

# Is Using the Public Trust Doctrine to Protect Public Parkland from Visual Pollution Justifiable Doctrinal Creep?

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“The health of the eye seems to demand a horizon. We are never tired, so long as we can see far enough.”<sup>1</sup>

*This Article asks whether the public trust doctrine should be applied to stop the construction of a multistory commercial building that will tower over the tree line of Palisades Interstate Park. The building, which received a variance from a local New Jersey zoning commission, will ruin views of the Park, particularly from scenic overlooks across the Hudson River in New York, like the Metropolitan Museum’s Cloisters and the George Washington Bridge. To make this argument, the author draws on the work of renowned public trust scholars, Professors Joseph Sax and Carol Rose, among others. Based on the doctrine’s adaptability to modern conditions, she finds a sufficient bridge from traditional uses of the doctrine to justify concluding that the proposed building’s interference with scenic views of the Park is an alienation of a trust resource in breach of the doctrine.*

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1. Ralph Waldo Emerson, *Nature, Addresses, and Lectures*, in 1 *Collected Works of Ralph Waldo Emerson* 13 (Robert E. Spiller & Alfred R. Ferguson eds., 1971).

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## INTRODUCTION

Two years ago, a large multinational corporation received approval from a local New Jersey town to construct an eight-story office building that would tower over Palisades Interstate Park's tree line.<sup>2</sup> Congress designated the Park a National Historic Landmark in 1965 and a National Natural Landmark in 1983, and the Department of Interior added it to the Register of National Historic Places in 1984.<sup>3</sup> The new building will not only be visible from inside the Park and along Palisades Parkway, which transverses the Park, but also from various scenic overlooks on the other side of the Hudson River, including the Cloisters, which is part of the Metropolitan Museum system, and Fort Tryon Park.<sup>4</sup>

Although the proposal generated fierce opposition from national and state environmental and historic preservation organizations, local mayors, and four former governors of New Jersey, both the Englewood Cliffs' town zoning commission<sup>5</sup> and a New Jersey Superior Court<sup>6</sup> approved it. Neither the commission nor the court mentioned the proposed building's impact on scenic views of the Park, although the record before both authorities contained considerable information on those impacts.<sup>7</sup> However, of interest to this Article, neither the comments nor the briefs filed in the litigation mentioned the public trust doctrine and its potential application to the dispute. Perhaps this is

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2. Proposed Brief for the State of New York as Amicus Curiae Supporting Appellant at 3, *Jacoby v. Bd. of Adjustment*, No. A-000259-13T1 (N.J. Super. Ct. App. Div. Apr. 4, 2014) [hereinafter *Amicus Curiae Brief for the State of New York*], available at [http://www.ag.ny.gov/pdfs/Palisades\\_amicus\\_brief\\_final.pdf](http://www.ag.ny.gov/pdfs/Palisades_amicus_brief_final.pdf).

3. Brief for New Jersey Conservation Foundation et al. as Amici Curiae Supporting Appellants at 13–14, *N.J. State Fed'n of Women's Clubs v. Bd. of Adjustment*, No. A-000007-13T1 (N.J. Super. Ct. App. Div. Apr. 4, 2014) [hereinafter *Amici Curiae Brief for N.J. Conservation Found. et al.*], available at <http://blog.preservationleadershipforum.org/wp-content/uploads/2014/04/Palisades-Brief.pdf>.

4. See *Amicus Curiae Brief for the State of New York*, *supra* note 2, at 2 (mentioning the Cloisters Museum, Fort Tryon Park, Riverside Park, and the Henry Hudson Parkway). For more on the opposition from the Metropolitan Museum, see Robin Pogrebin, *A Timeless View from the Cloisters Faces a Modern Intrusion*, N.Y. TIMES (Jan. 20, 2013), <http://www.nytimes.com/2013/01/21/arts/design/the-cloisters-view-is-threatened-by-lg-electronics-offices.html> (reporting that the museum had sent a letter “wish[ing] they would reconsider the design and perhaps come up with a plan that doesn’t pierce the treetops on the Palisades”).

5. See *Amicus Curiae Brief for the State of New York*, *supra* note 2, at 3.

6. See *id.*

7. *Id.* at 14.

not surprising; the doctrine's use in this instance would be a substantial step away from its historic provenance, which is largely tethered to water-based resources and their traditional uses, such as navigation and fishing.<sup>8</sup>

This Article argues that this next step should be taken. Applying the common law doctrine of public trust to protect scenic views of trust resources like parklands is consistent with the doctrine's gap-filling role and malleable nature.<sup>9</sup> The situation in New Jersey illustrates Professor Mary Christina Wood's concern that "[t]he ancient membrane of law that functions as a system of community restraint is pitted with holes"<sup>10</sup> because no environmental law squarely addresses the issue at hand. The local zoning commission's actions demonstrate Professor Wood's complaint that "agency discretion has been largely commandeered to serve industry and bureaucratic interests that operate at cross-purposes to the protective goals of the statutes that authorize such discretion. At best, environmental law today is used to hospice a dying planet."<sup>11</sup>

To support the thesis that protecting parks from visual intrusions is an application within the bounds of the public trust doctrine, the Article begins with a brief history of Palisades Interstate Park and the proposal that triggered this analysis, then it summarizes the key elements of the public trust doctrine and the rationales behind its use. The Article subsequently demonstrates the doctrine's flexibility by charting its emergence from tidelands to dry lands and its evolution from traditional uses, like navigation and fishing, to more modern non-water-based uses, like hiking, bird watching, and scientific research. The fourth Part of the Article links traditional uses of the doctrine with its application to protect scenic views of trust resources, first by exploring the relevance of aesthetics to the doctrine, then by showing that interfering with the aesthetic enjoyment of a trust resource is comparable with preventing access to that resource. Lastly, the Article concludes that the public trust doctrine is a viable tool for those interested in preserving the scenic vistas of trust resources, such as those that grace Palisades Interstate Park, despite criticisms of the doctrine's extension.

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8. See *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892) (concluding that state title to lands under navigable waters is "held in trust for the people of the state, that they may enjoy navigation of the waters, carry on commerce over them, and have the liberty of fishing therein"); see also Hope M. Babcock, *Has the United States Supreme Court Finally Drained the Swamp of Takings Jurisprudence? The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 36–54 (1995) (discussing the public trust doctrine's evolution in this country). Public trust scholars like James Huffman, however, criticize this doctrinal creep. See James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 8–99 (2007) (challenging the predominant historical account of the public trust doctrine's origins).

9. See generally Hope M. Babcock, *Grotius, Ocean Fish Ranching, and the Public Trust Doctrine: Ride 'Em Charlie Tuna*, 26 STAN. ENVTL. L.J. 3 (2007) (discussing regulatory gaps in the management of ocean fish ranching and how the public trust doctrine has been used to fill them).

10. Mary Christina Wood, "You Can't Negotiate with a Beetle": *Environmental Law for a New Ecological Age*, 50 NAT. RESOURCES J. 167, 176 (2010).

11. *Id.* at 209.

In light of species extinction, global warming, and other environmental catastrophes facing the world, protecting the views of a relatively small park on the banks of an urban river may seem too small to be worth the worry.<sup>12</sup> But keeping an undisturbed natural system intact by protecting it from visual pollution that would otherwise fundamentally change the enjoyment rights of people who view it seems a worthwhile, even attainable goal in a world of over-cluttered horizons; moreover, this task is particularly well suited as an application of the public trust doctrine.

I. BACKGROUND: PALISADES PARK, LG ELECTRONICS' PROPOSAL, AND THE ENSUING LITIGATION<sup>13</sup>

[I]f built, this tower will introduce a massive incompatible feature that will be visible for miles along the river and from vantage points along the west side of Manhattan as well as from the bridge.<sup>14</sup>

Palisades Interstate Park covers twelve miles of steep cliffs that stretch from the George Washington Bridge in New Jersey into New York State.<sup>15</sup> The Park encompasses 2500 acres of wild shore lands, uplands, and dramatic cliffs that run alongside the Hudson River.<sup>16</sup> Except for a historic brick church that sits below the Park's tree line, there are no buildings in the Park.<sup>17</sup> New York and New Jersey created the Park in 1900 to protect the cliffs from unregulated quarrying and to preserve the view from the New York shoreline.<sup>18</sup> The Park is managed by the Palisades Interstate Park Commission.<sup>19</sup> A parkway, built in 1961, runs for over forty miles from New Jersey into New York, providing both access to and scenic views of the Park for residents and out-of-state visitors.<sup>20</sup> Both states have designated the parkway a "state scenic byway . . . because of its outstanding historic and scenic character."<sup>21</sup> Local communities

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12. *Id.* at 180 ("On a worldwide basis, there is a staggering loss in ecosystem services provided to humans. The Millennium Ecosystem Assessment, conducted by over 1,300 experts from 95 countries, concludes: '[A]pproximately 60% (15 out of 24) of the ecosystem services examined . . . are being degraded or used unsustainably.'"), 177 ("The data and trends are impossible to dismiss. Humanity is violating nature's laws not only at the level of individual species and ecosystems, but at the level of atmospheric functioning and ocean health—a truly global level.").

13. See generally Amicus Curiae Brief for the State of New York, *supra* note 2, at 3 (listing supporting facts). Other sources are separately noted.

14. Robin Pogrebin, *New Forces Join Lawsuit Fighting Palisades Tower*, N.Y. TIMES (Jan. 22, 2014), [http://www.nytimes.com/2014/01/23/arts/design/new-forces-join-lawsuit-fighting-palisades-tower.html?\\_r=0](http://www.nytimes.com/2014/01/23/arts/design/new-forces-join-lawsuit-fighting-palisades-tower.html?_r=0) (discussing letters sent from the National Park Service to the Englewood Cliffs Planning Board).

15. Amicus Curiae Brief for the State of New York, *supra* note 2, at 4–6.

16. *Id.* at 4.

17. *Id.* at 4 n.2.

18. John D. Rockefeller donated 700 acres of land across the top of the cliffs to the Park on the condition that no structure would be built at a height that would be visible from across the river. *Id.* at 6. He also conditioned his gift on the removal of all man-made structures that were visible from across the river. *Id.*

19. *Id.* at 5.

20. See *id.* at 6.

21. *Id.* at 7.

adjacent to the Park have imposed zoning and land use restrictions, in particular height restrictions, to protect the Park from despoliation and to preserve views of the Park from various vantage points in both New Jersey and New York.<sup>22</sup> The town of Englewood Cliffs, which is at the center of this dispute, has a zoning ordinance that limits the height of buildings in commercial areas to thirty-five feet.<sup>23</sup> Until recent action by the Englewood Cliffs' zoning commission, none of the local towns adjacent to the Park had granted any variance that allowed buildings to exceed this limit.<sup>24</sup>

In 2012, LG Electronics, a South Korean manufacturer of televisions,<sup>25</sup> mobile phones, and appliances, received a zoning variance to construct a 143-foot office building adjacent to the Park.<sup>26</sup> The building will "tower" over the Park's tree line and be visible not only from Palisades Parkway, but also from important public viewing sites on the other side of the Hudson River,<sup>27</sup> including the Cloisters in New York City.<sup>28</sup> The building has drawn opposition from national environmental and historic preservation groups, four former governors of New Jersey, four mayors of surrounding towns, New York State,

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22. For example, Tenaflly, which is located north of Englewood Cliffs, has a zoning ordinance that limits the height of buildings to thirty feet (the equivalent of two-and-a-half stories) in residential districts and forty feet (or three stories) in commercial districts. *Id.* at 8. The zoning ordinance for Alpine, north of Tenaflly, limits building height to thirty-five feet. *Id.* Both of these ordinances "have preserved the majestic views of the Palisades' summit from the eastern side of the Hudson River for decades." *Id.*

23. *Id.* at 7.

24. *Id.* at 8.

25. See David Voreacos, *LG Wins New Jersey Court's Approval to Build atop Hudson Cliffs*, BLOOMBERG (Aug. 19, 2013, 9:01 PM), <http://www.bloomberg.com/news/2013-08-09/lg-wins-new-jersey-court-approval-to-build-on-hudson-cliffs.html> (reporting that LG Electronics is second only in size to Samsung Electronics with respect to producing televisions).

26. The new building will be less than sixty yards from the Park's border. Press Release, N.J. Conservation Found., Major Opponents of LG Tower Join Legal Battle to Protect Palisades Park (Apr. 7, 2014), available at <http://www.njconservation.org/pressreleases/ShowPressRelease.cfm?prid=110>. The first lawsuit opposed the grant of the variance. Pogrebin, *supra* note 14. But, after authorities permitted the land in question to be rezoned to allow the taller building, advocates filed the second lawsuit. *Id.*

27. Amicus Curiae Brief for the State of New York, *supra* note 2, at 1 (noting that the building will be "highly visible in every season from the George Washington Bridge and the eastern shore of the Hudson River").

