SITUATING THE MODERN PUBLIC TRUST DOCTRINE IN TRUST LAW: THE DUTY OF LOYALTY AND THE CASE FOR BIFURCATED, DE NOVO JUDICIAL REVIEW

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INTRODUCTION

This Article situates the modern public trust doctrine ("PTD") in contemporary trust law. Grounding the PTD in trust law leads to two important corollaries. First, the PTD planted in trust law imposes upon government actors and agencies trust law's fiduciary duty of loyalty. In the context of the PTD, that duty of loyalty runs to the public as the

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beneficiary of the PTD. Second, faced with plausible claims that this fiduciary duty of loyalty to the public has been violated, courts should apply trust law's de novo standard of review to those administrative and legislative decisions alleged to impair public trust resources. Such searching review stems from recognition that public trustees of the environment invariably confront conflict between their fiduciary obligation of loyalty to the public and the private interests which seek to capture such trustees and the natural resources they control. In light of that conflict between public and private interests, when evaluating PTD claims, courts should deploy trust law's de novo review rather than using one of administrative law's deferential standards of review. Since public trustees are trustees with trust law's duty of loyalty to the public, their compliance vel non with that fiduciary duty of loyalty should, as a matter of trust law, be assessed by the courts de novo rather than deferentially in light of the conflicts such trustees invariably confront.

Consequently, judicial review of agency actions in environmental cases should often be self-consciously bifurcated because agencies will often be acting in two, legally distinct capacities, i.e., as administrators and as trustees. When a court scrutinizes an agency's decisions as an administrator applying detailed statutes and regulations, deferential review will often be appropriate as a matter of administrative law. But when the inquiry shifts to the overriding issue of the PTD—does the agency's decision loyally implement its fiduciary responsibilities as trustee to the public?—the standard of judicial review should explicitly shift as well. At this ultimate stage in the litigation, the court should undertake de novo review based in trust law to determine if the outcome being reached satisfies the public trustee's duty of loyalty to the public under the modern PTD.

While environmental agencies may possess expertise as to the statutes and regulations they administrator, such agencies have no expertise in trust law. The courts are where trust law expertise resides.

This Article bolsters the existing state PTD case law which employs searching review of agency decisions and statutes involving public trust resources. This Article also criticizes and urges reversal of state court decisions which defer to agencies and legislatures in the PTD context when agencies and legislatures impair public trust resources. It may be appropriate to defer to administrative decisions involving technical statutes and regulations as to which agencies have significant expertise. But the PTD is an overriding rule of law, well within the competence of the courts. Courts should apply the modern PTD through the searching scrutiny of trust fiduciary law rather than the deferential review characteristic of administrative law. Given the conflicted decision-

making endemic in the environmental area, de novo judicial review based on trust law is more appropriate in the PTD context than is the deferential review which predominates in administrative law.

This is true whether a state embraces a narrower, more traditional understanding of the scope of the PTD or instead elects to expand the coverage of the PTD beyond its historic confines. In either case, the PTD should today be situated in trust law with its duty of loyalty and de novo review of the decisions of conflicted trustees. In those states which have yet to decide on the standard of review appropriate for PTD cases, this Article's argument, by highlighting the trust fiduciary law aspects of the PTD and the conflicts facing public trustees, points towards heightened, rather than deferential, judicial review of administrative and legislative decisions diminishing public trust resources.

Underlying the case for searching judicial review of administrative decisions implicating public trust values are the political realities of capture. Environmental agencies are highly susceptible to capture by private interests seeking for themselves valuable public trust resources. The modern revival of the PTD (whether by statute, state constitution, or common law) is most compellingly justified by the need to counterbalance the ability of private interests to capture environmental institutions for such interests' own advantage. If modern public trusteeship is to have meaning, it should not mean politics as usual or deferential judicial review but, rather, should provoke de novo judicial review to ensure that public trustees act under the PTD as the loyal fiduciaries for the public they are supposed to be.

Part I of this Article discusses the provenance of the PTD. The traditional narrative of the origins of the PTD ignores trust law. This Article supplements that narrative by grounding the modern PTD in trust law. Then, Part II of this Article discusses the modern revival of the PTD. Fundamental to the modern rejuvenation of the PTD is the inherent conflict confronting public trustees. While these public trustees are obligated as fiduciaries to loyally protect the public's interest in natural resources, they are also subject to significant pressures from private interests to obtain such valuable resources for themselves. Part III of this Article discusses the extensive codification of the modern PTD, both in state constitutions and in state statutes. Part IV explains the three reasons why the contemporary PTD should be situated in trust law. The public trust is substantively a trust (i) as a matter of history, (ii) in the contemporary usage of the terms "trust" and "trustee," and (iii) in the natural and normal evolution of the common law. Part V of this Article turns to the relevant substance of trust law and explores a trustee's fiduciary duty of loyalty to her beneficiaries as well as the trust

law mandate that actions allegedly breaching the duty of loyalty be subject to de novo review when trustees are conflicted.

Part VI of this Article analyzes judicial decisions implicating the contemporary PTD, both decisions that support and disagree with this Article's analysis. Bolstering this Article's analysis are *Pennsylvania Environmental Defense Foundation v. Commonwealth ("PEDF")*[1] and *National Audubon Society v. Superior Court*.[2] These decisions subject actions which implicate public trust values to searching judicial review. In these cases, public institutions are treated as trustees obligated to loyally pursue the public's interest in the natural environment and subjected to heightened judicial scrutiny.

In contrast to *PEDF* and *National Audubon Society* are judicial decisions which defer to administrative determinations impairing public trust resources. This Article criticizes these decisions. While deference to agency expertise may be appropriate as a matter of administrative law when detailed statutes and regulations are being examined, in the PTD context, the higher review standard of trust law should today prevail. Rather than deferring to agency decisions applying the PTD, the courts should scrutinize such decisions de novo when an agency impairs the public's access to or use of natural resources. The courts should engage in self-consciously bifurcated review in these kinds of environmental cases, deferring to administrative expertise in the context of detailed statutes and regulations but deliberately shifting to de novo review when the court considers the overriding impact of the PTD: Does the outcome reached by the agency implement its fiduciary duty to the public as a loyal trustee of environmental resources? It is in the courts, not environmental agencies, where expertise in trust law is to be found.

The lesson for those states that have yet to decide on the standard of review in PTD cases is that, as a matter of trust law, the searching judicial scrutiny of public trustees implemented by such decisions as *PEDF* and *National Audubon Society* is the correct standard of review in PTD cases, whether that standard is to be confirmed legislatively or by the courts. The upshot will typically be bifurcated review in environmental cases. State courts may, as a matter of administrative law, defer to agencies' applications and interpretations of detailed statutes and regulations within the scope of such agencies' expertise. However, the ultimate inquiry under the modern PTD—has the agency discharged its duty of loyalty to the public?—should be subject to trust law's de novo standard of judicial review.

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[1] 161 A.3d 911 (2017).
[2] 658 P.2d 709 (1983).

Finally, Part VII of this Article addresses five additional topics which clarify this Article's analysis and provide further context for that analysis.

I. THE ORIGINS OF THE PUBLIC TRUST DOCTRINE

Part I of this Article reviews the origins of the PTD. Trust law plays no role in the prevailing narrative of the PTD's origin. This Article supplements this narrative by situating the modern PTD in trust law.

In their casebook on the PTD,[3] Professors Michael Blumm and Mary Wood trace the PTD to ancient Roman law, English common law, and American constitutionalism:

> First surfacing in Roman law through the Justinian Code, it was revived in medieval England largely through the efforts of Sir Mathew Hale and became entrenched in American law in the nineteenth century through the process of statehood. . . . [T]he PTD is an inherent attribute of sovereignty and, accordingly, should apply to both the federal and state governments. The origins of the American PTD lie in bilateral federal-state agreements admitting states to the Union . . . .[4]

Professor Erin Ryan, writing with Holly Curry and Hayes Rule, similarly describes the public trust doctrine as "[a]mong the oldest doctrines of the common law tradition"[5]:

> Most accounts of the public trust doctrine trace its roots back to ancient Rome. . . . These principles were received from Roman common law into early English law, appearing as early as the 1215 Magna Carta, the progenitor of western democracy and constitutional law, and its 1217 addendum, the Charter of the Forest. . . . The doctrine also appeared in early English common law, which affirmed sovereign ownership of submerged tidelands for public use and enjoyment. The public trust doctrine was first recognized in the United States during the early 1800s, making its first appearances in state courts.[6]

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[3] MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW (3d ed. 2021).

[4] *Id.* at li ("the origins of the PTD date to Roman times"); *see also id.* at 6 ("Although the U.S. PTD is often characterized as common law, some scholars have located implicit constitutional underpinnings as well.").

[5] Erin Ryan, Holly Curry & Hayes Rule, *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 CARDOZO L. REV. 2447, 2456 (2021).

[6] *Id.* at 2457–58.

Other scholars are more skeptical of the PTD and its provenance. Dean Joseph Kearney and Professor Thomas Merrill call the PTD "nebulous,"[7] a "blunderbuss"[8] "[t]he exact contours" of which "have always been a matter of dispute."[9] Dean James Huffman criticizes the modern PTD as violating "[b]oth the law and the limited role of the judiciary."[10] The modern PTD, he tells us, "would require the courts to exceed both their traditional and their constitutional powers, and to make up a lot of law while treading on the vested rights of a lot of people."[11]

The divide between these scholars is evident in their respective characterizations of the U.S. Supreme Court's decision in *Illinois Central R.R. Co. v. Illinois*.[12] In 1869, the Illinois legislature adopted an act which granted to the Illinois Central railroad "nearly the whole of the submerged lands of [Chicago's] harbor" in Lake Michigan.[13] In 1873, the legislature repealed this act, thereby revoking the grant of these submerged lands made four years earlier to the railroad.[14] The railroad objected to this revocation, asserting that the legislature's 1869 act was "an absolute conveyance to [Illinois Central] of title to the submerged lands, giving [Illinois Central] . . . full and complete power to use and dispose of the same."[15] A four-justice majority[16] of the U.S. Supreme Court invalidated the legislature's 1869 grant to the railroad as void *ab initio* under the PTD.[17] Illinois's title to the submerged lands of Lake Michigan "is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."[18]

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[7] JOSEPH D. KEARNEY & THOMAS W. MERRILL, LAKEFRONT: PUBLIC TRUST AND PRIVATE RIGHTS IN CHICAGO 81 (2021).

[8] *Id.*

[9] *Id.* at 84. Professor Blumm criticizes this "jaundiced view of the public trust." Michael C. Blumm, *The Public Trust and the Chicago Lakefront: Review of Kearney & Merrill's* Lakefront: Public Trust and Private Rights in Chicago, 11 MICH. J. ENV'T & ADMIN. L. 315, 332 n.108 (2022).

[10] James L. Huffman, *Why Liberating the Public Trust Doctrine Is Bad for the Public*, 45 ENV'T L. 337, 340 (2015).

[11] *Id.*

[12] Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

[13] *Id.* at 448, 451.

[14] *Id.* at 449.

[15] *Id.* at 450.

[16] Two members of the Court abstained, *id.* at 464, and three dissented, *id.* at 464–65, 476 (Shiras, J., dissenting). Thus Justice Field's majority opinion in *Illinois Central* was supported by a four-member majority of the seven participating justices.

[17] *Id.* at 460.

[18] *Id.* at 452.

Given the importance of *Illinois Central* to the modern PTD, it is worthwhile to quote from the court's opinion in detail. The legislature's 1869 act, the Court said, violated the PTD:

> [T]he abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake . . . is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost . . . .[19]
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> The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.[20]
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> The ownership of the navigable waters of the harbor, and of the lands under them, is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated . . . .[21]

Among other decisions, the *Illinois Central* Court cited *Martin v. Waddell's Lessee*[22] and *Arnold v. Mundy*[23] for the proposition that "the bed or soil of navigable waters is held by the people of the state in their character as sovereign in trust for public uses for which they are adapted."[24] Consequently, the Court held:

> [A]ny attempted cession of the ownership and control of the state in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the state over the lands, or its ownership thereof . . . .[25]

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[19] *Id.* at 452–53.

[20] *Id.* at 453.

[21] *Id.* at 455.

[22] 41 U.S. 367 (1842). This decision is discussed *infra* at notes 105 through 109 and accompanying text.

[23] 6 N.J.L. 1 (1821). This decision is discussed *infra* at notes 98 through 104 and accompanying text.

[24] *Illinois Central*, 146 U.S. at 457–58.

[25] *Id.* at 460.

