

TWO WRONGS? CORRECTING PROFESSOR LAZARUS'S MISUNDERSTANDING OF THE PUBLIC TRUST DOCTRINE

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This paper responds to Professor Richard Lazarus's recent and longstanding criticisms of the public trust doctrine, claiming that Richard misunderstands the nonabsolutist nature of the doctrine, which seeks accommodation between public and private property. Although he acknowledges the value of the public trust doctrine as a defense to claims of private takings, he thinks that the "background principles" defense it affords government regulators is a static doctrine. And he fails to see that the public trust doctrine hardly equips courts with the authority to displace legislative and administrative decision makers. Instead, as epitomized in the well-known Mono Lake decision, the doctrine—an inherent limit on all sovereigns—requires those more representative branches to exercise their discretion in protecting trust resources from monopolization or destruction.

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I. INTRODUCTION

Richard Lazarus is one of the leading lights of modern environmental law. His book, *Making Environmental Law*,¹ should be required reading for anyone interested in the evolution of modern environmental law. He is without a doubt the leading academic analyst of the Supreme Court's environmental decisions, and his close following of the Court's decisions is a

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¹ RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004).

busy law professor's lifeline to the Court.² I have known Richard for nearly thirty years, and I always pay attention to what he says and writes. And I almost always agree with him.

But he not only got the public trust doctrine (PTD) wrong on his tenure piece thirty years ago,³ he has still got it wrong.⁴ Worse, he is unrepentant about his error.⁵ Over the years, he has moved from the law schools at Washington-St. Louis to Georgetown to Harvard, so he is not someone with whom you quarrel lightly. But, since I am associated closely with the PTD,⁶ I must because—given Richard's prominence—he could do more damage than he's already done to a doctrine that I don't believe he has studied it in sufficient depth.

Both Richard and I are deeply indebted to the legacy of Joe Sax, the patron saint of the modern PTD.⁷ Richard made clear his debt throughout his recent article,⁸ and my coauthors and I dedicated our recent Natural Resources Law casebook to Joe.⁹ But Joe was spot-on about Richard's conclusions about the PTD: he was, in Joe's words, "utterly wrong."¹⁰ Regrettably, he remains so. Although Richard might not be "hopelessly naïve," as I once alleged,¹¹ he is still way off-base. I want to use this space to explain why.

² I count myself among those who depend upon Richard's analysis of the Court. He often posts his opinions on the invaluable law professors' listserv, enlawprofessors@lists.uoregon.edu.

³ Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631 (1986) [hereinafter Lazarus, *Changing Conceptions of Property*].

⁴ Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make a Right?*, 45 ENVTL. L. 1139 (2015) [hereinafter Lazarus, *Judicial Missteps*]. Richard made a similar presentation at the Environmental Law symposium on the PTD held at Lewis & Clark Law School in April 2015. The other papers presented at the conference are published at 45 ENVTL. L. 257–640 (2015).

⁵ Lazarus, *Judicial Missteps*, *supra* note 4, at 1152–61 (explaining how he "would not refine [his] thinking" about the PTD).

⁶ See MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* (2d ed. 2015).

⁷ See, e.g., Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter Sax, *Natural Resource Law*]; Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980); Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473 (1989). Sax's influence was not confined to the PTD in the United States. See 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 *passim* (2012) (surveying the PTD abroad).

⁸ Lazarus, *Judicial Missteps*, *supra* note 4, at 1140–41, 1160–62.

⁹ ERIC T. FREYFOGLE, MICHAEL C. BLUMM & BLAKE HUDSON, *NATURAL RESOURCES LAW: PRIVATE RIGHTS AND THE PUBLIC INTEREST*, at iii, viii (2015). Looking back, I acknowledge that I acquired an enormous number of my ideas from Joe. Although I cited him a lot, I should have cited him more often, since he influenced my thinking so much. I often think about what Joe would say about the problems brought to me. Maybe that is the greatest tribute of all.

¹⁰ See Lazarus, *Judicial Missteps*, *supra* note 4, at 1143 n.18 (quoting Joe's tenure evaluation of Richard).

