

**PROPRIETARY AND SOVEREIGN PUBLIC TRUST
OBLIGATIONS: FROM JUSTINIAN AND HALE TO
LAMPREY AND OSWEGO LAKE**

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ABSTRACT

The public trust doctrine (PTD) has sometimes been mischaracterized as applicable only to state-owned resources. But this “proprietary PTD” is only half of the scope of the PTD, for the doctrine also contains a “sovereign” component. The latter has been recognized for over a century and is not dependent on state ownership of the public trust res.

*This article examines the evolution of both the proprietary and sovereign PTDs. We first trace the development of the former from Roman and English law through several prominent and recent decisions of the U.S. Supreme Court. We then turn to the lesser-recognized sovereign PTD, which grew out of a largely overlooked, but highly influential, decision of the Minnesota Supreme Court. The article explains the legacy of that case, *Lamprey v. Metcalf*, which established the now-dominant state-law view that the PTD applies to waterbodies whose beds are privately owned. Unlike the proprietary PTD, which employs the federal test for title navigability, the sovereign usufructuary PTD is not tethered to the federal title test, but is instead the product of state definitions of navigability, which often are much broader than the federal test.*

The article assesses the implications of widespread judicial recognition of the sovereign PTD as distinct from the proprietary PTD, spotlighting a case pending before the Oregon Supreme Court involving a 400-acre Oregon lake, Oswego Lake, in suburban Portland. But the implications are much broader than that controversy and point to the application of the PTD to all resources of public concern like wildlife, groundwater, and the atmosphere.

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INTRODUCTION

The public trust doctrine (PTD), an ancient precept widely recognized in both civil and common law jurisdictions,¹ has been often misunderstood as a threat to private property² or an unwarranted authorization of judicial allocation of natural resources.³ In truth, the PTD is an inherent limit on sovereign authority recognized in constitutions and statutes throughout the

1. J. INST. 2.1.1 (Thomas Collett Sandars trans., 5th ed. 1876); MAGNA CARTA of 1215, ch. 33, <https://www.bl.uk/collection-items/magna-carta-1215?shelfitemviewer=1> (providing a full-text translation of the 1215 edition of the Magna Carta); MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 333–64 (2d ed. 2015) (discussing how courts in various countries have applied the PTD); Lord Chief-Justice Hale, *A Treatise In Three Parts*, in A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 9 (Francis Hargrave ed., T. Wright 1787) [hereinafter Hale, *A Treatise*]; 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, 760–801 (2011) (discussing the PTD in India, Pakistan, Philippines, Uganda, Kenya, Nigeria, South Africa, Brazil, Ecuador, and Canada); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 428–29 (1989) (tracing the roots of the PTD to 13th century Spain, 11th Century France, the Ch’in dynasty 200 years before Christ, and beyond).

2. See Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 666 (2010) [hereinafter Blumm, *Public Trust and Private Property*] (casting the PTD as “not so much an anti-privatization concept as a vehicle for mediating between public and private rights in important natural resources”); see also *infra* text accompanying notes 131–34 (discussing *Movrich v. Lobermeier*, a recent PTD decision of the Wisconsin Supreme Court ruling that the PTD added rights to a private landowner).

3. See, e.g., James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 544 (1989) (contending that the PTD undermines the democratic choices of public officials).

world.⁴ Its widespread appeal is due to its dual purposes of avoiding monopoly control of essential natural resources⁵ and requiring sovereign protection of those resources.⁶

Although the PTD has a sound basis in the sovereign's proprietary ownership of natural resources, its scope is not limited to resources owned in fee by governments. Failure to understand the scope of the PTD has led some jurisdictions—like the state of Oregon—to erroneously claim no trust duties absent state ownership.⁷ This article shows that the PTD has not been limited to proprietary ownership but instead extends to public rights in non-governmentally owned resources by imposing sovereign duties of ensuring access and resource protection. Understanding the nature of these sovereign duties clarifies the essential usufructuary nature of the PTD's *jus publicum* and illustrates how and why the PTD coexists with private property.

Thus, there are actually two parts to the PTD: a proprietary land ownership side and a sovereign usufructuary side. This analysis compares and contrasts the two in an effort to provide a coherent explanation of the public's PTD rights and the sovereign's obligations to protect those rights and the dependent resources.

The article begins with an explanation of the proprietary side of the PTD as public rights to navigate and to fish that have long been thought to be rights ancillary to public ownership. As public rights became synonymous

4. *In re* Water Use Permit Applications (*Waiahole Ditch*), 9 P.3d 409, 447 (Haw. 2000) (interpreting the Hawai'iian Constitution to protect all natural resources under the PTD, including groundwater allocation); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1252 (D. Or. 2016) (“In its broadest sense, the term ‘public trust’ refers to the fundamental understanding that no government can legitimately abdicate its core sovereign powers.”), *motion to certify appeal denied*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017); *Waweru v. Republic* (2006) K.L.R. 1, 10, 12 (H.C.K.) (Kenya); *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (S.C., July 30, 1993) (Phil.) (en banc) (recognizing the express right of the people to a “balanced and healthful ecology” in the Philippines’ 1987 Constitution); *Cf.* S. AFR. CONST., 1996, § 24, <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf> (recognizing a right “to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures . . .”).

5. See Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENVTL. AFF. L. REV. 1, 2 (2017) (“[A]ntimonopoly is the essence of the PTD, preventing privatization of certain resources used by the public . . .”).

6. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 724 (Cal. 1983); *Waiahole Ditch*, 9 P.3d at 447–48 (extending the PTD to all water resources in the state); *Pa. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 938 (Pa. 2017) (protecting dedicated state environmental trust funds from proprietary dissipation).

7. See *infra* notes 147–57 and accompanying text (criticizing the state's argument that the PTD applies only to land owned by the sovereign).

with waters that were navigable,⁸ the definition of navigable waters became determinative, as evidenced in numerous 19th century decisions.⁹ Moreover, the U.S. Supreme Court, in what is now widely known as the PTD's lodestar case,¹⁰ ruled that public rights in navigable waters were not easily extinguished.¹¹ The proprietary ownership side of the PTD still generates considerable case law, as the ownership of the beds of waterways often has substantial pecuniary consequences.¹²

But the sovereign usufructuary side of the PTD—which is not dependent on public land ownership—was evident even before the end of the 19th century. The U.S. Supreme Court established public ownership of wildlife regardless of land ownership in 1896.¹³ Moreover, in a remarkable decision three years earlier, the Minnesota Supreme Court decided that navigability was a concept of state law, and that recreational use was sufficient to establish the navigability of a waterbody irrespective of the ownership of the underlying lakebed.¹⁴ The decision led to widespread judicial recognition that the public had rights to access and use waterbodies whose beds were privately owned.¹⁵ Both cases, widely adopted in American states,¹⁶ should have established the sovereign usufructuary nature of the PTD. However, as evidenced by the position of the Oregon government in an ongoing case involving lake access, they apparently have been misunderstood.¹⁷ This article aims to correct that error.

Section I begins with an analysis of the ancient articulation of the PTD in the Justinian Institutes over 1500 years ago because that proclamation

8. Bertram C. Frey, *The Public Trust in Public Waterways*, 7 URBAN L. ANN. 219, 224 n.22 (1974) (quoting *The River Banne*, 80 Eng. Rep. 540 (K.B. 1611)); see *infra* notes 34, 41–44 and accompanying text (discussing public rights in navigable waters). But see *infra* notes 34, 41 (discussing how the link between public rights in waterways and ownership of the underlying bedlands may have been based on a misinterpretation of English law).

9. See *infra* text accompanying notes 39–44 (discussing the development of the definition of navigable waters).

10. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 489 (1970) [hereinafter Sax, *Effective Judicial Intervention*] (describing the *Illinois Central* case as the “[l]odestar in American Public Trust Law”).

11. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

12. See, e.g., *infra* notes 56, 78, 83 (discussing several cases addressing ownership of the beds of waterways).

13. *Geer v. Connecticut*, 161 U.S. 519, 529 (1896), *overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322 (1979).

14. *Lamprey v. Metcalf*, 53 N.W. 1139, 1143–44 (Minn. 1893).

15. See *infra* Part III.B (describing how numerous state courts adopted *Lamprey's* reasoning).

16. See *infra* notes 117–30 and accompanying text (explaining that California, South Dakota, North Dakota, Arkansas, Ohio, Missouri, Maine, Montana, and Wisconsin adopted *Lamprey's* recreational boating test); Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 Utah L. Rev. 1437, 1451 (2013) (discussing *Geer's* widespread adoption by states).

17. *Kramer v. City of Lake Oswego (Kramer II)*, 395 P.3d 592, 597 (Or. Ct. App. 2017).

contains the seeds of the dual PTD. The discussion briefly examines both the Magna Carta and the Forest Charter—which brought Justinian’s principles to Britain—as well as Lord Matthew Hale’s interpretation of the sovereign’s trust obligations—which proved influential to American courts. Section II supplies some background on the evolution of the proprietary side of the PTD in the U.S. in the 19th century, culminating in the non-alienation rule the Supreme Court articulated in *Illinois Central Railroad v. Illinois*. Section III then focuses on the Minnesota Supreme Court’s unheralded decision in *Lamprey v. Metcalf*, in what should be recognized as the sovereign usufructuary PTD’s lodestar case. Section IV explains *Lamprey*’s considerable legacy in protecting and promoting public access to public resources. The article concludes with a comparative assessment of the proprietary and sovereign PTDs, revisiting the venerable concepts of *jus publicum* and *jus privatum*.

I. THE JUSTINIAN PROCLAMATION AND ITS LEGACY

The origins of the PTD lie at least as far back as the Roman Emperor Justinian’s Institutes in the 6th century:

By the law of nature these things are common to [all] mankind—the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects habitations, monuments, and buildings, which are not, like the sea, subject only to the law of nations.¹⁸

Although this dictum is frequently quoted, it warrants some examination, as there are several items worthy of note. First, as often observed, Justinian’s declaration includes air, as noted by the Oregon federal district court in the recent decision of *Juliana v. United States* concerning climate change.¹⁹ Second, the recognition of private property in the form of “habitations, monuments, and buildings”²⁰ is a reminder that the PTD can and does coexist with private ownership of property. Charges that

18. J. INST. 2.1.1 (Thomas Collett Sandars trans., 5th ed. 1876).

19. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1255 n.10 (D. Or. 2016); see generally Michael C. Blumm & Mary Christina Wood, “No Ordinary Lawsuit”: *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 9, 21–30 (2017) (discussing *Juliana* and its implications).