In his celebrated article which initiated the modern revival of the PTD, Professor Joseph Sax labeled *Illinois Central* as "celebrated."[26] In this vein, Professors Blumm and Wood observe that "*Illinois Central* is widely considered to be the lodestar decision of the field" of the PTD.[27] Professor Ryan and her co-authors similarly call *Illinois Central* a "canonical case" which "demonstrated the force of the [public trust] doctrine in constraining state authority to manage trust resources for the public benefit and in providing citizens with a judicial remedy for violations of the trust."[28] Professor Richard Frank characterizes *Illinois Central* as "one of [the] most influential public trust decisions in American legal history."[29]

In contrast, Dean Kearney and Professor Merrill are *Illinois Central* skeptics:

> [T]he central device of [*Illinois Central*]—the public trust doctrine as announced and applied—was primarily a product of the exigencies of litigation. Justice Field needed some doctrinal basis to defeat the Illinois Central's powerful vested-rights argument, reaffirmed by three of the seven participating justices. Absent the peculiar circumstances of the enactment and repeal of the Lake Front Act, there would have been no cause to invest the state's ownership of the lakebed with a trust that made large transfers to private entities inherently revocable.[30]

Dean Huffman takes a similarly dour view of the case, declaring that, in his *Illinois Central* opinion, "Justice Field invited [a] mistaken understanding" of the law.[31]

The courts embracing the PTD generally endorse the positive narrative of the doctrine's origins. According to the New Jersey Supreme Court, for example, the PTD "derives from the English common law" and "Roman jurisprudence."[32] With the success of the American Revolution, "the English sovereign's rights to the tidal waters became vested in the people of New Jersey as the sovereign of the country, and are now in their hands."[33]

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[26] Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970); *id.* at 490–91 (calling *Illinois Central* "an important precedent."); *see also infra* notes 37 through 43 and accompanying text.

[27] BLUMM & WOOD, *supra* note 3, at 75.

[28] Ryan et al., *supra* note 5, at 2459.

[29] Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 684 (2012).

[30] KEARNEY & MERRILL, *supra* note 7, at 81.

[31] Huffman, *supra* note 10, at 348.

[32] Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 879 A.2d 112, 119 (N.J. 2005).

[33] *Id.* (internal quotation marks omitted); *see also* Armstrong v. Sec'y of Energy & Env't Affs., 189 N.E.3d 1212, 1218 (Mass. 2022) ("For centuries, the Commonwealth has recognized

The California Supreme Court's "epic"[34] "Mono Lake" decision (more conventionally titled *National Audubon Society v. Superior Court*) similarly traces the PTD from Roman law through English common law into California statehood:

> From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people. The State of California acquired title as trustee to such lands and waterways upon its admission to the union; from the earliest days its judicial decisions have recognized and enforced the trust obligation.[35]

Locating the public trust doctrine in "English common law," Montana's Supreme Court summarized the history of the PTD under the "equal footing" rule:

> States admitted to the Union subsequent to the original thirteen succeeded to the same [public trust] rights on the theory that the lands acquired by the United States from the original thirteen colonies or from foreign governments were held in trust for the new states in order that they might be admitted on an equal footing with the original states.[36]

A striking feature of this narrative, as articulated by the courts and by supportive commentators on the PTD, is the absence of trust law in this narrative on the origins of the modern PTD. This Article seeks to append trust law to this narrative by situating the modern PTD in trust law with its fiduciary duty of loyalty and de novo review of the decisions of conflicted trustees.

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the importance of regulating its tidelands under the public trust doctrine, an age-old concept with ancient roots . . . expressed as the government's obligation to protect the public's interest in . . . the Commonwealth's waterways." (internal quotation marks omitted)).

[34] Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of* National Audubon Society v. Superior Court, 45 ENV'T L. 561, 603 (2015) (describing the *Mono Lake* decision as "epic"); Frank, *supra* note 29, at 670 (describing the *Mono Lake* decision as "iconic").

[35] Nat'l Audubon Soc'y v. Superior Ct. (*Mono Lake*), 658 P.2d 709, 718–19 (Cal. 1983) (internal citations and quotation marks omitted).

[36] Mont. Coal. for Stream Access, Inc. v. Curran, 682 P.2d 163, 166–67 (Mont. 1984); *see also* Lawrence v. Clark Cnty., 254 P.3d 606, 608–09 (Nev. 2011) (tracing the origins of the PTD from Roman law and English common law through *Illinois Central*); Clean Wis., Inc. v. Wis. Dep't of Nat. Res., 961 N.W.2d 611, 616 (Wis. 2021) (citing Movrich v. Lobermeier, 905 N.W.2d 807 (Wis. 2018)) (observing that the public trust "doctrine's roots stretch back to the 1787 Northwest Ordinance"); Chernaik v. Brown, 475 P.3d 68, 78 (Or. 2020) (noting that the PTD is a "common-law doctrine" which "in the United States traces its roots to English common law" and which applied to Oregon as a "new state" "[u]nder the equal-footing doctrine").

II. THE MODERN REVIVAL OF THE PTD

The modern revival of the PTD is universally attributed to Professor Joseph Sax's article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*.[37] This 1970 publication is the rare academic piece which genuinely deserves to be called "seminal."

> [It] was Professor Joe Sax's seminal 1970 article that first identified and proposed the public trust doctrine as a key component of the then-new discipline of environmental law. To state that Sax's article proved influential is a gross understatement: it is perhaps the most heavily-cited law review article—by courts and scholars alike—in over four decades of environmental law.[38]

One of Professor Sax's arguments for reviving the PTD is central to the reasoning of this Article: The responsibilities of public trusteeship should be imposed upon capturable environmental agencies to counteract the pressures such agencies receive (and often succumb to) from private interests seeking to divert treasured natural resources to themselves. The PTD, Professor Sax maintained, serves "[t]o counteract the influence which private interest groups may have with administrative agencies."[39] Public decision-makers are frequently subject to "intensive" pressures from private interests while these private-regarding pressures "are often of limited visibility to the general public."[40] "It is in these situations that public trust lands are likely to be put in jeopardy," given the imbalance between the "extraordinarily vigorous and persistent efforts" of private interests seeking natural resources for themselves and the public's limited understanding of what is occurring.[41] In these unbalanced situations, the PTD helps to remedy "inequality of access to, and influence over, administrative agencies" when private interests seek to obtain valuable public assets for themselves.[42] "[S]elf-interested and powerful minorities often have an undue influence on the public resource decisions of legislative and

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[37] Sax, *supra* note 26.

[38] Frank, *supra* note 29, at 667. Dean Huffman, while critical of the expansion of the PTD advocated by Professor Sax and his successors, agrees that Professor Sax's article was "truly seminal." Huffman, *supra* note 10, at 339.

[39] Sax, *supra* note 26, at 492.

[40] *Id.* at 495.

[41] *Id.*

[42] *Id.* at 498; *see also id.* at 560 (observing the "problem that frequently arises in public trust cases . . . [is that] a diffuse majority is made subject to the will of a concerted minority"); *id.* at 564 (noting "diffuse public uses are . . . poorly represented").

administrative bodies and cause those bodies to ignore broadly based public interests."[43]

Other scholars have amplified and reinforced in other contexts similar concerns about capture. At the same time that Professor Sax warned about the political capture of environmental bureaus by private interests, economists, political scientists, and legal academics highlighted the realities of political capture of regulatory agencies by the interests those agencies regulate. Professor (and ultimately Nobel Laureate) George Stigler, writing at roughly the same time as Professor Sax, is credited[44] with shifting the anodyne academic understanding of regulation to a more realistic vantage about the political services captured regulators habitually provide to their respective regulatees: "[D]enounc[ing] the ICC for its pro-railroad policies . . . seems to me exactly as appropriate as a criticism of the Great Atlantic and Pacific Tea Company for selling groceries, or as a criticism of a politician for currying popular support."[45]

Following in Professor Stigler's footsteps, scholars writing under the rubric of public choice theory today emphasize "regulatory capture."[46] For several reasons, industries dominate the institutions and processes intended to regulate them: Industries are concentrated interests while the public is diffused and disorganized, "rationally ignorant" of regulatory processes.[47] Regulators develop relationships with industry personnel and view "the firms they now regulate" as "a likely source of future employment."[48] While public choice theory is today conventionally characterized as a "conservative" doctrine[49] and the PTD is typically

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[43] *Id.* at 560; *see also id.* at 565 (describing "pressures imposed by powerful but excessively narrow interests").

[44] *See, e.g.*, Sam Peltzman, *George Stigler's Contribution to the Economic Analysis of Regulation*, 101 J. POL. ECON. 818, 818 (1993) (describing Stigler's "enormous legacy"); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 34 n.77 (1998) ("Stigler's is the seminal work . . . .").

[45] George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 17 (1971).

[46] *See, e.g.*, RANDALL G. HOLCOMBE, ADVANCED INTRODUCTION TO PUBLIC CHOICE 81–83 (2016); Jack Brown, *A Blind Eye: How the Rational Basis Test Incentivizes Regulatory Capture in Occupational Licensing*, 17 J.L. ECON. & POL'Y 135, 138–42 (2022) ("[R]egulatory capture occurs when a political or regulatory body is acquired, or 'captured,' by the industry which the body is intended to regulate. Once captured, the body then acts for the benefit of that industry.").

[47] HOLCOMBE, *supra* note 46, at 82.

[48] *Id.*; *see also* Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741, 755 (2012) (discussing the "contemporaneous ascension of 'public choice' political theory and the 'capture' theory of administrative decision making").

[49] *See, e.g.*, Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 11 (1991) (describing "the essentially conservative public choice movement"); Mark Tushnet, *Conservative Constitutional Theory*, 59

viewed as advancing the "progressive" cause of environmentalism,[50] the two vantages are similar insofar as both public choice theory and the modern PTD focus upon the capture of administrative agencies by the interests such agencies regulate.

The modern revival of the PTD, and its recognition that public environmental trustees are subject to capture by private interests seeking natural resources for themselves, inform this Article's project of situating the modern PTD in trust law. Also informing this project are the codifications of the modern PTD in state constitutions and statutes. To that codification this Article now turns.

III. THE CONSTITUTIONAL AND STATUTORY CODIFICATION OF THE PTD

While the PTD has historically been a judge-made, common law rule,[51] the modern doctrine has been codified in many state constitutions and state statutes. That codification helps to situate the modern PTD in trust law. When today's voters and legislators embrace terms such as "trust" and "trustees," they are best understood as using such terms in their contemporary meanings, i.e., a trustee holds property for beneficiaries subject to the fiduciary obligation of loyalty.

A. States' Constitutional Codification of the PTD

Various state constitutions explicitly or implicitly codify versions of the PTD. This section of the Article summarizes state constitutions embodying public trust principles.

TUL. L. REV. 910, 921–25 (1985) (discussing "public choice theory as the basis for conservative constitutional theory").

[50] *See, e.g.*, Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It "To the Bottom"?*, 48 HASTINGS L.J. 271, 367 (1997) (proposing "environmentally progressive multi-state agreements" as a solution to allow greater state standard-setting); Stepan Wood, Georgia Tanner & Benjamin J. Richardson, *What Ever Happened to Canadian Environmental Law?*, 37 ECOLOGY L.Q. 981, 1033–35 (2010) (describing "progressive" environmental standards set at the provincial level).

[51] *See, e.g.*, Coastal Conservation Ass'n v. State, 878 S.E.2d 288, 295 (N.C. Ct. App. 2022) ("[T]he public trust doctrine, established by the common law of this State, involves two concepts: (1) public trust lands, which are certain land[s] associated with bodies of water [and] held in trust by the State for the benefit of the public[;] and (2) public trust rights, which are those rights held in trust by the State for the use and benefit of the people of the State in common. Public trust rights attach to the [public trust lands] and include, but are not limited to the right to navigate, swim, hunt, fish, and enjoy all recreational activities offered by public trust lands." (internal quotation marks and citations omitted)); Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 766 S.E.2d 707, 715 (S.C. 2014) ("[T]he public trust doctrine . . . provides that those lands below the high water line are owned by the State and held in trust for the benefit of the public.").

A strong and broad codification of the PTD is Article I, Section 27 of Pennsylvania's Constitution adopted in 1971:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[52]

Article XI, Section 1 of Hawaii's Constitution, adopted in 1978, is similarly explicit about the state's status as the trustee of the state's natural resources, holding this trust corpus for the benefit of the people:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.[53]

Ohio's Constitution expressly confirms "the public trust doctrine as it applies to Lake Erie [and] the navigable waters of the state."[54] Florida's Constitution similarly declares that the state holds the "lands under navigable waters . . . in trust for all the people."[55] Montana's Constitution declares as "inalienable" "the right to a clean and healthful environment"[56] and mandates that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."[57] Montana's Constitution also provides that "[a]ll surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided

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[52] PENN. CONST. art. I, § 27. On the history of Article I, Section 27, see John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENV'T L. 463, 468–77 (2015). For a thorough argument for the importance of state constitutional guarantees in general, see JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018).

[53] HAW. CONST. art. XI, § 1.

