

To a Candidate in Search of an Environmental Theme: Promote the Public Trust

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1970: [T]hat the [public trust] doctrine contains 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.¹

1999: This may go down as the year when the American conservation movement began a serious counterattack against environmental decline . . . [T]he politics of despair [have] led to a rebirth of environmental restoration.²

I. INTRODUCTION

Al Gore, the presidential candidate dubbed the "Great Green Hope" of environmentalist voters, is taking some heat lately for his supposed compromising approach to environmental issues.³ Few commentators doubt Gore's environmental convictions.⁴ Instead, the debate is over how dedicated he is to actually effectuating environmental policy in the face of pressure to maintain a centrist im-

1. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 485 (1970).

2. Scott Allen, *Bringing Back Mother Nature*, BOSTON GLOBE, Oct. 17, 1999, at 12.

3. See, e.g., Scott Allen, *Some Environmentalists Say Gore Has Been More Passion Than Action*, BOSTON GLOBE, June 20, 1999, at A1 (quoting a critic characterizing the Clinton-Gore environmental program as "the school uniform solution to environmental problems"); Elizabeth Bramson, *Bill's Green Card: Clinton's Environmental Record*, MOTHER JONES, Nov. 1993, at 14 (noting that prominent environmentalists lament that Gore is less aggressive on environmental issues than they had hoped).

4. See, e.g., 138 CONG. REC. E2378 (daily ed. Aug. 5, 1992) (statement of Hon. Jon Kyl) (quoting Marcia Sielaff, *A Moderate? Sorry, But Al Gore Doesn't Fit the Mold*, PHOENIX GAZETTE, July 28, 1992, at A9) ("As told by the media, Sen. Al Gore is a model centrist. But anyone who believes that [Gore] is a moderate on most issues just hasn't been paying attention . . . When it comes to the environment, Gore moves from liberal to radical.").

age in his presidential campaign.⁵ Gore supporters argue that politicians must work within the reality of politics to achieve social change, and that where Gore has stood firm and refused to compromise, he has both won and lost in the political arena. Indeed, any suggestion that over the years Gore could have advanced an environmental agenda more effectively had he taken a less compromising approach is purely speculative.⁶

Nevertheless, as a candidate Gore is in the problematic position of being second-guessed by those who have firm ideas about the shortfalls of U.S. environmental law and little patience for political rhetoric. Although his supporters may argue that the country's environmental program is as advanced as American culture will presently allow, Gore's detractors argue that rival Democratic candidate Bill Bradley may have promised greater environmental achievements.⁷

In this political atmosphere, if Gore hopes to emerge as a powerful environmental candidate, he must craft a concise, meaningful statement of environmental values to persuade the public that he is, indeed, the choice for environmentalists, while also convincing voters that environmentalism should weigh heavily in their decision.⁸ The statement should encompass a philosophy of stewardship and emanate from a deep enough legal history so as to defy charges of radical liberalism. The statement must also communi-

5. See, e.g., Eric Goldsneider, *Go for the Green, Gore*, BOSTON GLOBE, Oct. 18, 1999, at A15 ("Maybe Gore figures he has the environmental votes locked up, so why ruffle feathers until after he gets into the Oval Office. It's the way the political game is played.").

6. See, e.g., John H. Cushman, Jr., *Clinton Sharply Tightens Air Pollution Regulations Despite Concern over Costs*, N.Y. TIMES, June 26, 1997, at A1 (describing the "fierce behind-the-scenes battle" over new air quality control regulations in which politics played a more significant role than the Clean Air Act mandate); see also, e.g., Allen, *supra* note 3:

Gore argues that he wants to steadily advance environmental causes without creating a polarizing debate, a mistake that he says the administration made in 1993 by trying to slap a new tax on coal and oil

Critics, however, suspect Gore's caution is driven by his presidential ambitions

"Nobody thinks he's insincere The criticism is more that he and his staff are letting the fearmongers circumscribe his political agenda, limiting him on environmental issues to small potatoes."

Id. (citation omitted).

7. See Allen, *supra* note 3 ("[E]nvironmentalists say they could back another candidate if Gore avoids their issues. Some note that Democratic challenger Bill Bradley has a higher lifetime rating from the League of Conservation Voters than Gore.").

8. See *id.*; see also Goldsneider, *supra* note 5 ("We should also be open to other candidates making a concerted play for the environmental vote. After all, if Gore won't champion that cause we might as well start shopping for someone who will.").

cate the urgency of a declining ecosystem, so as to justify a political savoir for the environmental cause. Finally, it should challenge and inspire voters rather than chastise them. This Article maintains that the public trust doctrine encompasses the essence of those environmental values.

The public trust doctrine asserts that the government has a duty to promote and maintain a healthy natural environment on behalf of current and future citizens.⁹ Although this statement of the trust appears simple and straightforward, complexities arise in its execution. Effective execution of the public trust responsibility requires preventative, remediative, and restorative measures and thus may necessitate both prospective regulation and compensation for restrictions of private activities.¹⁰ This mix of "liberal" and "conservative" approaches in the doctrine could alarm environmentalists as much as their legal adversaries. However, a public trust that draws on a variety of regulatory and political approaches could unify disparate constituencies behind an environmental goal and make a public environmental ethic far more universal.

Various legal theorists argue that the public trust doctrine, if understood as a legal duty, is inconsistent with common law, the Constitution, and American democracy, so that regardless of the ecological, social, and even economic soundness of an environmental restoration policy, the law of resource exploitation must march on.¹¹ These common law property and states' rights argu-

9. See Sax, *supra* note 1, at 556-57. Observing that historic applications of the trust have been narrower than its potential, Sax wrote,

Public trust problems are found whenever governmental regulation comes into question, and they occur in a wide range of situations in which diffuse public interests need protection against tightly organized groups with clear and immediate goals. Thus, it 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.

Certainly the principle of the public trust is broader than its traditional application indicates.

Id.

10. See *id.* at 557 (observing that certain public trust-based restrictions on environmentally degrading activities may constitute takings of private property, but that "a great deal of needed protection for the public can be provided long before that question is reached").

11. See generally, 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 public trust doctrine is only valid as a public easement); Richard A. Lazarus, *Changing Conceptions of Property and*

ments have been used to justify the battering that environmental claims tend to suffer in the courts.¹² Thus, politics and not the law needs to lead this evolution.¹³ Political leadership could fortify the public trust doctrine by incorporating the language of public trust in both executive policy and legislation, in this way influencing judicial decisionmakers who are reluctant to advance the doctrine solely on the basis of its common law roots.

This Article analyzes the foundations of the public trust doctrine and explores its potential contribution to current environmental law and politics. Part II fleshes out the definition of the doctrine, relying on an analogy to basic trust law and an exposition of its philosophical underpinnings to both clarify the doctrine and to illustrate our need for an updated public trust perspective. Part III examines regulatory takings and environmental standing from a public trust perspective, in both settings demonstrating the doctrine's potential to facilitate a judicial rapprochement between hard core environmentalism and the anti-environmentalist backlash. Part IV offers a constitutional justification for the doctrine's existence as a judicial doctrine and then urges Gore to embrace the public trust as a political challenge to promote environmental restoration through legislative and executive avenues. Finally, Part IV presents the example of natural resource damages law as a successful model of a legislative and regulatory approach to environmental restoration that captures the public trust.

Sovereignty in Natural Resources: Questioning the Public Trust Doctrine, 71 IOWA L. REV. 631 (1986) (criticizing the public trust as an antiquated and legally confused doctrine that harms rather than aids necessary developments in the law that could protect environmental interests).

12. See generally, e.g., Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVT'L L. 425 (1989). The author observes,

[O]ne must note a considerable irony when one hears complaints against the public trust doctrine, on the grounds of judicial activism, from those who advocate rigid, absolute protection of rights granted under state law Remember, after all, the context in which the traditional trust doctrine arose. The trust was necessary to complement the implied real estate transfer that was so extraordinarily favorable to the states. It is discordant, therefore, to hear criticism of half a formula on the basis of states' rights and judicial activism, when the other half of the formula is pro-states' rights and demonstrably the product of judicial activism.

Id. at 467.

13. See, e.g., *id.* at 468 (citing OLIVER WENDELL HOLMES, THE COMMON LAW 5 (1881)) ("The customs, beliefs, or needs of a primitive time establish a rule or formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains."). Similarly, one might observe that a necessity might *evolve* while a rule of law responding to a precursor of the necessity remains in its original form, an ineffectual dinosaur of law.

II. THE PUBLIC TRUST AS THE GOVERNMENTAL DUTY TO MAINTAIN A HEALTHY ENVIRONMENT

A. *A Declaration of the Public Trust*

The public trust doctrine has a long-term but somewhat ambiguous presence in United States culture.¹⁴ The “trust” concept is both vague and profound, conjuring up attributes of Americanism, statehood, and notions about the cultural legacy owed to future generations.¹⁵ For instance, a Commonwealth of Massachusetts license plate associates the concept with endangered species by reminding us to “preserve the trust” while depicting a diving whale. Our pennies affirm our apparent trust in God, stamped into a halo over Lincoln’s silhouette as if to associate patriotism, democracy, and a higher power with the trust. The idea that the citizens and government of the United States are bound to one another by some form of trust appears to be one of the foundations of our faith in the benevolence of American society.

In the law, therefore, it is unsurprising that the mere existence of the public trust doctrine rarely generates heated debate.¹⁶ It is at least tacitly agreed that the U.S. government owes some sort of public trust-based responsibilities to the people and that this trust embraces ideas like democracy, sovereign responsibility, and the historical agrarian, maritime, and other wilderness-based elements of American culture. In environmental law, the doctrine is most often relegated to discussions of shoreline access, where courts presume its applicability. Nevertheless, courts affirming the government’s authority in connection with shoreline disputes rarely rely solely or even predominantly on the public trust doctrine to determine the balance between property and environmental law.¹⁷

In spite of the politically-sanctified, almost slogan-like air that

14. See, e.g., Wilkinson, *supra* note 12, at 425-26 (characterizing the trust as complicated, timely, arcane, and controversial).

15. See Huffman, *supra* note 11, at 534 (“The word ‘trust’ has various meanings. In ordinary discourse, it [denotes] confidence in others. In law, it describes an arrangement [where] the legal and equitable title to property are held by different persons. The public trust doctrine has far more to do with the former than the latter meaning.”).

16. See Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 355-56 (“Though the general concept . . . [has been] widely cited in cases and . . . scholarship, the doctrine itself remained vague.”). Not all commentators accept the general concept of the public trust. See generally, e.g., Huffman, *supra* note 11; Lazarus, *supra* note 11.

17. See Sax, *supra* note 1, at 486 (“[A] careful examination of the cases will show that . . . almost all . . . statements [of public trust] are dicta and do not determine the limits of the state’s legitimate authority in dealing with trust lands.”).

both shields the public trust and prevents it from reaching its full potential in legal disputes, the doctrine actually does have a meaningful role to play in environmental management. Properly framed, the trust could play an even more visible part in environmental legislation and policy decisions.¹⁸ In fact, the present juncture in American law and politics may be a particularly opportune time for the public trust to emerge as a benchmark against which environmental regulation, goals, and values may be measured.

The declaration of the public trust doctrine most pertinent to modern environmental problems and law is that the government has a fundamental duty to adhere to a program of environmental husbandry aimed at maintaining a regenerative natural environment.¹⁹ This obligation is perpetual and requires both preventative measures to protect environmental health and remediative measures where past behavior has breached the trust. The public trust thus serves the general citizenry, including future citizens, by ensuring that the natural environment thrives and will continue to thrive as a healthy and diverse human habitat.²⁰

This articulation of the trust implicitly rejects the more limited obligations and aspirations of alternative formulations. First, it corrects the misperception that the public trust doctrine exists only in the maritime setting, or is otherwise confined in its application to the seashore.²¹ The doctrine has been and continues to be used to address impacts on non-aqueous elements of the environment.²²

18. See *id.* at 521 (discussing courts' use of public trust doctrine to ensure greater representation of public interest in state legislatures).

19. See Sax, *supra* note 1, at 478 (characterizing the trust as "the special, and . . . demanding, obligation [that the government] may have as a trustee of certain public resources").

20. This declaration of the public trust differs in certain respects from prior articulations of the general common law of public trust. It is similar, however, to some states' views of the public trust. For example, California recognizes that "public officials have an affirmative, ongoing duty to safeguard the long-term preservation of [certain natural] resources for the benefit of the general public." Richard M. Frank, *The Impact of California's Nuisance and Property Law*, LAND USE F., Winter 1993, at 44, 47. One goal of this Article is to state the general common law doctrine, whether recognized as precedential or as defining an intellectual approach to regulatory decisionmaking, in such clear and useful terms.

21. See Sax, *supra* note 1, at 557 ("Certainly the principle of the public trust is broader than its traditional application indicates."); Wilkinson, *supra* note 12, at 464 ("The standards for the trust, then, are best understood as having very broad parameters set as a matter of federal mandate, either by way of congressional preemption or constitutional law . . .").

22. See, e.g., *Sierra Club v. Dep't of Interior*, 398 F. Supp. 284 (N.D. Cal. 1975) (national parks); *Wade v. Kramer*, 121 Ill. App. 3d 377 (1984) (wildlife); *Gould v. Greylock Reservation Comm'n*, 350 Mass. 410 (1966) (forest land); *Matthews v. Bay Head Improve-*

Second, the above articulation of the public trust dispels any misconception that it should apply only to certain commercial and recreational activities. To the contrary, the doctrine requires far broader and longer term considerations than those served by a commercial regulator or public lands manager. Accordingly, the statement of public trust offered above transcends popular conceptions of trust responsibilities as beyond federal government purview, as well as those that pigeonhole the doctrine as merely another name for the police power or as nothing more than a type of property or private trust law.²³ Finally, the above definition's inclusion of future citizens as beneficiaries emphasizes the public trust's unique universality and benevolence. Far more than a right to access natural resources that may be asserted by individual members of the public, the public trust is a responsibility that the American people have imposed upon themselves for the general good of the citizenry and its natural environment.²⁴

This conception of the public trust doctrine accepts the necessity of a unique legal framework for its exercise. While it frees the public trust from the confines of the police power, it also imposes a heavier and less parochial set of duties on government trustees.²⁵ Likewise, although the doctrine is best perceived as separate from property and trust law, public trust duties include remediation and oversight responsibilities that could logically subject trustees to unique property and trust law challenges and financial burdens.²⁶ Indeed, if taken seriously, the public trust may best serve today's citizens through new forms of independent or quasi-independent agency authority as well as a unique—although long-conceived—

ment Ass'n, 95 N.J. 306 (1984) (dry sand beaches); Mayor & Mun. Council of Clifton v. Passaic Valley Water Comm'n, 224 N.J. Super. 53 (1987) (water supplies).

23. See Huffman, *supra* note 11, at 527-32. Huffman asserts that the public trust defines an easement shared by the public and thus emanates from, and should remain a part of, property law. He denies that the doctrine is part of the law of trusts or that it is another name for the police power. *Id.* at 527-29. He admits that others view the public trust far more broadly than he does, and that indeed it has responded to political needs as does all law. *Id.* at 531-32.

