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Democracy, Distrust and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine and the Search for a Substantive Environmental Value

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DEMOCRACY, DISTRUST, AND THE PUBLIC TRUST: PROCESS-BASED CONSTITUTIONAL THEORY, THE PUBLIC TRUST DOCTRINE, AND THE SEARCH FOR A SUBSTANTIVE ENVIRONMENTAL VALUE

William D. Araiza *

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The public trust doctrine has enjoyed a significant renaissance over the last twenty-five years as a tool for judicial review of government decisions to alienate natural resources. The analysis most responsible for the doctrine's rebirth, Joseph Sax's 1970 Michigan Law Review article, characterizes the doctrine as a tool for perfecting inadequacies in the political and administrative process that may result in inappropriate discounting of environmental values.

In this Article, Professor William Araiza considers this democracy-reinforcing conception of the doctrine by exploring the analogy between it and the political-process theory of the Equal Protection Clause. This latter theory justifies a searching judicial scrutiny of legislation burdening certain groups on the grounds that prejudice limits those groups' ability to participate fully in the political process. Essentially, Professor Araiza asks whether public trust resources can be meaningfully analogized to such "discrete and insular minorities," for which heightened judicial protection is appropriate. He concludes that while it may be theoretically possible to draw this analogy, a process-justified public trust doctrine nevertheless fails to provide principles limiting that which would otherwise be an extraordinarily broad scope for judicial review. Moreover, environmental protection is a politically powerful rallying cry in contemporary America; when combined with existing mechanisms for channeling that political power into administrative action, this fact undermines the appropriateness of special judicial solicitude for environmental conservation based on alleged defects in the government decision-making process.

Professor Araiza consequently rejects a purely process-justified public trust doctrine and instead considers sources of a substantive political commitment to public trust preservation. He argues that many state constitutions provide this commitment through provisions addressing environmental protection. Professor Araiza concludes that many of these provisions, carefully read, can provide the foundation for a public trust doctrine that seeks not to second-guess government decisions, but that merely attempts to ensure that environmental values are appropriately considered in the decision-making process. This conclusion both gives effect to these provisions, most of which have laid dormant since their enactment, and limits the judicial role in areas in which the need for technical expertise and political accountability make judicial policy making especially inappropriate.

INTRODUCTION

The last twenty-five years have witnessed a remarkable renaissance of the public trust doctrine. That doctrine, traceable to a Roman legal principle governing the public's right to use certain resources as a commons,¹

1. See *infra* Part I.A.

has found new life in American law as a source of judicial authority to supervise and sometimes limit the use of natural resources, usually² favoring resource preservation. The rebirth of the public trust doctrine is directly attributable to the publication of Joseph Sax's seminal 1970 article³ calling attention to the doctrine, finding it already reflected in contemporary American law, and lauding its use as a tool for judicial supervision of resource-allocation decisions made by government.⁴ Since the publication of Sax's article, many courts have relied on the doctrine to impose limits both on the government's ability to alienate natural resources, and on the government's and private owners' ability to use such resources in ways deemed incompatible with the public trust with which the resource was found to be impressed.⁵

While many commentators have applauded this trend and suggested ways to expand the doctrine's scope,⁶ others have not reacted as favorably. Radical critiques have argued that the ascendancy of the public trust doctrine preempted the debate about the future of society's relationship to the

2. The original conception of the doctrine protected the public's ability to use public trust resources for fishing, navigation, and commerce. See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 647 (1986). While modern American courts generally use the doctrine to protect recreational and conservation interests, courts have also relied on its commerce-promoting aim. See, e.g., *Morse v. Oregon Div. of State Lands*, 590 P.2d 709, 711 (Or. 1979) (holding that the use of water resources for airport expansion is consistent with the doctrine); *id.* at 716 (Bryson, J., concurring) (reasoning that airport expansion is consistent with the public trust doctrine because it promotes commerce and possible air "navigation"). Sometimes, however, recreational and preservation uses do not coincide, such as when the choice is between creating or increasing public access to an area that has remained in its natural state. See generally JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* (1980).

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

4. See *id.*

5. See, e.g., *National Audubon Soc'y v. Superior Court*, 658 P.2d 709, 728-29 (Cal. 1983) (reasoning that the public trust doctrine requires a state to consider resource conservation interests when allocating water rights); *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1095 (Idaho 1983) (holding that the public trust doctrine limits a state's authority to alienate public lands); *United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457, 462-63 (N.D. 1976) (noting that the public trust doctrine requires a state to engage in comprehensive water resource planning). For a comprehensive listing of cases employing the public trust doctrine, see Lazarus, *supra* note 2, at 644 n.77.

6. See, e.g., Michael Graf, *Using the Public Trust Doctrine to Achieve Proportionate Reductions of Water Diversions from the Delta*, 13 UCLA J. ENVTL. L. & POL'Y 263, 290-95 (1995); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989); Susan D. Baer, Comment, *The Public Trust Doctrine—A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*, 15 B.C. ENVTL. AFF. L. REV. 385 (1988).

natural world—a debate that some believe was, in 1970, on the verge of producing new and farther-reaching legal and social changes.⁷ Other scholars have suggested that any usefulness the doctrine may have had when Sax's article was published has since expired with the growing public awareness of environmental concerns and the resulting enactment of environmental protection legislation at the state, federal, and international levels.⁸ Commentators have also criticized the doctrine on the grounds that its vagueness and potential scope threaten efficient resource-allocation decision making and involve democratically unaccountable judges in resource-allocation decisions that should be made by more representative branches of government.⁹

This Article considers this latter critique of the public trust doctrine. Specifically, it examines whether the discretion the doctrine bestows on

7. See, e.g., 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, 1220–27 (1991) (arguing that the appearance of the public trust doctrine argument in the early 1970s effectively precluded consideration of earth-centered, Native American-based, and ecological-feminism approaches to environmentalism).

8. See, e.g., Lazarus, *supra* note 2, at 631 (“The last fifteen years [1970–1985] have witnessed a fantastic effort to develop a framework of legal rules reflecting this nation's increased awareness of the adverse impacts of environmental pollution and degradation.”). At the federal level, for example, the 1970s witnessed the enactment of an enormous quantity of federal statutory law seeking to protect the environment. Among the more significant federal environmental statutes enacted or substantially strengthened during the late 1960s and 1970s are the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 (West Supp. 1997), the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692 (1994), the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1994), the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (1994), the Safe Drinking Water Act, *codified at various parts of* 42 U.S.C.A. § 300f–300j (West Supp. 1997), the National Environmental Policy Act, 42 U.S.C. §§ 4321–4370 (1994), the Solid Waste Disposal Act and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6901–6992 (1994), and the Clean Air Act, 42 U.S.C. §§ 7401–7671 (1994).

The 1970s also saw the creation of the Environmental Protection Agency, in 1970. During this period, states also enacted a variety of statutes dealing with pollution prevention and natural resource conservation. See, e.g., Donald A. Brown, *EPA's Resolution of the Conflict Between Cleanup Costs and the Law in Setting Cleanup Standards Under Superfund*, 15 COLUM. J. ENVTL. L. 241, 243–44 (1990) (noting the enactment of state environmental laws in the 1970s and 1980s); Laurie Morissette & Lieutenant Colonel Laurent R. Hourcle, *State Environmental Laws Redefine Substantial and Meaningful Involvement*, 31 A.F. L. REV. 137, 137 (1989) (noting state legislative activity in the hazardous-waste field during the 1980s). Finally, this period witnessed the enactment of a number of international agreements dealing with environmental protection. See, e.g., Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087; Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *opened for signature* Dec. 29, 1972, 26 U.S.T. 2403 (dealing with ocean dumping).