[54] OHIO CONST. art. I, § 19b(F).

[55] FLA. CONST. art. X, § 11.

[56] MONT. CONST. art. II, § 3.

[57] *Id.* art. IX, § 1(1); *see* Held v. State, No. CDV-2020-307 (1st Dist. Ct. Mont. Aug. 14, 2023).

by law."[58] Montana's Supreme Court has declared that this latter provision embodies the public trust doctrine.[59]

Article I, Section 17 of the Rhode Island Constitution reflects the traditional, shoreline-based PTD by guaranteeing that "[t]he people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state."[60] This language resonates with the traditional, intertidal PTD between the high- and low-tide marks. In addition, the Rhode Island Constitution declares more broadly that the people "shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values."[61] Rhode Island's Constitution also imposes upon the Rhode Island legislature the duty "to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state."[62]

Alaska's Constitution provides that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."[63] This "common use" provision, Alaska's Supreme Court has held, "constitutionaliz[es] common law principles imposing upon the state a public trust duty with regard to the management of fish, wildlife and waters."[64] Similarly, Wisconsin's Supreme Court has found the Badger State's public trust doctrine to be "rooted" in the state constitution.[65] That constitution declares the state's "navigable waters" to be "common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States."[66] In this same vein, Washington's Supreme Court declared the PTD "partially encapsulated"[67] in that state's constitution, which declares the state the

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58 MONT. CONST. art IX, § 3(3).

59 Galt v. State, 731 P.2d 912, 914–15 (Mont. 1987).

60 R.I. CONST. art. I, § 17.

61 *Id.*

62 *Id.*; *see also* Sean Lyness, *A Doctrine Untethered: "Passage Along the Shore" Under the Rhode Island Public Trust Doctrine*, 26 ROGER WILLIAMS U. L. REV. 671, 684–88 (2021) (discussing 1986 amendment of the Rhode Island Constitution to confirm the PTD).

63 ALASKA CONST. art. VIII, § 3.

64 Owsichek v. Guide Licensing & Control Bd., 763 P.2d 488, 493 (Alaska 1988); *id.* at 495 ("[C]ommon law principles incorporated in the common use clause impose upon the state a trust duty to manage the fish, wildlife and water resources of the state for the benefit of all the people.").

65 State v. Bleck, 338 N.W.2d 492, 497 (Wis. 1983).

66 WIS. CONST. art. IX, § 1; *see also* Clean Wis., Inc. v. Wis. Dep't of Nat. Res., 961 N.W.2d 611, 615–16 (Wis. 2021) (explaining that the public trust "doctrine . . . [is] enshrined in the Wisconsin Constitution").

67 Rettkowski v. Dep't of Ecology, 858 P.2d 232, 239 (Wash. 1993).

owner of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."[68]

California's Constitution codifies the PTD in similar terms.[69] Article XX, Section 21 of New Mexico's Constitution "recognizes that a public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of [the] state."[70]

B. States' Statutory Codification of the PTD

The PTD has also been codified statutorily by many states. For example, Connecticut by statute confirms the state's "responsibility as trustee of the environment for the present and future generations."[71] Connecticut's General Assembly has further confirmed the PTD legislatively by ratifying the Long Island Sound Blue Plan:[72]

> Perhaps the most fundamental, legal and management principle underlying the Blue Plan is the public trust doctrine, through which the waters and submerged lands of Long Island Sound are owned by the states of Connecticut and New York in trust for the public. . . . In addition to state ownership, an essential element of the public trust doctrine is that the state's submerged lands and waters are in trust for use by the general public.[73]
>
> The Blue Plan recognizes that Long Island Sound belongs to the people of Connecticut and New York, and its waters and submerged lands are held in Public Trust by those States for the people. Management of the Sound shall use spatial planning for the benefit of the general public, and the pursuit of traditional

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[68] WASH. CONST. art. XVII, § 1.

[69] CAL. CONST. art. X, § 4; *see also* Carstens v. Cal. Coastal Comm'n, 182 Cal. App. 3d 277, 289–90 (Cal. Ct. App. 1986) (discussing "the public trust doctrine as codified in the California Constitution").

[70] Sanders-Reed v. Martinez, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015) ("New Mexico's constitutional and statutory provisions have incorporated and implemented the common law public trust doctrine . . . ."); NM CONST. Art. XX, § 21.

[71] CONN. GEN. STAT. § 22a-1 (1971); *see also* CONN. GEN. STAT. § 22a-1a(b)(1) (1977) (noting "the continuing responsibility of the state government to use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate state plans, functions, programs, and resources to the end that the state may: (1) Fulfill the responsibility of each generation as trustee of the environment for succeeding generations").

[72] H.R.J. Res. 53, 2021 Gen. Assemb., Jan. Sess. (Conn. 2021).

[73] CONN. DEP'T OF ENERGY & ENV'T PROT., LONG ISLAND SOUND BLUE PLAN 30–31 (Version 1.2, 2019).

> public trust uses including but not limited to aquaculture, fishing, recreation, and navigation.[74]

Equally explicit is Virginia's statutory codification of the PTD relative to "state-owned bottomlands."[75] Specifically, Virginia's State Marine Resources Commission must

> exercise its authority . . . consistent with the public trust doctrine as defined by the common law of the Commonwealth adopted pursuant to § 1-200 in order to protect and safeguard the public right to the use and enjoyment of the subaqueous lands of the Commonwealth held in trust by it for the benefit of the people as conferred by the public trust doctrine and the Constitution of Virginia.[76]

In this same spirit, New Hampshire by statute declares the state to be the "trustee" of the state's water resources "for the public benefit."[77] As the trustee for water resources, the Granite State "has the authority and responsibility to provide careful stewardship over all the waters lying within its boundaries."[78] Likewise, Maryland's Natural Resources Code codifies "the protections afforded to citizens by the public trust doctrine, which sets forth the responsibility of the government to administer, protect, manage, and conserve fish and wildlife."[79] In similar terms, Massachusetts mandates that the Secretary of Energy and Environmental Affairs shall conduct her "oversight, coordination and planning authority" over "ocean waters and ocean-based development" "in accordance with the public trust doctrine."[80] Georgia, by statute, declares that the state, "as successor to the Crown of England," "is trustee of the rights of the people of the state to use and enjoy all tidewaters which are capable of use for fishing, passage, navigation, commerce, and transportation, pursuant to the common law public trust doctrine."[81] Indiana, by statute, similarly declares that the state "holds and controls all public freshwater lakes in trust for the use of all of the citizens of Indiana for recreational purposes."[82] Maine confirms statutorily "public trust rights in intertidal land" for purposes of

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[74] *Id.* at 123.
[75] VA. CODE ANN. § 28.2-1205 (2005).
[76] *Id.* § 28.2-1205(A).
[77] N.H. REV. STAT. ANN. § 481:1 (1985).
[78] *Id.*
[79] MD. CODE ANN., NAT. RES. § 1-201.1(6) (2022).
[80] MASS. GEN. LAWS ch. 21A, § 4C(a) (2010).
[81] GA. CODE ANN. § 52-1-2 (1992).
[82] IND. CODE § 14-26-2-5(d)(2) (1995).

"fishing, fowling and navigation" as well as the "use [of] intertidal land for recreation."[83] Other states have similar statutes.[84]

IV. THE PUBLIC TRUST IS SUBSTANTIVELY A TRUST

Part IV of this Article explains why the contemporary PTD should be situated in trust law. For three reasons, the public trust is substantively a trust: (i) as a matter of history, (ii) in the contemporary usage of the terms "trust" and "trustee," and (iii) in the natural and normal evolution of the common law, the public trust is recognizably a trust as trusts are understood today. This conclusion emerges from early decisions implanting the PTD in American law. Moreover, when legislators and voters today embrace such terms as "trust" and "trustee" in state PTD statutes and constitutional provisions, such legislators and voters are best understood as endorsing those terms in their modern meanings, i.e., a trustee manages property for a beneficiary pursuant to a fiduciary duty of loyalty. Similarly, in the context of the common law PTD, the terms "trust" and "trustee" are today best understood in their contemporary meanings. While the understanding of the PTD as a trust has strong historic support, to the extent that characterizing the PTD as a trust represents a change from the past, this characterization of public trusteeship represents a normal and natural evolution of the common law.

Justice Thomas has recently observed that the term "trust" is sometimes used as "mere dicta,"[85] a label summarizing "general moral

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[83] ME. STAT. tit. 12, § 573(1) (1985).

[84] *See, e.g.*, MICH. COMP. LAWS § 324.32502 (1995) (declaring the state owns or holds "in trust" "the unpatented lake bottomlands and unpatented made lands in the Great Lakes, including the bays and harbors of the Great Lakes"); N.J. STAT. ANN. § 13:1D-151 (West 2019) (requiring the New Jersey Department of Environmental Protection to behave "consistent[ly] with the public trust doctrine"); N.J. STAT. ANN. § 13:1D-150 (West 2019) (statutory confirmation of "the public trust doctrine"); N.C. GEN. STAT. § 1-45.1 (1985) ("'[P]ublic trust rights' means those rights held in trust by the State for the use and benefit of the people of the State in common. They are established by common law as interpreted by the courts of this State. They include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State and the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches."); UTAH CODE ANN. § 11-65-203(3)(d) (West 2022) ("The lake authority shall respect . . . the public trust doctrine as applicable to land within the lake authority boundary."); VT. STAT. ANN. tit. 29, § 401 (2009) ("Lakes and ponds that are public waters of Vermont and the lands lying thereunder are a public trust . . . ."); *see also* Chernaik v. Brown, 475 P.3d 68, 77 (Or. 2020) (citing OR. REV. STAT. §§ 274.025, 274.430 (1967), which "partially codified" the public trust doctrine).

[85] Arizona v. Navajo Nation, 599 U.S. 555, 574 (2023) (Thomas, J., concurring) (discussing the term "trust" as it relates to American Indian law).

obligations" without any operational legal content.[86] In a similar vein, Professor Lucia Silecchia labels this as "aspirational trust language."[87] The most famous aspirational statement along these lines is associated with Grover Cleveland: "A public office is a public trust."[88]

The term "trust" is also sometimes used to denote a government fund segregated from the general treasury.[89] The federal Highway Trust Fund[90] and the Social Security trust funds[91] are among the best known of these separate funds which, for accounting purposes, earmark certain tax monies for particular purposes distinct from general fund resources. States also create such segregated trust funds.[92]

The third use of the term "trust" is substantive trusteeship. When used in this fashion, the term "trust," as Justice Thomas notes, "has a well-understood meaning at law: a relationship in which a trustee has legally enforceable duties to manage a discrete trust corpus for certain beneficiaries."[93] The Restatement of Trusts[94] and a leading treatise similarly define a "trust" as "a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another."[95]

Both historically and in today's understanding of the PTD, the PTD falls into this category of substantive trusteeship, i.e., the government as public trustee has "legally enforceable duties," holding natural resources for the benefit of the public. The historic articulation of the PTD and the contemporary understanding of the terms "trust" and "trustee" indicate that the modern public trust is substantively a trust, properly situated in trust law.

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[86] *Id.* at 571.

[87] Lucia A. Silecchia, *A "Directed Trust" Approach to Intergenerational Solidarity in American Environmental Law and Policy: A Modest Proposal*, 45 WM. & MARY ENV'T L. & POL'Y REV. 377, 421, 424 (2021).

[88] Photograph of a political poster from the presidential campaign of 1888, LIBRARY OF CONGRESS, https://www.loc.gov/item/2002719959/ ("Public office is a public trust."). Cleveland's original articulation of this idea was considerably less pithy. *See* TROY SENIK, A MAN OF IRON: THE TURBULENT LIFE AND IMPROBABLE PRESIDENCY OF GROVER CLEVELAND 45 (2022).

[89] *See, e.g.*, 26 U.S.C. § 9501 et seq.

[90] 26 U.S.C. § 9503.

[91] 42 U.S.C. § 401.

[92] *See, e.g.*, NEB. REV. STAT. § 9-812(1) (2023) (creating "State Lottery Operation Trust Fund"); N.J. STAT. ANN. § 13:19-16.1(a) (West 2008) (creating the "Shore Protection Fund").

[93] Arizona v. Navajo Nation, 599 U.S. 555, 570–71 (2023) (Thomas, J., concurring).

[94] RESTATEMENT (THIRD) OF TRUSTS, § 2 (AM. L. INST. 2003) ("A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.").

[95] GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 1 (3d ed. 2000).

In historic terms, two early, influential public trust decisions were *Arnold v. Mundy*[96] and *Martin v. Waddell's Lessee*,[97] both cited in *Illinois Central*. In both of these older cases, the courts treated the public trust doctrine not as dicta or as aspirational rhetoric, but as a substantive legal rule by which the government holds natural resources for the public's benefit and has enforceable obligations of trusteeship to the public.