28. See Amici Curiae Brief for N.J. Conservation Found. et al., *supra* note 3, at 16; see also Brendan T. Byrne et al., Op-Ed., *The Threat to the Palisades*, N.Y. TIMES (Mar. 24, 2014), <http://www.nytimes.com/2014/03/25/opinion/the-threat-to-the-palisades.html> (noting that four former governors commented critically about the proposed building); Editorial Bd., *LG's Plan to Deface the Palisades*, N.Y. TIMES (Apr. 28, 2014), <http://www.nytimes.com/2014/04/29/opinion/lgs-plan-to-deface-the-palisades.html> ("Four former governors of New Jersey—two Democrats and two Republicans—have pleaded with the company and local officials to reduce the size of the building. Virtually every major public official in New York, including the governor and both senators, have protested. The Environmental Protection Agency withdrew its approval of the construction last year because the main office building would damage the 'natural beauty of the Palisades.'"); Press Release, Protect the Palisades, 11 Organizations, NJ and NY Elected Officials File Legal Briefs Opposing LG's Tower (Apr. 7, 2014), available at [http://www.protectthepalisades.org/11\\_organizations\\_and\\_officials\\_from\\_nj\\_and\\_ny\\_file\\_legal\\_briefs\\_opposing\\_lg\\_s\\_tower](http://www.protectthepalisades.org/11_organizations_and_officials_from_nj_and_ny_file_legal_briefs_opposing_lg_s_tower) (reporting that four New Jersey mayors, including the mayors of Alpine and Tenaflly, had filed amicus briefs opposing the building).

and the Metropolitan Museum, among others.<sup>29</sup> According to opponents of the project, the building would breach a century-old agreement between the former governors of New York (Theodore Roosevelt) and New Jersey (Foster Voorhees).<sup>30</sup> Even the National Park Service wrote a letter asking the Englewood Cliffs Planning Board to reconsider the proposal, saying that the new building would “threaten the integrity of the scene in a startling and major way.”<sup>31</sup>

Despite this opposition, the request for a zoning variance to allow the building’s construction won easy approval from Englewood Cliffs’ zoning commission; and the New Jersey Superior Court later sustained the decision.<sup>32</sup> The commission’s decision is unsurprising because local agencies are frequently subject to substantial political pressure,<sup>33</sup> causing them to favor parochial interests by converting trust resources to commercial use and overriding the broader public interest in preserving trust property.<sup>34</sup> The casual issuance of the variance by the zoning commission only underscores the importance of Professor Wood’s call for repositioning public trust principles in a new “Nature’s Trust,”<sup>35</sup> which would “interject a fiduciary duty into every government action involving the environment.”<sup>36</sup>

29. See generally *Amici Curiae Brief for N.J. Conservation Found. et al.*, *supra* note 3 (listing some of the groups opposed to the building).

30. *Id.* at 23 (stating that “the work of such storied historical actors and cooperation between New Jersey and New York should not be so easily undone” and noting the National Park Service’s recognition of the Park as “one of the key moments in conservation history”).

31. Pogrebin, *supra* note 14. The *Times* noted that the World Monument Fund featured the Cloisters and Palisades on its annual list of endangered cultural sites, saying that the proposed building “would seriously affect one of the most unspoiled areas of the Hudson River, including treasured views from the Cloisters museum and gardens, and also have a negative impact on the region.” *Id.* The National Trust for Historic Preservation listed the Park among its most endangered historic places in 2014 because it was an example of a natural heritage “at risk of destruction or irreparable damage.” Robin Pogrebin, *Preservation Trust Lists Palisades, Wright Home and Remnant of the Slave Trade as Endangered*, N.Y. TIMES (June 23, 2014, 11:00 AM), <http://artsbeat.blogs.nytimes.com/2014/06/23/preservation-trust-lists-palisades-wright-home-and-slave-ship-as-endangered>.

32. See *supra* notes 5–7 and accompanying text.

33. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 495 (1970) (“[P]ublic officials are frequently subjected to intensive representations on behalf of interests seeking official concessions to support proposed enterprises. The concessions desired by those interests are often of limited visibility to the general public so that public sentiment is not aroused . . .”).

34. See *id.* at 534 (“The San Francisco Bay experiences indicate that local public interests may interfere with the public trust in the same manner as private profit-oriented interests; many aspects of local self-interest are as inconsonant with the broad public interest as are the projects of private enterprises. In both situations one may observe behavior which is rational from the atomistic perspective of the actor, but which, from the perspective of the larger community, is highly disadvantageous.”); *id.* (“[These experiences] suggest[ ] the need to adjust traditional decision-making mechanisms for resources like the bay in light of the potential disjunction between the perceived benefit to the local entity and the total impact of such local choices on the community of users as a whole.”). Sax’s survey of court public trust decisions revealed “a broad consideration of all potential public interests by requiring that decisions be made by a body with a constituency broad enough to be responsive to the whole range of significant potential users.” *Id.* at 560–61.

35. Wood, *You Can’t Negotiate with a Beetle*, *supra* note 10, at 191 (“Rather than using their delegated authority to protect crucial resources, nearly all agencies use their permit authority to

The former New Jersey governors commented, among other criticisms, that “LG would take for its own private benefit natural beauty which belongs to the public.”<sup>37</sup> An amicus curiae brief filed by nearby local towns added that they each regarded the Palisades Park as a part of their “public trust to protect the watershed” and that they and their residents considered the Park and its cliffs to be “critical elements” of the surrounding area, “not only providing recreational opportunities, but also creating a sense of place that enriches their communities.”<sup>38</sup> Although these comments resonate with language usually attributed to the public trust doctrine, none of the comments or principal briefs recommended the doctrine’s use to block the building’s construction. Their failure to do so thus invites the question of whether the doctrine should be used to protect the scenic views of a public park—a question that this Article attempts to answer in the positive.

## II. THE PUBLIC TRUST DOCTRINE: ITS ORIGINS AND TRADITIONAL USE

The public trust . . . is based on a set of modest beliefs: a belief that the public benefits mightily from private development, but that the public interest is in fact greater than the sum of the private interests; a belief that property ownership must be profoundly respected but that property rights in water, like rights in land, are not absolute but rather can be regulated and adjusted in reasonable ways for the good of the citizenry as a whole; a belief that wasteful uses of public resources are wrong and are not excused by return flows that return to our rivers not just water but also silt, salts, agrichemicals, and temperature changes; a belief that our rivers and canyons are more than commodities, that they have a trace of the sacred; a belief that words like ‘trust’ ought to be taken seriously.<sup>39</sup>

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affirmatively sanction destruction of resources by private interests.”), 200 (“The Nature’s Trust paradigm draws upon an ancient and enduring principle known as the public trust doctrine. The doctrine springs from an early civic and judicial understanding that some natural resources are so vital to public welfare and human survival that they cannot be exclusively exploited through private property ownership and control. The public has a lasting ownership interest, called a beneficial interest, in such crucial natural resources—a right so fundamental that it has been described by some scholars as a God-given right or natural right.”); see also Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 299 (1980) (“Thus we can expect courts today, like courts in earlier eras, to characterize Congress’ modern legislative scheme as imposing a public trust on the public resources.”).

36. Wood, *You Can’t Negotiate with a Beetle*, *supra* note 10, at 202 (“While the environmental statutes give agencies authority to allocate rights to pollute and destroy resources, the trust would act as, and be enforced as, a fundamental check on this authority.”).

37. Press Release, N.J. Conservation Found., *supra* note 26.

38. *Id.*

39. Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 471–72 (1989). Professor Wood has put forth a much bolder view of the trust, describing it as “the original legal mechanism used to ensure that government safeguards the natural resources necessary for public welfare and survival.” Wood, *You Can’t Negotiate with a Beetle*, *supra* note 10, at 200.

Much has been written about the public trust doctrine since its 1970 redeployment by the late Professor Joseph Sax,<sup>40</sup> and it is not the intent of this Article to repeat the work of others here. However, certain elements of the traditional doctrine relate to the question posed by this Article and are, therefore, discussed briefly in those contexts.

The public trust doctrine is based on the proposition that the sovereign holds certain common properties in trust in perpetuity for the free and unimpeded use of the general public.<sup>41</sup> As a result, the public trust doctrine requires first that:

[P]roperty subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.<sup>42</sup>

Thus, the doctrine protects public rights in trust resources in perpetuity and prevents the government and private individuals from alienating or otherwise adversely affecting those rights in all but another equivalent public purpose.<sup>43</sup> Under the doctrine, governments are not only prohibited from conveying trust resources into private hands or allowing their destruction, they “have an affirmative, ongoing duty to safeguard the long-term preservation of those resources for the benefit of the general public.”<sup>44</sup> This makes the doctrine “a fundamental limitation on governmental power,”<sup>45</sup> and the beneficiaries “are present and future generations of citizens.”<sup>46</sup> The essence of the doctrine requires trust management for public benefit rather than for private exploitation or political advantage.<sup>47</sup> This places a duty on trustees to choose less acute

40. See Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33.

41. See Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 *ECOLOGY L.Q.* 351, 351 (1998) (“Until it was revived and re-invented by Sax, the doctrine held that some resources, particularly lands beneath navigable waters or washed by the tides, are either inherently the property of the public at large, or are at least subject to a kind of inherent easement for certain public purposes. Those purposes are foremost navigation and travel, to a lesser extent fishing, and lesser still recreation and public gatherings.”).

42. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 477.

43. Hope M. Babcock, *Should Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-o-Links, and Other Things that Go Bump in the Night*, 85 *IOWA L. REV.* 849, 889–98 (2000) (summarizing salient aspects of the public trust doctrine); see also Mary Christina Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 *ENVTL. L.* 605, 612 (2004) (“[G]overnment trustees are required to preserve wildlife assets and protect them against damage.”).

44. Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 *U.C. DAVIS L. REV.* 665, 667 (2012); see also J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 *U.C. DAVIS L. REV.* 915, 918 (2012) (“Public trust rights are understood to precede and constrain legislative action to a larger extent than do private property rights.”).

45. Wood, *You Can’t Negotiate with a Beetle*, *supra* note 10, at 201; see also Wood, *Protecting the Wildlife Trust*, *supra* note 43, at 612 (noting that this capacity to “constrain the natural tendency of governmental officials to exhaust resources in the present generation” acts as “a normative anchor . . . geared towards sustaining society for generations to come”).

46. Wood, *You Can’t Negotiate with a Beetle*, *supra* note 10, at 201.

47. *Id.*



intrusions into resources in order to protect them from “avoidable destabilization and disruption.”<sup>48</sup> There were certainly options for less acute intrusions into the scenic views of Palisades Interstate Park had the zoning commission required them. Those options would not have compromised LG’s desire to receive a Leadership in Energy & Environmental Design (LEED) certification—which would have made the company eligible for certain state tax incentives.<sup>49</sup>

Public access to public trust resources is at the core of the doctrine.<sup>50</sup> Because granting absolute private dominion over property impressed with the public trust interferes with public access, it can never be granted unless the public interest is served in doing so.<sup>51</sup> Unrestricted public access to trust resources is the key issue in this Article.

Government agencies have the non-rescindable power to revoke uses of trust resources that are inconsistent with the doctrine.<sup>52</sup> This power is equivalent to an easement that permanently burdens trust resources with an overriding public interest in their preservation.<sup>53</sup>

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48. Joseph L. Sax, *Liberating the Public Trust from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 193 (1981) (discussing impacts to water-based resources like bottomlands); *see also* Wood, *You Can’t Negotiate with a Beetle*, *supra* note 10, at 188 (“The dual necessity of mitigation and adaptation is perhaps best captured by Thomas Friedman when he says: ‘Avoid the unmanageable and manage the unavoidable.’”).

49. For example, LG apparently ignored testimony by the project’s architect that the building could be wider without losing its environmental features and still qualify for LEED certification. Amicus Curiae Brief for the State of New York, *supra* note 2, at 10–11. Despite LG’s claims to “greenness,” Greenpeace reported that it ranked twelfth out of sixteen companies in energy consumption for its electronic products. *See* GREENPEACE INT’L, GUIDE TO GREENER ELECTRONICS (2012), *available at* <http://www.greenpeace.org/international/en/campaigns/climate-change/cool-it/Campaign-analysis/Guide-to-Greener-Electronics>.

50. *See* Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 731 (1989) (“In essence, the courts protect access rights to public trust resources.”); *id.* at 734 (“The public trust doctrine is a transcendent legal principle. . . . [with] roots . . . in natural law.”).

51. *See* Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 435, 452–54 (1892); *see also* United States v. 1.58 Acres of Land, 523 F. Supp. 120, 122–23 (D. Mass. 1981) (“Historically, no developed western civilization has recognized absolute rights of private ownership in [submerged] land as a means of allocating this scarce and precious resource among the competing public demands. Though private ownership was permitted in the Dark Ages, neither Roman law nor the English common law as it developed after the signing of the Magna Charta would permit it.”). Sax attributes the creation of a “model for judicial skepticism” to *Illinois Central*. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 491. The model:

[P]oses a set of relevant standards for current, less dramatic instances of dubious governmental conduct. For instance, a court should look skeptically at programs which infringe broad public uses in favor of narrower ones. Similarly, there should be a special burden of justification on government when such results are brought into question.

*Id.*

52. Babcock, *supra* note 43, at 892.

53. *Id.* at 893 (“One cannot construct a common law canon more offensive to the notion of absolute private rights in property than the public trust doctrine.”). *But see* Byrne, *supra* note 44, at 916 (finding two aspects to the doctrine, one pertaining to public right of use or access to trust resources and the other to the requirement that public officials take into account the public interest in natural resources when allocating private rights in those resources).

[A state] can no more abdicate its trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.<sup>54</sup>

The doctrine also applies to municipalities, like the town of Englewood Cliffs.<sup>55</sup>

This is not to say that public trust resources can never be alienated. As Professor Sax said, “It can hardly be the basis of any sensible legal doctrine that change itself is illegitimate.”<sup>56</sup> Preventing conversion of trust resources to nontrust uses would tie the hands of decision makers from responding to changing perceptions of the public interest with respect to the use of trust resources.<sup>57</sup> Thus, lands impressed with the public trust can be transferred to private owners, if the conveyance will serve the public interest in those resources and not interfere with trust uses in the nonconveyed land.<sup>58</sup> But private uses of trust resources are allowed only if those uses are consistent with the trust’s purposes, do not interfere with protected uses of those resources, and

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54. *Ill. Cent. R.R.*, 146 U.S. at 453. The public trust doctrine does not “sanction the abdication of the general control of the [s]tate over lands under the navigable waters of an entire harbor or bay, or of a sea or lake.” *Id.* at 452–53.