The argument that this heightened legislative interest in environmental protection renders the public trust doctrine outdated is made most cogently by Lazarus, *supra* note 2.

9. See, e.g., Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239 (1992); Lazarus, *supra* note 2, at 710–15.

courts and the “countermajoritarian difficulty”¹⁰ that such discretion implies can be mitigated by conceptualizing the doctrine as analogous to the political-process approach to the Equal Protection Clause.¹¹

This approach is traceable to the now-famous footnote four of the Supreme Court’s opinion in *United States v. Carolene Products*,¹² in which Justice Stone suggested that there remained a place for stringent judicial review of legislation even in the face of the Court’s then-recent retreat in its battle over the New Deal. In Justice Stone’s formulation, the Court retained such a role in four situations: first, when a statute “appears on its face to be within a specific prohibition of the Constitution;”¹³ second, when a statute “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation;”¹⁴ third, in the case of “statutes directed at particular religious . . . or national . . . or racial minorities;”¹⁵ and fourth, in cases of “prejudice against discrete and insular minorities.”¹⁶

Scholars, most notably John Hart Ely, argue that footnote four can be best understood as the post-*Lochner*¹⁷ Court’s attempt to find a role for judicial review within a democracy by focusing on the clearing of channels by which citizens exercise political power.¹⁸ Whether these channels are clogged by laws that directly impede political activity—for example, by restricting expression or voting rights (the second *Carolene* situation)—or that disadvantage particular groups of citizens in ways indicating their de facto disenfranchisement (*Carolene*’s third and fourth situations), scholars such as Ely argue that judicial review of this sort does not conflict with the

10. The phrase is Alexander Bickel’s. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16–23 (1962).

11. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

12. 304 U.S. 144, 152–53 n.4 (1938).

13. *Id.*

14. *Id.*

15. *Id.* (citations omitted).

16. *Id.*

17. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a New York statute mandating maximum working hours for bakers as a violation of due process liberty of contract). *Lochner* has become a shorthand for the Supreme Court’s practice, lasting from the end of the nineteenth century until 1937, of carefully reviewing state and federal social and economic regulations for possible violations of individuals’ freedom to participate in economic life. The Supreme Court’s abandonment and repudiation of this practice is well documented. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 574–81 (2d ed. 1988).

18. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Even scholars who question footnote four’s relevance today accept this reading of its genesis. See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 *HARV. L. REV.* 713, 713 (1985).

idea of democratic government, but in fact reinforces it by ensuring that the democratic process is indeed democratic—that is, open to all.

This process-based theory of equal protection finds distinct echoes in explanations of the modern public trust doctrine. The doctrine, at least in its modern incarnation as explained by Sax, is designed to respond to the problem of resource-allocation decision making skewed by what Sax describes as “perceived imperfections in the legislative and administrative process.”¹⁹ In his article, Sax identifies two sources of such “imperfect” decisions and suggests carefully tailored judicial remedies. The first systemic defect is decision making at an inappropriate level of government, resulting in a lack of consideration of important resource-conservation interests.²⁰ Sax’s discussion makes clear that he considers the problem to be decision making at too local a level, with the result that the more broadly distributed benefits of conserving a public use of the resource are undervalued relative to the (usually economic) benefits of alienating the resource. A classic example is a local government’s decision to allow the development of a wetland that provides benefits (such as flood control and wildlife habitat) for a much broader population. In response to this problem, Sax cites and applauds a line of Wisconsin cases requiring that decisions adversely affecting public trust interests be made at a larger governmental level—for instance, by the state instead of a county or city.²¹

The second process defect Sax discusses is the phenomenon of allocation decisions he characterizes as “low-visibility,” such as those made by an administrative agency or by means of a governmental grant of a land title to a private party. According to Sax, the relative invisibility of such decisions means that they do not attract the notoriety necessary to inform and energize the general public, whose interests these decisions may harm. To illustrate the point, Sax relies primarily on a series of Massachusetts cases dealing with decisions by state agencies to transfer control of a public trust resource to either a private party or another governmental agency desiring the resource for a non-public trust use.²² As with the Wisconsin cases, the Massachusetts courts did not flatly prohibit the proposed action; instead, they required explicit legislative authorization for the agency to make the transfer.²³ Sax explains these cases in process terms, arguing that the requirement of express legislative authorization would put the people’s

19. Sax, *supra* note 3, at 509.

20. See *id.* at 521–23.

21. See *id.* at 509–23.

22. See *id.* at 491–502.

23. See, e.g., *Robbins v. Department of Pub. Works*, 244 N.E.2d 577, 580 (Mass. 1969).

representatives on notice of the public trust implications of such a transfer, with the result that the beneficiaries of the trust—the people—could exert political pressure to safeguard the resource.²⁴

Sax's description of these two sets of case law suggests a parallel between them and the political-process theory of the Equal Protection Clause. Just as these types of public trust cases reflect judicial concern with governmental action taken without appropriate regard to public trust interests, so too the doctrine of strict scrutiny attempts to compensate for defects in the political process that result in disfavored groups being disadvantaged without good reason. However, it should be noted, even at this introductory point, that there is an important difference between the two doctrines—namely, the type of remedy. The public trust doctrine reflected in Sax's article attempts to redress a process *defect* through a process *remedy*—for example, the requirement of explicit legislative authorization for decisions impairing public trust resources. By contrast, equal protection doctrine normally attempts to guard the integrity of the political process through the *substantive* remedy of invalidation of laws that do not meet the strict scrutiny standard. Nevertheless, the resemblance between the public trust doctrine and Ely's vision of the Equal Protection Clause remains striking, if so far only at a distance.

This resemblance raises the question of whether the analogy can be taken further. Specifically, if both the public trust doctrine and process-based equal protection theory respond to the same concern about the legitimacy of judicial review, and if both do so by attempting to present judicial review as representation-reinforcing, as opposed to representation-defeating, can the former be legitimized by the same rationale underlying the latter? Or are the differences between the two doctrines simply too great for one to give meaningful insight into the other? Moreover, if a parallel does exist, do problems inherent in equal protection process theory also infect the public trust doctrine? Finally, if equal protection theory fails in some way to provide a basis for special judicial solicitude for public trust resources, is there any other place to look for such a justification? These are the questions this Article attempts to answer.

Part I of the Article provides the necessary background. It begins with a brief history of the public trust doctrine and then reviews the current state of the doctrine in American courts. This review focuses on two particular issues that have been the focus of much of the current criticism of the doctrine: the expansion of the types of resources that have come under

24. Sax also mentions California cases as illustrative of this point. See Sax, *supra* note 3, at 524–45.

the doctrine's protection, and the type of review courts perform over the decisions of other governmental branches. In brief, critics of the modern public trust doctrine argue that the scope of resources coming under its protection has expanded beyond all relation to the doctrine's historical focus on water-based resources, and that judicial review under the doctrine has usurped the role appropriately played by the political branches of government. Part I closes by reviewing these criticisms, thus setting the stage for the examination of whether process-based equal protection theory may help to answer them.