In *Arnold v. Mundy*, Robert Arnold claimed the oysters in the Raritan River by virtue of his ownership of the land adjacent to the river.[98] Benajah Mundy asserted the right to harvest these oysters, contending that the river bed was public space.[99] Mundy prevailed by virtue of his status as a beneficiary of New Jersey's ownership of the riverbed for the public.[100]

Writing for New Jersey's Supreme Court, Chief Judge Kirkpatrick traced New Jersey's ownership of the state's oyster beds to Charles II's grant to his brother, the Duke of York, of the land which would become New Jersey. Under British law, certain features of this granted land were "common property"[101] including "the air, the running water, the sea, the fish, and the wild beasts . . . to be held, protected, and regulated for the common use and benefit."[102] The sovereign (the Duke of York and later the State of New Jersey as his successor) was vested in this common property not for the sovereign's "own use, but for the use of the citizen, that is, for his direct and immediate enjoyment."[103]

Arnold occurred in the riverbed of the Raritan River, the kind of water-related area to which the PTD classically applied. However, Chief Judge Kirkpatrick was explicit that the "common property" held by the sovereign for the public extended beyond these water-based areas throughout the natural environment and included "the air, the running water, the sea, the fish, and the wild beasts."[104]

Two decades later, the U.S. Supreme Court came to a similar conclusion in *Martin v. Waddell's Lessee*, a replay of *Arnold* before the nation's highest court. Writing for the Court, Chief Justice Taney declared that the "navigable waters" of New Jersey and "the soils under

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[96] 6 N.J.L. 1 (1821).
[97] 41 U.S. 367 (1842).
[98] *Arnold*, 6 N.J.L. at 44.
[99] *Id.* at 65–66.
[100] *Id.* at 29–30, 77–78.
[101] *Id.* at 70–72, 77–78.
[102] *Id.* at 71.
[103] *Id.* at 77.
[104] *Id.* at 71.

them"[105] were given by Charles II to the Duke of York and thence to the State of New Jersey "as a public trust for the benefit of the whole community."[106] That "the shores, and rivers and bays and arms of the sea, and the land under them" were to be "held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery" was justified by the language of the charter.[107]

While the New Jersey Supreme Court's similar opinion in *Arnold* is "unquestionably, entitled to great weight,"[108] Chief Justice Taney acknowledged, the Supreme Court in *Martin* "[i]ndependently" came to the same conclusion, tracing the public trust in New Jersey's riverbeds from the British crown to the State of New Jersey.[109]

The historic PTD was thus not "mere dicta" nor "aspirational" language lacking legal efficacy.[110] Rather, the traditional PTD substantively recognized a trust "relationship in which a trustee"[111] (e.g., the King, the Duke, the State) "has legally enforceable duties to manage a discrete trust corpus" (e.g., "the air, the running water, the sea, the fish, and the wild beasts")[112] "for certain beneficiaries"[113] (e.g., "the people of New Jersey").[114] The public trusts affirmed by the courts in *Arnold* and *Martin* are recognizably trusts as trusts are today understood.

Against this background, Professor Sax's influential argument had strong antecedents in the historic public trust case law. Simultaneously, that argument, revitalizing the PTD as part of the then-contemporary environmental law revolution,[115] reflected the Holmesian tradition of adapting the common law to new circumstances. Sax's rejuvenation of the PTD was, in Holmes' famous formulation, driven by contemporary

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105 Martin v. Waddell's Lessee, 41 U.S. 367, 410–11 (1842).

106 *Id.* at 413.

107 *Id.*

108 *Id.* at 418.

109 *Id.* at 416–18.

110 Arizona v. Navajo Nation, 599 U.S. 555, 574 (2023) (Gorsuch, J., dissenting); Sileccia, *supra* note 87, at 424.

111 *Navajo Nation*, 599 U.S. at 570–71 (Thomas, J., concurring).

112 Arnold v. Mundy, 6 N.J.L. 1, 71 (1821).

113 *Navajo Nation*, 599 U.S. at 570 (Thomas, J., concurring).

114 *Arnold*, 6 N.J.L. at 78.

115 Among the environmental statutes adopted during the 1970s were the National Environmental Policy Act ("NEPA") (1969), Clean Air Act ("CAA") (1970), Federal Water Pollution Control Act Amendments ("CWA") (1972), Marine Mammal Protection Act ("MMPA") (1972), Federal Advisory Committee Act ("FACA") (1972), Endangered Species Act ("ESA") (1973), Magnuson-Stevens Act (1976), National Forest Management Act ("NFMA") (1976), Resource Conservation and Recovery Act ("RCRA") (1976), and Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or Superfund) (1980).

"considerations of what is expedient for the community concerned,"[116] placing the revitalized PTD in the vanguard of modern environmental law. Holmes' account of the adaptation of the common law describes this revival of the PTD: "[T]he rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received."[117]

Modern commentators reinforce the Holmesian tradition of the courts as the modernizers of judge-made law.[118] To the extent the modern PTD updates the common law PTD, it follows in this tradition.

Moreover, when voters and legislators today enact statutes and constitutional amendments adopting the PTD, they are most compellingly understood as embracing the terms "trust" and "trustee" in their contemporary meanings, i.e. a trustee holds property for the benefit of beneficiaries pursuant to a fiduciary duty of loyalty. Voters and legislators, by adopting trust terminology, situate the modern PTD in contemporary trust law.

In contrast to this analysis based on history, contemporary usage, and the evolution of the common law, Professor Silecchia rejects the argument that the PTD embodies a trust situated in trust law: "To be effective, a well-established trust has, at a minimum, a known settlor, a clearly written trust agreement, and a well-defined *res.* The trust analogy in the environmental law context lacks all of these."[119] Professor Silecchia thus invokes as a "minimum" baseline a private trust drafted by a competent attorney for a client's estate planning. The modern PTD does better by Professor Silecchia's criteria than she suggests. Consider each of the three elements Professor Silecchia identifies for "a well-established trust":

(1) "[A] known settlor." The public in each state is the settlor under that state's PTD. When the PTD is codified by legislation or by state constitutional provisions, the public, as settlor, acts directly at the ballot box or indirectly through its elected representatives to establish the public trust in natural resources in the state's statute books or in the text of the state constitution. The public is also the settlor when the modern PTD is embraced at common law by state court judges, judges who are

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116 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 35 (1881).

117 *Id.* at 5.

118 MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 132–35 (1988); JANE C. GINSBURG, LEGAL METHODS 140 (4th ed. 2014); EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 7–8 (1949).

119 Silecchia, *supra* note 87, at 381. Dean Huffman's analysis is similar. *See* Huffman, *supra* note 10, at 368.

either elected by the public or appointed by the governors and legislators elected by the public. Such judges act as agents for the public as the grantor establishing and elaborating the PTD through the judiciary's common law decisions.

The public is the beneficiary as well as the grantor of the public trust in natural resources. As a matter of trust law, a grantor can establish a trust of which the grantor is also the beneficiary.[120] The trustees under the PTD are the state and its actors and agencies, charged with the fiduciary obligation to loyally manage natural resources for the public as the beneficiary of the trust.

(2) "[A] clearly written trust agreement." State constitutions, statutes, and case law establish in writing the PTD. Moreover, most states recognize oral trusts,[121] as do the Restatement of Trusts[122] and the Uniform Trust Code.[123] A professionally-drafted trust instrument is the gold-standard for competent estate planning. But trusts can be legally effective even when written documentation is less detailed or even non-existent.[124]

(3) "[A] well-defined *res.*" There is today controversy about how far the PTD should extend. Professor Sax argued for expanding the PTD from the intertidal area to which the PTD traditionally applied to any natural "resource which is available for the free use of the general public."[125] Much public trust scholarship supports Professor Sax's call

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120 RESTATEMENT (THIRD) OF TRUSTS § 43 cmt. a (AM. L. INST. 2003) ("A settlor of a trust may be the sole beneficiary or one of the beneficiaries of the trust."); 3 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 3.1 (5th ed. 2007) ("An inter vivos trust may be for the benefit of the settlor alone, one or more third persons, or both the settlor and one or more third persons.").

121 STEWART E. STERK & MELANIE B. LESLIE, ESTATES AND TRUSTS: CASES AND MATERIALS 545–46 (6th ed. 2019); SCOTT ET AL., *supra* note 120, § 6.2.1 ("[T]he courts, in these states and elsewhere, almost always insist on proof that leaves little doubt of an oral trust's existence . . . .").

122 RESTATEMENT (THIRD) OF TRUSTS § 20 (AM. L. INST. 2003) ("Except as required by a statute of frauds, a writing is not necessary to create an enforceable inter vivos trust, whether by declaration, by transfer to another as trustee, or by contract.").

123 UNIF. TR. CODE § 407 (UNIF. L. COMM'N 2003) ("SECTION 407. EVIDENCE OF ORAL TRUST. Except as required by a statute other than this [Code], a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.").

124 *See, e.g.*, King v. Appleton, 61 V.I. 339, 352–53 (V.I. 2014) (holding a "warranty deed . . . complied with" "basic, definitional elements of an express trust"); Cabaniss v. Cabaniss, 464 A.2d 87, 91 (D.C. 1983) ("[D]ecedent's oral and written declarations and his conduct manifested his intention to create a trust . . . ."); Union Bank of Chi. v. Wormser, 256 Ill. App. 291, 303 (Ill. App. 1st Dist. 1930) ("No formal instrument was needed to effect the trust created."); *In re* Smith's Estate, 22 A. 916, 918–19 (Pa. 1891) ("[T]he trust is fully established" by "envelope" containing bonds on which decedent/grantor wrote "13 bonds, $1,000 each, held for Tom Smith Kelly" and "decedent's account-book . . . entry in his own handwriting").

125 Sax, *supra* note 26, at 490.

for enlarging the PTD's historic domain in the intertidal coastal zone to the protection of the environment as a whole. Professors Blumm and Wood, writing four decades after Professor Sax's seminal article, heralded the public trust "case law—as well as state constitutions and statutes—[which have] expanded the scope of trust assets from lands submerged beneath navigable waters to wetlands, beaches, parklands, wildlife, air, and groundwater."[126] In this same spirit, Ryan, Curry, and Rule conclude their overview of U.S. public trust law by stressing the "examples in which the modern public trust doctrine has been framed as a protector of environmental rights."[127]

In contrast, Dean Huffman argues that the PTD should remain as a "limited common law doctrine,"[128] restricted to "commerce, navigation, and fishing on navigable waters."[129]

Whether a state embraces this traditional approach to the PTD[130] or adheres (by statute, constitutional provision, or judicial decision) to a more expansive definition of the resources subject to public trusteeship, there is a trust *res*, namely, the natural resources which the state and its agencies manage as trustees for the benefit of the public. The public trust may not look like a well-drafted private trust agreement. But that should not be the test of whether the public trust is situated in contemporary trust law. Indeed, that test would disqualify as trusts oral arrangements recognized by trust law as well as trusts established by less detailed documentation.

A potentially discordant note is the statement in *Illinois Central* that "the bed or soil of navigable waters is held by the people of the State in their character as sovereign in trust for public uses for which they are adapted."[131] This phrase could be interpreted as consistent with Dean Huffman's claim that the PTD "makes absolutely no sense in trust law terms" since "the creator, trustee, and beneficiary are all one in the

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126 BLUMM & WOOD, *supra* note 3, at li.

127 Ryan et al., *supra* note 5, at 2476.

128 Huffman, *supra* note 10, at 342.

129 *Id.* at 373.

130 *See, e.g.*, Iowa Citizens for Cmty. Improvement v. State, 962 N.W.2d 780, 785 (Iowa 2021) (rejecting "effort to repurpose the historically narrow public trust doctrine"); *id.* at 789 ("[T]he scope of the public-trust doctrine . . . is narrow, and we have cautioned against overextending the doctrine." (quoting Bushby v. Wash. Cnty. Conservation Bd., 654 N.W.2d 494, 498 (Iowa 2002))); Chernaik v. Brown, 475 P.3d 68, 82 (Or. 2020) ("We do not foreclose the idea that the public trust doctrine may evolve to include more resources in the future. However, we decline to adopt the test that plaintiffs have urged us to use and, based on that test, to expand the resources included in the public trust doctrine well beyond its current scope. . . . [T]he doctrine applies to navigable waters and submerged and submersible lands.").

131 Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 457–58 (1892).

same."[132] A better understanding of the facts of *Illinois Central* is that, under the PTD, the people of Illinois are the grantors and beneficiaries of Chicago harbor's submerged lands and that the Illinois legislature is the public trustee whose disposition of the trust *res* is the subject of the Court's opinion, i.e., the Illinois legislature's 1869 act as public trustee granting the railroad the submerged lands violated the PTD.

