Preserving the Common Law Public Trust Doctrine: Maintaining Flexibility in an Era of Increasing Statutes

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"Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems." – Joseph L. Sax[1]

[1] Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 474 (1970).

I. INTRODUCTION

The public trust doctrine is the principle that certain natural resources are preserved for public use, and that the government must protect and maintain these resources for the people.[2] The public trust doctrine is one of the oldest environmental law doctrines.[3] The United States adopted the doctrine from England's common law system, but the doctrine's origin stretches much further back into history.[4] Since its arrival in the United States, the common law public trust doctrine has been continuously evolving—as is typical of any common law principle. Today, however, the public trust doctrine is no longer solely a common law doctrine. Many states have begun to codify the doctrine by adopting it into statutes and state constitutions. Nevertheless, the relationship between the common law public trust doctrine and the statutory public trust doctrine remains uncertain. This paper will focus on California court decisions that contemplate the interaction between the common law and statutory forms of the public trust doctrine and the implications these decisions have for the future of this important principle.

Part II of this paper will demonstrate the common law public trust doctrine's flexibility and evolutionary nature by showing how the doctrine has been steadily expanding to include more natural resources and public uses. Part III will turn to the statutory public trust doctrine and discuss its emergence and growth in California. Part IV will focus on California court decisions that contemplate the relationship between the common law and statutory public trust doctrines. Lastly, Part V culminates the analyses of the previous parts by discussing the potential implications that the California court decisions have for the future of the public trust doctrine. This paper concludes by arguing that the increased codification of the public trust doctrine threatens the common law public trust doctrine and, as a result, its most valuable characteristic—its flexibility and evolutionary nature. If we are not careful to maintain the common law public trust doctrine, then the doctrine as a whole may not prove as useful in the future as we currently assume.

II. THE FLEXIBILITY AND EVOLUTIONARY NATURE OF THE COMMON LAW PUBLIC TRUST DOCTRINE

The public trust doctrine's origins date as far back as ancient Roman law. As is typical with common law doctrines, it has been continually evolving ever since.[5]

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[2] MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 3 (2013).

[3] *Id.* at 1.

[4] *Id.*

[5] *See generally* Barton H. Thompson, *The Public Trust Doctrine: A Conservative*

The public trust doctrine is widely recognized as a flexible doctrine, and it is this flexibility that fosters the doctrine's evolutionary nature.[6] In the United States, the public trust doctrine originally and most traditionally only encompassed submerged lands and navigable waterways.[7] In connection with these trust resources, the government was obligated to protect the public's right to use these resources for fishing, navigation and commerce—now known as the "traditional uses."[8] For example, in 1842 the Supreme Court of the United States decided *Martin v. Waddell's Lessee*, in which Waddell's lessee sought to eject Martin and others from harvesting oysters on one-hundred acres of submerged lands allegedly owned by Waddell in Raritan Bay, New Jersey.[9] The Court held that Waddell could not exclude Martin or others wishing to harvest oysters because submerged lands are held in public trust to be "freely used by all for navigation and fishery, as well for shellfish as floating fish."[10]

The public trust doctrine has been steadily expanding not only to include more natural resources, but also to protect additional public uses of those trust resources. For instance, most states now consider an intermittently dry sand beach, up to the mean high tide line, as a resource covered by the trust (as opposed to including only the water or the land under that water as a trust resource).[11] The New Jersey Supreme Court famously set forth this notion in *Matthews v. Bay Head Improvement Association* in which the court stated, "Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge."[12]

Many states, including California, have expanded the doctrine to protect use of trust resources for recreational purposes such as "the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes."[13] California, along with Hawaii, is carving the leading edge of the doctrine with court decisions asserting that ecological protection or

Reconstruction and Defense, 15 SE. ENVTL. L. J. 47, 50-54 (2006) (provides a more thorough discussion of the public trust doctrine's history).

6 *See* Marks v. Whitney, 6 Cal. 3d 251, 259 (1971).

7 *See* Carson v. Blazer, 2 Binn. 475, 477-78 (Pa., 1810).

8 *See* Ill. Cent. R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

9 Martin v. Waddell's Lessee, 41 U.S. 367, 407 (1842).

10 *Id.* at 413.

11 Potash, Jack, The Public Trust Doctrine and Beach Access: Comparing New Jersey to Nearby States 1 (2016) (unpublished student scholarship) (on file with http://scholarship.shu.edu/student_scholarship/738/).

12 Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 325 (1984).

