

Finding a Constitutional Home for the Public Trust Doctrine

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INTRODUCTION

The public trust doctrine is a traditional common law doctrine, rooted in English and Roman law, that has for over a century served as a limit on government power over natural resources.¹ The doctrine limits government and private individuals' authority to use and transfer public trust resources when doing so would interfere with the purposes for which the resources were held in trust.²

Although the public trust doctrine has primarily been applied through state law, recent high-profile lawsuits have sought to apply this doctrine to federal climate change policy.³ These suits provoked debate not only about the viability of a federal public trust doctrine, but also about where, if anywhere, the U.S. Constitution could be read to protect public trust rights. Some argue that the public trust doctrine is a background constitutional principle protected by various express provisions.⁴ Others argue for recognizing public trust rights under the Ninth Amendment or employing the doctrine as a "constitutional interpretive convention."⁵ And perhaps most interestingly - and least explored - one Ninth Circuit opinion suggested the public trust doctrine stems from Article IV's Property Clause, which gives Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."⁶

To contribute to the ongoing federal public trust debate, this paper explores the Property Clause's relationship to the public trust doctrine. Part I provides an overview and history of the public trust doctrine. Part II outlines the history of the Property Clause, Congress' power over the western territories, and the admission of new states into the Union. Finally, Part III synthesizes the histories of the public trust and the Property Clause. This paper concludes that these intrinsically linked

¹J.D., Georgetown University Law Center.

² See ROBERT L. GLICKSMAN ET AL., ENVIRONMENTAL PROTECTION: LAW & POLICY 44-45 (8th ed. 2019).

³ See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1970); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 646 (1986).

⁴ See Alec L. *ex rel. Loorz v. McCarthy*, 561 F. App'x 7, 7-8 (D.C. Cir. 2014); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

⁵ See *Juliana*, 217 F. Supp. 3d at 1260-61 (finding that while "the public trust predates the Constitution," individual public trust rights were protected by substantive due process and the Ninth Amendment); Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J. L. & POL'Y 281, 290-93 (2014) (arguing that, among other things, the Constitution's preamble and the Equal Protection Clause also support a federal public trust doctrine).

⁶ See Hope Babcock, *Using the Federal Public Trust Doctrine to Fill Gaps in the Legal Systems Protecting Migrating Wildlife from the Effects of Climate Change*, 95 NEB. L. REV. 649, 689-91 (2017).

⁷ U.S. CONST. art. IV, § 3, cl. 2; see *United States v. Ruby Co.*, 588 F.2d 697, 704 (9th Cir. 1978).

histories establish that the public trust doctrine is a structural constitutional principle confirmed by the Property Clause. This principle provides judicially cognizable limits on congressional and Executive Branch authority over public trust resources. Further, by recognizing public rights in trust resources, the public trust doctrine provides a constitutional basis for the creation of administrative entities to adjudicate public trust-related issues. And while the judicial enforcement of an implied structural constitutional principle raises understandable separation of powers concerns, a neutral application of Supreme Court jurisprudence requires recognizing an enforceable constitutional public trust doctrine. The public trust doctrine is an enforceable constitutional principle because, without Congress' agreement to take on trustee duties for public lands, the Constitution never would have been ratified.

I. THE PUBLIC TRUST DOCTRINE

To understand the relationship between the Property Clause and the public trust doctrine, one must first understand the scope and history of the public trust. To that end, this Part (A) outlines the modern public trust doctrine's legal duties and enforcement mechanisms and (B) traces the history of the public trust from its Roman origins to its recognition in American law.

A. *Overview of the Public Trust*

The public trust doctrine imposes three limitations on government power and one related limit on private property. First, "the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public."⁷ Second, the government must preserve the public trust property for particular types of uses - either for traditional uses or for uses that are "in some sense related to the natural uses peculiar to that resource."⁸ These particular types of uses must be preserved not only for the current public, but also for future generations.⁹ Third, public trust duties can limit or entirely prohibit the government's transfer of property rights in, or regulatory authority over, public trust resources.¹⁰ This principle limits transfers to both private parties and smaller government entities (e.g., when a state allocates water rights to a particular

⁷ *Sax, supra* note 2, at 477.

⁸ *Id.* For example, Professor Sax posits that the public trust would require that San Francisco Bay be used "only for water-related commercial or amenity uses," such as a dock or a marina. *Id.* In contrast, Sax argues, the trust would prohibit filling the bay "for trash disposal or for a housing project." *Id.*

⁹ *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 837 P.2d 158, 170 (Ariz. Ct. App. 1991); *see* Michael O'Loughlin, Note, *Understanding the Public Trust Doctrine Through Due Process*, 58 B.C. L. REV. 1321, 1330 (2017).

¹⁰ *See* *Sax, supra* note 2, at 477; *see also* *Lazarus, supra* note 2, at 642.

locality).¹¹ Finally, to the extent a government can transfer property rights in public trust resources to a private party, that party's right to use its property is limited by the public trust.¹²

To enforce these limitations and protect public trust resources, modern courts have developed various procedural and substantive approaches to public trust cases, including: (1) narrowly construing both legislative delegations of authority over trust resources and governmental attempts to convey trust resources to private parties;¹³ (2) imposing burdens of justification for government actions that "infringe broad public uses in favor of narrower ones,"¹⁴ and (3) barring the government or private parties from taking actions that adversely affect the public trust resource.¹⁵ But regardless of which approach a court takes, the public trust doctrine prevents agency capture by private interests and ensures the government exercises its powers in the public interest by protecting the public's right to use and enjoy trust resources.

B. History of the Public Trust

While the public trust is widely recognized in state common and constitutional law,¹⁶ the modern Supreme Court has been less friendly to the public trust doctrine in federal law. In *PPL Montana, LLC v. Montana*,¹⁷ the Court explicitly refused to recognize a federal public trust, stating that, "[u]nlike the equal-footing doctrine . . . which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law."

To avoid this explicit rejection of a federal public trust doctrine, some scholars argue that *PPL Montana*'s discussion of the public trust was dicta.¹⁸ But whether dicta or not, *PPL Montana*'s public trust discussion is ahistorical and incorrect. As shown below, the Supreme Court has long recognized that age-old understandings of sovereignty impose public trust duties on the federal government.¹⁹

To better understand the status of the public trust under all constitutional interpretive methodologies, this section examines the history of the public trust

¹¹ See generally, e.g., Nat'l Audubon Soc'y v. Sup. Ct. of Alpine Cty., 658 P.2d 709 (Cal. 1983); Vill. of Menomonee Falls v. Wis. Dep't of Natural Res., 412 N.W.2d 505, 514 (Wis. Ct. App. 1987).

¹² Lazarus, *supra* note 2, at 646. Notably, because the government's public trust duties limit private property rights in trust resources, government regulation of such resources in furtherance of public trust purposes would never effectuate a taking. *Id.* at 648-49.

¹³ *Id.* at 642.

¹⁴ Sax, *supra* note 2, at 491.

¹⁵ Lazarus, *supra* note 2, at 642.

¹⁶ *Id.* at 649-50.

¹⁷ 565 U.S. 576, 603-04 (2012).

¹⁸ See Babcock, *supra* note 5, at 687.

¹⁹ See, e.g., *Light v. United States*, 220 U.S. 523, 537 (1911) (quoting *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890)).

doctrine from its ancient origins to its recognition by the Supreme Court.²⁰ That history begins in Rome.