24. See *infra* notes 46-57 and accompanying text.

25. See *infra* notes 75-110 and accompanying text.

26. For a discussion of the types of duties an environmental trustee might bear, see, for example, Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 464-71 (1972) (discussing the oversight, monitoring, and supervision responsibilities of environmental guardians, which he envisioned as private entities that the law would recognize as fiduciaries, guardians, or trustees of elements of the environment).

system for judicial review.²⁷ Thus, as conceived above, the public trust is not a costless or open-ended enterprise for either trustees or beneficiaries.

The following sub-Parts further discuss this view of the public trust doctrine and its potential as a directive for environmental law and policy. Part II.B relies on principles of trust law to more precisely define the primary focus and structure of the public trust. Part II.C recasts three fundamental cultural principles underlying the doctrine that were articulated in 1970 by its foremost advocate, Professor Joseph Sax,²⁸ bringing them up to date in light of current needs of environmental law and policy.

B. *Defining the Doctrine: Using Trust Law to Identify the Characteristics of Public Trust*

When pared down to its essence, the public trust doctrine resembles other trusts and is imbued with some of the familiar controls that define the typical trust relationship. At its simplest, a trust requires a creator, a beneficiary, a trustee, and trust property.²⁹ The creator originates the trust and designates the trustee and beneficiary of the trust property. The trustee holds legal title to the trust property and manages it in the best interest of the beneficiary, who holds equitable title.³⁰ The creation of such a trust may involve three separate parties, or a creator may designate herself as trustee or beneficiary.³¹ In the case of a charitable trust, which must be created to serve some public purpose, beneficiaries

27. For a discussion of environmental standing, see *infra* notes 111-166 and accompanying text.

28. Sax presents the idea that certain environmental values are concomitant with freedom, that gifts of nature must not be hoarded or privatized, and that certain environmental interests are public in nature as encompassed within the public trust doctrine. See Sax, *supra* note 1, at 485-89.

29. See RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. h (1980) ("[A] trust involves three elements, namely, (1) a trustee . . . ; (2) a beneficiary . . . ; (3) trust property, which is held by the trustee for the beneficiary.").

30. See *id.* at §2 cmt. f ("In a trust there is a separation of interests in the subject matter of the trust, the beneficiary having an equitable interest and the trustee having an interest which is normally a legal interest."); *id.* at § 2 cmt. b ("A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation Fiduciary relations include . . . the relation of trustee and beneficiary").

31. See *id.* at § 17 ("A trust may be created by . . . a declaration by the owner of property that he holds it as trustee for another"); *id.* at § 17 cmt. h ("Where a person has the entire beneficial interest in property, although he is not the legal owner, he can create a trust of the property.").

are often unspecified or defined only as members of the public.³² In the case of a resulting or constructive trust, a trust relationship may be implied from facts and circumstances.³³

These basic elements of the trust also appear in the public trust doctrine. Under American democratic theory, the nation's people possess an abstract form of sovereignty over the land and its natural resources that may be termed original ownership.³⁴ In creating the government, the people delegated many powers and duties to its sovereign authority, including managerial responsibilities over the country's resources.³⁵ In trust terms, the people designated the government as trustee of the land and other natural resources and themselves as beneficiaries.³⁶ This framework is particularly analogous to that of a charitable trust, which may incorporate a public purpose, government trustee, and generalized beneficiaries.³⁷

32. See, e.g., GEORGE T. BOGERT, TRUSTS 167 (1987) ("A trust may have as its purpose the accomplishment of advantages to society. Such a trust is called a public or charitable trust.") (footnote omitted); *id.* at 201-07, 235-37 (discussing governmental trusts, or trusts initiated to make the life of the community safer).

33. See RESTATEMENT (SECOND) OF TRUSTS § 1 cmt. e (1980) ("A resulting trust arises where circumstances raise an inference that the settlor does not intend that the person taking or holding title shall have the beneficial interest. On the other hand, a constructive trust is imposed, not to effectuate intention, but to redress wrong or unjust enrichment.") (citation omitted); see also BOGERT, *supra* note 32, at 20, 261-63; Huffman, *supra* note 11, at 537 ("If the public trust doctrine is properly a part of the law of trusts, it necessarily falls within the category of resulting trusts.").

34. See, e.g., CRAIG R. DUCAT, MODES OF CONSTITUTIONAL INTERPRETATION 172 n.145 (1978) (describing the theory of democratic elitism, under which "government by the people is replaced by government accountable to the people This . . . democratic theory appeared to be prompted by conclusions that the masses were incapable of running government [and] that it was a job for professionals (politicians)"); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 16 (1762) (recognizing the origin of sovereignty as the individual members of a political body). Professor Huffman himself recognizes the government as the agent of the people in his efforts to debunk any analogy between public trust and trust law. Huffman, *supra* note 11, at 543-44. For an early judicial statement of this view in the context of the public trust doctrine, see *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842) ("[W]hen the revolution took place, the people of each state became themselves sovereign").

35. See *Martin*, 41 U.S. (16 Pet.) at 410 (stating that the character of the people's sovereignty is such that they "hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government"); see also Huffman, *supra* note 11, at 537 ("If the property is owned by the state, and has been since statehood, it will be necessary to imply the trust from some earlier conveyance to the state. This is a difficult case to make, particularly for the original thirteen states, but . . . the argument is at least plausible.").

36. See, e.g., *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845) (observing that, as successor in title to the Crown's right in navigable waters and soils under them, the United States succeeded in the Crown's responsibilities).

37. See RESTATEMENT (SECOND) OF TRUSTS § 375 (1980) ("A trust is not a charitable

Significant distinctions between a charitable trust and the public trust doctrine include the fact that the public trust relies on common law to define its scope and intent as opposed to a creating instrument, and the fact that the public trust res consists of the nation's natural resources.³⁸ These distinctions account for much of the debate over the extent of the public trust's power and even its existence.³⁹ Consequently, the analogy between trust law and the public trust is not offered as an attempt to characterize the public trust doctrine as "regular" law.⁴⁰ Rather, basic trust law, in both its similarities to and differences from the public trust, helps explain the scope of the public trust doctrine.

For example, the model of trust law demonstrates by analogy that the public trust may claim a historical presence and yet embrace various articulations over the decades, many of which fall within the statement of the trust offered in this Article. Under general trust law, particularly in the case of a charitable trust, changing law, politics, and market conditions may call for alterations in a trustee's asset management activities while the essence of his fiduciary obligation remains intact.⁴¹ The doctrine of *cy pres*, for exam-

trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust").

38. These unique features of public trust help define the unique sovereignty-based environmental management responsibility of the public trustee. Trust law helps define the public trustee's responsibilities by differentiating between the active and passive trust. Active trusts impose a duty to manage trust property on the trustee, while passive trusts require the trustee to perform only non-discretionary functions. See BOGERT, *supra* note 32, at 167-69. Sovereign trusteeship blends these ideas in that sovereigns bear a duty to the citizenry that generally does not rise to the level of active management without a statutory directive. This Article terms this particular type of trustee responsibility the public trust fiduciary duty. For support for the idea that a sovereign may bear duties similar to those of a private trustee, see, for example, *id.* at 91.

39. See, e.g., SAX, *supra* note 1, at 477-80; see also ROSE, *supra* note 16, at 357 (stressing that the public trust does not recognize property rights in the general public). See generally HUFFMAN, *supra* note 11 (criticizing all views but that of the public trust as a public easement).

40. As used in this Article, the trust analogy is intended to serve primarily as a device for better understanding and utilizing the public trust, an essentially separate doctrine. It is true, of course, that states have recognized the public trust doctrine as a legitimate form of trust law, addressed in its terms and by its rules. See, e.g., WEISS v. STATE, 939 P.2d 380 (Alaska 1997) (evaluating state redesignation of trust land in terms of prudent trustee management in an action for breach of public trust); AGED HAWAIIANS v. HAWAIIAN HOMES COMMISSION, 78 Haw. 192, 891 P.2d 279 (1995) (applying trust law to public trust setting to determine legal authority of beneficiaries to bring suit against public trustee). This Article's use of trust law as a means of discussing a generally applicable public trust doctrine extends the current use of the trust-public trust analogy to the federal common law setting, but does not create that analogy by any means.

41. See JOEL C. DOLBRIS, *Changes in the Role and the Form of the Trust at the New Millennium* (1999).

ple, accommodates this reality.⁴² Trust law's accommodation of changing circumstances illustrates that it is neither unique nor outlandish for the law to accommodate a flexible public trust duty. Thus, the focus of the public trustees' specific environmental management duties can change in response to modifications in human habits that threaten environmental resources while leaving the essential trust obligation intact.⁴³ The public trust doctrine operates within established patterns of trust law as long as its various manifestations adhere to its basic doctrinal goal: serving the citizenry by managing America's natural resources.

Critics of a broad environmental focus for the public trust argue that the doctrine's original form, whether Justinian, British common law, or American case law, was that of a land use regulation, sometimes termed a public easement, protecting public use of navigable waters and their shores. Even liberal conceptions of the doctrine tend to bind it to the notion of public access to waterways.⁴⁴ Logically, however, we should only rely on common law to provide examples of the trust, not to articulate its scope and potential. After all, judges often limit their opinions' discussions, even of doctrine, to the particular facts before them. Moreover, judges may frame opinions to avoid discussing certain issues, particularly in a politically sensitive area like public trust.⁴⁵ Thus, the reach of the doctrine may be more accurately derived through contempla-

nium, or, *We Don't Have To Think of England Anymore*, 62 ALB. L. REV. 543, 544 n. 9 (1998) ("[T]he trust has endured because it has changed function."). But see 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, 1214 (1991) (discussing how trusts are by nature conservative, and how the model inhibits innovative thought).

42. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 399 (1980) ("If property is given in trust to be applied to a particular charitable purpose, and it . . . becomes impossible or impracticable or illegal to carry out the particular purpose, . . . the trust will not fail but [will apply] to some charitable purpose which falls within the general charitable intention of the settlor.").

43. See BOGERT, *supra* note 32, at 318 ("If the existence of [a certain power] is highly convenient or necessary in order to enable the trustee to carry out the purposes of the trust, it is inferred . . .").

44. See, e.g., SAX, *supra* note 1, at 477; Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 195 n.3 (1980) ("The term 'public trust' has been widely used and misused in this country. . . . For the purposes of this discussion, however, 'public trust' is limited to the duties of sovereign states to hold navigable waters for their people and to protect certain uses for which these waters are needed.").

45. See SAX, *supra* note 1, at 490-91 (casting *Illinois Central Railroad* as "[t]he model [of] judicial skepticism").

tion of its trust structure than from a painfully close reading of old opinions.

A second essential feature of public trust doctrine that trust law helps elucidate is the proper focus of public trust analysis. As noted above, the public trust is commonly conceived as a governmental obligation to preserve and assert the public's inalienable, perennial right to access and exploit natural resources for commercial or recreational purposes. Under a trust law analogy, this would translate into the primary focus of a private trust being the accommodation of a beneficiary's right to utilize trust assets. Although beneficiary access to trust assets is an important element of trust law, the basic thrust of the law is just the opposite.⁴⁶ After all, a trust creator's primary motivation for creating a trust is to control and limit the beneficiary's access to trust assets.⁴⁷ The essential reason that a trust creator places trust asset management duties in the hands of a trustee is that the creator possesses faith in the trustee as a fiduciary. Indeed, in creating a trustee, the creator places all other parties—beneficiary, creator, and outside parties—at the risk of the trustee's managerial skills and honesty.⁴⁸ Thus, the primary focus of trust law is on defining trustee duties and minimizing potential injuries that may result from trustee mismanagement.⁴⁹ This is particularly true in the charitable trust setting where beneficiaries are unspecified or may, as in the case of *cy pres*, change.

Following this analogy, the proper primary focus of public trust law is assessing—and, when necessary, reasserting—the government's fiduciary resolve in its management of natural resources.⁵⁰

46. See, e.g., Delgado, *supra* note 41, at 1215 ("[T]he impulse for setting up a trust is lack of confidence; we fear that we may act irresponsibly with respect to the valued good . . . so we place it in the hands of another whom we instruct to act in accord with our better natures . . .").

47. See *id.*

48. See, e.g., BOGERT, *supra* note 32, at 36.

49. A concern expressed by Professor Delgado supports this framing of the public trust:

Sax's public trust doctrine was attractive because it offered protection from our base instincts. It enabled us to tell ourselves that we no longer needed to worry about the dark sides of our natures. It enabled us to tell ourselves and each other that we had finally done something about the environmental problem. Yet by placing control over natural resources and wilderness areas in government agencies run by people like us, we could feel confident that familiar, comfortable values would shape and restrain environmental decisionmaking.

Delgado, *supra* note 41, at 1226.

50. If some sort of people's right to exploit were the primary focus, then we could

This focus is apparent, for example, in *Gould v. Greylock Reservation Commission*,⁵¹ in which the court expressed concern over government actions that allow too much private influence over a western Massachusetts natural reserve. At the heart of the court's determination was the fact that the state had undermined its own ability to meet its duty to preserve the natural area in question for the long-term enjoyment of the citizens.⁵² Any concern on the part of the court that the proposed ski facility might inhibit individual members of the public from accessing the reserve emerged, if at all, as a secondary concern. After all, ski lifts might have encouraged greater numbers of citizens to visit the reserve and ascend the mountain it contained. As was proper, the court never considered the public's position from the perspective of individual citizens.

In the leading federal public trust case, *Illinois Central Railroad Co. v. Illinois*,⁵³ the Supreme Court refused to recognize the validity of a contract that would have privatized certain submerged lands off the Chicago lakeshore. The Court's primary focus was not on whether the state's action had inhibited public access to Lake Michigan. Instead, it focused on the legal impossibility of a public trustee permanently alienating resources under its sovereign care.⁵⁴ Underscoring its focus on the trustee rather than the beneficiaries, the Court also accepted that a public trustee might validly authorize a private entity to exercise proprietary control over a natural resource as long as the trustee retained the power to void the

simply perceive the people, in their capacity as the original owners of America's natural resources, to have never created any sort of trust with the government as trustee and the people as beneficiary. The public would simply retain a right to access and freely exploit natural resources, with the government asserting that right, when necessary, as an administrative agent of the people, as in criminal law. But the trust has always been recognized as defining a different type of relationship than agency, relying on sovereign property ownership rather than simple representation of the people's interests. *See, e.g., Light v. United States*, 220 U.S. 523, 537 (1911) (describing public trust rights as incidents of proprietorship and the power of the federal government over property belonging to it as a sovereign); *United States v. Trinidad Coal & Coking, Inc.*, 137 U.S. 160, 170 (1890) (characterizing public lands as owned by the government in trust for the people of the whole country).

51. 350 Mass. 410 (1996).

52. *See id.* at 421-23 (questioning the state's authority to exercise "a roving eminent domain' power" in its delegation of its public trust duties to a private enterprise) (citing *Appleton v. Massachusetts Parking Authority*, 340 Mass. 303, 310 (1956)).

53. 146 U.S. 387 (1892).

