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Public Trust & Distrust: Theoretical Implications of the Public Trust Doctrine for Natural Resource Management

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PUBLIC TRUST AND DISTRUST: THE THEORETICAL IMPLICATIONS OF THE PUBLIC TRUST DOCTRINE FOR NATURAL RESOURCE MANAGEMENT

BY
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This Comment reviews the theoretical underpinnings of the public trust, a doctrine originating in Roman common law and now constitutionalized by many states, and explores its contentious reception by green legal theorists. Since Professor Joseph Sax's revival of the doctrine as a vehicle for environmental legal advocacy in the early 1970s, it has been hailed by many as the most powerful tool available for protecting natural resource commons and attacked by others who argue that use of the property rights-based doctrine will rely an ownership approach to natural resources and obstruct the development of more stewardship-oriented legal theories of natural resource management. Discussion focuses on the work of Professor Sax, representing the public trust advocates, and Professor Richard Lazarus, representing the green dissent. The Comment concludes that the green dissent may elide the theoretical growth of the modern constitutionalized version of the doctrine beyond its common law roots.

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I. INTRODUCTION

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.¹

Article I, section 27 of the Pennsylvania State Constitution represents an ambitious modern vision of the ancient common law doctrine of the public trust, a doctrine that has traditionally protected public rights of access to navigable waterways. Traced by legal historians to the Justinian Code of ancient Rome,² the public trust (*jus publicum*) doctrine was formally received in the United States via English common law, although scholars have observed an astonishingly universal regard for communal values in water worldwide.³ After a dramatic debut in Supreme Court jurisprudence preserving public ownership of Lake Michigan in *Illinois Central Railroad v. Illinois*,⁴ the doctrine retreated to the more prosaic realm of state common law,⁵ where it served quietly for some seventy years until the environmental awakening of the 1960s thrust it back into the forefront of legal inquiry.

1970 marked the dawn of the new public trust era. Professor Joseph Sax published the seminal disquisition of the new public trust movement, recalling past use of the doctrine to protect water resources and urging future development of a broader public trust that would encompass a greater range of natural resource values.⁶ On April 14, in honor of the nation's first celebration of International Earth Day, the Pennsylvania legislature adopted section 27 of their constitution.⁷ Other states paralleled Pennsylvania's course, enshrining various forms of the public trust idea in their constitutions.⁸

¹ PA. CONST. art. I, § 27.

² Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 429 (1989).

³ See, e.g., *id.* at 431 (discussing communal water values in early to modern Asian, African, European, Islamic, Latin American, and Native American laws: "The real headwaters of the public trust doctrine, then, arise in rivulets from all reaches of the basin that holds the societies of the world.")

⁴ 146 U.S. 447, 452-55 (1892) (allowing revocation without compensation of a grant to a railroad company of a large part of the lakebed of Lake Michigan, on grounds that the state legislature never had authority to make such a conveyance of land held in trust for the public).

⁵ Although the public trust doctrine is generally regarded as a creature of state law, its influence is present in federal law via the federal navigational servitude. See, e.g., Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 636-37 (1986).

⁶ See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

⁷ See Matthew Thor Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169, 1169 (1997).

⁸ See *id.* at 1169 n.4. See generally Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863 (1996) (cataloging various forms of public trust-like protections in state constitutions).

In the years following, environmental activists began strategizing to put the doctrine to creative use, launching litigation designed to compel protection of public trust resources against formidable adversaries. In 1978, a handful of local residents and college biologists in an isolated mountain hamlet filed a public trust lawsuit against the City of Los Angeles to cease water diversions from the Mono Lake Basin.⁹ This classic David-and-Goliath battle culminated in a 1983 victory for the Mono Lake advocates before the California Supreme Court¹⁰ and galvanized the new public trust jurisprudence.¹¹

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 the criteria of navigability), the new public trust heralded conservationist principles. The California Supreme Court construed a fairly traditional constitutional provision requiring that the state ensure "beneficial use" of water resources¹² to mean that "[t]he human and environmental uses of Mono Lake—uses protected by the public trust doctrine—deserve to be taken into account."¹³ Whereas constitutional provisions modeled on the traditional doctrine guaranteed that "[t]he title to lands under navigable waters, within the boundaries of the state . . . is held by the state, by virtue of its sovereignty, in trust for all the people,"¹⁴ the new public trust in Pennsylvania guaranteed that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."¹⁵

Environmental activists widely hailed the emergence of the new public

⁹ See JOHN HART, *STORM OVER MONO: THE MONO LAKE BATTLE AND THE CALIFORNIA WATER FUTURE* 74–81 (1996) (cataloging the events leading to the filing of the lawsuit).

¹⁰ *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983), *cert. denied*, *City of Los Angeles Dept. of Water & Power v. National Audubon Soc'y*, 464 U.S. 977 (1983) (holding that the State must balance Los Angeles's urban water needs against Mono Lake's public trust values in considering the City's application for a permit to divert lake-bound water to the Los Angeles Aqueduct). By the time the case reached the California Supreme Court, the list of plaintiffs had grown to include eleven additional environmental organizations and both state and federal agencies.

¹¹ Although the lawsuit represented a victory for the public trust doctrine and the Mono Lake advocates, the Mono Lake controversy continued for another decade, because the Supreme Court's decision reopened consideration of Los Angeles's diversion permits by the State Water Resources Control Board. Faced with balancing the City's water needs against a new set of "public trust" values, the Water Board conducted years of careful study to document the values and likely consequences of different levels of continued water diversion. The victory that finally yielded injunctive relief to protect the lake arrived with the Water Board's decision constricting diversions in 1994. Decision 1631, Cal. State Water Resources Control Board (Sept. 28, 1994).

¹² CAL. CONST. art. X, § 2.

¹³ HART, *supra* note 9, at 84 (citing *National Audubon Soc'y*, 658 P.2d at 732); see also *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971) (reading the California constitutional public trust provision to include recreational concerns and in dicta, ecological concerns).

¹⁴ FLA. CONST. art. X, § 11.