1. Roman Origins and Early Spread of the Public Trust

Roman law first enunciated *jus publicum*, the foundational tenet of the public trust.²¹ Justinian's *Institutes* provides the clearest example of this concept, stating that the "air, running water, the sea, and consequently the seashore" were "common to all" and thus open to public use.²² According to Justinian, individuals could freely use these common resources and could even construct improvements on them, provided that the improvements were consistent with the resources' use.²³ However, no person could appropriate these public resources for private use.²⁴

Although leading scholars acknowledge that Justinian's conception of *jus publicum* was likely more aspirational than descriptive, his formulation was incorporated into the earliest examples of modern property law.²⁵ Justinian's principles of common ownership were "mimicked practically verbatim" in thirteenth century Spanish law and were incorporated into the customs of most European nations during the Middle Ages.²⁶ English law, however, took a more circuitous route to reach the public trust.

2. Early English Constitutional Law and the Public Trust

In England, *jus publicum* eroded during the Dark Ages.²⁷ The English Crown claimed a private interest in formerly public resources and often granted feudal lords property rights to these resources.²⁸ The Magna Carta and the Charter of the Forest, however, triggered a shift back towards recognizing public rights in natural resources.

²⁰ See *Alden v. Maine*, 527 U.S. 706, 734-35 (1999) (looking to English legal history to determine the breadth of sovereign immunity under U.S. constitutional law); see generally Jeffrey Schmitt, *A Historical Reassessment of Congress's Power to Dispose of the Public Lands*, 42 HARV. ENVTL. L. REV. 453, 462-64 (2018).

²¹ Elizabeth Fuller Valentine, *Arguments in Support of a Constitutional Right to Atmospheric Integrity*, 32 PACE ENVTL. L. REV. 56, 91-92 (2015).

²² Joseph L. Sax, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 763-64 (1970) (internal quotation marks omitted) (quoting JUSTINIAN INSTITUTES 2.1.1 (4th ed. J.B. Moyle transl. 1889)). When compiled, Justinian's *Institutes* "were intended to be the sole source of Roman law." Valentine, *supra* note 21, at 92 n.246.

²³ Sax, *supra* note 22, at 763-64.

²⁴ *Id.*

²⁵ Lazarus, *supra* note 2, at 634.

²⁶ *Id.*

²⁷ Sax, *supra* note 22, at 765.

²⁸ *Id.*

The Magna Carta, long described as “the foundation of American [and] British liberty,”²⁹ prohibited fishing weirs in navigable rivers.³⁰ Later commentators such as Blackstone, as well as American courts, read this provision broadly to prohibit the Crown from granting private rights to navigable rivers and “creating several fisheries.”³¹ Yet this overstates the Magna Carta’s effect. By prohibiting fishing weirs in navigable rivers, the Magna Carta instead granted a public easement of navigability on waterways.³² Nevertheless, this provision embodied a return to recognizing public rights in natural resources under English constitutional law.

The Charter of the Forest provides even more explicit support for public rights in sovereign-owned natural resources. The Charter of the Forest was an addendum to the Magna Carta that established new laws governing the Crown’s authority in the royal forest, areas of England “set aside for the King’s hunt” and “governed by a separate set of especially severe laws.”³³ The Charter explicitly recognized public rights to use the royal forest in two ways. First, although the Charter returned certain areas of the royal forest to private ownership, the Charter affirmed grazing rights for those “accustomed to” using common pastures that remained within the royal forest.³⁴ Second, the Charter granted “every freeman” a right of free passage through the royal demesne forest - a portion of the royal forest that could not be alienated by the Crown - to graze “in their own woods, or else where they will.”³⁵

The Magna Carta and Charter of the Forest demonstrate that early English constitutional law guaranteed public rights in natural resources. And while most public trust scholarship focuses on the Magna Carta’s effect on English water law,³⁶ the Charter of the Forest suggests the public trust’s foundational principles were equally applicable to other natural resources.³⁷

²⁹ *Martin v. Lessee of Waddell*, 41 U.S. 367, 382 (1842).

³⁰ MAGNA CARTA ch. 33 (1215 & 1225), reprinted and translated in DAVID CARPENTER, MAGNA CARTA 51 (Penguin Classics 2015).

³¹ See *Martin*, 41 U.S. at 401; *Sax, supra* note 22, at 767-78.

³² See *Sax, Tidal Areas, supra* note 22, at 766.

³³ See Claire Breay & Julian Harrison, *Magna Carta in context*, THE BRIT. LIBR. (July 28, 2014), https://www.bl.uk/collection-items/~link.aspx?_id=553CAD54AE364BF490A939CF434C7375&_z=z.

³⁴ CHARTER OF THE FOREST ch. 1 (1225), available at *Charter of the Forest, 1225*, THE NAT’L ARCHIVES, <https://www.nationalarchives.gov.uk/education/resources/magna-carta/charter-forest-1225-westminster/> (last visited Jan. 6, 2020).

³⁵ *Id. ch. 9.*

³⁶ See generally, e.g., *Sax, supra* note 22.

³⁷ See John Meyer, *Using the Public Trust Doctrine to Ensure the National Forests Protect the Public from Climate Change*, 16 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 195, 212 (2010), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1215&context=hastings_environmental_law_journal.

3. Development of the Public Trust at English Common Law: Thirteenth through Nineteenth Centuries

Following the Magna Carta and the Charter of the Forest, English common law began shifting towards re-recognition of the public trust. Thirteenth Century common law treatises began expanding on the Magna Carta's easement of navigability and reincorporating Roman principles of *jus publicum*, particularly with regard to navigable waters.³⁸ By the early Nineteenth Century, English courts formally recognized the Crown's *prima facie* ownership of the shorezone up to the high-water mark - a principle enunciated almost contemporaneously with the framing of the U.S. Constitution in Sir Matthew Hale's seminal 1786 treatise *De Jure Maris*.³⁹ This sovereign interest, English courts recognized, was not a "private reservation . . . for [the Crown] itself . . . but *for the interest of the general public*."⁴⁰ By 1875, English common law officially recognized a form of the modern public trust doctrine: while the Crown could convey its proprietary interest in the land under navigable waters, the Crown could only convey or modify "general rights of egress and regress, for fishing, trading, and other uses by [its] subjects" with Parliament's approval.⁴¹

In sum, by the time of the U.S. Constitution's framing, English law recognized that: (1) the public had certain constitutional rights to use sovereign-owned natural resources, and (2) sovereign-granted individual property rights (at least in navigable rivers) could be superseded by public rights. Further, and perhaps most importantly, by the time Congress began admitting new states into the Union, English common law recognized that the Crown's interest in natural resources was not a private interest but an interest for the general public.

4. Incorporating the Public Trust into American Law

Soon after English courts began recognizing public rights in water resources, American courts began incorporating the public trust doctrine into state water law.⁴² Eventually, many states expanded their public trusts to encompass a wide

³⁸ Lazarus, *supra* note 2, at 635.

³⁹ See *Martin v. Lessee of Waddell*, 41 U.S. 367, 423-24 (1842) ("These rules, as laid down by Lord HALE [in *De Jure Maris*], have always been considered as settling the law upon the subjects so which they apply, and have been understood by all elementary writers, as governing rules, and have been recognized by the courts of justice as controlling doctrines."); Lazarus, *supra* note 2, at 635; Michael L. Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 567-68 (1982).