55. *See, e.g.*, *Ctr. for Biological Diversity v. FPL Grp., Inc.*, 83 Cal. Rptr. 3d 588 (Ct. App. 2008) (applying the public trust doctrine to a county); *Save the Welwood Murray Mem’l Library Comm. v. City Council*, 263 Cal. Rptr. 896 (Ct. App. 1989) (discussed in the following Part, applying the doctrine to a city); *Friends of Parks v. Chi. Park Dist.*, 786 N.E.2d 161 (Ill. 2003) (finding that state statute did not violate public trust doctrine); *Van Ness v. Borough of Deal*, 393 A.2d 571 (N.J. 1978) (striking down a restriction limiting membership to a municipally owned beach and casino to residents); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972) (striking down discriminatory fees charged at a municipally owned beach); *Bernstein v. City of Pittsburgh*, 77 A.2d 452 (Pa. 1951); *In re Conveyance of 1.2 Acres of Bangor Mem’l Park to Bangor Area Sch. Dist.*, 567 A.2d 750 (Pa. Commw. Ct. 1989); *City of Montpelier v. Barnett*, 49 A.3d 120 (Vt. 2012) (prohibiting city from permitting swimming, boating, and fishing on Berlin Pond, the city’s source of drinking water).

56. Sax, *Liberating the Public Trust from Its Historical Shackles*, *supra* note 48, at 186 (“[I]t is inconceivable that the trust doctrine should be viewed as a rigid prohibition, preventing all dispositions of trust property or utterly freezing as of a given moment the uses to which those properties have traditionally been put.”).

57. Sax acknowledges this problem as “the central problem of public trust controversies.” Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 495. “There must be some means by which a court can keep a check on legislative grants of public lands while ensuring that historical uses may be modified to accommodate contemporary public needs and that the power to make such modifications resides in a branch of government which is responsive to public demands.” *Id.*

58. *Ill. Cent. R.R.*, 146 U.S. at 453 (“The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”); *see also Nat’l Audubon Soc’y v. Superior Court of Alpine Cnty. (Mono Lake)*, 658 P.2d 709, 724 (Cal. 1983) (“The public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage[,] . . . surrendering that right . . . only in rare cases when the abandonment of that right is consistent with the purpose of the trust.”). The public purpose that will be served by a conveyance of trust lands cannot be “incidental, remote or secondary.” Tim Eichenberg & Barbara Vestal, *Improving the Legal Framework for Marine Aquaculture: The Role of Water Quality Laws and the Public Trust Doctrine*, 2 TERRITORIAL SEA J. 339, 349 (1992).

preserve them for future as well as present generations.<sup>59</sup> None of these exceptions matter in this case. Moreover, the conveyance becomes suspicious when profit-making ventures “obtain advantages which infringe directly on public uses and promote private profits.”<sup>60</sup> Here, the alienation of trust resources benefits only LG Electronics and its employees.<sup>61</sup>

Some courts will allow the conveyance of trust resources into private hands if the conveying government agency has considered the proposed activity’s potential adverse impacts to the public trust and has concluded that the impacts on remaining trust resources are minor.<sup>62</sup> Other courts balance competing interests when conflicts arise over the use of trust property,<sup>63</sup> still others simply allow conveyances to private hands, if they are legislatively authorized.<sup>64</sup> While courts use different standards when determining whether a particular transfer of trust resources to private ownership is permissible, all courts look at the transfer closely to determine if the private use would diminish the land’s usefulness for public trust purposes.<sup>65</sup>

Professor William Araiza likes none of these approaches, particularly when courts are faced with a nontraditional use of the doctrine, like the one

59. *Ill. Cent. R.R.*, 146 U.S. at 453.

60. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 496.

61. See, e.g., Amicus Curiae Brief for the State of New York, *supra* note 2, at 10 (reporting that the project architect explained that the height of the building was “to provide more daylight for the building’s occupants, thereby boosting employee happiness and retention,” and noting that other witnesses “remarked on how the building’s height would provide all LG employees with views outside” and that the building was “one of the most magnificent views in Bergen County”).

62. Deborah G. Musiker et al., *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87, 98 (1995) (noting that courts allow actions in derogation of the public trust “to proceed only if the impacts are minimal or necessary”); see also *Ill. Cent. R.R.*, 146 U.S. at 435, 453 (imposing a duty on states to prevent “substantial impairment” of trust resources).

63. See Musiker et al., *supra* note 62, at 98 (noting that some courts “have advocated more of a balancing approach”); see also *Mono Lake*, 658 P.2d at 728 (“This is not a case in which the Legislature, the Water Board, or any judicial body has determined that the needs of Los Angeles outweigh the needs of the Mono Basin, that the benefit gained is worth the price. Neither has any responsible body determined whether some lesser taking would better balance the diverse interests.”); Babcock, *supra* note 8, at 46 n.261 (discussing balancing under the public trust doctrine).

64. Eichenberg & Vestal, *supra* note 58, at 349 (“[T]rust lands may only be conveyed for purposes approved by the legislature as public uses.”); see also *Gould v. Greylock Reservation Comm’n*, 215 N.E.2d 114, 123–24 (Mass. 1966) (finding law authorizing commercial lease of state reserved land too vague to authorize construction of ski area); Babcock, *supra* note 8, at 44–45 (noting that unless the legislature finds that a proposed conveyance promotes the public interest, a court cannot destroy the public’s interest in remaining trust resources). Professor Sax considered *Gould* an extremely important public trust case because the court in that case “devised a legal rule which imposed a presumption that the state does not ordinarily intend to divert trust properties in such a manner as to lessen public uses.” Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 494.

65. Eichenberg & Vestal, *supra* note 58, at 349; see also Musiker et al., *supra* note 62, at 98 (interpreting *Mono Lake* as requiring state agencies to consider public trust values before making any decision affecting them, to act to preserve those values, and to supervise continually any conduct that might affect those values).

contemplated by this Article. He proposes instead that courts apply the public trust doctrine as “an interpretative canon of construction.”<sup>66</sup> He argues:

[T]he principle underlying the public trust doctrine—that “social” uses of natural resources generate benefits that merit protection—is so important that it warrants consideration when courts construe laws or review government actions that affect those uses. As such, the public trust principle constitutes a background principle, or canon, against which those laws should be construed.<sup>67</sup>

According to Araiza, such a canon invites “judges to place a thumb on the scales in favor of public trust assets,” but is not itself a substantive or procedural rule.<sup>68</sup> However, this approach seems too mild and too great a departure from the case law to justify the application of the doctrine to block construction of the LG building. Further, there is no law here that might block the unfettered discretion of the zoning commission. Hence an interpretative canon would be of no use.

According to Professor Sax, courts generally “look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate [a public] resource to more restricted uses *or* to subject public uses to the self-interest of private parties.”<sup>69</sup> This is because

[G]overnments operate in order to provide widely available public services, such as schools, police protection, libraries, and parks. While there may be good reasons to use governmental resources to benefit some group smaller than the whole citizenry, there is usually some relatively obvious reason for the subsidy, such as a need to assist the farmer or the urban poor. In addition, there is ordinarily some plainly rational basis for the reallocative structure of any such program . . . .<sup>70</sup>

Courts will also intervene when there is a blatant act of government corruption or when the transfer from public to private hands “raise[s] doubts.”<sup>71</sup> In his review of state court reactions when confronted with a case that raises public trust concerns, Professor Sax found that courts also remand cases when doing so will “promote equality of political power for a disorganized and diffuse majority” where organized and powerful minority interests have held sway.<sup>72</sup>

66. William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 703 (2012).

67. *Id.* at 704 (“[S]uch a canon, however applied, amounts to a call to judges to place a thumb on the scales in favor of public trust assets.”).

68. *Id.* at 726; *see also* Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 509 (“[P]ublic trust law is not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process.”).

69. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 490 (“When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.”).

70. *Id.*

71. *Id.* at 542–43.

72. *Id.* at 560.

There is nothing unusual in these court actions, according to Professor Sax, as they are functions that courts have been performing all along.<sup>73</sup> Given the size and economic strength of LG Electronics, there may well be a sufficient imbalance of political power in this situation to justify the doctrine's application to restore political balance.<sup>74</sup>

Professor Sax believed the doctrine is capable of contributing to intelligent resource management.<sup>75</sup> However, to "provide a satisfactory tool" to improve the management of natural resources, the doctrine must, among other things, "be capable of an interpretation consistent with contemporary concerns for environmental quality."<sup>76</sup> These concerns include the need to avoid destabilizing changes, particularly those that are abrupt and do not allow for adaption to a new regime.<sup>77</sup> This concern is particularly true in matters involving ecological systems, where Professor Sax thought that the public trust doctrine could create breathing room for natural systems to adapt.<sup>78</sup> Indeed, Professor Sax's support for the doctrine flowed, in part, from its capacity to prevent destabilizing change.<sup>79</sup> Although the construction of LG's building does not destabilize an ecological system, it is an abrupt change in scenic views of a century-old intact natural system; thus, it destabilizes expectations about what the public might see when it looks at Palisades Interstate Park.

73. *Id.*

74. According to LG's own webpage, LG was the fourth largest producer of mobile handsets in the world in 2005 and the second largest producer of liquid-crystal-display television products in 2009. History, LG ELECTRONICS, <http://www.lg.com/us/corporate-information/overview/history> (last visited Dec. 28, 2014).

75. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 474 ("Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and 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."). Indeed, Sax believed that recognition of "long-standing public uses have an important place" in any judicial analysis of the "justness of property claims," and he would have had courts "integrate legal doctrine and fundamental principles of intelligent resource management, instead of treating basic social decisions as if they were merely the province of a title examiner." Sax, *Liberating the Public Trust from Its Historical Shackles*, *supra* note 48, at 194. He also believed the doctrine contained "the seeds of ideas whose importance is only beginning to be perceived, and that the doctrine might usefully promote needed legal development, can hardly be doubted." Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 485.

76. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 474. Sax also said the doctrine must "contain some concept of a legal right in the general public" and "it must be enforceable against the government." *Id.* The doctrine's historical provenance meets the first requirement and at least two centuries of enforcement of the doctrine against government agencies for violating the public trust meet the second. See generally Babcock, *supra* note 8, at 36–54; Babcock, *supra* note 43, at 889–98.

77. Sax, *Liberating the Public Trust from Its Historical Shackles*, *supra* note 48, at 188; see also Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 474 (noting that the public trust doctrine has also "prevent[ed] the destabilizing disappointment of expectations held in common but without formal recognition such as title").

78. Sax, *Liberating the Public Trust from Its Historical Shackles*, *supra* note 48, at 188; see also Wood, *You Can't Negotiate with a Beetle*, *supra* note 10, at 177 ("When an ecosystem starts unraveling, it takes almost everything with it.").

79. See *supra* note 77.

Professor Sax also touted the doctrine's "democratization" of the decision-making process by forcing legislators and agency officials to publicize their decisions compromising the doctrine's protective capacity.<sup>80</sup> He noted that, while the doctrine has "no life on its own and no intrinsic content," it is "a name courts give to their concerns about the insufficiencies of the democratic process."<sup>81</sup> The failure of the commission, in a state with a long history of applying the public trust doctrine, to even acknowledge the doctrine's existence is surprising. The commission's failure certainly deprived the public from recognizing how its actions compromised their rights under the doctrine.

### III. THE DOCTRINE'S EVOLUTION BEYOND TRADITIONAL TRUST PROPERTIES AND TRADITIONAL USES OF THOSE PROPERTIES

The new public trust laid claim to the seed of the *jus publicum*, the notion that certain resources are of so common a nature that they defy private ownership in the classical liberal sense. But where the traditional doctrine evolved to protect common rights to access for commerce purposes (hence

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80. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 498 ("That state's supreme judicial court has penetrated one of the very difficult problems of American government—inequality of access to, and influence over, administrative agencies. It has struck directly at low-visibility decision making, which is the most pervasive manifestation of the problem. By a simple but ingenious flick of the doctrinal wrist, the court has forced agencies to bear the burden of obtaining specific, overt approval of efforts to invade the public trust." (referring to *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114 (Mass. 1966))). According to Sax, this places on administrative agencies "the burden of establishing an affirmative case before the legislature in the full light of public attention," something that was clearly not done in the case of Palisades Interstate Park. *See id.* at 499.

81. *Id.* at 521. Professor Sax identified multiple steps that courts should follow to determine whether a democratization problem exists:

[The court must first] search for those situations in which political imbalance exists, and the signal for the existence of that problem is diffusion. . . . When a claim is made on behalf of diffuse public uses, courts take the first step in the process by withdrawing the usual presumption that all relevant issues have been adequately considered and resolved by routine statutory and administrative processes. That first step is tantamount to a court's acceptance of jurisdiction.

*Id.* at 561. The second "step is to seek out the indicia which suggest that a particular case, on its own merits, possibly or probably has not been properly handled at the administrative or legislative level." *Id.* at 562. Indicia of such a problem are the disposal of trust resources at less than fair market value or a private entity being granted "authority to make resource-use decisions which may subordinate broad public resource uses to that private interest[.]" *Id.* The third inquiry by a court faced with the potential misuse of trust resources is whether there has "been an attempt to reallocate diffuse public uses either to private uses or to public uses which have less breadth[.]" *Id.* at 563. In those cases, Sax remarked that while courts seem disinclined to find such transfers "illegal per se," they will inquire into their public purpose justification and appear to "want to put legislatures and administrators on notice that such dispositions will be closely scrutinized and must be reasonably justifiable in terms of the public benefits to be achieved." *Id.* at 564. The reviewing court's last inquiry is whether the resource is being used for "its natural purpose." *Id.* at 565. Given the failure of the zoning commission to consider comments opposing the grant, the substitution of a narrow public use for a much broader diffuse use of a trust resource, and a use that is not natural at all, the variance granted to LG Electronics raises serious questions under all these inquiries.

the criteria of navigability), the new public trust heralded conservationist principles.<sup>82</sup>

As befits a doctrine that originates from property law,<sup>83</sup> the public trust doctrine's traditional reach is narrow.<sup>84</sup> Nonetheless, the doctrine has expanded over time, perhaps because property is "inextricably part of a network of

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82. Erin Ryan, Comment, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL. L. 477, 479 (2001).