Part II of the Article continues the theme of critiques of judicial review, but discusses those critiques in the context of equal protection jurisprudence. It begins by examining the theory of judicial review implicit in footnote four. It pays special attention to Ely's development of that theory in his book *Democracy and Distrust*.²⁵ Specifically, Part II examines how process-based equal protection theory deals with the three questions most prominently mentioned in critiques of the public trust doctrine: first, how can judicial review of legislation be justified in a democracy? (the "countermajoritarian problem"); second, how should a court decide which groups deserve heightened judicial solicitude? (the "suspect class problem"); and, finally, how should the suspect class analysis change when a previously suspect class begins to become the beneficiary, rather than the victim, of legislation? (the "political success problem").²⁶

Part II first discusses the countermajoritarian problem. That problem is easily answered by process theorists who argue that process-justified review in fact reinforces democracy by "clearing the channels of political change" or "facilitating the representation of minorities."²⁷ But that justification highlights a major difference between the situation described by process theorists and the public trust context: while process-based theory assumes the existence of humans, or human groups, the public trust context, as conceptualized in this Article, deals with the public trust resources

25. ELY, *supra* note 18.

26. The "political success problem" also speaks, if indirectly, to commentators' suggestions that the public trust doctrine may have outlived its usefulness in light of the growing body of statutory environmental protection. See *supra* note 8 and accompanying text.

It is important to note at this point that this Article limits its focus to governmental decision making at the administrative level, rather than at the legislative level. Because most government decisions that impair a particular trust resource are made at the administrative level, the focus on administrative action allows analysis of most trust-impairing decisions while avoiding the extra complexities that arise when contemplating judicial review of legislative enactments.

27. These phrases are taken from the titles of chapters 5 and 6, respectively, of *Democracy and Distrust*—the two chapters that present Ely's process-justified theory of judicial review. See ELY, *supra* note 18.

themselves. At one level, this difference does not pose insuperable barriers: human representatives can legitimately provide stand-in representation for such resources, consistent with constitutional jurisprudence in other fields in which process defect claims have been rejected based on such virtual representation.

This anthropomorphism issue does, however, present a more serious problem when considering the second question: the criteria for identifying a group as a suspect class. The problem arises because political-process theory assumes human participation in a political process (or, if there is a process defect, an impediment to such participation). The traditional indicia of suspect class status—discreteness, insularity, and a history of discrimination—simply do not apply to public trust resources. How can public trust resources be thought of as a suspect class? A possible answer to this question is based on Ely's idea that the suspect class inquiry turns in large part on the "empathy" that a legislature may feel for a class. Ely suggests that such empathy reduces the likelihood that laws will be based on inaccurate, derogatory stereotypes (which, in turn, suggest the intentional discrimination Ely finds to be the fundamental target of the equal protection guarantee). The concept of empathy can be transferred, while retaining its basic insight, into governmental (and especially administrative) decisions affecting public trust resources. By examining the structure by which government makes such decisions, courts can determine whether there is "bureaucratic empathy" for public trust resources—that is, whether the decision-making process is structured so as to ensure governmental consideration of the value of resources as public trust property.

The problem with this harmonization of classic process theory and its public trust analogue is that it proves too much: under this theory, courts would be justified whenever a supposed defect in the political or administrative process caused the decisionmaker systematically to undervalue a particular consideration (for example, trust resource conservation). Such a conclusion is at least troubling, as it implies a revolutionary change in the relationship between courts and the other branches of government, to the detriment of politically accountable and technically expert branches and the aggrandizement of nonelected and technically inexperienced courts. Is there something unique about public trust resources that justifies special judicial solicitude for them while not simultaneously justifying searching judicial review of all administrative action?

Part II concludes that process theory provides no good answer to this last question. In a well-functioning political process, minorities *should* lose

a significant number of battles; conversely, occasional success clearly should not mean that a minority is no longer systematically disadvantaged and thus not eligible for process-justified protection. The problem of political success is especially relevant in the public trust context, in which the environment, if not a sure political winner, is at least potent enough to command the attention of politicians at all levels of government. The lack of a satisfying answer to this "political success problem" reinforces the conclusion that stringent judicial review of governmental action affecting public trust resources cannot be a response to a pure process defect. Instead, such stringent judicial review must result from a substantive political commitment to public trust resource protection.

Part III addresses the concern about substantive values. It distills the principal conclusion reached above—namely, that justifying judicial scrutiny of trust-impairing decisions on a general idea that government often fails adequately to consider such resources would amount to a radical change in judicial review of legislative and administrative action. Moreover, absent such a substantive commitment to environmental protection, this change lacks an obvious limiting principle. Simply put, if the justification for heightened scrutiny is political-process failure, then an enormously broad range of governmental action would be susceptible to such scrutiny, depending on courts' conclusions that some vague test of process failure had been satisfied.

In response to this concern, Part III considers whether Carol Rose's idea of "inherently public property" provides a justification for this judicial review, by identifying a principled basis on which courts could exercise this review.²⁸ Rose examines the fact that nineteenth-century American courts embraced doctrines under which certain property was deemed owned by the public, not as government property but as held by the public at large. Rose explains that courts' willingness to embrace such doctrines, even during the nineteenth-century exaltation of private property, was based on an understanding that certain property was most valuable as such inherently public property. Her analysis suggests that such judicial calculation might serve as the substantive basis for a doctrine giving special protection for public trust resources today. However, even Rose's idea remains vulnerable to the charge that it provides a blank check for judicial scrutiny of governmental action based on vague and manipulable criteria. For there to be a legitimate, discrete justification for judicial review based on the proc-

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

ess analysis outlined in this Article, some substantive commitment to trust resource preservation must be found.

Part IV suggests that this commitment can be found in state constitutional provisions dealing with the environment. These provisions have been plagued by courts' hesitation to construe them as imposing limits on governmental action, largely due to concern about both the vagueness of the provisions and judicial competence to evaluate difficult social policy decisions affecting the environment. By construing these constitutional provisions as mechanisms for responding to a process-based problem, and by deploying against that problem a process-based remedy requiring government to consider environmental interests when making environmental decisions, this Article provides content to these provisions that is analytically coherent and appropriate for judicial enforcement, and that gives effect to the unquestionable, if vaguely expressed, will of the polity that government accord a high value to public trust conservation.

I. AN INTRODUCTION TO THE PUBLIC TRUST DOCTRINE

A. The Public Trust Doctrine from Justinian to Sax²⁹

The modern public trust doctrine traces its origins to Byzantine law—specifically, the Justinian Code's statement that "By natural law, these things are common property of all: air, running water, the sea, and with it the shores of the sea."³⁰ It is unclear whether this principle represented actual Byzantine practice or merely an aspiration.³¹ Regardless of its actual legal force in the Byzantine Empire, the principle eventually found its way into the codified or customary law of most medieval European legal systems,³² including England's.³³

29. This Article provides only the barest outline of the early history of the public trust doctrine. For more in-depth treatments, see MOLLY SELVIN, *THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789–1920* (1987); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 *YALE L.J.* 762, 763–68 (1970) (discussing the Roman-law origins of doctrine).

30. *THE INSTITUTES OF JUSTINIAN* bk. 2, tit. 1, pts. 1–6, at 65 (J. Thomas trans., 1975).

31. See, e.g., Lazarus, *supra* note 2, at 633–34 (noting that the statement probably represented Justinian's idealization of a legal regime).