20. J. INST. 2.1.1 (Thomas Collett Sandars trans., 5th ed. 1876).

the PTD undermines private property are hyperbolic.²¹ This peaceful coexistence is the basis of the sovereign PTD, as explained below.

A third observation concerns the reference to the shores of the sea, suggesting that the scope of the PTD should include access rights from uplands to trust waters.²² Access rights have not been widely recognized in modern interpretations of the PTD.²³ Recognition of the sovereign usufructuary PTD might change that, however, through public easements, providing public access to public trust resources.

Finally, the Justinian proclamation recognized the PTD as part of the “law of nations” that includes waterways of public importance—undoubtedly highways of commerce—which might help explain why the PTD has been so widely adopted in other countries.²⁴ These waterways, especially the Mediterranean Sea—which was shared by numerous countries even in Justinian’s day—were subject to international law.²⁵ Private property on the shorelands, however, was governed by domestic property law.²⁶ This distinction reinforces the importance of recognizing the sovereign PTD, which imposes sovereign obligations on governments but coexists with private property.

II. THE MAGNA CARTA, MATHEW HALE, AND THE EVOLUTION OF THE PROPRIETARY PTD

Justinian’s prescriptions reached England, and some were codified in the Magna Carta of 1215, which recognized public rights in important waterways.²⁷ The amended Magna Carta soon included the Forest Charter, which also recognized public rights in important uplands.²⁸ Lord Matthew Hale’s writings and decisions proved to be important vehicles in

21. See Blumm, *Public Trust and Private Property*, *supra* note 2, at 660–65 (giving examples of how the PTD and private property coexist).

22. J. INST. 2.1.1 (Thomas Collett Sandars trans., 5th ed. 1876) (declaring public access rights to sea shores).

23. *But see infra* note 83 (discussing *Nies v. Town of Emerald Isle* and *Long Branch v. Liu*, in which courts recognized public access rights).

24. See Blumm & Guthrie, *supra* note 1, at 760–801 (discussing the PTD in various foreign jurisdictions).

25. See Gordon W. Paulsen, *An Historical Overview of the Development of Uniformity in International Maritime Law*, 57 TUL. L. REV. 1065, 1069 (1983).

26. *Cf.* J. INST. 2.1.1 (Thomas Collett Sandars trans., 5th ed. 1876) (explaining that, although shorelands were theoretically subject to international law, the Roman people bore responsibility for protecting international principles through their own laws).

27. MAGNA CARTA of 1215, ch. 33, <https://www.bl.uk/collection-items/magna-carta-1215?shelfitemviewer=1>.

28. CHARTER OF THE FOREST of 1225, chs. 9, 11–13, 16 <http://www.nationalarchives.gov.uk/education/resources/magna-carta/charter-forest-1225-westminster/>.

transporting public rights to America, which became Supreme Court doctrine in the 19th century.²⁹

A. *The Magna Carta and the Forest Charter*

The Magna Carta of 1215 and ensuing amendments³⁰ implemented some of the Justinian principles by requiring the removal of weirs that interfered with public fishing and navigation on the Thames and other rivers.³¹ These provisions, unlike most of the 1215 Charter that benefited only the Norman nobility,³² gave rights to commoners who fished—for subsistence and commerce—and navigated—for travel and commerce.³³ Public rights in what came to be called navigable waters were thus first entrenched over eight centuries ago.³⁴

The Magna Carta included several provisions related to forest uses, which evolved into a Forest Charter a couple of years later.³⁵ The Forest

29. See *Martin v. Waddell's Lessee*, 41 U.S. 367, 367, 412–13, 428 (1842) (applying principles from Lord Matthew Hale's writings on public rights of navigable waters in formulating American common law).

30. The Magna Carta (also known as the Magna Charta) was almost immediately annulled by Pope Innocent III because he thought the nobles coerced King John into signing it. See Daniel Magraw & Natalie Thomure, *Carta de Foresta: The Charter of the Forest Turns 800*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10,934, 10,934 (2017). But the Charter was reissued the next year, after John died, and again a year later in 1217, when the Forest Charter first appeared. *Id.* at 10,935. The two charters, whose recognition of public rights were often controversial, were reissued a half-dozen times by the end of the 13th century. *Id.* at 10,934–36.

31. MAGNA CARTA of 1215, ch. 33, <https://www.bl.uk/collection-items/magna-carta-1215?shelfitemviewer=1> (calling for the removal of all fish-weirs from “the Thames, the Medway, and throughout the whole of England, except on the sea coast”); see also *id.* ch. 48 (“All evil customs relating to forests . . . or river-banks and their wardens, are at once to be investigated in every county . . . [and] are to be abolished completely and irrevocably.”).

32. S. Colin G. Petry, *The Regulation of Common Interest Developments as it Relates to Political Expression: The Argument for Liberty and Economic Efficiency*, 59 CASE W. RES. L. REV. 491, 499 (2009) (recounting that King John signed the Magna Carta “to protect the English nobility’s property and privileges”).

33. See Magraw & Thomure, *supra* note 30, at 10,939–40 (attributing the enduring principles of the “ecosystems’ role in preserving wildlife, the interdependence of nature, intergenerational equity, public participation, sustainable use, the value of biodiversity, and the maxim ‘sic utere tuo alienum non laedas’” (use your land so as not to damage the land of another) to the Forest Charter).

34. The distinction between navigable and non-navigable waters was first judicially articulated in the *River Banne* case. See Frey, *supra* note 8, at 224 n. 22 (concluding that navigable waters were owned by the sovereign in trust for the public; on the other hand, the beds of non-navigable waters were privately owned without public rights (citing *The River Banne*, 80 Eng. Rep. 540 (K.B. 1611))). Whether American courts’ drawing on this dichotomy was an accurate reflection of English law is unclear. See Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13, 55–58 (1976) (questioning *Arnold v. Mundy*’s conclusion that English common law based public rights on the distinction between navigable and non-navigable waters).

35. The original Magna Carta included provisions calling for a rollback of royal forests—so-called “disafforest[ation]” declared by King John—an investigation of pernicious forest customs, and

Charter, part of the amended Magna Carta in 1217, contained directives rolling back royal-forest restrictions on the use of those forests by commoners and guaranteeing public access rights to forage, graze animals, plant crops, and gather wood.³⁶ These access rights were cabined, however, by the first recognition of the golden rule—to not injure neighbors—now the foundation of nuisance law.³⁷ Like the waterways provisions of the Magna Carta, these forest rights applied to everyone, not just the nobility—the beneficiaries of most of the Magna Carta’s provisions.³⁸ Thus, the Forest Charter gave the public rights in common resources owned by the Crown, the foundation of the proprietary PTD, some 800 years ago.

B. *The Influence of the Matthew Hale*

The evolution of the PTD continued with Lord Chief Justice Matthew Hale’s interpretations of the PTD.³⁹ In his treatise, *De Jure Maris*—first published in 1787, but written long before⁴⁰—Hale interpreted chapter 33 of

procedural protections for non-forest dwellers in forest courts. MAGNA CARTA of 1215, chs. 44, 47–48, <https://www.bl.uk/collection-items/magna-carta-1215?shelfitemviewer=1>.

36. See Magraw & Thormure, *supra* note 30, at 10,936 (citing CHARTER OF THE FOREST of 1225, chs. 1, 9, 12–13).

37. See *id.* (citing CHARTER OF THE FOREST of 1225, ch. 12). The Forest Charter also banned capital punishment for poaching game and provided procedural protections in forest courts. *Id.* at 10,936–37 (citing CHARTER OF THE FOREST of 1225, chs. 2, 7–8).

38. See *id.* at 10,937 (noting that the Magna Carta only applied to some whereas the Forest Charter applied to all).

39. Matthew Hale (1609–76) was a successful barrister who helped negotiate the end of the English Civil War in 1645. *Sir Matthew Hale, 1609-1676*, INST. FOR NEW ECON. THINKING, <http://www.hetwebsite.net/het/profiles/hale.htm> (last visited Nov. 25, 2018) [hereinafter *Hale*, ECON. THINKING]; David Eryl Corbet Yale, *Sir Matthew Hale: English Legal Scholar*, ENCYCLOPEDIA BRITANNICA (June 20, 2017) [hereinafter Corbet, *Hale*], <https://www.britannica.com/biography/Matthew-Hale>. Although Hale was a defender of the beheaded Charles I, Oliver Cromwell, due to Hale’s reputation for incorruptibility, Oliver Cromwell appointed him to head a law reform commission (which became known as the Hale Commission). *Id.*; Mary Cotterell, *Interregnum Law Reform: The Hale Commission of 1652*, 83 ENG. HIST. REV. 689, 690–91 (1968). Cromwell subsequently appointed Hale to the Court of Common Pleas, where he served from 1653 to 1658. *Hale*, ECON. THINKING, *supra*. He was then elevated to Chief Baron of the Exchequer, where he served from 1660 to 1671, and from there to Chief Justice of the King’s Bench from 1671 until he retired in 1676. Corbet, *Hale*, *supra*.