83. See *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 83 (1851) ("[W]hether this power be traced to the right of property or right of sovereignty as its principle source, it must be regarded as held in trust for the best interest of the public . . ."). Indeed, some well-respected scholars fault the doctrine of its property law provenance. See generally Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 633 (1986) ("[T]he historical function of the public trust doctrine has been to provide a public property basis for resisting the exercise of private property rights in natural resources deemed contrary to the public interest. In recent decades, however . . . modern trends in natural resources law increasingly have eroded traditional concepts of private property rights in natural resources and substituted new notions of sovereign power over these resources. These trends . . . are currently weaving a new fabric for natural resources law that is more responsive to current social values and the physical characteristics of the resources. By continuing to resist a legal system that is otherwise being abandoned, the public trust doctrine obscures analysis and renders more difficult the important process of reworking natural resource law."). Erin Ryan responds to this concern: "One is hard-pressed to challenge the proposition that the common law public trust doctrine developed independent from property law, but is it possible that the force of the new public trust doctrine, as Professor Sax has implied, flows from roots deeper than classical liberal property law?" Ryan, *supra* note 82, at 495.

84. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 556 ("[T]he historical scope of public trust law is quite narrow. Its coverage includes, with some variation among the states, that aspect of the public domain below the low-water mark on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence."). Indeed, Professor Thomas Merrill, in an article on the public dedication doctrine in which he compares the effectiveness of that relic doctrine to the public trust doctrine, lists the wider scope of the dedication doctrine as a distinct advantage over the public trust doctrine. See Joseph D. Kearney & Thomas W. Merrill, *Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine*, 105 NW. U. L. REV. 1417, 1522 (2011) ("[T]he public dedication doctrine covers a much wider array of resources. . . . In virtually all states, the public trust doctrine remains tethered to navigable waters, and courts have resisted extending the doctrine to public lands having no nexus to navigable waters. The public dedication doctrine, in contrast, applies to any and all lands that have been dedicated to public uses, including streets, alleys, squares, landings, and parks."). Professor Merrill notes that the public trust doctrine "is mired in uncertainty about what kind of nexus to navigable waters is required (if any), and what kinds of trust obligations are imposed on the state when the doctrine applies." *Id.* at 1523. He suggests that the public dedication doctrine "incorporates a rule-like understanding, which encourages judicial enforcement and facilitates bargaining among affected interests"—both of which advantage the public dedication doctrine over the public trust doctrine. *Id.* Merrill observes that the public trust doctrine "tends to reflect a poorly defined standard, which confers considerable discretion on courts and tends to make bargaining among interest groups more difficult." *Id.* at 1524. He also remarks that enforcement of the public dedication doctrine may happen more easily because "[p]art of the value of the public dedication is capitalized in the value of [abutting landowners'] real estate holdings, and this gives [them] a powerful incentive to seek to preserve the dedication." *Id.* The same is not true of the public trust doctrine's enforcement where:

Limiting enforcement to public officials may lead to underenforcement, particularly if public officials are vulnerable to capture by private interests that favor development. Expanding enforcement by recognizing universal taxpayer standing may result in overenforcement, insofar as the preferences of advocacy groups may not align with median voter preferences.

*Id.*

relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing.”<sup>85</sup> This is because property is a social construct and not a natural right.<sup>86</sup> Since “a man’s right [to] his real property . . . is not absolute, [it is] a maxim of the common law that one should . . . use his property” in a way that does not “injure the rights of others.”<sup>87</sup> According to Morris Cohen:

[W]e can no longer maintain Montesquieu’s view that private property is sacrosanct and that the general government must in no way interfere with or retrench its domain . . . . To be really effective . . . , the right of property must be supported by restrictions or positive duties on the part of owners, enforced by the state as much as the right to exclude others which is the essence of property . . . . [I]f the large property owner is viewed, as he ought to be, as a wielder of power over the lives of his fellow citizens, the law should not hesitate to develop a doctrine as to his positive duties in the public interest.<sup>88</sup>

This view of property, a concept constructed by society that should not be used in a way that harms others, also infuses the public trust doctrine<sup>89</sup> and every expansion of it.<sup>90</sup>

Prior to the advent of modern environmental legislation, Professor Sax suggested that the doctrine could be used to address a variety of environmental harms, including many that are now addressed by modern environmental

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85. Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971); see also Shelby D. Green, *No Entry to the Public Lands: Towards a Theory of a Public Trust Servitude for a Way Over Abutting Private Land*, 14 WYO. L. REV. 19, 58 (2014) (“[Property] has evolved into a law of accommodation—evolving with societal needs and efficiency.”). But see George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law: Emanations within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307, 342 (2006) (“Expansion of the public trust doctrine for no other reason than to protect the environment simply ignores the economic precedent established by the original doctrine itself.”). Even Professor George P. Smith II and Michael Sweeney, who are clearly not fans of the public trust doctrine, nonetheless believe that “[t]he doctrine must be seen as representing and giving legal force to innumerable ‘unmarketized present and future social values’ that are oftentimes ignored or overlooked in daily life—values that shape the total life experience.” *Id.* at 341 (citing ZYGMUNT J. B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 102 (3d ed. 2004)). Professor Wood goes further, suggesting that her concept of “Nature’s Trust” invites a complete reconceptualization of the doctrine. See Wood, *You Can’t Negotiate with a Beetle*, *supra* note 10, at 202–03 (“Courts have repeatedly invited expansion of the doctrine by emphasizing its flexibility to accommodate emerging societal needs. Nature’s Trust invites a re-conceptualization of the public trust doctrine . . . .”).

86. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964) (stating that property “is not a natural right, but a deliberate construction by society”).

87. *New Jersey v. Shack*, 277 A.2d 369, 373 (N.J. 1971). The *Shack* court went on to say that the fact that property rights are not absolute leads to “the inevitable proposition that rights are relative and [that] there must be an accommodation when they meet.” *Id.*

88. Green, *supra* note 85, at 60 (quoting Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21, 26 (1928)).

89. See *supra* Part II.

90. Professor Carol Rose suggests that the possibility of “hold outs” explains the characterization of some property as “inherently public” and thus entitled to protection. See generally Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 750 (1986).



laws.<sup>91</sup> Responding to Professor Sax's call to arms,<sup>92</sup> the modern public trust doctrine has expanded to protect new trust resources<sup>93</sup> and nontraditional public uses of those resources despite having to steer around multiple environmental laws at all levels of government.<sup>94</sup> Araiza finds these instances

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91. See Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 556–57 (“[I]t seems that the delicate mixture of procedural and substantive protections which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling on private lands in a state where governmental permits are required.”); see also Byrne, *supra* note 44, at 918 (“Sax saw the public trust doctrine primarily as a device whereby courts could correct the tendency of parochial administrative agencies and legislatures to respond to well-organized minorities and slight the public interest in natural resource protection.”). Sax also thought it was not beyond possibility that the doctrine might be applied to the poor and consumer groups who are also “often particularly dramatic examples of diffuse public interests and contain all their problems of equality in the political and administrative process.” Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 557. He goes on to say that “[o]nly time will reveal the appropriate limits of the public trust doctrine as a useful judicial instrument.” *Id.*

92. See, e.g., Ryan, *supra* note 82, at 480 (“Scholars and practitioners have responded to Sax’s call and have advocated extending public trust protection to wildlife, parks, cemeteries, and even works of fine art.”); Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. & TECH. L. REV. 285 (2004) (proposing the application of the public trust doctrine to the electromagnetic spectrum to improve public access and perhaps return some of the spectrum that has been allocated to special interests back to the public). *But see id.* at 315–16 (noting differences between the electromagnetic spectrum and natural resources law) (“Electromagnetic spectrum is finite in scope and limited by geographic range (a signal can only transmit so far), yet when a particular frequency is not used, it remains in its natural state in exactly the same condition that it was before and after it was used. In this sense, unlike other natural resources, [it] cannot be depleted. . . . [I]ts exploitation does not have negative externalities . . .”). On the other hand, Patrick Ryan remarks that “the electromagnetic spectrum is used to move information from one place to another just as intertidal waters are used to move goods, and so ‘navigation’ within the spectrum should be a protected public right just as navigation within intertidal waters is protected.” *Id.* at 336. He asks “the reader to take faith that the new technologies that have been described in [the article] will allow the public to gain access to electromagnetic spectrum as modern technological fishers, fowlers, and navigators of this natural resource.” *Id.* at 335.

93. Some scholars have recommended the expansion of the doctrine to protect entire ecosystems. See Eric T. Freyfogle, *Ownership and Ecology*, 43 CASE W. RES. L. REV. 1269, 1289–90 (1993) (arguing for expanding the settings in which the legal concept of public trust could be applied); Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393, 410–18 (1991) (explaining various theoretical bases for expanding the doctrine to protect naturally functioning ecosystems).

94. See Babcock, *supra* note 43, at 889–98 & n.180 (summarizing salient aspects of the public trust doctrine); see also Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892) (holding that state title to lands under navigable waters is “held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties”); *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893) (making Minnesota the first state to recognize public recreation rights as within the scope of the public trust doctrine); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972) (applying the public trust doctrine to recreational use) (“We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend . . . to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.”); Harry R. Bader, *Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law*, 19 B.C. ENVTL. AFF. L. REV. 749, 761 (1992) (“The marriage of absolute ecological protection with absolute access for the purpose of

of doctrinal creep sensible because these interests “are . . . grounded in the historical version of the public trust doctrine . . . refer[ring] back to a similar (though not identical) set of resources—natural resources.”<sup>95</sup>

Once the doctrine expanded to protect ecological systems, the importance of navigation as a protected trust use became significantly less important, leaving proponents free to identify other uses of trust property entitled to protection.<sup>96</sup> To Professor Wood, the historic view of the doctrine’s scope, which limits it to streambeds and water-related areas, is “superficial and at odds with the overriding truth of nature that all ecological resources are interconnected and interdependent.”<sup>97</sup> To her, “[t]he essential doctrinal purposes underlying the public trust doctrine would extend government’s fiduciary duty of protection in a holistic manner to all natural assets, including air, atmosphere, forests, wildlife, wetlands, aquifers, and soils.”<sup>98</sup> Accordingly, several scholars—Professor Wood the most prominent among them—have even proposed to extend the doctrine to the atmosphere. Professor Peter Byrne finds this expansion supportable by “normal legal reasoning,” and believes the lack of precedent on the matter is indicative of only the absence of a need until now to determine who owns the atmosphere.<sup>99</sup> Professor Wood, who has put

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utilizing natural resources comes the closest to the true essence of the public trust doctrine.”); Rose, *supra* note 90, at 723 (“[There may be] other practices that share with commerce the power to enhance our sociability. We might even think that properties devoted to such noncommercial uses as recreation or speech could achieve their highest value when they are accessible to the public at large.”); Wood, *Protecting the Wildlife Trust*, *supra* note 43, at 611 (explaining the expansion of the doctrine’s geographic coverage and the scope of protected trust-based activities). See generally Babcock, *supra* note 8, at 36–54 (discussing the doctrine’s evolution in this country).

95. See Araiza, *supra* note 66, at 715–16. Professor Rose argued that the socializing function of inherently public property might be extended to protect speech taking place in certain locations, citing Justice William Brennan’s dissent in *Members of City Council v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2136–37 (1984), where

[He] suggested in dissent that certain publicly owned properties—here, utility poles—are uniquely suitable for the dissemination of political speech, and should be held open to the ‘time-honored’ practice of posting signs. This could be stated as a public trust concept: this property is needed for the public’s political communication, thus governments hold the property in ‘trust’ for this communication, and have only limited abilities to divest the public of its trust rights.

See Rose, *supra* note 90, at 778.

96. Byrne, *supra* note 44, at 925 (“Once the public trust extended to the protection of ecological interests, the relation to navigability became vestigial.”); see also Ryan, *supra* note 82, at 480 (“Scholars and practitioners have responded to Sax’s call and have advocated extending public trust protection to wildlife, parks, cemeteries, and even works of fine art.”). See generally Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part 1): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43 (2009) (calling for an expansion of the public trust doctrine that would include protecting natural resources against threats of climate change and ecological collapse).

97. Wood, *You Can’t Negotiate with a Beetle*, *supra* note 10, at 205.

98. *Id.*

99. Byrne, *supra* note 44, at 925–26 (“[N]ormal legal reasoning supports claims that the atmosphere lies within the public trust; the absence of precedent on this point is a testament to the prior lack of need to specify the nature of ownership of atmosphere.”); see also *Save Ourselves, Inc. v. Louisiana*, 452 So. 2d 1152, 1154 (La. 1984) (recognizing that the public trust doctrine potentially protects all natural resources, including air); *Payne v. Kassab*, 312 A.2d 86, 93 (Pa. Commw. Ct. 1973)

forth “a theory of a planetary public trust in the atmosphere,”<sup>100</sup> has promoted this theory in a series of lawsuits around the country.<sup>101</sup> These lawsuits, to date, have been largely unsuccessful.<sup>102</sup> Her theory has also drawn the criticism of scholars like Professor Byrne. Despite his sympathy with the reasoning behind the leap, Professor Byrne criticizes the initiative because it “exposes the public trust doctrine’s greatest weakness: it simply claims too much.”<sup>103</sup> The same concern, of course, is also raised by the argument in this Article.