32. See, e.g., *id.* (noting that the principle was reflected in medieval Spanish codes and the customary law of most European legal systems); see also Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 *U.C. DAVIS L. REV.* 185, 189 (1980) (observing that the principle was reflected in medieval French customary law).

33. See, e.g., Lazarus, *supra* note 2, at 635 (commenting that the principle was reflected in Bracton's thirteenth-century legal commentary).

From England, the public trust principle became part of American common law. As early as 1821, the New Jersey Supreme Court, in *Arnold v. Mundy*,³⁴ used the term "public trust" in the course of stating a rule limiting a private party's capacity to own water-related resources. However, the unquestionable fountainhead of the American public trust doctrine was the Supreme Court's 1892 decision in *Illinois Central Railroad Co. v. Illinois*.³⁵ That case concerned an attempt by the Illinois legislature to rescind its earlier grant to the railroad of most of the land along the Chicago waterfront. The Court ruled in favor of the state, concluding that the original grant was void because the state did not have the power to alienate property in which the public had a trust interest for purposes such as navigation and fishing. The doctrinal basis for this conclusion is unclear, as the Court's opinion cited no authority for its conclusion.³⁶ Decades later, the Court described the case as involving merely a matter of Illinois law,³⁷ a strange conclusion since if that had been the case, the state legislature's grant presumably would have superseded any common law prohibitions on such transfers.³⁸

Despite the vagueness of the support for the Court's holding, the *Illinois Central* decision became the basis for state court³⁹ decisions employing the public trust doctrine. In the decades following *Illinois Central*, a

34. 6 N.J.L. 1, 71-78 (1821) (restricting a private party's ability to own oyster beds submerged in river).

35. 146 U.S. 387 (1892).

36. See, e.g., Rose, *supra* note 28, at 737 (describing this part of the opinion as "remarkably free of supporting authority").

37. See *Appleby v. City of New York*, 271 U.S. 364, 395 (1926).

38. The Illinois legislature lacked the power to legislate in a way that violated the state constitution, but the *Illinois Central* Court gave no indication that its decision was based on the Illinois Constitution. Cf. Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 877 (1996) (describing the public trust doctrine as "a curious and unique hybrid, borne purely of customary law but constitutional in character").

39. There is great uncertainty about whether the public trust doctrine is based on state or federal law. Compare *Appleby*, 271 U.S. at 395 (stating that the *Illinois Central* decision was based on state law), and Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521, 548-51 (1992) (stating that the public trust doctrine is primarily a state-law doctrine), with Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 425 & n.1 (1989) (noting that the public trust "doctrine" comprises 50 state-law doctrines and a federal-law doctrine), and Michael L. Wolz, Comment, *Applications of the Public Trust Doctrine to the Protection and Preservation of Wetlands: Can It Fill the Statutory Gaps?*, 6 BYU J. PUB. L. 475, 483-84 (1992) (explaining that it is unclear whether the public trust doctrine is based on federal or state law). Regardless of its basis, state courts have been the most active in enforcing the doctrine. See Lazarus, *supra* note 2, at 644 n.77 (listing cases).

number of courts, especially in Wisconsin⁴⁰ and Florida,⁴¹ held that the public enjoyed rights in various types of waterways, which served to limit the legislature's ability to alienate those resources. The Wisconsin decisions established especially strict limitations on the legislature's police power. One opinion, for example, questioned the state's police power to authorize the conversion of a stream into agricultural fields, regardless of the benefits the public might thereby enjoy.⁴² Even the cases that did not go this far nevertheless established the basic principle that the public holds rights in certain water resources that limit the power of legislative representatives to alienate such resources. These cases provided the background for Sax's 1970 exposition and advocacy of the doctrine in the service of not just fishing and navigation, but an entirely new objective: environmental preservation.⁴³

B. Sax's Vision of the Public Trust Doctrine

Sax's 1970 article on the public trust doctrine⁴⁴ is generally considered—by both detractors⁴⁵ and admirers⁴⁶—to be the catalyst behind the doctrine's modern revival. His article, however, is less a call for an entirely new way of thinking about the public trust doctrine as it is an attempt to find common themes in already-existing doctrines courts had developed. Sax focuses primarily on existing case law in an attempt to show that courts have played and could continue to play a legitimate role in natural resource decision making. Sax views that role fundamentally as one of process, not

40. See, e.g., *City of Milwaukee v. State*, 214 N.W. 820 (Wis. 1927); *In re Crawford County Levee & Drainage Dist. No. 1*, 196 N.W. 874 (Wis. 1924); *In re Trempealeau Drainage Dist.*, 131 N.W. 838 (Wis. 1911); *Priewe v. Wisconsin State Land & Improvement Co.*, 67 N.W. 918 (Wis. 1896).

41. See, e.g., *Adams v. Elliott*, 174 So. 731 (Fla. 1937); *Perky Properties, Inc. v. Felton*, 151 So. 892 (Fla. 1934); *Trumbull v. McIntosh*, 138 So. 34 (Fla. 1931); *Freed v. Miami Beach Pier Corp.*, 112 So. 841 (Fla. 1927); *Martin v. Busch*, 112 So. 274 (Fla. 1927); *Apalachicola Land & Dev. Co. v. McRae*, 98 So. 505 (Fla. 1923); *State ex rel. Ellis v. Gerbing*, 47 So. 353 (Fla. 1908); *State v. Black River Phosphate Co.*, 13 So. 640 (Fla. 1893).

42. See *Crawford County*, 196 N.W. at 878 (“[I]t does not lie within the power . . . of the state to change navigable waters into agricultural fields, no matter how great the public benefits might be in favor of the latter.”).

43. In addition to fishing and navigation, courts as early as the late-nineteenth century had begun to recognize recreation as a public trust use. See *Rose*, *supra* note 28, at 757 n.225.

44. See *Sax*, *supra* note 3.

45. See, e.g., *Delgado*, *supra* note 7, at 1211; *Lazarus*, *supra* note 2, at 632 (describing Sax's article as “seminal”).

46. See, e.g., *Baer*, *supra* note 6, at 392 (“The public trust doctrine languished somewhat in the early twentieth century. It was not until Joseph Sax's seminal and oft-quoted 1970 article that the doctrine was actively incorporated into modern jurisprudence.”).

substance: "public trust law," he says, "is not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process."⁴⁷ In the next sentence, Sax makes his vision even more explicit: "the public trust concept is, more than anything else, a medium for democratization."⁴⁸

Sax supports his claim by discussing existing case law, primarily from Massachusetts, Wisconsin, and California. According to Sax, the public trust cases in these states reflect different ways in which the doctrine can correct "imperfections" in governmental natural resource decision making. Sax first discusses a line of Massachusetts cases from the 1950s and 1960s dealing with attempts by state agencies, acting under extremely broad statutory mandates, either to alienate a public trust resource to private use or to convert it from a public preservation use to another public use (usually, a highway) that did not further preservation goals. In these situations, Massachusetts courts adopted a principle requiring explicit legislative authorization before state agencies could so proceed. In one case, in which the agency's statutory authorization was quite explicit, the court went so far as to require the legislature to insert in the authorizing statute a recital that it was aware of the existing public use of the land the agency was trying to convert to a non-public trust purpose.⁴⁹

Sax finds in these cases a judicial concern for "low visibility decision making,"⁵⁰ which he characterizes as a situation in which important resource-allocation decisions are made without a great deal of publicity or official notice. Without such notice, the public is not alerted and thus its interests are often not heard or considered.⁵¹ With the problem so conceived, the solution embraced by the Massachusetts courts logically follows: require the legislature to give explicit approval to public trust-impairing projects, even to the point of requiring the legislature explicitly to acknowledge the existence of the threatened trust use. Compliance with this requirement will, in turn, place the public on notice of the threat to its interests; if it values the resource highly enough, it will exert political pressure to preserve the resource.