¹¹ Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 593 n.98 (1989) [hereinafter Blumm,

In order to do so, I need to briefly outline the contours of the PTD. In this country, the doctrine grew up in the nineteenth century around the idea of protecting public access to water resources in an era where transportation by road was difficult and by rail was either unavailable or not subject to price competition.¹² Public property rights in streams were therefore essential to widespread participation in the developing market economy, and the PTD ensured that those crucial resources were not subjected to monopoly rents.¹³ Thus, the PTD was consonant with a populist agenda of the mid-1800s that promoted widespread distribution of land ownership through the federal legislation, and looked skeptically on unbridled accumulation of private wealth.¹⁴

The PTD's antimonopolization and widespread distribution impulses today coexist with its environmental role because the PTD has never been an exclusively ownership doctrine—it emphasizes public uses as well.¹⁵ This public easement aspect of the PTD means that the PTD is not so much a threat to private property as a means of curtailing private rights that damage public uses. In fact, the roots of the PTD's environmental role also may be traced to the nineteenth century in the form of state sovereign ownership of wildlife, which was the fulcrum of state wildlife regulation, and was

Public Property]. I now acknowledge that my article was also “hopelessly naïve” concerning my prediction that the decision in *National Audobon Society v. Superior Lake (Mono Lake)*, 658 P.2d 709 (Cal. 1983), would lead to what I thought would be a large PTD effect on Western water law. *Id.* at 597–600. Only Hawaii fully endorsed the application of the PTD to water rights. *In re Water Use Permit Applications (Waiahole Ditch)*, 9 P.3d 409, 445 (Haw. 2000). And even in California, the effect of the PTD has been difficult to determine. See Dave Owen, *The Mono Lake Case, the Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099, 1103–05 (2012) (finding, after reviewing administrative and court decisions, that the PTD in California water decision making has had most of its influence at the administrative level, with little evidence of PTD influencing the courts).

¹² See, e.g., Lazarus, *Changing Conceptions of Property*, *supra* note 3, at 636 (“Commerce was primarily waterborne; the rivers served as highways for pioneers and supplied power for industry. Accordingly, cities and towns invariably lined major waterways, and natural ports were a prerequisite to developing a major metropolitan area.”); Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and the Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 431–33 (1989) (footnotes omitted) (“[I]t is hard to overstate the importance of the major watercourses during the formative years of the United States. To the early settlers, the rivers furnished paths of exploration and avenues for the fur trade and log floats. Due to the density of the forests and the difficulty of road construction, the watercourses afforded logical areas for settlement. Fishing was significant, both for commercial and subsistence purposes.”); PAUL W. MACAVOY, *THE ECONOMIC EFFECTS OF REGULATION: THE TRUNK-LINE RAILROAD CARTELS AND THE INTERSTATE COMMERCE COMMISSION BEFORE 1900*, at 13–14 (1965) (discussing railroad cartels in the 1800s).

¹³ Michael C. Blumm & Kara Tebeau, *Antimonopoly in American Public Land Law*, 28 GEO. ENVTL. L. REV. 155, 189–90 (2016).

¹⁴ See *id.* at 169–73 (discussing, *inter alia*, the Homestead Act of 1862, ch. 75, 12 Stat. 392, and the Preemption Act of 1841, ch. 16, 5 Stat. 453, *repealed by* General Revision Act of 1891, ch. 561, § 4, 26 Stat. 1095, 1097).

¹⁵ Blumm, *Public Property*, *supra* note 11, at 580–82.

judicially ratified in cases like *Geer v. Connecticut*.¹⁶ State sovereign ownership, properly understood, is a fundamental aspect of the PTD.

Richard does not see the important role for the PTD in either its antimonopolization or environmental protection roles, although he does acknowledge its value as a defense to regulatory takings claims.¹⁷ His mistakes were basically three: 1) he thinks the PTD is absolutist—it is not; 2) he thinks the *Lucas v. South Carolina Coastal Council*¹⁸ decision's reference to “background principles,” which serve as a defense to takings claims, and which clearly include the PTD, is a reference to static property principles—it was not; and 3) he thinks that the PTD usurps legislative and executive prerogatives—it clearly does not. I explain each of Richard's errors below.

