

SEEING THE FOREST FOR THE TREES: PROTECTING WILDERNESS
UNDER THE PUBLIC TRUST

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SEEING THE FOREST FOR THE TREES: PROTECTING WILDERNESS UNDER THE PUBLIC TRUST

*“A river is more than an amenity, it is a treasure.”*¹

I. INTRODUCTION

“I didn’t know our lakes and resources were for sale,”² a Wisconsin television advertisement announced to viewers. “Wisconsin’s lakes and rivers belong to the people. But legislators want to give Big Business developers the right to fill pristine streams, dredge rivers and build on sensitive lakeshore.”³ This provocative television commercial, played on major stations across the state, was part of an attack by Wisconsin environmentalists and concerned citizens against the state’s proposed “Job Creation Act.”⁴ The commercial warned that the Job Creation Bill, which State GOP leaders claimed as necessary to “make Wisconsin competitive with other states in attracting businesses”⁵, would actually lead to pollution, fish and wildlife destruction, and the degradation of lakes, rivers and streams.⁶ To Wisconsin citizens, this bill represented a regression from prior state environmental efforts. The proposed bill undermined air and water protections by implementing the nation’s lowest air-quality standards and allowing dredging, diverting, and filling of state waterways without a public comment period or oversight by the State Department of Natural Resources.⁷ Despite the environmental

¹ Justice Oliver Wendell Holmes, in *State of New Jersey v. State of New York*, 283 U.S. 336, 342 (1931). Holmes also proclaimed that a river “offers a necessity of life that must be rationed among those who have power over it” in his discussion of the Delaware River.

² *Sierra Club Launches Ads on the Jobs Creation Bill*, (January, 2004), at <http://wisconsin.sierraclub.org/jobs.htm>.

³ *Id.*

⁴ Weier, Anita, *Environmentalists Decry GOP’s Job Creation Act*, Madison.com (November 12, 2003), at www.madison.com.

⁵ *Id.*

⁶ *See supra* note 2.

⁷ *See supra* note 4.

controversy surrounding the bill, however, Wisconsin Governor Doyle signed a version of the Job Creation Bill into law on January 22, 2004.⁸

In Arizona, citizens are protesting a State Senate Appropriations Committee decision to divert money from a voter-created land conservation fund in order to purchase private land around military bases.⁹ The state government's recent decision¹⁰ to set aside land for the preservation of military bases rather than nature ignores Arizona citizens' decision to "prevent 'beautiful property from becoming subdivisions and shopping centers'" so that Arizona may remain "beautiful and bountiful."¹¹ Instead, the state government has sidestepped citizens' efforts to preserve nature in favor of military base interests, because military bases are a "major part of Arizona's economy."¹² Arizona's state government has decided that "any money the state spends to make the bases less likely to be closed would be money well spent,"¹³ even if that money was set aside, by Arizona citizens, to protect nature.

Meanwhile, environmentally concerned Kansans continue their struggle with the state over the construction and regulation of corporate hog farms, which pollute waterways, kill fish and wildlife, create odor pollution, and contaminate water and air with harmful bacteria.¹⁴ A 1998 Kansas law passed to regulate hog farms in the state

⁸ WISCONSIN CONSERVATIVE DIGEST, *2004 Tax Relief and Job Growth Key for Strong Future: Active Spring Session Topped by Job Creation and Tax Relief* (January, 2004), at <http://www.widigest.com/honadel012204.html>.

⁹ TUCSON CITIZEN, *Our Opinion: Fund Switch Again Ignores Voters' Wishes* (March, 2004), at www.tucsoncitizen.com.

¹⁰ This decision was made on March 12, 2004. *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ National Resources Defense Counsel, *America's Animal Factories: How States Fail to Prevent Pollution from Livestock Wastes, Chapter 1: Introduction and Executive Summary* (1998), available at <http://www.nrdc.org/water/pollution/factor/exec/asp>.

failed to “adequately address odor problems.”¹⁵ The law also barred counties from “passing tougher environmental regulations” than those set at the state level, limiting local conservation efforts.¹⁶

States have a combination of high goals and limited budgets often make economic growth a top priority for state governments. As the Natural Resource Defense Counsel stated in reference to the Kansas hog farms, “State leaders were so anxious to attract [the corporate hog farming] industry,” they expedited permitting required by environmental regulations and offered tax benefits to the corporations, despite the fact that state residents “were not aware of the environmental and economic havoc that could result from having a half-million hogs in the neighborhood.”¹⁷ In the rush to attract economic windfalls, many states, like Kansas, minimize the importance of their natural resources and wilderness lands, preferring immediate financial gain over long-term environmental conservation. In Missouri, for example, hog farms have polluted one-hundred and fifty miles of Missouri’s streams, killing over five-hundred thousand fish.¹⁸

States are so concerned with increasing revenue that they compete with one another for industrial interests, attempting to lure corporations and businesses into bringing their industrial endeavors and their economic windfalls to the state. To attract industry, states offer companies more relaxed environmental regulations, making industrial efforts easier and more affordable. This environmentally detrimental

¹⁵ Natural Resources Defense Counsel, *America’s Animal Factories: How States Fail to Prevent Pollution from Livestock Wastes, Chapter 9: Kansas* (1998), available at <http://www.nrdc.org/water/pollution/factor/stkan.asp>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See supra* note 11.

marketing tactic is referred to as the “race to the bottom” or the “race of laxity.”¹⁹ States “race” to claim the lowest permissible environmental regulation requirements in order to pursue their economic goals through industrial gains. The race may help local marketplaces, but it destroys wilderness.

With the constant push to pursue economic benefits and promote industry, it is difficult to bring environmental concerns to the forefront of state policy. Professor Barton H. Thompson, Jr. notes that state legislatures are often short sighted, seeking immediate economic gain, and immediate approval by state citizens.²⁰ State government agencies are also easily susceptible to “capture” by special interest groups who may easily influence the decisions of state policymakers.²¹ In order to preserve America’s wilderness from the economic focuses of state governments, a forward-thinking, environment-protecting policy must be enforced in every state. The public trust doctrine offers an excellent model for wilderness preservation, and acts as an effective barrier to use in protecting conservation efforts, even during times when state governments attempt to engage in anti-environmental activities.

The public trust doctrine has already been used in many states to protect natural waterways and shorefronts, as well as surrounding nature-lands. The New Jersey Coastal Zone Management Program has been creating a federally funded plan, in accordance with §306(d)(2)(G) of the Coastal Zone Management Act, to manage state waterfronts in a

¹⁹ ZYMUNT J.B. PLATER, ROBERT H. ABRAMS, WILLIAM GOLDFARB & ROBERT L. GRAHAM, ESQ., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 311 (American Casebook Series, West Group, 2d ed. 1998).

²⁰ Barton H. Thompson, *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 Rutgers L.J. 863 (1996).

²¹ Capture is a phenomenon in which governmental agencies become ‘captured’ by market forces. *See id.* ‘Capture’ occurs when the agenda of a government agency who initially seeks to benefit the public interest becomes eroded into narrower views that do not benefit the public, due to the persuasion of special interest groups. *See supra* note 18 at 397.

way that preserves the public use of New Jersey beaches.²² It is suggested that use of the public trust doctrine should incorporate the modern interpretation of public trust concepts, which says that the public trust is meant “to preserve and continually assure the public’s ability to fully use and enjoy public trust lands, waters, and resources for certain public uses.”²³

Similarly, Jan Stevens, retired Attorney General for the State of California, road-mapped “the public’s right to use navigable waterways in California” in accordance with California’s public trust doctrine.²⁴ She stated that under California’s public trust doctrine, all water is open to the public for fishing and recreational purposes, and that the state has a responsibility to assure that waterways and shorelines are maintained and kept unpolluted to promote these benefits.²⁵

The public trust works well to protect America’s waterways and surrounding natural resources. As other resources besides waterways, such as air, state parks, and state wilderness areas become increasingly endangered in times of increasing urbanization and industry, many people are attempting to expand the public trust doctrine to cover these additional resources.

State by state, we can preserve America’s wilderness and reserve land for public use and enjoyment, rather than allowing land allocation and use that degrades the environment. By incorporating the public trust doctrine into state constitutions and laws, states can effectively protect their natural lands from environmental degradation, and

²² The Urban Harbors Institute of the University of Massachusetts Boston, under Contract with the New Jersey Coastal Zone Management Program, *Public Trust Doctrine and Public Access in New Jersey 1* (January 2003), available at http://www.uhi.umb.edu/pdf_files/public_access_in_nj.pdf.

²³ According to *Idaho Forest Industries, Inc. v. Hayden Lake Watershed Improvement District*, 733 P.2d 733, Idaho 512 (1987). See *id.* at 5.

²⁴ Jan Stevens, *Common Highways, and Forever Free: The Public Right of Navigation 1*, available at <http://dbw.ca.gov/PDF/PublicTrustDoctrine.pdf>.

²⁵ *Id.*

solidify a forward-thinking policy of preserving land for future generations instead of dealing with environmental destruction after it occurs. Public trust protections will block anti-environmental state legislative and judicial decisions and alter the national environmental perspective. If every state holds its valuable wilderness in trust for its citizens, the federal government will be urged to follow suit and support the conservation efforts to which America's congressmen and citizens are committed. "Think globally, act locally," the activist mantra, reflects the idea that if Americans make commitments to protect the environment on a local and state level, environmental awareness will increase, and the collective state actions will perpetuate national, and possibly global, change. The public trust doctrine offers an ideal mechanism for acting locally to promote national environmental protection efforts.