47. Sax, *supra* note 3, at 509; *see also id.* at 521 ("The 'public trust' has no life of its own and no intrinsic content. It is no more—and no less—than a name courts give to their concerns about the insufficiencies of the democratic process.").

48. *Id.* at 509.

49. *See Robbins v. Department of Pub. Works*, 244 N.E.2d 577, 580 (Mass. 1969).

50. Sax, *supra* note 3, at 498.

51. *See id.* at 496–98.

Sax next discusses several Wisconsin cases. In most of these cases, state transfers of public land to a private party were challenged on the ground that the land was impressed with a public trust use, which the proposed grantee would impair or destroy. Wisconsin courts, in a series of cases starting in 1896, refused to accord broad deference either to the state agency's, or even the state legislature's, recital of a public purpose underlying the grant. For example, in the first of these cases, *Priewe v. Wisconsin State Land and Improvement Co.*,⁵² the legislature attempted to grant a private party title to a lake bed, along with permission to drain the lake. The court refused to allow the transfer, however, holding that the statute was invalid because it was for "private purposes, and for the sole benefit of private parties."⁵³ The court reached this conclusion even in the face of a statutory finding that drainage was required for public health.⁵⁴ In another case of this type, the court suggested that there might be an absolute prohibition on legislative alienation of certain public resources. In *In re Crawford County Levee & Drainage District No. 1*,⁵⁵ the court refused to allow the implementation of a state commission's drainage plan, focusing on the conclusion of a commission report, which stated that "public rights of trapping, hunting, fishing, and navigation will, by no means, be wholly destroyed."⁵⁶ The court deduced from the report's use of the word "wholly" that some trapping, hunting, fishing, and/or navigation rights would be destroyed and refused to allow that result, holding that "it does not lie within the power of . . . the state to change navigable waters into agricultural fields, no matter how great the public benefits might be in favor of the latter."⁵⁷ From these cases, and others that employ a somewhat more deferential attitude toward legislative decisions,⁵⁸ Sax distills the following conclusion:

[The Wisconsin Supreme Court's opinions], sensitively read, can be taken as a form of notice to the legislature and the agencies that when the public interest of a project is unclear, its proponents will have the burden of justifying the project and will not be allowed to rely on traditional presumptions of legislative propriety or administrative discretion. In adopting this position, the court does not

52. 67 N.W. 918 (Wis. 1896).

53. *Id.* at 922.

54. *See id.*

55. 196 N.W. 874 (Wis. 1924).

56. *Id.* at 875.

57. *Id.* at 878.

58. According to Sax, the Wisconsin courts ultimately developed a five-factor test for judging public trust challenges to government land-use decisions. *See Sax, supra* note 3, at 517.

seek a confrontation with the legislature nor does it attempt to substitute itself as an ultimate judge of the public good. Rather, it tries to identify and correct those situations in which it is most likely that there has been an inequality of access to, and influence with, decision makers so that there is a grave danger that the democratic processes are not working effectively.⁵⁹

Thus, Sax attempts to square the court's substantive review with his own process-based vision of the public trust doctrine as a democratizing tool. Closer to this process-based vision are two more recent Wisconsin cases⁶⁰ in which the court, rather than reviewing the substance of the state's action, instead required that the decision be made at a different level of government. In these cases, the court denied local government units from taking action affecting water-related resources such as lakes or rivers. While the opinions themselves do not make the process rationale completely clear,⁶¹ Sax interprets them as reflecting a concern that allowing resource-impairing decisions to be made at an inappropriately local level would allow localized interests to make decisions affecting resources in which the larger public—in these cases, the entire state—had an interest. These decisions did not merely represent judicially crafted limits on local government; in one case, for example, the court held unconstitutional the legislature's attempt to delegate such decision-making power to local governments.⁶² Regardless of the level of government thereby restrained, the point remains that Sax views these cases as responding to perceived defects in the political process. Thus, for instance, he characterized the non-delegation opinion as "requir[ing] the legislature to respond to a statewide constituency—another form of judicially imposed democratization."⁶³

The final set of cases Sax considers in detail arose in California. The California cases do not fit into categories as tidy as those describing Massachusetts and Wisconsin case law. Nevertheless, his discussion sug-

59. *Id.* at 514.

60. See *City of Madison v. Tolzmann*, 97 N.W.2d 513 (Wis. 1959); *Muench v. Public Serv. Comm'n*, 53 N.W.2d 514, *reh'g granted*, 55 N.W.2d 40 (Wis. 1952); see also Sax, *supra* note 3, at 521–23 (discussing these two cases).

61. The closest any of these opinions seems to come to discussing such a rationale is the court's second opinion in *Muench*, in which the court expressed concern that the delegation to a local government unit of the power to impair a trust resource would make it impossible for the state to carry out its duty to protect the public trust. See *Muench*, 55 N.W.2d at 46.

62. See *Muench*, 53 N.W.2d at 514.

63. Sax, *supra* note 3, at 523; see also *id.* at 531–34 (discussing an analogous situation in California and again concluding that a statewide entity should make decisions affecting public trust resources in order to guard against "the potential disjunction between the perceived benefit to the local entity and the total impact of such local choices on the community of [public trust resource] users as a whole").

gests that, as of 1970,⁶⁴ California law limited the ability of both private and government landowners to use public trust property inconsistently with public trust purposes. For example, the legislature could authorize a grantee of state tidelands (whether a private party⁶⁵ or a municipality⁶⁶) to develop the property only in the aid of a use, such as commerce, consistent with the public trust. At the level of the state's own use of such resources, Sax concludes that California courts have generally upheld proposed state uses of tidelands if the use has a colorable water-related purpose.⁶⁷ Sax concludes that California courts might be willing to impose limits on the state's own power to impair public trust resources.⁶⁸ He views these limited restrictions on the state's capacity to act as both opening the door for litigants to press for the process-based approach he associates with the Massachusetts and Wisconsin decisions,⁶⁹ as well as sending a warning signal to the legislature not to assume complete judicial acquiescence in such situations.⁷⁰

C. The Public Trust Doctrine Today

There is no question but that the public trust doctrine has blossomed into an important doctrine in natural resource law. Since 1970, courts from at least twenty-five American jurisdictions have embraced some form of the doctrine.⁷¹ Paralleling this widespread recognition has been a broadening of the doctrine to include resources not previously within its scope. The original Byzantine version of the doctrine concerned mainly water-based resources,⁷² although it also included air as a common property.⁷³ Since 1970, however, the doctrine has been invoked to support claims for preservation of any number of natural areas and man-made

64. Since the publication of Sax's article, the California Supreme Court has embraced the public trust doctrine much more explicitly. See *National Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

65. See Sax, *supra* note 3, at 528-29.

66. See *id.* at 534-38.

67. See, e.g., *People v. City of Long Beach*, 338 P.2d 177 (Cal. 1959) (upholding a lease of state-owned land for the construction of an armed-services YMCA on the grounds that the facility would aid sailors).