In sum, the contemporary PTD should be situated in trust law because the public trust is substantively a trust. As a matter of history, in the contemporary usage of the terms "trust" and "trustee" when the PTD is codified statutorily and constitutionally, and in the natural and normal evolution of the common law, the PTD is substantively a trust as trusts are today understood.

V. TRUST LAW'S DUTY OF LOYALTY: CONFLICT AND DE NOVO REVIEW

Two central concepts of contemporary trust law are a trustee's duty of loyalty to her beneficiaries and de novo judicial review of a trustee's actions when a trustee is conflicted. Situating the PTD in contemporary trust law imposes upon public trustees trust law's duty of loyalty and subjects such trustees to de novo review because of the inherent conflicts they confront managing natural resources. The upshot in environmental cases should often be self-consciously bifurcated review as the courts defer as a matter of administrative law to agencies' applications of detailed statutes and regulations, but shift to trust law's standard of de novo review for the ultimate determination of whether agencies have satisfied their duties of loyalty to the public in the management of the natural resources subject to the PTD.

The "principle of undivided loyalty" to the beneficiary is "fundamental" to trust law.[133] "A trustee must always be loyal to his trust."[134] A trustee's duties, including the duty of loyalty to the trust beneficiary, are "the highest known to the law."[135] "Trust law frames the

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132 Huffman, *supra* note 10, at 368.

133 RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. a (AM. L. INST. 2003).

134 Hall v. Schoenwetter, 686 A.2d 980, 983 (Conn. 1996) (quoting Conway v. Emeny, 96 A.2d 221, 225 (Conn. 1953)).

135 Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982); *see also In re* Andrews' Appeal from Probate, 826 A.2d 1260, 1265 (Conn. App. Ct. 2003) (discussing "the special duty of loyalty that a fiduciary owes to the beneficiary of a trust"); Birmingham Tr. Nat'l Bank v. Henley, 371 So. 2d 883, 895 (Ala. 1979) ("[A] trustee owes undivided loyalty to the Trust."); *In re* Otto Bremer Tr., 984 N.W.2d 888, 898–99 (Minn. Ct. App. 2023) ("The duty of loyalty prohibits a trustee from placing 'the trustee's own interests above those of the beneficiaries.'" (quoting MINN. STAT. § 501C.0802)).

duty of *loyalty* as a 'sole' interest rule," focusing the trustee exclusively on the beneficiary's interest.[136] One leading treatise states:

> Perhaps the most fundamental duty of a trustee is the trustee's duty of loyalty to the beneficiaries, often stated as the duty to act solely in the interests of the beneficiaries. This duty is sometimes stated as the rule of undivided loyalty. The trustee must administer the trust with complete loyalty to the interests of the beneficiary, without consideration of the personal interests of the trustee or the interests of third persons. The application of the duty of loyalty reflects the concern that a conflict of interest may prevent the trustee from exercising independent and disinterested judgment on behalf of the trust.[137]

Another important treatise emphasizes this point, stating that "[t]he most fundamental duty of a trustee is the duty of loyalty."[138]

As Professor Sax observed, the modern PTD is motivated in important part by the need to impose upon environmental agencies the obligations of trusteeship to offset the pressures from private interests which seek valuable natural resources for themselves.[139]

The issue thus becomes the appropriate standard of review of a trustee's actions when compliance with the duty of loyalty is questioned. Trust law mandates de novo review for assessing the decisions of trustees who are conflicted as environmental public trustees invariably are, caught between their duties to the public and the often effective pressures of private interests seeking valuable natural resources for themselves.

Surprisingly, the U.S. Supreme Court has played a critical role in clarifying how courts should scrutinize trustee decisions in general and conflicted trustees' decisions in particular. Trusts and estates are quintessential matters of state law. It therefore initially seems anomalous that the federal forum of the U.S. Supreme Court is an important location for deciding how the courts should scrutinize trustee decisions.

This anomaly is explained by the fact that the Employee Retirement Income Security Act of 1974 ("ERISA") incorporates trust law into the

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136 Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 41 (Evan J. Criddle et al. eds., 2019) (emphasis in original).

137 BOGERT ET AL., *supra* note 95, § 543.

138 SCOTT ET AL., *supra* note 120, § 17.2. Professor Wood highlights the duty of loyalty of public trustees in environmental decision-making. MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 188 (2014) ("Steadfast and unbending loyalty to the beneficiaries remains the essence of any trust.").

139 *See supra* notes 37–43 and accompanying text.

federal regulation of employee benefits plans.[140] Thus, on two occasions, the U.S. Supreme Court has, in the ERISA context, defined the proper standard of judicial review for trustee decision-making, importing into federal law the Court's understanding of the state trust law Congress borrowed when it crafted ERISA. These two decisions counsel that, when trustees are conflicted (as public trustees of the environment invariably are), courts should apply the de novo standard of review when examining such trustees' decisions.

Firestone Tire & Rubber Co. v. Bruch was brought by six salaried employees of Firestone Tire who worked at plants which Firestone Tire sold to Occidental Petroleum Company.[141] These six employees were immediately hired by Occidental Petroleum to continue in their previous positions at the plants Firestone Tire sold to Occidental Petroleum.[142] Though there was no break in their employment between Firestone Tire and Occidental Petroleum, these employees claimed "severance benefits" from Firestone Tire's "termination play plan."[143] That plan promised payments to any Firestone Tire employee whose "service is discontinued" due to a "reduction in work force."[144]

Firestone Tire was the administrator of its severance benefit plan and thus a fiduciary for ERISA purposes.[145] In that fiduciary capacity, Firestone Tire decided that no workforce reduction had occurred since the affected employees were immediately hired by Occidental Petroleum in their old positions at their old locations.[146] The issue before the high court was the standard of judicial review appropriate for this fiduciary decision denying benefits to these employees.[147] The Court concluded that, on the facts of *Bruch*, de novo, rather than more deferential, judicial review was appropriate for the fiduciary's decision.[148]

The *Bruch* Court started from the premises that, in terms of statutory terminology, "ERISA abounds with the language and terminology of trust law"[149] and that, similarly, ERISA's legislative history "confirms" the relevance "of the law of trusts" to interpreting ERISA.[150] The Court

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140 Pub. L. No. 93-406, § 4002, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001 et seq.).

141 Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 105 (1989).

142 *Id.*

143 *Id.*

144 *Id.* at 105–06.

145 *Id.* at 105.

146 *Id.* at 106.

147 *Id.* at 105.

148 *Id.* at 115.

149 *Id.* at 110.

150 *Id.*

further opined that "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers" if such discretionary powers arise "by the instrument under which [such trustees] act."[151]

However, the Court continued, the Firestone Tire severance pay plan contained no language confiding discretion to Firestone Tire as plan administrator.[152] Absent such plan language, "[t]he trust law de novo standard of review" is the proper approach for the court to scrutinize Firestone Tire's decision as plan administrator/fiduciary to deny severance benefits to its former employees immediately hired by Occidental Petroleum.[153] Moreover, the *Bruch* Court continued, even if a trust instrument confides discretion to a trustee, a court ought to review the exercise of that discretion more carefully if a fiduciary "is operating under a conflict of interest."[154]

Subsequently, *Metropolitan Life Ins. v. Glenn* explored the situation where a trustee possessing instrument-based discretion operates under a conflict of interest.[155] *Glenn* reiterated that such a conflict is "a factor" which must be weighed by the reviewing court.[156] Wanda Glenn was a Sears, Roebuck employee who claimed long-term disability benefits under a plan which Metropolitan Life both administered and insured for Sears, Roebuck.[157] Unlike the Firestone Tire plan document at issue in *Bruch*, the Sears, Roebuck disability plan expressly granted Metropolitan Life discretion as plan administrator.[158] After awarding Ms. Glenn a short-term disability benefit, Metropolitan Life denied her the plan's long-term benefit.[159]

Metropolitan Life, the Court held, operated under a conflict of interest since any benefit it awarded as plan administrator Metropolitan Life also paid out as the plan's insurer.[160] This conflict, the Court held, is "a factor" to be assessed in reviewing Metropolitan Life's exercise of its discretion as a plan administrator, an ERISA-regulated fiduciary.[161]

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151 *Id.* at 111; *id.* (emphasis and internal quotation marks omitted) (quoting Nichols v. Eaton, 91 U.S. 716, 724–25 (1875)).

152 *Id.*

153 *Id.* at 112–13 (emphasis omitted).

154 *Id.* at 115.

155 Metro. Life Ins. v. Glenn, 554 U.S. 105 (2008).

156 *Id.* at 113.

157 *Id.* at 108–09.

158 *Id.* at 108.

159 *Id.* at 109.

160 *Id.* at 112–14.

161 *Id.* at 113 (internal quotation marks omitted) (quoting 1 RESTATEMENT (SECOND) OF TRUSTS § 107 cmt. f (AM. L. INST. 1957)).

The leading commentator on trust law is not a fan of *Bruch.* Professor John Langbein argues that "*Bruch* rests on an elementary error in applying long-settled principles of trust law."[162] According to Professor Langbein, it is not necessary for a trust instrument to explicitly grant discretion to a trustee. In the trust context, he maintains, "[d]iscretion is the norm" even if the trust document is silent.[163] Courts following the "conventional trust-law path" should undertake "stricter scrutiny in cases of fiduciary conflict of interest," thus "preserving deferential review for neutral fiduciaries."[164] Though he rejects the de novo label, Professor Langbein concludes that "trust law exhibits [a] tradition of strict scrutiny of a fiduciary's conflict-tainted transactions."[165]

In particular cases, these two approaches can lead to disparate outcomes.[166] But, in the context of the modern PTD, these two formulations—the Supreme Court's and Professor Langbein's—lead to the same conclusion in light of the inherent conflicts public trustees confront; that is, a de novo standard of review for such trustees' decisions. Public trustees are conflicted between their duty of loyalty to the public as the beneficiary of natural resources and the pressures private interests routinely (often successfully) bring to obtain such resources for themselves. The invariable conflicts public trustees face cause searching review under both Professor Langbein's approach and under *Bruch* and *Glenn*.

Under the "case-specific"[167] approach mandated by *Bruch* and *Glenn*, there may be instances when a trustee's conflict will be deemed to be "a factor" of minimal import.[168] But a premise of the modern PTD is that

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162 John H. Langbein, *The Supreme Court Flunks Trusts*, 1990 SUP. CT. REV. 207, 208 (1990).

163 *Id.* at 219.

164 *Id.* at 223.

165 *Id.* at 227; *see also* John H. Langbein, *Trust Law as Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1316 (2007) [hereinafter Langbein, *Unum/Provident*] (characterizing part of the *Bruch* opinion as an "an ill-considered passage").

166 Suppose, for example, that a trust document is silent on the degree of a trustee's discretion and the trustee has no conflicts. *Bruch* and *Glenn* indicate that in this setting the default rule is de novo judicial review of the trustee's decisions because the trust document is silent on the issue of discretion. Professor Langbein retorts that the default rule is deferential review of trustee decision-making because the trustee is not conflicted. *See supra* notes 162–65 and accompanying text.

167 Metro. Life Ins. v. Glenn, 554 U.S. 105, 117 (2008).

168 Applying the "factor" test of *Bruch* and *Glenn* has been particularly controversial in the context of disability benefit determinations. *See* Langbein, *Unum/Provident*, *supra* note 165, at 1333–34; Danya M. Hooker, *The Eighth Circuit's Evolving Standard of Review in ERISA Conflict-of-Interest Cases: Past, Present, and Future*, 62 DRAKE L. REV. 857, 866–67 (2014); James Goodley, *The Effect of* Metropolitan Life v. Glenn *on ERISA Benefit Denials: Time for the "Treating Physician Rule"*, 26 J. CONTEMP. HEALTH L. & POL'Y 403, 431 (2010).

capture and conflict are serious and endemic problems for environmental agencies.[169] The conflicts confronting environmental administrators—obligated to loyally protect the public but subject to capture by private interests seeking valuable natural resources for themselves—should weigh heavily in judicial analysis and thus cause searching review under the modern PTD of administrative decisions impairing public trust resources. The Restatement of Trusts buttresses this conclusion, declaring that when "conflict-of-interest situations exist, the conduct of the trustee in the administration of the trust will be subject to especially careful scrutiny."[170]

Under the PTD, trust law's de novo standard of review should typically result in bifurcated judicial review in environmental cases because government agencies will generally act in these cases in two distinct capacities, as administrators and as trustees. Courts may reasonably defer to agency decisions as a matter of administrative law when courts assess agencies' expert determinations under detailed statutes and regulations. But, when the courts evaluate an agency's ultimate performance as a loyal public trustee, the courts should engage in trust law's de novo review. When a public agency serves in its capacity as a regulator or as an administrator, deferential judicial review to the agency's decisions may be appropriate because of the expertise such an agency may possess. As Professor Schumacher observes: "The conceit of nearly all of administrative law is that a group of subject-matter experts are making decisions, and courts (whose members are generally not experts) should defer to those decisions."[171]

But matters are different when the court's focus shifts to the governmental entity's acts as a public trustee. At this point in the judicial process, the court should not defer to agency decisions but should instead use trust law's de novo standard of review. Public trusteeship is substantively trusteeship and should be supervised by the courts in searching fashion, recognizing the pervasive problems of capture and conflict in the context of environmental regulators. While environmental agencies may possess expertise as to the statutes and

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169 *See supra* notes 39–43 and accompanying text.