⁴⁰ Sax, *supra* note 22, at 772 n.39 (emphasis in original) (quoting *Dickens v. Shaw*, (1822) (Eng.), reprinted in R. HALL, *ESSAY ON THE RIGHTS OF THE CROWN AND THE PRIVILEGES OF THE SUBJECT IN THE SEA SHORES OF THE REALM* app. xlv, lx (2d ed. 1875)).

⁴¹ Sax, *supra* note 2, at 476 (quoting HALL, *supra* note 40, at 108); see Rosen, *supra* note 39, at 568.

⁴² See Lazarus, *supra* note 2, at 636-38 (summarizing early American common law and collecting cases).

range of resources, including beaches, seashore amenities (like public bathhouses), parklands, historical landmarks, wildlife, air, and even downtown areas.⁴³

The United States Supreme Court quickly recognized the public trust doctrine as well. In 1842, *Martin v. Lessee of Waddell* acknowledged that sovereignty inherently imposed public trust duties on state governments, relying on Hale's *De Jure Maris* to find (albeit in dicta) that the Crown - and after independence, the State of New Jersey - held "the shores, and rivers and bays and arms of the sea, and the land under them . . . as a public trust for the benefit of the whole community to be freely used by all for navigation and fishery."⁴⁴ Then, in 1892, the Supreme Court decided *Illinois Central Railroad v. Illinois*,⁴⁵ holding that Illinois' public trust duties prohibited the state from conveying a large portion of the bed of Lake Michigan to a private railroad.⁴⁶ The exact source of law relied upon in *Illinois Central* has been subject to much academic debate.⁴⁷ But as shown below, by the time *Illinois Central* was decided, the Court already understood the Constitution to impose public trust duties on Congress's exercise of Property Clause authority.⁴⁸ Thus, *Illinois Central* suggests the Court believed public trust duties were fundamental to a proper understanding of sovereignty - that, at both federal and state levels, the sovereign derived its authority from the people and thus had a duty to exercise its authority in a manner that preserved the people's rights in commonly held natural resources.

II. THE PUBLIC TRUST DOCTRINE & THE HISTORY OF THE PROPERTY CLAUSE

The Property Clause provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."⁴⁹ The exact meaning of the Clause has long been subject to debate,⁵⁰ but the modern Supreme Court has stated, in dicta, that it provides Congress power over federal lands "without limitation[]." ⁵¹ Similar to *PPL Montana*'s public trust dicta, however, the Court's Property Clause dicta oversimplifies the history underlying the framing and

⁴³ See *id.* at 649-50 (collecting cases).

⁴⁴ See *Martin v. Lessee of Waddell*, 41 U.S. 367, 409-17 (1842).

⁴⁵ *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892).

⁴⁶ *Id.* at 455-56.

⁴⁷ See *Lazarus*, *supra* note 2, at 638-40; see generally Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004).

⁴⁸ See *Light v. United States*, 220 U.S. 523, 537 (1911) (quoting *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890)).

⁴⁹ U.S. CONST. art. IV, § 3, cl. 2.

⁵⁰ See generally, e.g., Eugene R. Gaetke, *Refuting the 'Classic' Property Clause Theory*, 63 N.C. L. REV. 617 (1985).

⁵¹ *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976).

implementation of the Clause in the early republic. That history, as well as the cases relied on to reach the modern Court's broad reading of the Clause, demonstrates that the Property Clause confirms the public trust doctrine as a constitutional principle.

A. Origins of the Property Clause: Congress' Power over the Territories under the Articles of Confederation

By the end of the American Revolution, seven of the thirteen original states owned lands beyond their settled boundaries.⁵² So-called “unlanded” states that did not own such territories, however, were concerned that these territories would enrich only a handful of states.⁵³ Thus, Maryland and the other unlanded states refused to join the Articles of Confederation until the landed states ceded their western territories.⁵⁴

Responding to these demands in 1780, New York ceded its western land claims to Congress.⁵⁵ Congress shortly thereafter passed a resolution that encouraged further cessions and “embodied an emerging national consensus on territorial policy.”⁵⁶ Congress’s resolution stated that any territory ceded to the federal government would be “settled and formed into distinct republican states” that would have the same “rights of sovereignty, freedom and independence, as the [original] states.”⁵⁷ Critically, the resolution also assured states that the ceded lands would be “disposed of for the common benefit of the United States.”⁵⁸

The next year, Virginia ceded its territories to Congress.⁵⁹ The deed of cession imposed two key conditions: that (1) any new states formed from Virginia’s territories must “have the same ‘rights of sovereignty, freedom, and independence, as the other States,’” and (2) the ceded territories must be held as a “common fund for the use and benefit” of all states and disposed of “only for that purpose, and for no other use or purpose whatsoever.”⁶⁰ In 1784, Congress accepted these conditions, taking over a territory so large that historians called this acceptance the “creation of the national domain.”⁶¹ Even advocates of a broad,

⁵² Gaetke, *supra* note 50, at 624.

⁵³ Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 643 (2018).

⁵⁴ Gaetke, *supra* note 50, at 624.

⁵⁵ Schmitt, *supra* note 20, at 465.

⁵⁶ *Id.* (quoting Arthur Bestor, *Constitutionalism and the Settlement of the West: The Attainment of Consensus, 1754-1784*, in *THE AMERICAN TERRITORIAL SYSTEM* 13, 21 (John Porter Bloom ed., 1973)).

⁵⁷ *Id.* (quoting Bestor, *supra* note 56, at 21 (quoting 18 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 915-16 (1910))).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* (quoting PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 52 (1968)); *see also* Pollard v. Hagan, 44 U.S. 212, 222 (1845).

⁶¹ Ablavsky, *supra* note 53, at 643.

effectively unlimited Property Clause admit the acceptance of Virginia's terms "evinced a congressional willingness to serve as a type of trustee over the western lands."⁶²

As Congress began to legislate for the territories, Americans "universally expected that, when territory was disposed for the common good, it would be sold to private parties for cultivation."⁶³ But unorganized settlement of the western territories was seen as dangerous to the Union; diffuse frontier settlements could become so economically and politically isolated that, if such settlements provoked conflict with Native American tribes, the settlements might turn to European nations rather than the United States for protection.⁶⁴ Therefore, American land policy in the 1780s sought to establish extensive federal control over western settlement to ensure that "settlements were compact, interconnected, and strategically located."⁶⁵

After several attempts to develop an effective system of political organization for the territories, Congress passed the Northwest Ordinance in 1787.⁶⁶ The Ordinance designated Virginia's ceded lands as the first federal territory and set out "a durable template for how the new territories would be governed and ultimately admitted to statehood."⁶⁷ The Ordinance provided that new states would be admitted "on an equal footing with the original States, in all respects whatever," but it also affirmed the federal government's primacy in territorial regulation, providing that new states "shall never interfere with the primary disposal of the Soil by the United States . . . nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers."⁶⁸ Notably, the Articles of Confederation did not explicitly grant Congress the power to issue such territorial regulations. But these provisions were quickly extended to subsequent federal territories, and the Ordinance was quickly readopted by the First Congress following the Constitution's ratification.⁶⁹ Thus, even prior to the Constitution's framing, the newly independent American states began entrusting the federal government with authority to manage and regulate public lands for the common benefit of the people.