68. See Sax, *supra* note 3, at 542-44.

69. See *id.* at 544.

70. See *id.* at 543-44.

71. See Lazarus, *supra* note 2, at 644 n.77 (listing numerous state cases involving the public trust doctrine).

72. See *supra* note 30.

73. But see *Evans v. City of Johnstown*, 410 N.Y.S.2d 199, 207 (N.Y. Sup. Ct. 1978) (holding that the public trust does not extend to air over the city).

items, including parks,⁷⁴ historical areas,⁷⁵ cemeteries,⁷⁶ archeological sites⁷⁷ and remains,⁷⁸ and works of art.⁷⁹ While not all of these claims have been accepted,⁸⁰ courts are clearly receptive to requests to extend the doctrine beyond its traditional water-related focus. This expansion is a logical outgrowth of the willingness of late nineteenth-century courts to extend the concept of public trust purposes to include, for the first time, recreation.⁸¹ Given that opening, the recent expansion of the public trust doctrine to protect a wide variety of natural, man-made, and cultural resources follows relatively easily, leading to the important role the doctrine plays today and suggesting the basis of an even more expanded role for the doctrine, as called for by many commentators.⁸²

This expansion in the doctrine's scope has troubled its critics,⁸³ and even its defenders,⁸⁴ in light of the potentially intrusive role the doctrine allows for courts in natural resource decision making. Such expansion only

74. See, e.g., *Paepcke v. Public Bldg. Comm'n*, 263 N.E.2d 11 (Ill. 1970); *Wade v. Kramer*, 459 N.E.2d 1025 (Ill. App. Ct. 1984).

75. See, e.g., *Wisconsin's Envtl. Decade, Inc. v. Wisconsin Dep't of Natural Resources*, 340 N.W.2d 722 (Wis. 1983).

76. See, e.g., *Washington Metro. Transit Auth. v. Vestry of Rock Creek Parish*, 514 F.2d 1350 (D.C. Cir. 1975).

77. See, e.g., *San Diego County Archaeological Soc'y, Inc. v. Compadres*, 146 Cal. Rptr. 786 (Ct. App. 1978) (holding that the public trust doctrine cannot be extended to cover archeological remains located on private property).

78. See, e.g., *Wade*, 459 N.E.2d at 1025.

79. See Ellen R. Porges, Note, *Protecting the Public Interest in Art*, 91 YALE L.J. 121, 122 (1981) (suggesting a public trust basis for preserving the integrity of art work).

80. Some courts have refused to accept an unlimited expansion of the classes of resources protectable under the doctrine. See, e.g., *Compadres*, 146 Cal. Rptr. at 788; *Mamolella v. First Bank*, 423 N.E.2d 204, 206-07 (Ill. App. Ct. 1981) (holding that the public trust doctrine did not extend to cover a junkyard alleyway).

81. See, e.g., *Grand Rapids v. Powers*, 50 N.W. 661 (Mich. 1891); *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893); *Diana Shooting Club v. Husting*, 145 N.W. 816 (Wis. 1914); see also Rose, *supra* note 28, at 754-58 (discussing the nineteenth-century cases concerning the public trust character of hunting and fishing uses).

82. See, e.g., Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559 (1995); Sax, *supra* note 32 (arguing that the public trust doctrine should not be limited to a traditional set of water-based resources, but instead should be viewed as protecting reasonable social expectations against destabilizing change); Baer, *supra* note 6; Donna Sheehan Fitzgerald, Note, *Extending Public Trust Duties to Vermont's Agencies: A Logical Interpretation of the Common Law Public Trust Doctrine*, 19 VT. L. REV. 509 (1995); Porges, *supra* note 79.

83. See, e.g., Cohen, *supra* note 9, at 256-63 (criticizing the expansion of the public trust doctrine beyond water-related resources).

84. See, e.g., Thompson, *supra* note 38, at 907-14 (defending the doctrine but arguing against its expansion to non-water-related resources).

exacerbates what these commentators consider to be problems associated with the public trust doctrine, such as its undemocratic nature,⁸⁵ the latitude it gives for technically noncompetent courts to second-guess administrative decisions on highly complex matters,⁸⁶ and the danger that courts will overvalue public trust uses at the expense of private property rights.⁸⁷ As these problems grow, the common-law basis for the doctrine becomes less compelling as it leaves behind its historical basis in water-related resources.⁸⁸

II. THE PUBLIC TRUST DOCTRINE AND THE EQUAL PROTECTION CLAUSE

A. Introduction

As noted above, the growth of the public trust doctrine has not gone uncriticized. Commentators have attacked courts' expanded use of the doctrine to protect resources not originally within the doctrine's ambit,⁸⁹ as well as its use as a check on governmental, as opposed to private, land-use decisions.⁹⁰ Commentators have also questioned the continued need for the doctrine in a society in which environmental concerns clearly have the attention of the public and the legislature.⁹¹ Especially in light of the public's interest in environmental issues, and politicians' awareness of that

85. See, e.g., Cohen, *supra* note 9, at 252 (arguing that in keeping with the English version of the doctrine, which limited prerogatives only of the King, not of Parliament, the republican form of American government should not logically be bound by the doctrine); Thompson, *supra* note 38, at 912–13 (noting some risk in the “quasi-constitutional character of the public trust doctrine,” which limits legislative authority to override judicial miscalculations).

86. See, e.g., Lazarus, *supra* note 2, at 688 (“[T]he nature of today’s environmental issues are often so exceedingly complex that the judicial role must necessarily be limited and reliance on administrative agencies must be great.”).

87. See, e.g., Thompson, *supra* note 38, at 911–12.

88. See, e.g., Cohen, *supra* note 9, at 256–57 (arguing that an expansion in the doctrine’s scope “cuts the public trust doctrine off from its primary normative root”).

89. See, e.g., *id.* at 256.

One rather significant change in the [public trust] doctrine over time has been its journey from the sea, up navigable streams, to unnavigable streams, its leap to inland ponds, and then like our amphibian ancestors its eventual emergence from the water and march across the land. This change in the doctrine is fundamental, radical, and illegitimate.

Id.; see also Lazarus, *supra* note 2, at 710–12.

90. See Cohen, *supra* note 9, at 260–62.

91. See generally *id.* at 254–56 (arguing that increased public awareness of environmental issues since 1970 obviates the need for the doctrine); Lazarus, *supra* note 2, at 643–47 (same).

interest, the doctrine has been criticized as a backward-looking, antidemocratic vestige whose time, if it ever existed, has passed.⁹²

These critiques boil down to the argument that today the public trust doctrine is both unnecessary, in light of political developments, and affirmatively undesirable, given its antidemocratic nature. This argument finds a distinct, if distant, echo in the debate over the Equal Protection Clause of the federal Constitution. As with the public trust doctrine, judicial review under the Equal Protection Clause has been labeled antidemocratic, even more so than judicial review under other constitutional provisions that purportedly provide more explicit rules and correspondingly less leeway for government by judicial policy preference.⁹³ The parallel between equal protection and the public trust doctrine becomes even closer when one considers that scholars' efforts to answer the antidemocratic charge have in both cases centered on attempts to cast judicial review in terms of democracy-perfecting, instead of democracy-defeating. In the public trust context, this attempt is best represented by Sax himself, whose article repeatedly argues that the doctrine should be viewed as a means of perfecting democracy by ensuring that public trust considerations be represented in the decision-making process. In the equal protection context, the democracy-enhancing role of judicial review is best suggested by John Hart Ely in *Democracy and Distrust*.⁹⁴ Ely explains and justifies judicial review under the Equal Protection Clause by conceiving of such review as protecting the democratic process. According to Ely, such judicial review ensures the ability of all groups to participate in the democratic process by guarding against the threats posed by both formal constraints on such participation⁹⁵ and de facto constraints in the form of majority prejudice that hinders effective political participation.⁹⁶

This Article examines whether and to what extent Ely's process-based theory of the Equal Protection Clause provides insights useful to justification of the public trust doctrine. Specifically, this inquiry will attempt to determine whether Ely's process theory resolves three issues prominent in discussions of the public trust doctrine: first, can the doctrine be justified against the charge that it constitutes antidemocratic judicial interference in matters properly left to the political branches of government?; second,

92. See, e.g., Cohen, *supra* note 9, at 251-53; Lazarus, *supra* note 2, at 691.

93. See, e.g., ELY, *supra* note 18, at 30-32 (concluding that the text and enactment history of the Equal Protection Clause do not limit what is otherwise a sweeping mandate to judges to evaluate the validity of legislative classifications).