II. THE NONABSOLUTIST NATURE OF THE PTD

Richard seems to think that the PTD is objectionable because it imposes “absolutist notions of property rights.”¹⁹ You hear this often from the libertarian crowd, which views the PTD as a threat to private property.²⁰ It is just not true, as I have tried to show: the PTD and private property can and do coexist. What the PTD demands is an accommodation of both public and private rights in property. As I once wrote:

Some libertarians see application of the public trust doctrine as an evisceration of private property rights. In reality, such claims are hyperbolic. The doctrine actually functions to mediate between public and private rights, and thus is hardly the antithesis of private property; instead, it functions to transform, not eradicate, private property rights.²¹

Richard's assumption that the PTD is absolute is just as wrong as the libertarians' view. A good example is the famous *National Audubon Society v. Superior Court (Mono Lake)*²² case. There, the California Supreme Court hardly viewed the PTD as absolutist, directing the state to “exercise

¹⁶ 161 U.S. 519, 534–35 (1896) (upholding a state wildlife statute prohibiting the transport of legally caught game after the hunting season on state sovereign ownership grounds), *overruled by* *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

¹⁷ Lazarus, *Judicial Missteps*, *supra* note 4, at 1150–52.

¹⁸ 505 U.S. 1003 (1992).

¹⁹ Lazarus, *Judicial Missteps*, *supra* note 4, at 1141.

²⁰ See, e.g., Randy T. Simmons, *Property and the Public Trust Doctrine*, 39 PROP. & ENV'T RES. CENTER POL'Y SERIES 13 (Roger Meiners, ed. 2007) (charging that the PTD equips judges and legislatures with the power to reduce property rights at the whims of changing public perceptions; and charging that the effect of the PTD on private property eliminates the fundamental right to exclude, and, without that right, property devolves into the open access commons from which it emerged, leading to inevitable overuse of resources and environmental destruction).

²¹ Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENVTL. L. REV. 649, 650 (2010) [hereinafter Blumm, *The Public Trust Doctrine*] (footnotes omitted).

²² 658 P.2d 709 (Cal. 1983).

continuous supervision” of diversionary water rights in order to ensure consideration of the ecological values protected by the public trust.²³ The court did not rule that the public trust uses trump appropriated water rights, but it did direct the state to protect public trust uses “whenever feasible” to achieve both the economic value of the diversions and the ecological values of the lake and its feeder streams.²⁴ In implementing the court’s directive, the state water board decided to try to partially restore the lake’s level by cutting back on the diversions, but it did not eliminate them.²⁵ The accommodation the state reached over a decade later, in 1994, benefitted both the lake and the water supply situation in Los Angeles, where the court’s decision helped to revolutionize the city’s approach to water management and use.²⁶

In short, the *Mono Lake* court’s interpretation of the PTD as requiring an accommodation of PTD values through a publicly reviewable balancing process produced a win-win situation. This balancing hardly reflected an absolutist view of property.

Nor was *Mono Lake* an unusual decision. As I have tried to show elsewhere, the PTD has provided a mediating force in numerous other cases.²⁷ Courts have, for example, divided ownership conceptually into distinct public and private estates, the so-called *jus privatum* and *jus publicum*; they have authorized small privatizations of trust resources that don’t substantially adversely affect trust values; they have interpreted what were thought to be fees simple to be determinable fees; and they have found public easements that burden other private fees simple.²⁸ In none of these cases were private rights disregarded. There was no “absolute” public right that eviscerated private rights. Richard’s assumption about the absolute nature of the PTD is simply misguided.

III. THE NONSTATIC NATURE OF “BACKGROUND PRINCIPLES” AS A TAKINGS DEFENSE

Richard does see the value of the PTD as a useful defense to regulatory takings claims.²⁹ The *Lucas* decision, no doubt unintentionally, actually provided a powerful defense to government regulators through its recognition of “background principles of nuisance and property law.”³⁰

But Richard’s criticism of *Lucas* misinterpreted the decision as reflecting a static view of property rights.³¹ Perhaps Justice Scalia, author of

²³ *Id.* at 712.

