covered by little NEPAs

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<sup>142</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 453 (1991) (construing Age Discrimination in Employment Act not to apply to state court judges given federalism implications of such interpretation).

<sup>143</sup> See *Bowen Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (noting presumption that Congress does not give agencies authority to promulgate regulations with retroactive effect).

<sup>144</sup> See, e.g., NORMAN J. SINGER, *SUTHERLAND’S STATUTES AND STATUTORY CONSTRUCTION* § 61.01 (7th ed. 2011) (“[S]tatutes in derogation of the common law should be strictly construed . . .”).

<sup>145</sup> “Little NEPAs” are the state-law versions of the federal National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2006) [hereinafter NEPA]. In a nutshell, NEPA requires the federal government to consider the environmental impacts of any major federal action significantly affecting the environment. Little NEPAs are state laws that impose analogous requirements on state governments. For a discussion of NEPA, see STEVEN FERREY, *ENVIRONMENTAL LAW* 81,143 (5th ed. 2010).

or other positive law. Little NEPAs do not exist in all states<sup>146</sup> and vary greatly in their coverage, their requirements, and their provisions for judicial review.<sup>147</sup> Moreover, their general requirement that government consider environmental impacts does not completely track the impact a canon would have. For example, little NEPAs generally do not apply to state legislatures.<sup>148</sup> By contrast, this Article envisions that the proposed canon would apply to legislation.

Still, the objection may have force in a state that has enacted in its positive law significant substantive and procedural protections for the environment.<sup>149</sup> But this fact should count in favor, not against, the canon proposal. The basic idea behind the canon is that it responds to a fundamental background principle of American law that may be difficult to instantiate because of concerns about judicial authority and competence. To the extent that the legislature of a state (or its people, in the case of a constitutional amendment) translates that broad principle into a precise legal rule enforceable by a court, one can conclude that canon has served its purpose. At that point, the canon can appropriately fade from the scene, at least to the extent the positive law protection covers the situation at hand. This dynamic is somewhat analogous to the familiar principle that statutory law supersedes the common law. When a positive law enactment provides the protection that the canon would otherwise provide, it is appropriate to conclude that the purpose of the canon — to ensure that public trust values are recognized — has been satisfied.

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<sup>146</sup> See David Sive & Mark Chertok, *Little NEPAs and Their Environmental Impact Assessment Procedures*, SK008 ALI-ABA 325, 327-28 (2004) (describing 2004 survey counting 15 states, the District of Columbia, and Puerto Rico as jurisdictions that have enacted a little NEPA); see also Daniel Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 URB. LAW. 949, 951 (2006) (describing 2006 survey two years later counting 16 states, along with District of Columbia and Puerto Rico).

<sup>147</sup> See Sive & Chertok, *supra* note 146 (noting the coverage and judicial review provisions of little NEPAs); Selmi, *supra* note 146, at 954-57 (noting the coverage provisions of little NEPAs).

<sup>148</sup> See Selmi, *supra* note 146, at 956.

<sup>149</sup> See, e.g., *Mont. Env'tl. Info. Ctr. v. Dep't of Env'tl. Quality*, 988 P.2d 1236, 1246 (Mont. 1999) (concluding Montana Constitution requires actions infringing on citizens' enjoyment of a clean environment satisfy version of strict scrutiny); Selmi, *supra* note 146, at 982 (illustrating that California's little NEPA, the California Environmental Quality Act, "establishes a policy that agencies should not approve projects where feasible alternatives or mitigation measures would reduce environmental damage").



## 2. Has American Law Obviated the Public Trust Doctrine?

The prospect, noted in the prior section, of positive law superseding the proposed public trust canon raises the empirical question of whether this dynamic has occurred to such a degree that the canon is, in fact, already obsolete. Writing in the mid-1980s, Richard Lazarus suggested that the public trust doctrine may have outlived its usefulness, in part because of developments in public law that increased government power to protect public trust values in privately held land and recognized government's duty to protect such values in its decision-making more generally.<sup>150</sup> However, developments since Professor Lazarus's article call into question the vitality of at least some of the phenomena he believed to have obsolesced the doctrine.