The doctrine has now firmly taken one modern leap in its application to dry land. For example, in *Lawrence v. Clark County*, the Nevada Supreme Court formally embraced the public trust doctrine as fully applicable to existing and former riverbeds in that jurisdiction.<sup>104</sup> The New Jersey Supreme Court held in *Matthews v. Bay Head Improvement Ass’n* that the doctrine “protects the public’s right of access to the seashore, and that this right of access extends across dry sand areas located between the water and the nearest public road.”<sup>105</sup> In effect, declared the court, “members of the public have a public trust-based

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(citing the public trust doctrine and Pennsylvania Constitution as sources of a mandate to preserve “clean air . . . and [] the preservation of the natural, scenic, historic and esthetic values of the environment”); Frank, *supra* note 44, at 679 (“In many ways, our air resources would seem the natural resource most susceptible of treatment as a foundational public trust resource. After all, it is by its physical nature incapable of private ‘ownership,’ and science has demonstrated how the private degradation of air quality can have demonstrable, harmful impacts on public health and aesthetic values.”).

100. Byrne, *supra* note 44, at 926 (referring to Mary Christina Wood, *Atmospheric Trust Litigation*, in CLIMATE CHANGE: A READER 4–6 (W.H. Rodgers, Jr. et al. eds., 2009), available at <http://www.law.uoregon.edu/faculty/mwood/docs/atmo.pdf>); see also Chris Evans, *Atmospheric Trust Litigation*, W. COAST ENVTL. L. (June 14, 2011), available at <http://wcel.org/resources/environmental-law-alert/atmospheric-trust-litigation> (discussing 2011 litigation filed by environmental activists against all fifty states and the federal government for their failure to reduce greenhouse gas emissions, a deficiency plaintiffs claim violates public trust principles).

101. See *Legal Action, OUR CHILDREN’S TR.*, <http://ourchildrenstrust.org/Legal> (last visited Dec. 27, 2014) (linking to lawsuits filed across the nation).

102. See, e.g., *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 17 (D.D.C. 2012) (dismissing a claim against the Environmental Protection Agency administrator for failing to state a claim and holding that the public trust doctrine is a state doctrine that does not raise a federal question), *cert. denied*, 135 S. Ct. 774 (2014) (mem.).

103. Byrne, *supra* note 44, at 927; see also Andrew Childers, *General Policy: Appellate Judges Reject Appeal from Teens Seeking Federal Action on Greenhouse Gases*, ENV’T REP. (BNA) (June 13, 2014) (reporting that the appellate court had dismissed a suit by California teenagers and two environmental groups that sought to compel the federal government to cap greenhouse gas emissions after finding that the public trust doctrine does not establish federal question jurisdiction (referring to *Alec L. ex rel. Loorz v. McCarthy*, No. 13-5192 (D.C. Cir. June 5, 2014))); Seth Jaffe, *Two Strikes against Common Law Approaches to Climate Change: The Atmosphere Is Not a Public Trust*, L. & ENV’T (June 1, 2012), <http://www.lawandenvironment.com/2012/06/01/two-strikes-against-common-law-approaches-to-climate-change-the-atmosphere-is-not-a-public-trust/> (decrying the use of the public trust doctrine to compel agencies to protect the atmosphere from climate change by reducing carbon dioxide emissions).

104. 254 P.3d 606 (Nev. 2011); see also Rose, *supra* note 41, at 355 (“According to Sax’s analysis, the public trust doctrine required the collection of adequate information, public participation in decisions, informed and accountable choices, and close scrutiny of private giveaways of environmental resources.”).

105. Frank, *supra* note 44, at 674 (referring to *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355 (N.J. 1984)).

easement right to cross privately-owned, shoreline property to get to the ocean.”<sup>106</sup> In *Raleigh Avenue Beach Ass’n v. Atlantis Beach Club, Inc.*, the New Jersey Supreme Court reaffirmed *Matthews*, holding that the public trust easement is not limited to access across privately owned dry sand areas, but also includes the public’s right to sunbathe, picnic, and generally recreate on those dry sand areas.<sup>107</sup> In *In re Water Use Permit Applications*, the Hawaii Supreme Court applied the public trust doctrine to groundwater.<sup>108</sup> New York later applied the doctrine to its state and municipal parks.<sup>109</sup>

In these applications of the doctrine, a link to traditional trust resources like navigable water or tidelands appears to be fading. Thus, many states have now applied the public trust doctrine to parklands.<sup>110</sup>

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106. *Id.*; see also *Matthews*, 471 A.2d at 323–34 (“Exercise of the public’s right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine. This does not mean the public has an unrestricted right to cross at will over any and all property bordering on the common property. The public interest is satisfied so long as there is reasonable access to the sea.”), 365–66 (“Today, recognizing the increasing demand for our [s]tate’s beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary. While the public’s rights in private beaches are not co-extensive with the rights enjoyed in municipal beaches, private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine.”).

107. 879 A.2d 112, 119–20 (N.J. 2005). See generally Frank, *supra* note 44 (discussing these and other modern public trust cases).

108. 9 P.3d 409, 445–47 (Haw. 2000).

109. *Grayson v. Town of Huntington*, 554 N.Y.S.2d 269, 270–71 (N.Y. App. Div. 1990); see also *Williams v. Gallatin*, 128 N.E. 121, 122 (N.Y. 1920) (Pound, J.) (“It need not, and should not, be a mere field or open space, but no objects, however worthy, such as courthouses and schoolhouses, which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred . . .”); *Brooklyn Park Comm’rs v. Armstrong*, 45 N.Y. 234, 234 (1871) (applying the public trust doctrine to prevent Brooklyn from transferring land that it had taken title to without approval of the state legislature).

110. See, e.g., *Save the Welwood Murray Mem’l Library Comm. v. City Council*, 263 Cal. Rptr. 896 (Ct. App. 1989) (invoking the public trust doctrine to block conversion of a public library to improve public access to nearby commercial areas); *Big Sur Props. v. Mott*, 132 Cal. Rptr. 835, 837–38 (Ct. App. 1976) (revoking a permit to cross public parkland to access private property); *Paepcke v. Pub. Bldg. Comm’n of Chi.*, 263 N.E.2d 11, 19 (Ill. 1970) (allowing the conveyance of 2 percent of Washington Park for a middle school and recreational facilities only after the Chicago Public School District showed that the public rights in the remaining parkland were protected and used for a public purpose); *Gallatin*, 128 N.E. at 121 (invalidating a ten-year lease of part of Central Park for a museum for impermissibly diverting park resources without the state legislature’s approval); *Armstrong*, 45 N.Y. at 243 (disallowing a sale of parkland due to the city’s trust obligations); *Ellington Constr. v. Zoning Bd. of Appeals*, 549 N.Y.S.2d 405, 414 (N.Y. App. Div. 1989) (prohibiting the reconveyance of parkland for redevelopment); *Ackerman v. Steisel*, 480 N.Y.S.2d 556, 558 (N.Y. App. Div. 1984) (ordering removal of city sanitation equipment from a park); *Hoffman v. City of Pittsburgh*, 75 A.2d 649 (Pa. 1950) (upholding an injunction against the sale of a public square for development based on public trust doctrine); *In re Conveyance of 1.2 Acres of Bangor Mem’l Park to Bangor Area Sch. Dist.*, 567 A.2d 750 (Pa. Commw. Ct. 1989) (blocking an attempted transfer of parklands for the construction of an elementary school).

[Parklands] have the same public values as lands touched by the sea. . . . Public land serves as a natural habitat for many species of wildlife and vegetation; the rivers and streams flowing through public land have served as places for recreation, apart from their service of commerce and communication.<sup>111</sup>

But, some scholars think that applying the doctrine to nonnavigable water is a major, and, therefore, highly questionable enlargement of the doctrine's scope.<sup>112</sup> Thus, the doctrine's expansion to dry land has not proceeded without criticism.<sup>113</sup>

Another doctrinal leap has expanded the protection of traditional uses of trust resources, like navigation, commerce, and fishing to include a similar protection of passive uses, like bird watching or gathering scientific information.<sup>114</sup> While the doctrine's traditional uses do not easily extrapolate to non-water-based resources, the recreational and conservation uses protected by the modern doctrine certainly do.<sup>115</sup>

Extending a historically water-based doctrine to dry land has led to questions about the legal foundation for such expansions, their democratic legitimacy, and whether courts are competent to manage the broader doctrine.<sup>116</sup> Araiza sees this situation "as the 'paradox' of the public trust

111. Green, *supra* note 85, at 59; see also Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 556 ("Traditional public trust law also embraces parklands, especially if they have been donated to the public for specific purposes; and, as a minimum, it operates to require that such lands not be used for nonpark purposes."). But see Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 556 ("[I]t is uncommon to find decisions that constrain public authorities in the specific uses to which they may put parklands, unless the lands are reallocated to a very different use, such as a highway.").

112. Araiza, *supra* note 66, at 724–25 ("[B]ringing the doctrine onto dry land is still seen by some as a major expansion in its scope, as would embrac[ing] uses grounded in conservation rather than access.").

113. See, e.g., *id.* at 737–38 ("However, as critics note, it is also true that the doctrine's expansion into dry-land resources raises analytical and practical problems. Precedent, which until recently focused on aquatic resources, does not directly support this expansion. It also presents the potential for exceptionally broad applications of the doctrine's legal rule restricting government alienation. In addition to raising legitimacy concerns, such an expansion may also test the competence of courts as they are asked to decide complex land use and ecosystem-management questions, and evaluate the real costs and benefits associated with conflicting resource uses."). But see Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 552 (finding courts perfectly able to distinguish between appropriate and inappropriate "dealings with trust lands").

114. *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (holding that the public trust doctrine protects environmental and ecological values).

115. Araiza, *supra* note 66, at 718 (stating that while traditional doctrine uses "do not easily find obvious analogues in dry-land resources, the recreational and conservation uses that the doctrine protects surely do"); see also *Raritan Baykeeper v. City of New York*, 984 N.Y.S.2d 634 (N.Y. Sup. Ct. 2013) (holding that the use of a municipal park for solid waste processing (leaf composting) did not meet the aesthetic, enjoyable appearance associated with recreation, and finding that the alienation of the park for this purpose violated the public trust doctrine). The *Raritan Baykeeper* court also found that leaf composting is a "disruptive, commercial enterprise" that could only be authorized by the legislature. 984 N.Y.S.2d 634.

116. Araiza, *supra* note 66, at 711 (questioning the doctrine's "precise legal foundation, its democratic legitimacy, and judicial competence to implement it"); see also Babcock, *supra* note 43, at 891 (noting that this application of the doctrine is "even more controversial than the doctrine itself").

doctrine: a deeply felt principle established in venerable law, but at the same time, an incompletely worked-out legal doctrine that, in its more aggressive forms, threatens to provide courts with wide-ranging authority poorly cabined by legal rules.”<sup>117</sup> Even Professor Sax conceded that the doctrine’s legal provenance was “dubious,”<sup>118</sup> creating a shaky platform for its expansion.

Even so, the “public trust doctrine unquestionably exists as a legally binding rule and has existed for centuries. Moreover, the traditional doctrine responds to concerns about the political vulnerability of diffusely held public resources that transfer, with more or less ease, to a wider set of resources and uses.”<sup>119</sup> Even Professor Araiza agrees that “the modern resource-protecting version of the rule is well established in American law.”<sup>120</sup> This is despite his finding that the link between modern interests in public trust resources and the traditional interests the doctrine protects is “doubly attenuated” because not only has the doctrine been used to protect dry land resources, but it has also been used to protect uses of trust resources regardless of whether there is public access to them.<sup>121</sup>

Professor Sax worried about pushing the doctrine too far and warned lawyers not to exceed a court’s comfort level. He counseled that courts will not intervene if the trust beneficiaries are “press[ing] for direct confrontation between the court and the legislature.”<sup>122</sup> To Professor Sax:

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117. Araiza, *supra* note 66, at 738; *see also* Smith & Sweeney, *supra* note 85, at 307 (arguing that modern expansions of the public trust doctrine “should be limited within the ancient values of principle economic reasoning”), 341 (“In American constitutional law, the public trust doctrine emerged from the idea that commercially protected interests enjoyed the right to free navigation on the watercourses. While the original doctrine was somewhat simplistic, it was rooted in ancient values and inherited from a line of principled economic reasoning.”). Smith and Sweeney find natural law a useful restraint on extreme applications of the doctrine. Smith & Sweeney, *supra* note 85, at 309 (“Although the tenets of the Natural Law are penumbic, they nonetheless provide a foundational bearing—or direction—for legitimizing the application of the public trust doctrine and, as the case may be, restraining its application.”).

118. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 484 (“Other than the rather dubious notion that the general public should be viewed as a property holder, there is no well-conceived doctrinal basis that supports a theory under which some interests are entitled to special judicial attention and protection.”); *see also* Rose, *supra* note 90, at 722 (“Despite its popularity, the modern public trust doctrine is notoriously vague as to its own subject matter; cases and academic commentaries normally fall back on the generality that the content of the public trust is ‘flexible’ in response to ‘changing public needs.’”). *But see* Smith & Sweeney, *supra* note 85, at 313 (“Although the Supreme Court has never expressly stated so, the concept of the public trust and the resulting affirmative duties seem to emanate from the Constitution. While other interpretations of the public trust source exist, this is the most reasonable explanation considering the ‘heavy overlay of constitutional doctrine’ concerning watercourse regulation.”).