40. See *City of New York v. Hart*, 95 N.Y. 443, 451 (1884) (observing that Hale’s three-part manuscript, including *De Jure Maris*, went unpublished for more than a hundred years, and that Hale had willed many of his writings to the library of Lincoln’s Inn, and its publisher, Hargrave, later obtained the essay from the solicitor-general to the queen). Hale left a wealth of unpublished writings, and it is likely that his manuscripts went unpublished for so long because his will expressly forbade their posthumous publication without prior authorization. See J.B. WILLIAMS, MEMOIRS OF THE LIFE, CHARACTER, AND WRITINGS, OF SIR MATTHEW HALE 348 (1835) (“I do[] expressly declare that I will have nothing of my own[] writing printed after my death, but [only] such as I shall, in my life time,

the Magna Carta to give the public rights to fish in all waters that were “common highways.”⁴¹ Hale discussed a case where a claimant asserted a right to operate a ferry because he owned both the ferry and the surrounding shorelands.⁴² Hale maintained that the landowner had no “privilege or prerogative” over the river in which the whole people depended for transportation; instead, the king had jurisdiction over waterways, to be exercised “not primarily for his profit, but for the protection of the people and the promotion of the general welfare.”⁴³ The river was therefore a commons not subject to any landowner’s exclusive control because doing so would result in monopoly control of a resource on which the whole people depended for transport and other vital services.⁴⁴ Hale’s treatise perceptively laid down the reason why the trust doctrine became a central principle of Anglo-American law over the next five centuries.

deliver out to be printed.”); see also GILBERT BURNET, *THE LIFE AND DEATH OF SIR MATTHEW HALE* 100 (W. Baynes 1805) (listing manuscripts that remained unpublished at the time of Hale’s death).

41. See Hale, *A Treatise*, *supra* note 1, at 1, 9, 21–22. There is some question whether public rights in waterways were actually limited to navigable waters, but American courts thought the *River Banne* decision’s distinction between navigable and non-navigable waters was determinative of public rights. See *Arnold v. Mundy*, 6 N.J.L. 1, 85–86 (1821) (explaining that the *River Banne* court ruled navigable rivers belonged to the king and non-navigable rivers belonged to the owners of land abutting the river); see also *supra* note 8 (discussing the *River Banne* decision). Some scholars interpreting Hale claim he defined the *jus publicum* as an easement applicable to all waters useful for transportation of goods regardless of ownership of the bed. See, e.g., James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 *DUKE ENVTL. L. & POL’Y F.* 1, 30 (2007) (footnote omitted) (citing Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don’t Hold Water*, 3 *FLA. ST. U. L. REV.* 511, 567 (1975)). See also *Palmer v. Mulligan*, 3 *Cai.* 307, 319 (N.Y. 1805), in which Chancellor Kent cited Hale’s treatise in deciding that:

[F]resh rivers, as well as those which ebb and flow, may be under the servitude of the public interest, and may be of common or public use for the carriage of boats, [etc.], and in that sense may be regarded as common highways by water They are called public rivers, not in reference to the property of the river, but to the public use.

(citing Hale, *A Treatise*, *supra* note 1, at 5, 8–9).

42. Hale, *A Treatise*, *supra* note 1, at 6–7.

43. *Munn v. Illinois*, 94 U.S. 113, 126 (1876) (citing Hale, *A Treatise*, *supra* note 1, at 6). For a modern take on Hale, see Kevin D. Williamson, *Masterpiece Cakeshop: The Slope Is, in Fact, Slippery*, *NAT’L REV.* (Dec. 28, 2017), <https://www.nationalreview.com/2017/12/masterpiece-cakeshop-slippery-slope-anti-discrimination-law> (claiming that in *De Portibus Maris*, Hale established that private wharves may cease to be wholly private when “affected with a public interest” (quoting Hale, *A Treatise*, *supra* note 1, at 78)).

44. See Hale, *A Treatise*, *supra* note 1, at 6; see also Blumm & Moses, *supra* note 5, at 2 (arguing that preventing monopoly control has been a persistent goal of public trust law).

C. The Origins of the U.S. Public Trust Doctrine

Hale became a central (albeit posthumous) figure in what was arguably the first American PTD decision: Chief Justice Andrew Kirkpatrick's famous 1821 decision in *Arnold v. Mundy*.⁴⁵ In that landmark decision, Robert Arnold attempted to exclude Benjamin Mundy and other fishers from harvesting oysters in a tidal bed in New Jersey's Raritan River on the ground that he owned the adjacent riparian land.⁴⁶ Reviewing his own trial court decision for the New Jersey Supreme Court, Justice Kirkpatrick reaffirmed that adjacent landowners did not own the lands submerged under navigable waters.⁴⁷ Instead, the state owned the beds, and therefore the public could not be excluded by monopolist landowners.⁴⁸

Kirkpatrick relied heavily on Hale's language in reaching his decision. For example, he quoted Hale to the effect that "the common people of England have regularly a liberty of fishing in the sea [or the] creeks [or] the arms thereof, as a public common piscary, and may not, without injury to their right, be restrained [thereof]."⁴⁹ He referred to the public's rights as being "transient usufructuary possession, only" and, citing Hale, concluded that the public had a "common piscary" that enabled Mundy and his colleagues to harvest oysters over the objection of the adjacent landowner.⁵⁰

Some two decades after the *Arnold* decision, the U.S. Supreme Court adopted it as federal law in a case amounting to a collateral attack on Kirkpatrick's decision, as it involved another oystering conflict on the very same Raritan River. A landowner again sought to exclude an oyster-harvester, Merrit Martin.⁵¹ The landowner surprisingly prevailed in the New Jersey Circuit Court below, but the U.S. Supreme Court reversed in an opinion by Chief Justice Roger Taney.⁵² According to Taney, the issue was

45. *Arnold v. Mundy*, 6 N.J.L. 1, 8 (1821). There is an argument that the first American PTD decision was *Carson v. Blazer*, in which the Pennsylvania Supreme Court ruled that a shoreside landowner had "no exclusive right to fish in the river immediately in front of his lands [because] the right to fisheries in [a large freshwater river not subject to tidal influence] is vested in the state, and open to all." *Carson v. Blazer*, 2 Binn. 475, 478 (Pa. 1810). But *Arnold v. Mundy* has proved more influential in other courts.

46. *Arnold*, 6 N.J.L. at 65, 67.

47. *Id.* at 79.

48. *Id.* at 42.

49. Compare *id.* at 74 (providing an update to Hale's Old English language), with Hale, *A Treatise*, *supra* note 1, at 11 (resulting in the following alterations: "the common people of England have regularly a liberty of fi[s]hing in the [s]ea [or the] creek[is [or the arms] thereof, as a public[] common . . . pi[s]cary, and may not [] without injury to their right [] be re[s]trained [thereof]").

50. *Arnold*, 6 N.J.L. at 71, 74.

51. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 367 (1842).

52. The decision reversed the federal Circuit Court of New Jersey. *Id.* at 418. *Martin* drew a dissent from Justice Thompson because, while he agreed with the notion of public rights to navigate and

whether navigable waters “were intended to be a trust for the common use.”⁵³ Citing *Hale* for the proposition that “the common people of England have regularly [had] a liberty of fishing in the sea, or creeks, or arms thereof, as a public common of piscary,” the Chief Justice ruled that those waters were “held as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery.”⁵⁴

The *Martin* decision expressly ratified the result in *Arnold*, considering that decision sound and “unquestionably entitled to great weight.”⁵⁵ The case established the public’s right to fish and navigate in navigable waters, at least in the original states, which inherited the Crown’s rights due to the Revolution.⁵⁶

The Supreme Court quickly extended those public rights to non-original states just three years later in *Pollard v. Hagan*, which involved a dispute over the ownership of submerged lands in Mobile Bay.⁵⁷ The Taney Court, in an opinion by Justice John McKinley, ruled that the new states of the West would have the same ownership rights and public obligations as the original states because they entered the Union on an “equal footing” with the original states.⁵⁸ *Pollard* thus extended *Martin*’s recognition of the PTD nationwide.

fish in navigable waters, he thought that the right to fish extended only to “floating fish,” not to shellfish. *Id.* at 434.

53. *Id.* at 411.

54. Compare *id.* at 412–13 (updating *Hale*’s Old English language), with *Hale, A Treatise, supra* note 1, at 11 (resulting in the following alterations: “the common people of England have regularly [had] a liberty of fi[s]hing in the [s]ea[], or creek[s], or arms thereof, as a public[] common of pi[s]cary”).

55. *Martin*, 41 U.S. (16 Pet.) 367 at 417–18. But see *Gough v. Bell*, 22 N.J.L. 441, 469 (1850) (holding that a riparian landowner could “wharf[] out” so long as the wharf did not interfere with public navigation, but noting that “any encroachment upon the shore, or other part of the public domain, may at all times be restricted and controlled by legislation”).

56. See *North Carolina v. Alcoa Power Generating Inc.*, 853 F.3d 140, 149 (4th Cir. 2017) (explaining that equal footing and associated federal title rules apply to the original states like North Carolina, despite the fact that they did not benefit from the equal footing conveyance of submerged lands and had long before developed their own law of title navigability), *reh’g denied*, June 9, 2017, *cert. denied*, 138 S. Ct. 981 (2018); see also *infra* note 83 (discussing recent cases applying the equal footing doctrine).

57. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 219, 228–29 (1845). The decision was not unanimous, as Justice John Catron dissented, suggesting that the question of land ownership of submerged lands should be left to the political arena. *Id.* at 232 (Catron, J., dissenting).

58. *Id.* at 228–29 (majority opinion). *Pollard*’s reference to equal footing has been misinterpreted by opponents of federal public lands. See John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 531–41, 551–53 (2018) (describing *Pollard*’s oft-cited language as non-precedential, politically-charged *dicta* surrounding a relatively narrow holding); Michael C. Blumm & Olivier Jamin, *The Property Clause and Its Discontents: Lessons from the Malheur Occupation*, 43 ECOLOGY L.Q. 781, 790–91 (2016) (“[T]he Supreme Court [has] clearly confined its holding in *Pollard* to submerged lands beneath navigable waters.”).