First, takings law has moved, at least somewhat, toward increased protection for private property. Heightened requirements for conditional development permits,<sup>151</sup> *per se* rules finding a regulation to constitute a taking,<sup>152</sup> acceptance of the idea that landowners can have a takings claim even when they take title to property after the state has reduced the relevant bundle of sticks associated with property ownership,<sup>153</sup> and the possibility that the Court may recognize a taking based on a state court's interpretation of state property law<sup>154</sup> all suggest at least somewhat greater protection for private property owners against government regulation imposed for environmental reasons.<sup>155</sup> Together these developments<sup>156</sup> call into question the

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<sup>150</sup> Lazarus, *Changing Conceptions*, *supra* note 3, at 658-91 (1986).

<sup>151</sup> See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (requiring some relationship between development permit conditions and problem caused by development).

<sup>152</sup> See, e.g., *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-19 (1992) (describing regulatory takings of landlords' property rights).

<sup>153</sup> Compare *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-28 (2001) (holding that a landowner can have a valid takings claim even when the law reducing his property rights was enacted before he purchased the parcel in question), with Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement within the Supreme Court*, 57 HASTINGS L.J. 759, 815-17 (2006) [hereinafter Lazarus, *Measure of a Justice*] (arguing *Palazzolo* is not as strongly pro-property rights as might appear).

<sup>154</sup> See *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tl. Prot.*, 130 S. Ct. 2592, 2612 (2010) (plurality opinion) (recognizing possibility of a judicial taking); *id.* at 2614 (Kennedy, J., concurring) (declining to decide this issue but expressing doubt about concept of judicial taking); *id.* at 2618 (Breyer, J., concurring) (declining to decide this issue).

<sup>155</sup> Moreover, the hotly contested 5-4 decision in *Kelo v. City of New London*, 545 U.S. 469 (2005), and, perhaps even more directly, states' responses to *Kelo*, at least raise the possibility that claims of public use will be more carefully scrutinized when

modern force of Lazarus's argument that the expansion of the police power has rendered less relevant the property rights-reservation theory underlying the classic public trust doctrine.

Second, the administrative law developments Lazarus identified, which he argued mitigated the need for the public trust doctrine to ensure adequate government consideration of public trust values, have also moved in a direction unfavorable to those values. Federal courts' increased reluctance to review programmatic agency action at the behest of environmental plaintiffs<sup>157</sup> makes it harder to obtain judicial review of the broader environmental decisions that are most important for many public trust values today. At the same time, the arguable decline in the intensity of "hard look" review of agency action<sup>158</sup> suggests that when courts engage in such review, it may not be as searching as Professor Lazarus was able to assume a quarter-century ago.

Third, the rise of cost-benefit analysis — a phenomenon Professor Lazarus identified<sup>159</sup> — raises new risks to the consideration of public trust values. As scholars have long noted, elevation of cost-benefit analysis as a major factor in administrative decision-making raises difficult issues about the valuation of interests that are not easily quantifiable, let alone monetizable.<sup>160</sup> While scholars offer various

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private property rights are at stake. Concededly, *Kelo* is technically not on point, given that it focused on the question of government power to acquire property by eminent domain when the public use was alleged to be a private use in disguise. Presumably, such actions in pursuit of public trust values easily come within the public use rubric. Still, the controversy surrounding *Kelo* is consistent with a greater solicitude for private property rights that may affect government power to impact property rights in pursuit of public trust values.

<sup>156</sup> The Court's — and states' — directions with regard to the takings clause is not completely clear. See Lazarus, *Measure of a Justice*, *supra* note 153, at 811-23 (suggesting that the Court has flagged in its protection of private property rights). At the very least, though, the developments identified in the text, which occurred after Professor Lazarus wrote, suggest at least greater protection for those rights at the expense of broad government power to act to protect public trust values.

<sup>157</sup> See, e.g., *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 72 (2004) (finding ongoing agency obligations unreviewable under the APA); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 885-900 (1990) (finding programmatic agency action unreviewable under the APA).

<sup>158</sup> Compare *Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983) (using arguably strict review to strike down the agency's consideration of a regulatory issue under "arbitrary and capricious review"), with *FCC v. Fox Television Stations*, 556 U.S. 502 (2009) (arguably reviewing the agency's action under more deferential standards).