II. TRANSFORMING PUBLIC TRUST CONCEPTS INTO A POWERFUL ENVIRONMENTAL INSTRUMENT

The public trust doctrine is one of the most studied, written about, and controversial concepts in the legal world.²⁶ The doctrine is not isolated to a certain audience. Rather, it is referenced in publications ranging from the scholarly writings of law journals²⁷ to the rock-and-roll centered *Rolling Stone Magazine*²⁸ as a doctrinal tool for guarding nature from anti-environmental government policies. When environmental

²⁶ Robert E. Beck, *Reflections on the Occasion of Doug Grant's Departing Idaho*, 35 IDLR 424, 427 (1999). Professor Beck remarks on the large body of writing that has been done on the topic of the public trust doctrine in his article.

²⁷ See Joseph Sax's groundbreaking article, published in 1970 as the contemporary environmentalism lifted off in the United States. Joseph L. Sax, *The Public Trust in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970).

²⁸ Robert F. Kennedy, Jr.'s article pointed to the public trust doctrine as evidence that conservation was a vital part of American history and environmental interests at large. Robert F. Kennedy, Jr., *Crimes Against Nature*, ROLLING STONE MAGAZINE, Feb. 2004 at <http://www.rollingstone.com/features/nationalaffairs/featuregen.asp?pid=2154>.

goals are frustrated by anti-environmental government policies, citizens often point to the public trust doctrine as a source of environmental protection.

Professor Joseph Sax, whose seminal law review article on the public trust doctrine set the path for contemporary use of public trust concepts in America, upholds the idea that the public trust doctrine is a valuable device for combating anti-wilderness governmental activities. He wrote that the public trust concept is useful because it allows judicial oversight when governmental actions “result in wrongful discounting of natural resource values vis a vis competing economic use values.” According to Sax, the public trust doctrine is “a medium for democratization” when environmental interests are ignored by the government.²⁹

Even though the public trust doctrine is lauded as an environmental protection mechanism, the amorphous quality of the concept makes it nebulous and unwieldy, difficult to clarify and even more difficult to properly implement. The doctrine has existed for centuries, but modern civilizations have not solidified public trust concepts into black-letter law. Despite the copious writings regarding the public trust concept, the real-world uses for the doctrine are unclear, and the scope of the doctrine’s power remains largely undefined.³⁰ It is clear through the vast body of reference to the public trust doctrine, however, that although public trust concepts seem amorphous, they are widely regarded as potential instruments in nature conservation efforts. Unfortunately, the public trust doctrine is an unwieldy tool in its current state.

²⁹ Erin Ryan, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 *Envtl. L.* 477, 482-483, citing Joseph Sax in “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 *Mich. L. Rev.* 741 (1970).

³⁰ Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife*, 35 *Land & Water L. Rev.* 23 (2000).

The difficulties of putting the doctrine into action have not completely obstructed use of public trust concepts in American law. It has been used effectively to protect resources that are seen as ‘unownable’ by individuals, namely the nation’s waterfronts and parks. The public trust doctrine is a common law solution that reaches farther than the narrow, plaintiff-by-plaintiff approach of negligence law. While the doctrine protects land itself, negligence law only protects private parties suffering private harms and is only triggered if the tortfeasor knew with substantial certainty that their actions would result in injury, or showed unreasonable conduct or breach of duty.³¹

The public trust doctrine also acts preemptively to protect wilderness and nature-lands. While nuisance and toxic tort claims do deter pollution to some degree, by warning polluters that there may be legal ramifications to their activities, the public trust doctrine offers a more direct approach to blocking environmental degradation. Due to the ripeness requirement inherent in tort law, which bars plaintiffs from filing suit if no injury has occurred, toxic tort and negligence suits are largely after-the-fact remedies for damages already suffered. On the other hand, the public trust doctrine declares, before anti-environmental activities are even contemplated, that certain landscapes and resources are reserved for the public use and conserved to benefit future generations. Because of the public trust doctrine’s focus on preserving lands into the future, tort law, when used in conjunction with the public trust concepts, has the capacity to protect the environment throughout the timeline of pollution, and even before environmental degradation occurs.

This paper demonstrates the potential power of the public trust doctrine as an environmental safeguard for natural resources that cannot be parceled out and ‘captured’

³¹ See *supra* note 15 at 166.

by individual owners. Section III offers a concrete definition of the public trust doctrine and its requirements. In section IV and V, an investigation of the philosophical backings of the doctrine, as well as the historical foundations of public trust concepts, demonstrates that the public trust doctrine has long been imbedded in the nation's policy and also plays an intrinsic role in the value people place on wilderness and nature in society. Section VI discusses modern law interpretations of the public trust doctrine, and section VII addresses case law that further exemplifies the importance and validity of the public trust doctrine. Section VIII introduces the state approach to implementing the public trust requirements set out in section III of this paper. Although the seemingly endless body of work addressing the public trust doctrine makes the doctrine appear merely ideological and unwieldy at first glance, by taking a closer look at the realities of the doctrine, as well as the 'nuts-and-bolts' functionality of the public trust, it becomes clear that the public trust doctrine is a potentially powerful and useful tool if properly implemented to protect the American wilderness from anti-environmental government policies.

By 'thinning' the forest of information surrounding the public trust doctrine, and carving a clear plan for enactment through state governments, via constitutional amendments and self-executing clauses or triggering legislation, the public trust doctrine can become a uniform, enforceable responsibility of the States. This state-by-state implementation can serve as a powerful weapon with which to ward off anti-environmental government policies.

III. A MODEL FOR THE PUBLIC TRUST: THE INNER WORKINGS OF THE PUBLIC TRUST DOCTRINE

Some people who write about the public trust doctrine describe it as an easement over privately owned land, while others speak of the public trust as if it is nothing more than a nature-loving state of mind. Conflicting definitions of the public trust concept lend greatly to its amorphous nature. In order to use the doctrine, it must be based in real-world trust theories, which are clearly defined. Black's Law Dictionary defines a "trust" as: "The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*), for the benefit of a third party (the *beneficiary*)."³² According to Black's definition, "for a trust to be valid, it must involve specific property, reflect the settlor's intent, and be created for a lawful purpose."³² A fiduciary interest attaches to the trustee of the corpus, "subjecting the person with title to the property to equitable duties to deal with it for another's benefit; the confidence placed in a trustee, together with the trustee's obligations toward the property and the beneficiary"³³

Trusts require three basic elements, "1) a trustee, who holds the trust property and is subject to equitable duties to deal with it for the benefit of another; 2) a beneficiary to whom the trustee owes equitable duties to deal with the trust property for his benefit, and 3) trust property, which is held by the trustee for the beneficiary."³⁴ Under the public trust model, state governments serve as trustees, holding certain lands for the beneficiaries, who are the citizens of the state; the public. The trust property is assigned within the state constitutions or statutory laws of the state, and the trust corpus is usually land for which there is a strong desire to preserve rather than privatize. These are usually

³² BLACK'S LAW DICTIONARY 1513 (7th ed. 1999).

³³ *Id.*

³⁴ RESTATEMENT (SECOND) OF TRUSTS §2 cmt. h (1959).

lands that the state has decided are too vital for public use to be parceled off for sale and limited from public access. For instance, parklands have been placed under the trusteeship of state governments across the country because they are more valuable as a commons than as separated parcels of individually-owned land.³⁵ States can preserve state-owned lands in trust for future generations, as well as purchase lands under private ownership for trusteeship purposes. Or, if certain resources are deemed vital enough to the public welfare and interests of the state, a state may engage in compensated takings, as permitted by the Fifth Amendment of the U.S. Constitution, in order to set aside land within its borders for public trust purposes.

In addition to the three basic trust requirements of trustee, beneficiary, and trust property, some legal scholars claim that there is a fourth requirement: identification of the trust's purpose, as set out by an "intentional act of the creation of a trust."³⁶ The purpose of the public trust doctrine is stated in a variety of historical and contemporary legal documents, from century-old U.S. Supreme Court cases to contemporary state constitutions.³⁷ These legally binding documents were created by intentional acts and explicitly establish trusts held by state governments to the public.

The public trust does not put the federal government in a trustee position. Instead, there are fifty state level public trust doctrines under the guardianship of the state governments. A working example of the public trust doctrine can be found in the U.S. laws regarding tidelands. The United States has long declared that lands covered by tidal

³⁵ The trusteeship of parklands is demonstrated in *Gerwitz v. City of Long Beach*, 330 N.Y.S. 2d 495, and *Borough of Neptune City v. Borough of Avon by the Sea*, 61 N.J. 296 (1972). See DENNIS W. DUCSIK, *SHORELINE FOR THE PUBLIC* 119 (The MIT Press 1974).

³⁶ Jeffrey M. Gaba, *We Do Not Hold the Earth In Trust*, 33 ELR 10325 (May 2003), available at Lawschool.Westlaw.com (WL Number 10325).

³⁷ See *Smith v. Maryland* 59 U.S. 71 (1855). See also North Carolina's State Constitution which establishes that "the enjoyment of the wildlife resources of the State belongs to all of the people of the State". N.C.Gen Stat. §113-133.1(a) (1987).

waters “belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters.”³⁸ In short, tidal waters and waterfront access are held in trust by the states in which they lie. The states have some leeway to utilize the water-lands as they see fit, but their use is conditioned on the preservation of that land in the public interest as well as its availability to the public.

The public trust concept can be utilized to protect resources that defy privatization and play important roles in human survival, such as air and waterways, by placing the land under public ownership, with state governments acting as trustees. The public trust doctrine can thus be applied to the preservation of finite, irreplaceable resources, such as the American wilderness. It is certainly within the bounds of a state’s police power responsibility over public interest and human welfare to maintain and protect such lands, and hold those lands in trust for future beneficiaries.