²⁴ *Id.* at 728.

²⁵ See BLUMM & WOOD, *supra* note 6, at 183.

²⁶ Madeleine Nash, *The Tenuous Revival of Mono Lake*, HIGH COUNTRY NEWS Nov. 25, 2015, <http://www.hcn.org/issues/47.20/the-tenuous-revival-of-mono-lake> (last visited July 16, 2016).

²⁷ Blumm, *The Public Trust Doctrine*, *supra* note 21, at 650–55.

²⁸ *Id.* at 658–65 (collecting cases).

²⁹ Lazarus, *Judicial Missteps*, *supra* note 4, at 1150.

³⁰ *Lucas*, 505 U.S. 1003, 1031 (1992).

³¹ Lazarus, *Judicial Missteps*, *supra* note 4, at 1150 (“Justice Scalia’s majority opinion for the Court in *Lucas* is rooted in nonsensical static notions of property law . . .”).

Lucas, did view property rights as being static, but his *Lucas* opinion ratified a dynamic vision of property law in state courts. The “background principles” it authorized as an exception to the per se takings rule that the case established was hardly a recognition of static property rights.³² Instead, it incorporated state nuisance law and property law as interpreted by state courts.³³ As Richard himself recognized, nuisance law has always been dynamic in nature, evolving over time.³⁴ So property law, like the PTD, can evolve.³⁵ One effect of the *Lucas* decision was, as Richard understood, to rule that environmental regulations that merely codify the common law take no private property rights.³⁶ In fact, the background principles exception of *Lucas* has been more influential than the per se takings rule the case announced.³⁷ Thus, the real effect of the case hardly has been to establish a static vision of property law, as Richard alleged.³⁸

³² *Lucas* established a categorical takings rule for landowners affected by regulations which produce complete economic wipeouts, the loss of “all beneficial value,” 505 U.S. at 1019 n.8, but authorized an exception where a regulation merely replicates “background principles” of state property and nuisance law, as defined by state courts. 505 U.S. at 1031–32.

³³ *Id.* at 1031–32.

³⁴ Lazarus, *Judicial Missteps*, *supra* note 4, at 1150.

³⁵ *See supra* note 31 and accompanying text.

³⁶ Lazarus, *Judicial Missteps*, *supra* note 4, at 1150.

³⁷ *See* Michael C. Blumm & Lucas Ritchie, *Lucas’s Unlikely Legacy: The Rise of Background Principles in Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 322 (2005) (“[T]he *Lucas* legacy represents one of the starkest recent examples of the law of unintended consequences. For rather than heralding in a new era of landowner compensation or government deregulation, *Lucas* instead spawned a surprising rise of categorical defenses to takings claims in which governments can defeat compensation suits . . .”); *see also* John D. Echeverria, *The Public Trust Doctrine as a Background Principles Defense in Takings Litigation*, 45 U.C. DAVIS L. REV. 931, 945 (2012) (“[T]he *Lucas* decision has turned out to have greater impact than most observers originally anticipated insofar as courts have relied heavily on the background principles concept to reject takings claims.”).

³⁸ It is true that in *Lucas*, Justice Scalia suggested that the “background principles” defense could be cabined by “objectively reasonable” interpretations of the state’s property and nuisance precedents, 505 U.S. at 1032 n.18, but no federal court has found a state court’s interpretation to fail that test. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010), four members of the Court joined Justice Scalia in suggesting that a judicial interpretation could produce a compensable taking. *Id.* at 730; *see* Michael C. Blumm & Elizabeth B. Dawson, *The Florida Beach Case and the Road to Judicial Takings*, 35 WM. & MARY. ENVTL. L. & POL’Y REV. 713, 716 (2011) (discussing the judicial takings doctrine). But that possibility also has not resulted in any compensable takings.