<sup>159</sup> See Lazarus, *Changing Conceptions*, *supra* note 3, at 682 n.317.

<sup>160</sup> See, e.g., NICHOLAS STERN, *STERN REVIEW: THE ECONOMICS OF CLIMATE CHANGE* 144 (2005) (characterizing, quantifying, and monetizing "full range" of climate

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methods to account for these difficulties within the context of a general cost-benefit mandate,<sup>161</sup> the general focus on cost-benefit analysis raises the possibility that the administrative process will be systematically skewed against interests, such as public trust interests, that are not easily reducible to inputs in cost-benefit calculations.

These public law developments described above generally refer to federal rather than state law. Still, to the extent they reflect general trends in public law,<sup>162</sup> they suggest that the developments Professor Lazarus identified as obviating the need for the public trust doctrine may have either slowed down or even partially reversed, thus making some version of a public trust principle relevant once again.

### 3. Does the Canon Amount to a Backdoor Expansion of a Legally Binding Public Trust Doctrine?

The opposite objection to the proposed canon is that it is too aggressive, in that it all but envisions expansion of a legally binding public trust doctrine. This objection describes the public trust doctrine as a requirement that government give heightened consideration to public trust values. Thus, some argue that the classic public trust itself takes the form of a presumption, or as expressed in this Article, a canon of construction. If so, then this Article's call for such a canon is essentially indistinguishable from a call for expanding the doctrine itself. This argument is a fair one; on reflection, however, it loses much of its force.

First, the premise of the argument — that the public trust doctrine functions not as a substantive restriction on government authority but rather as a de facto “hard look” requirement or presumption — is not completely accurate. Courts often use the doctrine as a substantive

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change effects as “conceptually, ethically and empirically very difficult”); Jonathan Cannon, *The Sounds of Silence: Cost-Benefit Canons in Entergy Corp. v. Riverkeeper, Inc.*, 34 HARV. ENVTL. L. REV. 425, 430 (2010) (noting difficulty in quantifying environmental benefits).

<sup>161</sup> E.g., CASS SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 139, 369-70 (1997) [hereinafter SUNSTEIN, *FREE MARKETS*] (advocating modified form of cost-benefit analysis that would allow departures from purely economic criteria).

<sup>162</sup> See, e.g., Christina Ditty, *The Frustration of the Resource Conservation and Recovery Act: Clean Air For Everyone v. Meyer*, 20 J. NAT. RESOURCES & ENVTL. L. 141, 148 (2006) (noting cost-benefit requirement in Washington environmental law); Samuel Hays, *The Future of Environmental Regulation*, 15 J. L. & COM. 549, 557-59 (1996) (noting attempts by Illinois and air quality agency for southern California to perform cost-benefit analysis).

limit on government authority to alienate public trust property or impair public trust values.<sup>163</sup>

Second, the fact that the proposed canon influences outcomes by filtering pro-public trust preferences through other legal requirements means that treating the doctrine as a canon will not yield the same results as a free-standing public trust doctrine. As explained earlier,<sup>164</sup> if the underlying legal requirement is that the decision-maker consider particular factors in making its decision, then this canon would likely require the agency to consider public trust values. By contrast, if the underlying law is substantive — for example, if it permitted alienation of public trust property or destruction of public trust values — then that authority would be construed more narrowly. Thus, sensitively applied, the canon would impact actual decisions in ways potentially far different from those that might obtain under a legally binding public trust rule.

#### V. UNDERSTANDING THE CANON AND ITS UNDERLYING DOCTRINE

The final, and in some ways most fundamental, objection to this Article's proposed canon is that it does not respond to the concerns that motivated it. This argument levels essentially the same objection to the proposed canon that some scholars and judges level at the Supreme Court's embrace of intermediate scrutiny in the equal protection context: that it represents nothing but a poorly thought-out compromise between two extreme positions, rather than the result of a principled legal analysis. As such, the criticism goes, the idea of a canon simply reflects an unprincipled compromise between the extreme positions of no dry-land public trust-based protection at all and, on the other side, a binding legal rule protecting dry-land public