54. *See id.* at 452-54 (describing the unique title held by the state in trust for the people in connection with public trust lands, and how it allows latitude in the state's use of the land but not actions that jeopardize the state's basic duty to protect lands on behalf of the people).

arrangement in the public interest.⁵⁵ Thus, the Court was open to the idea that public access to natural resources protected under the trust might be inhibited, at least temporarily. By focusing on the trustee's duty to adhere to minimal standards in long-term management of trust assets, rather than the right of beneficiaries to unmitigated access to those assets, *Illinois Central Railroad*, like a number of other public trust opinions, conformed public trust analysis to private trust analysis.

The significance of recognizing the trustee's fiduciary duty as the primary focus of public trust analysis is that it redirects the assessment of common law precedents away from the character and extent of the so-called public easement. Certainly the public trust, like trust law generally, necessitates a trust res and a beneficiary, thus encompassing aspects of property law and even, perhaps, liberty and privacy rights. But property law properly accommodates rather than dominates the public trust doctrine. To illustrate this point in general trust law terms, the segregation of legal and equitable title shows how property law accommodates trust law, as does trust law's ability to recognize a party as having purchased full title in trust land from a trustee who held less than full title.⁵⁶ More profoundly, just as property law evolves with the social culture, the property interests invoked under trust law should evolve with the needs of society. Recently, for example, the law determined that the title possessed by trustees may not constitute ownership under a pollution statute's strict liability scheme.⁵⁷

In short, under American law, the property concept is flexible and responsive in the trust setting. Consistent with this, the legal system should accept that the public trust encompasses the government's duty with respect to clam beds and shipping in one era;

55. See *id.* at 453 ("A grant of [full ownership of public trust lands] has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.").

56. See RESTatement (SECOND) OF TRUSTS § 273 (1980) ("Where a third party has an interest in specific trust property, such interest will be protected to the same extent as if the property were not held in trust").

57. See Comprehensive Environmental Response, Compensation, and Liability Act § 107, 42 U.S.C. § 9607 (1994) ("CERCLA") (creating liability for parties on the basis of their status as owners of polluted facilities but limiting trustee liability to trust assets); see also *Castlerock Estates, Inc. v. Estate of Markham*, 871 F. Supp. 360 (N.D. Cal. 1994) (exempting from CERCLA liability a conservator or executor holding "bare legal title" to contaminated land); *City of Phoenix v. Garbage Services Co.*, 816 F. Supp. 564 (D. Ariz. 1993) (finding trustee liability under CERCLA definition of owner, but acknowledging exemption for those holding legal title for purposes of protecting security interest).

parks and wildlife in another; and contaminants, development rights, and conceivably even human population issues in modern times. The public trust doctrine is the legal receptacle for the government's long-term duty, as supported by the judicial system, to manage and perpetuate the public enjoyment of natural resources. The trust must reflect the environmental concerns of the day.

The public trust doctrine thus comprises more than the sum of its expressions in individual opinions. Its primary focus, like that of trust law generally, is on trustee obligations, and the citizen access rights it invokes are properly considered from a long-term perspective. If recognized as a long-term governmental duty aimed at controlling and thereby prolonging the public's enjoyment of its natural resources, the public trust will remain logical, consistent, and pertinent as an American policy.

C. *Fleshing Out the Trust: Updating Sax's Statement of Public Trust Values*

In a famous 1970 article, Professor Joseph Sax sought to cast the public trust as a legal vessel for a society's evolving environmental values.⁵⁸ Sax approached the public trust primarily as a source of common law claims.⁵⁹ In terms of the trust analogy set forth above, Sax promoted a public trust doctrine through which citizen beneficiaries could assert their right to have their equitable interest in nature's bounty protected. Thus, his focus for the trust's utility differs from that offered here. In the course of his analysis, however, Sax articulated three cultural principles as bases for the trust, which he elicited from its varied historical applications. In spite of Sax's own primary focus on individual claims, these cultural principles indicate the doctrine's capacity for providing broader legal protection of the environment than individually enforceable rights might.

The first of the historical-cultural bases for public trust protection that Sax identified was that certain environmental interests are so intrinsically fundamental that their status as free marks the society as free.⁶⁰ This principle may be seen as rooting the public trust

58. See generally Sax, *supra* note 1.

59. See *id.* at 474 (offering the trust as a "tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems"); *id.* at 480-81 (exploring whether the government bears a duty to protect public property that is legally enforceable by private citizens who are "suing on behalf of the public").

60. See *id.* at 484 (arguing that "certain interests are so intrinsically important to every

in the meaning of democracy.⁶¹ The second historical principle that Sax identified was that certain "gifts of nature" should not be hoarded or privatized.⁶² Here, he indicated a moral or aesthetic element to the trust.⁶³ Sax's third historical principle was that some environmental interests are public in nature and thus not translatable into private interests.⁶⁴ This observation provides a basis for defining limitations on private legal rights that might threaten the public environment.⁶⁵

It is significant that Sax cast all of these historical-cultural bases of the public trust in terms of the individual's right to freely access and enjoy nature. In addition to being an accurate reflection of the public trust's historical focus, Sax's focus on the private right of action (i.e., the public trust beneficiary's rights) made sense in the context of the 1970s. Sax articulated his public trust thesis at a moment in history—perhaps the only moment in modern American history—when it appeared that the country's political and legal institutions might fully embrace environmental values.⁶⁶ The particular salience of his arguments is affirmed by the fact that Sax's public trust thesis is credited with inspiring the National Environmental Policy Act, which arguably expresses the government's trustee role in connection with environmental values.⁶⁷

Since 1970, however, American legal institutions have failed to fully incorporate the public trust principles that Sax articulated and instead have launched a significant backlash against a public trust presence in the law. Indeed, over the decades the majority of important takings and standing decisions have embraced principles that work in direct opposition to Sax's three foundations of public trust. Contrary to Sax's observation that intrinsic environmental interests mark a free society, for example, the Supreme

citizen that their free availability tends to mark the society as one of citizens rather than of serfs").

61. See *id.*

62. *Id.*

63. See *id.* at 484-85. Sax illustrated this view by identifying efforts to protect great ponds and create national parks around natural wonders.

64. See *id.* at 485.

65. See *id.* For example, Sax distinguished property rights in water, such as the riparian right of usufruct, from those in traditional chattel, such as a watch or shoe.

66. See Rose, *supra* note 16, at 354.

67. See Delgado, *supra* note 41, at 1211 ("Sax's idea caught on quickly, influencing the National Environmental Policy Act, whose history reflects trust considerations at numerous points."); see also National Environmental Policy Act of 1969 § 101(b)(1), 42 U.S.C. § 4331(b)(1) (1994) (identifying the present generation of Americans as bearing "responsibilities . . . as trustees of the environment for succeeding generations").

Court has identified property exploitation rights as an interest more intrinsic to American democratic freedom.⁶⁸ With regard to the existence of gifts of nature that ought not be privatized, current courts have relentlessly questioned claims brought by conservationists, animal rights activists, hikers, and other nature lovers, whatever their legal bases.⁶⁹ As for the public nature of environmental interests, courts have been reticent to allow advances in ecological knowledge or the potential of new environmental threats to invade the sanctity of private property interests that some jurists and legal scholars perceive as the most essential element of American culture.⁷⁰ Public environmental interests remain second-class interests in American law, and are difficult to elevate above private interests where the judiciary resists.

Meanwhile, public trust scholars' attacks on one another's theories of public trust have ultimately contributed to the perception of the doctrine as contrary to common law and the Constitution.⁷¹ Those who dispute the presence of a public trust almost seem to perceive it as contrary to the very meaning of American democracy.⁷² For these reasons and others, now may be the right time to reissue Professor Sax's observations about the human-environment-societal triage in less positive and uplifting terms than those he offered. As noted above, Sax sought an environmental right suitable for translation into a legal claim, a means of empowering the public trust beneficiary. The time has come to work towards empowering the trustees so that the non-individualized rights of the citizen beneficiaries might be better served.

In order to rejuvenate the public trust doctrine and inject it into current environmental law and policy, Sax's arguments must

68. See generally *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (determining that environmental regulation, albeit valid and even important, may not infringe upon essential attributes of property ownership, such as habitable or productive improvements).

69. See generally, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (denying standing for plaintiffs who sought to enforce the Endangered Species Act on United States government-funded activities in foreign countries); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) (denying standing for plaintiffs who hike along federal lands subject to mining leases).

70. See, e.g., *Bennett v. Spear*, 520 U.S. 154 (1997) (concluding that the Endangered Species Act citizen suit provision provides standing to ranchers and others seeking to bring suit under the Act to combat government actions taken in the interest of protecting particular species).

71. See generally *Delgado*, *supra* note 41; *Huffman*, *supra* note 11; *Lazarus*, *supra* note 11.

72. See *Lazarus*, *supra* note 11, at 633.

be adapted to the latest generation of environmental threats. Indeed, environmental interests such as long-term biodiversity and a non-artificially-accelerated ecological evolution are arguably so intrinsically important to the survival of American culture that their status as *regulable* under federal and state police power may be essential to a free American society.⁷³ Moreover, Sax's moral/aesthetic observation that gifts of nature should not be hoarded or privatized should be considered in light of the increase in our understanding of the environment over the past few decades. We must recognize from experience that long-term societal sharing of nature's gifts requires short-term limits to access of those gifts and even reversals of their privatization. In fact, Sax's observation that certain environmental interests are public in nature translates into a need for stronger environmental laws, not for legislative and judicial inattention to environmental interests.

In sum, the public trust principles that Sax elicited from the common law describe a world in which environmental access is not associated with environmental destruction, and in which the attributes of nature are protected from over-exploitation when they remain outside the realm of private rights. An updated public trust doctrine, however, must presuppose that it is impossible to separate environmental interests and private rights if the environment is to remain healthy. Sax's advocacy also presupposed a legal system that would allow environmental claims to translate into individually asserted citizen rights. Today's public trust, however, must cope with the law's failure to effectively accommodate public environmental interests in private claims. Thus, today's public trust still faces the challenge of infusing the law with a sense of the government's overarching sovereign duty to protect the environmental rights of citizen beneficiaries from the exploitative tendencies of the beneficiaries themselves. Access rights must be secondary. The duty of this generation to future generations must be the key ingredient of an effective modern public trust.

73. In contrast, Richard Lazarus perceives increased government regulation as a means of effectuating the public trust as undermining its benefits for improved environmental stewardship. *See id.* ("[T]he doctrine threatens to fuel a developing clash in liberal ideology between furthering individual rights of security and dignity, bound up by notions of private property protection and supporting environmental protection and resources preservation goals, inevitably dependant on intrusive governmental programs designed to achieve longer-term collectivist goals."). *Id.*

III. JUDICIAL APPLICATIONS OF THE PUBLIC TRUST: EXPLORING THE DOCTRINE'S UNIQUE POTENTIAL TO FOSTER A RAPPROCHEMENT IN THE LAW OF TAKINGS AND STANDING

Part II of this Article discussed the public trust doctrine as a philosophy of environmental responsibility but presented no effective means for that philosophy to influence legal decisionmaking. Rather than arguing that the public trust invokes a private right of action or derives from the state's police power, the following Parts discuss the doctrine as a principled approach to environmental decisionmaking. In doing so, this Article does not concede that there is no common law or constitutional basis for the trust. Instead, in the spirit of calling upon our presidential candidates to embrace the public trust doctrine as part of executive policy and the federal legislative agenda, this Part seeks to illustrate the doctrine's effectiveness as applied to current environmental law decisions, thus providing an incentive for our next president to announce a strong executive public trust policy.

To this end, the following sub-Parts offer two applications of the public trust to existing law. Part III.A illustrates the non-radical, even compromisory possibilities offered by the doctrine as applied through common law, in contrast to recent all-or-nothing application of takings law to environmental regulation. Part III.B explores the possibility for judicial policing of the trust, advocating a revival of the late Justice Blackmun's organizational standing model from *Sierra Club v. Morton*⁷⁴ as an appropriate and limited application of a unique form of standing to a unique legal-political doctrine.

A. *The Public Trust Doctrine as a Response to Modern Takings Decisions: Examining the Possibilities for Compromise*

Trust terminology aids in demonstrating how courts might better conceptualize the competing interests involved in an environmental dispute. In the case of a private trust, trustees may be liable to beneficiaries for abusing their trust authority, but the law tends to protect third parties by allowing them to presume that trustees with whom they transact business are acting within the scope of their authority.⁷⁵ Thus, if a trustee violates the trust by selling trust

74. 405 U.S. 727 (1972).

75. See RESTATEMENT (SECOND) OF TRUSTS §§ 283-85 (1980) (protecting third party transferees of trust assets where transferees are bona fide purchasers).

real estate, the law may protect the purchaser against a court's voiding the sale or forcing a resale.

In the public trust setting, the situation is more complex. First, the public trust "property" includes the environmental attributes of land, and thus is intermingled with private property interests. Certainly there are aspects of nature that may be assigned a dollar value, but, as discussed in Part IV.C in the context of natural resource damages law, the public trust concept balks at the trust law view that trustees who squander trust property may simply compensate beneficiaries out of personal assets.⁷⁶ A second distinction between the public trust and trust law is that the public trust's sovereign trustees are presumptively immune from liability. For example, some commentators assert that natural resource damages trustees act at their own discretion, insulating them from judicial review instigated by their citizen beneficiaries.⁷⁷

Of course, the government may waive its immunity where the national good warrants it.⁷⁸ In the public trust setting, however, sovereign immunity is more than simply a shield against government accountability. It would be as unfair to hold government trustees to a duty of care requiring them to divine the various ecological impacts of all their acts or omissions as it would to expect individual private entities to bear the entire financial burden of environmental remediation in the aftermath of some legally permissible activity that results in unforeseen environmental harm. But much of environmental regulatory law does exactly this, saddling either the government or individual private entities with the entire burden of correcting unforeseen environmental harms. Under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), for example, individual defendants who have broken no law but nevertheless have contributed to a pollution event may bear the entire financial burden of cleanup, at least in theory.⁷⁹ Conversely, the Supreme

76. See *infra* notes 201-202 and accompanying text (discussing *Ohio v. United States*, 880 F.2d 432 (D.C. Cir. 1989)).

77. But see CERCLA § 107 (f)(1), 42 U.S.C. § 9607(f)(1) (1994) (stating that the government "shall act on behalf of the public as trustees of . . . natural resources").

78. See, e.g., 42 U.S.C. § 9620 (applying CERCLA liability provisions to United States departments, agencies, and instrumentalities).

79. 42 U.S.C. § 9607 (setting forth the criteria for liability, which is joint and several and status-based). Public perception of CERCLA's unfairness is at least partially responsible for the frequently made argument that the statute sparks more litigation than its joint and several strict liability scheme avoids. See, e.g., James M. Sweeney, *Opening the Front Door: The Argument for a Causal Requirement in Multisite CERCLA Litigation*, 46 UCLA L. Rev. 1989

Court in *Lucas v. South Carolina Coastal Council*⁸⁰ decided that the state's beachfront development ban constituted a taking requiring compensation, thus placing the burden of humankind's past ignorance about the coastal ecosystem's needs squarely on the government.