IV. PHILOSOPHICAL ORIGINS OF THE PUBLIC TRUST DOCTRINE

Although the public trust concept is rooted in the law of trusts, public trust concepts also have philosophical backings. Humans are intrinsically and inherently aware that they exist on the earth for a limited period of time, and that land and nature subsequently pass from generation to generation. “The environment is not something we inherit from our ancestors [...] but something we borrow from our children” is a common environmental slogan³⁹ that reflects this awareness. Because of this philosophy, although land is often parceled out and divided among individuals as private property, some

³⁸ Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine* 425, 454 (1989).

³⁹ Carol M. Rose, *Given-Ness And Gift: Property and the Quest for Environmental Ethics*, 24 *Envtl. L.* 1, 25 (1994).

aspects of nature, such as waterways and air are internationally recognized as “unownable,” or conversely, “owned by all.”

These specially designated components of nature are seen as *jus publicum*, a term that dates back to the Roman Empire and refers to resources that “defy private ownership” due to their undeniably common nature.⁴⁰ Blowing winds and drifting streams cannot be divided and parceled, due both to their physical properties and their necessary use by multiple individuals. Similarly, waterfront access has, since America’s founding, been viewed as an inherent right of its citizens.

Along with the idea that certain aspects of nature cannot be divided or removed from public access in order to preserve public welfare comes the proposition that certain portions of nature are more valuable as a whole, rather than as parcels of privately owned property. When people divide and possess land, they often ignore the value derived from its resource in a wild, undivided state. Purely economic perspectives and the privatization of land neglect “the importance of maintaining the availability of resources for all to use.”⁴¹

The mere “existence value” of environmental landscapes represents a greater public value, in some instances, than “use value.” As James P. Power points out, “A ‘consumer’ of the existence values that natural resources provide does not detract from the consumption or preservation values of others,” so that “the problem of trading off one person’s value for another [...] does not arise.”⁴² Additionally, by keeping land in trust, opportunity values are passed by the current generation to future generations, so that

⁴⁰ See Ryan *supra* note 29 at 479.

⁴¹ James P. Power, *Reinvigorating Natural Resource Damage Actions Through the Public Trust Doctrine*, 4 N.Y.U. Env’tl. L.J. 418, 424 (1995).

⁴² *Id.* at 425.

future generations can see, enjoy, and make use of the land's resources.⁴³ The public trust doctrine upholds the concept of value inherent in nature, and accounts for the idea that once land is tampered with, it cannot be restored to its original 'wilderness' state.

Where does the public trust doctrine fit in, on a functional level, to these philosophical precepts? While it is not an environmental 'catch-all' that protects the entirety of nature from privatization or destructive behaviors, with the environment as a surrogate for "mother nature," as some would posit⁴⁴, it is an important player in the conservation movement. The best philosophical view of the doctrine is offered by Professor Carol M. Rose. She suggests that property required by people to connect with each other and property that allows society to interact belongs, inherently, to the public.⁴⁵ Although this theory does not directly incorporate environmental concepts, Professor Rose's public trust philosophy requires the protection of environmental resources for recreation, sharing the preservation of biodiversity, and experiencing natural wonders as a society.⁴⁶ The protection and preservation of shared social space and values, in essence, requires the conservation of nature, which is vital to social understanding and well being.

The public trust doctrine only covers land used by the public for education and enjoyment. Public trust concepts work without infringing upon privately owned land or resources that are not seen as being in need of special preservation efforts for the public. Instead, the public trust carefully balances the inherent interests of private ownership,

⁴³ *Id.*

⁴⁴ Jack Kelly, *Preserving Paradise for Future Generations*, HAWAII ISLAND JOURNAL (Dec. 2003), available at <http://hawaiiislandjournal.com/stories/12b03a.html>. This article goes a bit far when it claims that the public trust doctrine gives people the ultimate ability to advocate for environmental issues, across the board.

⁴⁵ Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 Ecology L.Q. 351, 359 (1998).

⁴⁶ *Id.* at 360.

highly valued in American ideology, with the necessity of maintaining lands used by the whole of society, such as waterways, parks, and other public spaces. Private areas not reached by public trust requirements include privately owned farmlands and forest acreage, although it must be noted that activities occurring on such lands can violate public trust concepts if they cause harm to public trust lands.

V. THE PUBLIC TRUST DOCTRINE THROUGHOUT HISTORY

The public trust concept has taken on various forms throughout history. Even though the doctrine has changed forms through times and civilizations, and taken on different meanings (Ancient Greeks and Romans probably had little interest in “maintaining healthy biological systems”)⁴⁷, it has existed for centuries. Although the concepts dealt with in this paper focus primarily on the Western European construction of the public trust doctrine, it is important to note that public trust ideas are global, and not limited only to Western thought. Professor Charles F. Wilkinson wrote:

“ ‘From time immemorial the people of Nigeria have enjoyed the right to fish the sea, with its creeks and arms and navigable rivers within tides.’ In Moslem countries, ‘the fundamentals of Islamic water law purport to ensure to all members of the Moslem community the availability of water.’ Spanish and Mexican laws and institutions in the New World evinced a powerful tradition that large portions of the water supply must be dedicated to the community good.”⁴⁸

⁴⁷ See *supra* note 30 at 31.

⁴⁸ See *supra* note 38 at 429-430.

The fact that the doctrine has existed in many civilizations illustrates that many different societies have agreed that not all of nature is ‘ownable’, and some wilderness should remain in trust to preserve its integrity and use by all.

A. NATURAL LAW ORIGINS OF THE PUBLIC TRUST

*“The Public Trust Doctrine is a transcendent legal principle”*⁴⁹

Because the concepts of public trust are intuitive to cultures across the globe⁵⁰, the conclusion can be made that observing nature as a part of a public trust is a “universalized conception of human nature or divine justice.”⁵¹ The doctrine has existed throughout civilization as a notion of proper land use and a perception of the natural environment as more than a collection of resources. The natural law origins of the public trust doctrine can be observed across eras.

B. ROMAN LAW CODIFICATION OF PUBLIC TRUST RULES

Although some say that the Public Trust Doctrine existed as far back as ancient Greek Stoicism⁵², the first civilization to codify and record the rule was the Roman Empire. In this civilization, *jus naturale* was designated as the body of law which applied to the relationship between nature and man. The Justinian Digest states that “*Jus naturale* is that which nature has taught to all animals, for it is a law not specific to mankind but is common to all animals—land animals, sea animals, and the birds as well.”⁵³ Although, as Professor Susan Morath Horner points out, “from these definitions, it would seem that the *jus naturale* had little if anything to do with the presence, or the

⁴⁹ Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 *Envtl. L.* 723, 734. This sentiment was enunciated by the Supreme Court in *Geer v. Connecticut*, 161 U.S. 519 (1896).

⁵⁰ See Ryan *supra* note 29 at 496.

⁵¹ BLACK’S LAW DICTIONARY 1049 (7th ed. 1999). This quotation is taken from the definition of ‘Natural Law’.

⁵² See *supra* note 30 at 31.

⁵³ See *id.*, quoting JUSTINIAN’S DIGEST, which appeared in 533 A.D.

absence of rights.” She notes that *jus naturale* was important as “a recognition of liberty of the natural world,” which assumed that “nonhuman animals lived in a ‘natural state of freedom’ or a ‘natural state of liberty’.”⁵⁴

Additionally, Roman law contained rules governing *res commune* or “things common to all which cannot be owned or appropriated, such as light, air, and the sea.”⁵⁵ In Roman law, “certain interests, such as navigation and fishing, sought to be preserved for the benefit of the public”⁵⁶ and thus the property used for those activities was protected from grant to private owners. Similarly, certain “common properties—such as the seashore, highways, and running water,” were dedicated to the public for “perpetual use.”⁵⁷

C. PUBLIC TRUST IN ENGLISH COMMON LAW

The English common law “disliked ‘ownerless’ things,”⁵⁸ and so the “ownership of public resources was placed in the hands of the king” and property relating to the public good could not be sold or transferred from the crown.⁵⁹ This led to the creation of a public trust in which the crown maintained the land for its nation’s inhabitants. Likewise, in England’s feudal economy, wildlife law was tied to the notion of a ‘commons’ which recognized the necessity of giving people a legal right of access to the

⁵⁴ *Id.* at 32.

⁵⁵ BLACK’S LAW DICTIONARY 1308 (7th ed 1999). The concept of *res communis* is also inherent in modern international law, which holds that some aspects of the natural world, such as the high seas, outer space, and Antarctica cannot be owned by a single entity, and belong to the entire world. *Res communis* also implies that these places should be preserved for the use and enjoyment of all nations, and protected from exploitation by any single nation. Mark W. Janis, AN INTRODUCTION TO INTERNATIONAL LAW 193 (Aspen Publishers, 4th ed. 2003).

⁵⁶ See *supra* note 27 at 475.

⁵⁷ See *id.*, quoting Roman Law scholar W. Hunter, ROMAN LAW 311 (4th Ed. 1903).

⁵⁸ See *supra* note 30 at 33-34.

⁵⁹ *Id.* at 33.

king's land for "grazing, hunting, fishing, and foraging."⁶⁰ This trust was not created to protect nature from exploitation, instead, existed to "ensure that the king did not hoard all the natural resources."⁶¹

The initial characterization of the public trust doctrine as a conservation rule probably originated in historic England as "the rebellion against the idea that the sovereign may act as it pleases with respect to the natural world, at the expense of the people." This perspective on the public trust doctrine reflects modern perspectives on the public trust concept as an environmental tool, and it "probably came to fruition during the Tudor and Stuart monarchies in England."⁶² William Blackstone explained that "humans have no absolute interest in wild animals, only a qualified, limited, and often transient interest."⁶³ The public trust shifted, in England, from a protection of freedoms to the recognition that some things in nature cannot be owned.