119. Araiza, *supra* note 66, at 724.

120. *Id.* at 725.

121. *Id.* at 716 (stating that “the class of protected resources is expanded to dry-land resources” and that the public trust use is expanded from public access to “preservation, with or without public access”).

122. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 544; *see also* Sax, *Liberating the Public Trust from Its Historical Shackles*, *supra* note 48, at 194 (“[S]harp confrontations between courts and legislatures should be avoided wherever possible. The courts can do much to provoke a search for less disruptive alternatives below the constitutional level. They can assure that

A litigation theory which begins with a sophisticated analysis of public trust principles—setting out alternatives for the achievement of a reasonable development of trust lands with minimal infringement of public use—is likely to obtain a far more sympathetic response from the bench than is one which takes a rigorous legal principle and squeezes it to death.<sup>123</sup>

The last Part of this Article attempts to persuade the reader that applying the public trust doctrine to protect scenic vistas of Palisades Interstate Park is neither “squeezing the doctrine to death” nor asking a court to do “the impossible.”<sup>124</sup>

#### IV. EXTENSION OF THE PUBLIC TRUST DOCTRINE TO PROTECTING SCENIC VIEWS OF PALISADES INTERSTATE PARK IS JUSTIFIABLE

According to Professor Sax, there are three bases for expanding the doctrine. First, “certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs.”<sup>125</sup> Second, “certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace.”<sup>126</sup> And third, “certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate.”<sup>127</sup> This Part of the Article posits that seeing beautiful natural scenery is of great intrinsic importance to the public, and that wild places, especially those in close proximity to urban areas like Palisades Interstate Park, are such unique gifts of nature’s bounty that

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decisions made by mere administrative agencies are not allowed to impair trust interests in the absence of explicit, fully considered legislative judgments. . . . Finally, the courts can reduce the pressures that claims of private ownership put on public trust resources by looking to the history of common rights.”).

123. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 553.

124. *Id.* at 566 (“If lawyers and their clients are willing to ask for less than the impossible, the judiciary can be expected to play an increasingly important and fruitful role in safeguarding the public trust.”). This Article does not address whether LG Electronics could have brought a successful takings claim against the Englewood Cliffs’ zoning commission had it denied the variance. It seems likely that such a claim would fail because of the reciprocity of advantage that all landowners would enjoy from the height restrictions given the economic value of scenic views. See Troy A. Rule, *Airspace and the Takings Clause*, 90 WASH. U. L. REV. 421, 423 (2012). Courts frequently recognize landowners’ air rights in the form of view and solar easements. *Id.* at 423, 429. However, the reciprocity of advantage defense, where one argues that the government’s action actually promotes general welfare or sufficiently benefits other landowners, as would be the case here where all neighboring parcels benefit in common from open air space, would appear to defeat the claim. *Id.* at 448–49 (“This ‘reciprocity of advantage’ among landowners is a familiar characteristic of the sorts of legitimate police power regulations that tend not to trigger compensable takings. Regulatory takings laws seek not to hinder valuable police power regulation but to target those restrictions by which ‘private property is being pressed into some form of public service under the guise of mitigating serious public harm.’”).

125. Sax, *The Public Trust Doctrine in Natural Resource Law*, *supra* note 33, at 484.

126. *Id.*

127. *Id.* at 485; see also Ryan, *supra* note 92, at 246–47. Like the electromagnetic spectrum, Palisades Interstate Park is “finite, geographically bound, and subject to exploitation and enjoyment by a mixture of public, private, and governmental uses. And like many of the world’s largest natural resources, [it] provides its greatest value to the public not by being improved, but by being left alone.” See Ryan, *supra* note 92, at 360–61.

the interest in maintaining them as they are is so “peculiarly public” that their appropriation for private use, in this case as the foreground for a commercial building, is inappropriate.

Even where Professor Sax’s three bases for expanding the doctrine are met, the existence of some “conceptual bridge” between traditional uses of the doctrine and a proposed new use would further strengthen the argument that the public trust doctrine should apply in a novel situation like the one proposed here.<sup>128</sup> In the case of scenic views of a public park, this Article suggests that a conceptual linkage can be found in the doctrine’s socializing benefits, which flow from individuals viewing an aesthetically pleasing site, like an unspoiled landscape. A conceptual link can also be found in the prohibition against alienating trust resources and the necessity of having unencumbered visual access to trust resources to be able to enjoy them.<sup>129</sup> Both of these rationales are developed further below.

*A. Viewing Palisades Interstate Park Is a Protected Use Because It Enhances the Park’s Social Value*

[T]he simple perception of natural forms is a delight . . . . The tradesman, the attorney comes out of the din and craft of the street, and sees the sky and the woods, and is a man again.<sup>130</sup>

Protection of aesthetic values has been integrated into the concept of public welfare<sup>131</sup> and has been accepted as a legitimate use of local police

128. See Ryan, *supra* note 92, at 360.

129. Rose argues:

An entire populace may have customs as well, as Blackstone and others recognized when they called the common law the ‘custom of the country.’ The concept of a managed but completely open commons presupposes just such a populace—one that behaves according to customs of civic care, and with some regard for the resources it uses. Such a concept of the citizenry, after all, was familiar to nineteenth-century jurisprudence, given the serious discussion during the American revolutionary and constitutional periods of ‘republican virtue’—the individual self-restraint and civic regard for the greater good that was thought essential to any democratic regime.

Rose, *supra* note 90, at 746. Because of the requirement that “custom” be an activity that existed before the memory of man, this Article does not posit that the public has a customary right to view Palisades Interstate Park. But, the idea that an undifferentiated public, as opposed to specific individuals, can lay claim to inherently public property is a useful one in the public trust context, as Rose explains in the context of public roads and waterways. *Id.*

130. Emerson, *supra* note 1, at 13.

131. See *Berman v. Parker*, 348 U.S. 26, 33 (1954) (Douglas, J.) (“The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”); see also *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608, 611–12 (2d Cir. 1965) (“[The project] is to be located in an area of unique beauty and major historical significance. . . . ‘Recreational purposes’ are expressly included among the beneficial public uses to which [the Federal Power Act] refers. The phrase undoubtedly encompasses the conservation of natural resources, the maintenance of natural beauty, and the preservation of historic sites.”) (holding that the Federal Power Commission construed its mandate too narrowly when it authorized the construction of a pump storage project on top of Storm King Mountain).



powers by courts around the nation,<sup>132</sup> even though judgments about what is aesthetically pleasing can be highly subjective.<sup>133</sup> Viewing a landscape is “an undeniable ‘aesthetic experience’”;<sup>134</sup> this conclusion is borne out by the literature of landscape aesthetics, which links scenic visual resources with having an aesthetic experience.<sup>135</sup>

The conviction that an enlightened person should take aesthetic pleasure in nature has grown only more pervasive in American society—evidence not only that nature has skillful publicists, but that the nature aesthetic is serving important social and political functions: marking class status, galvanizing political support for environmental causes, and selling consumer goods from tulip bulbs to suburban estates. It also suggests that the pursuit of natural beauty may represent other, non-aesthetic concerns: an emotional connection to the landscape, a spiritual rather than aesthetic approach to nature, an intellectual satisfaction with the idea of pristine wildness, even sheer sensual delight.<sup>136</sup>

Aesthetic experiences, such as viewing scenic landscapes, add richness to everyday life at the same time that they offer a detachment from the ordinariness of that life.<sup>137</sup> An aesthetic experience gives a person intrinsic pleasure from merely looking at something of beauty; she need not possess it to

132. See Mark Bobrowski, *Scenic Landscape Protection under the Police Power*, 22 B.C. ENVTL. AFF. L. REV. 697, 701 (1995) (“While the results have varied from state to state, there is a clear trend for courts to find aesthetic regulation solely for aesthetic purposes permissible under the general welfare prong.”), 718 (“[A]esthetic goals have been accepted in a majority of jurisdictions as a legitimate exercise of the police power, even when standing alone.”); Beverly A. Rowlett, *Aesthetic Regulation under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 VAND. L. REV. 603, 608 (1981) (“[M]ore recent interpretations of the general welfare provide new ‘nonaesthetic’ justifications, the traditional rule that aesthetics alone is not a proper basis for regulation now has virtually no discernible effect on the outcome of the aesthetic regulation cases.”); Norman Williams, *Scenic Protection as a Legitimate Goal of Public Regulation*, 38 WASH. U. J. URB. & CONTEMP. L. 3, 4 (1990) (stating that scenic protection is a legitimate public goal).

133. Rowlett, *supra* note 132, at 606. But see Douglas E. Fisher, *Can Law Protect Landscape Values?*, 9 N.Z. J. ENVTL. L. 1, 48 (2005) (“A value, particularly a value such as landscape, tends to lack the precision and certainty required for rules of law. It is therefore not a surprise that the legal system has difficulty in addressing issues of landscape values.”); Williams, *supra* note 132, at 4 (“[T]he courts have been willing to uphold the application of restrictions based on aesthetic criteria without worrying about how to deal with the more difficult problems at the margin, where reasonable people may reasonably differ.”).

134. Bobrowski, *supra* note 132, at 722. But see Richard E. Chenoweth & Paul H. Gobster, *The Nature and Ecology of Aesthetic Experiences in the Landscape*, 9 LANDSCAPE J. 1, 2 (1990) (stating that much of the literature on aesthetics concerns art, which may not “translate well to landscapes” because “unlike the experience of art, landscapes are dynamic, people are *in* the landscape, and the mere turning of one’s head may change the experience radically”).

135. Bobrowski, *supra* note 132, at 724.

136. Kimberly K. Smith, *Mere Taste: Democracy and the Politics of Beauty*, 7 WIS. ENVTL. L.J. 151, 158 (2000).

137. Bobrowski, *supra* note 132, at 722–23 (“[Aesthetic experiences offer] a richness otherwise not present in the experience of ordinary life events, a unity within itself, and a detachment from the normal flow of events.”); see also Chenoweth & Gobster, *supra* note 134, at 2 (“[A]esthetic experiences have a completeness and coherence, a unity that makes them stand out from the experiences and flow of everyday life.”).

feel that pleasure.<sup>138</sup> Taking time to view something pleasing offers opportunities for leisure and recreation as well as an opportunity to reduce stress.<sup>139</sup> Enjoying something that is naturally beautiful can also be defended on utilitarian grounds—quite simply, “natural beauty delights us. To preserve it makes everyone happier.”<sup>140</sup> The intrinsic satisfaction of having an aesthetic experience, such as viewing a beautiful thing, makes that experience priceless.<sup>141</sup>

Natural beauty has consistently played a role in environmental politics and since the latter half of the nineteenth century, Americans have supported beauty as a freestanding policy goal.<sup>142</sup> Early policy debates over the preservation of trust resources such as the national parks, scenic rivers, and coastlines reveal that preserving natural beauty was a dominant concern, beyond just protecting natural resources, wildlife, and the integrity of ecosystems.<sup>143</sup> Thus, President Lyndon Johnson echoed a long line of policy makers when he cited the preservation of beauty as the primary goal of the National Wilderness Preservation System: “‘In this conservation,’ he insisted, ‘the protection and enhancement of man’s opportunity to be in contact with beauty must play a major role. This means that beauty must not be just a holiday treat, but a part of our daily life.’”<sup>144</sup>

Not surprisingly, protecting visual resources of aesthetic value has been an acknowledged goal of environmental management for at least a generation.<sup>145</sup> “The protected visual resource may be a ‘viewshed’—a vista featuring mountains and hillsides, riverbanks and watercourses, villages and farms, or

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138. See Chenoweth & Gobster, *supra* note 134, at 2 (“Merely looking at something without needing to possess or consume it because of its potential usefulness ‘gives us the special experience that we derive from objects that please us merely upon being seen.’”); see also Emerson, *supra* note 1, at 12 (“The ancient Greeks called the world [kosmos], beauty. Such is the constitution of all things, or such the plastic power of the human eye, that the primary forms, as the sky, the mountain, the tree, the animal, give us a delight in and for themselves; a pleasure arising from outline, color, motion, and grouping.”).

139. Smith, *supra* note 136, at 165.

140. *Id.*

141. Bobrowski, *supra* note 132, at 722.

142. Smith, *supra* note 136, at 155.

143. *Id.*

144. *Id.* at 156; see also Emily Brady, *Aesthetics in Practice: Valuing the Natural World*, 15 ENVTL. VALUES 277, 277 (2006) (“I have titled this paper ‘Aesthetics in Practice’ to convey how deeply aesthetic value permeates human practice, from engagement with everyday environments, to enjoying wild places, to making moral choices, to scientific study of nature. The aesthetic is not reserved for the art museum, concert hall or scenic view-point. While a distinctive kind of valuing, it is not separate or cut off but rather integrated into the relationships we develop with the natural world through a variety of human activities.”).