13 Marks v. Whitney, 6 Cal. 3d 251, 259 (1971).

preservation is also a "use" protected by the public trust doctrine.[14] In California, this concept was pioneered in *Marks v. Whitney*, in which the Supreme Court of California stated:

> There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[15]

There are legal academics, legal practitioners, and environmental advocates who hope that the evolutionary nature of the common law public trust doctrine will help them tackle some of our future's most challenging environmental problems. For example, there is a movement based upon the notion that the public trust doctrine could be invoked to help combat climate change.[16] To render this feasible, the courts would need to expand public trust resources to include the air and atmosphere.[17] In fact, one state trial court, in Texas, and one state court of appeal, in New Mexico, have held that the air is a public trust resource.[18] As these decisions demonstrate, the common law public trust doctrine has been steadily expanding to include more natural resources and more uses of those resources.[19]

III. THE EMERGENCE AND GROWTH OF THE STATUTORY PUBLIC TRUST DOCTRINE

Thus far, this paper has focused on the public trust doctrine as it has evolved through the common law. It will now turn to an increasingly relevant aspect of this doctrine—the statutory public trust doctrine.[20] The statutory public trust doctrine consists of statutes and state constitutional provisions that embody, either explicitly or implicitly, public trust doctrine principles. Although not the focus of his seminal essay, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, Professor Joseph Sax recognized this as an important and

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[14] 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, 71 (2010).

[15] *Marks*, 6 Cal. 3d at 259-60.

[16] BLUMM & WOOD, *supra* note 2, at 349.

[17] *Id.* at 377.

[18] Sanders-Reed *ex rel.* Sanders-Reed v. Martinez, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015); Bonser-Lain v. Tex. Comm'n on Envtl. Quality, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex. Dist. Ct. Aug. 2, 2012), *vacated*, Texas Comm'n on Envtl. Quality v. Bonser-Lain, 438 S.W.3d 887 (Tex. App. 2014) (vacated on other grounds).

[19] BLUMM & WOOD, *supra* note 2, at 85; Craig, *supra* note 11, at 80.

[20] BLUMM & WOOD, *supra* note 2, at 5.

burgeoning aspect of the doctrine.[21] In this essay, Sax states, "To note the continued importance of court action, even in the most progressive states, is by no means to detract from the essential role of legislation and administration."[22] Sax accurately foresaw the emergence of the statutory public trust doctrine as an important tool for protecting environmental resources. Since the publication of his essay in 1970, states have increasingly adopted public trust principles into their constitutions and statutes.

In 1879, California adopted several constitutional amendments that incorporated the public trust doctrine into its constitution.[23] There are several sections of the California Constitution that are relevant to California's statutory public trust doctrine, but Article X is the most explicit invocation of public trust principles.[24] For example, Article X section 4 states:

> No individual, partnership, or corporation, claiming or possessing the frontage or tide lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction of this provision, so that access to the navigable waters of this State shall always be attainable for the people thereof.[25]

This is merely one of several Article X sections that embody the public trust doctrine.[26] California courts have recognized the public trust doctrine in its constitutional form. For example, in a case concerning the public's right to access the American River for whitewater rafting, the Third District Court of Appeal concluded, "The public's right of access to navigable streams is a constitutional right."[27]

In addition to the state constitution, there are numerous California state statutes that embody public trust principles.[28] One of many examples includes California Government Code section 66478.3, which states:

> The Legislature further finds and declares that it is essential to the health and well-being of all citizens of this state that public access to public

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21 Sax, *supra* note 1, at 548-51.

22 *Id.* at 550-51.

23 Craig, *supra* note 14, at 111.

24 CAL. CONST. art. X.

25 *Id.* § 4.

26 Craig, *supra* note 14, at 104-06.

27 People *ex rel.* Younger v. County of El Dorado, 96 Cal. App. 3d 403, 406 (1979).

28 Craig, *supra* note 14, at 106-08.

> natural resources be increased. It is the intent of the Legislature to increase public access to public natural resources.[29]

Interestingly, as of 2010 the California Water Code included language that explicitly adopted the public trust doctrine for the first time. This language can be found in the California Water Code section 85023, which states, "The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta."[30]

Just as the courts have acknowledged the public trust doctrine in its constitutional form, they have also recognized the doctrine as it exists in modern statutes. For example, in *Environmental Protection Information Center v. California Department of Forestry and Fire Protection*, the Supreme Court of California explained:

> First is the common law doctrine, which involves the government's affirmative duty to take the public trust into account . . . . The second is a public trust duty derived from statute . . . . There is doubtless an overlap between the two public trust doctrines . . . .[31]

The California Constitution provisions and statutes quoted above are merely singular examples to demonstrate a broader trend in California—the increasing number of statutes that include public trust doctrine principles.[32] The remainder of this paper will help elucidate why this trend could have important implications for the future of the public trust doctrine.