⁶² Gaetke, *supra* note 50, at 626.

⁶³ Schmitt, *supra* note 20, at 465-66.

⁶⁴ *Id.* at 466.

⁶⁵ *Id.* at 466-67.

⁶⁶ *Id.* at 467-68.

⁶⁷ Ablavsky, *supra* note 53, at 643-44.

⁶⁸ Schmitt, *supra* note 20, at 468 (quoting *Transcript of the Northwest Ordinance*, art. 4, OURDOCUMENTS.GOV [<https://perma.cc/XZ76-C2QN>]).

⁶⁹ See *id.*; Ablavsky, *supra* note 53, at 644.

B. The Framing of the Property Clause

The Property Clause was adopted at the Constitutional Convention with little fanfare or discussion. Maryland delegate Daniel Carroll proposed a provision stating that “the Constitution would not affect any claims of the United States or of the individual states to western lands” and that disputes over such claims would be resolved by the Supreme Court.⁷⁰ Gouverneur Morris then successfully moved to postpone Carroll’s proposal and proposed a substitute provision, now known as the Property Clause, which was adopted “almost without debate.”⁷¹

Despite the framers’ apparent consensus on the Property Clause’s language, there was no immediate, uniform understanding of the Clause - particularly as applied to preexisting state law-based territorial land claims. The disagreement among founding-era sources stemmed from the fact that, although the Property Clause gave Congress authority “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States,”⁷² the very next clause provides that “nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”⁷³ James Madison suggested the Property Clause was necessary to resolve the issue of Congress’ authority to pass the Northwest Ordinance,⁷⁴ but another noted Federalist instead claimed that “lordship of the soil . . . remain[ed] in full perfection with every state.”⁷⁵ In contrast, some Anti-Federalists saw the Property Clause as “smooth and easy language” that effected a “complete deed and absolute grant of sovereignty of all our western territory [to the federal government].”⁷⁶

C. The Property Clause in the Early Republic

Despite the original ambiguity surrounding the Property Clause’s meaning, a predominant understanding of the Clause quickly emerged in practice. Following

⁷⁰ Gaetke, *supra* note 50, at 631 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (1911), 465–66 (Max Farrand 2d ed. 1937)).

⁷¹ *Id.*

⁷² U.S. CONST. art. IV, § 3, cl. 2.

⁷³ *Id.* § 3, cl. 3.

⁷⁴ Ablavsky, *supra* note 53, at 644–45 (citing THE FEDERALIST NO. 43, at 242 (James Madison) (Clinton Rossiter ed., 1961)); Schmitt, *supra* note 20, at 469 (citing THE FEDERALIST NO. 38, at 193 (James Madison) (George Carey & James McClellan ed., 2001)).

⁷⁵ Ablavsky, *supra* note 53, at 645 (quoting *A Freeman III*, PA. GAZETTE, Feb. 6, 1788, reprinted in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, NO. 4, at 49 (John P. Kaminski et al. eds., 2009)).

⁷⁶ *Id.* at 644–45 (first quoting Letter from Massachusetts, Oct. 17, 24, 1787, in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: DELAWARE, NEW JERSEY, GEORGIA, AND CONNECTICUT 1, 377 (John P. Kaminski et al. eds., 2009); then quoting Speech by Benjamin Gale, Nov. 12, 1787, in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra*, at 428).

the framing, the federal government solidified its authority over the territories and public lands. That, in turn, reinforced the understanding of sovereignty outlined in the Virginia cession: that the federal government held public lands in trust for the common benefit of the people of the United States.

After ratification, the newly constituted Congress not only re-enacted the Northwest Ordinance, but also, from 1802 to 1821, passed enabling acts for the admission of seven new states to the Union.⁷⁷ These acts admitted states under the same terms as those laid out in the Northwest Ordinance.⁷⁸ And in 1806, after resolving a decade-long dispute over continued federal ownership of land in the new state of Tennessee,⁷⁹ Congress began setting an additional condition for admission: from Ohio to Alaska, all new states had to expressly acknowledge the supremacy of the Northwest Ordinance or disclaim “all right or title to the waste or unappropriated lands” within its borders.⁸⁰ Consistent with these disclaimers, the federal government continued to hold property in newly admitted states, exercising its Property Clause powers to limit federal property sales and control development.⁸¹ Thus, the Northwest Ordinance – the very statute the Articles of Confederation Congress passed to ensure public lands were managed consistently with its trustee duties under the Virginia deed of cession - became the template for admission of all new states to the Union.

Even when the Panic of 1819 - a financial meltdown that many blamed on federal land policy - triggered another decades-long debate about the meaning of the Property Clause, Congress rejected multiple proposals to cede federal lands to the states.⁸² Instead of using those lands for the benefit of particular states, Congress sought to use them for the common benefit of the public.⁸³ President John Quincy Adams also publicly argued against these cession proposals, defending federal lands as “the common property of the Union, *the appropriation and disposal of which are sacred trusts* in the hands of Congress.”⁸⁴ Similarly, in private correspondence, Madison stated that the framers unambiguously intended for Congress to retain title to the public domain: “the title in the people of the

⁷⁷ See Schmitt, *supra* note 20, at 471.

⁷⁸ *Id.*

⁷⁹ See Ablavsky, *supra* note 53, at 667-70.

⁸⁰ *Id.* at 671-73 (quoting Act of Feb. 20, 1811, 2 Stat. 641, 642 (enabling act for Louisiana)). “The sole exception was Hawai’i, to which the federal government ceded ownership over most public lands upon admission but required the acknowledgment of federal ownership of certain retained lands.” *Id.* at 673 n.254.

⁸¹ Schmitt, *supra* note 20, at 471.

⁸² See *id.* at 471-491.

⁸³ *See id.*

⁸⁴ *Id.* at 478 (emphasis added) (quoting 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902 391 (James D. Richardson ed., 1907)).

United States rests on a foundation too just and solid to be shaken by any technical or metaphysical argument whatever.”⁸⁵

By the time the Supreme Court decided *Dred Scott v. Sandford* in 1852, it was considered well-settled that - consistent with the views of Madison, Adams, and the early Congresses - the Federal Government held lands under the Property Clause as trustee for the people’s common benefit. All nine justices in *Dred Scott* agreed with Chief Justice Taney’s statement that the federal government’s Property Clause powers in the territories were that of a “trustee of the territories.”⁸⁶ The dissenters instead disagreed with Taney’s recognition of a constitutionally protected property right in owning slaves in the territories.⁸⁷

D. Foundations of Modern Property Clause Doctrine in the Supreme Court

The settled understanding that Congress holds lands in trust for the public continues to underpin the Supreme Court’s seminal (and more palatably reasoned) Property Clause decisions. For example, in *Light v. United States*, a unanimous decision from 1911, the Court stated:

All the public lands of the nation are held in trust for the people of the whole country. . . . And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose.⁸⁸

Because Congress was the most direct representative of the public, the *Light* Court deferred to Congress’ determination of appropriate public uses for a trust resource - there, a statutorily established federal forest reserve that could not be used for cattle grazing without a permit.⁸⁹ But even though the *Light* Court stated (in dicta) that courts have no role in determining uses for public lands, the Court rested its rationale on public trust grounds. This public trust rationale remains relevant in modern Property Clause jurisprudence: *Kleppe v. New Mexico*⁹⁰

⁸⁵ *Id.* at 480-81 (quoting JAMES MADISON, 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, FOURTH PRESIDENT OF THE UNITED STATES 188 (Philadelphia, J.B. Lippincott & Co. 1865)).