England also protected air quality in the interest of public health, thereby serving as guardian over this common, public necessity. Clean air laws passed in the 14th century in England made it a capital offense to burn coal in London. Violators of this rule could be subject to execution for their criminal act.⁶⁴ This English law also proves that when necessary, the public trust doctrine must be invoked to protect the common good. When air quality became poor in England, the air was put under the trust of the English government.

D. THE PUBLIC TRUST DOCTRINE IN EARLY AMERICAN LAW

⁶⁰ *Id.* at 34.

⁶¹ *Id.*

⁶² *Id.* at 35.

⁶³ *Id.* at 37.

⁶⁴ *See supra* note 28.

The first European settlers on this continent viewed the wilderness not as a natural landscape worthy of conservation, but as a vast land which required civilizing and privatizing in order to create a homeland like the European continent so recently departed.⁶⁵ Jeremy Bentham described American wilderness as an “immense region” which offered only a “frightful solitude, impenetrable forests or sterile plains, stagnant waters, and impure vapours.”⁶⁶ The desire to ‘tame’ this unfriendly wilderness led to the quick transfer of ‘nature’ to ‘property’ and ‘wilderness’ to ‘resources’. Within years of the first settlers’ arrival on the North American continent, fences arose dividing land into neat parcels, dirt-paved town squares bustled with activity, and farms lay in tidy rows on the outskirts of villages. This “order” was far more comforting for the new North American transplants than the prior, seemingly dangerous and unpredictable landscape.

America also subscribed to the rule of capture.⁶⁷ In *Pierson v. Post*⁶⁸ the court adopted the capture concept to describe the ability of citizens to reduce wilderness to dominion through capturing the wilderness and thus owning what was once considered wild and “unownable.” Although *Pierson v. Post* deals with the hunting of wild animals, the rule of capture lies at the foundation of American civilization. Our nation’s settlers depended upon the Lockean notion that hard work and commitment lead to right of ownership. This concept embraced ideas of privatization and personal ownership of land, including the great American wilderness.

⁶⁵ Native Americans, on the other hand, seek harmony with nature, believing that nature is animate with spirit powers, and that people come from the earth, so that the nature and the Earth serves as a mother figure. See Rebecca Tsosie, *Tribal Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 Vt. L. Rev. 225, 268-287 (1996). This article offers a comparative discussion of Euro-American and indigenous land ethics, and describes how their differences lead to different styles of environment-related decision making.

⁶⁶ See *supra* note 39 at 2.

⁶⁷ *Id.* at 5.

⁶⁸ *Pierson v. Post*, N.Y. Sup. Ct. 1805.

Although early Americans put supreme value on private property ownership and the ability to “capture,” they did reserve several things under the public trust, carrying over ideas from their English homeland. Professor Sax summarized early American public trust concepts. He wrote: “Our system has adopted a dual approach to public property which reflects both the Roman and English notion that certain public uses ought to be specially protected.”⁶⁹ Since the beginning of America’s history, titles from the federal government have run down only to the high water mark of shorelines, so that the title seaward of that point remained in the states, which took shorelands into trust for the public, upon admission to the Union.⁷⁰

The Equal Footing Doctrine of early American policy was “the principle that a state admitted to the Union after 1789 entered the union with the same rights, sovereignty, and jurisdiction within its borders as did the original thirteen states.”⁷¹ Under this doctrine, as enunciated in *Phillips Petroleum Company v. Mississippi*⁷², States “acquired, at the time of statehood and held in public trust all land lying under any waters influenced by the tide, whether navigable or not.”⁷³ The Taylor Grazing Act of 1934 was another American law displaying public trust qualities.⁷⁴ This act authorizes the Secretary of the Interior to create and manage ‘grazing districts,’ which serve as government created commons where settlers, residents, and other stock owners who receive permits from the Secretary of the Interior may collectively graze their cattle.⁷⁵ The Grazing Act and Equal Footing Doctrine demonstrate America’s use of public trust

⁶⁹ See *supra* note 27 at 476.

⁷⁰ *Id.*

⁷¹ BLACK’S LAW DICTIONARY 557 (7th ed. 1999).

⁷² *Phillips Petroleum Company v. Mississippi*, 484 U.S. 469 (1987).

⁷³ *Id.* at 472.

⁷⁴ 43 U.S.C.A. § 315 (1934).

⁷⁵ 43 U.S.C.A. § 315(b) (1934).

concepts in the law when situations demand governmental trusteeship of certain kinds of property for the common public good.

VI. MODERN INTERPRETATIONS OF THE PUBLIC TRUST DOCTRINE

In January 1970, the Michigan Law Review printed an article by Professor Sax that would bring new life to the public trust doctrine in America. In this article, Professor Sax used the Public Trust Doctrine as a foundation for the proposal that “much private land is held, and has always been held, subject to paramount rights of the state to see that it is used in the public interest.”⁷⁶ Whether Sax realized the impact of his proposition or not, it was undeniable that the article raised people’s attentions, eliciting a flood of responses from both admiring fans and nay-saying critics. Although the article was simultaneously hailed as the harbinger of a new era of environmentalism and an obstacle to environmental progress, offering the government a perfect excuse for uncompensated takings, one thing was clear: Professor Sax had reinvigorated a long-latent legal concept. As Professor Michael C. Blumm joked, “The public trust doctrine...represents every law professor’s dream: a law review article that not only revived a dormant area of the law but continues to be relied upon by courts some two decades later”⁷⁷ and now appears in every property law case book printed for American legal scholars.

Professor Sax’s article did more than invigorate a resting legal principle. It also suggested an expansion of previous public trust concepts. Sax posited:

“Of all the concepts known to American law, only the
public trust doctrine seems to have the breadth and

⁷⁶ See James Gordley, ed., *Joseph Sax and the Public Trust*, ISSUES IN LEGAL SCHOLARSHIP (2003), available at www.bepress.com/ils/iss4.

⁷⁷ Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 *Envtl. L.* 573, 573-574 (1989).

substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.”⁷⁸

Where the public trust doctrine had historically been applied to America’s waterways and shorelines, Professor Sax suggested that the doctrine could expand to property away from the water, such as public parks and forests. His landmark paper prompted legal scholars to think about how public trust concepts could be used to promote and protect certain interests. Sax’s paper also influenced the creation of the National Environmental Policy Act (NEPA)⁷⁹, which requires that the federal government carefully think out, research, and understand the full environmental implications of its projects before engaging in potentially environmentally harmful activities. Additionally, since Sax’s article was published, articles and books have been written expanding the doctrine to protect hunting⁸⁰, public parks⁸¹, and other resources like air and national forests, as well as endangered species.⁸²

The expansion of the doctrine has brought both applause and criticism, as some argue that the doctrine will allow us to “save the environment,” and others fear that focus on the public trust doctrine curbs the use of established environmental legal tools by embracing property-law trust ideas rather than working within the environmental law

⁷⁸ See *supra* note 27 at 474.

⁷⁹ See Ryan *supra* note 29 at 480. See also Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax’s Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 Vand. L. Rev. 1209, 1211.

⁸⁰ Darren K. Cottriel, *The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?*, 27 PACLJ 1235 (1996).

⁸¹ See Ducsik *supra* note 35.

⁸² See *supra* note 49 at 723.

statutory scheme.⁸³ Scholars also fear that the public trust doctrine, if put into the wrong hands, will be abused, injuring the abilities of private owners to hold and improve private land and allowing the government to justify taking of land without proper compensation.⁸⁴ In actuality, when looking at the way the public trust doctrine has been put into use in the modern legal scheme, it is clear that proper implementation of the public trust doctrine is environmentally beneficial, as well as respectful of private land use rights.

VII. CONTEMPORARY PUBLIC TRUST SCHEMES IN AMERICAN LAW:

JUDICIAL INTERPRETATIONS OF PUBLIC TRUST CONCEPTS

A. FEDERAL COURTS AND THE PUBLIC TRUST DOCTRINE

Although *Illinois Central Railroad Company v. Illinois*⁸⁵ is the benchmark U.S. Supreme Court case affirming a public trust responsibility within states, this landmark case was not the first occasion in which the federal courts dealt with public trust issues. The first state public trust case that found its way into federal court was based on principles first enunciated in *Arnold v. Mundy*.⁸⁶ *Arnold*, a New Jersey State Supreme Court decision, predated *Illinois Central*. In this case, Arnold sued to prevent Mundy from trespassing into an oyster bed in Raritan Bay. The court found for Mundy, and held that the laws of nature, Roman law, and the common law of England which was incorporated into U.S. law, required that the land be held in trust for the people. The

⁸³ See Ryan *supra* note 29 and her analysis of Professor Lazarus's critique of the public trust concepts.

⁸⁴ See *supra* note 45 at 357-358.

⁸⁵ *Illinois Central Railroad Company v. Illinois*, 13 S.Ct. 110 (1892).

⁸⁶ *Arnold v. Mundy*, 6 N.J.L. 1 (1821).