¹⁵ PA. CONST. art. I, § 27.

trust as the legal tool that would finally empower them against powerful private and government interests they believed imperiled natural resources nationwide.¹⁶ Scholars and practitioners have responded to Sax's call and have advocated extending public trust protection to wildlife,¹⁷ parks,¹⁸ cemeteries,¹⁹ and even works of fine art.²⁰ Sax's 1970 article influenced the development of numerous environmental statutes, including the National Environmental Policy Act.²¹ Judged by the pace and scope of the public trust revival, Sax's project has met with resounding success.²² And yet, voices of dissent have arisen even from within the environmentalist camp, represented most persuasively in the work of Professor Richard Lazarus.²³

This Comment explores the debate among natural resource lawyers over the true value of the public trust theory in environmental advocacy. While activist deployment of the new public trust doctrine has mostly stirred controversy between those who would privilege natural resource protection²⁴ and those who would prioritize the protection of private property rights,²⁵ an important divide has also developed between legal

¹⁶ See HART, *supra* note 9, at 179-86.

¹⁷ See, e.g., Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 724-31 (1989).

¹⁸ See, e.g., Paepcke v. Public Bldg. Comm'n, 263 N.E.2d 11, 15 (Ill. 1970) (citizens bringing an action to stop the Chicago Building Commission from building a school and recreational center in area parks); Wilkinson, *supra* note 2, at 455-66.

¹⁹ See Washington Metro. Transit Auth. v. One Parcel of Land, 514 F.2d 1350, 1352 (D.C. Cir. 1975) (appellants arguing general condemnation power does not authorize the condemnation of a property interest in a cemetery because of the common law rule that property already devoted to a public use is protected from invasion by other uses except by express legislative action.).

²⁰ See Note, *Protecting the Public Interest in Art*, 91 YALE L.J. 121, 122 (1981) (presenting a theory that would extend the Public Dedication Doctrine to protect the public interest in art).

²¹ National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(e) (1994 & Supp. III 1997); see also Richard Delgado, *Our Better Natures: A Revisionist View of Joseph Sax's Public Trust Theory of Environmental Protection, and Some Dark Thoughts on the Possibility of Law Reform*, 44 VAND. L. REV. 1209, 1211 (1991).

²² See, e.g., Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 574 (1989) (referring to the Sax article phenomenon as representing "every law professor's dream: a law review that not only revived a dormant area of the law but continues to be relied upon by courts some two decades later"). The Sax article was ultimately adjudged one of the 40 most cited law review articles of all time. See Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1551-53 (1985) (cataloging the 50 law review articles of the past 40 years most frequently cited in other law review articles).

²³ See Lazarus, *supra* note 5; see also Delgado, *supra* note 21.

²⁴ See, e.g., Terry W. Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 VT. L. REV. 299, 300 (1995) (arguing that classical liberal property theory fails to establish an adequate balance between the protection of private autonomy interests and the preservation of community interests "central to the concept of property ownership").

²⁵ See, e.g., James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) (arguing that the elaboration of the public trust doctrine in modern case law cannot be reconciled with its doctrinal origins in classical liberal property law); James R. Rasband, *Equitable Compensation for Public Trust Takings*, 69 U. COLO. L. REV. 331 (1998) (arguing that states should provide compensation for public trust "takings" as a matter of public policy, even if not constitutionally required). For a particularly personalized duel of the proponents and opponents of the public trust on these grounds, see

scholars who stand shoulder-to-shoulder in the environmentalist camp. While some, like Sax, see the public trust doctrine as the environmentalist's best hope for securing needed protection for natural resources in court, others, like Lazarus, fear that resort to the doctrine will obstruct the development of a more progressive body of natural resource law. After reviewing the arguments, this Comment reflects on whether the empirical progress of natural resource law has restructured the debate since the 1984 publication of Lazarus's critique of Sax's public trust manifesto. The Comment concludes that the modern trend of constitutionalization may propel the doctrine beyond the theoretical constraints of its common law roots.

II. PUBLIC TRUST AND DISTRUST

[F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots . . . The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.²⁶

Byzantine law declared that "[b]y natural law, these things are common property of all: air, running water, the sea, and with it the shores of the sea."²⁷ As Professor Lazarus notes, it remains unclear whether this represented true Roman practice or mere Justinian aspiration,²⁸ but this seminal promulgation of the public trust doctrine ultimately infused customary and common law throughout medieval Europe.²⁹ In the United States, the public trust doctrine serviced arguments in state courts against private ownership of water resources as early as the 1820s,³⁰ and most case law that followed over the subsequent 150 years invoked the trust to preserve public access to waterways for the purposes of fishing and

Huffman, *supra*, at 568-72, replying directly to a critique of his thesis in footnote 108 of Michael Blumm's piece in the same symposium, *supra* note 22, at 597-99. See also Blumm *supra* note 22, at 600 (responding directly to Professor Huffman's reply).

²⁶ *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (Holmes, J., majority opinion).

²⁷ Lazarus, *supra* note 5, at 633-34 (citing THE INSTITUTES OF JUSTINIAN bk. 2, tit. 1, pts. 1-6, at 65 (J. Thomas trans., 1975)).

²⁸ See *id.*

²⁹ See William D. Araza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 395 (1997).

³⁰ See *Arnold v. Mundy*, 6 N.J.L. 1, 71-78 (1821) (explicitly invoking the public trust doctrine to restrict a private party's ability to own oyster beds submerged in a river).

navigation.³¹

A. *Sax and the New Public Trust*

Professor Sax's argument was revolutionary because it sought to expand the scope of the public trust doctrine to encompass environmental preservation, and it proved consequential in documenting a common law basis for courts to legitimately assume a normative stance in adjudicating natural resource questions. In the 1970 article and subsequent work,³² Sax focuses less on the public trust doctrine's substantive potential and more on the procedural protections it offers defenders of natural resource values against democratic failures of the political process: "public 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."³³ Essentially, Sax argues that the doctrine enables judicial oversight when inadequacies in legislative and administrative processes result in wrongful discounting of natural resource