⁸⁶ *Id.* at 493-94 (quoting *Dred Scott v. Sandford*, 40 U.S. 393, 448 (1852)).

⁸⁷ *Id.* at 494-95.

⁸⁸ *Light v. United States*, 220 U.S. 523, 537 (1911) (internal quotation marks omitted) (quoting *United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160, 170 (1890)).

⁸⁹ See *id.* at 534-37.

⁹⁰ 426 U.S. 529, 539 (1976).

explicitly relied on *Light* when describing the federal government's broad powers under the Property Clause.

The federal government's authority as trustee over public lands also led the Court to establish the constitutional justification for much of the modern administrative state. Because many of the original thirteen states issued land grants in their respective territories prior to ceding those territories to the federal government, the states' territorial cessions and subsequent federal land grants led to significant confusion and litigation over competing claims to territorial lands.⁹¹ To resolve these issues, Congress relied on federally-created territorial courts and federal territorial officials - "the precursor[s] of the federal administrative state" - to create title and resolve thousands of claims.⁹² By the time the Supreme Court limited the reach of Executive Branch adjudicatory authority in *Murray's Lessee v. Hoboken Land & Improvement Co.*,⁹³ the use of federal territorial administrative adjudications was so entrenched that the Court expressly found that territorial land claims were matters "involving public rights" that Congress could constitutionally delegate to administrative bodies.⁹⁴

III. MERGING HISTORIES: ANALYSIS & IMPLICATIONS

As made evident from the histories outlined above, the public trust doctrine goes hand-in-hand with the long-settled understanding of federal government authority under the Property Clause. But these histories do more than show that the public trust and the Property Clause are closely related - they demonstrate that the Property Clause confirms the public trust doctrine as a structural constitutional principle. This principle, drawn from the inherent nature of a sovereign's stewardship over land and resources, both limits federal government authority under the Property Clause and empowers Congress to establish an administrative state to effectuate its public trust duties.

A. Recognizing a Federal Constitutional Public Trust

The interpretive methodologies used to recognize the structural constitutional principles of equal footing doctrine and state sovereign immunity similarly support recognizing the public trust as a structural constitutional principle. For example, in the equal footing doctrine's foundational case, *Pollard v. Hagan*, the Court found that the Virginia and Georgia territorial cessions to the federal government imposed a requirement that states be admitted to the Union on an equal footing with the other states.⁹⁵ According to the *Pollard* Court, these

⁹¹ Ablavsky, *supra* note 53, at 650-51.

⁹² *Id.* at 658.

⁹³ *Den ex dem. Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855).

⁹⁴ *Id.* at 284.

⁹⁵ See *Pollard v. Hagan*, 44 U.S. 212, 221-23 (1845).

cessions “invest[ed] the United States with the eminent domain of the country ceded . . . for the purposes of temporary government, *and to hold it in trust* for the performance of the stipulations and conditions . . . in the deeds of cession and the legislative acts connected with them.”⁹⁶ Thus, the *Pollard* Court instructed, when Alabama joined the Union, the trustee duties imposed by the Georgia cession dictated that Alabama receive “the sovereignty and jurisdiction over all the territory within her limits, subject to common law, to the same extent that Georgia possessed it before she ceded it to the United States.”⁹⁷

Importantly, the equal footing requirement was not the only trust duty envisaged by the *Pollard* Court. The Court also recognized another duty imposed by the terms of the Virginia and Georgia cessions: that the United States could use the ceded lands solely “as a common fund for the use and benefit of all the United States.”⁹⁸ *Pollard* thus recognized that the Virginia and Georgia cessions also imposed on the federal government one of the core duties of public trust doctrine.⁹⁹

The modern Supreme Court has repeatedly relied on *Pollard*’s reasoning - and thus on the terms of the trust imposed by the Virginia and Georgia cessions - to reaffirm the equal footing doctrine as a *constitutional* doctrine that reaches beyond the territories actually covered by those deeds of cession.¹⁰⁰ And given that, as

⁹⁶ *Id.* at 222. Contrary to the so-called “classic” Property Clause theory, *see, e.g.*, Gaetke, *supra* note 50, at 619-22 (summarizing “classic” Property Clause theory), the fact that the original deeds of cession imposed enforceable legal duties, including the requirement to admit states on an equal footing with existing states, does not mean that the federal government had to cede all federal lands within a new state to that state upon admission into the Union. The deeds of cession also required that the territories be used for the common benefit of all states. *See supra* section II.A. “Common benefit” may have initially been understood to include transferring territorial lands to states and private parties, but even at the time of founding, settlement of the West had to be controlled to protect national security interests. Schmitt, *supra* note 20, at 465-67. Further, as the West continued to develop, the “common benefit” principle evolved to include values of conservation and preservation. *See* Schmitt, *supra* note 20, at 495-504 (discussing how the Progressive Era Congresses began reserving broad swaths of public land for conservation). Thus, the enforceable public trust duties imposed by the deeds of cession have always allowed the federal government to hold public lands within newly admitted states, and the federal government can continue to hold such lands now for purposes of conservation.

⁹⁷ *Pollard*, 44 U.S. at 228-29. Although *Pollard* held that the United States did not have authority under the Property Clause to regulate the shoreline and soil disputed in that case, *see Pollard*, 44 U.S. at 230, that does not mean the federal government’s public trust duties extend only to the federal territories. The *Pollard* Court stated that the federal government’s “municipal sovereignty” over its territory ceases when a state is admitted to the union, but the Court acknowledged the federal government could still validly retain public lands within states “by force of the deeds of cession, and statutes connected with them.” *Pollard*, 44 U.S. at 224. These were the same deeds and statutes that imposed a trust duty to use the ceded lands solely for the “benefit of all the United States.” *See Pollard* 44 U.S. at 221.

⁹⁸ *Pollard*, 44 U.S. at 221.

⁹⁹ *See* Sax, *supra* note 2, at 477 (describing how public trust property must be used for a public purpose).

¹⁰⁰ *See* PPL Mont., LLC v. Montana, 565 U.S. 576, 590-91 (2012); Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 373-74 (1977).