IV. THE UNCERTAIN RELATIONSHIP BETWEEN THE COMMON LAW AND STATUTORY PUBLIC TRUST DOCTRINES

As the discussion in Parts II and III illustrates, the modern public trust doctrine is comprised of both common law and statutory provisions. As a result, any analysis of the public trust doctrine that includes only one or the other is incomplete. It is worth noting that this structure is not unique to either the topic

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29 CAL. GOV'T CODE § 66478.3 (West 2015).

30 CAL. WATER CODE § 85023 (West 2015).

31 Envtl. Prot. Info. Ctr. v. Cal. Dep't of Forestry and Fire Prot., 44 Cal. 4th 459, 515 (2008) (citations and internal quotation marks omitted).

32 *See, e.g.*, CAL. CONST. art. X, §§ 2-5 (adopted in 1976); CAL. CONST. art. I, § 25 (adopted in 1910); CAL. WATER CODE § 85023 (adopted in 2009); CAL. PUB. RESOURCES CODE § 5093.50 (adopted in 1972); CAL. FISH & GAME CODE § 5937 (adopted in 1957); CAL. PUB. RESOURCES CODE § 6301 (adopted in 1941); CAL. HARBOR & NAVIGATION CODE, § 100 (adopted in 1937); CAL. CIV. CODE, § 670 (adopted in 1872). For an explanation of how these Constitution sections and statutes invoke or relate to the public trust doctrine see http://www.marinefm.org/assets/images/Stories/public%20trust%20guide.pdf.

of the public trust doctrine or to the United States. In contemporary common law systems (such as in England and Australia), this mixture of common law and statutory law is the norm, and almost every area of law is best understood by considering both common law and statutory law together.[33] But what does it mean to "consider" both common law and statutory law together? Complicating matters is the fact that conflicts and discrepancies between the two render it difficult to simply give both equal weight in determining outcomes. California courts have begun to tackle these conflicts when deciding cases that involve the interaction between the common law public trust doctrine and statutory law. Their decisions regarding the interaction between the public trust doctrine and statutory law have important implications for the future of the doctrine.

A. National Audubon Society v. Superior Court

In 1983, the Supreme Court of California decided what is perhaps California's most famous public trust doctrine case, *National Audubon Society v. Superior Court* (the "Mono Lake case").[34] This case involved the interaction between the common law public trust doctrine and California's statutory scheme of water rights. It is important to note that the statutory scheme of water rights at issue here did not involve public trust principles. Nonetheless, this case serves as a useful starting point because it explains the fate of the common law public trust doctrine when it is pitted against a general statutory scheme. The cases in Sections B and C below will build on this foundation by utilizing *National Audubon Society* as a point of comparison and discussing statutes that do involve public trust principles.

The litigation in *National Audubon Society* stemmed from the City of Los Angeles' practice of diverting water from streams flowing into Mono Lake.[35] As a result of the diversions, Mono Lake diminished in size and suffered serious ecological harm.[36] The Supreme Court of California explained the situation:

> As a result of these diversions, the level of the lake has dropped; the surface area has diminished by one-third; one of the two principal islands in the lake has become a peninsula, exposing the gull rookery there to coyotes and other predators and causing the gulls to abandon the former island. The ultimate effect of continued diversions is a matter of intense dispute, but there seems little doubt that both the scenic beauty and the ecological values of Mono Lake are imperiled.[37]

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[33] Giacomo A. M. Ponzetto & Patricio A. Fernandez, *Case Law vs. Statute Law: An Evolutionary Comparison*, 37 J. LEGAL STUD. 379, 404 (2008).

[34] 33 Cal. 3d 419 (1983).

[35] *Id.* at 424.

[36] *Id.* at 424-25.

[37] *Id.*

The National Audubon Society argued that because the public trust doctrine was antecedent to California's water rights system, it limited all appropriative water rights.[38] Alternatively, the City of Los Angeles argued that the public trust doctrine cannot apply to the tributaries that flow into Mono Lake, in part because California's complicated scheme of statutory water rights completely occupies the field of water planning and allocation. The City argued:

> [T]he public trust doctrine as to stream waters has been "subsumed" into the appropriative water rights system and, absorbed by that body of law, quietly disappeared; according to DWP, the recipient of a board license enjoys a vested right in perpetuity to take water without concern for the consequences to the trust.[39]

But the Court rejected this argument, concluding that the public trust doctrine is separate and independent from the statutory water rights scheme.[40] The court explained, "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[41]