Crown's trusteeship passed to the State of New Jersey, so New Jersey, as the Crown before it, was limited in its ability to privatize the waters of the State.⁸⁷

*Martin v. Waddell*⁸⁸ brought the public trust issue in *Arnold v. Mundy* before the United States Supreme Court. Martin sued to claim title to a Raritan Bay fishery on the basis of a grant from the New Jersey legislature. Chief Justice Taney declined to rule directly on the public trust concept advanced in *Arnold* and allowed the grant for reasons unrelated to the public trust. Justice Thompson's dissent, however, pointed out that the U.S. Supreme Court improperly allowed New Jersey to grant away land in a manner forbidden by the New Jersey Supreme Court in *Arnold*, violating the State's public trust doctrine.⁸⁹

The inconsistency between the New Jersey Court and the U.S. Supreme Court was resolved in favor of the New Jersey analysis in *Illinois Central*. In this seminal case, the Supreme Court upheld the state of Illinois' responsibility to enforce the public trust vested in the state by the Equal Footing Doctrine in order to block the transfer of shoreline land to the Illinois Central Railroad Company.⁹⁰ The Supreme Court described states' public trusteeship, and called Illinois' title to the land beneath Lake Michigan "a title different in character from that which the state holds in lands intended for sale."⁹¹ The court differentiated the State's public trust title from ordinary title by stating that public trust title, "is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing

⁸⁷ *Id.* as discussed in Timothy Patrick Brady's article. Timothy Patrick Brady, "But Most of it Belongs to Those Yet to be Born": The Public Trust Doctrine, NEPA, and the Stewardship Ethic, 17 B.C. Envtl. Aff. L. Rev. 621, 625.

⁸⁸ *Martin v. Waddell*, 41 U.S. 367 (1842).

⁸⁹ The *Martin v. Waddell* dissent is discussed in full by Timothy Patrick Brady, *see supra* note 85.

⁹⁰ *Illinois Central Railroad Company v. Illinois*, 13 S.Ct. 110 (1892).

⁹¹ *Id.* at 118.

therein, freed from the obstruction or interference of private parties.”⁹² Justice Field, writing for the Supreme Court said:

“The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious [...] The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the state, in the interest of the public, as is deemed consistent with the preservation of the public right.”⁹³

The *Illinois Central* decision supports state implementation of the public trust doctrine. The Supreme Court has continually upheld the responsibility of states in enacting state-by-state public trust plans. In historic cases like *Smith v. Maryland*⁹⁴ and *Manchester v. Massachusetts*⁹⁵, the U.S. Supreme Court found that state laws prohibiting capture of sea life did not violate the commerce clause because of the state’s public trust in fishery interests. Additionally, the more recent *Hughes v. Oklahoma*⁹⁶ decision, which overruled *Geer v. Connecticut*⁹⁷, stated that, although states could not act in violation of

⁹² *Id.*

⁹³ *Id.* at 120.

⁹⁴ *Smith v. Maryland*, 59 U.S. 71 (1855).

⁹⁵ *Manchester v. Massachusetts*, 11 S.Ct.559 (1891).

⁹⁶ *Hughes v. Oklahoma*, 99 S.Ct. 1727, (Okl. 1979).

⁹⁷ *Geer v. Connecticut*, 161 U.S. 519 (1896). This Supreme Court decision allowed the state of Connecticut to protect hunting interests as part of the state’s public trust.

the commerce clause⁹⁸ to obstruct the pathways of interstate commerce, there is “ample allowance for preserving [...] the legitimate state concerns for conservation and protection of wild animals underlying the 19th century legal fiction of state ownership.”⁹⁹ These cases grant public trust powers to the states and outline the proper implementation of public trust concepts.

B. THE PUBLIC TRUST DOCTRINE IN STATE LAW

*“If Sax is correct, much private land is held, and has always been held, subject to paramount rights of the state to see that it is used in the public interest.”*¹⁰⁰

Professor Sax’s conception of the public trust doctrine as a state powered legal tool is an accurate and useful perspective from which to view the public trust for wilderness conservation purposes. The public trust doctrine calls for state, not federal stewardship, and requires the trusteeship of state governments. Thus, the public trust doctrine falls under states’ responsibilities and should be designed and upheld, on a state-by-state basis, to cater to the individual resource protection needs of each state. Additionally, because the doctrine is enacted to protect the natural environment for the health and welfare of the public, the doctrine falls under states’ police power, and can be enforced and adapted only by the powers of individual states. State government enforcement of the public trust doctrine allows states to effectively tailor public trust concepts so that they best protect the public’s interest in the common natural landscapes of each state.

As discussed earlier, the U.S. Supreme Court upheld the responsibility of states to enforce and enact public trust concepts in its *Illinois Central* decision.¹⁰¹ Many state

⁹⁸ U.S. Const. art. I, § 8, cl. 2.

⁹⁹ See *supra* note 91 at 1763.

¹⁰⁰ See *supra* note 62.

cases also affirm the responsibilities of individual state governments to the public trust doctrine. The most powerful state case enforcing state public trust powers is *National Audubon Society v. Superior Court of Alpine County*, commonly called the *Mono Lake* decision after the body of water preserved by the public trust doctrine affirmation in the case.¹⁰² In *Mono Lake*, citizens filed a suit against the Department of Water and Power of Los Angeles to enjoin the Department from diverting water from Mono Lake, under the theory that “the shores, bed, and waters of Mono Lake are protected by a public trust”, in order to preserve the ecological integrity of the lake and to promote the preservation of wilderness.¹⁰³ Mono Lake is the second largest lake in California, located immediately next to the Sierra Nevada escarpment and Yosemite National Park. The lake supports a brine shrimp habitat¹⁰⁴, as well as other varieties of aquatic and avian ecosystems.¹⁰⁵ In this case, the California Supreme Court held that “the state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever possible.”¹⁰⁶

Courts recognize states’ stewardships of public trust concepts, but they do not specify particular methods for applying public trust protections. Though there is no strict public trust scheme to be adopted, the inclusion of the public trust doctrine in state

¹⁰¹ *Phillips Petroleum Co. v. Mississippi*, *supra* note 58, held that the equal footing doctrine created state trust responsibilities to be upheld by each state, and *Appleby v. City of New York*, 271 U.S. 364, 395 (1926) quotes numerous cases in which New York’s highest court expressly held the state responsible for upholding public trust protections, which were granted to the state at the start of its sovereignty. These cases were pointed to by Professor Barton Thompson in footnote 67 of his paper to evidence the same conclusion of state responsibility over the public trust. *See supra* note 17.

¹⁰² *National Audubon Society et al. v. Superior Court of Alpine County*, 33 Cal.3d 419 (1983).

¹⁰³ *Id.* at 425.

¹⁰⁴ Many different bird species depend upon the brine shrimp for sustenance.

¹⁰⁵ *See supra* note 102 at 424.

¹⁰⁶ *Id.* at 446.

constitutions has been a successful method for creating state public trust policies and plans.

Public Trust amendments to state constitutions represent commitments by state officials and citizens alike to shared and continued use of their natural surroundings. While the combination of constitutional public trust provisions with triggering statutory mandates maximizes the power of the public trust doctrine, even public trust amendments lacking enforcement triggers can create conservation powers in states. For these reasons, environmental law scholars acknowledge that amendments to state constitutions are useful to enact the public trust doctrine most effectively.¹⁰⁷

VIII. EFFECTIVE APPLICATION OF THE PUBLIC TRUST DOCTRINE: PUTTING THE PUBLIC TRUST DOCTRINE IN STATE CONSTITUTIONS

A. SAX'S REQUIREMENTS FOR A FUNCTIONAL PUBLIC TRUST DOCTRINE

Professor Sax outlined guidelines for the successful implementation of the public trust doctrine in his famous 1970 law review article.¹⁰⁸ Sax claimed that in order to use the public trust doctrine as “a satisfactory tool, it must meet three criteria. It must contain some concept of a legal right in the general public, it must be enforceable against the government, and it must be capable of interpretation consistent with contemporary concerns for environmental quality.”¹⁰⁹

First, there must be state-level implementation of the public trust doctrine. States, as the sole guardians of police powers, have the responsibility to further their citizens' health and welfare by preserving dwindling wilderness. The destruction of nature works

¹⁰⁷ Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 Duke L.J. 1169 (1997).

¹⁰⁸ See *supra* note 24.

¹⁰⁹ *Id.* at 474.

against the well being of America's citizens and their ability to use state parks and waterways, interact, and enjoy the outdoors.

In addition to the assignation of states as public trustees, according to Sax, there must be enforcement mechanisms built into state plans that exceed mere declarations of policy. Doctrines fail to be binding when they lack enforcement mechanisms. This failure is proven in international law, where international laws cannot be enforced due to the lack of enforcement mechanisms upon sovereign states.¹¹⁰ Sovereign nations are loath to submit to rules that often offer no immediate or tangible benefits. Similarly, humans are reluctant to submit to restrictions that serve no immediate personal benefit, although such restrictions may benefit the whole of society. Restrictions on social behavior, however, are sometimes necessary to maintain public welfare. For example, state laws restrict people from committing certain acts that pose risks to the public, such as driving while intoxicated.

Applying similar public welfare restrictions to nature, however, proves more complicated, because the public harm caused by destruction of nature and wilderness cannot be measured precisely in human lives or monetary values, and the effects of environmental degradation may not be immediately felt. For these reasons, lawmakers are less inclined to restrict nature-harming behavior. Environmental laxity in the law may promote temporary freedom from restrictions, but its eventuality is destructive and a long-term violation of police power requirements. As Professor Rose wrote, "if we are to have environmental good things and democracy at the same time, we need to exercise

¹¹⁰ According to Mark W. Janis. *See Janis supra* note 55 at 2. John Austin theorized that international law failed because there was no sovereign enforcer, and thus no enforcement mechanism, present in the structure of international law

some self-restraint.”¹¹¹ Similarly, if states are to conserve their natural resources, they must set aside some lands for preservation purposes, even if doing so limits alienability and use of the lands for ends that may not immediately benefit the citizens of the state.