Pollard recognized, the terms of these cessions also imposed public trust duties, the public trust doctrine should similarly be granted constitutional status.¹⁰¹

The Court's rationale for recognizing state sovereign immunity similarly supports recognizing a federal constitutional public trust doctrine. In *Alden v. Maine*,¹⁰² the Court held the Eleventh Amendment - which rendered states immune from suit "commenced or prosecuted . . . by Citizens of another State, or by Citizens or Subjects of any Foreign State"¹⁰³ - "confirmed rather than established [state] sovereign immunity as a constitutional principle . . . implicit in the constitutional design."¹⁰⁴ To reach this conclusion, the Court looked to the ratification debates and influential founders like Madison to establish the framers' original understanding and "the importance of sovereign immunity to the founding generation."¹⁰⁵ Based on these sources from the early republic, the Court concluded sovereign immunity was a cognizable structural constitutional principle because "[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself."¹⁰⁶

Alden's reasoning is equally applicable to the public trust doctrine. Consistent with the predominant understanding of sovereign authority from the Articles of Confederation through at least the early 20th Century, Madison thought it unambiguously clear that federal ownership of public lands vested title "in the people of the United States."¹⁰⁷ And even more fundamentally, Maryland would not have even joined the Articles of Confederation unless landed states, like

¹⁰¹ Professor James Rasband has argued that modern equal footing doctrine - which permits the federal government to grant lands under navigable waters in pre-statehood federal territories to private parties when authorized by a clear statement from Congress - is irreconcilable with the modern public trust doctrine. *See* James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 LAND & WATER L. REV. 1, 4-5, 83-84 (1997); *id.* at 46 (quoting Utah Div. of State Lands v. United States, 482 U.S. 193, 197-98 (1987)). Contrary to Professor Rasband's argument, however, this conflict is easily reconcilable if one recalls the purposes for which the federal government took the western territories into trust in the first place: promoting development in the territories and creating new states on an equal footing with the existing states. *See* Schmitt, *supra* note 20, at 465-67. Pre-statehood grants of land under navigable waters furthered the development of the territories and thus were consistent with one of the particular uses for which land was taken into trust at the time. *See* Sax, *supra* note 2, at 477. And just as courts often strictly construe legislative dispositions of public trust property, *see, e.g.*, Vill. of Menomonee Falls v. Wis. Dep't of Nat. Res., 412 N.W.2d 505, 514 (Wis. Ct. App. 1987) (narrowing the authority granted under a state statute purporting to delegate "management and control" of navigable waters to local governments), the equal footing doctrine's clear statement rule helps ensure Congress exercises its authority to further one public trust purpose (settlement and development of western territories) without unduly compromising another public trust purpose (establishment of states on an equal footing with other states).

¹⁰² *Alden v. Maine*, 527 U.S. 706 (1999).

¹⁰³ U.S. CONST. amend. XI.

¹⁰⁴ *Alden*, 527 U.S. at 728-29.

¹⁰⁵ *Id.* at 726-27.

¹⁰⁶ *Id.* at 727 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985)).

¹⁰⁷ Schmitt, *supra* note 20, at 480-81 (quoting MADISON, *supra* note 85, at 187).

Virginia and Georgia, ceded their territories to the federal government.¹⁰⁸ Given that those landed states would not have ceded their lands absent Congress' agreement to take on public trust duties,¹⁰⁹ it is safe to conclude the Constitution never would have been ratified if the federal government could regulate its newly acquired territories under the Property Clause without regard to the duties imposed by the public trust. Consequently, just as the Eleventh Amendment - which only explicitly addressed citizen-state diversity suits - confirmed the larger structural principle of state sovereign immunity, the Property Clause confirms that the public trust doctrine is a cognizable structural constitutional principle. Because all property held by a sovereign is held in trust for the common use and benefit of the people, the very fact that the Property Clause acknowledged the federal government's power to hold and regulate property confirms that the Constitution imposes public trust duties on the federal government.

B. A Federal Constitutional Public Trust Doctrine's Implications for Government Power

The history outlined above demonstrates not only that the public trust doctrine is a judicially cognizable constitutional limit on the federal government's power, but also that the public trust guarantees Congress' authority to establish an administrative state to manage trust resources. This section addresses both sets of implications in turn.

1. Negative Authority

Given that the Constitution never would have been ratified absent the federal government's agreement to take on public trust duties, the federal constitutional public trust should, contrary to the dicta in *Light*,¹¹⁰ be judicially enforceable.¹¹¹ And while public trust cases have generally focused on limiting executive authority,¹¹² the federal public trust should set enforceable limits on both legislative and executive power because the early territorial deeds of cession and the Property Clause both vest public trust duties in Congress.¹¹³

The public trust duties imposed on Congress would not only limit what regulations of federal property are "needful" under the Property Clause, but they would also provide judicially cognizable limits to the Property Clause's seemingly standardless grant of authority "to dispose of" federal lands and

¹⁰⁸ Gaetke, *supra* note 50, at 624.

¹⁰⁹ *Id.* at 626; *see also* Pollard v. Hagan, 44 U.S. 212, 222 (1845).

¹¹⁰ *See Light v. United States*, 220 U.S. 523, 537 (1911).

¹¹¹ *See Alden*, 527 U.S. at 727.

¹¹² *See Lazarus*, *supra* note 2, at 642.

¹¹³ *See U.S. CONST. art. IV, § 3, cl. 2*; Schmitt, *supra* note 20, at 465 (quoting GATES, *supra* note 60, at 52).

territories. And while judicial review of acts of Congress could still be deferential and limited, over a century of public trust cases provide judicially manageable standards for such review.

First, similar to “public purpose” analysis in Fifth Amendment takings cases, legislation serving a public trust purpose can permissibly benefit individual parties.¹¹⁴ But there certainly are cases where a legislative act could be so inconsistent with Congress’ public trust duties as to require invalidation. Such invalidation would most often occur when Congress irrevocably transfers complete control or regulatory authority over a public trust resource to an individual party or non-federal government entity. In *Illinois Central*, for example, the Supreme Court invalidated a state statute that irrevocably granted the land beneath the entire harbor of Chicago to a private railroad.¹¹⁵ Although the railroad planned to construct wharves that arguably would have constituted an improvement consistent with public trust purposes,¹¹⁶ the Court found that an irrevocable transfer of complete control would violate the state’s public trust duty to preserve the harbor’s navigable waters for public use.¹¹⁷ A permanent transfer, the Court reasoned, would cause the state to entirely abdicate its role in regulating such a large and economically valuable resource.¹¹⁸ Similarly, in *Village of Menomonee Falls v. Wisconsin Department of Natural Resources*,¹¹⁹ the Wisconsin Court of Appeals narrowly construed a state statute delegating “management and control” of navigable waters to local governments because a “blanket delegation of the state’s public trust authority” would violate the public trust doctrine.¹²⁰ Under a federal constitutional public trust, the reasoning of *Illinois Central* and *Menomonee Falls* would invalidate (or at least require narrowing constructions of) acts of Congress that expressly abdicate Congress’ public trust duties by irrevocably transferring complete control or regulatory authority over public trust property to a private party, state, or local government.¹²¹

¹¹⁴ Cf. *Kelo v. City of New London*, 545 U.S. 469, 485-86 (2005).

¹¹⁵ *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 448-52, 460 (1892) (describing an Illinois state statute that purported to grant a private railroad all submerged lands under the harbor of Chicago “in perpetuity” and holding the act invalid insofar as it “irreparabl[y]” conveyed the harbor to the railroad).

¹¹⁶ See *Sax, supra* note 2, at 477 (describing valid improvements that could be made on San Francisco Bay).

¹¹⁷ *Ill. Cent.*, 146 U.S. at 460.

¹¹⁸ See *id.* at 452-56 (explaining how “abdication of the general control of the state over lands under the navigable waters of an entire harbor” violated the public trust doctrine because “the exercise of the [public] trust . . . requires the government of the state to preserve such waters for public use”).

¹¹⁹ *Vill. of Menomonee Falls v. Wis. Dep’t of Nat. Res.*, 412 N.W.2d 505, 514-15 (Wis. Ct. App. 1987).