How does this decision elucidate the relationship between the common law public trust doctrine and statutory law? The Court's conclusion is helpful because it confirms the existence and importance of the common law public trust doctrine even in the face of a comprehensive statutory scheme. However, this conclusion only provides guidance to a point. When one reflects upon a typical contemporary common law system—which requires consideration of both common law and statutes—this conclusion is neither surprising nor revolutionary. The case provides no practical guidance as to how to deal with conflicts or discrepancies between the common law and statutory forms of the public trust doctrine. Rather, the opinion as a whole reads more like a statement of policy than anything else. Furthermore, it was unclear after *National Audubon Society* was decided whether its holding would be extended to situations in which the common law doctrine was pitted against a statute explicitly containing public trust principles. In such a situation, would a court still hold that the common law doctrine has value separate and independent from the statute? Or, would the fact that the statute contains public trust principles somehow change the analysis and conclusion? Sections B and C below contemplate the answers to these questions.

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38 *Id.* at 445.

39 *Id.*

40 *Id.* at 452.

41 *Id.* at 446.

B. Environmental Protection Information Center v. California Department of Forestry and Fire Protection

In 2008, the Supreme Court of California decided *Environmental Protection Information Center v. California Department of Forestry and Fire Protection*.[42] Unlike *National Audubon Society*, which involved a general statutory scheme, this case involved the interaction between the common law public trust doctrine and a statute that *explicitly* embodied public trust principles.

The facts of this case concern the regulatory approval of a logging plan for old growth redwoods in Humboldt County, California.[43] In this case, the Environmental Protection Information Center ("EPIC") contended that by granting an Incidental Take Permit, the Department of Fish and Game (renamed the California Department of Fish and Wildlife as of January 1, 2013) violated its duty to protect natural resources as dictated by the public trust doctrine.[44]

The court began by explicitly acknowledging the two public trust doctrines at issue—the common law doctrine and the statutory version found in the Fish and Game Code section 711.7. Fish and Game Code section 711.7 states, "The fish and wildlife resources are held in trust for the people of the state by and through the department."[45] The Court mentioned how there is "doubtless an overlap between the two public trust doctrines," but quickly concluded that the government's duty to protect wildlife is chiefly statutory.[46] As a result, the agency's decision to issue an Incidental Take Permit did not violate its common law public trust doctrine duty but, rather, a specific statutory obligation.[47] Because the violation was statutory in nature, then there was no separately actionable violation under the common law public trust doctrine.[48]

Unlike in *National Audubon Society*, the court here provides a more concrete principle when it comes to interpreting the interaction between the common law and statutory forms of the public trust doctrine. Here, the court seems to conclude that when there are both common law and statutory public trust doctrine principles at issue, the common law doctrine is subsumed by the statute. As such, this conclusion limits the strength of the common law public trust doctrine.

However, the full scope of this rule is unclear. One significant distinguishing characteristic of *Environmental Protection Information Center* is the fact that it involves the resource of fish and wildlife—part of what is known as the wildlife trust. The wildlife trust carries with it some unique characteristics because it is born out of a line of cases slightly separate from those involving submerged lands

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42 44 Cal. 4th 459 (2008).

43 *Id.* at 470.

44 *Id.* at 515.

45 CAL. FISH & GAME CODE § 711.7 (West 2015).

46 *Envtl. Prot. Info. Ctr.*, 44 Cal. 4th at 515.

47 *Id.* at 515-16.

48 *Id.*

and navigable waterways.[49] The wildlife trust encompasses wildlife in its natural and free state, both aquatic and terrestrial.[50] For example, in 1896 the United States Supreme Court held in *Geer v. State of Connecticut* that states have the power to regulate the killing of game within their borders:

> Stated in other language, to hunt and kill game is a boon or privilege, granted either expressly or impliedly by the sovereign authority, not a right inherent in each individual; and consequently nothing is taken away from the individual when he is denied the privilege, at stated seasons, of hunting and killing game. It is, perhaps, accurate to say that the ownership of the sovereign authority *is in trust for all the people of the state; and hence, by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust*, and secure its beneficial use in the future to the people of the state.[51]

A future court presented with a public trust doctrine issue regarding navigable waterways or dry sand beaches could distinguish *Environmental Protection Information Center* on the fact that it involved the wildlife trust. In such an instance, the strength of the common law public trust doctrine would be maintained in cases involving trust resources other than wildlife. On the other hand, a court less amenable to the common law public trust doctrine could conclude that this distinction is irrelevant. As a result, the rule in *Environmental Protection Information Center*—that in the presence of the statutory public trust doctrine, there is no separately actionable common law public trust claim—would be applied no matter what resource the statute covers. This could severely limit the strength of the common law public trust doctrine in situations involving a statue that also incorporates public trust principles. How courts treat *Environmental Protection Information Center* as precedent, and whether they distinguish or analogize based on its facts, will likely determine how detrimental the case is to the strength of the common law public trust doctrine.