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<sup>163</sup> See, e.g., *Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs*, 742 F. Supp. 441, 444 (N.D. Ill. 1990) (“[A]ny attempt by the state to relinquish its power over a public resource should be invalidated under the [public trust] doctrine.”); *Zack's, Inc. v. City of Sausalito*, 81 Cal. Rptr. 3d 797 (Ct. App. 2008) (limiting, under the public trust doctrine, the state's power to alienate tidelands and submerged lands); *State by Kobayashi v. Zimring*, 566 P.2d 725, 735 (Haw. 1977) (employing “public trust principles” to limit the state's ability to sell land held for the public); see also *People v. Cal. Fish Co.*, 138 P. 79, 82 (Cal. 1913) (quoting *Ward v. Mulford*, 32 Cal. 365, 372 (1867)) (“The right of the state is subservient to the public rights of navigation and fishery, and theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purposes of navigation and fishery, and, whatever disposition she does make of them, her grantee takes them upon the same terms upon which she holds them, and of course, subject to the public rights above mentioned.”).

<sup>164</sup> See *supra* notes 115-116 and accompanying text.

trust resources to the same degree as their aquatic counterparts. This objection requires that we think more carefully about the public trust doctrine, so we can determine whether the proposed canon constitutes an analytically plausible tool for courts. This argument requires a return to our earlier consideration of the proper grounding for the public trust doctrine in American law.<sup>165</sup>

The first step in responding to this objection recognizes that a public trust canon is not an innovation in American law. Instead, it grows out of the undoubted existence of the core public trust doctrine as expressed in cases such as *Illinois Central*. In this sense, the canon could be understood as a penumbra emanating from the core component of the doctrine. Of course, penumbras can be criticized as unprincipled. Justice Black's criticism of the most famous penumbra in American law — the "right of privacy" Justice Douglas discerned in *Griswold v. Connecticut*<sup>166</sup> — centered on this argument.<sup>167</sup> The challenge is to discern a principled reason to view the core, water-based public doctrine as a foundation for this broader penumbra.

One can meet this challenge by understanding the development of the core doctrine not as an arbitrary rule that singles out water-based resources for special protection, but as an exemplification of a broader American commitment to non-arbitrary government. On this understanding, legal rules must always be based on some notion of the public good.<sup>168</sup> This understanding allows for vindication of private interests, but these interests must be the equal and fair beneficiaries of a general rule enacted to benefit all. This type of requirement has permeated statements of fundamental American law, from "law of the land" clauses in early state constitutions to prohibitions on "class legislation" during the middle decades of the nineteenth century, to the Equal Protection Clause.<sup>169</sup>

Of course, stated at this high level of generality, this rule is difficult for courts to apply.<sup>170</sup> When confronted with fundamental but vague

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<sup>165</sup> See *supra* Part III.A.

<sup>166</sup> 381 U.S. 479, 484 (1965).

<sup>167</sup> See *id.* at 507, 508-10 (Black, J., dissenting).

<sup>168</sup> See generally Sunstein, *Nondelegation*, *supra* note 58 (identifying concern for the public good as a fundamental requirement of legislative action under the U.S. Constitution).

<sup>169</sup> See generally V.F. Nourse, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955 (2009) (noting this history).

<sup>170</sup> See, e.g., Richard Kay, *The Equal Protection Clause in the Supreme Court, 1873-1903*, 29 BUFF. L. REV. 667, 705 (1980) (noting how the Supreme Court's investigation into the reasonableness of legislative classifications in the late nineteenth century inevitably led it to an ultimately-abandoned practice of evaluating the wisdom of the

rules, courts often craft more specific legal rules to guide on-the-ground adjudication of concrete cases. For example, in an attempt to apply equal protection's vague command of "treating likes alike," courts have crafted an elaborate structure of mediating rules that require particular scrutiny levels for specific classifications. Analogously, courts unsure of their competence to police the substance of the federal-state balance sometimes rely on the political process, not by completely deferring to congressional legislation, but rather by requiring Congress to speak plainly when it legislates in ways that impact that balance.<sup>171</sup>

The canon proposed here should be understood as a similar instantiation of the basic imperative that government act in pursuance of the public interest. It responds to the reality that public trust uses of natural resources are often under-represented in the political-administrative process exactly because of their diffuse nature. At the same time, as Carol Rose explained, the public may gain significant benefits from public ownership — benefits that outweigh the aggregate benefits of private parties' ownership of the resource. Thus, government decision-making relating to public trust resources runs the risk of underprotecting those public values. As such, public trust values deserve protection from courts.