Lastly, in order to implement the public trust doctrine as a legal concept according to Professor Sax, states must design public trust rules that are “capable of interpretation consistent with contemporary concerns for environmental quality.”¹¹² Environmental concerns increase as the Earth’s population grows, and wilderness dwindles. Public trust rules must be flexible and adaptable. A flexible construction of the public trust doctrine allows the concept to grow and change by containing wording which allows states to add, highlight, and alter certain resources as necessary to protect the public interest. For example, Hawaii’s public trust provision covers “all natural resources including land, water, air, minerals, and energy resources.”¹¹³ While this constitutional provision includes specific resources, the first clause states, “all natural resources,” which makes the provision flexible and open to other resources that may need future protection. This flexibility is important because, as conservation interests grow more pressing, the public trust doctrine becomes increasingly necessary to reserve certain lands from environmental degradation.¹¹⁴ Public trust concepts should be able to meet the needs of the contemporary public, and not become outdated. By adopting Professor Sax’s requirements, the public trust doctrine can be used as a flexible tool that grows with the needs of the public.

B. STATE CONSTITUTIONS: IDEAL VEHICLES FOR PUBLIC TRUST CONCEPTS

¹¹¹ See *supra* note 45 at 9-10.

¹¹² See Sax *supra* note 27 at 474.

¹¹³ HAW. CONST. amend. XI, § 1.

¹¹⁴ See Thompson *supra* note 20.

Professor Barton H. Thompson, Jr. concluded that, because the public trust doctrine has been held to constrain state legislative action, the public trust doctrine is “constitutional in character.”¹¹⁵ Thompson also demonstrates that constitutional amendments provide more permanent and secure public trust measures than statutory environmental protections. While constitutional amendments are secured permanently into state policy, statutes enjoy only a ‘medium level’ of security. As Professor Thompson writes, “future legislatures can amend or abandon a statutory policy generally by simple majority vote.”¹¹⁶ State constitutions are more impervious to changing political fronts and private interest group forces because they cannot easily be repealed or reworded. State constitutions are also effective vehicles for implementing public trust protections even when state legislatures are averse to such restrictions, because constitutional provisions endure through partisan disputes and changing political leadership.¹¹⁷ State constitutional clauses can additionally work to reduce the influence of special interest groups by requiring protection such as independent expert commissions to oversee state policies and stand as watchdogs in protection of environmental conservation.¹¹⁸

C. EFFECTIVE INCLUSION OF THE PUBLIC TRUST DOCTRINE IN STATE CONSTITUTIONS

i. *Triggering the Public Trust Doctrine*

In order to effectively enact the public trust doctrine via states’ constitutions, each state must allow for direct implementation of the doctrine. If state constitutional

¹¹⁵ *Id.* at 887.

¹¹⁶ *Id.* at 915.

¹¹⁷ *Id.* at 865.

¹¹⁸ *Id.*

amendments cannot be implemented, they may be regarded as mere broad policies of public trust concepts that lack effective enforcement provisions. To optimize the effectiveness of public trust constitutional amendments, it is important to assure that the provisions are either accompanied by triggering laws or self-executing in the absence of legislative triggers. Triggering statutes or self-executing provisions are necessary to show that the public trust doctrine is enforceable and can be used as more than a statement of objectives.

A provision is considered “self executing” when “the judiciary can enforce the provision without the aid of a legislative enactment.”¹¹⁹ Black’s Law Dictionary defines self-executing as being “effective immediately without the need of any type of implementing action.”¹²⁰ This can occur in constitutional amendments, for example, if the text of the amendment makes the public trust judicially enforceable, or if it is clear that the amendment is intended to be enforceable through judicial means.¹²¹

Constitutional provisions can also gain strength by requiring triggering statutes. Triggering statutes assure that constitutional provisions are more than mere policy declarations by requiring, in the text of the amendment, that state statutes be adopted to uphold the public trust doctrine contained in the constitution. These statutes clarify the public trust requirements in the constitutional amendment by providing specific measures to be taken in regards to the public trust resources. Triggering statutes also include provisions that allow judicial enforcement of the state’s public trusteeship.

¹¹⁹ Tammy Wyatt-Shaw, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: “They mean Something”*, 15 Pub. Land L. Rev. 219 (1994).

¹²⁰ BLACK’S LAW DICTIONARY 1364 (7th ed. 1999).

¹²¹ *Id.*

Although constitutional provisions reflect state policies so important that they are permanently inscribed in the State’s supreme guiding document, the absence of mandating clauses or statutes to actively put the public trust doctrine into effect could render the constitutional clause inert and useless for enforcement purposes. For instance, Pennsylvania’s constitution contains a public trust amendment, adopted in 1971. It states that “Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come.” and adds that Pennsylvania is a “trustee of these resources [and] shall conserve and maintain them for the benefit of all people.”¹²² Despite this public trust declaration, “Pennsylvania courts have watered down the doctrine”¹²³ due to lack of explicit self-executing language or triggering statutes. Pennsylvania courts have, to some extent, accepted the public trust doctrine.¹²⁴ When the public trust amendment has been enforceable in the courts, however, it has undergone an “abuse of discretion” standard of review, which is highly deferential to the state government. Pennsylvania’s largely ineffective public trust amendment could have been strengthened by including explicit self-executing language and triggering statute requirements. The proper wording, specifying enforceability and assigning a standard of review for public trust enforcement by the judiciary, can shape a powerful public trust policy.

Matthew Thor Kirsch offers four ways to overcome the lack of self-executing language in constitutional provisions in his article, “Upholding the Public Trust in State

¹²² PA. CONST. art. I, § 27.

¹²³ See *supra* note 30, at 62.

¹²⁴ In *Payne v. Kassab*, 312 A.2d 86 (Pa. Commw. Ct. 1973), a test was developed for determining whether the state complied with its constitutional public trust amendment, but the test has since been proven to be highly deferential to the state, undergoing an ‘abuse of discretion’ standard of review. All of this comes from Horner, *supra* note 30, p.61-62.

Constitutions.” Through 1) court declarations that constitutional provisions are self-executing, 2) the use of legislative enactments to trigger enforcement, 3) court declarations that constitutional provisions codify pre-existing common law, and 4) courts’ flat-out avoidance of self-execution issues in discussions of public trust amendments, states can craft enforceable public trust amendments absent specific triggering language.¹²⁵

Although the inclusion of self-executing language creates a legally enforceable public trust amendment, self-executing clauses are not necessary for an enforceable state public trust policy. The current trend in courts assumes self-execution for public trust doctrine provisions rather than harboring presumptions against the enforceability of constitutional amendments. “Courts in states that have given effect to constitutions’ environmental protection provisions have interpreted them as evocations of the public trust.”¹²⁶ When addressing the importance of self-executing clauses, however, it is important to note that the majority of states with public trust doctrine clauses in effect also enact legislation citing the constitutional amendment to help litigants get around self-execution issues and to guarantee the enforceability of their statutes.¹²⁷

ii. *Defining the Scope of the Public Trust Doctrine*

Even before attaching triggering language to constitutional public trust amendments, it is important to consider the scope of the public trust doctrine for state conservation uses. Professor Thompson suggests that moving towards a beneficial “commons trust” involves the expansion of nineteenth century water-access-focused

¹²⁵ See *supra* note 107 at 1176.

¹²⁶ *Id.* at 1174.

¹²⁷ Naiking Tsao, *Ameliorating Environmental Racism: A Citizen’s Guide to Combatting The Discriminatory Citing of Toxic Waste Dumps*, 67 N.Y.U. L. Rev. 366, 401 (1992).

public trust concepts to encompass “public parks, forests, undeveloped foothills, and other open spaces [that] provide important commons today in most states.”¹²⁸ Like Professor Rose, Professor Thompson agrees that the public trust doctrine should be used to protect lands “of unique importance to public communion.”¹²⁹ Professor Thompson says that in order to assure the effective implementation of a more expansive public trust doctrine through state constitutions, the public trust provisions should include explicit public trust plans. These plans should disclose which lands will be protected by the amendment, the types of rights to be enjoyed by the public upon the protected lands, and a listing of which circumstances should allow lands to be exempt from the public trust protections.¹³⁰

An explicit list of all of the public trust lands held by the state at the time of the constitutional amendment creates a permanent protective public trust barrier against the privatization and misappropriation of those lands. Although the designation of lands not mentioned in the constitutional amendment will inevitably fall under the discretion of state legislatures, if the constitutional amendment also specifies some criteria that legislatures can use to determine what lands to place under state trust, the constitutional amendment will serve as a long-term implementation tool for the public trust doctrine.¹³¹ The criteria listings may include factors such as “the value of the land for common recreational, social, or aesthetic use by a broad segment of the general public, or the

¹²⁸ See Thompson *supra* note 20 at 887-888. Thompson argues that commons are necessary in the United States, despite a national focus on privatization of property. He highlights the importance of such commons by pointing out that, “If all property were private, the chafe of uneven ownership might rapidly lead to revolution. The nonlanded majority of today’s America accept the nation’s private property system arguably only because they have free access to roads, parks, beaches, and other public “commons”.

¹²⁹ *Id.* at 888.

¹³⁰ *Id.* at 888-890.

¹³¹ *Id.* at 888-889.

land's historic significance to the state and its citizens.”¹³² Creating a list of factors by which to determine the public trust status of lands would serve as an effective guide for state legislatures in the absence of explicit mention of certain lands in the state constitution.