C. Citizens for East Shore Parks v. California State Lands Commission

In 2011, the California Court of Appeal decided *Citizens for East Shore Parks v. California State Lands Commission*.[52] The statute at issue in this case was the California Environmental Quality Act ("CEQA"). CEQA does not explicitly

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[49] *See* Michal C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673 (2005), *as reprinted in* BLUMM & WOOD, *supra* note 2, at 196-98.

[50] BLUMM & WOOD, *supra* note 2, at 195.

[51] Geer v. Conn., 161 U.S. 519, 533-34 (1896) (quoting Magner v. People, 97 Ill. 320, 334 (1881)), *overruled by* Hughes v. Okla., 441 U.S. 322 (1979) (emphasis added).

[52] 202 Cal. App. 4th 549 (2011).

invoke the public trust doctrine. However, the case may still be informative given the dearth of cases that explicitly contemplate the interaction between the common law public trust doctrine and the statutory public trust doctrine.

Citizens for East Shore Parks involved the California State Lands Commission's approval of a thirty-year lease allowing Chevron U.S.A., Inc. to continue operating a marine terminal in San Francisco Bay.[53] Citizens for East Shore Parks contended that by approving the lease, the California State Lands Commission violated both CEQA and the common law public trust doctrine.[54]

The court began by acknowledging the holding of *National Audubon Society*, that the common law public trust doctrine possesses a value separate and independent from the statute, and therefore must be considered even in the face of a comprehensive statutory scheme.[55] However, the court in this case proceeded to utilize the analysis in *National Audubon Society* as a justification for its decision not to give the common law public trust doctrine value separate and independent from the CEQA statute in question. The court explained:

> Aside from the possibility that statutory protections can be repealed, the noncodified public trust doctrine remains important both to confirm the state's sovereign supervision and to require consideration of public trust uses *in cases filed directly in the courts without prior proceedings before the board*. Notably, the court [in *National Audubon Society*] did not suggest the doctrine remains relevant because it imposes protections above and beyond CEQA.[56]

The court relied heavily on this logic in justifying its holding that because the Lands Commission properly conducted a CEQA impact analysis, and because no change in the use of the resource was proposed, the common law public trust doctrine does not require the agency to conduct any additional analysis or consideration beyond what is required by CEQA.[57] The implication of this holding appears to be that as long as an agency follows the procedural requirements of a statute, then the common law public trust doctrine does not impose any additional requirements.

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53 202 Cal. App. 4th 549, 554-55 (2011).

54 *Id.* at 553.

55 *Id.* at 577.

56 *Id*. (emphasis in original, internal citations omitted).

57 *Id.* at 578.

V. THE FUTURE OF THE PUBLIC TRUST DOCTRINE: MAINTAINING THE DOCTRINE'S COMMON LAW CHARACTER AND, AS A RESULT, ITS FUTURE UTILITY

A. Reliance on the Future Public Trust Doctrine

For decades, the public trust doctrine has played an important role in maintaining the public's right to use and access certain natural resources. Today, many in legal academia, legal practice, and environmental advocacy place great value on the doctrine and its promising role in future environmental issues.[58] Historically, the doctrine has often represented a beacon of hope for those who believe in its great potential. Perhaps the most famous endorsement of the public trust doctrine's capacity to usher in a new era of environmental protection can be found in Professor Joe Sax's 1970 essay, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*.[59] Many consider this essay the most significant modern revival and reinvention of the public trust doctrine.[60] In his essay, Sax emphasized the doctrine's core principle—that some natural resources are especially subject to public claims—but argued that the doctrine should be expanded beyond its traditional aquatic confines to include dry land as well.[61] During the same era in which Sax published his seminal essay, the United States experienced a wave of environmentalism that resulted in the passage of the nation's most famous environmental statutes, including the Clean Air Act, the National Environmental Policy Act, and the Endangered Species Act.[62] As a result, some scholars did not share Sax's enthusiasm for the public trust doctrine's potential. For example, in 1986, Richard Lazarus, wrote:

> The day of "final reckoning" for the doctrine is here, or soon will be, and reliance upon it is no longer in order . . . . The law of standing, tort law, property law, administrative law, and the police power have all evolved in response to increased societal concern for and awareness of environmental and natural resources problems and are weaving a new and unified fabric for natural resources law. Whether these developments are viewed as totally independent of the doctrine or, alternatively, as somehow having subsumed the doctrine's principles does not matter. The conclusion is the same from either perspective: much of what the public trust doctrine offered in the past is now, at best, superfluous and,

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58 *See* BLUMM & WOOD, *supra* note 2, at 3.