D. *The Expansion of Navigable Waters*

The issue of which waters were subject to the PTD, however, remained unsettled. Navigable waters were key to federal Commerce Clause jurisdiction,⁵⁹ and later the scope of the PTD became entwined with federal admiralty authority. In its *Genesee Chief* decision in 1852, the Supreme Court expanded the scope of federal admiralty jurisdiction beyond tidal waters to include waters that were actually navigable (so-called *navigable-in-fact* waters).⁶⁰ The Court emphasized that the geography of North America was markedly different from England, as the former contained thousands of miles of waters that were actually navigable without tidal influence; England largely lacked such waterways.⁶¹

A quarter-century later, in 1876, the Court applied its expanded federal admiralty jurisdiction, a sovereign regulatory concept, to proprietary ownership under equal footing in *Barney v. Keokuk*.⁶² Thus, the public had navigation and fishery rights to all navigable-in-fact waterbodies because the state owned those submerged lands in trust for the public.⁶³ This

59. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824) (“All America understands, and has uniformly understood, the word ‘commerce,’ to comprehend navigation.”).

60. *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1851). *The Genesee Chief*, a propeller boat, collided with and sank *The Cuba*, a cargo-laden schooner on Lake Ontario in 1847. *Id.* at 450. *The Cuba*’s owners sued to collect damages. *Id.* The litigation in their favor culminated in the U.S. Supreme Court’s untethering admiralty jurisdiction from tidal waters alone, overruling *The Thomas Jefferson*. *Id.* at 457, overruling *The Steam-Boat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825).

61. *Id.* at 454–57. *The Genesee Chief* Court stated:

[I]n England . . . there was no navigable stream in the country beyond the ebb and flow of the tide; nor any place where a port could be established to carry on trade with a foreign nation, and where vessels could enter or depart with cargoes. In England, therefore tide-water and navigable water are synonymous terms, and tide-water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones; and they took the ebb and flow of the tide as the test, because it was a convenient one, and more easily determined the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide.

Id. at 454–55.

62. *Barney v. Keokuk*, 94 U.S. 324, 336 (1876) (“In this country, as a general thing, all waters are deemed navigable which are really so; and especially it is true with regard to the Mississippi and its principal branches.”). In *Barney*, the City of Keokuk filled submerged lands below the high-water mark of the Mississippi River, creating a 250-foot wharf for rail and steamboat use. *Id.* at 325–27. The Supreme Court rejected claims of riparian landowners to the wharf, citing Iowa law that private ownership of the banks of the Mississippi “extend[ed] only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the state.” *Id.* at 336.

63. Navigable waters also include tidal waters. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475–76 (1988) (rejecting a claim that the extension of navigable waters to all waterbodies that are navigable-in-fact supplanted tidal waters as navigable).

substantial expansion in the scope of public rights—accomplished through a judicial borrowing from admiralty law—occurred over 140 years ago.

E. The Effect of the Illinois Central Railroad Decision

A long-running dispute over control of Chicago Harbor⁶⁴ led to an 1892 Supreme Court decision that Professor Sax anointed as the PTD's lodestar case.⁶⁵ The validity of the Illinois legislature's 1869 decision to grant a railroad company the bed of Lake Michigan adjacent to the city—a decision the legislature revoked four years later—eventually reached the Supreme Court more than two decades later.⁶⁶

The Court upheld the legislature's revocation of the earlier grant on antimonopoly grounds, making clear that the state's ownership was "in trust for the people . . . 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."⁶⁷ Justice Stephen J. Field, writing for the Court, distinguished submerged lands from state lands held for sale, saying that the former had "a title different in character," one in fact held in trust.⁶⁸ That trust, Justice Field averred, required "management and control" by the state, a sovereign obligation that could not be lost through a proprietary conveyance any more than a state could renounce its police power.⁶⁹

64. See generally Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799, 800–01 (2004) (providing a detailed historical analysis of the Supreme Court's 1892 decision in *Illinois Central Railway*).

65. See Sax, *Effective Judicial Intervention*, *supra* note 10, at 489 (describing *Illinois Central* as "[t]he most celebrated public trust case in American law"). Actually, the decision became a celebrated one because of Professor Sax's article.

66. Kearney & Merrill, *supra* note 64, at 913–19 (explaining why the case took so long to reach the Supreme Court); see also *id.* at 887–95, 927–30 (noting the probable corruption of the Illinois legislature in making the grant).

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

68. *Id.* ("But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale.")

69. *Id.* at 453. The Court specified:

The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soils under them, so as to leave them entirely under the use and control of private parties, except in [two] instance[s] . . . [(1)] for the improvement of the navigation and use of the waters [i.e., conveyances serving trust purposes], or [(2)] when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers

Without the trust, “every harbor in the country [would be placed] at the mercy of a majority of the legislature in the state where the harbor is situated.”⁷⁰ The *Illinois Central* decision confirmed that the PTD was a sovereign governmental obligation that was largely inalienable, seemingly universal, and protected by searching judicial review.⁷¹

Two years after *Illinois Central*, the Supreme Court returned to the PTD in a case involving tidelands in Astoria, Oregon.⁷² Two landowners asserted ownership to the same lands, a federal grantee who received a patent and a later state grantee.⁷³ The Court retraced the English origins of the PTD, citing Lord Hale and distinguishing private proprietary rights—the *jus privatum*—from the inalienable public trust rights—the sovereign *jus publicum*—and interpreting the federal grant not to include tidelands, which were reserved for the state by the equal footing doctrine.⁷⁴ The

Id.; see also *id.* at 455–56 (“The trust . . . is governmental and cannot be alienated, except . . . [for] parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.”).

70. *Id.* at 455.

71. On close judicial review in PTD cases, Professor Sax observed that:

[T]he Court [in *Illinois Central*] articulated a principle that has become the central substantive thought in public trust litigation. When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to relocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.

Sax, *Effective Judicial Intervention*, *supra* note 10, at 490. *But see supra* note 69, noting the exceptions to the general inalienable rule.

72. *Shively v. Bowlby*, 152 U.S. 1, 9 (1894).

73. *Id.*

74. *Id.* at 11 (explaining that the *jus publicum* in England was reserved to the king “as the representative of the nation and for the public benefit”); see also *id.* at 48–49 (citing Lord Hale’s explanation that the *jus publicum* was to ensure “common commerce, trade and intercourse,” and Justice Taney (in *Martin*) to the effect that the king’s *jus publicum* obligations “vested absolutely in the people of each state” at the American Revolution and was “incidental to the sovereignty of the State”); see also *Hardin v. Jordan*, 140 U.S. 371, 381 (1891) (upholding state law as to the ownership of lands submerged beneath non-navigable waters). The *Hardin* Court stated:

With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high-water mark, and that the title to the shore and lands under water in front of lands so granted enures to the State within which they are situated, if a State has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state— . . . held in trust for the public purposes of navigation and fishery—and cannot be retained or granted out to individuals by the United States.

Id. (citing *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 216 (1845)). This statement suggested that state ownership of navigable waters was a federal doctrine, as *Pollard* ruled that the federal government had a pre-statehood trust obligation to deliver ownership of navigable waters and their beds to subsequently admitted states. *Pollard*, 44 U.S. (3 How.) at 216; see *infra* note 92 (discussing the equal footing doctrine).

Shively Court's recognition that the PTD lands are conceptually divided between proprietary *jus privatum* and a sovereign *jus publicum* was a key insight in the evolution of the PTD.

F. *Ascertaining Navigable Waters*

By the end of the 19th century, the contours of the PTD were thus fairly well established. Cases like *Shively* involving pre-statehood grants—and consequently federal-state disputes over proprietary ownership—generally favored the states, as the Supreme Court allowed only narrow exceptions from the rule that the federal government was to preserve lands submerged under navigable waters due to the equal footing doctrine for later conveyance to states at statehood.⁷⁵ For example, the federal government failed to show that a pre-statehood reservation of reservoir sites on a Utah Lake defeated an equal footing conveyance to the State of Utah.⁷⁶ Only occasionally did the federal government prevail, as in the cases of the submerged lands in the Arctic National Wildlife Refuge⁷⁷ and part of the lakebed of Lake Coeur d'Alene, reserved for the Coeur d'Alene Tribe.⁷⁸

But what was a navigable water subject to equal footing and the PTD remained unclear. Nearly a century ago, the Supreme Court determined that the definition of “navigable” was grounded in federal law and applied to identified river segments, not the entirety of a river.⁷⁹ The Court applied this definition in 2012, when it overruled the Montana Supreme Court, which held that three rivers were navigable-in-fact and therefore state-owned.⁸⁰ Justice Kennedy, writing for a unanimous Court, faulted the state

75. Under *Shively*, pre-statehood conveyances could defeat equal footing if they either (1) responded to a “public exigency” or (2) fulfilled an international duty. *Shively*, 152 U.S. at 49–50.

76. *Utah Div. of State Lands v. United States*, 482 U.S. 193, 197, 203 (1987) (presuming Congress did not intend to defeat a state's title, in light of the longstanding federal policy of holding land under navigable waters for the benefit of future states, absent exceptional circumstances).

77. *United States v. Alaska*, 521 U.S. 1, 4, 40 (1997) (finding a “clear intent” to segregate the submerged lands in both the refuge and the National Petroleum Reserve prior to statehood).

78. *Idaho v. United States*, 533 U.S. 262, 265, 280–81 (2001) (holding that Congress “intended to bar passage to Idaho of title to” certain “lands underlying portions of Lake Coeur d'Alene and the St. Joe River”).

79. *United States v. Utah*, 283 U.S. 64, 89 (1931) (concluding that certain “sections of the Green, the Grand, and the Colorado Rivers” were navigable). The federal test for navigable-in-fact streams and lakes is met when they are used in their ordinary condition at statehood as highways for commerce. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871) (“[Rivers] are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”).

80. *PPL Mont. LLC v. Montana*, 565 U.S. 576, 580–81 (2012).

court for failing to employ a segment-by-segment analysis and interpret historic portages to disqualify rivers as navigable at statehood.⁸¹

All of these cases are proprietary PTD cases concerning which waterways are owned by the state due to the equal footing conveyance. That is, the PTD in these cases stems from the state's ownership of the lands, through the equal footing conveyance at statehood. Ironically, federal law determines the scope of these equal footing lands, and therefore the state's proprietary PTD obligations.⁸² There continue to be a number of important proprietary PTD cases.⁸³

But the PTD extends to waterways and other resources in which the state does not have a proprietary interest. This is the sovereign side of the PTD, which the next section explores.