An example of a prominent background principle of state property law is the state sovereign ownership of wildlife doctrine, which nearly every state has recognized. *See* Michael C. Blumm & Aurora Paulsen, *The Public Trust in Wildlife*, 2013 UTAH L. REV. 1437, 1488–504 (including citations to 48 state claims of sovereign ownership). The Supreme Court recently gave a surprising endorsement to the sovereign wildlife ownership in *Horne v. Department of Agriculture*, 135 S. Ct. 2419 (2015), distinguishing a compensable takings of raisins in the context of a government price-control program from a similar program involving oysters. *Id.* at 2431 (internal quotation marks omitted) (“Raisins are not like oysters; they are private property—the fruit of the growers’ labor—not public things subject to the absolute control of the state.”); *see also* John D. Echeverria & Michael C. Blumm, *Horne v. Department of Agriculture: Expanding Per Se Takings While Endorsing State Ownership of Wildlife*, 75 MD. L. REV. 657, 696–97 (2016) (discussing the Court’s surprising ratification of the sovereign wildlife trust doctrine).

IV. THE NONINTRUSIVE NATURE OF THE PTD ON EXECUTIVE AND LEGISLATIVE PREROGATIVES

Perhaps Richard's largest error was his assumption that the PTD encourages courts to substitute "their policy judgment regarding the proper level of environmental protection for that of the legislature or executive branch."³⁹ He was particularly critical of courts' ability to fashion appropriate remedies in cases seeking to invoke the PTD to curb greenhouse gas emissions, claiming that courts would have to make "fundamental social and economic and policy judgments" inappropriate for the judiciary.⁴⁰

Richard mischaracterized how the PTD actually functions. The *Mono Lake* decision is again illustrative. In the process of affirming that recreation and ecological values, including air quality, were within the scope of the PTD, the California Supreme Court made no attempt at policy judgments; it merely directed the state to reconsider the balance between diversionary uses and instream uses, requiring a calibration of costs and benefits and tradeoffs.⁴¹ It took over a decade, but the state water agency in 1994 finally did the balancing the court ordered, and the results were a partial restoration of Mono Lake and a revolution in water conservation in Los Angeles.⁴² The invocation of the PTD thus did not involve the court in the policy balancing; that was the chore of the state water agency. As in *Mono Lake*, the PTD often functions as a vehicle for courts to require agencies to exercise their discretion, as Joe Sax anticipated all those years ago.⁴³

The *Mono Lake* decision also serves as a reminder that the PTD is much more than a common law doctrine. It is a doctrine of *sovereign ownership*. That implies not only sovereign authority, but also sovereign duties. As the California Supreme Court ruled, the PTD imposed an affirmative duty to "attempt, so far as feasible, to avoid or minimize harm" to trust resources.⁴⁴ This duty requires the state to exercise a "continuous supervision" of trust resources and actions that affect them.⁴⁵ And the duty, as the case illustrated, was publicly enforceable.⁴⁶

³⁹ Lazarus, *Judicial Missteps*, *supra* note 4, at 1152.

⁴⁰ *Id.* at 1156; *See also id.* at 1159 (doubting that judges are "remotely competent" to take the place of deadlocked legislators).

⁴¹ *Mono Lake*, 658 P.2d 709, 727-29 (Cal. 1983).

⁴² *See* Brian E. Gray, *Ensuring the Public Trust*, 45 U.C. DAVIS L. REV. 973, 994-97 (2012) (describing the 1994 decision as setting a goal of restoring the lake level by 18 feet, curtailing LA's diversions, establishing minimum flow criteria for the tributary feeder streams, and determining that the city could make up its losses through a combination of increased groundwater pumping, water purchases, water transfers, water conservation, and use of reclaimed wastewater); Nash, *supra* note 26 (observing that despite adding over a million residents Los Angeles uses less water than it did nearly a half-century ago).

⁴³ Sax, *Natural Resource Law*, *supra* note 7, at 518. Using the PTD as a vehicle for courts to remand issues to the legislature is another means by which Professor Sax saw the doctrine as performing a democratizing function without displacing the legislative function of more representative branches. *Id.* at 559. *See also* Lazarus, *Judicial Missteps*, *supra* note 4, at 1160 (quoting Sax).

⁴⁴ *Mono Lake*, 658 P.2d at 712.

⁴⁵ *Id.*

⁴⁶ *Id.* at 716 n.11.