However, as critics note, it is also true that the doctrine's expansion into dry-land resources raises analytical and practical problems. Precedent, which until recently focused on aquatic resources, does not directly support this expansion. It also presents the potential for exceptionally broad applications of the doctrine's legal rule restricting government alienation.<sup>172</sup> In addition to raising legitimacy concerns, such an expansion may also test the competence of courts as they are asked to decide complex land use and ecosystem-management questions, and evaluate the real costs and benefits associated with

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challenged legislation).

<sup>171</sup> See, e.g., *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 114, 116 (1992) (Souter, J., dissenting) (noting that presumption that Congress does not intend to preempt state law "provides assurance that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts") (internal quotation and citation omitted); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (same); *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989) (noting that Congress must speak plainly when enacting legislation that impacts the federal-state balance), *overruled on other grounds by Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

<sup>172</sup> For example, one commentator has proposed applying the doctrine to a claim on behalf of the public that a professional sports team repay government expenditures on a sports stadium. See Chris Dumbroski, *Application of the Public Trust Doctrine to the Pittsburgh Stadium and Exhibition Authority*, 7 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 63, 65 (2010).

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conflicting resource uses. But it is exactly these problems flowing from a broader doctrine that lead to under-enforcement of the basic principle.

An interpretive canon is a mediating rule that provides courts with a judicially manageable method of vindicating the fundamental principle of public purpose in government management of natural resources. When aquatic resources played the most important role in vindicating public trust values, courts embraced the doctrine to protect those values. As social needs have changed, many scholars have called for the law to change as well, and to recognize and protect those values in a broader set of resources. But objectors have a fair point that, taken to its logical extreme, such an expansion would be hard to cabin. In such a situation, where the logic of a legal rule takes courts beyond their likely competence (or legitimacy), an interpretive canon becomes more than an unprincipled midway point between a legally binding rule and no rule at all. Instead, it becomes an appropriate method of vindicating the underlying principle in a way that is both accessible to courts and consistent with their legitimacy as an important player, but not the sole player, in our government system.<sup>173</sup>

#### CONCLUSION

This Article attempts to resolve what it describes as the “paradox” of the public trust doctrine: a deeply felt principle established in venerable law, but at the same time, an incompletely worked-out legal doctrine that, in its more aggressive forms, threatens to provide courts with wide-ranging authority poorly cabined by legal rules. It proposes a canon approach to an expanded application of the doctrine.

Regardless of whether this proposal gains acceptance, it remains clear that the public trust doctrine requires further study. Scholars

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<sup>173</sup> In addition, under this approach it makes sense that the proposed canon would have little impact in situations where a court already applies a legal requirement protecting public assets — such as when a state constitutional provision or little NEPA applies. In such situations it could be said that the resource-protecting law has directly addressed the resource underrepresentation problem and, thus, obviated the need for a mediating rule such as an interpretive canon. This makes much more sense than attempting to find room for an expanded public trust doctrine fitting alongside a state constitutional provision or little NEPA that applies to the particular case before the court. Attempting to shoehorn in a public trust doctrine in such a situation raises serious legitimacy questions, not simply because of the lack of a solid foundation for a dry-land public trust doctrine, but also because the existence of the constitutional or statutory protection for the asset would seem to suggest that the legislature had in fact supplanted any common law dry-land doctrine.

continue to call for an expansion of the doctrine to respond to the heightened need for more careful attention before natural resources are alienated or shifted into private uses. In a world of disappearing ecosystems and changing climates, our increased understanding of the benefits those resources provide as publicly owned resources dedicated to public uses make those calls ever more pressing. Accommodating those needs within our legal system and traditions is an urgent task, to which scholars of public law, environmental law, and property law must turn if the law is to retain its promise of flexibility and adaptability to new social needs.