Some fairness in allocating cost between private and government parties operating under CERCLA results from the statute's waiver of sovereign immunity for government entities that have contributed pollutants to a CERCLA site.⁸¹ Not so in the land use regulation setting of *Lucas*, where the Supreme Court has yet to see its way past an all-or-nothing takings analysis. In the aftermath of the Court's decision, the State of South Carolina was forced to purchase Lucas' land and pay him costs associated with the litigation in the amount of \$1,575,000.00.⁸² The amount aptly demonstrates the Court's hostility toward exercises of police power aimed at protecting environmental values. Application of the public trust doctrine suggests a more equitable and compromisory approach than the law has achieved to date.

1. Reexamining Lucas from a public trust perspective.

In *Lucas*, the Court determined that environmental regulation prohibiting economically productive use of land constitutes a taking unless regulators can establish that the regulation emerged from "background principles of the State's law of property and nuisance."⁸³ Resisting any temptation to "indulge [in its] usual assumption that the legislature is simply 'adjusting the benefits and burdens of economic life'" when regulation strips a landowner of all productive use of his land, the majority decided that unfamiliar assertions of police power, albeit within the state's authority, require the state to compensate landowners.⁸⁴ In a footnote, the Court did admit that the state police power encompasses situations in which the government destroys private property to forestall

(1999); Lynda J. Oswald, *New Directions in Joint and Several Liability Under CERCLA?*, 28 U.C. DAVIS L. REV. 299 (1995).

80. 505 U.S. 1003 (1992).

81. See *supra* note 78.

82. See Settlement Agreement and Final Release at 2, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (No. 89-CP-10-66A).

83. *Lucas*, 505 U.S. at 1029.

84. *Id.* at 1017-18 (quoting *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 124 (1978)).

"grave threats to the lives and property of others."⁸⁵ By making that statement in the context of its decision against South Carolina's coastal regulation, the Court made clear that it did not perceive the danger that real estate development presented to the shoreline ecosystem to constitute a grave threat.

This perception may seem odd in light of the fact that a primary motivation for South Carolina's beachfront regulation was the vulnerability of coastal development to weather-related destruction.⁸⁶ Logically, a state regulation aimed at protecting against dangerously fragile residential construction would fit comfortably within the background principles of a state's property regulations. The Court did not explore that idea, however, indicating that its decision was focused on the other motivation for the South Carolina regulation, which was the preservation of the beach ecosystem. It was that element of the regulation that the Court refused to acknowledge as falling within traditional police powers. Thus, apparently the mere presence of an environmentalist element in the beachfront management plan rendered the program's application to Lucas' land a taking.

Justice Blackmun argued to no avail against what he plainly discerned as the majority's anti-environmentalist manipulations of police power and takings law.⁸⁷ He observed that nuisance is historically a common law doctrine developed out of individual courts' perceptions of dangers and preventative measures as best understood at a particular time.⁸⁸ Blackmun stressed the perverseness of the Court's holding that all land use regulation must derive from antiquated perceptions of public needs, finding the idea not only intellectually stagnant, but dangerous as well. "There is nothing magical in the reasoning of judges long dead," he observed in the closing paragraph of this passage of his dissent.⁸⁹ "They determined a harm in the same way as state judges and legislatures do

85. *Id.* at 1029 n.16.

86. See Brief for Appellant at 30, *Lucas* (No. 90-38) ("The 1988 Beachfront Management Act serves the important police purposes of: 1. Protecting life and property; and 2. Protecting the beach/dune resource which provides for the economic well-being of the state, the recreation for its citizens, habitat for plants and animals and scenic beauty.").

87. *Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting).

88. See, e.g., *id.* at 1055-56 ("It is not clear from the Court's opinion where our 'historical compact' or 'citizens' understanding comes from, but it does not appear to be history."); *id.* at 1060 ("[T]he Court seems to treat history as a grab bag of principles, to be adopted where they support the Court's theory, and ignored where they do not").

89. *Id.* at 1055.

today.”⁹⁰

The *Lucas* dissent was Blackmun’s last environmental opinion, written in an emotive and adversarial style at a point in his career when he undoubtedly perceived a judicial backlash against social goals, including environmentalism, that he had tried throughout his Court career to make a permanent part of the protections offered by United States law.⁹¹ Blackmun’s *Lucas* effort was the third in a well-known trilogy of Blackmun dissents in environmental cases.⁹² In this context, it is curious that Blackmun did not raise the public trust doctrine. The conception of the trust as serving the people’s environmental values and not just their maritime commercial interests had emerged in the mainstream of legal literature by 1970, and thus there is no doubt that Blackmun was aware of its logical basis, its potential, and the respect it commanded among legal scholars.⁹³ Moreover, Blackmun’s thesis on the evolutionary nature of nuisance and property law comports directly with the idea of the public trust as evolutionary and environmentally responsive. And, *Lucas* centered on shoreline regulation, the mainstay of public trust precedents. Justice Stevens, the only other *Lucas* dissenter, did not present a public trust analysis either.⁹⁴ Thus, the task of reintroducing the public trust concept into the vernacular of environmental law was left for another day.

In any event, it is highly unlikely that a public trust analysis would have altered the outcome of *Lucas*. An aggressive public trust argument in that setting would bear the same burdens as those borne by the police power argument. The argument would be that the public trust, as a protector of the public’s right to a

90. *Id.* Blackmun went on to observe that “[i]f the judges in the 18th and 19th centuries can distinguish a harm from a benefit, why not judges in the 20th century, and if judges can, why not legislators? There simply is no reason to believe that new interpretations of the hoary common-law nuisance doctrine will be particularly ‘objective’ or ‘value free.’” *Id.*

91. See generally Peter Manus, *The Blackbird Whistling—The Silence Just After: Evaluating the Environmental Legacy of Justice Blackmun*, 85 IOWA L. REV. (forthcoming 2000).

92. *Lucas* followed *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Justice Scalia authored all three majority opinions, and Blackmun dissented to each decision with ascending acrimony.

93. Interestingly, in his 1970 article, Professor Sax predicted that the time would come when a takings claim might be brought against the government for failure to assert the public trust, rather than the other way around. See Sax, *supra* note 1, at 557. *Lucas* could have been a case in which the Court considered this notion.

94. *Lucas*, 505 U.S. at 1061-76 (Stevens, J., dissenting). Stevens presented a traditional takings analysis that differed in its outcome from that of the majority, and critiqued the majority’s categorizations of takings precedents.

healthy and bountiful natural environment, is an integral part of the background common law principles upon which current land use regulations must be based so as to avoid constituting takings requiring compensation. This argument, though valid, casts the trust as analogous to the police power, and thus echoes the "all-or-nothing" approach of Scalia's takings analysis,⁹⁵ under which the burdens of land use regulations are borne either entirely by the public or by the individual landowner. If the *Lucas* majority was unwilling to acknowledge that nuisance common law contains environmentalist sentiments or that property law is designed to evolve with the social needs of the citizenry, it could not be expected to accept such concepts when expressed in public trust terminology.

2. *Public trust analysis as a vehicle to accommodate both environmental and property interests.*

The public trust doctrine offers a less adversarial approach to the conflicts that arise when private owners have a stake in the use of a resource that should be conserved in the public interest. Under trust law, in the aftermath of an improper alienation of trust property to a third party, the law examines the culpability of both the trustee and the third party to determine who bears the burden of correcting the error. On the one hand, trust law may protect a bona fide third party purchaser who reasonably believed he acquired an interest in trust property, even where the supposed acquisition was due to a trustee breach of duty.⁹⁶ The law requires the third party to prove that he paid value for the property interests and undertook due diligence to determine the availability and extent of property rights he acquired.⁹⁷ On the other hand, a trustee may be barred by laches from maintaining an action against a third party with respect to trust property,⁹⁸ making trustees responsible for third party reliance on trustee inaction. In these ways, trust law has the flexibility to address the motives and realistic

95. *See, e.g.*, *Orion Corporation v. State*, 109 Wash. 2d 621 (1987) (finding no taking where a landowner was denied the right to engage in all profitable activities in tidelands subject to the public trust doctrine); *see also Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990) (determining that the rescission of a marine construction permit cannot constitute a taking).

96. *RESTATEMENT (SECOND) OF TRUSTS* § 273 (1980).

97. This notice element distinguishes between notice of the existence of a trust and notice of its breach. *Id.* at § 296.

98. *Id.* at § 327.

perceptions of trustees and third parties when determining parties' status following a breach of trust.

In the *Lucas* setting, both of these rules of trust law might have aided the Court in better weighing the positions of Lucas and the state. It is true, of course, that in connection with its takings analysis the Court did examine the relative culpability of the state and Lucas in bringing about their dispute. South Carolina argued that the statutory restriction under scrutiny simply amended a prior existing coastal management statute, and that beachfront development restrictions under that statute offered Lucas ample warning that his lots might be subject to use restrictions subsequent to his purchase. As the state argued to the Court, “[l]ong before the passage of the [state law in question], this State recognized the substantial value of beaches and dunes.”⁹⁹ South Carolina also presented ample evidence suggesting that Lucas knew or should have known about the environmental instability of his lots and the state’s history of beach dwelling disasters.¹⁰⁰ Thus, the police power/takings orientation of the case provided a sufficient forum for the state to question the reasonableness of Lucas’ investment-backed expectation.¹⁰¹ *Lucas* shows that the trust-based analysis of whether the law should protect a bona fide third party purchaser in her exploitation of trust property would require little additional fact-finding beyond that involved in traditional takings law analysis.

The limitations of the police power/takings analysis emerge in the perspective that a court may bring to such facts. At the core of takings law lies the concept of property, its meaning and value under the American system.¹⁰² From this perspective, doubtful as the Court may have been as to the reasonableness of Lucas’ plan to

99. Brief for Appellant at 27, *Lucas* (No. 90-38) (citing the South Carolina Coastal Council Rules and Regulations). The state also argued that the findings and policies set forth in the 1977 Coastal Zone Management Act gave evidence of its interest in protecting beaches and dunes:

The legislature declared the basic state policy in the 1977 Coastal Management Act to be promotion of “economic and social improvement of the citizens of this state . . . with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development

Id. at 28-29 (quoting S.C. CODE § 48-39-30(B)(1) (1978)).

100. *See id.* at 25.

101. Respondent’s Brief on the Merits at 1-3, *Lucas* (No. 91-453).

102. *See generally* Phillips v. Washington Legal Found., 118 S. Ct. 1925 (1998) (debating the question of how to determine the meaning of the words “private property” under the Fifth Amendment taking clause).

construct homes on an unstable shoreline, South Carolina could not convince the majority that Lucas' private losses were sufficiently offset by the amount he benefitted as a member of the public on whose behalf the state managed its coastline.¹⁰³ A conclusion that Lucas had been enriched as a citizen even as he lost the opportunity to build a pair of million dollar homes would have been squarely at odds with the private property concept.¹⁰⁴

Apparently sensing the hollow solace that public enrichment offered a private property owner, South Carolina also focused on its own position in the takings scheme.¹⁰⁵ Pointing out that common law offers stronger protection for state exercises of police power than it does for exercises of eminent domain, South Carolina primarily relied on older cases to support its argument that states may strip landowners of all economic uses of land without compensation where the public good necessitates such drastic measures.¹⁰⁶ The Court interpreted this argument as requiring it to balance the necessity of the state action to protect public health and safety against the sanctity of the private property exploitation right.¹⁰⁷ Such balancing unavoidably pits the long-term health of the coastal ecosystem against the economic survival of the coastal landowner, with a predictable outcome. In short, whether or not the Scalia majority in *Lucas* could fairly be cast as anti-environmentalist, its reasoning followed a defensible trail through the law of police power and takings to its property-based conclusion.

A public trust perspective, however, would have offered the Court an opportunity to conduct an analysis less anchored in traditional property law prejudices. In trust terminology, Lucas stood in the positions of both a third party exploiter of the public trust and a public trust beneficiary. More than simply echoing the private burden/public benefit takings argument set forth above, identifying Lucas as a public trust beneficiary underscores the fact that a

103. See, e.g., *Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

104. See, e.g., *Phillips*, 118 S. Ct. at 1936 (Souter, J., dissenting) (noting that "a court seeks to place a claimant 'in as good a position pecuniarily as if his property had not been taken.'") (citation omitted).

105. See Brief for Appellant at 8, *Lucas* (No. 90-38) (arguing in favor of the state interests involved and the importance of the police power).

106. See *id.* at 8-12.

107. See *Lucas*, 505 U.S. at 1022-26.

public trustee aims to protect individual citizens from their own trust-destructive instincts. As noted, trust law places its faith in the trustworthiness and attentiveness of the trustee in its management of the beneficiary's property. Third party and beneficiary rights to exploit trust property are important but do not dominate the primacy of the trustee's fiduciary responsibility to protect that property. Also, like any trustee's duty to protect trust property from the shortsighted exploitation of beneficiaries, the state's regulatory power permits the implementation of a long-term land management plan based on the maximum amount of environmental exploitation that its citizens should safely bear. From this perspective, rather than allowing Lucas' presumed property right to exploit and profit from his land to sweep all other concerns from before the Court, the Court might have considered Lucas' development scheme more skeptically, weighing his property rights against the state's interest in implementing protective measures.

Also from a public trust perspective, the Court might have more closely scrutinized the matter of South Carolina's having promulgated its Beachfront Management Act ("BMA") only after Lucas had purchased his land. This examination might have focused on the technical skills and resources required for the state to preemptively identify and legislate with regard to critical coastal areas. Never addressed in either the briefs or the Court's opinion was the question of whether South Carolina could have even determined that Lucas' land was unbuildable prior to his purchase, or whether evolving coastal conditions precluded the state from prospectively promulgating the BMA. Certainly, public trustees cannot prophylactically remove all public trust assets from the realm of private interests so as to avoid any and all retroactive regulation.¹⁰⁸ In essence, public trustees must recognize that future patterns in land use and resource consumption may create ecological problems that trigger public trust duties to regulate these uses and, consequentially, impact private property owners.

These considerations illustrate how even a loose application of appropriate trust principles to a regulatory takings scenario would assist in weighing responsibilities and allocating the financial burdens associated with ecological stewardship among regulators and regulated parties. Of course, just as a standard takings analysis

108. See Sax, *supra* note 1, at 486 ("The first point that must be clearly understood is that there is no general prohibition against the disposition of trust properties, even on a large scale.").

presumes that the law should protect the property owner's right to profit, a public trust approach presumes that the law should protect natural resources against both property owner exploitation and government mismanagement. Thus, it may appear to simply replace a pro-private property presumption with the opposite. The public trust presumption that the trust property must remain intact, however, allows a court to assess the motivations and comparative culpability of the various parties more fairly than under takings analyses of the *Lucas* variety. Under trust law, a trustee may be culpable to beneficiaries or a third party for inattention to or a breach of the trust that threatens the trust property.¹⁰⁹ Alternatively, a third party may be determined to deserve its losses, and a beneficiary may be denied exercises of ownership deemed a threat to its equitable ownership.¹¹⁰ Under an analogous public trust approach, the government could indeed end up liable to private citizens or the public at large for a breach of its trust responsibilities. That liability, however, need not be of the all-or-nothing nature of the *Lucas* analysis and others that view all state authority as police power and thus categorically either allow or deny uncompensated regulation.