94. *Id.*

95. See *id.* ch. 5.

96. See *id.* ch. 6.

can coherent rules be developed regarding the scope of the resources protected by the doctrine?; and third, how should the doctrine be affected by the unquestioned increase in governmental concern for the environment?

Before examining these links, however, it is necessary to outline the debate over equal protection jurisprudence, and Ely's contribution to that debate.

B. Ely and the Equal Protection Clause⁹⁷

Ely bases his vision of the Equal Protection Clause on the well-known footnote four of the Supreme Court's opinion in *Carolene Products*. He identifies two broad situations in which footnote four suggests that defects in the political process may justify stringent judicial review. The first is marked by laws that impede activities, such as speech, assembly, and voting, that directly relate to political action. Judicial review of such laws clearly reinforces democratic rule by ensuring that the political process is truly open to all. In Ely's words, judicial review of such governmental action "clear[s] the channels of political change."⁹⁸ The second situation is marked by governmental action that does not restrict politically relevant activity, but instead imposes substantive burdens on discrete and insular minorities. In Ely's view, such actions require close judicial scrutiny in order to determine whether the legislature was motivated by prejudice against the burdened group.⁹⁹ Ely defines "prejudice," and explains when a law should be considered a result of prejudice and not simply the burdened group's political weakness, as an unwillingness to give "proper" consideration to the arguments or the political power wielded by the burdened minority due to some sort of irrational bias against that minority.¹⁰⁰

If the public trust doctrine is analogous to any part of Ely's equal protection theory, the analogy is to this latter, minority-burdening situation. The public trust doctrine does not normally address situations analogous to Ely's first situation—that is, situations in which government enacts laws that have the effect of denying trust resources the chance to be "heard" in

97. This section provides only the most skeletal explanation of Ely's theory. For more detailed discussions, see the sources cited at note 212 *infra*, critiquing Ely's theory. For an explanation of his theory from a more sympathetic perspective, see Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991).

98. ELY, *supra* note 18, at 105 (title to Chapter 5).

99. See *id.* ch. 6.

100. See *id.* at 152 (stating that a necessary element of the suspect class analysis is "that the minority in question be one that is barred from the pluralist's bazaar, and thus keeps finding itself on the wrong end of the legislature's classifications, for reasons that are in some sense discreditable").

the decision-making process. Rather, the idea behind the doctrine, at least as explained by commentators such as Sax, is that government often makes resource-allocation decisions that substantively burden public trust interests without giving appropriate consideration to those interests. Thus, this Article will examine only this second aspect of Ely's theory.

Ely's justification for special judicial solicitude for discrete and insular minorities traces ultimately to the value that there be no discrimination for its own sake—that is, no discrimination solely for the sake of disadvantaging members of a particular group.¹⁰¹ In discussing the means for making this determination, Ely begins by noting the difficulty of uncovering legislative motivations,¹⁰² and he suggests that the now-familiar suspect class-tight fit analysis serves as a proxy for determining legislative motives.¹⁰³ In other words, the requirement that certain laws be justified by a close fit to a compelling governmental purpose reveals the true character of acts that are motivated merely by a desire to harm certain groups, because, according to Ely, it will be impossible to meet this strict scrutiny by reference to a more legitimate motive.¹⁰⁴

For present purposes, the important component of Ely's analysis concerns the identification of the groups that should be the beneficiaries of such strict scrutiny. This is a necessary part of his analysis; since all legislation burdens members of particular groups, without a theory limiting the reach of strict scrutiny courts could require that all legislation meet this stringent standard. Ely starts his analysis of this issue with an institutional competence point: the idea, he suggests, is to identify the groups that the political branches of government have no interest in protecting, which will then become the groups the courts are the best equipped to protect.¹⁰⁵ This establishes his embrace of *Carolene's* statement that laws burdening discrete and insular minorities should be subject to special judicial scrutiny, since prejudice against such groups makes it impossible for the disliked minority to participate fully in, and thus protect its interests through, the political process.¹⁰⁶ Thus, Ely's reading of *Carolene* suggests that strict scrutiny be applied only in cases in which the parties burdened by the statute have not had the chance to participate in the political process producing the statute because of some larger prejudice against that group.

101. See *id.* at 153.

102. See *id.* at 136–45.

103. See *id.* at 145–48.

104. See *id.* at 146.

105. See *id.* at 151.

106. See *id.* at 152–53.

The remaining task for Ely's theory, then, is to develop a means of identifying such "suspect classes." Ely argues that courts should be especially concerned about legislative stereotypes that are self-serving, not just in the material sense, but also in the psychic sense—that is, stereotypes that tend to flatter the members of the groups that comprise the legislature.¹⁰⁷ It is here that Ely begins to justify the familiar rule that suspect class status turns on a group's discreteness and insularity, the history of discrimination against it, and the immutability of its identifying characteristic.¹⁰⁸ All of these factors, he suggests, speak to self-flattering and other denigrating stereotypes, either by physically distinguishing between the "we" and the "they" (immutability), or by reflecting social distance between them (discreteness, insularity, and history of discrimination). In this way, the criteria traditionally associated with "discrete and insular minorities" make sense as justifications for strict scrutiny of legislation that burdens such groups.¹⁰⁹

Such is Ely's theory. This Article now examines the applicability of Ely's theory to the public trust doctrine. The first step is to determine whether public trust resources can even be theoretically analogized to suspect classes as understood by Ely. If this analogy is at least theoretically plausible, the next question becomes whether it makes sense as an empirical matter.

C. Are Public Trust Resources Analogous to Suspect Classes?

1. The Anthropomorphic Problem

The clearest difference between the public trust doctrine and process-based equal protection jurisprudence is that the resources protected by the public trust doctrine, being inanimate, do not participate in politics and thus cannot meaningfully be said to be denied representation. This point is not as obvious as it might at first seem. Nation-states "participate" in world politics, lobbying assemblies comprised of other nations and making commitments purporting to bind future governments of the signatory nation. Corporations also participate in domestic politics,¹¹⁰ through

107. See *id.* at 158–59.

108. See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (noting characteristics of suspect classes); *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 26 (1973).