59 *Sax*, *supra* note 1, at 471.

60 *See* Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 351 (1998), http://digitalcommons.law.yale.edu/fss_papers/1805.

61 *See id.* at 352.

62 E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON. & ORG. 313, 317 (1985).

> at worst, distracting and theoretically inconsistent with new notions of property and sovereignty developing in the current reworking of natural resources law.[63]

However, as is apparent from this paper's discussion in Part II and III, the public trust doctrine only continued to expand, rather than fade into the background as Lazarus predicted it would.

Looking to the future, academics, practitioners, and environmental advocates herald the public trust doctrine as one of the greatest tools we possess to help create new protection for natural resources that currently lack sufficient safeguards.[64] Applying the public trust doctrine to the atmosphere and to groundwater are examples of contemporary expansions of the public trust doctrine. A team of academic professionals and a handful of trial and appellate courts[65] are pushing the boundaries of the public trust doctrine in their attempts to establish an atmospheric trust to help address climate change.[66] One of the leaders of this effort is Mary C. Wood, a professor at University of Oregon School of Law. In an essay concerning the atmospheric trust, Professor Wood explains the concept:

> As a legal doctrine, the public trust compels protection of those ecological assets necessary for public survival and community welfare. Courts have recognized an increasing variety of assets held in public trust on the rationale that such assets are necessary to meet society's changing needs. The essential doctrinal purpose expressed by courts in these public trust cases compels recognition of the atmosphere as one of the crucial assets of the public trust. The public interests at stake in climate crisis are unfathomable leagues beyond the traditional fishing, navigation and commerce interests . . . . Atmospheric health is essential to all civilization and to human survival across the globe.[67]

Note how Professor Wood emphasizes the doctrine's evolutionary nature. She

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63 Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 658 (1986).

64 BLUMM & WOOD, *supra* note 2, at chs. 11-12.

65 Sanders-Reed *ex rel.* Sanders-Reed v. Martinez, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015); Bonser-Lain v. Tex. Comm'n on Envtl. Quality, No. D-1-GN-11-002194, 2012 WL 3164561 (Tex. Dist. Ct. Aug. 2, 2012), *vacated*, Tex. Comm'n on Envtl. Quality v. Bonser-Lain, 438 S.W.3d 887 (Tex. App. 2014) (vacated on other grounds).

66 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, 43–45, 65–84 (2009).

67 Mary Christina Wood, *Atmospheric Trust Litigation Across the World*, *in* FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST (Ken Coghill, Charles Sampford & Tim Smith eds., 2012) *as reprinted in* BLUMM & WOOD, *supra* note 2, at 352.

draws on this to argue that the public trust doctrine is capable of expanding to include the atmosphere, and, therefore, to help combat climate change.

Many people also hope to expand the public trust doctrine to include groundwater. In fact, in 2000 the Hawaiian Supreme Court held that the state's public trust doctrine applied to groundwater.[68] In California, however, the effort to expand the public trust doctrine to include groundwater has proven more challenging.[69] The California Court of Appeal declined to apply the public trust doctrine to groundwater because of groundwater's lack of connection to navigable waterways.[70] This lack of connection is widely recognized as legal fiction (meaning, in reality there is a well-documented hydraulic connection between groundwater and surface water), but one the courts honor nonetheless.[71] However, California Governor Jerry Brown signed a package of bills—AB 1739, SB 1168 and SB 1319—that are beginning to help dissolve this legal fiction by linking surface water and groundwater.[72] AB 1739 states, "Sustainable groundwater management in California depends upon creating more opportunities for robust conjunctive management of surface water and groundwater resources."[73] Prior to these bills, the legal fiction that groundwater and surface water were not connected acted as a barrier to efforts to apply the public trust doctrine to groundwater. With the help of these bills, the public trust doctrine now stands at the ready—flexible and capable of expanding to include groundwater, should a court be willing to take that step.

Efforts to expand the public trust doctrine to include the atmosphere and groundwater are concrete examples of how people rely on the flexibility and evolutionary nature of the public trust doctrine to assist them in their quest to create additional protections for natural resources. These examples demonstrate the hope many people place in the public trust doctrine's ability to assist us in a future where pressure placed on our limited natural resources will only increase. But rather than rely on being able to invoke the public trust doctrine in the future, it is critical to pause and evaluate whether the evolution of the doctrine will result in a version that is indeed capable of accomplishing what many hope it will.