170 RESTATEMENT (THIRD) OF TRUSTS § 37 cmt. f(1) (AM. L. INST. 2003); *see also id*. § 50 cmt. b, illus. 1 (describing that even in the face of "settlor-created conflict of interest," trustee's "acts are to be carefully scrutinized for abuse"); Oksner v. Jaco, 646 S.W.2d 385, 387 (Mo. Ct. App. 1983) ("[T]he trustee was also a beneficiary under the trust; therefore, the facts and circumstances surrounding his refusal to pay the funeral expenses merit unusually close scrutiny.").

171 Scott A. Schumacher, *Taxes, Administrative Law, and Agency Expertise: Questioning the Orthodoxy*, 76 TAX LAW. 341, 362 (2023) (parenthetical in original).

regulations they administer, such agencies have no expertise in trust law. The courts are where trust law expertise resides.

VI. THE PTD IN THE COURTS

A. Cases Imposing Searching Review

Part VI of this Article discusses cases that both support this Article's analysis and that do not. The former category starts with *Pennsylvania Environmental Defense Foundation v. Commonwealth ("PEDF")*.[172] In that case, the Keystone State's Supreme Court, construing Article I, Section 27 of Pennsylvania's Constitution, declared that the PTD is situated in trust law, not administrative law, as public trustees are trustees of the environment for the public, not "proprietor[s]" of natural resources.[173] *PEDF* bolsters this Article's claims that the PTD should be construed as imposing upon the state and its agencies and actors trust law's duty of loyalty and that the courts should, as a matter of trust law, review de novo whether public trustees' actions satisfy that duty.

PEDF stemmed from leases granted by the state, permitting private parties to extract gas from public lands.[174] Initially, the rents and royalties received by the state under these leases were earmarked to a "Lease Fund" for "conservation, recreation, dams, or flood control" purposes undertaken by Pennsylvania's environmental department.[175] Subsequently, Pennsylvania's legislature "wrought a dramatic change in the flow of royalties from the Lease Fund."[176] In several successive steps, the legislature diverted to the state's General Fund almost $500 million from the Lease Fund, a fund which was restricted to environmentally-related outlays.[177]

Pennsylvania's Commonwealth Court rejected challenges to these diversions under Article I, Section 27.[178] On appeal to Pennsylvania's Supreme Court, that court defined the "two overarching issues" as "[t]he proper standards for judicial review of government actions and legislation challenged under" Article I, Section 27 and the

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172 161 A.3d 911 (Pa. 2017).

173 *Id.* at 939.

174 *Id.* at 920–21.

175 *Id.* at 919–20 (quoting Oil and Gas Lease Fund Act, 71 PA. CONS. STAT. § 1331 (1955) (repealed 2017)).

176 *Id.* at 921.

177 *Id.* at 922–24.

178 *Id.* at 926–28.

"[c]onstitutionality under Article I, [Section] 27 of . . . the General Assembly's transfers/appropriations from the Lease Fund."[179]

The Court, citing Professor John C. Dernbach's analysis, emphasized "the text of" Article I, Section 27 "and the trust principles animating it."[180] The terms of the article ("trust" and "trustee") "carry" the meanings of "Pennsylvania [trust] law" "at the time the amendment was adopted"[181] into the state constitution in 1971.[182] As a public "trustee," the state is not "a mere proprietor."[183] Rather, the state, "as the trustee of the environmental trust," has the trust law fiduciary duties of prudence and loyalty.[184] "[T]he public trust provisions of [Article I] Section 27 are self-executing,"[185] and thus binding on the state as a loyal public trustee.

In light of these considerations, the Pennsylvania Supreme Court held some of the challenged legislation to be "facially unconstitutional."[186] By diverting trust money to the General Fund, these laws "plainly ignore the Commonwealth's constitutionally imposed fiduciary duty to manage the corpus of the environmental public trust for the benefit of the people to accomplish its purpose—conserving and maintaining the corpus by, inter alia, preventing and remedying the degradation, diminution and depletion of our public natural resources."[187] Moreover, the court wrote, "[t]he Commonwealth (including the Governor and General Assembly) may not approach our public natural resources as a proprietor, and instead must at all times fulfill its role as a trustee."[188]

While the Pennsylvania Supreme Court did not explicitly caption its approach as de novo review, in substance, its scrutiny of the challenged legislation was exactly that—a searching determination of whether the challenged legislation was consistent with the state's constitutional responsibility to act as a loyal public trustee in matters of the environment. This approach flows from the court's recognition that a public trustee is substantively a trustee whose fiduciary duties of prudence and loyalty derive from trust law as trust law is today understood. When the people of Pennsylvania ratified the constitutional

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179 *Id.* at 929.

180 *Id.* at 930 (citing Dernbach, *supra* note 52, at 499).

181 *Id.* at 932.

182 *Id.* at 916.

183 *Id.* at 932; *see also id.* at 935 (explaining that the state is not "a mere proprietor of those public natural resources" but is "a trustee").

184 *Id.* at 932.

185 *Id.* at 937.

186 *Id.* at 938. Challenges to other laws were remanded to the Commonwealth Court for consideration in light of the Pennsylvania Supreme Court's construction of Article I, Section 27. *Id.* at 935–36.

187 *Id.* at 938.

188 *Id.* at 939 (parenthetical in original).

PTD, they understood trusteeship in its modern formulation and thereby situated the PTD in today's trust law with its duty of loyalty and de novo review of conflicted trustees' decisions.

The Pennsylvania Supreme Court's approach in *PEDF* is consistent both with the *Bruch*/*Glenn* understanding of the de novo standard of judicial review when trustee decision-making is challenged as disloyal and Professor Langbein's formulation of that standard of review. A codification of the modern PTD like Pennsylvania's Article I, Section 27 is properly read as imposing upon the state trust law's fiduciary obligations to the public in light of the conflicts inherent in environmental contexts and the contemporary understanding of trusteeship. Whether those fiduciary obligations are satisfied vel non requires searching review of the type undertaken by the Pennsylvania Supreme Court in *PEDF*. Such review is, as a matter of trust law, sensitive to the conflict between the state's role as a loyal trustee for the environment and offsetting competing interests.

In *PEDF*, the executive and legislative branches of the Keystone State were not just conflicted; they surrendered to that conflict by diverting public trust monies from environmental protection activities into the state's General Fund.[189] Whether the touchstone for searching, rather than deferential, review is *Bruch* and *Glenn* or Professor Langbein's analysis, trust law's de novo scrutiny is appropriate in a PTD case like *PEDF* where the public trustee is conflicted; indeed where the public trustee succumbs to that conflict.

While the court in *PEDF* undertook a searching review of challenged activity under the constitutionally codified PTD, *National Audubon Society v. Superior Court* (colloquially known as the "Mono Lake" decision[190]) entailed searching review by a court acting pursuant to the modern common law PTD.[191] The *Mono Lake* decision is particularly important for its recognition that public environmental agencies act as both administrators and trustees and that, while deference may be

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189 *Id.* at 921–24.

190 Ryan, *supra* note 34, at 561; Frank, *supra* note 29, at 670. The history of Mono Lake is peopled by many interesting figures including Mark Twain and John Muir. ABRAHAM HOFFMAN, MONO LAKE: FROM DEAD SEA TO ENVIRONMENTAL TREASURE 1–4, 9–12, 17 (2014); DEAN KING, GUARDIANS OF THE VALLEY: JOHN MUIR AND THE FRIENDSHIP THAT SAVED YOSEMITE 130–31 (2023) ("Mount Dana . . . provided [Muir] a panoramic view of peaks, glaciers, and desert with briny Lake Mono, flashing in the sun like a metallic disk, six thousand feet below.").

191 Nat'l Audubon Soc'y v. Superior Ct. (*Mono Lake*), 658 P.2d 709 (Cal. 1983). California's Constitution codifies the PTD to protect "the free navigation of" "navigable waters." CAL. CONST. art. X, § 4; *see* Carstens v. Cal. Coastal Comm'n, 227 Cal. Rptr. 135, 143 (Cal. Ct. App. 1986) (discussing "the public trust doctrine as codified in the California Constitution"). Navigation was not at issue in the *Mono Lake* decision which instead implemented judicial, common law formulations of the modern PTD. *Mono Lake*, 658 P.2d at 712.

appropriate when courts review agencies' actions as administrative experts, such deference is not proper when the courts evaluate agencies' performance as public trustees.

Mono Lake is "the second largest lake in California."[192] Over time, the freshwater streams that feed Mono Lake were heavily diverted to Los Angeles.[193] This diversion caused "the level of the lake" to drop.[194] As a result, "both the scenic beauty and the ecological values of Mono Lake [were] imperiled."[195] Plaintiffs invoked the PTD to challenge the continued diversion of water from Mono Lake's feeding streams to Los Angeles.[196] California's Supreme Court characterized the resulting litigation as "a collision course" between the PTD and the "water rights system which since the days of the gold rush has dominated California water law."[197] Affirming the PTD, the California court observed "that before state courts and agencies approve water diversions[,] they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests."[198]

In assessing "the authority and obligations of the state [of California] as administrator of the public trust, the dominant theme is the state's sovereign power and duty to exercise continued supervision over the trust."[199] This is further reflected in the court's opinion:

> Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.[200]

In line with this reasoning, the court emphasized, "the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust and to preserve, so far as consistent with the public interest, the uses protected by the trust."[201]

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192 *Mono Lake*, 658 P.2d at 711.

193 *Id.*

194 *Id.*

195 *Id.*

196 *Id.* at 712.

197 *Id.*

198 *Id.*

199 *Id.* at 721.

200 *Id.* at 724; *see also id.* at 726 (describing that the Water Board "is required by statute to take [public trust] interests into account").

201 *Id.* at 728 (citation omitted).

This is contemporary trust law's duty of loyalty: The State of California "as trustee" has a "duty" to "supervis[e]" the natural resources it holds in "public trust" for the benefit of "the people's common heritage." This duty of loyalty extends both to the "state courts" and to administrative "agencies" which must implement "the purposes of the [public] trust" over natural resources.[202]

After reviewing the extensive history of the water diversions harming Mono Lake, the California Supreme Court concluded that, at no time in this protracted process, had any "responsible body . . . ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Aqueduct."[203] In light of this disregard for the public trust in Mono Lake, there needed to be "a reconsideration and reallocation which also takes into account the impact of water diversion on the Mono Lake environment."[204]

In sum, the relevant state agencies and courts must take "a new and objective look at the water resources of the Mono Basin. The human and environmental uses of Mono Lake—uses protected by the public trust doctrine—deserve to be taken into account."[205] Like the Pennsylvania Supreme Court in *PEDF,* the California Supreme Court in its *Mono Lake* decision did not explicitly use the term "de novo." But that is the kind of searching review the California court undertook under the PTD and mandated for California's other courts and administrative agencies as they discharge their public trust responsibilities.

Like *PEDF*, the *Mono Lake* decision fits squarely within the paradigm of contemporary trust law including the duty of loyalty to the public and searching review of claims that that duty is being flouted. California and its agencies as public trustees are obligated to protect the trust corpus, the natural resources of the Golden State. When a plausible claim is advanced that the state (through its legislature, courts, or administrative agencies) has not loyally protected the public trust, the courts should not defer to the institution whose conduct is being challenged. Rather, the courts should undertake trust law's de novo review under the PTD because of the conflicts that beset those institutions.

The *Mono Lake* decision supports the bifurcated review this Article advocates for PTD cases. The *Mono Lake* court observed that the

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[202] *Id.* at 712, 724; *see also id.* at 728 ("The state has an affirmative duty to take the public trust in account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.").

[203] *Id.* at 728.

[204] *Id.* at 729.

[205] *Id.* at 732.

decisions of California's water board may merit deference insofar as that board has "experience and expert knowledge, not only in the intricacies of water law but in the economic and engineering problems involved in implementing water policy."[206] When appropriate, the courts should defer to that "expert knowledge."[207] But under the PTD, the ultimate issue is whether a particular outcome is consistent with the public trustee's duty of loyalty to the public. Under the PTD, the courts are the proper forum for that determination under a searching standard of review.