³¹ See, e.g., *Grosse Ile Township v. Dunbar & Sullivan Dredging Co.*, 167 N.W.2d 311 (Mich.App. 1969) (enjoining a river-based dike and fill operation because, *inter alia*, area was used for boating and fishing and constituted wildlife habitat protected by the public trust doctrine); *State ex rel. Squire v. City of Cleveland*, 82 N.E.2d 709 (Ohio 1948) (holding that the state, as trustee for the people with respect to waters of Lake Erie and the land under them, may not permit a diversion of trust property to private uses different from the object for which the trust was created); *Niagara Falls Power Co. v. Duryea*, 57 N.Y.S.2d 777 (N.Y. Sup. 1945) (holding that no damages arise from state interference with private riparian rights when a public use in the interests of commerce as well as navigation may be discernible); *Southern Pac. Co. v. Western Pac. Ry. Co.*, 144 F. 160 (N.D. Cal. 1906) (holding that lands under the navigable waters of San Francisco Bay below the line of low tide belong to the state and that other waterfront lands were held by the town of Oakland but subject to a public trust and thus not liable to levy and sale to private interests); *City of Providence v. Comstock*, 65 A. 307 (R.I. 1906) (affirming the common law doctrine that lands submerged beneath navigable waters belong to the state in which they are located, limitable only by local legislation or custom that preserves public trust values); *Williams v. Davidson*, 43 Tex. 1 (Tex. 1875) (holding that the proprietors of adjoining banks have a right to use the land and water of the river in any way not inconsistent with the public easement of navigation); *Gough v. Bell*, 22 N.J.L. 441 (N.J. 1850) (holding that state sovereignty precludes New Jersey proprietors from granting lands below high-water and that a riparian owner cannot acquire title to land by filling up in front of his premises); *People v. Vanderbilt*, 26 N.Y. 287 (N.Y. 1863) (lands beneath the waters of the Hudson River are held by government only as a public trust, and the public right of navigation will be upheld notwithstanding agreements by city officials to the contrary); *Thompson v. People ex rel. Taylor*, 23 Wend. 537 (1840) (discussing navigational values in public trust terms). *But see City of Oakland v. Carpentier*, 21 Cal. 642, 661-62 (Cal. 1863):

The City of Oakland had the title to the wharf franchise, but it is said there was a public trust connected with the title, and therefore she could not lease the franchise. Why not? In all parts of the world these franchises are in the hands of private individuals and dealt with for the purpose of trade and profit . . . Here, then, on this subject of public trust, this wharf franchise of the municipal corporation, the Legislature has exercised its will and power and no one can gainsay it.

³² See, e.g., Joseph L. Sax, *The Limits on Private Rights in Public Waters*, 19 ENVTL. L. 473 (1989); Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980).

³³ Sax, *supra* note 6, at 509.

values *vis a vis* competing economic use values, noting that "the public trust concept is, more than anything else, a medium for democratization."³⁴

Interestingly, one of the more serious critiques of the new public trust doctrine unleashed by Sax is that it is anything *but* democratic in empowering publicly unaccountable judges to overturn the democratic deliberations of legislatures³⁵ and to frustrate very recently reasonable expectations of private property owners without affording them compensation.³⁶ Related critiques allege that the unbounded scope of the new public trust has so far departed from its doctrinal origins that it lacks jurisprudential legitimacy³⁷ and may conflict with other constitutional values.³⁸ Even leading environmental advocates have expressed concern that the "blank check" evolution of the public trust doctrine not exceed the limits of acceptable jurisprudential development, lest even its application to water resources lose claim to legitimacy.³⁹ In the realm of common law, the lively discourse on these issues indicates that they have yet to be resolved.⁴⁰

However, in much modern public trust jurisprudence, these issues have been discharged by the widespread adoption of constitutionalized public trust provisions by the separate states.⁴¹ So long as these provisions do not conflict with the overarching procedural constraints of the U.S. Constitution, they represent superstatutory declarations of the public trust, specifically designed and democratically approved to constrain the legislature against derogation of trust values.⁴² At least in the states that have so embraced the trust constitutionally, the antidemocratic critique has been muted, if not mooted.

³⁴ But Sax also argues that any of four unambiguously substantive criteria present in natural resource conflicts should trigger the concerns of the public trust doctrine. *Id.* at 562-65.

³⁵ See, e.g., Huffman, *supra* note 25, at 565 (arguing that Sax's explanation of the public trust doctrine fails constitutionally "by claiming that democratic exercise of the police power is served by permitting the courts to second-guess the legislature"); Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 *ECOLOGY L.Q.* 351, 356 (1998) (reviewing the possible antidemocratic implications of the doctrine because the public trust could be construed as providing a self-executing means of overturning public decisions via the legislature).

³⁶ See, e.g., Rasband, *supra* note 25, at 331-406 (arguing that states should provide for equitable compensation to private property owners harmed by state exercise of the public trust doctrine).

³⁷ See, e.g., Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 *CAL. W. L. REV.* 239, 252-63 (1992) (criticizing the expansion of the trust's application beyond water resources and suggesting that its doctrinal roots may counter the presumption that the doctrine constrains even a republican form of government).

³⁸ See, e.g., Huffman, *supra* note 25, at 534 (arguing that the doctrine offends constitutional protections against takings of property without compensation); Rasband, *supra* note 25, at 331-32 (discussing arguments that the *Illinois Central* decision allowing the trust to defeat a takings claim is analytically indefensible).

³⁹ See Thompson, *supra* note 8, at 907 (fearing that expansion of the doctrine will further the backlash against the use of the doctrine even in traditional water resource arenas).

⁴⁰ For a particularly rigorous exposition of the constitutional issues implicated by the doctrine, see generally Araiza, *supra* note 29.

⁴¹ See Thompson, *supra* note 8, at 867-68.

⁴² *Id.* at 995; Huffman, *supra* note 25, at 547-49.

B. *The Public Trust and Notions of Property*

Nevertheless, other critiques of the public trust approach follow it even, and perhaps especially, to its constitutional infiltration. The most prominent concern is the relationship between the doctrine and theoretical constructions of property law. From the right hail the vindicators of private property rights, who argue that the doctrine, in whatever form, is incompatible with the liberal theories of property that undergird civil society.⁴³ And from the left come the more unlikely green dissenters, who, like Professor Lazarus, fear that the canonization of the public trust doctrine as the preeminent framework of natural resource allocation analysis has robbed civil society of the opportunity to nurture a better framework.⁴⁴

Indeed, although Sax's ideas rang revolutionary to the ears of many environmental activists and disconcerted property rights advocates, nevertheless the ideas remained basically faithful to traditional principles of property law by involving the common law concept of the "trust." The common law's treatment of property law is grounded in classical liberal theories of property, which give primacy to private autonomy to control property,⁴⁵ define things (and persons) according to ownership,⁴⁶ and elevate the right to exclude others as the most important in the bundle of rights that constitutes "property."⁴⁷

Many environmentalists on the left reject classical liberal property theory because it elevates individual autonomy above all other considerations in defining the relationship between human and non-human components of the world and fails to account for the ecological reality of interconnectedness. "Green Property"⁴⁸ theorists do not dispute the value of individual autonomy, but they advocate a theory of property that provides a better balance between considerations of personal autonomy and competing community interests in allocating the rights and responsibilities that should constrain our relationship with the things that constitute property.⁴⁹ As Professor Frazier argues,

To support the theory that autonomous control over our property is the best guarantee of liberty, happiness, and security, classical liberal property theorists must postulate that each one of us, as a property owner, can live more or less independently. This important principle—which celebrates the independence of a landowner—amounts to denial of interdependence between

⁴³ See, e.g., Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to "Environmental Takings,"* 46 S.C. L. REV. 613 (1995).