III. *LAMPREY V. METCALF* AND THE RISE OF THE SOVEREIGN USUFRUCTUARY PTD

The sovereign usufructuary PTD is not grounded on public ownership of lands.⁸⁴ Instead, it derives from sovereign duties to protect select resources from monopolization and development.⁸⁵ Because state law provides these protections, there is no uniform interpretation of the sovereign PTD's scope, unlike the proprietary public trust, which is largely a question of federal law under the equal footing doctrine.⁸⁶

81. *Id.* at 580, 594, 598.

82. *Id.* at 590; *see supra* note 74 and accompanying text (discussing *Pollard*, in which the Supreme Court held that all states receive title to beds underlying navigable waterways on equal footing).

83. For example, the Fourth Circuit recently ruled that the equal footing doctrine determined the ownership of North Carolina's Yadkin River—even though the state was an original state that was not subject to the Constitution's Admissions Clause—rejecting the state's claim that state law determined navigability for title in the original states. The Fourth Circuit refused to rehear the case on an 8–7 vote. *See North Carolina v. Alcoa Power Generating Inc.*, 853 F.3d 140, 149 (4th Cir. 2017), *reh'g denied*, June 9, 2017, *cert. denied*, 138 S. Ct. 981 (2018). On the other hand, the North Carolina Court of Appeals decided that the public owned—and therefore had access rights to—replenished beaches, and the North Carolina Supreme Court refused to review the case. *See Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 194, 196 (N.C. Ct. App. 2015), *appeal docketed*, 784 S.E.2d 171 (2016), *appeal denied*, 793 S.E.2d 699 (2016). Similarly, the New Jersey Supreme Court affirmed that an adjacent landowner's property was not unconstitutionally taken when a beach replenishment project included public access rights to the new publicly provided beach. *City of Long Branch v. Liu*, 4 A.3d 542, 546–47, 554–55 (N.J. 2010); *see Gunderson v. State*, 90 N.E.3d 1171, 1188 (Ind. 2018) (concluding that the public's right to walk on the Lake Michigan shore extended to the ordinary high-water mark, regardless of the existing water level).

84. *See infra* notes 99–109 and accompanying text (describing the origins of the sovereign usufructuary PTD).

85. *See infra* notes 110–11 and accompanying text (discussing *Lamprey's* widespread influence on public rights in waterbodies).

86. *See infra* note 92 (explaining that state ownership of navigable waters derives from federal law and the equal footing doctrine).

A. The Lamprey Decision

The foundation case of the sovereign PTD is the Minnesota Supreme Court's 1893 decision in *Lamprey v. Metcalf*, an otherwise uneventful case concerning title to 300 acres of an unnamed dry lakebed.⁸⁷ The federal government conveyed the lands bordering this meandered lake to various private parties in 1856, and Uri Lamprey and his partner, Oscar Metcalf, acquired the lands sometime before 1873.⁸⁸ Lamprey filed suit against Metcalf to partition their co-tenancy.⁸⁹ The lower court ruled that the two possessed a tenancy in common.⁹⁰ The state, made party to the suit by statute,⁹¹ claimed ownership of the now dry lakebed on the ground that the land had been submerged beneath a navigable water at statehood.⁹²

A unanimous Minnesota Supreme Court rejected the state's claim, determining that the relict lakebed was owned by Lamprey and Metcalf, not the state.⁹³ Had the *Lamprey* Court stopped there, the case would have

87. *Lamprey v. Metcalf*, 53 N.W. 1139, 1140 (Minn. 1893). The first case to recognize public rights in waterbodies that were not state-owned was the Supreme Judicial Court of Massachusetts decision in *Inhabitants of West Roxbury v. Stoddard*, in which the Court held that the town of West Roxbury could not exclude the public from Jamaica Pond—one of that state's Great Ponds—to prevent the removal of ice blocks. *Inhabitants of West Roxbury v. Stoddard*, 89 Mass. (7 Allen) 158, 171–72 (1863) (“Fishing, fowling, boating, bathing, skating or riding upon the ice, taking water for domestic or agricultural purposes or for use in the arts, and the cutting and taking of ice, are lawful and free upon these ponds . . .”). The *Lamprey* Court cited *West Roxbury* in its decision, but because “the Great Pond case” involved an interpretation of the Colonial Ordinances of 1641 and 1647, it had less influence on the evolution of navigability than *Lamprey*'s common law interpretation.

88. *Lamprey*, 53 N.W. at 1140. In 1860, after the lake had begun to dry up, apparently due to natural causes, the government again surveyed the land, this time between the original meander line and the diminished lake. *Id.* In 1873, the government issued a land patent to Lamprey and Metcalf's predecessor. *Id.*

89. *Id.*

90. *Id.* Lamprey owned a 49/50 share of 300 acres; Metcalf owned the remaining 1/50 as a tenant in common. See *Hobart v. Hall*, 174 F. 433, 463–64 (C.C.D. Minn. 1909), *aff'd*, 186 F. 426 (8th Cir. 1911).

91. MINN. STAT. § 74.45 (1866) (“The state may be made a party to an action for the sale or partition of real property, in which case the summons and complaint shall be served upon the attorney general, who shall appear on behalf of the state.”).

92. *Lamprey*, 53 N.W. at 1140. The Supreme Court created the proprietary equal footing doctrine in *Pollard*. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 223, 228–30 (1845) (ruling that the Constitution's Admissions Clause (art. IV, § 3, cl. 2), governing the admission of new states, requires all states to have the same title to the beds of navigable waters); see also *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 391 (1842) (adopting the reasoning of *Arnold v. Mundy*).

93. *Lamprey*, 53 N.W. at 1144. Reliction is the gradual recession of water from the ordinary high-water mark; the newly uncovered land is the property of the adjoining riparian landowner. See Joseph W. Dellapenna, *Boundaries Along a Waterbody*, in 1 WATERS AND WATER RIGHTS § 6.03(b)(2) (Amy K. Kelley ed., Matthew Bender & Co. 3d ed. 2018) (“Generally, accretion, reliction, and erosion carry the boundary along with the change, a rule accepted in virtually every state, and sometimes termed the ‘doctrine of accretion.’”).

been long forgotten. But Justice William Mitchell (later the namesake of the law school that is now Mitchell-Hamline) decided to propound on the nature of public rights in navigable waters in Minnesota.

According to Justice Mitchell, navigability—which he recognized as a vehicle for dividing public and private rights⁹⁴—(1) was a matter of state law;⁹⁵ (2) was determined by waterways that were navigable-in-fact;⁹⁶ and (3) for non-navigable waters, littoral owners owned to the middle of the waterbody.⁹⁷ Although the state owned all navigable waters and their beds, that ownership was “in its sovereign capacity, as trustee for the people, for public use.”⁹⁸ Because the lakebed at issue was dry due to reliction, it was clearly not navigable; therefore, the Minnesota Court decided there were no public rights.⁹⁹

Justice Mitchell proceeded to expound on the meaning of navigability, declaring that although unnecessary to resolve the case, some clarification would help “to avoid misconception.”¹⁰⁰ He explained that due to changed conditions in America, courts redefined navigability to embrace non-tidal, navigable-in-fact waters because they were “public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year.”¹⁰¹ Justice Mitchell concluded that the existing case law seemed to indicate that navigability was neither a function of the size of the boats nor “that navigation . . . be by boats at all,” only that “the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure.”¹⁰² But he challenged this limited view, averring that “we fail to see why [bodies of water used for public uses other than mere commercial navigation] ought not to be held to be public waters, or navigable waters.”¹⁰³ This declaration

94. *Lamprey*, 53 N.W. at 1143.

95. This statement is no longer true under the now prevailing federal test for title navigability. *See supra* notes 80–82 and accompanying text (discussing *PPL Mont. LLC v. Montana*, where the Supreme Court applied the federal test for title navigability in determining that lands were not owned by Montana).

96. Judge Mitchell erroneously rejected the tidal ebb and flow test for navigable waters, a mistake the Supreme Court later corrected. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 479 (1988) (describing “the American decision to depart from . . . the English rule limiting Crown ownership to the soil under tidal waters”).

97. *Lamprey*, 53 N.W. at 1143.

98. *Id.*

99. *Id.* at 1144. The Court was concerned that if relict land did not inure to the littoral owner, the owner would lose the “fundamental riparian right—on which all others depend, and which often constitutes the principal value of the land—of access to the water.” *Id.* at 1142.

100. *Id.* at 1143.

101. *Id.*

102. *Id.*

103. *Id.*

marked the beginning of a significant evolution of the PTD to embrace lands not owned by the sovereign.¹⁰⁴

In words that would have considerable influence over the years, Justice Mitchell wrote “we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit.”¹⁰⁵ Looking toward the future, the court recognized that many of Minnesota’s lakes “probably will never be used to any great extent for, commercial navigation.”¹⁰⁶ But population increases will cause them to be used:

[B]y the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. *To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time.*¹⁰⁷

Although the immediate result in *Lamprey* was to recognize private rights in relicted littoral lands, its long-term significance lay in its expansion of the definition of navigability to include recreational and other uses that had not been previously considered to be commercial uses.¹⁰⁸ This expansion of navigable waters—for avowedly anti-monopolistic purposes—recognized public rights in waterbodies whose beds were not owned by the

104. *Lamprey* was soon followed by *Geer v. Connecticut*, 161 U.S. 519, 529 (1896) (recognizing state ownership of wildlife regardless of land ownership). The Minnesota Supreme Court later clarified that *Lamprey* public rights applied to privately owned submerged lands. *State v. Korror*, 148 N.W. 617, 622 (Minn. 1914) (“Under the law of this state the state owns the soil under public waters in a sovereign, not a proprietary, capacity, but still the state owns it and the shore owner does not.”). Similarly, the beaches in New Jersey and Oregon have public rights of access, despite underlying private ownership, as a version of ancillary rights to access public tidelands and the ocean. See *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1994) (establishing a four-factor test to determine the public’s rights in privately owned beaches); *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 113, 121–22 (N.J. 2005) (applying the four-factor test to uphold public access rights to a privately owned beach); *State ex rel. Thornton v. Hay*, 462 P.2d 671, 673 (Or. 1969) (upholding public rights to use private beaches on the basis of customary rights); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 453 (Or. 1993) (en banc) (reaffirming *Thornton*).