When (as is often the case) an administrative agency performs a dual role as a regulator and as a public trustee, the deference properly given under administrative law to the agency's regulatory decisions does not also extend to the agency's behavior as a trustee. That behavior is, as a matter of trust law, to be reviewed de novo in light of the conflicts inherent in environmental settings. The courts, not administrative agencies, are the experts in trust law. The upshot should be deliberately bifurcated judicial review, with the court deferring to the agency's judgment about technical statutes and regulations, but scrutinizing de novo the ultimate issue of trust law under the PTD, i.e., whether the outcome being challenged loyally protects the public's interest in public trust resources.[208]

B. Cases Depriving the Modern PTD of Content

In contrast to these two decisions implementing searching review under the modern PTD, New Hampshire's Supreme Court deprived the PTD of substance in *Appeal of Town of Nottingham* (*New Hampshire Department of Environmental Services*).[209] The New Hampshire court ignored both trust law's duty of loyalty and searching judicial review in the face of plausible claims that that duty to the public had been violated.[210] In this case, plaintiffs challenged a state permit authorizing a groundwater withdrawal permit.[211] The plaintiffs claimed that the issuance of this permit violated, inter alia, New Hampshire's public trust statute[212] and the common law PTD.[213] The Granite State's Supreme

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206 *Id.* at 731.

207 *Id.* at 731–32.

208 In this same vein, Chief Justice Marshall of Massachusetts' Supreme Judicial Court, writing in *All. to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, criticized the court for deferring to the agency's "interpretations of its obligations under the public trust doctrine." 932 N.E.2d 787, 822 n.13 (Mass. 2010) (Marshall, C.J., dissenting).

209 904 A.2d 582 (N.H. 2006).

210 *Id.* at 589–91.

211 *Id.* at 589.

212 *Id.* at 588–89 (citing N.H. REV. STAT. ANN. § 481:1).

Court gave short shrift to the PTD, both in its statutory and its common law manifestations. Because other New Hampshire statutes give detailed instructions for water permits, the court concluded that the PTD had no role to play in such permitting decisions.[214]

This approach deprives the modern PTD of content. The more compelling interpretation of a statute imposing trust duties upon the state is that that statute embodies contemporary trust law's obligation of loyal trusteeship and its strict review of the decisions of conflicted trustees, which most environmental agencies are. As the *Mono Lake* court observed, environmental controversies often involve complex statutes and regulations as to which administrative agencies possess expertise.[215] But even if a groundwater extraction permit application satisfies the statutory and regulatory tests applicable to it, that application must also be consistent with the state's overriding public trust responsibility to loyally manage natural resources for the ultimate benefit of the public. While courts may properly defer to agencies' applications of technical laws, courts can and should undertake de novo review when determining whether an outcome faithfully discharges the public trustee's duty of loyalty to the public's interest in the environment. The courts, not environmental agencies, are where trust law expertise resides. The upshot should be a self-consciously bifurcated review in a case like *Appeal of Town of Nottingham* with the court, as a matter of administrative law, deferring to the agency's application of detailed statutes, but shifting to de novo review when considering the ultimate question whether, as a matter of trust law, the agency is properly discharging its duty of loyalty to the public as the beneficiary of the natural resources protected by the PTD.

As discussed *infra*,[216] searching review does not guarantee that the plaintiffs will prevail. The *Town of Nottingham* defendants might have won even under a heightened standard of judicial review. But such searching review does guarantee that the challenged agency action will be scrutinized carefully to determine whether the ultimate outcome (to permit or not) implements the state's duty as a loyal public trustee to protect the environment for the public. An environmental administrator who knows that her actions will be reviewed de novo under the PTD may behave with greater regard for the public's interest in public trust resources than will an administrator who expects the courts to defer to her decisions.

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213 *Id.*

214 *Id.* at 589–90.

215 *See supra* notes 206–07 and accompanying text.

216 *See* discussion *infra* Section VII.D.

Boone v. Harrison similarly eviscerates the PTD via judicial deference to the agency the PTD is designed to constrain through trust law's duty of loyalty.[217] The issue in *Boone* was whether the Virginia Marine Resources Commission erred in granting "an after-the-fact permit" for improvements to a pier which had been destroyed by Hurricane Isabel.[218] The Virginia appeals court held that it was up to the commission "in its expert discretion," "not the courts," to determine whether the permit granted was "consistent with the public trust doctrine."[219] As a matter of administrative law, the appeals court ruled, "the courts have no authority to make a de novo judgment on the subject."[220]

This decision deprives the modern, statutorily-based PTD of content by conflating the trust law standard of de novo review appropriate for the PTD with the deferential review standards of administrative law. As a matter of administrative law, it may have been proper for the *Boone* court to defer to the commission in the application of the statute and regulations governing the commission's decision to retroactively approve the challenged pier permit. But the PTD requires a further, overriding inquiry, namely, whether as a matter of trust law the permit (even if otherwise lawful) implements the duty of loyal trusteeship to the public in the management of natural resources. As to that trust law inquiry, the *Boone* court should have exercised de novo review in light of the conflicts environmental regulators routinely confront and the resulting possibility that such regulators will be captured by the private interests being regulated. Courts, not administrative agencies, are the repositories of trust law.

Unlike the *Mono Lake* court, the *Town of Nottingham* and *Boone* courts failed to recognize that, in these kinds of environmental controversies, environmental agencies simultaneously play different roles properly subject to different standards of review. As regulators with expertise in statutes and regulations, agencies may deserve deference as a matter of administrative law when they apply the statutes and regulations in which they have expertise. But at the same time these agencies are also charged by the PTD with the overriding fiduciary duty of loyalty to the public. As to the execution vel non of that paramount responsibility, judicial review should be de novo as a matter of trust law in light of the conflicts and capture endemic in the environmental arena and the courts' expertise in trust law. The result should be a bifurcated

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217 Boone v. Harrison, 660 S.E.2d 704 (Va. Ct. App. 2008).

218 *Id.* at 706.

219 *Id.* at 712.

220 *Id.* (emphasis omitted).

review with the court deferring to the agency as administrator but undertaking de novo review of the agency as public trustee. The PTD is an overriding rule of law, well within the competence of the courts as expounders of trust law.

Becker v. Bureau of Parks & Lands involved Maine's PTD.[221] The *Becker* plaintiffs challenged a state agency's decision to "award[] a submerged land lease" to private property owners "to maintain a seasonal float system."[222] Confirming the agency's grant of the submerged land[223] lease, the Maine Supreme Court articulated a classic statement of administrative law deference to agency decision-making: "We give considerable deference to an agency's interpretation of its own internal rules, regulations, and procedures and will not set it aside, unless the rule or regulation plainly compels a contrary result."[224]

The *Becker* court took glancing note of the state's "public trust rights."[225] But the State's responsibilities as public trustee of the submerged lands played no role in the court's decision. This slights the modern PTD and misconceives the appropriate, bifurcated approach for a case of this sort. When assessing an agency's actions pursuant to detailed statutes and regulations, it is often appropriate for the reviewing court to defer to the agency's expertise. But, when considering the ultimate outcome under the overriding PTD, the court should undertake searching review as a matter of trust law to assess whether the agency is loyally discharging its fiduciary obligation to the public over public trust resources. The modern PTD should implement the contemporary understanding of trusteeship. Such trusteeship entails the duty of loyalty to the beneficiary, i.e., the public, and recognition that the decisions of inherently conflicted trustees should be subject to "careful scrutiny"[226] by the courts.[227]

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221 Becker v. Bureau of Parks & Lands, 886 A.2d 1280 (Me. 2005).

222 *Id.* at 1280.

223 *See* ME. STAT. tit. 12, § 1801(9) (2023) (defining "submerged lands").

224 *Becker*, 886 A.2d at 1281 (quoting Fryeburg Health Care Ctr. v. Dep't of Hum. Servs., 734 A.2d 1141, 1143 (Me. 1999)).

225 *Id.*

226 *See supra* note 167.

227 Another case in which the court improperly discounted the PTD was *Murray v. Dep't of Energy and Environmental Protection* in the Connecticut Superior Court. *See* Memorandum of Decision at *8–9, Murray v. Dep't of Energy and Env't Prot., No. HHB-CV-21-6064634-S (Conn. Super. Ct. Mar. 15, 2022). In the interests of full disclosure, it should be noted that the author of this Article served as counsel to the plaintiffs in *Murray* and that the author's spouse was one of the plaintiffs in *Murray.* The appellants in *Murray* opposed an application for a private dock in public trust waters. *Id.* at *2, 4. The appellants argued that the PTD and its duty of loyalty to the public precluded this dock because the dock applicant already possessed other means of water access. *Id.* at *10. Rejecting this argument, the *Murray* court used a deferential test of

Consider finally *Chernaik v. Brown*, in which Oregon's Supreme Court acknowledged that it has "relied on common-law private trust cases in explaining the state's role as trustee" under the PTD.[228] However, the Oregon court qualified this observation with the limitation that its "case law cannot be read to conclude that all common-law principles of private trust law govern the public trust doctrine."[229]

No one doubts that private trusts and public trusts have important differences and thus not "all" rules applicable to the former will apply to the latter and vice versa. But public and private trusts also have much in common which is why, in many instances, "private trust cases" properly inform the understanding of the PTD. The argument of this Article is that two (not "all") features of trust law apply under the PTD, the duty of loyalty to the public as beneficiary under the PTD and de novo judicial review, because of the inherent conflicts public trustees confront between the public and private interests seeking valuable natural resources for themselves. The courts, not environmental agencies, are where trust law expertise resides.

VII. FIVE ADDITIONAL TOPICS

This final Part of the Article addresses five additional topics that clarify this Article's analysis and provide further context for that analysis.

A. Standards of Review in Administrative Law

Administrative law contains a variety of standards for judicial review of administrative decisions. Prominent scholars question whether these different standards are necessary or in practice meaningful.

Professor David Zaring characterizes administrative law as containing a "bewildering array of standards of review"[230] which "are not very consequential, either as a matter of theory or as a matter of practice."[231] He identifies six administrative law standards[232] by which courts review agency determinations of law and fact: "the deferential *Chevron* standard, the less deferential *Skidmore* standard,"[233] "the no-

"balance" rather than apply de novo review as to the state's fiduciary duty of loyalty to the public under the PTD. *Id.* at *12–14.

228 475 P.3d 68, 82–83 (Or. 2020).

229 *Id.* at 83.

230 David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 143 (2010).

231 *Id.*

232 *Id.* at 152.

233 *Id.* at 143–44.

deference-at-all standard of de novo review,"[234] "substantial evidence review,"[235] "arbitrariness review" of agency factfinding,[236] and "*State Farm*" "review of arbitrariness."[237] Professor Zaring notes that "de novo review has been interpreted to be quite different from deferential standards of review."[238] He quotes with approbation Judge Richard Posner's observation that "[t]he only distinction the judicial intellect actually makes is between deferential and nondeferential review."[239]

Other administrative law scholars come to similar conclusions. Professor Richard J. Pierce, summarizing administrative law's varied standards of review and the empirical studies of the outcomes under those different standards, observed that "a court's choice among the six doctrines has little if any explanatory value."[240] Dean Paul R. Verkuil's extensive empirical research similarly leads him to conclude that formal review standards are often less important than the "inarticulate factors" that influence judicial review of agency decisions.[241] In their casebook on administrative law, Justice Breyer and his co-authors highlight this discussion.[242]

This Article follows Judge Posner's approach by framing the decision confronting the courts in PTD cases as whether to defer or not. Courts should undertake trust law's de novo review when they scrutinize the decisions of agencies' actions as public trustees. In a bifurcated fashion, courts may, as a matter of administrative law, review deferentially the decisions of such agencies in their capacities as administrators. The precise standard for implementing that administrative law deference does not affect the choice under the PTD for trust law's more searching review.

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234 *Id.* at 144.

235 *Id.* at 148.

236 *Id.* at 149.

237 *Id.* at 150.

238 *Id.* at 155; *see also id.* at 160 ("[D]e novo review does not lie at the heart of administrative law.").

239 *Id.* at 192; *see also* Sch. Dist. of Wis. Dells v. Z.S., 295 F.3d 671, 674 (7th Cir. 2002) ("[T]he cognitive limitations that judges share with other mortals may constitute an insuperable obstacle to making distinctions any finer than that of plenary versus deferential review.").

240 Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 86 (2011).

241 Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 707, 714, 718 (2002).

242 STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 385 (9th ed. 2022).

B. The Future of Chevron

A second important administrative law debate is the future of *Chevron v. Natural Resources Defense Council, Inc.*[243] and its progeny. In the federal courts, deference to administrative determinations is today often grounded in *Chevron*. However, the U.S. Supreme Court has signaled that some justices intend to reconsider *Chevron*.[244]

Whether or not *Chevron* is revised or abandoned, deference will remain important in the state courts where the PTD is primarily formulated. In the state courts, deference to administrative decisions is based on the states' respective administrative procedure acts[245] and the state courts' respect for administrative expertise.[246] These factors will not change if *Chevron* is modified or scrapped.