B. Policing the Trust: Reconsidering Organizational Standing

1. The standard for environmental standing: *Sierra Club v. Morton*.

The *Lucas* dissent was Blackmun's last opinion as a Court environmentalist. He launched his environmental jurisprudence on the Court in an equally high profile environmental case, *Sierra Club v. Morton*, a 1972 standing dispute that has resonated in environmental law ever since.¹¹¹ The four-justice majority determined that environmental organizations could introduce broad environmen-

109. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 267 (1980) (addressing suits in equity against trustees for liability incurred in the administration of the trust); see also *id.* at §§ 268-273.

110. See *id.* at §§ 284-293 (defining the limits of third party protection in connection with transactions involving trust assets).

111. 405 U.S. 727 (1972). For evidence of the case's symbolic impact, see, for example, Oliver A. Houck, *The Secret Opinions of the United States Supreme Court on Leading Cases in Environmental Law, Never Before Published!*, 65 U. COLO. L. REV. 459, 497-98 (1994):

[*Sierra Club's*] holding has become all but forgotten. Instead, *Sierra Club v. Morton* has become a monument in administrative environmental law for the degree of standing that it did in fact confer The legacy of *Sierra Club v. Morton* is perhaps more pervasive, if less visible, than any opinion in environmental law.

tal issues into the courts either by establishing a direct injury to the organization related to the issue at stake or by supporting the court battle of an individual member of the organization who had suffered a personal injury related to the organization's broader concern.¹¹² Motivating this decision, as revealed during oral argument, was the majority's fear that judicial recognition of environmental issues other than those that relate closely to personal injuries could spawn an overwhelming amount of litigation brought by environmental advocates claiming to be aggrieved by any and all impacts on nature.¹¹³ The Sierra Club argued against this bootstrapping approach to judicial review of matters of public concern as susceptible to legal erosion. The Club feared that future courts could easily refuse to acknowledge issues other than the narrowest private interest before them, thereby disallowing environmental organizations to use the recreational or aesthetic injuries of individual members as a basis for the organization's standing.¹¹⁴ The *Sierra Club* majority disagreed that this represented a major impediment to meritorious environmental claims, and for some years case law supported that view.¹¹⁵

112. *Sierra Club*, 405 U.S. at 731-41. The Sierra Club had relied on the Administrative Procedures Act's standing provision to assert standing as an aggrieved environmental organization facing the prospect of a ski resort being developed on federal land in the Sierra Nevada Mountains. The Court concluded that the Club had failed to establish standing because it alleged no judicially cognizable specific injury that it or its members would suffer as a direct consequence of the development. *Id.* at 734-35. The Court indicated, however, that an individual plaintiff who achieved standing in a private action could bring issues of public concern arising out of the same injury, including the types of environmental issues that the Sierra Club had attempted to litigate in the case. *Id.* at 737, 740 n.15.

113. See generally Transcript of Oral Argument, *Sierra Club* (No. 70-34). Justice Stewart aired his concern about opening a litigation floodgate:

I'm reminded of those so-called clubs that get chartered airplane flights across the Atlantic Ocean, these ad hoc organizations. Could I form a club, Friends of Walt Disney Productions, and come in on the other side as a party? . . . Even if the club were brand-new, if it was all in favor of these new highways coming into Mineral King, and they were all friends of great big, broad, paved highways, and they were bona fide, couldn't they associate and become a party and bring a lawsuit?

Id. at 10-13.

114. See Reply Brief for Petitioner at 6, *Sierra Club* (No. 70-34):

The government seeks to create a "heads I win, tails you lose" situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Counsel have shaped their case to avoid this trap.

Id.

115. See generally *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438

2. Recent erosion of environmental standing.

More recently, however, courts have substantiated the Sierra Club's fears more than they have the Court's. Even when aided by generous judicial views of standing and broadly constructed citizen suit provisions in environmental statutes, environmental advocates have not been able to check the advance of a polluting culture.¹¹⁶ In the meantime, the Supreme Court in *Lujan v. National Wildlife Federation*,¹¹⁷ *Lujan v. Defenders of Wildlife*,¹¹⁸ and *Steel Company v. Citizens for a Better Environment*,¹¹⁹ has demonstrated repeatedly that standing can present an insurmountable obstacle to judicial review in courts unsympathetic to the environmental cause. More recently, the Fourth Circuit in *Friends of the Earth v. Gaston Copper Recycling Corporation*¹²⁰ rejected standing grounded in the Clean

U.S. 59 (1978) (allowing standing for potential neighbors of nuclear power plants challenging the constitutionality of a federal law capping nuclear industry liability, which law the plaintiffs claimed allowed the construction of nuclear facilities); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (recognizing standing for students challenging an agency's adherence to the National Environmental Policy Act ("NEPA") where the agency failed to conduct a NEPA study before implementing a railroad rate increase that threatened to increase levels of natural resource depletion and discarded refuse in the Washington area where the students lived); *Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445 (10th Cir. 1996) (recognizing standing for an environmental organization with members living downstream from a government-authorized ski area expansion in a national forest); *Resources Ltd. v. Robertson*, 35 F.3d 1300 (9th Cir. 1994) (recognizing standing where an organization challenged a forest management plan by alleging that its members regularly visited the forest impacted by the plan); *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978) (finding that a plaintiff alleging injury to a personally-held environmental interest may raise related issues as a representative of the public's generalized interest in the environment).

116. Indeed, the prevailing focus on the exploitation of natural resources as property rights has supported the utilization of such citizen suit provisions in environmental statutes to challenge government activities aimed at ensuring environmental preservation. *See Bennett v. Spear*, 520 U.S. 154 (1997) (recognizing standing under the Endangered Species Act for ranchers disputing a federal plan to alter reservoir levels as a means of aiding the survival of certain endangered fish).

117. 497 U.S. 871 (1990) (holding that plaintiffs who did not identify particular tracts of federal land that were both their personal recreation destinations and the targets of a federal leasing program had failed to allege specific enough facts to satisfy the injury requirement of standing).

118. 504 U.S. 555 (1992) (holding that plaintiffs who alleged professional interests in and non-specific plans to revisit endangered species in foreign countries failed to allege specific enough facts for standing to challenge a government decision removing such endangered species from the protection of the Endangered Species Act).

119. 523 U.S. 83 (1998) (denying standing to plaintiffs who alleged informational injury arising from defendant's past violations of its statutory record-keeping requirements where plaintiffs did not allege ongoing violations that would cause future harm if not redressed by the courts).

120. 179 F.3d 107 (4th Cir. 1999).

Water Act citizen suit provision and the “health, economic, recreational, aesthetic and environmental interests” of the plaintiffs because the plaintiffs presented no convincing scientific evidence that the defendant’s illegal discharges harmed them.¹²¹ The lone dissenter worried that the holding called for “the litigation of scientific facts as a matter of standing,” and warned that “courts should now prepare for threshold ‘battles of the experts’ over matters of degree.”¹²²

The Court’s recent emphasis on fact-based pleading to establish standing was partially relieved in the District of Columbia Court of Appeals 1998 *en banc* reversal of its decision in *Animal Legal Defense Fund v. Glickman* a year later.¹²³ The 1998 decision affirmed the validity and non-exclusive nature of the aesthetic injury,¹²⁴ dispensed with the argument that redressability may fail based on speculative notions about how a defendant might respond to a court order,¹²⁵ and reestablished the zone-of-interests test as “generous and relatively undemanding.”¹²⁶ In spite of the sharp divide among the members of the D.C. Circuit bench, the Supreme Court denied certiorari on the case.¹²⁷ The decision against hearing *Animal Legal Defense Fund*, however, apparently did not reflect the full Court’s acquiescence to an accommodating view on the environmental standing issue. Rather, more recent Court history indi-

121. The court held that the plaintiffs’ lack of physical evidence aided in their failure to establish the injury in fact and traceability elements of standing. *Id.* at 113-15.

122. *Id.* at 117-18 (Wilkinson, J., dissenting). Judge Wilkinson also accused the majority of “encroach[ing] on congressional authority by erecting standing hurdles so high as to effectively excise the citizen suit provision from the Clean Water Act.” *Id.* at 116-17.

123. *Animal Legal Defense Fund v. Glickman*, 130 F.3d 464 (D.C. Cir. 1997), *rev’d en banc*, 154 F.3d 426 (D.C. Cir. 1998), *cert. denied*, National Ass’n for Biomedical Research v. *Animal Legal Defense Fund*, 119 S. Ct. 1544 (1999).

124. See *Animal Legal Defense Fund*, 154 F.3d at 432 (“[T]he fact that many may share an aesthetic interest does not make it less cognizable.”). On the topic of the aesthetic injury, the court also dispensed with the notion that an aesthetic injury requires an allegation that the threat to the environmental element in question be one of total elimination. *Id.* at 437 (“It has never been the law, and is not so today, that injury in fact requires the elimination (or threatened elimination) of either the animal species or environmental feature in question.”).

125. See *id.* at 443-44 (rejecting the idea that the plaintiffs might fail to establish the redressability element of standing on the basis of speculations regarding the cooperativeness of the agency administering the federal program addressing the welfare of zoo animals).

126. *Id.* at 444 (quoting *Nat'l Credit Union Administration v. First National Bank & Trust Co.*, 118 S. Ct. 927, 934 (1998)).

127. *Nat'l Ass'n for Biomedical Research v. Animal Legal Defense Fund*, 119 S. Ct. 1544 (1999).

cates that those on the Court who would eviscerate environmental standing are anything but content.

3. *From Steel Company to Laidlaw: The environmental standing battle continues.*

Justice Scalia, the author of three powerful efforts to destroy environmental standing in *National Wildlife Federation*,¹²⁸ *Defenders of Wildlife*,¹²⁹ and *Bennett v. Spear*,¹³⁰ in 1998 led the majority once again in a decision to deny standing for environmental plaintiffs in *Steel Company v. Citizens for a Better Environment*.¹³¹ *Steel Company* involved a company that had violated record-keeping requirements of the Emergency Planning and Community Right-to-Know Act ("EPCRA") by denying a local citizen group access to information about hazardous materials used by the company.¹³² In the majority opinion, Scalia determined that the citizen group had failed to establish standing because the civil penalty it sought, which went directly to the government, would neither enrich the plaintiff nor redress the informational injury it claimed.¹³³ In order to reject the civil penalty as a means of redressing the plaintiff's alleged injury, Scalia had to conclude that the citizen group faced no threat of continuing or imminent violations.¹³⁴ Scalia executed a logical maneuver to reach this conclusion that appears to underplay pertinent facts, as the defendant had complied with EPCRA after a long history of non-compliance only shortly before the plaintiff filed its action in court.¹³⁵ When a defendant complies with the law only

128. 497 U.S. 871 (1990) (denying standing based primarily on a finding that environmental plaintiffs are not sufficiently adversely affected by the agency action to constitute injury in fact).

129. 504 U.S. 555 (1992) (denying standing where environmental plaintiffs' allegations of injury were speculative and their claimed injury was deemed non-redressable).

130. 520 U.S. 154 (1997) (finding standing for plaintiff ranchers and irrigation districts based on potential adverse economic impacts to plaintiffs from government activities aimed at preserving endangered species).

131. 523 U.S. 83 (1998).

132. *See id.* at 86-87.

133. *See id.* at 106 (denying that penalties payable to the United States Treasury would redress citizen plaintiffs); *see also id.* at 108 (denying that the injunctive relief sought by the plaintiffs could remedy the past wrongs they suffered due to defendant's noncompliance with EPCRA).

134. *See id.* at 108 ("If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm. But there is no such allegation here—and on the facts of the case, there seems no basis for it").

135. *See id.* at 87-88 ("[P]etitioner had failed since 1988, the first year of EPCRA's filing deadlines, to complete and to submit the requisite hazardous-chemical inventory and

upon facing litigation, a judge might logically conclude that a civil penalty is warranted to ensure future compliance.¹³⁶ Consistent with his method of narrowly construing facts and doctrine in the environmental standing context, here Scalia relied on the silence in the citizens' allegations on the issue of future violations to conclude that the citizen group sought nothing more than compensation for past record-keeping violations.¹³⁷

Justice Stevens' concurrence in *Steel Company* directly challenged Scalia's standing analysis.¹³⁸ Stevens pointed out that the majority opinion was the Court's first denial of standing on the basis of redressability where the plaintiff had alleged a direct, as opposed to indirect, injury to itself.¹³⁹ Although no justice fully addressed the informational nature of the injury in the case, Stevens' observation suggests that it could have been key to the Court's decision to deny standing.¹⁴⁰ That is, the justices may have considered an informational injury to be akin to an indirect injury, and thus been less sensitive to the threat to the plaintiff of its recurrence. More directly in response to Scalia's redressability argument, Stevens argued that U.S. law accepts the proposition that a punishment, as in a civil penalty running to the government, may redress an injury to third parties related to the activity being punished.¹⁴¹

The debate between Scalia and Stevens in *Steel Company* presaged a shift of majority votes in a more recent environmental standing case, *Friends of the Earth v. Laidlaw*.¹⁴² The case revolved around a dispute between residents of the North Tyger River area

toxic-chemical release forms under [the Act]."); *see also id.* at 130 n.27 (Stevens, J., concurring) (discussing the fact that Steel Company repeatedly violated EPCRA for eight years).

136. *See id.* at 128 n.26 (Stevens, J., concurring) (observing that one may properly conclude that a sanction against a wrongdoer may lessen the likelihood that it will repeat its offensive conduct).

137. *See id.* at 108-09 ("Nothing supports the requested injunctive relief except respondent's generalized interest in deterrence, which is insufficient for purposes of Article III.").

138. *Id.* at 112-34 (Stevens, J., concurring).

139. *See id.* at 125-26.

140. *See id.* at 105 ("We have not had occasion to decide whether being deprived of information that is supposed to be disclosed under EPCRA or at least being deprived of it when one has a particular plan for its use is a concrete injury in fact that satisfies Article III."); *see also id.* at 126 n.22 (Stevens, J., concurring) ("Assuming that EPCRA authorizes suits for wholly past violations, then Congress has created a legal right in having EPCRA reports filed on time.").

141. *See id.* at 127-28 (Stevens, J., concurring) (presenting both logical and historical arguments that punishment and deterrence can redress an injury).

142. 120 S. Ct. 693, 699 (2000) (7-2 decision).

in South Carolina and a wastewater treatment plant that discharged pollutants to the river in excess of discharges allowed under its Clean Water Act permit.¹⁴³ Although the nature of the alleged injury—direct pollution rather than information about the use of toxins—may account for the majority shift between *Steel Company* and *Laidlaw*, the opinion nevertheless is surprising given the Court's recent track record of following Scalia's lead.