105. *Lamprey*, 53 N.W. at 1143.

106. *Id.*

107. *Id.* (emphasis added).

108. See Harrison C. Dunning, *The Pleasure Boat Test*, in 2 WATERS AND WATER RIGHTS § 32.03(a.01) (Amy Kelley ed., Matthew Bender & Co. 3d ed. 2018) (describing the expansion of the test from 1893 into the modern day).

state under equal footing.¹⁰⁹ Due to its widespread acceptance by other courts, Justice Mitchell's opinion became the foundation of the sovereign usufructuary PTD.

B. *Lamprey's Legacy*

The *Lamprey* decision has proved to be a landmark. Its expansive state-law definition of navigability unmoored public rights from public proprietary ownership and has been widely emulated.¹¹⁰ In *Lamprey's* wake, states began to adopt broad definitions of waterways to which the public had access rights irrespective of public riverbed or lakebed ownership.¹¹¹ Because private ownership of such submerged bedlands was widespread, liberating public waterway rights from land ownership led to a considerable extension of public rights under what a leading treatise on water rights has referred to as “the pleasure boat” theory of navigability.¹¹² This interpretation of navigability, now the dominant rule, is fundamental to the non-proprietary, sovereign usufructuary PTD.¹¹³

Lamprey's legacy has been widespread. Courts across the country have examined Justice Mitchell's definition in some detail. For instance, in *Guilliams v. Beaver Lake Club*, the Oregon Supreme Court quoted extensively from *Lamprey* in concluding that a small lagoon—approximately 50-feet in width, capable of floating only small skiffs and scows—was navigable-in-fact.¹¹⁴ In *Luscher v. Reynolds*, the same court again quoted *Lamprey* in deciding the public had the “paramount right” to use Blue Lake for the purposes of transportation and commerce regardless of ownership of the bed.¹¹⁵ Echoing *Lamprey*, *Luscher* declared that “[c]ommerce” has a broad and comprehensive meaning” beyond pecuniary profit, so public rights extended even to lakes with privately owned beds.¹¹⁶

109. *See id.* (noting that the *pleasure boat* test defined navigability without regard to commercial use).

110. *See id.* § 32.03(a) n.35 (listing several states that have adopted state law definitions of navigability).

111. *See id.* (providing examples of state's adoption of the pleasure boat test).

112. *Id.* § 32.03(a).

113. *Id.* § 32.03(a) n.35.

114. *Guilliams v. Beaver Lake Club*, 175 P. 437, 442 (Or. 1918).

115. *Luscher v. Reynolds*, 56 P.2d 1158, 1162 (Or. 1936).

116. *Id.*

Many other states have also relied on the language of *Lamprey* to recognize the recreational boating test, including California,¹¹⁷ South Dakota,¹¹⁸ North Dakota,¹¹⁹ Arkansas,¹²⁰ Ohio,¹²¹ Missouri,¹²² Maine,¹²³ Montana,¹²⁴ and Wisconsin.¹²⁵ A prominent example is *People ex rel. Baker v. Mack*, in which the California Court of Appeal announced in 1971 that “[t]he federal test of navigation does not preclude a more liberal state test establishing a right of public passage whenever a stream is physically navigable by small craft.”¹²⁶ Arkansas followed suit in 1980, in *State v.*

117. *People ex rel. Baker v. Mack*, 97 Cal. Rptr. 448, 451 (Cal. Ct. App. 1971); *see also* *Bohn v. Albertson*, 238 P.2d 128, 135 (Cal. Dist. Ct. App. 1951) (holding that waterways used for recreational purposes, without heavy commercial traffic, are navigable under *Lamprey*).

118. *Flisrand v. Madson*, 152 N.W. 796, 800 (S.D. 1915) (“And when we say that the state is the owner of the bed of said lake we do not mean that the state is the proprietary owner, in the sense that the state might sell or otherwise dispose of . . . , but that the state holds the title to such lake bed in trust for the benefit of the public.” (citing *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893))); *see also* *Hillebrand v. Knapp*, 274 N.W. 821, 822 (S.D. 1937) (“[W]hether or not waters are navigable depends upon the natural availability of waters for public purposes” (citing *Lamprey*, 53 N.W. at 1143)); *cf.* *Parks v. Cooper*, 2004 SD 27, ¶ 1, 676 N.W.2d 823, 825 (“[W]e conclude that all water in South Dakota belongs to the people in accord with the public trust doctrine and as declared by statute and precedent, and thus, although the lake beds are mostly privately owned, the water in the lakes is public and may be converted to public use, developed for public benefit, and appropriated, in accord with legislative direction and state regulation.”).

119. *Roberts v. Taylor*, 181 N.W. 622, 626 (N.D. 1921) (“A public use may not be confined entirely within a use for trade purposes alone.” (emphasis omitted)).

120. *State v. McIlroy*, 595 S.W.2d 659, 664–65 (Ark. 1980) (holding that a river was navigable because it could “be used for a substantial portion of the year for recreational purposes”), *cert. denied*, 449 U.S. 843 (1980).

121. *Lamprey*’s application in Ohio has been uneven. For example, in 1955, the Ohio Supreme Court quoted *Lamprey* with approval in upholding the navigability of a waterbody suitable for use by small pleasure craft and were so used for 14 years by a boat rental business. *Coleman v. Schaeffer*, 126 N.E. 2d 444, 446–47 (Ohio 1955) (referring to *Lamprey* with approval for the trend in the law towards defining navigability more broadly). But 50 years later, in *Portage County*, the Ohio Supreme Court decided that Lake Rockwell was non-navigable—even though it was situated between two navigable areas of the Cuyahoga River—because recreational boating was not, standing alone, a dispositive factor in determining navigability. *Portage Cty. Bd. of Comm’rs v. City of Akron*, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478, 498–99, at ¶ 109. The surprised dissenter, Justice Pfeifer, claimed that the majority’s reasoning was inconsistent with *Coleman v. Schaeffer*. *Id.* ¶ 115–16 (Pfeifer, J., dissenting).

122. *Elder v. Delcour*, 269 S.W.2d 17, 26 (Mo. 1954).

123. *Smart v. Aroostook Lumber Co.*, 68 A. 527, 532 (Me. 1907).

124. *Compare* *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 169, 171 (Mont. 1984) (holding, based on *Lamprey*, that “under the public trust doctrine and the 1972 Montana Constitution, any surface waters that are capable of recreational use may be so used by the public”), *with* *Mont. Coal. for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088, 1091 (Mont. 1984) (approving of *Curran* and stating the applicable test in Montana is “capability of use of the waters for recreational purposes”), *overruled on other grounds by* *Gray v. City of Billings*, 689 P.2d 268 (Mont. 1984).

125. *Muench v. Pub. Serv. Comm’n*, 53 N.W.2d 514, 520 (Wis. 1952).

126. *People ex rel. Baker v. Mack*, 97 Cal. Rptr. 448, 452 (Cal. Ct. App. 1971).

McIlroy, holding that navigable waters included all waters floatable by “oar or motor propelled small craft.”¹²⁷

Other courts adopting the so-called *pleasure boat* test often relied on cases premised on *Lamprey*. For example, in 1973, the Idaho Supreme Court used the logic of the *Mack* decision to uphold public rights to boat and wade in a privately owned creek bed in *South Idaho Fish & Game Ass’n v. Picabo Livestock, Inc.*¹²⁸ The *Picabo* court expressly affirmed the lower court’s interpretation of navigability under Idaho law to include any natural stream “capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes.”¹²⁹ Similarly, in 2013, the Alabama Supreme Court, relying on *Mack*, decided that the Cahaba River was navigable-in-fact wherever it was capable of being used for recreational canoeing.¹³⁰

A recent example of *Lamprey*’s legacy is *Morvich v. Lobermeier*, a 2018 Wisconsin Supreme Court decision that closely examined both PTD rights and the rights of an owner of submerged lands in an artificial waterbody.¹³¹ The Court concluded that an adjacent landowner claiming access rights had no riparian rights due to prior private conveyances.¹³² But the Court nonetheless decided that the PTD gave that adjacent landowner access rights even absent riparian rights,¹³³ illustrating how the PTD can *add to* as well as limit private rights. All parties in the case conceded—and the Court announced—that the public possessed access rights to the artificial waterbody, even though its bedlands were privately owned.¹³⁴

127. *State v. McIlroy*, 595 S.W.2d 659, 664–65 (Ark. 1980); see Ark. River Rights Comm. v. Echubby Lake Hunting Club, 126 S.W.3d 738, 742 (Ark. 2003) (extending the Arkansas PTD to waterbodies created by dams).

128. *S. Idaho Fish & Game Ass’n v. Picabo Livestock, Inc.*, 528 P.2d 1295, 1297–98 (Idaho 1974).

129. *Id.* at 1297–98 (“Any stream which, in its natural state, will float logs or any other commercial or floatable commodity, or is capable of being navigated by oar or motor propelled small craft, for pleasure or commercial purposes, is navigable. . . . [T]he basic question of navigability is simply the suitability of a particular water for public use.”).

130. *City of Irondale v. City of Leeds*, 122 So. 3d 1244, 1250 (Ala. 2013) (citing *People ex rel. Baker*, 97 Cal. Rptr. at 451).

131. *Morvich v. Lobermeier*, 2018 WI 9, ¶¶ 4, 8–9, 379 Wis. 2d 269, 905 N.W.2d 807.

132. *Id.* ¶¶ 54–55.

133. *Id.* ¶ 6. However, with no riparian rights, the landowner lacked the ability to install a pier on the submerged lands owned by his neighbor. *Id.* ¶ 5.