Merely setting aside land from alienability under the public trust, without supplying a description of the public's rights to that land, undermines the public trust doctrine as a guarantee that land be preserved for the public's benefit. Thus, in order to guarantee that particular public benefits arise under state trusteeship, state constitutions should expressly provide for open public use of the land. Additionally, public trust amendments should specify uses for the trust lands such as fishing, camping, or hiking, to avoid land use which is inconsistent with preservation efforts.¹³³ Finally, the public trust amendments need to allow for the exemption of some lands from public trust doctrine protections, in order to avoid overly rigid amendments. If amendments are too restrictive and rigid, they eventually cease to be reasonable, and thus become unused and ignored by the state and its citizens. Flexibility must be considered in the wording of constitutional amendments to avoid their eventual nullification.¹³⁴

D. A LOOK AT THE EFFECTIVENESS OF ACTIVE PUBLIC TRUSTS IN STATE CONSTITUTIONS

The requirements set forth by Professors Sax and Thompson have been successfully adopted by various states to enforce conservation efforts through

¹³² *Id.* at 889.

¹³³ *Id.*

¹³⁴ *Id.* at 889-890. Thompson points to the example of an 1879 California Constitutional provision strictly prohibiting the sales of some of the state's tidelands for proof of the dangers of constitutional rigidity. The rigidity of the prohibition has “forced courts...to develop a number of exceptions to the restrictions” and “as the public interest has evolved...the constitutional protection has grown increasingly misaligned with the public's actual interest”. These problems can be avoided by including exemption rules in the amendment to provide for increased flexibility over time.

constitutional amendments. Although it can be said that every state has public trust lands and resources, several states have given extra force to these often latent trusts. Many states added such amendments to their constitutions around April 14, 1970, at the time of the first Earth Day celebration in America.¹³⁵ Successful state efforts include those of Louisiana¹³⁶ and Hawaii.^{137 138}

Louisiana engages a combination of constitutional language and triggering legislation to create explicit and enforceable public trust doctrine responsibilities. While the constitution, in Article XI, §1, states that the state’s natural resources “shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people” it also grants that “the legislature shall enact laws to implement” this public trust policy.¹³⁹ The legislation created under this constitutional amendment recognizes the public trust policy of the state and creates a system under which no entity may have an excessive share of trust rights or privileges.¹⁴⁰ Louisiana’s public trust policy, as enunciated in both the State’s constitution and statutes, has resulted in a collection of State court cases effectively upholding the public trust doctrine.

For instance, *State v. McHugh*¹⁴¹, which dealt with state limitations of deer hunting in order to preserve deer and wildlife populations, held that the state’s public trust doctrine requires the state to “protect, conserve, and replenish all natural resources,

¹³⁵ See *supra* note 107 at 1169.

¹³⁶ LA. CONST. art. IX.

¹³⁷ HAW. CONST. art. XI.

¹³⁸ These are not, by a long stretch, the only states with public trust doctrine provisions in their constitutions. Some of the other states who have adopted the public trust doctrine into their constitutions include Pennsylvania (PA. CONST. art. I, § 27.), Alaska (ALA. CONST. art. VIII.), Florida (FLA. CONST. art. II, § 7.), Virginia (VA. CONST. art. XI, § 3.), Michigan (MICH. CONST. art. IV.), Montana (MONT. CONST. art. IX, § 1.), New Mexico (N.M. CONST. art. XX.), and many others as mentioned in footnote nineteen of Matthew Thor Kirsch’s article about the public trust in state constitutions. See *supra* note 107 at 1210.

¹³⁹ LA. CONST. art. XI, § 1.

¹⁴⁰ LA. REV. STAT. ANN. § 56:640.3 (West 1986).

¹⁴¹ *State v. McHugh*, 630 So. 2d 1259 (La. 1994).

including the wildlife and fish of the state, for the benefit of its people.”¹⁴² The *McHugh* Court looked to the constitution-legislation combination to hold the state to its public trust duty, finding that “upon judicial review, a public trustee is duty bound to demonstrate that he has properly exercised his responsibility under the constitution and laws.”¹⁴³ The combination thusly triggered enforcement through the courts. Additionally, *Save Ourselves Inc. v. Louisiana Environmental Control Commission*,¹⁴⁴ dealt with the Louisiana public trust doctrine. When a citizen group sought review of the state’s issuance of permits allowing the construction and operation of a hazardous waste disposal facility, the Louisiana court would not accept the issuance of the construction permit because the court could not tell whether Louisiana performed its public trust duty to assure that the environment would be sufficiently protected for the benefit of the public. The court in *Save Ourselves* admonished the commission, saying,

“the commission's role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the commission.”¹⁴⁵

It is clear from cases like *McHugh* and *Save Ourselves, Inc.* that Louisiana’s constitutional provision and statutory trigger create a forceful and effective public trust policy in the state.

¹⁴² See *Id.* at 1265 as discussed in Horner at *supra* note 30.

¹⁴³ *Id.* at 1265.

¹⁴⁴ *Save Ourselves Inc. v. Louisiana Environmental Control Commission*, 452 So. 2d 1152 (La. 1984).

¹⁴⁵ *Id.* at 1157.

Hawaii is another example of effective state public trust doctrine implementation.

Hawaii's constitution states:

“For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.”¹⁴⁶

Triggering language in the state's constitution under § 9 of Article XI makes the public trust clause self-executing and gives citizens of the state standing to sue for enforcement.¹⁴⁷ This provision says, in part, that “each person has the right to a clean and healthful environment” and “any person may enforce this right against any party, public or private, through appropriate legal proceedings.”¹⁴⁸ Additionally, in 1986, Hawaii's legislature created a statute to explicitly grant specific enforcement powers against those who fail to get government permits or approval before engaging in anti-environmental acts.¹⁴⁹

¹⁴⁶ HAW. CONST. amend. XI, § 1.

¹⁴⁷ *See supra* note 30 at 64.

¹⁴⁸ HAW. CONST. amend. XI, § 9.

¹⁴⁹ Haw. Rev. Stat. §607-25 (1986).

Hawaii courts have also upheld the state’s public trust doctrine. In a 2004 Hawaii Supreme Court case, *In re Waiola O Molokai, Inc.*¹⁵⁰, the court found that a decision by Hawaii’s Commission on Water Resource Management to grant a water company’s application for a water use permit and its issuance of well construction and pump installation permits to the company violated the state’s public trust doctrine. The Supreme Court of Hawaii held that the duties imposed upon the state by its public trust doctrine are the duties of a trustee and not simply the duties of a “good business manager.”¹⁵¹ Additionally, the court declared that, although it would not supplant the judgments of state agencies or the state legislature, it would not act as a mere “rubber stamp for agency and legislative actions” when public trust issues were involved.¹⁵² Hawaii has set out its public trust doctrine as a basic right of its citizens and future generations, and serves as a guide for potential public trust provisions in other state statutes and constitutional amendments.

IX. ANSWERS TO CRITICS OF THE PUBLIC TRUST DOCTRINE

The expansive body of writing dedicated to the public trust doctrine in American legal writing contains both praise and criticism. While many are quick to commend the doctrine as a key tool in the operation of national conservation efforts and the protection of national wilderness, other legal scholars criticize the doctrine on a number of levels. This section discusses those criticisms and offers constructive rebuttal to arguments against the use of the public trust doctrine.

A. THE PUBLIC TRUST AS LEGITIMATE MODEL FOR CONSERVATION SCHEMES

¹⁵⁰ *In re Waiola O Molokai, Inc.*, 83 P.3d 664 (Hawaii, 2004).

¹⁵¹ *Id.* at 684.

¹⁵² *Id.* at 685.

Professor Jeffrey Gaba argues that the public trust doctrine is nothing more than a government effort to prescribe morals and that the public trust model is “a flawed metaphor for the relationship of present to future [...] obscure[ing] more than clarify[ing] the issues of our moral relationship to future generations.”¹⁵³ Professor Gaba claims that because the source of the public trust concept cannot be easily defined, and the origins of the public trust doctrine are difficult to pinpoint, the public trust model is erroneous. “The very legitimacy of a trust model requires identification of a settlor”, asserts Gaba, because “without the intentional act or creation of a trust, there is no basis for claiming a trust model.” He additionally maintains that public trust doctrine is invalid because, “there is no purpose or terms of the trust that define the scope of the obligations of the trustee.”¹⁵⁴

Gaba’s first argument regarding a lack of origin is cancelled out by the public trust responsibility for states as set out by the Equal Footing Doctrine, which triggered the public trust in each state as the state entered the Union. Additionally, this argument fails if the origin of the trust responsibility comes from the constitution of every state. If states create public trusts within their state constitutions, there is no mystery as to where the state’s trust obligation originates.

Additionally, in contrast to Gaba’s second argument regarding scope, constitutional trust provisions define the scope of the trust and obligations of the state trustee. Gaba’s argument that “a trust model requires an identification of its purpose”¹⁵⁵ is nullified by the presence of constitutional trusts on a state level, because such public trust declarations set out the purpose of their trust requirements to benefit the state’s

¹⁵³ See *supra* note 36.

¹⁵⁴ *Id.* at 5.

¹⁵⁵ *Id.* at 6.

resources and the welfare of its citizens. The public trust model, contrary to the Professor Gaba's convictions, is a complete and whole model for conservation.

B. ANSWERING ANTI-ENVIRONMENTALISTS' CRITIQUES

Most critics of the public trust doctrine argue that the public trust doctrine serves as a large scale uncompensated confiscation of private rights.¹⁵⁶ The concern that the public trust doctrine, while seemingly conservation-minded, could become no more than a tool for state and federal governments to justify the uncompensated taking of land from private owners, in violation of the 5th amendment of the U.S. Constitution, is a reasonable concern. This concern will be greatly lessened, however, if states supplement their constitutional public trust amendments with clauses specifying that uncompensated takings will not be permitted under the public trust doctrine. Such clauses will protect 5th Amendment rights and balance public trust powers with private ownership interests.