⁴⁴ See, e.g., Frazier, *supra* note 24, at 300 (outlining classical liberal property theory and suggesting alternatives).

⁴⁵ *Id.* at 307.

⁴⁶ See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 377-78 (1988) (discussing the Hegelian "personality" theory of property ownership, in which a person cannot realize free will and be accorded self-hood except in the exercise of dominion over his property).

⁴⁷ See, e.g., Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 711 (1986).

⁴⁸ J. Peter Byrne first coined the term "Green Property" in *Green Property*, 7 CONST. COMMENT. 239 (1990), cited in Frazier, *supra* note 24, at 301 n.10.

⁴⁹ See Frazier, *supra* note 24, at 302.

individual landowners and the other components of the land communities in which they live. Therein lies the flaw in classical liberal property theory. Denial of interdependence contradicts the first law of ecology, which holds that each thing in our biosphere, including each human being, is connected to every other thing.⁵⁰

Green Property theorists argue that to organize our relationship with things—including natural resources and the environment—according to a theoretical construct that denies the essential logic of the relationship exogenous to that framework is not only poor theory, but also a recipe for eventual human unhappiness (or in the language of property, “disutility”) and ecological disaster.

C. *The Lazarus Dissent*

In 1986, Professor Richard Lazarus published the most interesting and influential of the green critiques of the public trust doctrine.⁵¹ Although his condemnation of the doctrine is unequivocal, Lazarus’s effort represents one of the more politically even-handed critiques, matching a traditional regard for fundamental principles of liberal autonomy with the bold proposition that society finally reject its outdated private property rights approach to natural resource management. His alternately radical and conservative argument thus treads a narrow theoretical ground upon which no ideologue will join him, but none stands too far away. Measured by the mode, his thesis bows toward the green agenda; measured by the mean, Lazarus proves the most passionately independent of moderates.

Although this balanced analysis may lend Professor Lazarus credentials as an unlikely moderate, little is moderate about his treatment of the public trust. He finds fault with the theoretical inconsistency of Sax’s approach to the public trust,⁵² with the trust doctrine’s reliance on possibly historical and arguably legal fictions,⁵³ and with its vulnerable dependence on a proenvironment judicial bias.⁵⁴ Moreover, he argues that the need for the public trust doctrine is receding in the wake of a new environmental consciousness infusing the law, demonstrated in the liberalized treatment by courts of citizen standing to bring environmental injury suits,⁵⁵ common law nuisance’s embrace of environmental and natural resource claims,⁵⁶ and the

⁵⁰ *Id.* at 306–07.

⁵¹ See Lazarus, *supra* note 5.

⁵² See *id.* at 642–43 (noting that Sax declines to engage with the property rights rationale of the public trust, resulting in his advocacy of a doctrine without a precise legal basis).

⁵³ See *id.* at 656–57.

⁵⁴ See *id.* at 712–15.

⁵⁵ See Lazarus, *supra* note 5, at 658–60 (discussing the holding in *Association of Data Processing Serv. v. Camp*, 397 U.S. 150, 154 (1970), that Article III standing requirements could be met by injury to a range of interests, including environmental interests). Note that Lazarus writes prior to the Supreme Court’s assault on (and subsequent redemption of) citizen standing. See *infra* notes 95–98 and accompanying text.

⁵⁶ See Lazarus, *supra* note 5, at 660–64 (noting that “with increasing frequency, courts have abandoned rigid property-based rules in favor of balancing the competing considerations,

expansion of the "modern police power state"⁵⁷ and of administrative law.⁵⁸ Indeed, the major federal environmental statutes passed during the "environmental decade" of the 1970s⁵⁹ signified a new governmental mandate of environmental stewardship, and many included broad citizen suit provisions to involve public participation and guarantee enforcement.⁶⁰

To Lazarus, the changing shape of government represents the most important element in the obviolation of the public trust doctrine. The rapid industrialization, war efforts, and social urbanization that occurred over the early half of the century transformed the limited executive branch envisioned by the framers into the powerful post-New Deal administration,⁶¹ marked by "the steady erosion of private property's sanctity in the face of the sovereign police power's growth."⁶² Where early sovereign power was limited almost exclusively to its mission of protecting private property from domestic or foreign incursion, the modern sovereign authority to tax, spend, and regulate restructured the federal government into an institution able and willing to affirmatively protect environmental values that might earlier have depended on concepts of a public trust.⁶³ The passage of new environmental statutes has established a complex web of permit requirements for resource use and extraction that effectively creates a new set of property rights mediated by the federal government,⁶⁴ and this regulatory state, Lazarus argues, demonstrates increasing sensitivity to environmental concerns.⁶⁵

In short, the Lazarus dissent proposes that the evolution of government has rendered obsolete the central premise of the public trust's doctrinal origins, which Lazarus identifies as "a needed legal basis to ensure public accountability for . . . decisions that adversely affect the environment."⁶⁶ Lazarus argues that our society has outgrown the need for the public trust

including both individual equities and broad societal interests, of each party's legal position").

⁵⁷ See *id.* at 665.

⁵⁸ See *id.* at 679.