¹²⁰ See also John Quick, *The Public Trust Doctrine in Wisconsin*, 1 WIS. ENVTL. L.J. 105, 110-12 (1994) (collecting cases, including *Menomonee Falls*).

¹²¹ This conclusion is not inconsistent with federal land grants to newly admitted states and private parties during the early republic. As described in sections II.A and C, the main original purpose of the

Second, if an act of Congress does not entirely abdicate Congress' public trust duties but nonetheless derogates a public trust purpose, the public trust doctrine could require Congress to build a legislative record sufficient to justify the derogation.¹²² In *Arizona Center for Law in Public Interest v. Hassell*, for example, the Arizona Court of Appeals invalidated the Arizona legislature's attempt to: (1) relinquish its equal- footing-derived interests "in all watercourses other than the Colorado, Gila, Salt, and Verde Rivers and in all lands formerly within those rivers but outside their current beds" and (2) permit any record titleholder of lands in or near the beds of the Gila, Salt, and Verde Rivers to obtain quitclaim deeds from the state at a rate of twenty-five dollars per acre.¹²³ The challenged statutes violated the legislature's public trust duties, the *Hassell* court held, because neither the legislature nor any administrative agency had made a particularized assessment of the disputed lands' value "for purposes consistent with the public trust."¹²⁴ Although *Hassell* acknowledged the legislature could divest itself of riverbed land no longer suited for public trust purposes, the legislature would have to find, prior to any transfer, that the land in fact had no such value.¹²⁵ Applying this standard to acts of Congress, a federal constitutional public trust could require Congress to make legislative findings that, similar to section 5 of the Fourteenth Amendment's "congruent and proportional" test,¹²⁶ ensure Congress' judgments are justified and proportional to its public trust duties.

Executive action could, consistent with modern state law public trust doctrine, be subject to more scrutinizing review. For example, the federal constitutional public trust could require that any executive action that derogates a public trust purpose be expressly authorized in an enabling statute.¹²⁷ Further, like the legislative limitation outlined above, the public trust could require federal agencies to justify their actions as consistent with their public trust duties or as valid deviations from those duties.¹²⁸ And given that the Administrative Procedure Act ("APA") provides a cause of action to challenge unconstitutional agency

federal public domain was to facilitate controlled settlement of the western territories. Thus, granting lands to new states and private parties was a valid public trust purpose at that time. Public trust purposes, however, have long since changed. *See supra* note 96. And in any event, transfers of public trust property are permissible so long as the federal government retains authority to regulate consistent with its public trust duties.

¹²² *See* Sax, *supra* note 2, at 491-92.

¹²³ Ariz. Ctr. for Law in Pub. Interest v. Hassell, 837 P.2d 158, 162 (Ariz. Ct. App. 1991).

¹²⁴ *See id.* at 172-73; Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701, 735 (1995).

¹²⁵ *See Hassell*, 837 P.2d at 172, 172 n.18.

¹²⁶ *See Tennessee v. Lane*, 541 U.S. 509, 527-34 (2004).

¹²⁷ *See Lazarus*, *supra* note 2, at 646.

¹²⁸ *See* Sax, *supra* note 2, at 491.

action,¹²⁹ there is a ready-made cause of action for public trust challenges to agency decision-making.

Skeptics of the public trust doctrine validly point out that modern administrative law jurisprudence and existing environmental and public lands statutes already do much of the work that could be done by the public trust doctrine.¹³⁰ But the public trust doctrine would also reach government actions left unaddressed by existing laws. First, given that the President is not an agency under the APA, the public trust doctrine could provide an answer to the unsettled question of what standard of review applies to presidential proclamations creating or, even more importantly, shrinking national monuments under the Antiquities Act of 1906.¹³¹ If, for example, President Trump had to explain how his decision to shrink the size of Bear Ears National Monument comported with the government's public trust duties, his decision could be held unconstitutional if it failed to adequately consider the effects of withdrawing national monument protections from various areas previously included in the monument.¹³² Second, unlike under existing environmental and land use laws, a federal constitutional public trust would invalidate or place a burden of justification on congressional actions that legislatively shrink protected areas like Bear Ears.¹³³

Moreover, public trust skeptics miss a fundamental point about the need for a public trust. Because the public trust doctrine provides constitutionally vindicable substantive and procedural limitations on government power, the public trust would provide a theoretical backstop to the always-looming threat that the Court could undo much of modern administrative law based on *Vermont Yankee Nuclear*

¹²⁹ 5 U.S.C. § 706(2)(B).

¹³⁰ See Lazarus, *supra* note 2, at 665-68. Many of these statutes also acknowledge that the federal government holds natural resources in trust for the public. See, e.g., National Environmental Policy Act, 42 U.S.C. § 4331(b), (b)(1) (declaring that "it is the continuing responsibility of the Federal Government to use all practicable means . . . to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations"); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(f)(1) ("The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for [damages to natural resources under CERCLA]."). This merely confirms that from the Articles of Confederation to the present, there has been a common, unbroken understanding that the nature of governmental power itself imposes public trust duties on the federal government.

¹³¹ See generally Roberto Iraola, *Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906*, 29 WM. & M. ENVT'L. L. & POL'Y REV. 159 (2004); Lance F. Sorenson, *The Hybrid Nature of the Property Clause: Implications for Judicial Review of National Monument Reductions*, 21 U. PA. J. CONST. L. 761 (2019); Mark Squillace, *The Looming Battle Over the Antiquities Act*, HARV. L. REV. BLOG (Jan. 6, 2018), <https://blog.harvardlawreview.org/the-loomng-battle-over-the-antiquities-act/>.

¹³² See *Presidential Proclamation Modifying the Bear Ears National Monument*, WHITEHOUSE.GOV (Dec. 4, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-modifying-bears-ears-national-monument/>.

¹³³ See *supra* notes 114-126, and accompanying text.

*Power Corp. v. Natural Resource Defense Council.*¹³⁴ The public trust could thus preserve the modern structure of environmental administrative decision-making.

2. Positive Authority Granted by the Public Trust

Although the public trust doctrine limits federal government power over trust resources, it also empowers Congress to establish an administrative state to manage, regulate, and adjudicate issues related to public trust resources. As shown by *Murray's Lessee*, the earliest example of public rights in the United States - determining validity of title in the federal territories - concerned public trust resources.¹³⁵ Because rights in public trust resources qualify as public rights, Congress can constitutionally delegate far-reaching adjudicatory authority over such resources to the Executive Branch and Article I courts.¹³⁶ Thus, to the extent that, for example, the Clean Air Act and Clean Water Act's permitting programs govern public trust resources, the public trust doctrine could provide a separate basis for the programs' constitutionality as permissible congressional delegations of adjudicatory authority.¹³⁷

C. Addressing Separation of Powers Objections

Despite the extensive history supporting recognition of a federal constitutional public trust doctrine, the doctrine remains open to a key separation of powers critique: by recognizing a previously unenforced, unwritten constitutional principle, would courts be engaged in improper judicial policymaking? The Constitution expressly granted certain enumerated powers to Congress, and the Tenth Amendment reserved the remaining power to the States.¹³⁸ Those express limits, public trust skeptics would argue, should not be supplemented by unwritten, policy-driven principles; otherwise the courts would be engaged in the notorious practice of *Lochnerizing*.¹³⁹

¹³⁴ See *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances[,] the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." (emphasis added) (internal quotation marks omitted) (quoting *FCC v. Schreiber*, 381 U.S. 279, 290 (1965))).