Indeed, the Court appears to have relaxed its previous emphasis on highly specific allegations of injury to establish standing. The majority determined that the plaintiffs suffered an injury in fact sufficient for standing purposes in the form of various sworn statements of "concern" over the state of the river due to Laidlaw's presence.¹⁴⁴ The majority distinguished the affidavits in this case from the affidavits Scalia had deemed inadequate in *National Wildlife Federation* and *Defenders of Wildlife*, perhaps betraying a subtle shift in thinking about injury that accepts plaintiffs' expressions of harm without imposing rigorous standards of proof.¹⁴⁵ Scalia reminded the Court that the standing issue is pertinent at all levels of judicial review, pointing out that the lower court had established that Laidlaw's discharges had not, in fact, polluted the river.¹⁴⁶ He argued that where the injury to the plaintiffs emerged from an injury to the environment, disproving the injury to the environment should be tantamount to disproving the injury to the plaintiff.¹⁴⁷ The majority merely asserted that environmental plaintiffs need not prove injury to the environment for standing purposes, but only need allege injuries to themselves.¹⁴⁸

In addition to the Court's more inclusive view of injuries that qualify for standing, its apparent easing of the redressability element may indicate the start of a new trend in environmental standing. Similar to the situation in *Steel Company*, the *Laidlaw* plaintiffs

143. See *id.* at 701-02.

144. See *id.* at 704-06 (reviewing plaintiff affidavits and finding "nothing 'improbable' about the proposition that a company's continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms").

145. See *id.* at 705-06.

146. See *id.* at 713-14 (Scalia, J., dissenting).

147. *Id.* at 714 (Scalia, J., dissenting) ("In the normal course, however, a lack of demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen plaintiffs.").

148. See *id.* at 704 ("The relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff").

sought civil penalties payable to the government as their relief.¹⁴⁹ The *Laidlaw* majority concluded that "a sanction that effectively abates [the allegedly injurious] conduct and prevents its recurrence provides a form of redress,"¹⁵⁰ distinguishing *Steel Company* by pointing out that the violations in *Steel Company* were "wholly past," while the discharges in *Laidlaw* had been taking place at the time of the suit's commencement.¹⁵¹ In focusing on this distinction, the majority took advantage of Scalia's aggressively narrow reading of the allegations in *Steel Company*, observing that "[w]e specifically noted in [*Steel Company*] that there was no allegation in the complaint of any continuing or imminent violation"¹⁵² In contrast, the majority concluded, "the civil penalties sought by [the *Laidlaw* plaintiffs] carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress [the alleged] injuries"¹⁵³

Finally, with regard to the related issue of mootness, the *Laidlaw* majority concluded that the shutdown of Laidlaw's facility, which occurred subsequent to the filing of the suit, did not moot the case because Laidlaw had not met the "'heavy burden of persuad[ing]' the court that the challenged conduct cannot reasonably be expected to start up again"¹⁵⁴ The Court recognized the question of whether Laidlaw could resume operation of its facility as a disputed fact that did not moot the case.

Overall, the *Laidlaw* majority's arguable relaxation of injury-in-fact, redressibility, and mootness considerations suggests that a majority of justices may be rebelling against a ten-year reign of intolerance toward environmental plaintiffs. The majority rejected Scalia's relatively sound logic without comment, used his past narrow constructions of facts to marginalize his prior standing opinions, and altered the law addressed in *Steel Company* on the basis of a narrow distinction. Scalia condemned the majority's broad treatment of standing criteria as "a sham" and "cavalier."¹⁵⁵ He warned that "the new standing law that the Court makes . . . has grave im-

149. *See id.* at 702.

150. *Id.* at 706.

151. *Id.* at 708.

152. *Id.* at 707.

153. *Id.*

154. *Id.* at 708 (quoting *United States v. Concentrated Phosphate Export Ass'n.*, 393 U.S. 199, 203 (1968)).

155. *Id.* at 715 (Scalia, J., dissenting).

plications for democratic governance."¹⁵⁶ From this perspective, the decision may stand for the Court's wresting the issue of environmental standing away from Scalia's unilateral control more than it stands for a statement of the majority's particular viewpoint on the various standing issues or on mootness.

It remains to be seen how controlling the specifics of the *Laidlaw* decision will be. Indeed, *Laidlaw* may spark a constitutional debate that for the present only lurks in the background of the environmental standing issue. Both Scalia in his *Laidlaw* dissent¹⁵⁷ and Justice Kennedy in his concurrence,¹⁵⁸ as well as Justice Stevens in his *Steel Company* concurrence,¹⁵⁹ referenced without any in-depth discussion the issue of whether private lawsuits threaten the executive's authority to "take Care that the Laws be faithfully executed."¹⁶⁰ That debate, if it emerges, could significantly undercut the effectiveness of environmental watchdogs. Thus, although *Laidlaw* may be heartening to environmentalists as a return to the environmental standing criteria first established in *Sierra Club v. Morton*,¹⁶¹ it would be premature to cast the decision as inviolate precedent or as an end to the obstacles encountered by environmental plaintiffs over the past decades.

4. *Standing from a public trust perspective.*

Viewed in a positive light, *Laidlaw* may be cast as a sign that the Court is ready to reconsider its original stance on environmental standing, that of *Sierra Club*. A public trust perspective may aid in the analysis of the standing models offered in that decision. The *Sierra Club* dissents offered two alternatives to the majority's bootstrapping model of standing. Justice William O. Douglas made creative use of Professor Christopher Stone's article *Should Trees Have Standing?—Toward Legal Rights for Natural Objects* to argue that the

156. *Id.*

157. *Id.* at 719-20 (offering that Article II is beyond the scope of the current case, but that "Article III, no less than Article II, has consequences for the structure of our government," and going on to discuss the imposition into executive authority allowed by the majority's decision).

158. *Id.* at 713 (Kennedy, J., concurring) (noting that "[d]ifficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of . . . Article II").

159. 523 U.S. 83, 129 (1998) (Stevens, J., concurring) (dismissing the argument that the Act's citizen suit provision unduly impinges on the executive power).

160. U.S. CONST. art. II, § 3.

161. 405 U.S. 727 (1972).

judiciary should recognize elements of nature as parties to lawsuits.¹⁶² Douglas' thesis relied on the trustee concept in calling for the law to recognize petitions by nature lovers seeking to serve as legal representatives for injured and "legally incompetent" elements of the environment.¹⁶³ Although Douglas' thesis was consistent with the sentiment underlying the public trust doctrine, it departed from it in placing trustee responsibilities in the hands of volunteer individual members of the public rather than the government.¹⁶⁴ Where no qualified individual emerges, environmental injury may go unaddressed by the courts. In addition, Douglas' individual trustees, in applying for their trustee or guardian status, would face very similar court prejudices as those experienced by members of environmental advocacy groups attempting to assert individual standing under the *Sierra Club* majority's ruling.¹⁶⁵

Blackmun's *Sierra Club* dissent ultimately provided a truer translation of the public trust than Douglas', as well as a more controlled and traditional expansion of standing that could both accommodate the trust and police its administration. Blackmun urged that an environmental organization that is able to convince a court that it is qualified to serve as an appropriate legal representative for the environment should receive judicial recognition of its standing as an environmental spokesperson.¹⁶⁶ On a practical level, this approach differed from Douglas' in that in many cases courts would be better able to determine whether an organization applying for judicial standing represented the best environmental advocate than it would in connection with an individual. Definable organizational attributes like articles of incorporation, historical accomplishments, and membership lists could aid a court in determining whether an environmental organization promised to serve as an able judicial advocate. Certainly, judges could exercise undis-

162. *Id.* at 745 (1972) (Douglas, J., dissenting).

163. Douglas argued that the courts should recognize standing in persons who are able to present themselves as occupying a level of intimacy with a particular ecological unit. *Id.* at 743. He analogized such persons to trustees and fundamentally similar legal figures such as guardians ad litem, executors, conservators, and receivers. *Id.* at 750 n.8.

164. See *supra* note 30 and accompanying text.

165. Douglas himself revealed such prejudices in his *Sierra Club* dissent, on the one hand disparaging people with mere political concern for nature, while on the other hand expecting courts to recognize heartfelt ecological concern even where a person had never visited a particular ecological unit. See *Sierra Club*, 405 U.S. at 752 (Douglas, J., dissenting).

166. *Id.* at 757 (Blackmun, J., dissenting) ("Alternatively, I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the *Sierra Club*, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues.").

ciplined prejudices against organizations applying for judicial standing, but where an organization enjoys a track record of effective environmental advocacy, judges will have less room for discretion than they might in the case of an individual claiming a guardian-like kinship with a river or forest. The situation is analogous to comparing the discretion that may be exercised by a court considering whether to appoint a professional trust company as trustee of a private trust with that of a court considering whether to appoint a friend of the beneficiary.

In addition, Blackmun's organizational standing model reflects the public trust doctrine structurally. Unencumbered by the need to link environmental concerns to personal, self-focused losses, environmental organizations would present themselves as the legal servants of current and future citizens, the public trust beneficiaries. They would litigate against both government trustees and third party polluters in cases resolved through a straightforward balancing of the interests of environmental health against the multifaceted concerns of regulators and industry. Economic pressure would oblige environmental organizations to prioritize carefully in choosing which threats to the public trust res warrant a commitment of their resources. This constraint would ensure that litigation brought by such organizations addresses the environmental threats of most concern to their contributing members and to legal and scientific experts.

In this way, organizational standing could allow all three trust parties—trustee, beneficiaries and third parties—to weigh economic, legal, social, and even moral considerations when dealing with one another over the public trust res. By including all these relevant factors, the construct on which environmental litigation rests would be very different and far more reflective of reality outside the courthouse than the one the Court set out in *Lucas*. In contrast to the status quo, where states may exercise the public trust to protect the environment only if third parties emerge fully compensated for foiled development schemes, organizational standing might allow more conservation-friendly outcomes.

IV. A PUBLIC TRUST FOCUSED ON ENVIRONMENTAL RESTORATION AS A POLITICAL CHALLENGE TO THE PEOPLE

A. *Beyond the Organizational Standing and Takings Settings: The Need to Institutionalize the Trust*

The proposition that courts and regulators adopt a public trust approach to the environment is far more than an exercise in grafting selected aspects of trust law onto the law of takings and standing so as to aid environmentalist litigants. Instead, it would reorient a justice system that has meandered far from addressing the environmental issues of concern in a modern society. In earlier days, when environmental problems were scarce, the law accurately reflected the nation's social needs in its recognition of unencumbered land use rights and environment-related standing grounded in property law. Today, conservative jurists often fight the efforts of agencies and environmentalists in the name of separation of powers or traditions of property and individual autonomy.¹⁶⁷ What they do in actuality, however, is to frustrate the law's ability to address environmental realities with legal fictions that apparently attempt to preserve some quaint agrarian and wilderness imagery in, of all places, our civil procedure.¹⁶⁸ As Judge Patricia Wald of the D.C. Circuit wrote:

I ask you: Is this work for sophisticated adult jurists? There was a real dispute here [over the fate of an Asian elephant supposedly protected under the Endangered Species Act] The descent in Talmudic refinements about whether one must be a student of the animal in that particular environment to bring suit, and whether the disputed permit covered the transport away from the zoo as well as to the animal exhibition would strike an ordinary as the essence of caprice. More than most subjects of lawsuits, the use of our natural resources is a communitarian matter. Why then must a genuine dispute over an acknowledged injury to the environment stemming from a violation of law be judgeable only when one individual can show a minutely particularized use of the resource that is threatened, down to the last square inch of hiked soil, or the date of the next planned visit to the zoo?¹⁶⁹

Judge Wald's obvious references to *National Wildlife Federation* and *Defenders of Wildlife* point the finger of blame at the Supreme

167. See, e.g., *Bennett v. Spear*, 520 U.S. 154 (1997); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

168. See Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329, 334 (1995).

169. Patricia Wald, *Environmental Postcards from the Edge: The Year That Was and the Year That Might Be*, 26 ENVT'L. L. REP. (ENVT'L. L. INST.) 10,182, 10,186 (1996).

Court for the perverse denial of social evolution expressed in its recalcitrance on environmental standing. From this perspective, the idea that courts adopt a public trust approach to environmental cases, applying the rudiments of trust law so as to shift away from a presumption favoring environmental exploitation, represents a modest proposal. If the federal administration and Congress embraced the public trust, of course, the courts could do far more with it. The exercises above serve as a demonstration to those who create policy from outside the courthouse of how a federal policy favoring public trust could translate the law into modern terms without toppling traditional notions of property and judicial process.

Certainly if the courts follow *Laidlaw* and reinvigorate *Sierra Club*, allowing the public trust to blossom into full flower as a common law doctrine, Sax's principles may find modern expression in standing and takings law, creating a legal climate in which environmental stewardship may thrive. Organizational standing, for example, captures Sax's principle of democratic freedom that the public trust projects by empowering collectives of private citizens to bring the widespread environmental needs of the public to judicial attention. A public trust perspective on takings law protects against the hoarding of nature's gifts by refusing to allow private property interests to presumptively include the right to destroy natural resources. A public trust approach to both takings law and environmental standing also endows the inherently public attributes of nature with legal protections traditionally reserved for private interests, encompassing the third of Sax's public trust principles. In sum, the above application of public trust as a judicial perspective illustrates how close modern common law may be to embracing the principles of the doctrine.

Establishing the public trust as a mode of judicial decisionmaking, however, is merely an informal institutionalization of the principles of environmentalism that leaves those principles vulnerable to the whims of particular courts. Only a powerful surge of public support for a public trust policy will compel legislators and judges alike to recognize that environmental stewardship stands as a modern translation of fundamental concepts of constitutional and common law, including the government's duty to police private enterprise, the right of all citizens to seek enjoyment of life, and the adaptation of principles of privacy and property to an evolving culture.

The following sub-Parts seek to fortify and guide the presidential candidates in catalyzing a surge of public support. Part IV.B provides legal justification for the political promotion of a policy favoring environmental restoration by offering a constitutional basis for a broad, environmentally-focused public trust. Part IV.C applies a public trust perspective to the statutory context of natural resource damages law, illustrating how that regulatory program embraces the essence of the trust. The example also demonstrates how a more direct public trust analysis of natural resource damages issues may inform the focus and scope of environmental restoration projects.

B. *Constitutional Justifications for a Public Trust Doctrine Encompassing a Social Philosophy of Environmental Stewardship*

Rachel Carson wrote in *Silent Spring* that “[i]f the Bill of Rights contains no guarantee that a citizen shall be secure against lethal poison distributed either by private individuals or by public officials, it is surely only because our forefathers . . . could conceive of no such problem.”¹⁷⁰ Carson may have lodged her notion of the environmental right in the Bill of Rights in response to the failure of environmentalists’ attempt to halt government pesticide spraying in *Murphy v. Benson*.¹⁷¹ The case taught her that private property rights do not stand up well against politically supported exercises of the police power, even when agrarian landowners establish consequent economic injury.¹⁷² The case may have convinced Carson that a robust environmental right does not emanate from the protections offered by property or police power but instead must be sought in even more fundamental constitutional

170. RACHEL CARSON, *SILENT SPRING* 12-13 (1962).

171. 151 F. Supp. 786 (E.D.N.Y. 1957), *vacated in part, aff'd in part*, 270 F.2d 419 (2d Cir. 1959), *cert. denied*, 362 U.S. 929 (1960).

172. See *Murphy v. Benson*, 362 U.S. 929, 930 (1960) (Douglas, J., dissenting to denial of certiorari).

There was evidence that one of the petitioners who sells milk from her dairy had measurable contamination in the milk as late as five months after the spraying, which made its sale illegal under both federal and state regulations.