145. See Bobrowski, *supra* note 132, at 697; see also Fisher, *supra* note 133, at 47 (“International law, for example, has begun to move quite rapidly towards the recognition and protection of landscape. However, it has done so indirectly for the most part by recognizing the relevance of landscape values in the context of environmental conservation on the one hand and the recognition of human rights on the other hand.”).

other areas of natural or cultural beauty.”<sup>146</sup> According to Professor Mark Bobrowski, the New England states all agree that the protection of scenic views is publicly beneficial.<sup>147</sup> Additionally, the National Environmental Policy Act and its state offspring assume that visual resources, like scenic vistas, offer the public a highly valued opportunity for aesthetic experiences.<sup>148</sup> The National Environmental Policy Act recognizes the importance of aesthetics as a purpose behind the law’s enactment,<sup>149</sup> and other laws like the National Wild and Scenic Rivers Act, the National Trails Act, the Coastal Zone Management Act, and even the Endangered Species Act<sup>150</sup> and several state constitutions consider the protection of scenic and aesthetic environmental values as a matter of great public importance.<sup>151</sup> Courts have also recognized the importance of

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146. Bobrowski, *supra* note 132, at 698, 702 (“The range of approaches employed in these ordinances and regulations reflect the history of the debate over aesthetic purposes: landscape protection has evolved from a secondary purpose, barely countenanced under the police power, to a consistent theme in environmental protection.”). Sometimes protecting a scenic view complements an effort to protect an important natural resource like a wetland or a forest, but regardless, the views of that resource enhance the attractiveness of the area. *Id.* at 713 (“Farmlands are important to the local economy . . . . The value of farmlands, however, goes beyond economic considerations. Farmlands play an important role in the protection of fragile natural environments such as wetlands and streams, and contribute to certain wildlife habitat needs. In addition, farmlands function as a valuable scenic and open space resource . . . .” (quoting *Kentview Props., Inc. v. City of Kent*, 795 P.2d 732, 736 (Wash. Ct. App. 1990))); *see also* Chenoweth & Gobster, *supra* note 134, at 8 (“Our results showed that aesthetic experiences tended to occur unexpectedly rather than being sought out by a person, occurred most often as a result of interactions with natural objects, and tended to occur in familiar places. Together, these findings suggest that opportunities should be provided for people to experience nature in their home environments as part of their everyday activities.”).

147. Bobrowski, *supra* note 132, at 729; *see also* *Kroeger v. Dep’t of Env’tl. Protection*, 870 A.2d 566 (Me. 2005) (sustaining Maine Department of Environmental Protection’s decision to deny a permit for a private dock in part because it would interfere with scenic views of the sound into which it protruded and in part because of the area’s importance for tourism); *In re Waterfront Dev. Permit No. WD88-0443-I*, 582 A.2d 1018, 1019 (N.J. Super. Ct. App. Div. 1990) (remanding New Jersey environmental protection commissioner’s decision to issue a permit for the build-out stage of a Lincoln Harbor development, reasoning that the development would obscure “spectacular” scenic views of the Hudson River and the New York City skyline from New Jersey in violation of regulations prohibiting the blocking of skylines and horizons).

148. Bobrowski, *supra* note 132, at 698.

149. *See, e.g.*, 42 U.S.C. § 4331(b)(2) (2012) (“It is the continuing responsibility of the Federal Government to . . . assure for all Americans safe, healthy, productive, and aesthetically and culturally pleasing surroundings.”).

150. Smith, *supra* note 136, at 157 (citing National Trails System Act, 16 U.S.C. § 1242(a)(2) (2012); National Wild and Scenic Rivers Act, 16 U.S.C. § 1271; Coastal Zone Management Act, 16 U.S.C. §§ 1451(b), (e), 1452(2); Endangered Species Act, 16 U.S.C. § 1531(a)(3); 42 U.S.C. § 4331(b)(2)).

151. *See, e.g.*, PA. CONST. art. 1, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”); *see also* *Robinson Township v. Commonwealth*, 83 A.3d 901, 913 (Pa. 2013) (applying section 27 to a local town’s refusal to permit a fracking operation); John C. Dernbach et al., *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications* 15 (Widener Law Sch. Legal Studies, Research Paper No. 14-10, 2014), available at <http://ssrn.com/abstract=2412657> (analyzing the implications of the opinion for section 27 and reporting that dozens of state constitutions “contain provisions fairly characterized as recognizing that the state holds resources in ‘public trust’”).

landscapes to the general welfare. Professor Mark Bobrowski observed that judges responding to state laws and local ordinances protecting scenic views found that they constituted a valid public purpose.<sup>152</sup>

Studies show that the psychologically valuable opportunities for leisure and recreation that scenic landscapes offer are important to “our collective mental health.”<sup>153</sup> Part of the restorative benefit of recreation comes from being in natural surroundings.<sup>154</sup> Professor Rose reports that Frederick Law Olmsted, the nineteenth century designer of major park systems in New York City and Washington, D.C., among others, considered recreation in natural settings to have a “socializing and educative influence, [which are] particularly helpful for democratic values.”<sup>155</sup> According to Professor Sax, these influences are important attributes of the public trust doctrine.<sup>156</sup> Olmsted’s view was that the “rich and poor would mingle in parks, and learn to treat each other as neighbors. Parks would enhance public mental health, with ultimate benefits to sociability; all could revive from the antisocial characteristics of urban life under the refining influence of the park’s soothing landscape.”<sup>157</sup> Thus, scenic landscapes, like parks, “help define valuable aspects of the community.”<sup>158</sup>

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*But see* Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana’s Environmental Provisions*, 64 MONT. L. REV. 157, 158 (2003) (“State courts also have helped ease most of the constitutional provisions [protecting the environment] into relative obscurity by holding that the provisions are not self-executing, by denying standing to private citizens and groups trying to enforce the provisions, or by establishing relatively easy standards for meeting the constitutional requirements.”).

152. Bobrowski, *supra* note 132, at 724 (surveying judicial responses to state and local ordinances protecting scenic views, and concluding that there was “ample support for the proposition that enhancement of the visual resource constitutes a valid public purpose”); *see also* Tara J. Foster, Comment, *Securing a Right to View: Broadening the Scope of Negative Easements*, 6 PACE ENVTL. L. REV. 269 (1989) (discussing the history of easements that protect the viewshed rights of private property owners).

153. Bobrowski, *supra* note 132, at 723.

154. *See id.* (“[V]iewing unthreatening natural landscapes tends to promote faster and more complete restoration from stress than does viewing unblighted urban or built environments lacking nature.”), 745 (“Protection of the visual resource promotes greater opportunities for aesthetic experiences such as recreation and leisure. There is an apparent link between such aesthetic experience and psychological or philosophical well-being.”); Louis G. Tassinari et al., *Equal Protection and Aesthetic Zoning: A Possible Crack and a Preemptive Repair*, 42 URB. LAW. 375, 390 (2011) (“[M]uch of the impetus for research on the restorative benefits of nature has come from actively engaged recreationists in scenic settings, self-reporting stress reduction, and other psychological benefits.”).

155. Rose, *supra* note 90, at 779.

156. *See supra* notes 80–81 and accompanying text (discussing Professor Sax’s praise for the democratization of the decision-making process by the public trust doctrine).

157. Rose, *supra* note 90, at 779.

158. Bobrowski, *supra* note 132, at 703. Scenic easements are conservation easements that have the goal of protecting views of the physical environment deemed of public value, while burdening private property. *See Scenic Easements & View Protection*, SCENIC AM., <http://www.scenic.org/issues/scenic-easements-a-view-protection> (last visited Jan. 31, 2015). The authorizing law of the state in which a scenic or conservation easement is created determines their scope and what they are called. *Id.* The Federal Uniform Conservation Easement Act “expressly allows conservation easements that retain or protect natural, scenic, or open-space values of real property.” *Id.* “As of 2000, the laws of at least [twenty-four] states expressly allowed conservation easements that protected scenic values, with many more allowing them as part of common law practice.” *Id.* Scenic easements favor protecting an

Olmsted believed that nature was important for character transformation and that it was important to create civic places where all “people, regardless of socioeconomic standing, should sense that they belong to a community.”<sup>159</sup>

The landscape is more than a passive backdrop. It is the stage on which we move. The events of life take place somewhere and that “whereness” affects the perception of the event. The visual landscape, the environment we see, gives shape to our character. The objects and forms in that landscape influence our actions, guide our choices, affect our values, restrict or enhance our freedom, determine where and with what quality we will mix with each other. The perceived landscape molds our dreams, locates our fantasies and in some mysterious way even predicts our future.<sup>160</sup>

According to Professor Rose, “contemplation of nature elevates our minds above the workaday world, and thus helps us to cope with that very world.”<sup>161</sup> Others maintain that “[n]atural beauty is arguably a unique good, conferring health benefits not realizable in other ways; there are few obvious substitutes for sunlight on still water or a snow-covered forest.”<sup>162</sup> Perhaps this is why most Americans prefer the natural environment to an urbanized one.<sup>163</sup>

Thus, one way to justify protecting beautiful landscapes is to realize that “beauty . . . is essential to our mental, physical, and spiritual health—a basic need, if only we were enlightened enough to see it.”<sup>164</sup> Getting to this point of

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offsite visual feature of economic importance to the burdened property. *See, e.g., Williams, supra* note 132, at 4 (“[W]ith the widespread increase in both income and leisure time, many more people are able to—and have the opportunity to—indulge their preferences for a visually attractive environment, and public bodies have been responding with protective measures.”) (explaining why protecting scenic vistas has become a legitimate public policy goal).

159. Scott Roulier, *Frederick Law Olmsted Democracy by Design*, 4 NEW ENG. J. POL. SCI. 311, 313 (2010).

160. Bobrowski, *supra* note 132, at 719 (quoting Alan Gussow, *Conserving the Magnitude of Uselessness: A Philosophical Perspective*, in OUR NATIONAL LANDSCAPE: A CONFERENCE ON APPLIED TECHNIQUES FOR ANALYSIS AND MANAGEMENT OF THE VISUAL RESOURCE 10 (Apr. 23–25, 1979), available at [http://www.fs.fed.us/psw/publications/documents/psw\\_gtr035/psw\\_gtr035\\_FC-35.pdf](http://www.fs.fed.us/psw/publications/documents/psw_gtr035/psw_gtr035_FC-35.pdf)); *see also* Roulier, *supra* note 159, at 313–14 (“[I]t is hard to deny that Olmsted’s tireless efforts to preserve national treasures for posterity and to create beautiful and accessible public parks has enriched our democratic landscape—a landscape constantly threatened by excessive privatization and social isolation.”).

161. Rose, *supra* note 90, at 780.

162. Smith, *supra* note 136, at 165; *see also* FREDERICK LAW OLMSTED, *YOSEMITE AND THE MARIPOSA GROVE: A PRELIMINARY REPORT* (1865), available at <http://www.yosemite.ca.us/library/olmsted/report.html> (“It is a scientific fact that the occasional contemplation of natural scenes of an impressive character, particularly if this contemplation occurs in connection with relief from ordinary cares, change of air and change of habits, is favorable to the health and vigor of men and especially to the health and vigor of their intellect beyond any conditions which can be offered them, that it not only gives pleasure for the time being but increases the subsequent capacity for happiness and the means of securing happiness.”). Olmsted, *supra*, also writes that “the enjoyment of scenery employs the mind without fatigue and yet exercises it, tranquilizes it and yet enlivens it; and thus, through the influence of the mind over the body, gives the effect of refreshing rest and reinvigoration to the whole system.”

163. Tassinary et al., *supra* note 154, at 386; *see also* JAY APPLETON, *THE EXPERIENCE OF LANDSCAPE* 389 (1996) (“Further, prospect focal features in environmental scenes are found to elicit eye fixations of greater duration than would be expected by chance.”).

164. Smith, *supra* note 136, at 173.

enlightenment, which might enable the preservation of landscapes because of their natural beauty, however, may require focused civic education.<sup>165</sup>

Professor Bobrowski believes that protecting visual resources like landscapes promotes the general welfare because doing so can enhance both communal and individual aspirations.<sup>166</sup> For this reason, Professor Bobrowski concludes that protecting a “landscape is crucial in defining [a] community” and “may help us define ourselves as individuals.”<sup>167</sup> Additionally, because the pleasure one experiences from viewing a beautiful object is largely passive, it may trigger in the observer “a sense of humility, unity, and introspection.”<sup>168</sup> In this way, visual experiences, like viewing a natural vista, can actually mold our nature.<sup>169</sup>

Visual resources play a crucial role in many parts of daily life.<sup>170</sup> Professor Rose reminds us that the belief that recreating in natural environments or viewing nature civilizes and socializes us as a people is well-established in Western thought.<sup>171</sup> According to Emily Brady, some environmental philosophers like Aldo Leopold believed that engaging with nature aesthetically can encourage a moral attitude toward it.<sup>172</sup> Brady

165. Tassinari et al., *supra* note 154, at 393 (“To justify preserving existing landscapes or urbanscapes via the codification of aesthetic values requires the premise that beauty is essential to our mental, physical, and spiritual health—a basic need, albeit one that may require the education of our individual and collective attention.”).

166. Bobrowski, *supra* note 132, at 745 (“Protection of the visual resource promotes the general welfare by furthering both communitarian and individualistic aims.”), 746 (“The specific protected view, in some locally understood way, helps to define the very core of the community. Denver’s legislative [body found] . . . that its panoramic mountain views encourage civic pride and embody the city’s ‘unique environmental heritage and attributes as a city of the plains at the foot of the Rocky Mountains.’”); *id.* at 746 (“[T]he visual landscape, the environment we see . . . gives shape to our character,’ as communities and as individuals.”).

167. *Id.* at 745; *see also* Smith, *supra* note 136, at 194 (“[W]hile aesthetic judgment may have supported the elitist pretensions of the upper classes, it has also played a role in protecting communal values against dangerously ‘wanton’ impulses.”).

168. Bobrowski, *supra* note 132, at 722–23; *see also* Chenoweth & Gobster, *supra* note 134, at 3 (reporting that aesthetic experiences can be disorienting in space and time and arouse “a sense of humility, unity, and introspection”). Ralph Waldo Emerson wrote that “[n]o reason can be asked or given why the soul seeks beauty. Beauty, in its largest and profoundest sense, is one expression for the universe.” Emerson, *supra* note 1, at 17.