⁵⁹ See *e.g.*, National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4370(e) (1994 & Supp. III 1997); Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q (1994 & Supp. III 1997); Federal Water Pollution Control Act (CWA), 33 U.S.C. §§ 1251-1387 (1994 & Supp. III 1997); Marine Protection, Research and Sanctuaries Act of 1972 (MPRSA), 16 U.S.C. §§ 1401-1445 (1994); Endangered species Act of 1973 (ESA), 16 U.S.C. §§ 1531-1544 (1994); Public Health Service Act (PHSA), 40 U.S.C. §§ 300f-300j-26 (1994 & Supp. III 1997); Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2692 (1994 & Supp. IV 1998); Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6992k (1994 & Supp. III 1997) (amending Solid Waste Disposal Act, Pub. L. No. 89-272, 79 Stat. 992); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1994 & Supp. III 1997).

⁶⁰ See, *e.g.*, 42 U.S.C. § 7604 (1994 & Supp. III 1997) (CAA); 33 U.S.C. § 1365 (1994 & Supp. III 1997) (CWA); 16 U.S.C. § 1540(g) (1994) (ESA); 15 U.S.C. § 2619 (1994 & Supp. IV 1998) (TSCA); 42 U.S.C. § 6972 (1994 & Supp. III 1997) (RCRA); 42 U.S.C. § 9659 (1994 & Supp. III 1997) (CERCLA).

⁶¹ See Lazarus, *supra* note 5, at 667.

⁶² *Id.* at 668.

⁶³ *Id.* at 667.

⁶⁴ See *id.* at 676.

⁶⁵ See *id.* at 684-85 (discussing concern for environmental laws expressed by judicial and legislative branches).

⁶⁶ *Id.* at 679.

"because it was based on a characterization of the relationship of the government to the natural environment that bears little resemblance to the role of government today."⁶⁷ Nevertheless, the public trust doctrine "continues to resist the ghost of narrow-minded prodevelopment—government as it was, not as it is[.]"⁶⁸ and "[i]n so doing, the doctrine serves no meaningful role in the ongoing debate on the merits; it has become a relic of the past ready to be discarded."⁶⁹ This is especially urgent, Lazarus warns, considering the stakes of continued reliance on the doctrine:

Continued use of the doctrine ultimately threatens to impede environmental protection and resource conservation goals and possibly render Pyrrhic earlier advances. Most fundamentally, the doctrine's operation exacerbates a growing clash in liberal ideology within natural resources law—between the need for individual autonomy and security, traditionally tied up in private property rights, and the demands of longer-term collectivist goals expressed in environmental protection and resource conservation laws.⁷⁰

Although Professor Lazarus attacks public trust-based approaches to environmental conservation on multiple fronts, ultimately his critique flows from an antipathy for its implied property law framework similar to that of the Green Property advocates for ecologically sterile liberal property theory. The doctrine, he observes, "is squarely rooted in property law."⁷¹ And what concerns him most is not the suboptimal results that use of the trust yields in local natural resource cases, but the suboptimal legal world that today's use of the doctrine promises for tomorrow.

The public trust, after all, remains a "trust"—in which a bundle of specifically designated private property rights are assigned to the "public" and delegated to the oversight of the sovereign as trustee. But Lazarus questions the utility of this model in application to our developing republican, increasingly administrative, centralized, and federally dispersed system of government.⁷² What precisely are the mechanisms by which the sovereign performs its fiduciary duties? As trustee, who in the government decides which use is most beneficial or which resource most worthy of protection? Clearly, the trust privileges the judiciary, but Lazarus suggests that judges lack the technical competence to oversee resource-sensitive decisions by agency administrators who are more likely to be professional resource managers by training.⁷³

Although common law principles work well to structure the behavior between private individuals, they are poorly equipped to order the relationship between branches of government. Even constitutionalized public trust provisions have encountered this problem, as constitutional

⁶⁷ *Id.* at 688–89.

⁶⁸ *Id.* at 691 (allowing for a limited continued useful role for the trust in its traditional domain of access to beaches and public waterways).

⁶⁹ *Id.*

⁷⁰ *Id.* at 692.

⁷¹ *Id.* at 642.

⁷² *Id.* at 769.

⁷³ *Id.* at 712.

amendments in certain states have remained impotent when interpreted as non-self-executing.⁷⁴ In the classical liberal world, private property rights are inviolate, and so, as commentators have criticized, a common law public trust increasingly divorced from its doctrinal moorings could nonetheless preempt even democratically supported legislative efforts to redirect resource uses in environmentally positive exchanges.

And does it really make sense to think of the public interest in natural resource protection as one of ownership? Aside from the cognitive dissonance this will stir in many committed environmental advocates, the ownership model leaves traditionally phrased trusts vulnerable to shifting public visions of what constitutes a beneficial use. Indeed, Sax explicitly acknowledges this limitation of the trust, although he addresses it in his defense of the trust's frustration of riparian property owners' expectations when the tide turned (literally and figuratively) green:

[T]he fundamental rule remains that beneficial use is the basis, measure, and limit of property rights in water. When uses cease to be seen as beneficial, however long standing, they are repudiated in favor of modern conceptions of beneficiality Does this mean that the wheel of history might turn again, and that resource protection might again someday be subordinate to development? The answer is yes.⁷⁵

To reassure his audience, Sax immediately qualifies his assertion: "In theory, it might happen, although such a reversion is unlikely."⁷⁶ But this seems like perilous optimism and an outright abrogation of natural resource stewardship under competing, non-property-based views of the nature of—well, nature.

As the Green Property theorists critique liberal conceptions of property, so Lazarus and his fellow dissenters suggest there may be a better framework for structuring our relationship to the natural world than through the awkward vocabulary of property and ownership. Lazarus envisions a natural resource legal regime in which private property rights-structured relationships do not dominate our thinking about land and resource management:

[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

⁷⁴ Kirsch, *supra* note 7, at 1177.

⁷⁵ Sax, *supra* note 32, at 478.