There was evidence that the vegetables grown by one of the petitioners for family use were rendered inedible Another petitioner, who spent \$13,000 developing her land for chemical-free food production, testified that after the planes came over her plants were damaged and the fruit was withered, making it inedible.

sources.¹⁷³ Murphy helped inspire Carson to write *Silent Spring*, which was in good part an effort to turn the political tide toward a search for sources of environmentalism in American law and government.¹⁷⁴

Carson perceived environmentalists as attempting to assert a fundamental liberty interest of all persons to live unmolested by toxins.¹⁷⁵ Unfortunately, the question of whether any particular part of the Constitution, with its incredible ability to address and even instruct the vicissitudes of society, encompasses the right to a healthy environment has never been answered conclusively.¹⁷⁶ Even if it were, advancing knowledge about the links between pollution, ecology, and human welfare would necessitate revisiting the question of whether our increasingly toxic culture would at some point trigger the law's direct recognition of environmental health as a constitutional matter falling within privacy, property, or due process interests.

In this light, perhaps the strongest argument supporting the constitutionality of the public trust doctrine is that it emanates from the penumbra created by various expressly protected rights, as recognized in *Griswold v. Connecticut* to be the source of the privacy right.¹⁷⁷ Unsurprisingly, *Griswold* author Justice Douglas, per-

173. See CARSON, *supra* note 170, at 158-59. Ornithologist Robert Cushman Murphy led a group of Long Island citizens against a United States Department of Agriculture program to blanket-spray DDT diluted with fuel oil over several million acres of land per year to "eradicate" the gypsy moth. *Id.*

174. See, e.g., *American Experience* (PBS television broadcast, Feb. 8, 1993) (transcript No. 511 at 8, on file with author) (discussing Carson's purposeful attack on the government's program to eradicate elements of nature); *id.* at 13 (discussing how President Kennedy responded favorably to the groundswell of support for Carson's sentiments following the publication of *Silent Spring*).

175. See *id.* at 10. Although her experience supported a view that environmentalists constituted a minority of the American population, Carson did express the right of such citizens to live securely against the intrusion of toxins as "one of the basic human rights." *Id.* In this statement, Carson spoke in terms compatible with the public trust.

For discussion of the liberty interest, see, for example, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring).

176. See Sax, *supra* note 1, at 480-81 (discussing several cases in which courts avoided the issue of a constitutional right to a healthy environment, despite litigants having raised the issue, preferring instead to hold on other grounds).

177. 381 U.S. 479 (1965). Justice Douglas authored *Griswold*. It is probably not a coincidence that Douglas also wrote some of the most powerful environmentalist opinions to emerge from the Supreme Court. See, e.g., *Sierra Club v. Morton*, 405 U.S. 727, 745-46 (1972) (Douglas, J., dissenting) (arguing that the courts should recognize standing in injured elements of the environment themselves, as represented by concerned citizens); *Udall v. Federal Power Comm'n*, 387 U.S. 428, 450 (1963) (characterizing the Federal Power Commission's licensing of private power companies as an overly privatized enter-

haps the most committed legal realist ever to serve on the Court, later argued strenuously that the legal basis for jurisdiction over the environment was no more or less than the simple fact that modern society presented a serious threat to this important and legally stranded element of the human experience.¹⁷⁸ Douglas might well have detected a constitutional penumbra analogous to the privacy penumbra encompassing environmental interests. Certainly a right to a healthy environment bears similarities to the privacy right in that both may be perceived as rights held by individual citizens that keep the government's authority in check.¹⁷⁹ Indeed, as Justice Goldberg stressed in his *Griswold* concurrence, the privacy right encompasses the right to a "safeguard[ed] . . . home" in which to "bring up children."¹⁸⁰ As an example of such safeguarding, Justice Goldberg included the right to educate our children.¹⁸¹ Although never addressed by the Court, it does seem as if the right to raise our children in a non-toxic and biologically diverse environment is closely related to the family-related privacy interests that the Court did expressly recognize. And just as various justices did in *Griswold* with regard to the privacy interest under discussion in that case, jurists could point to the many early forms of the public trust as evidence that individual members of the public bear an unarticulated constitutional privacy interest in a healthy environment.

The privacy right as vindicated in *Griswold* might serve as the source of certain environmental interests, but it fails to fully support the public trust concept as a long-term sovereign duty. After all, while the privacy interest resides in individuals, members of the public do not enjoy an unmitigated expectation that their government will promote and preserve a constantly accessible natural environment. Under the public trust, members of the public do not enjoy a private, individual right to government preservation of the environment for their personal enjoyment. In addition, certain as-

prise that threatened the U.S. Department of the Interior in its management of federal lands).

178. See *Sierra Club*, 405 U.S. at 745 (Douglas, J., dissenting).

179. See, e.g., *Murphy v. Benson*, 362 U.S. 924, 929 (1960) (Douglas, J., dissenting to denial of certiorari); see also *Roe v. Wade*, 410 U.S. 113 (1973) (determining that individual women possess a privacy right in connection with abortion). As in the case of Justice Douglas, whose view of a strong privacy right corresponded with his belief in an environmental right, it is not surprising that Justice Blackmun, the Court's other outspoken environmentalist, authored *Roe* and generally perceived a strong privacy right.

180. *Griswold*, 381 U.S. at 495 (Goldberg, J., concurring).

181. See *id.*

pects of the environment, such as breathable air and useable water, are so elementally within the public domain that their availability is integral to democratic freedom and they cannot be characterized as private.¹⁸² In short, the privacy right provides a strong constitutional basis for the private assertion of those environmental rights that we hold individually, such as those protected by citizen suit provisions. However, the public trust needs additional support to sustain itself in its more sweeping form.

Griswold's discussion of the Ninth, Fourth, and Fifth Amendments actually establish more than a personally-held privacy right that renders unconstitutional certain state and federal intrusions.¹⁸³ In his concurrence, Justice Goldberg explained that the Ninth Amendment obligates the federal and state government to refrain from infringing on fundamental rights reflected in the "traditions and collective conscience" of the people.¹⁸⁴ American principles incorporated into the Constitution through the Ninth Amendment include those "of such a character that [they] cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."¹⁸⁵ Goldberg went on to point out that such "liberty" gains content "from experience with the requirements of a free society."¹⁸⁶ Goldberg characterized the protections offered in the Fourth and Fifth Amendments as even broader in scope, observing that:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.¹⁸⁷

In light of current knowledge regarding environmental threats, it would be difficult to argue that Professor Sax's doctrinal principles of environmentalism do not fall within the various protections

182. See *supra* notes 60-61 and accompanying text.

183. See *Griswold*, 381 U.S. at 492-95 (Goldberg, J., concurring).

184. *Id.* at 493 (alterations in original omitted).

185. *Id.* (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

186. *Id.* (quoting *Poe v. Ullman*, 367 U.S. 497, 517 (1961)). These observations led Justice Goldberg to conclude that the privacy right "is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'" *Id.* (quoting *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting)).

187. *Id.* at 494.

of fundamental rights articulated by Justice Goldberg. Indeed, American beliefs, thoughts, emotions, and sensations do include a sense of environmentalism.¹⁸⁸ The overwhelming popularity of the writings of environmentalists like John Muir, Rachel Carson, and modern writers like Bill McKibben suggests that the desire to leave an environmental legacy for future generations is part of the American collective conscience.¹⁸⁹

Justice Goldberg's discussion of the Ninth Amendment in *Griswold* stressed its relevance in preventing state and federal power from infringing on fundamental personal liberties other than those specifically mentioned in the first eight amendments.¹⁹⁰ At first glance, this expanded protection of personal liberties may seem antithetical to a public trust under which the government bears the authority to control and even temporarily prevent citizen access to natural resources. The trust element of the public trust, however, under which the government operates in a fiduciary-like role on behalf of American citizens present and future, translates the government's sovereign *control* over the people into government *service* to the sovereign people.¹⁹¹ Certainly the trust concept, as a structure of law, was part of the common law upon which American constitutional protections were founded.¹⁹² Thus, the idea that a party may exercise control over the assets of a second party on that party's behalf, and not in subjugation of the second party, is a principle that was among the fundamental presumptions of the original American settlers as well as the constitutional framers. Additionally, while not synonymous with the public trust, the constitutional police power further illustrates that the American legal system recognizes that personal protections reflected in the Bill of Rights may take the form of governmental management of private interests.

For those who favor a broad public trust, *Griswold* and the prin-

188. See, e.g., Al Gore, *Address at Rio Earth Summit*, 59 TENN. L. REV. 645, 646-47 (1992) (identifying the environmental crisis as a fundamental spiritual crisis).

189. See generally Peter Manus, *One Hundred Years of Green: A Legal Perspective on Three Twentieth Century Nature Philosophers*, 59 U. PITTS. L. REV. 557 (1998) (discussing the popularity and legal impact of nature writers including Muir, Carson, and McKibben).

190. *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring).

191. See *supra* notes 34-36 and accompanying text.

192. Trusts date back to before the Norman Conquest in England. The American colonies and the thirteen original states adopted the English system, which "constitutes the foundation on which present day American trust law rests." BOGERT, *supra* note 32, at 5-6, 14; see also RESTatement (SECOND) OF TRUSTS § 67 (1980) (relying on old English law to explain the derivation of the American Statute of Uses).

ciples it allows us to call upon may provide convincing evidence that Supreme Court precedents, constitutional theories, and common law history support the trust as an element of American judicial common law. Conversely, the above discussion is unlikely to convince the trust's detractors of its validity as a judicial doctrine. Nevertheless, it shows that a plausible case can be made for the trust doctrine as a broad government duty to preserve the basic health of America's natural resources, emanating from the fundamental principles of liberty and the traditions of common law reflected in various Constitutional amendments.¹⁹³

Many of our most profound and pervasive cultural foundations rely on unstated truths of United States democracy with weak or no express constitutional support. The separation of powers is a doctrine that is unstated in the Constitution and could not have pre-dated it, yet it remains fiercely guarded by conservative legal scholars and politicians.¹⁹⁴ Regulatory agencies, pervasive and heavily influential over property and due process rights, have little constitutional grounding. Further, one of the strongest characteristics of American democracy is that it accommodates advances in technology, knowledge, and understanding by engineering change in the day-to-day operations of public and private bodies in response to evolving conventional wisdom. For example, the cultural foundations on which the Constitution and our common law heritage rest presume that women enjoy fewer rights than men and that the white race may exercise dominion over other races. Recent executive and legislative expressions of public trust in the form of environmental restoration programs demonstrate the adaptability of the legal system. These programs include ongoing efforts by the Army Corps of Engineers and others to restore environmental resources, such as the Florida Everglades,¹⁹⁵ and suc-

193. See *Griswold*, 381 U.S. at 493-94 (Goldberg, J., concurring).

194. See, e.g., DAVID A. SCHULTZ & CHRISTOPHER E. SMITH, THE JURISPRUDENTIAL VISION OF JUSTICE ANTONIN SCALIA xvii, 82 (1996) (discussing Justice Scalia's strict vision of separation of powers); see also *Morrison v. Olson*, 487 U.S. 654, 710-11 (1988) (Scalia, J., dissenting) (observing that separation of powers may prevent the Court from righting wrongs, but does so in the interest of ensuring liberty).

195. See, e.g., *Hearings on the Estuary Habitat Restoration Protection Act of 1999 Before the Subcomm. of Fisheries Conservation, Wildlife and Ocean of the Senate Comm. on Resources*, 1999 WL 27594801 (1999) (statement of Michael L. Davis) (calling for legislation to expand the authority of the Army Corps of Engineers in its efforts to restore and oversee estuary habitats); Larry Lipman, *Senate Joins House To Approve \$100.4 Million for Everglades*, PALM BEACH Post, Sept. 30, 1999, at 2A (discussing the tripling of financial support for Everglades restoration under the Energy and Water Appropriations Bill to be signed by President Clinton).

cessful efforts to dismantle particular dams.¹⁹⁶ While courts may balk at recognizing the public trust without legislative support, nothing stops the legislative and executive branches from supplying that support. A stand-out example of legislative and regulatory public trust law that enjoys a relatively long history of success is that of natural resource damages.

C. A Statutory Incarnation of Public Trust and Environmental Restoration: Natural Resource Damages

The law of natural resource damages (“NRD”) embodies the spirit of the public trust doctrine and the goals of the environmental restoration movement by authorizing government trustees to collect damages for a variety of losses humans suffer due to environmental injuries, and then to use the funds to diminish those losses.¹⁹⁷ The NRD concept addresses nature’s need to convalesce, as well as to detoxify, if it is to flourish again in the aftermath of a pollution event.¹⁹⁸ The focus is environmental husbandry rather than mere cleanup. Under CERCLA, for example, the NRD program addresses rehabilitative efforts apart from, and often subsequent to, the remediation of contaminants.¹⁹⁹ Although CERCLA and other statutes incorporating NRD law do not use the term “public trust doctrine,” the trust relationship between government trustees and public beneficiaries is apparent.²⁰⁰ Thus, NRD law utilizes the skeletal framework of the public trust and trust law generally, as discussed above.

Upon this skeleton, NRD law fleshes out various aspects of the public trustees’ unique fiduciary duty to maintain nature’s health. For example, in 1989 the D.C. Circuit ordered NRD trustees to pri-

196. See, e.g., Allen, *supra* note 2 (detailing projects to dismantle the Edwards Dam in Augusta, Maine, and referencing numerous other restoration projects); see also Richard Ingebretsen, *Foreword*, 19 STAN. ENVTL. L.J. xi (2000) (arguing for the decommissioning of Glen Canyon Dam).

197. See, e.g., Clean Water Act, 33 U.S.C. § 1321(f)(4) (1994); Oil Pollution Act, 33 U.S.C. §§ 2701-2761 (1994); Trans-Alaska Pipeline Authorization Act of 1973, 43 U.S.C. § 1653(a)(1) (1994); Outer Continental Shelf Lands Act Amendments, 43 U.S.C. § 1813(a)(2)(C) (1994).

198. See, e.g., Peter Manus, *Natural Resource Damages from Rachel Carson’s Perspective: A Rite of Spring in American Environmentalism*, 37 WM. & MARY L. REV. 381, 388 (1996).

199. See CERCLA § 107(a)(C), 42 U.S.C. § 9607(a)(C) (1994) (declaring that liability includes “damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release”).

200. See *id.* § 9607(f) (addressing the scope of natural resource damage liability and the role of the natural resources trustee).

oritize restoration of natural resources over compensation for permanent environmental injury.²⁰¹ The court made clear that pollution liability in the NRD context is less a matter of traditional anthropocentric economic valuation of property damages and losses, and more a matter of biocentric evaluation of the measures necessary to repair the environment's injury.²⁰² Accordingly, current regulations identify various options for nurturing the environment toward health, based on ecological principles of biodiversity and resource distribution.²⁰³

Thus, NRD law, unlike early cases invoking the public trust as something akin to a perpetual public fishing license, reflects a public trust doctrine that is less about the human need to exploit environmental resources than it is about the government's role in preserving resources for the good of all.²⁰⁴ Viewed in this light, public trust cases about fishing and boating rights—if their reliance on the term “trust” is to carry any meaning at all—protected the public’s right to indulge itself freely in connection with specific natural resources only because there existed no reason for the trustee to do otherwise at the time. Had fish been scarce, it is conceivable that, from the doctrine’s inception, public trustees could have invoked the trust to prevent the public from accessing their resources.