169. Bobrowski, *supra* note 132, at 723; *see also* Brady, *supra* note 144, at 279 (“Rather than being private expressions of individual taste, aesthetic judgements [sic] are based upon a set of critical activities that are practised [sic] and developed in a public context.”).

170. Bobrowski, *supra* note 132, at 720. Indeed, Tassinari and his colleagues urge people to “actively seek aesthetic goals through the political arena because we must aspire to ‘a democracy in which sensitive aesthetes and expressive and emotional forms of discourse have a secure place . . . [in order to avoid] cultural mediocrity, degraded materialism and suffocated human spirits.’” Tassinari et al., *supra* note 154, at 392 (quoting Smith, *supra* note 136, at 194–95); *see also id.* at 376 (arguing that beauty standing alone serves a public good, placing its preservation firmly within a state’s police power); Bobrowski, *supra* note 132, at 744 (arguing that visual resource protection’s importance “makes it a [public] purpose that may stand alone as an exercise of the police power”).

171. Rose, *supra* note 90, at 781.

172. Brady, *supra* note 144, at 280 (“Some environmental philosophers [like Leopold] have suggested that developing a relationship with nature through aesthetic experiences, that is, first-hand,

comments that sometimes, an aesthetic experience is “the most visceral, felt experience we can have of nature. In that sense it can be very penetrating, have a strong impact and just stay with us.”<sup>173</sup>

Many of the individual and community benefits that flow from viewing beautiful landscapes are those associated with protecting trust resources like parks, according to Professors Sax and Rose. Based on this discussion of the importance of having an aesthetic experience to the general welfare and the recognition that viewing a landscape is such an experience, a strong argument can be made that protecting passive uses of trust resources, such as enjoying views of them, fulfills a public purpose and thus is a protectable use of a trust resource under the public trust doctrine.

### B. *Spoiling the View of a Trust Resource Is Like Impeding Access to It*

Nature at the doorstep should not be underestimated.<sup>174</sup>

Scenic vistas have the classic attributes of a use of a public trust resource—*res communis*—as they are “open to everyone, belonging to everyone, and incapable of appropriation by anyone.”<sup>175</sup> A scenic vista can be appropriated by someone interfering with it.<sup>176</sup> Indeed, Professor Rose might argue that interfering with the public’s view of the Palisades Interstate Park matters “a great deal, not because it would be impossible to conduct these activities elsewhere, but because to relocate would rupture the continuity of the community’s experience and diminish the significance of the activity itself.”<sup>177</sup> While we may change our view of what activities are “socializing” and thus justify calling some property “inherently public,” “we always accept that the

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multi-sensory, emotional and imaginative engagement, can encourage or contribute to a moral attitude toward nature.”).

173. *Id.*

174. Chenoweth & Gobster, *supra* note 134, at 8.

175. Montserrat Gorina-Ysem, *World Ocean Public Trust: High Seas Fisheries after Grotius—Towards a New Ocean Ethos?*, 34 GOLDEN GATE U. L. REV. 645, 664 (2004); *see also* OLMSTED, *supra* note 162 (“For the same reason that the water of rivers should be guarded against private appropriation and the use of it for the purpose of navigation and otherwise protected against obstructions, portions of natural scenery may therefore be properly guarded and cared for by the government. To simply reserve them from monopoly by individuals, however, it will be obvious, is not all that is necessary. It is necessary that they should be laid open to the use of the body of the people.”).

176. *See, e.g.,* Friends of Shawangunks v. Clark, 754 F.2d 446 (2d Cir. 1985) (holding that an amendment to a federally funded, state conservation easement, which would have extended a private golf course, impermissibly converted the land to “other than public outdoor recreation use” without federal approval under the Land and Water Conservation Fund Act, and holding that even though the public did not have access to the land during the easement, the land served a public outdoor recreation use by exposing a scenic vista and acting as a buffer between a state park and developed areas).

177. Rose, *supra* note 90, at 759–60 (“[L]and ‘dedicated’ to the public could be ‘accepted’ by sheer public usage, if that use had continued so long that public ‘accommodation’ would be substantially affected by interruption.” (quoting *President of Cincinnati v. Lessee of White*, 31 U.S. (6 Pet.) 429, 439 (1832))).

public requires *access* to some physical locations for some of these activities.”<sup>178</sup>

A poorly placed “eyesore,” like a billboard or a junkyard, can interfere with a scenic view in the same way that a gate blocking access to an otherwise public beach appropriates that beach to a private use. Detracting from the beauty of the landscape, in this case by allowing the construction of a building that mars its visual integrity, diminishes the desire to physically enjoy the resource. For this reason, local regulations often protect scenic vistas that are accessible from public locations by prohibiting structures like junkyards and billboards.<sup>179</sup> The restrictions often also apply to the construction of buildings when their placement interferes with views of scenic places,<sup>180</sup> and courts frequently sustain height restrictions to protect scenic views.<sup>181</sup> The regulations “acknowledge and protect the landscape behind the eyesore”; in other words, “it is the eyesore’s interference with the viewshed that justifies government regulation.”<sup>182</sup> Although the building at issue in this Article is in the background, not foreground, of the scenic vista, the interference with the viewshed, the scenic vista, is just as pronounced.

The fact that many members of the public can enjoy scenic views of the Park and that those numbers can increase “enhances the value of the [aesthetic]

178. *Id.* at 781 (emphasis added).

179. Bobrowski, *supra* note 132, at 708.

180. *See, e.g.,* Belmar Estates v. Cal. Coastal Comm’n, 171 Cal. Rptr. 773, 774–75 (Ct. App. 1981) (upholding the California Coastal Commission’s decision to deny permission to construct a subdivision in the Santa Monica Mountains, noting, among other problems with the project, that “[s]ince the home sites are to be on the top of ridges, the houses will restrict ocean view from other parts of the Santa Monica mountains and view of the mountains from significant parts of the ocean and ocean frontage”); Dep’t of Ecology v. Pacesetter Constr. Co., 571 P.2d 196, 199–202 (Wash. 1977) (ordering removal of two, new proposed buildings that would project into the lake further than existing buildings along the shoreline and cut off views of the lake from preexisting houses). The *Pacesetter* court also noted that the project was “inconsistent with the permitted uses which favor preservation of the shoreline’s natural character and the ecology of the shoreline.” 571 P.2d at 201.

181. *See* Williams, *supra* note 132, at 4 (“[W]ith the widespread increase in both income and leisure time, many more people are able to—and have the opportunity to—indulge their preferences for a visually attractive environment, and public bodies have been responding with protective measures.”) (explaining why protecting scenic vistas have become a legitimate public policy goal), 24 (“[O]n the authority of experienced courts in important states, we have it (a) that the height of new buildings may be restricted to preserve the vista of a major mountain range, [and] (b) that new development in a residential neighborhood may be held up, and modifications may be required, if a proposed development would block a neighbor’s existing views . . .”).

182. Bobrowski, *supra* note 132, at 729; *see also* Asselin v. Town of Conway, 628 A.2d 247, 249 (N.H. 1993). The New Hampshire Supreme Court upheld a zoning ordinance that regulated sign illumination after finding that it was adopted “solely to promote aesthetic values, including preserving scenic vistas, discouraging development from competing with the natural environment, and promoting the character of a ‘country community.’” *Asselin*, 628 A.2d at 249. The court additionally found that “[i]t is reasonable to infer that the scenic vistas sought to be preserved by the town include the splendor of mountains at twilight and the brilliance of stars at night.” *Id.* at 372–73. Bobrowski cites the *Asselin* decision as “a clear example of a court upholding an eyesore regulation, supported on aesthetic grounds alone, because a specific background view was protected by the local government.” Bobrowski, *supra* note 132, at 731.



activity rather than diminishing it.”<sup>183</sup> In fact, this lack of exclusivity—its “very publicness”—“makes it valuable, because this activity is exponentially enhanced by greater participation.”<sup>184</sup> According to Professor Rose, “[i]n an odd Lockeanism, the public deserve[s] access to these properties, because ‘publicness,’ nonexclusive open access, create[s] their highest value.”<sup>185</sup> In order for the public to claim a property right, according to Professor Rose, two elements are essential:

[F]irst, the property ha[s] to be physically capable of monopolization by private persons—or would have been without doctrines securing public access against such threats. Second, the public’s claim ha[s] to be superior to that of the private owner, because the properties themselves [are] most valuable when used by indefinite and unlimited numbers of persons—by the public at large.<sup>186</sup>

In the instant situation, LG Electronics has proposed to monopolize views of the Park by constructing a building that will substantially interfere with that use. The fact that views of the Park can be enjoyed by an infinite and unlimited number of people makes that use of the Park superior to LG’s proposed use.

Seeing something is a form of access to the thing being seen; if you do not have access to it with your eyes, you cannot see and enjoy it. It makes sense to accord the public a right to see something they have a right to use.<sup>187</sup> Even the Supreme Court in *Nollan v. California Coastal Commission*,<sup>188</sup> which held unconstitutional permit conditions that expropriated a private beach for public use, did not disparage the principle that being able to see something affirms access to it.<sup>189</sup>

Therefore, having access to a trust resource is dependent on being able to see it; conversely, enjoying a trust resource with your eyes is dependent on

183. Rose, *supra* note 90, at 768.

184. *Id.* at 769.

185. *Id.* at 770.

186. *Id.* at 774.

187. Michael Neiderbach, *Transferrable Public Rights: Reconciling Public Rights and Private Property*, 37 BUFF. L. REV. 899, 928 (1989) (“The Court’s opinion should have focused on whether the public had a right to view the coast. It makes sense to accord the public this right . . . since the public has the right to use the tidelands, it certainly must have the right to see them. . . . [T]he beauty of the coastline should be seen, not only heard.” (commenting on the Court’s opinion in *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987))).

188. *Nollan*, 483 U.S. at 838 (rejecting the California Coastal Commission’s allegation that a landowner’s proposed construction would block “visual access” to a beach, interfering with the desire of people driving past the house to use the beach and creating a “psychological barrier” to “access,” finding that the Commission had failed to demonstrate a nexus between the nature of the exaction and a legitimate end that would justify total prohibition of the proposed use); Foster, *supra* note 152, at 295.

189. Neiderbach, *supra* note 187, at 920 (“Even though the *Nollan* Court implicitly acknowledged the public’s right to view the foreshore in its analysis, the practical effect of the decision was to deny the existence of public rights.”); see also *id.* at 915 (“While the Court was willing to assume, for the sake of argument, that preserving the public’s view of the beach and surmounting the psychological barrier to using the beach were legitimate state interests, it nevertheless imposed severe nexus requirements on the development permit condition. The Court viewed the permit condition as unconstitutional because there was a lack of sufficient nexus between the lateral access easement and the legitimate state interest in preservation of the coastal view and psychological access.”).

having access to it. When access to a trust resource is impeded and the enjoyment of that resource is thus prevented, the public trust doctrine is violated. Although there is no physical barrier preventing the public from accessing Palisades Interstate Park, the intrusion of the LG Electronics building into the scenic view of the Park will interfere with its visual use; this interference is as concrete as if there were a fence across a trail into the Park or pollution from a nearby factory shrouding the view. Therefore, restricting the public's ability to enjoy a scenic vista of the Park by constructing a building in that view is a violation of the public trust doctrine.

Scenic views of Palisades Interstate Park have public value and are a use of the Park that merits protection under the public trust doctrine. Undisturbed landscapes perform many positive societal functions that are typical of trust property.<sup>190</sup> As Professor Rose might say, the fact that many people can enjoy unobstructed views of Palisades Interstate Park is good "for the . . . socialization and the inculcation of habits of considering others."<sup>191</sup> The public's interest in unobstructed views of Palisades Interstate Park is comparable to the public's interest in traditional uses of trust property; interfering with the view of a trust resource is equivalent to blocking access to it.

#### CONCLUSION

Since its rediscovery in 1970 by the late Professor Joseph Sax, the public trust doctrine has continued to expand, to the dismay of its detractors and the delight of its adherents. This Article has explored whether the doctrine can be applied to the proposed construction of a building that will tower over the tree line of Palisades Interstate Park, where it will interfere with the public's visual enjoyment of an otherwise undisturbed natural landscape and thus appropriate that landscape to a private use in violation of the doctrine. Answering that question in the affirmative, as this Article has done, takes the doctrine beyond its watery origins, applying it to an upland public park and to the most ephemeral, nonphysical use of a trust resource imaginable—its public observation. The Article argues that the doctrine is sufficiently malleable to cover this situation, given the value the public places on preserving vistas of an unspoiled landscape.

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190. See Rose, *supra* note 41, at 359 ("The main thrust of these 'inherent public property' doctrines, however, was not particularly aimed at preserving resources that we generally denote as environmental. Instead, the key feature of these doctrines was to reserve for the public those properties that the public needs for travel, communication, commerce, and to some degree public speaking—that is, uses that connect people with one another and with a wider world . . ."), 360 ("[T]he public trust doctrine only indirectly relates to environmental resources—perhaps insofar as recreation, the experience of natural wonders, and the preservation of biodiversity act as a part of a liberal education, promote public health (including mental health), and generally enable people to interact with one another more productively and civilly.").

191. Rose, *supra* note 90, at 776.

In making this argument, the Article is aware of Professor Sax's concern about overextending the public trust doctrine, but has tried to persuade that this instance of doctrinal creep fits snugly within the doctrine's purpose and barely stretches beyond the perimeters of the modern doctrine. Its doctrinal leap, therefore, is quite modest and hopefully will not draw too much calumny.

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**We welcome responses to this Article. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact [ecologylawcurrents@boalt.org](mailto:ecologylawcurrents@boalt.org). Responses to articles may be viewed at our website, <http://www.boalt.org/elq>.**