⁷⁶ *Id.*

law.⁷⁷

Other authors have expressed similar frustration over the public trust's appropriation of the environmental law discourse at a time when the discourse seemed ready to embrace more progressive, "greener" approaches to characterizing the special relationship between human beings and natural resources. Professor Delgado notes that "the public trust . . . model is inherently antagonistic to the promotion of innovative environmental thought. A trust is by nature, conservative—its purpose is to protect a corpus and put it to some use."⁷⁸ Delgado blames the ascendancy of the new trust for entrenching the property rights model and preempting consideration of alternative models arising in prominence at the time, including Aldo Leopold's environmental ethics, Native American thought, and principles of ecofeminism.⁷⁹

The green dissenters challenge the notion of private property rights in natural resources and suggest that it has already so eroded under the stream of government regulation and the wind of ideological progress that legal principles by now should formally recognize the change. The undeniable examples of resource degradation as a result of market failure—via the aggregation of costs externalized by rational actors—prove that the property rights model cannot sustainably direct the relationship between our technologically bionic society and the natural environment.⁸⁰ Like Delgado, Lazarus suggests an alternative framework for the future elaboration of natural resource law, in which traditional notions of private rights in natural resources are replaced by a variegated web of property rights created by statute and administered through government-mediated entitlements.⁸¹

Unlike other green critics, Professor Lazarus punctuates his argument by noting the importance of reestablishing a certain level of security in private interests in natural resources, since the total erosion of private property rights, he concedes, would threaten individual liberty.⁸² Essentially, he seeks to move our relationships with natural resources away from the absolute ownership model of private property rights and toward a more qualified model of reasonable expectations in rights of use, in which "reasonable expectations" are subject to communal constraints downplayed (though not absent⁸³) in classical liberal property theory. The public trust doctrine, he argues in a final pragmatic gesture, fails the public even further by reifying a property rights regime while declining to deal candidly with the problem of private property owners' reasonable expectations in the face of today's rapidly and relentlessly destabilizing natural resource public policy.⁸⁴

⁷⁷ Lazarus, *supra* note 5, at 633.

⁷⁸ Delgado, *supra* note 21, at 1214.

⁷⁹ *Id.* at 1218.

⁸⁰ Lazarus, *supra* note 5, at 697.

⁸¹ *Id.* at 698–99.

⁸² *Id.* at 702–03.

⁸³ See Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 129 (1990) (defining the concept of property as the management of tensions between individual autonomy and community interests).

⁸⁴ Lazarus *supra* note 5, at 709–10.

In resisting any compromise of its staunch but doctrinally-adrift principle, the public trust furthers the anxieties of property owners and threatens to fuel the "growing conflict in liberal ideology" that will only frustrate, rather than further, the development of a unified system of workable natural resource law.⁸⁵

III. REVISITING THE TRUST: FIFTEEN YEARS LATER

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.⁸⁶

Thirty years after the Sax revival and nearly fifteen since the Lazarus assault, the public trust doctrine remains a formidable theme of natural resource law, if perhaps more rhetorically than legally charged. Although calls continue to expand use of the doctrine,⁸⁷ it has not made significant progress toward protecting natural resources unrelated to water, and even Professor Sax eventually refocused his energies toward advocating the importance of the doctrine specifically to water law.⁸⁸

Nor, however, has it retreated to memory as Professor Lazarus had hoped. In the last five years, claims under the doctrine yielded environmental victories in the supreme courts of Colorado⁸⁹ and Idaho⁹⁰ and in the appellate court of Wisconsin.⁹¹ In Colorado and Wisconsin, the doctrine was invoked to sustain state action against the challenges of private

⁸⁵ *Id.* at 710.

⁸⁶ Wilkinson, *supra* note 2, at 471-72.

⁸⁷ See, e.g., Eric Swenson, *Public Trust Doctrine and Groundwater Rights*, 53 U. MIAMI L. REV. 363 (1999) (arguing that the doctrine should be extended to protect public interests in groundwater); Cathy J. Lewis, *The Timid Approach of the Federal Courts to the Public Trust Doctrine: Justified Reluctance or Dereliction of Duty?*, 19 PUB. LAND & RESOURCES L. REV. 51 (1998) (advocating, as Charles Wilkinson had twenty years earlier, that federal courts should make vigorous use of the public trust doctrine in natural resource cases).

⁸⁸ See Sax, *supra* note 32.

⁸⁹ See *Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd.*, 901 P.2d 1251, 1257 (Colo. 1995) (en banc) (holding the state's trust duty requires protection of instream flows to protect creek ecology against the appropriations of a ski resort for snow-making purposes).

⁹⁰ See *Selkirk-Priest Basin Ass'n v. Idaho ex rel. Andrus*, 899 P.2d 949, 953-55 (Idaho 1995) (holding the public trust doctrine conferred standing to an environmental group to challenge a timber sale on state forest lands because sedimentation from the logging would harm fish spawning grounds and the bed of an appurtenant creek).

⁹¹ See *Vander Bloemen v. Wisconsin Dep't of Natural Res.*, No. 95-1761, 1996 WL 346266 (Wis. Ct. App. 1996) *rev. denied*, *Vander Bloemen v. Dep't of Natural Res.*, 555 N.W.2d 815 (Wis. 1996) (holding the public trust doctrine applies to the protection of lakeside ecology).

property owners, and in the Idaho case, the doctrine provided standing to an environmental group to challenge state action (in the absence of any other statute on which they could have relied). Professor Sax's seminal article continues to be cited in countless cases and law reviews, and periodic symposia offer an academic forum for continued exchange on the value of the public trust to environmental law. In a recent symposium, Professor Carol Rose offered a thoughtful intellectual history of the new public trust, crediting "not only . . . Sax's arguments, but also . . . his masterful use of the rhetorical resources implicit in the name [with making] the 'public trust in natural resources' . . . now so well-known and so widely referenced in our current debate on the management of natural resources."⁹²

A. *The Silence of the Green Dissent*

That little has been heard from the green dissent over the last decade may reflect a realization of the fears Lazarus expressed about the appropriation of natural resources law by the public trust idea. Perhaps, as Professor Delgado warned, the discourse was stifled and alternatives disregarded. Inasmuch as most of the boundary-pushing ideas that emerged in the late 1960s and early 1970s were swallowed up by the conservative tide of the 1980s, this may be an accurate characterization. But it falls shy of persuasive, especially since the most revisionist theoretical development in property law—the Green Property movement—has occurred largely during the 1990s.⁹³ Indeed, in the most comprehensive theoretical exposition of the Green Property, Professor Frazier entertains points of collaboration between the public trust doctrine and the community interest foundations of the Green Property project, demonstrating that ambitiously creative thinking continues to challenge solid theoretical paradigms within natural resource law.⁹⁴

The more likely explanation for the decade of silence lies in the surprising (to the green dissenters) turn of jurisprudential events that followed the salad days of the early recognition of environmental values in the law. In utter contrast to the environmentally friendly government-in-progress that Lazarus heralded in 1986, the Reagan-Bush era produced an administrative state resistant to environmentalist concerns and an openly hostile Supreme Court. The landmark precedent set in *Chevron v. Natural Resources Defense Council*,⁹⁵ which required courts to give "strong deference" to agency interpretations of their legislative mandates, might seem attractively green when agencies are sympathetic to natural resource protection. However, as foreshadowed by the very facts in *Chevron*,⁹⁶ the

⁹² Rose, *supra* note 35, at 362.