134. *Id.* ¶ 10 (“Lobermeiers concede that the Wisconsin public trust doctrine grants Movriches, and all other members of the public, access to the Flowage’s waters for navigation and recreation purposes.”); see *State v. Bleck*, 338 N.W.2d 492, 497–98 (Wis. 1983) (recognizing the state’s ability to restrict private rights by authorizing “limited encroachments upon the beds of [navigable waters held in trust] where the public interest will be served”); see also *Muench v. Pub. Serv. Comm’n*, 53 N.W.2d 514, 520 (Wis. 1952) (“Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit.” (quoting *Lamprey v. Metcalf*, 53

Lamprey foreshadowed this result 125 years earlier, when Justice Mitchell uncoupled the PTD from sovereign proprietary ownership and announced the sovereign usufructuary PTD.¹³⁵

IV. MISUNDERSTANDING THE SOVEREIGN USUFRUCTUARY PTD: THE STATE OF OREGON'S POSITION IN THE OSWEGO LAKE CASE

Oswego Lake is a large, approximately 400-acre lake, located about eight miles south of Portland, Oregon, in the suburb of Lake Oswego, a city with one of the highest average incomes in the state.¹³⁶ For roughly the last six decades, the lake has been closed to the public and managed by a private corporation whose members are either shoreside landowners or those possessing easements to reach and use the lake.¹³⁷ Although the Lake Corporation claims to own the lake,¹³⁸ the bed of the lake is likely owned by the state as a navigable waterbody because it was meandered at statehood.¹³⁹ Even if the state does not own the lakebed, it clearly owns the water in the lake.¹⁴⁰

N.W. 1139, 1143 (Minn. 1893))), *aff'd on reh'g*, 55 N.W.2d 40 (Wis. 1952); *Diana Shooting Club v. Husting*, 145 N.W. 816, 820 (Wis. 1914) (asserting the PTD must be interpreted with a "broad and beneficent spirit" sufficient to allow for "the full and free use of public waters").

135. *Lamprey*, 53 N.W. at 1143.

136. *Lake Oswego (Clackamas)*, ATLAS OF OR. LAKES, <http://aol.research.pdx.edu/lakes/17090012000369> (last visited Nov. 25, 2018); *Income in Lake Oswego, Oregon (City)*, STATISTICAL ATLAS, <https://statisticalatlas.com/place/Oregon/Lake-Oswego/Household-Income> (last visited Nov. 25, 2018).

137. Brief on the Merits of Respondent on Review, State of Oregon at 6, *Kramer v. City of Lake Oswego*, 395 P.3d 592 (Or. Ct. App. 2017) (No. SC S065014), 2018 WL 1240191 [hereinafter *Appellate Brief of State of Oregon*]; Defendant-Respondent City of Lake Oswego's Answering Brief and Supplemental Excerpt of Record at 8, *Kramer v. City of Lake Oswego*, 395 P.3d 592 (Or. Ct. App. 2017) (No. A156284), 2014 WL 9865510 ("The City acquired title to the Swim Park property in the 1930s, pursuant to deeds restricting use of the property to the children of the City of Oswego." (internal quotations omitted)).

138. *Appellate Brief of State of Oregon*, *supra* note 137, at 4.

139. *City of Lake Oswego*, 395 P.3d at 597 n.8. The practice of meandering all lakes of over 25 acres in size originated in the Land Ordinance of 1785, which established the rectangular survey system as part of an effort to survey all of the lands in the Northwest Territory. *Cf.* ALBERT WHITE, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM 12 (1983) (explaining the theory and history of the rectangular surveying method); *Northwest Ordinances*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/event/Northwest-Ordinances> (last visited Nov. 25, 2018). Federal surveyors drew straight lines (*meander lines*) between points on a shore to more accurately estimate the quantity of land available for sale. WHITE, *supra*, at 103. Today, some states give meandered lakes and streams a presumption of navigability. Dellapenna, *supra* note 93, § 6.03(a)(2). In Oregon, the presumption is a conclusive one. OR. REV. STAT. ANN. § 274.430(1) (2017).

140. OR. REV. STAT. ANN. § 274.430(1) (2017) ("All meandered lakes are declared to be navigable and public waters. The waters thereof are declared to be of public character. The title to the submersible and submerged lands of such meandered lakes, which are not included in the valid terms of a grant or conveyance from the State of Oregon, is vested in the State of Oregon.").

Even though roughly two-thirds of the residents of Lake Oswego are excluded from the lake (as well as the rest of the public),¹⁴¹ the city council enacted ordinances enforcing Lake Oswego Corporation's claim that only its members have access rights to the lake.¹⁴² In 2012, two individuals—one a member of the city's planning commission at the time and the other a resident of Portland—challenged the city's exclusionary ordinances.¹⁴³ The plaintiffs sought non-motorized access from public parklands adjacent to the lake for swimming and kayaking under the state's PTD.¹⁴⁴

The city, the Lake Oswego Corporation, and the state all opposed their use.¹⁴⁵ The trial court rejected the access claim, largely on the basis of the state's argument that the PTD did not apply to uplands like the city's parklands.¹⁴⁶ The Oregon Court of Appeals affirmed in 2017, but the state's Supreme Court agreed to review that decision, heard oral argument in May 2018, and will issue a decision soon.¹⁴⁷

The state's successful argument in the lower courts reflected a fundamental failure to understand the sovereign usufructuary PTD, as the state maintained that the PTD applies only to submerged or submersible state-owned lands.¹⁴⁸ In short, the state of Oregon claims to recognize only the proprietary PTD, despite apparent Oregon Supreme Court authority to the contrary.

Although the Oregon Supreme Court has twice quoted language from *Lamprey* recognizing the sovereign usufructuary PTD,¹⁴⁹ the state's

141. Hannah Leone, *Planning Commissioner Ousted Over Oswego Lake Public Access Lawsuit*, OREGONIAN (May 22, 2015), https://www.oregonlive.com/lake-oswego/index.ssf/2015/05/planning_commissioner_ousted_o.html.

142. LAKE OSWEGO, OR. RES. 12-12 (2012); see LAKE OSWEGO CORP., RULES & REGULATIONS HANDBOOK art. 1.7 (2017) (“Lake Oswego Swim Areas” means the City of Lake Oswego Swim Area, located at the eastern end of the East Arm of Oswego Lake, which is designated for use for swimming by all holders of Lake privileges and residents of the City of Lake Oswego; and the Lake Grove Swim Park, designated for use only by owners whose property lies within the boundaries of the Old Lake Grove School District.” (emphasis added)).

143. *Kramer v. City of Lake Oswego (Kramer I)*, No. CV12100913, 2014 WL 8817709, at *1 (Or. Cir. Ct. Jan. 24, 2014); Leone, *supra* note 141.

144. *Kramer v. City of Lake Oswego (Kramer II)*, 395 P.3d 592, 594 (Or. Ct. App. 2017), review allowed, 403 P.3d 776 (Or. 2017).

145. *Kramer I*, 2014 WL 8817709 at *1.

146. *Id.* at *3 (“Although the [public use] doctrine may allow temporary touching or access to uplands where necessity requires it, the doctrine cannot serve as a basis for preventing upland owners from restricting access to the water.”).

147. *Kramer II*, 395 P.3d at 610, 612; *Entry Form, Mark Kramer v. City of Lake Oswego*, OR. JUD. DEP’T, <https://www.ojd.state.or.us/records/sccalendar.nsf/b29dd44d01dffa088256c91005b3a5b/d976b0e71bfa229b882581b7007eb2bf?OpenDocument> (last modified Apr. 16, 2018).

148. *Appellate Brief of State of Oregon*, *supra* note 137, at 15–16.

149. *Luscher v. Reynolds*, 56 P.2d 1158, 1162 (Or. 1936); *Guilliams v. Beaver Lake Club*, 175 P. 437, 442 (Or. 1918).

attorney general issued a 2005 opinion that attempted to create a new kind of public right—a so-called “public use doctrine”—distinguished from the sovereign usufructuary PTD.¹⁵⁰ According to that opinion, where the bed of a waterbody is not state-owned, the public has a right to use the water if it is capable of supporting recreational watercraft.¹⁵¹ However, the attorney general’s opinion made no mention of the state’s obligation to protect public access under the Statehood Act and implied that the Oregon PTD was limited to submerged and submersible lands owned by the state.¹⁵²

The state’s position is now under challenge before the Oregon Supreme Court. The plaintiffs claim that (1) the PTD applies to Oswego Lake as a navigable-in-fact water that supports numerous recreational watercraft on any sunny summer day and (2) the public may access those trust waters from city-owned public parklands adjacent to the lake.¹⁵³ The plaintiffs are supported by amicus briefs from over sixty law professors and several public access and fishing groups.¹⁵⁴ The law professors not only claim that the state’s position is inconsistent with the Oregon Supreme Court’s embracing of the sovereign usufructuary PTD over a century ago, but also overlooks both the Oregon courts’ recognition of public access rights to and from public parklands and the Statehood Act’s promise that the navigable waters in the state would remain as “common highways” and “forever free.”¹⁵⁵

A problem for the state before the Oregon Supreme Court may be inconsistency. In litigation over the Superfund site that is the Lower Willamette River, the state has claimed that:

The State holds in trust for the public the bed and banks, and waters between the bed and banks, of *all waterways* within the State. By virtue of its public trust responsibilities, all such lands are to be preserved for public use *The state is also the trustee of all natural resources—including land, water, wildlife,*

150. Op. Or. Att’y Gen. 8281, 2005 WL 1079391, at *16–17, *24 (Apr. 21, 2005).

151. *Id.* at *21–24 (discussing *Lamprey*, *Guilliams*, and *Luscher*).

152. *See id.* at *27 (“[I]t is unclear how Oregon appellate courts . . . will take into account the essential nullification of the right to use a navigable waterway worked by an inability to access the uplands.”).

153. Appellant’s Opening Brief and Excerpt of Record at 18–19, 21, *Kramer v. Lake Oswego*, No. A156284 (Or. July 8, 2014), 2014 WL 9865507.