In many states, although not California, the PTD has a constitutional or statutory basis.⁴⁷ In both Hawaii and Pennsylvania, the sites of two important PTD decisions, the PTD has constitutional entrenchment.⁴⁸ In those states, Richard's complaint that the PTD has no constitutional basis is clearly inapt.⁴⁹ In other places, the PTD may be embedded in a statehood act, such as in Oregon and other states with statehood acts drawn from the language of the Ordinance of 1787.⁵⁰ In those states, it is not accurate to dismiss the PTD as a common law doctrine capable of being subsumed by statutes.

V. CONCLUSION

Richard is a prominent environmental law scholar and perhaps the leading academic environmental lawyer before the United States Supreme Court. But after he published his tenure piece some thirty years ago,⁵¹ he has not closely followed PTD developments. Although he does appreciate the utility of the PTD as a governmental defense to regulatory takings claims,⁵² he fails to see that the PTD is not merely a useful takings defense, but is also an affirmative means of preventing monopolization of important public resources, going back to the Supreme Court's foundation case of *Illinois Central Railroad v. Illinois*⁵³ 120 years ago.⁵⁴

⁴⁷ See, e.g., Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 685 (2012) (using Nevada and Pennsylvania as examples of constitutional basis for PTD, and Vermont as an example of statutory basis); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 Notre Dame L. Rev. 699 *passim* (2006) (discussing the role of the PTD in constitutional and statutory interpretation).

⁴⁸ See *Waiahole Ditch*, 9 P.3d 409, 443 (Haw. 2000) ("The plain reading of these provisions manifests the framers' intent to incorporate the notion of the public trust into our constitution."); *Robinson Twp. v. Pennsylvania*, 83 A.3d 901, 954–56 (Pa. 2013) ("This environmental public trust was created by the people of Pennsylvania, as the common owners of the Commonwealth's public natural resources; this concept is consistent with the ratification process of the constitutional amendment delineating the terms of the trust."). For further discussion of *Robinson Township*, see John C. Dembach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENVTL. L. 463 *passim* (2015).

⁴⁹ Lazarus, *Judicial Missteps*, *supra* note 4, at 1155–56.

⁵⁰ Ordinance of 1787: The Northwest Territorial Government, *reprinted in* 1 U.S.C., at LVII (2012) [hereinafter Northwest Ordinance]. The argument that the Act of Feb. 14, 1859 (Oregon Statehood Act), ch. 33, § 2, 11 Stat. 383, 383 (1859), established the PTD is made in an amicus brief in a case pending before the Oregon Court of Appeals, alleging that the state breached its fiduciary duty in failing to regulate greenhouse gas emissions. Brief for Law Professors, as Amici Curiae Supporting Appellants at 9, *Chernaik v. Brown*, No. A159826 (Or. Ct. App filed Feb. 25, 2016), available at <http://ssrn.com/abstract=2720012>. The Oregon Statehood Act's language that the navigable waters in the state would be "common highways and forever free," section 2, was drawn from article IV of the Northwest Ordinance, the foundation of six Midwest States, from Michigan to Minnesota. See generally Mathew J. Festa, *Property and Republicanism in the Northwest Ordinance*, 45 ARIZ. ST. L.J. 409, 461 (2014) (recognizing the importance of the Northwest Ordinance in establishing the PTD).

⁵¹ Lazarus, *Changing Conceptions of Property*, *supra* note 3.

⁵² Lazarus, *Judicial Missteps*, *supra* note 4, at 1150–52.

⁵³ 146 U.S. 387 (1892).

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Properly understood, the PTD's sovereign ownership is not only a defense for government regulators, but an antidote to government inaction, preventing privatization and calling for protection of select resources to preserve them for the beneficiaries: the public, including future generations. My hope is that Richard will come to see the functions served by the modern PTD, and that PTD advocates may count upon him for support if a PTD case reaches the United States Supreme Court.

⁵⁴ See Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and Illinois Central Railroad*, 45 ENVTL. L. 399, 402 (2015) (analyzing the effect of *Illinois Central Railroad* on the PTD).