B. Increasing Codification of the Public Trust Doctrine

Those who hope to invoke the public trust doctrine in the future must take time to examine the trends that are currently shaping the doctrine. They must evaluate

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[68] *In re* Water Use Permit Applications, 94 Haw. 97, 133 (2000).

[69] *See* BLUMM & WOOD, *supra* note 2, at 378.

[70] Golden Feather Cmty. Ass'n v. Thermalito Irrigation Dist., 209 Cal. App. 3d 1276, 1287 (1989).

[71] ARTHUR L. LITTLEWORTH & ERIC L. GARNER, CALIFORNIA WATER II 71-72 (2007).

[72] Assemb. B. 1739, 2013-14 Leg., Reg. Sess. (Cal. 2014); S. B. 1168, 2013-14 Leg., Reg. Sess. (Cal. 2014); S. B. 1319, 2013-14 Leg., Reg. Sess. (2014).

[73] Assemb. B. 1739, 2013-14 Leg., Reg. Sess. § 1(a)(11) (Cal. 2014).

whether these trends will result in a future doctrine capable of filling the strategic niche they plan for it to occupy. While many trends are contributing to the evolution of the public trust doctrine, at issue here is the increased adoption of public trust doctrine principles into state constitutions and statutes—the codification of the public trust doctrine.

In recent history, countries with common law systems have experienced a relatively dramatic increase in the number of statutes and regulations. In England, for example, statutes were created as early as the Middle Ages, but were few in number before the 1900s.[74] However, statutes have since increased exponentially in both England and the United States.[75] In the United States, the area of environmental and natural resources law is no exception—the field is continually inundated with environmental statutes and, thus, countless regulations.[76] In California, the public trust doctrine also tracks this general trend. As discussed more extensively in Part III of this paper, California's legislature is increasingly infusing state statutes with public trust doctrine principles. Since the California Constitution adopted public trust principles in 1879,[77] numerous California statutes have adopted public trust principles.[78]

The notion that an entire field of common law could be completely superseded by statutes is not mere conjecture. With this observed phenomenon in mind, it is important to evaluate what form the future public trust doctrine will eventually assume.

C. The Common Law as Key to Maintaining the Doctrine's Evolutionary Nature and, thus, its Future Utility

Law created through judicial decisions (common law) and as part of the legislative process (statutes) represent two very different lawmaking mechanisms. The advantages and disadvantages associated with these two methods have been the subject of debate since antiquity.[79] Those who favor statutory law, such as the famous philosophers Aristotle, Thomas Hobbes, and Jeremy Bentham, emphasized the certainty and legitimacy of laws enacted by the sovereign authority and, in modern societies, by democratic representatives of the people.[80] They argue that statutes provide precisely formulated rules that bring certainty to society.[81] On the other hand, those who favor case law, such as the famous

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[74] Ponzetto & Fernandez, *supra* note 33, at 403.

[75] *Id*.

[76] *See* Elliott et al, *supra* note 62, at 317.

[77] *Laws and Regulations*, CAL. ST. LANDS COMM'N, http://www.slc.ca.gov/Laws-Regs/Laws-Regs.html (last visited Dec. 17, 2015).

[78] Craig, *supra* note 14, at 106-108.

[79] Ponzetto & Fernandez, *supra* note 33, at 379-80.

[80] *Id*.

[81] *Id*.

philosophers Cato the Younger, Edmund Burke, and Friedrich Hayek, championed the advantages associated with the ability of case law to evolve slowly through a series of court decisions.[82] In their paper *Case Law versus Statute Law: An Evolutionary Comparison*, Giacomo A. M. Ponzetto and Patricio A. Fernandez developed a mathematical model to test the merits of case law versus statutory law. They summarize their results as follows:

> Posner's claim that common law tends toward efficiency has been one of the most influential ideas in law and economics. In this paper, we have provided a formal model that confirms this convergence hypothesis. The evolution of case law is beneficial because it generates a sequential interaction between a series of judges with different preferences, whose idiosyncrasies then balance one another. Stare decisis implies that rulings that deviate from precedent are personally costly to the judge. Through the decisions of judges with heterogeneous biases, case law develops as a never-ending process that evolves toward greater predictability and efficiency.
>
> Legislatures are expected to be more democratically representative than are individual judges, whose decisions may reflect the pressures of powerful litigants. Moreover, statutes provide the short-run certainty of written law. But the evolution of case law provides better outcomes in the long run, unless the efficient rule is changing over time. When the optimum is highly mutable, common law should include a role for statutes to correct the rigidity of binding precedent. Yet statutes should be integrated in the body of case law and interpreted by precedent-bound courts.[83]

Ponzetto and Fernandez's discussion regarding the ever-evolving nature of case law is true of any common law doctrine. However, when it comes to the public trust doctrine, its ability to evolve is one of its most important and advantageous features. As a result, preservation of the doctrine's common law tradition is of utmost importance if we wish to utilize it effectively in the future.