154. *See* Brief on the Merits of Law Professors, et al. as Amici Curiae in Support of Petitioners, *Kramer v. Lake Oswego*, No. A156284 (Or. Dec. 12, 2017), 2017 WL 6805171 [hereinafter *Law Professors Amicus*]; Amicus Brief of the Association of Northwest Steelheaders, Inc., *Kramer v. City of Lake Oswego*, No. A156284 (Or. Dec. 11, 2017), 2017 WL 6605507.

155. *Law Professors Amicus*, *supra* note 154, at 12–14, 24–25, 30–31 (quoting Oregon Admission Act, ch. 33, § 2, 11 Stat. 383, 383–84 (1859)).

and habitat areas—within its borders. As trustee, the State holds these natural resources in trust for all Oregonians—preserving, protecting, and making them available for all¹⁵⁶

This statement directly contradicts the state’s position in the Oswego Lake case, in which the state has denied trust responsibility for a waterbody that clearly meets the state’s navigability test—being capable of navigation by recreational watercraft.¹⁵⁷ The Oswego Lake case will test the viability of the sovereign usufructuary PTD in Oregon. Oregon courts are also being asked to apply the PTD to destabilizing atmospheric pollution threatening the planet’s climate.¹⁵⁸

CONCLUSION

As the New Jersey Supreme Court recognized close to a half-century ago, the PTD is not static.¹⁵⁹ Instead, as Justice Holmes articulated concerning common law decision making, the PTD reflects the “[f]elt necessities of the time.”¹⁶⁰ In the context of the PTD’s public use obligations, these “felt necessities” are within the discretion of state courts.¹⁶¹

Recognition of public rights in wildlife and beaches requires no further evolution of the PTD.¹⁶² These public rights are both clear examples of the application of the sovereign usufructuary PTD.¹⁶³ Distinguishing them as the *wildlife trust* or as *customary rights* is simply a mechanism for eliminating

156. Complaint at 5, *Oregon v. Monsanto Co.*, No. 18CV00540 (Or. Cir Ct. Jan. 4, 2018) (emphasis added).

157. See *supra* notes 146–56 and accompanying text (describing the City of Lake Oswego and the State of Oregon’s position in the litigation).

158. *Chernaik v. Kitzhaber*, 328 P.3d 799, 800 (Or. Ct. App. 2014) (“Plaintiffs are children who . . . sued the State of Oregon . . . for declaratory and equitable relief [P]laintiffs seek . . . a declaration that defendants have violated their duties to uphold the public trust and protect the State’s atmosphere [and resources] from the impacts of climate change.” (internal quotations omitted)).

159. *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972).

160. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (1881).

161. *Id.*; see *supra* Parts III & III.A (explaining that the sovereign usufructuary PTD is a matter of state law).

162. See *supra* notes 83 and 104 (discussing cases recognizing public trust rights to beach access and wildlife).

163. See, e.g., *Nies v. Town of Emerald Isle*, 780 S.E.2d 187, 194 (N.C. Ct. App. 2015) (“Public trust rights are associated with public trust lands, but are not inextricably tied to ownership of these lands.”); see also *Geer v. Connecticut*, 161 U.S. 519, 529 (1896) (“The wild game within a State belongs to the people in their collective sovereign capacity.” (quoting *Ex Parte Maier*, 37 P. 402, 404 (Cal. 1894))).

public enforcement rights.¹⁶⁴ The loser would be the public: the beneficiary of the PTD.

The frontier of the sovereign usufructuary PTD may well lie in public access rights to trust resources. The public's right to use the trust *res* is of little value if the public can be excluded through closed off public access to adjacent lands, as has happened in the Oswego Lake case. The principle behind the beach access decisions was that access over the privately owned dry sand was ancillary to the public's use of tidelands and the ocean.¹⁶⁵ In those cases the *jus privatum* was not a mechanism of exclusion of the *jus publicum*.¹⁶⁶ Public access advocates will likely seek a similar ancillary right to reach trust resources in the future.¹⁶⁷

Judicial recognition of the PTD's dichotomous *jus privatum* and *jus publicum* estates—the kind of split estate familiar to private trust lawyers—has produced a sovereign usufructuary PTD that burdens resources that are not state-owned. Recently, the Washington Supreme Court presciently examined the nature of this dichotomy in a decision involving the status of a nearly 60-year old fill in Lake Chelan.¹⁶⁸ The court contrasted the *jus publicum* with the *jus privatum*, explaining that “[t]he fact that the State never acquired title ownership [to the fill property] does not mean the public trust doctrine has no constitutional force as to this property.”¹⁶⁹ The court also clarified that the *jus privatum* “remains subservient” to the *jus*

164. See *supra* notes 83, 104 and accompanying text (discussing *Geer* and *Thornton*).

165. See *supra* notes 83, 104 and accompanying text (discussing several cases where courts upheld public access across privately owned beaches); see also *supra* Part III.B (explaining that after *Lamprey* “states began to adopt broad definitions of waterways to which the public had access rights irrespective of public riverbed or lakebed ownership”).

166. See *Shively v. Bowlby*, 152 U.S. 1, 48 (1894) (discussing the distinction between *jus privatum* and *jus publicum*); see also *infra* notes 168–70 and accompanying text (analyzing the *jus privatum* and *jus publicum* distinction in a recent Washington Supreme Court case).

167. In *Weise v. Smith*, the Oregon Supreme Court long ago recognized that a member of the public using a navigable water for log floats could fasten supports on surrounding private uplands to facilitate the operation. *Weise v. Smith*, 3 Or. 445, 450–51 (1869). Similarly, states recognizing portage rights sanction trust users' temporary use of private uplands. See, e.g., *Galt v. State ex rel. Dep't of Fish, Wildlife & Parks*, 731 P.2d 912, 916 (Mont. 1987) (“Landowners, through whose property a water courts flows . . . , have their fee impressed with a dominant estate in favor of the public.”).

168. See *Chelan Basin Conservancy v. GBI Holding Co.*, 413 P.3d 549, 557, 561–62 (Wash. 2018) (deciding that the Washington legislature had authorized the fill in a 1971 statute, which a trenchant four-member concurrence insisted should have been subjected to the *Illinois Central*-like PTD exemptions); see also *Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987) (“The test of whether or not an exercise of legislative power with respect to tidelands and shorelands violates the ‘public trust doctrine’ is found in [*Illinois Central*].”).

169. *Chelan Basin Conservancy*, 413 P.3d at 555, 558 (explaining that private property “remains continuously subject to the [PTD] servitude”). The PTD is constitutionally entrenched in Washington. WASH. CONST. art. XVII; see *Chelan Basin Conservancy*, 413 P.3d at 558 (“[T]he public trust doctrine is ‘partially encapsulated’ in article 17 of [the] state constitution.” (quoting *Rettkowski v. Dep't of Ecology*, 858 P.2d 232, 239 (Wash. 1993))).

publicum, which operates “much like ‘a covenant running with the land.’”¹⁷⁰

Over 125 years ago, the Minnesota Supreme Court anticipated the Lake Chelan Court’s decision by uncoupling the sovereign PTD from land ownership in its *Lamprey* decision.¹⁷¹ Judicial recognition of the sovereign usufructuary PTD could have significant effects on ongoing cases. For example, if courts understand that the scope of the PTD is not confined to state lands, there might be no principled way of distinguishing state trust ownership of surface water from groundwater.¹⁷² Something similar might be said concerning wildlife, a widely recognized trust resource,¹⁷³ and the atmosphere.¹⁷⁴ Groundwater sustainability and atmospheric stability both clearly fit within *Illinois Central*’s issues “of public concern.”¹⁷⁵ If *Lamprey*’s legacy extends to the state’s duty to protect these resources in a climate-challenged world, the decision may be remembered as just as much of a lodestar as the *Illinois Central* decision that Professor Sax made famous a half-century ago.¹⁷⁶

170. *Chelan Basin Conservancy*, 413 P.3d at 555 (quoting *Orion Corp. v. State*, 747 P.2d 1062, 1072–73 (Wash. 1987)); Scott W. Reed, *The Public Trust Doctrine: Is it Amphibious?*, 1 J. ENVTL. L. & LITIG. 107, 118 (1986).

171. *Lamprey*, decided in 1893, was a year after the Supreme Court’s *Illinois Central* decision and three years before *Geer v. Connecticut*. See *supra* notes 11, 104 (providing decision dates of *Illinois Central* and *Geer*, respectively). All three cases reflect the strong anti-monopolization sentiment widespread in the populist movement of the 1890s, a counterweight to privatization and exclusion of the dominant thinking of the Gilded Age of post-Civil War America. See Dunning, *supra* note 108, § 32.03 (explaining the expansion of the *Lamprey* rule to include non-commercial public rights). Populists distrusted hierarchy and the centralization of wealth, as evident in other initiatives like the Interstate Commerce Commission Act and the Sherman Anti-Trust Act. See George J. Stigler, *The Origin of the Sherman Act*, 14 J. L. STUD. 1, 1 (1985) (discussing the populist sentiments that led to the passing of the Sherman Anti-Trust Act). By extending the PTD—beyond a means to ensure public use of waterbodies that were important arteries of commerce—to protect the public’s recreational use of waterways, the *Lamprey* decision reflected the sentiments of the age. *Id.* at 5.

172. See, e.g., *Envtl. Law Found. v. State Water Res. Control Bd.*, No. 34-2010-80000583, 2014 WL 8843074, at *2, *6 (Cal. Super. Ct. July 15, 2014) (“[T]he court concludes the public trust doctrine protects navigable waterways from harm caused by groundwater extraction”); *Lake Beulah Mgmt. Dist. v. Wis. Dep’t of Nat. Res.*, 799 N.W.2d 73, 76 (Wis. 2011) (“The [Department of Natural Resources] has the authority and a general duty to consider whether a proposed high capacity well may harm waters of the state.” (footnotes omitted)).

173. See *supra* note 104 (discussing the state ownership of wildlife).

174. See *supra* notes 4, 19 (discussing *Juliana* and the atmospheric trust).

175. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 455 (1892) (“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.” (emphasis added)).

176. Sax, *Effective Judicial Intervention*, *supra* note 10, at 489.