The public trust doctrine can maintain its effectiveness while respecting property rights. Because it only applies to public lands, public trust concepts do not necessarily lead to an invasion of private property owners' rights. If states cannot use public trust protections on lands they do not own, have not purchased, or have not offered compensation for, the states will avoid infringing on property owner's rights. Ideally, implementation of the public trust doctrine would create public space while simultaneously lending respect to the rights of private landowners. If constitutional amendments specify factors for creating public trusteeships, implementation of the public trust doctrine will not involve takings of private land without compensation.

C. ANSWERING CRITIQUES FROM EXTREME ENVIRONMENTALISTS

¹⁵⁶ This common argument appears at <http://www.bepress.com/ils/iss4> at *supra* note 73. See *supra* note 73.

Professor Lazarus, a “green dissenter,” “fears that the canonization of the public trust doctrine as the preeminent framework of natural resource allocation analysis has robbed civil society of the opportunity to nurture a better framework.”¹⁵⁷ He claims that utilizing environmental concepts under an “ownership model” creates a system in which the public trust doctrine is ineffective because it “leaves traditionally phrased trusts vulnerable to shifting public visions of what constitutes a beneficial use” so that the public trust may benefit development interests rather than conservation interests.¹⁵⁸ Sax’s analysis substantiates this fear. Sax believes that beneficial use can change with time and “when uses cease to be seen as beneficial, however long standing, they are repudiated in favor of modern conceptions of beneficiality” which may not support wilderness conservation.¹⁵⁹

Professor Sax reassures his audience, however, stating that such an anti-environmental turn is “unlikely.”¹⁶⁰ Although Lazarus’s fear is not ungrounded, and the presence of anti-environmental sentiment may increase over time, it could be suggested that constitutional public trust amendments would create a permanent protection against shifting definitions of trust responsibilities, by solidifying and documenting the intentions of public trust use to benefit society through conservation.

Additionally, Lazarus’s wish for a “natural resource legal regime in which private property rights-structured relationships do not dominate our thinking about land and resource management”¹⁶¹ is surely impossible. America’s “law of the land” is based upon private property protections. Because private property ownership is highly valued

¹⁵⁷ See Ryan *supra* note 29 at 484.

¹⁵⁸ *Id.* at 488.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

in American law, there is little chance that private property concepts will be eradicated in the future per Lazarus's wishes, and the public trust doctrine serves as an excellent model for the protection of wilderness in the face of privatization and potential exploitation of natural resources.

Lazarus also argues that the need for the public trust doctrine in American law is waning in the wake of a "new environmental consciousness infusing the law." He points to the courts' treatments of citizen suits and the continued enforcement of the Clean Water Act, Clean Air Act, and NEPA as evidence of an environmental upswing.¹⁶² "The evolution of government has rendered obsolete the central premise of the public trust's doctrinal origins" as a "needed legal basis to ensure public accountability for [...] decisions that adversely affect the environment."¹⁶³

Time has proven the error of Lazarus's logic. Lazarus wrote his dissent on the public trust doctrine in 1986, and since then several occurrences have disproved the existence of a new environmental awareness in federal law. After Lazarus's 1986 declaration that environmental progress rendered the public trust doctrine protections unnecessary, on a Federal level, the Reagan era and current Bush presidency have demonstrated that government powers are not consistently supportive of environmentalism. In the face of anti-environmental government coalitions, a more permanent pro-environmental policy declaration is necessary in order to preserve environmental interests. Finally, the public trust doctrine has not been abandoned since 1986, and in the almost two decades since his fearful declaration that the public trust

¹⁶² *Id.* at 485.

¹⁶³ *Id.* at 486.

doctrine would obstruct environmental efforts, the doctrine has yet to be used as a tool for anti-conservation efforts.¹⁶⁴

Professor Thompson offers several arguments on why, contrary to nay-sayers opinions, the public trust doctrine serves as a useful environmental tool. He observes that the public trust doctrine is a necessary device to force state and local governments to account for the future. One reason Professor Thompson gives for a lack of accounting for the future in environmental legislation is that “the current generation will have an inevitable bias toward present consumption.” He points out that our attention “seldom extends beyond our children and grandchildren.” A second reason offered by Thompson for environmental shortsightedness involves the political process. Politicians focus on current consumption, not future use.¹⁶⁵ This makes sense when one considers that politicians easily gain more votes by pleasing the current generation rather than withholding resources from use. Additionally, the public trust doctrine protects against the very real “capture” of governmental agencies and politicians by private interests. Politicians can easily be swayed by private interests, and become captives to the interests of private corporations and individuals, regardless of public welfare.

Public trust doctrine criticisms reflect the constant struggle in American property law to optimize the balance between private property interests and the necessity of conservation. Both are highly valued concepts, and it is often difficult to justify, in a free-market society, the need for commons; for public lands left unexploited. The protection of the environment for future generations works against contemporary concepts of instant gratification and the protection of what is owned. The public trust

¹⁶⁴ *Id.* at 490.

¹⁶⁵ *See* Thompson *supra* note 20 at 900-901.

doctrine attempts to balance the desires of the present generation with the environmental needs of future generations without violating the rights of private property owners. The public trust is an appropriate model for environmental protection. What is needed among dissenters (current government trend-setters included) is a new perspective that allows environmental necessity to play a more central role in policy considerations.

X. CONCLUSION

When state governments engage in anti-environmental policies, the public trust doctrine offers a barrier with which to protect our nation's wilderness. In times where anti-environmental government policies run rampant, the public trust doctrine forces state governments to act as trustees of rivers, parks, forests, and other public resources, considering the environmental impacts of their decisions on current citizens and future generations. If enacted effectively on a state-level, the public trust concept could protect the air Americans breathe, the nation's waterways, and the remaining unexploited wilderness by holding it not as a resource to be exploited, but as a natural ecosystem essential to the health and well-being of present and future generations. The time has come for a shift in environmental law perspectives. As Professor Gary Meyers proposed, America needs "a new ethical framework for environmental thinking."¹⁶⁶

The public trust is more than a 'state of mind', however, a change of "states of mind" is necessary in order to fully accept the idea that some land must be held in trust.

Professor Meyers says:

"We should be capable of perceiving intrinsic significance—sanctity, if you will—in the very principles which govern the framework for choices [...] according to

¹⁶⁶ See *supra* note 49 at 733.

which we orchestrate our relationships with one another
and with the physical world of which we are part”.¹⁶⁷

Professor Rose also believes that a shift in “environmental norms” is required as the need for conservation continues to increase. She theorizes that people must think of the world as a “gift,” and not a “given.” “When we think about environmental resources as ‘just a given’” she writes, “we are regarding their use as normatively neutral, ethically up for grabs.”¹⁶⁸ This approach leads to land hoarding and massive exploitation of nature that is merely “ours for the taking.” Under this standard, the only thing that stops humans from the destruction of nature is “voluntary self-restraint.”¹⁶⁹ However, the idea of the environment not as a given, but a “gift,” provides a major change in the social norms regarding wilderness and nature.

Rose uses an analogy supplied by economist Richard Titmuss.¹⁷⁰ When people donate blood, Rose and Titmuss posit, their blood is “viewed with greater respect by those responsible for its use because voluntary donors were more likely to be truthful about their health and their blood was usually pure.”¹⁷¹ On the other hand, commercially collected blood was more likely to contain impurities, because “concealment of impurity was in the seller’s interest.”¹⁷² The initial act of not disclosing the blood quality due to financial interest created a string of “callousness, spoilage, and waste” leading to a less safe and less efficient medical process.¹⁷³ The gift blood is purer, safer, and more trustworthy than its commercially offered counterpart. Similarly, Rose analogizes, all

¹⁶⁷ *Id.* at 733-734.

¹⁶⁸ *See supra* note 39 at 11.

¹⁶⁹ *Id.*

¹⁷⁰ Richard Titmuss is an economist, his book containing the analogy is title, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971).

¹⁷¹ *See supra* note 39 at 11.

¹⁷² *Id.*

¹⁷³ *Id.*

gifts are “approached with a special kind of care and respect,” and if nature is seen by society as a gift, people will more likely use the gift, but they will have enough respect not to waste or pollute it.”¹⁷⁴ The public trust concept does just that: it sets aside certain “unownable” resources as public “gifts” to be enjoyed and maintained, so that nature can be enjoyed as a gift to all.

It is unclear whether the shift in perspective advocated by both Rose and Meyers is necessary for enactment of the public trust doctrine, but it is likely that incorporation of the public trust doctrine will shift policy interests towards environmental considerations. If states adopt the constitutional public trust model and incorporate environmental considerations into their state police powers, they will be forced to consider the environmental impacts of their actions, and will be required to act in ways that benefit the public trust corpuses. This would decrease the power of future government administrations to roll back environmental protections and destroy America’s wilderness. The public trust’s incorporation of environmental concerns into public welfare-related police power considerations gives states the ability to stop their governments from engaging in the creation of environmentally harmful laws and regulations. Additionally, if every state creates a constitutional public trust amendment, their collective commitment to environmental preservation would help to shape a more environmentally protective national policy. If a legally enforceable public trust clause is included in the constitution of each state, then states’ waterways, forests, parklands, other areas of wilderness, and air cannot be degraded. After all, the government cannot exploit, destroy, and alienate that which it holds in trust.

¹⁷⁴ *Id.*