⁹³ See Frazier, *supra* note 24, at 302 n.13 (cataloging the seminal scholarship of the Green Property school).

⁹⁴ See *id.* at 354–57 (observing both the possibilities and obstacles for a theoretical partnership).

⁹⁵ 467 U.S. 837 (1984).

⁹⁶ Against a challenge by the National Resources Defense Council, the Court upheld the Environmental Protection Agency's environmentally questionable adoption of a plant-wide

rule has devastated the ability of environmental plaintiffs to challenge agency decisions that discount natural resource values in favor of property rights and commercial interests.

Furthermore, in *Lujan v. Defenders of Wildlife*,⁹⁷ the Court sharply curtailed the liberal standing requirements that Lazarus had argued would supplant the need for a public trust doctrine, making it even more difficult for environmental plaintiffs to be heard.⁹⁸ Ultimately, by holding in *Lucas v. South Carolina Coastal Council*⁹⁹ that environmental regulations could effect a constitutional taking requiring compensation, the Rehnquist Court eviscerated Lazarus's 1984 proposition that the private property rights model of interests in natural resources was giving way to a "new property" model predicated on the sovereign power of the state to grant use rights in natural resources via limited entitlements.

At least Professor Lazarus was right about the public trust's vulnerable reliance on pro-environment judicial bias! But therein lies the fundamental dilemma. While the changes evident in shifting federal environmental policies reflect the vagaries of partisan politics, they also betray the weakness in Lazarus's preferred vision of the operation of natural resource law. Just as the public trust doctrine relies unduly on pro-environmental bias among the judiciary, the "new property" approach to natural resource management relies unduly on a pro-environment bias among the executive, and to a lesser extent, the legislature. Confronted on this very point, Professor Lazarus acknowledges the problem, but holds to his preference that environmental matters be decided by the executive or legislative branches over the judiciary; he favors "getting it in the regs," or sending it through the administrative or legislative process over trusting the protection of a natural resource to the discretion of an unaccountable judge who may know nothing about ecological science.¹⁰⁰

B. *Evaluating the Trust Today*

In the end, an evaluation of the public trust doctrine's value to natural resource law may simply reduce to the given evaluator's pet federal branch. If the judiciary is seen as the least dangerous branch (and the one most shielded from short-term majoritarian interests), then the public trust offers an ideal means of guaranteeing judicial oversight whenever public trust values are threatened. But, if the expertise of the administrative state and the public-accountability required of agency action under the Administrative

definition of a "stationary source" of air pollution for the purposes of administering the Clean Air Act. *Id.*

⁹⁷ 504 U.S. 555 (1992) (dismissing a claim under the Endangered Species Act for lack of standing because the plaintiffs failed to demonstrate a sufficient or redressable injury).

⁹⁸ *But see* *Friends of the Earth, Inc. v. Laidlaw Environmental Serv., Inc.*, 528 U.S. 167 (2000) (reinvigorating citizen standing in environmental cases).

⁹⁹ 505 U.S. 1003 (1992) (holding that the effects of an environmental regulation amounted to a taking that required just compensation).

¹⁰⁰ Telephone Interview with Richard J. Lazarus, Professor of Law, Georgetown University (May 3, 2000) [hereinafter Lazarus Interview].

Procedure Act (APA)¹⁰¹ are exalted, then channeling natural resource decisions through an executive agency seems more likely to yield the most informed, comprehensively analyzed results. However, as the last fifteen years have shown, even agencies staffed with experts are vulnerable to capture, and the APA provides little means of public oversight of informal adjudication, which comprises the vast majority of agency action.¹⁰² When greens control the Department of Interior and libertarians control the Court, surely environmentalists will prefer to safeguard eggs in the executive basket. But what if "Wise Use" interests dominate both branches?

Today, even green dissenters concede the problem of advocating a wholesale retreat by environmental lawyers from the public trust doctrine.¹⁰³ As Professor Lazarus notes, when a resource like the unique Mono Basin ecosystem faces imminent destruction and the only efficacious tool in the environmental legal arsenal is appeal to the public trust, it would seem impossible, and possibly unethical, not to use it.¹⁰⁴ But this concession is painful, because such emergency measures nevertheless serve to entrench the hegemony of the public trust model of natural resource law, despite its doctrinal and theoretical limitations. Dissenters warn that in the end, the understanding of natural resources in private property terms that is reified by the public trust may render more vulnerable to degradation the very resources impressed with the trust.¹⁰⁵

IV. CONCLUSION

The visitors collect at the parking lot, breathlessly absorbing the magnificent escarpment of the Yosemite-Inyo Sierra before them, admiring the defiant cones of the Mono Crater volcanoes behind them, and settling their gazes over the crystalline edges of the body of water between, a vast inland sea twice the size of San Francisco—the mythical Mono Lake of newspaper headline and bumper-sticker fame. As they gradually descend the volcanic ash trail a few hundred yards out to shore, the ranger explains that the parking lot had been submerged twice their standing height in lakewater only a few decades ago, before the lake's tributaries were first diverted into the Los Angeles Aqueduct for the 350-mile journey south to the City.

The ranger explains that the moonscape of limestone pinnacles they are crossing formed as underwater stalagmites of sorts—rising where calcium-spiked underground springs permeated the carbonate-rich brine of Mono's ancient waters, precipitating towers of "tufa" that grew until they touched the lake's surface from below. They learn of the unique species of shrimp that populates the lake by the trillions and of the

¹⁰¹ 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1994 & Supp. IV 1998).

¹⁰² JOHN H. REESE, ADMINISTRATIVE LAW: PRINCIPLES AND PRACTICE 261 (1995).

¹⁰³ Lazarus Interview, *supra* note 100.