The cases discussed in Part IV above teach us that courts in California do not hesitate to recognize both the common law and statutory public trust doctrines in their decisions. In practice, however, their analyses and holdings show that when both the common law and statutory public trust doctrine are at issue, the statutory doctrine may subsume the common law one. *National Audubon Society* held that the common law public trust doctrine has value that is separate and independent

[82] *Id.*

[83] *Id.* at 411.

of a general statutory scheme.[84] However, the Supreme Court of California in *Environmental Protection Information Center* chose not to extend that logic when confronted with the intersection between the common law doctrine and a statute incorporating similar principles. In that case, the Court ruled that there was no separately actionable claim under the common law public trust doctrine. Although not a perfect fit for our analysis, *Citizens for East Shore Parks* taught us that the common law doctrine does not require an agency to engage in any further consideration beyond what the statute requires—even if public trust concerns were brought up during public comment. These decisions suggest that statutes embodying public trust principles may subsume, or at least heavily deemphasize, the common law doctrine. If these two decisions portend a larger trend, the common law public trust doctrine may fade in importance as the doctrine becomes chiefly statutory.

When discussing the common law and statutory public trust doctrine, Sax noted that "nothing could be more mistaken than to conceive the problem as one in which it is necessary to choose a single branch of government to develop and administer the policies which will produce optimum results."[85] This paper does not stand for the proposition that the public trust doctrine should solely consist of common law, or that there is no meaningful role for statutes. Instead, this paper is intended to emphasize the unique utility of the public trust doctrine in its original common law form. For instance, Part II of this paper discussed how the common law doctrine has been able to expand to cover more natural resources and public uses. If the doctrine continues to become a chiefly statutory one, then it may lose this flexibility and halt the historical trend towards including more natural resources and public uses. The doctrine may then fail to rise to the occasion and help tackle the environmental issues as many have hoped, and instead become merely another stagnate statutory principle.

VI. CONCLUSION

The common law public trust doctrine is one of the oldest and most cherished environmental law doctrines. Since its arrival in the United States, the doctrine has proven its flexibility by steadily expanding to include more natural resources and more public uses of those resources. Once limited to submerged lands and navigable waterways and to the traditional uses of fishing, navigation and commerce, the doctrine subsequently evolved to include intermittently dry sand beaches, recreational activities, wildlife, and more. It is no wonder, given this history, that people hope to apply the public trust doctrine to resources that desperately need some additional protection, such as groundwater and the atmosphere. People who devise such plans for the public trust doctrine hold an

[84] Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709, 732 (1983).

[85] Sax, *supra* note 1, at 551.

implicit assumption that the doctrine will remain flexible enough to continue evolving and eventually encompass the resources they have in mind.

Because the public trust doctrine serves society well, people seek to codify the doctrine in hopes of making it more reliable and certain. As a result, the public trust doctrine has been increasingly codified. But as this paper aimed to show, the codification of the public trust doctrine may result in the diminishment of its characteristic flexibility. If bound to mere statutory interpretation, the courts will no longer possess the same latitude to push the doctrine forward as they can under a common law approach.

California courts are slowly determining the relationship between the common law and the statutory public trust doctrines, but, as of now, there is by no means a definitive answer. Due to the fact that there are currently few cases that contemplate the direct interaction between the common law and statutory public trust doctrine, this paper merely intends to indicate a possible trend. In his seminal essay, Joseph Sax noted, "[T]he courts, in their own intuitive way—sometimes clumsy and cumbersome—have shown more insight and sensitivity to many of the fundamental problems of resource management than have any of the other branches of government."[86] While some could debate Sax's strong opinion, at its heart lies a sentiment worth noting—that the courts can play a valuable role in the management of natural resource issues. If we take away the courts' flexibility when it comes to the public trust doctrine, we do more than merely remove the doctrine's most valuable characteristic—we deprive ourselves of one of society's most useful tools in adapting to the ever-changing resource management issues of our world.

[86] Sax, *supra* note 1, at 556.