Even if the U.S. Supreme Court overturns or revises *Chevron*, state courts will independently continue to defer to agency determinations. PTD cases largely occur in the state courts. If, in the future, some state courts grant less or no deference to agency interpretations of statutes and regulations, the searching judicial approach under the PTD advanced here as a matter of trust law would then be similar to or the

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[243] 467 U.S. 837 (1984).

[244] Loper Bright Enters. v. Raimondo, 143 S. Ct. 2429 (2023) (mem.) (granting certiorari); Loper Bright Enters. v. Raimondo, 45 F.4th 359 (2022), *petition for cert filed*, 2022 WL 19770137, at *i–ii (U.S. Nov. 10, 2022) (No. 22-541) (framing of case by petitioners was to determine whether the Court should "overrule" or "clarify" *Chevron*); Relentless, Inc. v. Dep't of Com., 144 S. Ct. 325 (2023) (mem.) (granting certiorari "to be argued in tandem" with *Loper Bright Enterprises*); *see also* Buffington v. McDonough, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting) ("We should acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts."); Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 782 (2010) ("[A]s a legal doctrine, [*Chevron*] has proven to be a complete and total failure, and thus the Supreme Court should overrule it at the first possible opportunity.").

[245] *See, e.g.*, MASS. GEN. LAWS ch. 30A, § 14(g) (2015) ("The court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it."); WIS. STAT. § 227.57(10) ("[D]ue weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.").

[246] *See, e.g.*, Kiawah Dev. Partners, II v. S.C. Dep't of Health & Env't Control, 766 S.E.2d 707, 718 (S.C. 2014) ("[South Carolina] deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations 'unless there is a compelling reason to differ.'" (quoting S.C. Coastal Conservation League v. S.C. Dep't of Health & Env't Control, 610 S.E.2d 482, 486 (S.C. 2005))); Shah v. State Farm Mut. Auto. Ins., No. 353298, 2021 Mich. App. LEXIS 1276, at *9 (Mich. Ct. App. Feb. 25, 2021) ("We generally defer to an agency's administrative expertise in making decisions falling within the agency's wheelhouse, including the agency's conclusions of law."); Abrahamson v. Ill. Dep't of Pro. Regul., 606 N.E.2d 1111, 1122 (Ill. 1992) ("[A] reviewing court defers to the administrative agency's expertise and experience in determining what sanction is appropriate to protect the public interest.").

same as the courts' approach to the statutes and regulations enforced by administrative agencies. Unless and until that day comes, it remains compelling to distinguish courts' continuing deference to agency determinations under technical statutes and regulations from the de novo inquiries courts should undertake when assessing whether a typically conflicted public trustee has discharged its duty of loyalty to the public under the modern PTD.

C. The Possibility of Judicial Capture

A potential retort to this Article's analysis is that, if environmental agencies can be captured by private interests, courts can be captured too. What then is to be gained by the call for more searching inquiry in the courts if these too are fora capturable by private interests?

It is not a new observation that courts are subject to political pressures, whether judges are elected or appointed.[247] However, courts of general jurisdiction, with broad constituencies advancing often conflicting interests, are less easily captured than are environmental agencies with narrower, more homogenous constituencies which can more readily cooperate to capture. Courts of general jurisdiction impact many, varied and adverse interests and thus are less prone to capture by any particular interest group because the pressures of different groups offset each other. In contrast, more narrowly focused environmental agencies have limited jurisdictions and thus have fewer, more homogenous groups potentially pressuring them for valuable resources such agencies control.[248]

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[247] Michael Herz, *Rediscovering Francis Lieber: An Afterword and Introduction*, 16 CARDOZO L. REV. 2107, 2123 (1995) (discussing "the then-prevailing view that judges were merely politicians in robes and the resulting Jacksonian efforts to curb judicial independence").

[248] *See* Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1166 (1993) (arguing that more "specialized, limited-clientele organizations" face fewer and less diverse "constituencies"); Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1767 (1997) ("[T]he generalist judge is less likely to become the victim of regulatory capture than her specialized counterpart . . . ."); N. Adam Dietrich II, *BP's Deepwater Horizon: "The Goldman Sachs of the Sea*," 13 TRANSACTIONS 315, 319 (2012) ("Generally, the more active interest groups making claims on regulators, the less likely the agency is to adopt policies in favor of any one group. The opposite is also true, however, as the regulator is likely to favor the interests of the regulated community if the voices of countervailing interest groups, such as environmentalists or consumer advocates, are not heard."); David A. Moss & Daniel Carpenter, *Conclusion: A Focus on Evidence and Prevention*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 462 (Daniel Carpenter & David A. Moss eds., 2014) ("[T]he risk of capture [is reduced by] . . . engaging with a diversity of interests and experts, beyond the regulated industry itself."); *id.* at 463 (noting that capture is reduced by "linkages and alliances with a broad range of interests and authorities").

To paraphrase The Federalist's famous formulation, when an institution impacts many diverse, often conflicting interests, "[a]mbition [will] counteract ambition,"[249] making less likely the capture of the institution by any particular group. In contrast, single-purpose agencies with narrower purviews and more limited clienteles are more vulnerable to capture because relatively few groups are in the business of capturing these agencies. These fewer groups will typically have congruent interests and can more readily coordinate their efforts to capture.

Environmental agencies are capturable institutions controlling valuable natural resources. Searching review by a court of general jurisdiction is more likely to produce independent consideration of the public interest in such resources, as offsetting and competitive interests will have a more difficult time capturing such courts.

D. Chances of Victory with De Novo Review of PTD Claims

De novo review of PTD claims does not guarantee that plaintiffs invoking the PTD will win. Such review does give plaintiffs a judicial forum in which they should obtain careful consideration of their claims with no deference to the agency being challenged. On balance, this will strengthen the legal claims of PTD claimants, but there is no assurance such claimants will prevail.

Consider, for example, situations where there are divisions within the public. To take one case, restrictions on current fishing rights may be promoted as necessary to assure future fishers of adequate stocks.[250] In a fight over such restrictions, both current and future fishers may credibly assert the mantle of the PTD. When a court reviews these restrictions de novo, one side will lose.

An analogy in the private trust setting is when current income beneficiaries invoke the duty of loyalty to obtain more income today while the trust's ultimate remaindermen seek protection of their longer term interests by reducing the trust's current payouts, thereby preserving

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[249] THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

[250] *See, e.g.*, Dennis Anderson, *Brainerd Fishing Guide: Walleye Limit Cut from 6 to 4 Popular Among Anglers and Might Help*, STAR TRIB. (March 19, 2022), https://www.startribune.com/brainerd-fishing-guide-walleye-limit-cut-from-6-to-4-popular-among-anglers-and-might-help/600157620/; Dave Golowenski, *10-Fish Limit of Yellow Perch to Begin May 1 in Central Basin of Lake Erie*, COLUMBUS DISPATCH, https://www.dispatch.com/story/sports/2021/04/04/fishing-outdoors-10-fish-limit-lake-erie-yellow-perch-begins-may-1/4850978001/ (last updated April 10, 2021); Jim Carlton, *Alaska Fishermen Struggle as Rules to Save King Salmon Limit Their Catch*, WALL ST. J. (Oct. 29, 2023), https://www.wsj.com/us-news/climate-environment/alaska-fisherman-king-salmon-7c45b45a.

trust principal for ultimate distribution.[251] De novo review requires the court adjudicating these kinds of conflicts to undertake searching scrutiny of the contending parties' claims. Searching review does not guarantee victory for either side.

Consider as well situations in which public trustees confront superior legal obligations. Suppose, for example, that the federal government requisitions public trust land for national defense purposes.[252] A conscientious public trustee will seek to minimize the scope of the requisition to protect the public interest in this land. But ultimately the public trust will be subject to the claims of national defense.

Here again a private trust analogy is instructive. A private trustee must pay income taxes to the federal[253] and state[254] governments on the trust's income. A fiduciary who negligently or deliberately overpays taxes wastes trust assets and thus does not loyally or prudently protect the beneficiary's interest.[255] However, a beneficiary who sues a trustee for paying taxes properly owed by the trust will lose since trustees must follow the law in their administration of trust assets.

In short, trust law's de novo standard of review provides the beneficiary with a forum in which he can obtain searching review of his claim. On balance, this strengthens the legal position of PTD advocates but it is no guarantee of success in any case a PTD plaintiff may bring.

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[251] On the adverse interests of income beneficiaries and principal remaindermen, *see* STERK ET AL., *supra* note 121, at 733–38; *see also* RESTATEMENT (THIRD) OF TRUSTS § 79 (AM. L. INST. 2003) ("[T]he trustee's duty of impartiality includes a duty to so invest and administer the trust, or to so account for principal and income, that the trust estate will produce income that is reasonably appropriate to the purposes of the trust and to the diverse present and future interests of its beneficiaries."); SCOTT ET AL., *supra* note 120, § 17.15 ("[T]he trustee must deal impartially with each of the beneficiaries.").

[252] *See, e.g.*, Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 302 (1923) (recounting that federal government "requisitioned and took possession of such land to provide storage facilities for supplies necessary to the support of the Army and other uses connected with the public defense").

[253] I.R.C. § 1(e)(2) (tax rates on trust income); I.R.C. § 641(a) ("The tax imposed by section 1(e) shall apply to the taxable income of estates or of any kind of property held in trust . . . ."); 31 U.S.C. § 3713(b) ("A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.").

[254] *See, e.g.*, KAN. STAT. ANN. § 79-32,110(d) (2022) ("*Fiduciaries.* A tax is hereby imposed upon the Kansas taxable income of estates and trusts at the rates provided in subsection (a)(2) hereof.").

[255] *See, e.g.*, Est. of Gerber, 140 Cal. Rptr. 577, 585 (Cal. Ct. App. 1977) (finding executor liable for extra taxes paid for "failure to take action with respect to the federal estate tax return"); Salce v. Cardello, 301 A.3d 1031, 1044 (Conn. 2023) (discussing executor's "responsibilities to minimize the estate's tax burden under [Conn. Gen. Stat.] § 45a-233 (d)"); Mark L. Ascher, *The Fiduciary Duty to Minimize Taxes*, 20 REAL PROP., PROB. & TR. J. 663, 664, 700 (1985) (discussing how fiduciaries are usually personally liable for overpaying taxes and that such overpayment negatively impacts the beneficiary).

E. The Scope of the PTD

This Article argues that even those who would confine the coverage of the PTD to its traditional locale in intertidal waters can agree that the PTD, where it applies, should be situated in contemporary trust law. There is much contention today between those who seek to expand the PTD from its traditional scope between the high- and low-tide marks to cover more of the natural environment and those who would cabin the PTD to its traditional realm in intertidal areas.[256] But even those who would limit the PTD to traditional water areas should find compelling the argument that, within those areas, the modern PTD is best understood as imposing upon the state and its actors a fiduciary duty of loyalty to the public and that, as a matter of trust law, the courts are the agencies with expertise in trust law which should review de novo the decisions of conflicted public trustees under the PTD.

A potential retort is that some legislators, voters, and judges might be more willing to broaden the reach of the PTD to additional natural resources if the obligation being imposed on the state is understood to be less stringent. The analysis of this Article suggests that, when less rigorous protection is being extended to the environment and natural resources, it is unhelpful, and perhaps misleading, to call this less stringent protection a public trust. In contemporary parlance, a trust relationship imposes upon the trustee duties which are "the highest known to the law."[257] If voters, legislators, and judges want to impose lesser obligations on the state and its agencies, it would properly clarify their intentions by eschewing the term "trust." When they invoke the terminology of contemporary trust law, voters, legislators, and judges should be understood as embracing that trust law including its duty of loyalty and its de novo review of conflicted trustees.

CONCLUSION

The modern public trust doctrine should be situated in trust law. Central to contemporary trust law is a trustee's duty of loyalty to her beneficiary and the de novo review courts undertake when the decisions of conflicted trustees are credibly challenged as disloyal to the beneficiary's interests.

Judicial review of agency actions in environmental cases should often be self-consciously bifurcated. When a court examines an agency's decisions as an administrator applying detailed statutes and regulations,

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256 *See supra* notes 125–29 and accompanying text.

257 Donovan v. Bierwirth, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

deferential review will often be appropriate as a matter of administrative law in recognition of agency expertise. But when the inquiry shifts to the overriding issue under the modern PTD—whether the agency's decision loyally implements its responsibilities as trustee to the public—the standard of judicial review should explicitly shift as well. It is the courts, not environmental agencies, where expertise in trust law resides. At the ultimate stage of environmental litigation implicating the public trust, a court should undertake de novo review based in trust law to determine if the outcome being reached satisfies the often-conflicted public trustee's duty of loyalty to the public under the modern PTD.