¹⁰⁴ *Id.*

¹⁰⁵ Lazarus, *supra* note 5, at 696.

millions of migratory shorebirds that visit the lake each year as they traverse the Pacific flyway from the Arctic to Argentina. They taste the kutsavi, the bacon-flavored pupae of the alkali fly that formed the dietary staple of the Kuzedika'a Paiute for countless generations. They learn how the water diversions that began in 1942 caused the enormous lake to lose forty vertical feet in as many years to unreplenished evaporation—halving the lake's volume and doubling its salinity, threatening ecosystemic collapse and poisoning the local air with toxic alkali particulates windswept from the mile-wide exposed lakebed ringing the shrinking lake.

And then, just a few yards from the foaming water's edge, the ranger stops them and explains that thanks to important legal decisions between 1983 and 1994, the water level is now rising again—the salinity falling, the birds returning, the shrimp safe from extinction, and the people breathing clean air again—all because of an ancient article of common law, the public trust doctrine, according to which the California Supreme Court finally decided that to allow the death of Mono Lake for the benefit of one city would violate the State's duty to protect it as an ecological resource belonging to all. Parents' eyes grow as wide as their children's in sudden wonder of the power of ideas, and in awe of the devastation of near loss and the grace of last-minute salvation. And as they stand in the midst of such unparalleled natural splendor, rejoicing in a happy ending so rare in like stories of environmental crises, the visitors experience—for perhaps for the first time in their lives—genuine gratitude for the presence of lawyers in society.

Despite the spirited debate and tumultuous development of natural resources law, today's public trust doctrine seems well and healthfully entrenched in the realm of law most doctrinally suitable: water law. And as the common law continues its inexorable progress, courts extend the reach of water-related interests over time,¹⁰⁶ legislative and executive branches debate the relationship between trust values and the missions of administrative agencies,¹⁰⁷ and all three branches of government continue to explore the normative requirements of constitutionalized versions of the public trust.¹⁰⁸

The Lazarus critique of the public trust doctrine as obviated by the changing shape of government was undone by subsequent historical events demonstrating, perhaps ironically, that government had not finished changing. But his theoretical critique of the doctrine as dangerously reifying a private property-based conception of natural resource management remains potent. The private property model leads to environmental harm via

¹⁰⁶ See, e.g., *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983) *cert. denied* *City of Los Angeles Dep't of Water & Power v. National Audubon Soc'y*, 464 U.S. 977 (1983) (the Mono Lake case); see discussion *supra* note 10.

¹⁰⁷ See Donna Sheehan Fitzgerald, *Extending Public Trust Duties to Vermont's Agencies: A Logical Interpretation of the Common Law Public Trust Doctrine*, 19 VT. L. REV. 509 (1995).

¹⁰⁸ See e.g., Kirsch, *supra* note 7.

the aggregation of costs externalized by liberally autonomous actors making otherwise "rational" decisions. Increasingly persuasive arguments are made that natural resources left as commons do not inevitably produce Garrett Hardin's¹⁰⁹ tragedy of the commons,¹¹⁰ but instead that the allocation among individual owners of illusory "ownership rights" to commons resources produces a tragedy of market failure (or as one author has coined it, a "tragedy of the commoners").¹¹¹ As Lazarus notes, "the problem of externalities has become so acute that the very notion of traditional private property rights in [natural] resources is in doubt."¹¹² If the public trust is truly beholden to liberal property theory, then the rise of a natural resource law regime predicated on the public trust risks future collapse.

Yet the public trust continues to gain adherents, win legal victories, and inspire citizens like the Mono Lake visitors on an intellectual-emotional plane rarely accessed by legal doctrine. 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,¹¹³ flows from roots deeper than classical liberal property law?

Professor Rose suggests, in her reflections on Sax's public trust campaign, that the primary power of the doctrine in contemporary natural resource law has been its rhetorical facility to "challenge our ideas about natural resource management."¹¹⁴ She notes that the 'public trust' is an "arresting phrase" that directs the attention with "intimations of guardianship, responsibility, and community."¹¹⁵ Why is it that the notion of the public trust is so intuitively arresting that even disinterested tourists respond immediately? (Try this with other longstanding principles of property law, such as the Rule Against Perpetuities, to demonstrate the special appeal of the public trust doctrine.) As Professor Wilkinson noted, notions that water resources defy private ownership is a remarkably pan-cultural, pan-historical concept visible in cultural constructs constraining resource access worldwide.¹¹⁶

Commentators have attacked the validity of the public trust doctrine's success on the grounds that it is little more than a "simple, easily understood, and intuitively appealing approach to environmental

¹⁰⁹ See Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

¹¹⁰ See e.g., BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY (1998).

¹¹¹ *Id.* at xxiii (describing overexploitation of resources as a "tragedy of the commoners").

¹¹² Lazarus, *supra* note 5, at 698.

¹¹³ See Sax, *supra* note 6, at 478-83 (rejecting property law as a doctrinal basis of the new public trust). *But see* Daniel Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 810-14 (1979) (insisting that the public trust doctrine would rest more firmly on its historical basis in property law).

¹¹⁴ Rose, *supra* note 35, at 351.

¹¹⁵ *Id.*

¹¹⁶ Wilkinson, *supra* note 2, at 429-30.

protection,"¹¹⁷ but perhaps it is time to ask more seriously whether this intuitive appeal indicates that the doctrine taps into more fundamental principles that inform the human understanding of our relationships with each other, nature, and law. In this age of legal realism, one hesitates to invoke the concept of "natural law," but perhaps the intuitive appeal of the public trust signifies its theoretical proximity to other foundational and cross-cultural legal constructs, such as the principle of fairness. Indeed, it seems that the core of the public trust is the same as the core that motivates the "new property" approach advocated by the green dissenters: the fundamental idea that no one may exclusively control what, in the language of common law public trust doctrine, belongs to all—or what, in the language of the new property theorists, we are all responsible for.

Ultimately, Professor Lazarus is right to worry that a property law reinforcing use of the doctrine could subvert future advances in natural resource law that emphasize stewardship, but Professor Sax may be right that modern use of the doctrine does not require a backwards-looking appeal to a property law rationale. That the common law embraced the principles of the public trust in the available language of common law may be no more than coincidence, demonstrated by the embrace of similar principles by other cultural constructs predating and subsequent to Byzantine law. In the final analysis (and especially as applied to constitutionalized trusts), the fact that the public trust is *in* the common law hardly requires that it be *of* the common law.

¹¹⁷ Delgado, *supra* note 21, at 1210.