As noted above, however, the primary focus of public trust on trustee responsibilities does not obliterate the aspect of the trust that may be defined as the public easement or beneficiaries’ rights. NRD law illustrates the important presence of the access right in its

201. See *Ohio v. United States Dep’t of Interior*, 880 F.2d 432 (D.C. Cir. 1989) (ordering the Department of the Interior to amend its NRD rules to reflect a preference that liability reflect the cost of natural resource restoration rather than the value of its diminished use).

202. See *id.* at 464 (“In this vein, we instruct DOI that its decision to limit the role of non-consumptive values, such as option and existence values, in the calculation of use values rests on an erroneous construction of the statute.”).

203. See 43 C.F.R. §§ 11.15, 11.83 (1998) (identifying the measure of NRD as costs associated with natural resource restoration, rehabilitation, replacement and/or acquisition, and including as NRD the administrative and scientific costs associated with these actions).

204. The nature of this obligation, unfortunately, may not be absolute under NRD law. The language of CERCLA does not create a duty on the part of the federal government to respond to hazardous substances in the environment. Rather, it “authorize[s]” the President to undertake response actions, or to “allow” persons responsible for the condition to undertake actions in connection with its correction. CERCLA § 104 (a)(1), 42 U.S.C. § 9604(a)(1) (1994).

attention to “lost use” injuries.²⁰⁵ Reminiscent of public trust discussions that focus on mariner trade or an associated need for the public to access shorelines, NRD law translates into damages a wide array of commercial and recreational losses resulting from natural resource pollution.²⁰⁶ In addition, NRD law transcends the fiction that public rights in natural resources are held by individual hikers and hunters. Forging deeper into the human need for natural resource access, NRD law encompasses the public trust’s sensitivity to the environmental legacy left to future citizens by addressing injuries termed “non-use” losses.²⁰⁷

Non-use losses translate into legal damages the sense of loss Americans experience from the knowledge that human behavior has seriously injured or even destroyed an area of the environment or a population of animals, birds, or fish.²⁰⁸ Further, NRD regulations specify, as one type of non-use loss, the sense of loss Americans experience from the knowledge that through such environmental incidents we leave future generations with a diminished natural environment.²⁰⁹ Damages that NRD trustees collect as compensation for such losses fund rehabilitative programs aimed at replenishing such injured environmental elements.²¹⁰ In these ways, non-use losses further a government program to maintain, as much as possible under our reactive liability system, a healthy and diverse environment for the benefit of current and future generations. NRD law thus stands as a relatively complete expression of the public trust doctrine as it applies to a human-mediated environmental disaster.

Although NRD law provides a clear illustration of the public trust doctrine, the fact remains that NRD law does not rely on the public trust doctrine by name, as if Congress were unsure of the

205. See 43 C.F.R. § 11.83 (1998) (defining compensable value—that is, legal damages—to include “the value of lost public use of the services provided by the injured resource”).

206. Use values include the losses suffered by fishermen and other water users, campers, hunters and even those who might have the authority to rent public lands subject to NRD remediation. See generally 43 C.F.R. § 11.83 (1998) (defining use values).

207. See 43 C.F.R. § 11.83 (1998) (addressing the emotional sense of loss experienced by members of the public due to the eradication of some identified natural resource, as well as the general sense of loss at the knowledge that our generation leaves a less diverse environment for future generations in the aftermath of an episode of contamination).

208. See *id.*

209. See *id.*

210. See CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) (1994) (designating that NRD “shall be available for use only to restore, replace, or acquire the equivalent of [injured, destroyed, or lost] natural resources”).

doctrine's legal status while nevertheless relying on its structure and thesis. Whatever the reason for the omission of public trust terminology from NRD legislation, Congress' silence highlights an essential question about the legal status of the doctrine. No conventional wisdom prevails on whether the public trust is common law, as filtered through the federal constitution, or whether it requires legislation, usually in the form of state law, for its judicial cognizance.²¹¹ Alternatively, the doctrine may be regarded as an interpretive mechanism, or a form of American democratic philosophy that defines a perspective on the law, which courts and regulators may utilize in considering cases involving sovereignty and natural resources.²¹² In connection with NRD law under CERCLA, of course, the safest use of public trust doctrine is as this interpretive mechanism.

Although relegating the public trust to an interpretive role may seem legally weak, even an informal acknowledgment that NRD law encompasses the essence of public trust can aid courts and administrators in utilizing NRD. For example, in connection with one current NRD project, environmental restoration of the Housatonic River in Massachusetts, various parties are grappling with the question of whether trustees may be persuaded to utilize some part of NRD to fund an environmental education program.²¹³ Those in favor of the program argue that when an element of the environment, in this case a river, has been polluted for generations, its long-term remediation necessitates rebuilding public appreciation for it as a natural resource.²¹⁴ They point to the NRD regulations, specifically the non-use focus on leaving a healthy environment to future generations, as support for the argument that NRD law encompasses more than physical rehabilitation.²¹⁵ In addition, those favoring the use of NRD for environmental education argue that

211. As Sax pointed out, "there is no well-conceived doctrinal basis that supports a theory under which some [environmental] interests are entitled to special judicial attention and protection." Sax, *supra* note 1, at 484.

212. *See id.* at 563 ("[A]lthough there is little specific supporting evidence, there seems to be implicit in the cases a feeling that there is something rather questionable about the use of governmental authority to restrict, rather than to spread, public benefits."); *id.* at 565 ("This . . . article has been an extended effort to make the rather simple point that courts have an important and fruitful role to play in helping to promote rational management of our natural resources.").

213. *See generally* Memorandum of Law Re: Use of Natural Resource Damages from GE/Housatonic River NRD Site (Aug. 12, 1999) (on file with author).

214. *See id.* at 2.

215. *See id.* at 3-4.

an educational program would serve as direct compensation for use and non-use losses suffered by members of the community unable to visit, study, and enjoy the river prior to and during its rehabilitation.²¹⁶ Conversely, the argument against applying NRD to environmental education relies on the overall emphasis of NRD law on physical rehabilitation.²¹⁷

If the parties involved consider NRD law as a legislative response to the government's public trust duties, they might better evaluate whether programs other than physical remediation fall within the scope of NRD law. The thrust of CERCLA, and of the NRD regulations themselves, is physical remediation and rehabilitation.²¹⁸ Nowhere do those regulations discuss educational programs or any other non-physical commitments of NRD funds. Yet, the NRD statutory provision and regulations expressly contemplate that NRD trustees may use NRD funds in ways not enumerated in the regulations.²¹⁹ Further, the regulations are silent on the use of damages compensating non-use losses, whereas they do link funds collected for particular physical injuries directly to their rehabilitation.²²⁰ Thus, the proper interpretation of the regulations may be that non-use and visitation losses should be compensated as fully as possible, supporting the idea of an education program as a direct response to lost opportunities to study, enjoy, and otherwise benefit from contact with the river.²²¹

216. *See id.*

217. *See* CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) (1994) (requiring that damages recovered in a NRD action "shall be available for use *only* to restore, replace, or acquire the equivalent of such natural resources") (emphasis supplied).

218. *See id.*; *see also* 43 C.F.R. § 11.13(3) (linking NRD compensation to "the costs of restoration, rehabilitation, replacement, and/or acquisition of equivalent resources"). Provisions in the regulations allow damages to include administrative and scientific assessment costs associated with a natural resource restoration, rehabilitation, replacement and/or acquisition. *See id.* §§ 11.15, 11.83. In contrast, the regulations do not tie compensation for use and non-use losses to physical remediation.

219. CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1) ("The measure of damages in any [NRD action] shall not be limited by the sums which can be used to restore or replace such resources."); *see also* 43 C.F.R. § 11.13(3). In addition, CERCLA and the NRD regulations protect assessment procedures performed in accordance with the specific directives of the regulations with a rebuttable presumption of their validity. *See* CERCLA § 107(f)(2)(C), 42 U.S.C. § 9607(f)(2)(C); *see also* 43 C.F.R. §§ 11.10-11.11, 11.91(c). These provisions suggest that CERCLA and its regulations presume that natural resource trustees possess the authority to deviate from the express directives of the NRD regulations.

220. *See* 43 C.F.R. § 11.13(3).

221. On October 8, 1999, the United States Environmental Protection Agency and Department of Justice announced that they had reached a settlement agreement with General Electric Corporation under which it would fund multi-faceted environmental restora-

The public trust doctrine, with its emphasis on the protection of a healthy environment for an entire range of benefits that it provides the people, supplies the long-term perspective necessary to support a broad reading of the NRD rehabilitation concept. Whether accepted as a rule of law or a statement of a modern political philosophy of stewardship, the public trust doctrine may aid in the development and interpretation of environmental law and policy.

V. CONCLUSION: THE PUBLIC TRUST AS A STATEMENT OF AMERICAN VALUES SUPPORTING A PRESIDENTIAL POLICY OF ENVIRONMENTAL RESTORATION

Go for the Green, Gore.²²²

This year's presidential candidates have preached less than they might on the topic of the environment. In the millennium year election, with its promise of progressive directions and also its foreboding of futuristic and alien lifestyles, it is a shame that no candidate has sought to play on the public's optimism and fears with a broad and central environmental campaign theme. This is particularly so because, in the current thriving economy, a challenge for individuals to meet the needs of all Americans is more likely to fall on receptive ears. Moreover, it seems a waste that a candidate like Al Gore, with his knowledge of and history of dedication to environmental issues, may not, for whatever political reasons, cast himself openly as a candidate whose dream of an environmentally benign industrial base is central to his plans for America's future.²²³

Environmental restoration, or the idea that nature's needs include rehabilitation as well as detoxification and preservation, is neither a new nor a radical idea. The concept existed before Rachel Carson published *Silent Spring* and before the nation turned its attention to the health threats posed by chemicals as a primary environmental concern. For example, Aldo Leopold, in his famous 1949 book, *A Sand County Almanac*, discussed environmental

tion projects as a response to the long-term contamination of the Housatonic River. See PCBs: GE Reaches \$250M Settlement with EPA, DOJ, GREENWIRE, Oct. 8, 1999, at 2.

222. Goldscheider, *supra* note 5 (urging Gore to "cast himself as an unapologetic ecologist" in his presidential campaign).

223. Gore has cast himself as an environmentalist politician from early in his career. See, e.g., AL GORE, EARTH IN THE BALANCE 8 (1992) (attributing the failure of his 1987 presidential bid to his marginalization as a result of an environmentalist campaign).

husbandry in detail, both lamenting the impossibility of true environmental restoration and describing methods for reconstructing a facsimile of a natural ecosystem that might then evolve naturally.²²⁴ Thus, restoration should be attractive to a politician looking for traditional paths toward meeting current environmental challenges. In contrast to the years of environmentalist finger-pointing and predictions of doom, the restoration movement casts environmentalism in positive terms. This optimism is expressed in statements by political leaders that support the growing movement for dam decommissioning. "It's the beginning of a new chapter of river restoration," declared Secretary of the Interior Bruce Babbitt. Remarking on the deconstruction of the Edwards Dam, Maine Governor Angus King observed that "in time, nature will heal."²²⁵

Such positive sentiments are necessary for environmental policy to appeal to the voters and to inspire voters to embrace political platforms requiring responsibility and self-control. The public trust is a phrase that captures this spirit. In the law, it translates into a doctrine that may achieve a great deal if supplied with the political backing to support its long but ill-defined history. In fact, the law, like the American public, may currently be well disposed to embrace a public trust doctrine as articulated in this Article. Lately, members of the Supreme Court have expressed dissatisfaction with the type of arguments offered in *Lucas*²²⁶ and *Bennett v. Spear*.²²⁷ In *Steel Company v. Citizens for a Better Environment*,²²⁸ for example, a number of justices chastised Justice Scalia for his logic in denying a hearing to the environmentalists in that case on the basis of jurisdictional objections.²²⁹ More recently, in *Friends of the Earth v. Laidlaw*,²³⁰ a majority of justices has asserted a view on environmental standing that is far more accommodating than the dominant Court view for the past decade.²³¹ These cases and others

224. See generally ALDO LEOPOLD, A SAND COUNTY ALMANAC (1949).

225. Allen, *supra* note 2, at 23.

226. 505 U.S. 1003 (1992).

227. 520 U.S. 154 (1997).

228. 118 S. Ct. 1003 (1988).

229. Justices Breyer, O'Connor, and Kennedy, although concurring, disagreed pointedly with the majority's rigid and selective characterization of the relationship between jurisdictional and other issues dispositive of a case. *See id.* at 1020, 1021. Also concurring, Justice Ginsberg published a blunt criticism of Justice Scalia's bench activism. *See id.* at 1032. Finally, Justice Stevens published a lengthy and critical concurrence intimating that the doctrines of originalism and separation of powers were vehicles for a politically conservative Court agenda. *See id.* at 1020.

230. 120 S. Ct. 693 (2000).

231. *See supra* notes 142-161 and accompanying text.

indicate that the courts are primed to perceive environmental complaints as part of the judicial realm.²³² They illustrate the potential for, rather than obviating the need for, political leadership in asserting a public trust.

When Rachel Carson published *Silent Spring*, her chronicle of the government's betrayal of its public trust duties to the American citizenry through a profit-driven and ecologically naive program of pesticides spraying, President John F. Kennedy took notice.²³³ Kennedy was also the President famous for presenting a unique challenge to his fellow Americans to "ask not what your country can do for you, ask what you can do for your country."²³⁴ In a fundamental sense, the public trust doctrine combines these two inspirational elements of Kennedy's legacy. Defined as a government responsibility to preserve a healthy natural environment for the American people, the public trust captures the essence of the stewardship principle. At the same time, by stressing the duty of all parties—government trustees, market participants, and citizen beneficiaries—to compromise personal exploitation values before the needs of the environment, the public trust captures the ideal of a democratic society of individuals working for the greater good even as they work for individual benefits. Kennedy's tremendous popularity and the enshrinement of his inaugural challenge should prove to the current presidential candidates that the American public can and will flock to a politician who challenges them to give of themselves. As for the environment's need for a champion to offer such a challenge, the state of the earth may speak for itself.

232. See, e.g., Friends of the Earth v. Laidlaw, 120 S. Ct. 693 (2000); Animal Legal Defense Fund v. Glickman, 154 F.3d 426 (D.C. Cir. 1998).

233. See *American Experience*, *supra* note 174 (depicting former Department of the Interior Secretary Udall memories of "a conversation with President Kennedy where he brought the subject [of Rachel Carson's *Silent Spring*] up . . . [because] getting it into the consciousness of the President, getting action in the White House was very important" for Carson to catalyze any kind of environmental defense program).

234. John F. Kennedy, Inauguration Speech (Jan. 20, 1961), in DEP'T ST. BULL., Feb. 6, 1961, at 176.



Notes