¹³⁵ See *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1855); *Ablavsky, supra* note 53, at 650-51.

¹³⁶ See *Stern v. Marshall*, 564 U.S. 462, 487-591 (collecting examples of public rights-related congressional delegations); *Murray's Lessee*, 59 U.S. at 284.

¹³⁷ Cf. *Stern*, 564 U.S. at 487-591; *Thomas v. Union Carbide Ag. Prods. Co.*, 473 U.S. 568, 571-75 (1985) (holding that Congress could constitutionally require companies that enter into data sharing agreements under federal pesticide registration laws to submit compensation claims to binding arbitration).

¹³⁸ See generally U.S. CONST. art. I; *id.* amend. X.

¹³⁹ See Thomas B. Colby & Peter J. Smith, *The Return of Lochner*, 100 CORNELL L. REV. 527, 536-37 (2015).

These criticisms are not without some force. After all, the public trust is not explicitly mentioned in the Constitution other than perhaps the Property Clause's oblique reference to Congress' authority to make "needful" regulations regarding government property and the territories.¹⁴⁰ Nevertheless, these criticisms are rebutted for four reasons.

First, as shown above, the same reasoning and sources used to recognize the settled, unwritten constitutional principles of state sovereign immunity and equal footing also support recognizing an enforceable constitutional public trust.¹⁴¹ Given that these sources have already been used to recognize other unwritten constitutional principles, it would be impermissible judicial policymaking for the courts to *refuse* to recognize a federal constitutional public trust. If courts refused to recognize that these venerated sources - from the Magna Carta and Charter of the Forest, to the early territorial deeds of cession, to the Northwest Ordinance, to key founders' writings - establish a constitutional public trust doctrine, they would improperly rely on these sources to selectively recognize some unwritten constitutional principles but not others.

Second, even if the public trust was in fact originally reserved to the states by the Tenth Amendment, those duties were imposed on the federal government by its retention of authority over natural resources in newly recognized states. When the federal government holds title over public lands within a state, *Pollard* instructs that the sources of the federal government's continued authority are the state deeds of cession and associated state statutes.¹⁴² These cessions invested power in the federal government "to the same extent, in all respects, that it was held by the states."¹⁴³ And state power over the ceded areas was always limited by the public trust. Thus, even assuming the public trust was a matter originally reserved to the states under the Tenth Amendment, the federal government took on those public trust duties by accepting and continuing to hold cessions of land and natural resources.

Third, the public trust doctrine comports with accepted understandings of the proper judicial role in our constitutional system. Judicial review under the public trust doctrine sounds in process theory, which "posits that [constitutional] judicial review is legitimate in a democracy insofar as it either unblocks equal access to the political process or corrects for systematic disadvantages confronted by minority groups within that process."¹⁴⁴ While process theory generally focuses

¹⁴⁰ See U.S. CONST. art. IV, § 3, cl. 2.

¹⁴¹ See *supra* section III.A.

¹⁴² *Pollard v. Hagan*, 44 U.S. 212, 224 (1845).

¹⁴³ *Id.* at 222-23.

¹⁴⁴ Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L. REV. 1273, 1281 (2019) (citing JOHN HART ELY, DEMOCRACY & DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)). Process theory has been criticized over the past several decades. See generally Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721 (1991); Aaron Tang, *Reverse Political*

judicial scrutiny on discrimination against minority groups,¹⁴⁵ its focus on equal access similarly justifies elevated scrutiny under the public trust doctrine. Although environmental conservation and regulation enjoy broad public support, their beneficiaries are diffuse and thus transaction costs of collective action are extremely high.¹⁴⁶ By contrast, the parties economically effected by such regulation are generally concentrated, well-funded, and well-represented before Congress and Executive Branch agencies.¹⁴⁷ As a result, beneficiaries of environmental conservation “are far less likely to act effectively in political settings, while [regulated parties] will be nearly certain to act, due to the higher stakes and relatively small transaction costs associated with acting collectively.”¹⁴⁸ The public trust doctrine corrects for this structural imbalance in political access by raising judicial scrutiny when government dispositions of trust resources appear to favor particular interests at the expense of the general public.¹⁴⁹ By thus preventing special interest capture of democratic processes, the public trust doctrine fits squarely within the judiciary’s proper role in the separation of powers: as a democracy-enhancing institution that corrects for systemic malfunctions in the political process.¹⁵⁰

Fourth, any concern about opening federal courthouse doors to new generalized grievances would be easily dealt with by the doctrines of standing and ripeness.¹⁵¹ By limiting the judiciary to resolving only concrete cases and controversies, these

Process Theory, 70 VAND. L. REV. 1427 (2017). But even its critics acknowledge that process theory underpins Supreme Court decisions that remain good law. See Ortiz, *supra*, at 729-35 (acknowledging that the Supreme Court relied on process theory when determining “the suspectness of a class” in discrimination cases such as *Frontiero v. Richardson*, 411 U.S. 677 (1973), and *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)).

¹⁴⁵ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

¹⁴⁶ GLICKSMAN, *supra* note 1, at 10 (citing MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965)); *id.* at 71.

¹⁴⁷ Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 U. PA. J. CONST. L. 419, 449-50 (2015); *id.* at 452 (“[B]usiness organizations and wealthy individuals are ubiquitous at every step of the process. They continually check and balance—or prod and plea with—governmental actors, working to define the scope of public debate and the shape of governmental policy.”); see also ROGER G. NOLL, REFORMING REGULATION 40-43, 46 (1971), as reprinted in GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 78-79 (2019).

¹⁴⁸ GLICKSMAN, *supra* note 1, at 11.

¹⁴⁹ See, e.g., SAX, *supra* note 2, at 521 (“The ‘public trust’ has no life of its own and no intrinsic context. It is no more—and no less—than a name courts give to their concerns about the insufficiencies of the democratic process.”).

¹⁵⁰ See Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 170 (2012) (citing ELY, *supra* note 144, at 103); *id.* at 178 (“However objectionable judicial review may be in the abstract, most scholars approve of its use to counter democratic deficiencies.”).

¹⁵¹ Indeed, for better or for worse, this is precisely how the Ninth Circuit disposed of the climate change-related public trust claims in *Juliana v. United States*, No. 18-36082, 2020 WL 24149, at *5-11 (9th Cir. 2020).

doctrines would ensure judges respect the separation of powers in public trust cases.¹⁵²

CONCLUSION

If, as all schools of constitutional interpretation recognize, history is an appropriate guide for understanding constitutional principles, then it should be beyond debate that the public trust doctrine is a judicially enforceable constitutional principle. Though not expressly mentioned in the Constitution, the public trust is easily found in foundational documents that shaped our nation and the structure of the modern federal government. Indeed, were it not for Congress' agreement to take on public trust duties, there never would have been a Union at all. Given that these trust duties were vital to the creation of the Union, the public trust should have more than an academic impact - it should inform the courts' understandings of both executive and legislative power. And given that the courts have, for over a century, found judicially manageable standards to enforce public trust duties against the states, there is no reason that these standards could not be applied to the federal government as well.

¹⁵² See RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURT AND THE FEDERAL SYSTEM 49 (7th ed. 2015).