109. See ELY, *supra* note 18, at 160–70.

110. They may also participate in world politics, for example, by lobbying governments to support an international treaty favorable to the corporation's interests.

lobbying, speaking, and campaigning; indeed, they have been held to have First Amendment rights—rights perhaps the most closely related to political participation aside from actual voting.¹¹¹ Finally, and in a reasonably close analogue to our situation, the Supreme Court's modern dormant commerce clause jurisprudence relies to a great degree on whether the challenged state law places especially heavy burdens on out-of-state economic interests, including corporations, on the theory that such interests deserve protection from such burdens due to their inability to participate in the political process leading to the enactment of the challenged statute.¹¹²

Corporations' voices and ability to influence in other ways (most notably by financial contributions and other material assistance) exist only because the law allows and protects the combination of resources necessary to form a corporation that can then organize itself and appoint human agents to act on its behalf.¹¹³ Nevertheless, the fact remains that the American legal system does not generally recognize the legal existence of nonhuman natural objects, whether or not animate, and regardless of whether considered in the aggregate (for example, a species or plant genus, an ecosystem, or a geological formation) or as an individual entity (for instance, an animal, a plant, or a rock).¹¹⁴ Without the ability to organize or speak on their own behalf, such resources cannot be viewed as par-

111. See, e.g., *Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1 (1986) (holding that a utility company's First Amendment rights had been violated by the commission's requirement that the utility include with its bills non-bill-related information with which the utility disagreed).

112. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981) ("The existence of major in-state interests adversely affected by the [challenged statute] is a powerful safeguard against legislative abuse."); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938).

State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted. . . . Underlying the stated rule has been the thought . . . that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.

Id. at 184 n.2 (citations omitted); see also *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945).

113. See, e.g., HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* § 68, at 125-29 (3d ed. 1983); see also Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 452-53 (1972) (noting the relatively recent innovation of legal recognition of corporations).

114. But see Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1, 4-5 (1985) (noting ambiguous results from suits in which natural objects, joined by humans, attempted to sue).

ticipating in the political process. Nor can it be said that interests, aside from the articulate entities that espouse them, participate. Interests—natural resource preservation, international trade promotion, or opposition to Fidel Castro—do not participate in politics; rather, environmentalists, exporters, and anti-Castro Floridians do. These facts raise questions about the applicability of Ely's political-process theory to the public trust doctrine. For, if Ely's theory is really about ensuring that all groups can participate in the give-and-take of the political process, it has no applicability to a doctrine dealing not with recognized interest groups, but instead with either inanimate resources or interests (as distinct from their human espousers).

Nevertheless, Ely's access justification may still apply to public trust resources. The difference in the public trust context is that access is provided not to the resources or interests themselves, but to their stand-in, or virtual, representatives. This technique has been used in legal contexts other than the Equal Protection Clause, most notably Article IV's privileges and immunities clause¹¹⁵ and the dormant commerce clause.¹¹⁶ In both of these latter contexts, the Supreme Court seeks to ensure that states not treat strangers discriminatorily, in part by examining whether an out-of-state interest is "virtually represented" in that state's political process by a similarly situated, and thus, similarly motivated, resident.¹¹⁷ Ely uses the theory to support the idea that equality sometimes requires that the interests of the powerful be tied to those of the powerless, for example, by requiring that legislation impose burdens on all similarly situated parties.¹¹⁸ Analogously, a theory of virtual representation in the public trust context

115. U.S. CONST. art. IV.

116. While not textually independent of the interstate commerce clause, U.S. CONST. art. I, § 8, cl. 2, the term "dormant commerce clause" has come to stand for the negative implications of the interstate commerce clause, which have been interpreted to prohibit state regulation that either directly discriminates against interstate commerce or places an overly heavy burden on interstate commerce relative to local benefits. See *TRIBE*, *supra* note 17, at 403–41.

117. See, e.g., *Clover Leaf*, 449 U.S. at 473 n.17 (upholding a statute against a dormant commerce clause challenge in part because out-of-state economic interests challenging state law had similarly situated analogues inside the state); see also *Austin v. New Hampshire*, 420 U.S. 656, 662–63 (1975) (alluding to political representation theory in the context of the privileges and immunities clause); cf. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (holding that Article IV's privileges and immunities clause "was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy"). For a critique of this methodology, see *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 212 (1994) (Rehnquist, C.J., dissenting) (questioning the use of political-process methodology in the dormant commerce clause context).

118. See *ELY*, *supra* note 18, at 82–87.

would inquire into whether the resource is adequately represented by an articulate stand-in who would represent a pro-conservation interest.

Commentators have criticized the use of virtual representation in the equal protection context. Most notably, Lea Brilmayer has argued that Ely's process jurisprudence cannot adequately explain why only *discriminatory* legislation enacted without the participation of the burdened minority should be subject to special judicial scrutiny.¹¹⁹ She points out that hostility or bias against an unrepresented minority may also take the form of facially neutral legislation, legislation that, according to her reading of Ely, would not be subject to heightened judicial scrutiny regardless of the identification of any group as a suspect class.¹²⁰ Brilmayer asks an important question of process theory: Why should it be assumed that a facially neutral statute reflects an absence of conflicts of interest between the legislators and the nonparticipating group (and thus, virtual representation of that group by that legislature)? Indeed, Brilmayer suggests that even a statute that is not just facially, but truly, neutral (that is, has neither a discriminatory motive nor a disparate impact) should be suspect under Ely's analysis because of the process defect assumed by the suspect class analysis.¹²¹ In other words, if neutral statutes can still reflect process defects, courts should review all legislation strictly so long as any suspect class exists.¹²²

These objections, however, do not pose as great a difficulty in the public trust context, for reasons that go to the heart of the difference between the public trust doctrine and traditional equal protection doctrine. The difference lies in the remedy available for violations. To some degree, process-based equal protection theory cannot hope to correct the flawed process itself, but only to use process flaws as the justification for striking down a statute. Under the public trust doctrine, however, there is the possibility of a true process-based remedy. Such a remedy is reflected, for example, in the requirement, identified in the Massachusetts cases Sax discusses, that an agency seeking to impair a public trust resource be required to show explicit legislative authorization to do so.¹²³ Process-based

119. See Lea Brilmayer, Carolene, *Conflicts, and the Fate of the "Inside-Outsider,"* 134 U. PA. L. REV. 1291, 1310-15 (1986).

120. See *id.* at 1306-15. Brilmayer acknowledges the possibility that current equal protection doctrine would allow an equal protection claim to be made against a facially neutral statute whose enactment had a discriminatory motivation. See *id.* at 1311 n.63. However, she views this exception as "de minimis." See *id.* at 1311.

121. See *id.* at 1307-15.

122. See *id.* at 1315.

123. See Sax, *supra* note 3, at 491-502.

remedies appear even more clearly in the Wisconsin cases that require public trust–impairing decisions to be made at a particular level of government.¹²⁴ In a similar vein is the decision by the North Dakota Supreme Court that the state’s public trust doctrine requires comprehensive water-use planning, not a particular outcome of that planning.¹²⁵ These remedies amount to a judicial restructuring of the process by which government makes decisions affecting public trust resources so as to ensure that such resources will “be heard” in the decision-making process. Such restructuring will, of course, affect future decisions as well as the particular decision challenged in that case, and thus may have the effect of ensuring an appropriate process in all future decisions by that entity.¹²⁶

Because this remedy does not simply invalidate the substance of the decision but instead corrects, for future effect, the process by which it was made, it allows judicial involvement whenever there might be a process defect, and not just (as Brilmayer argues is the case with Ely’s theory) when the substance of the governmental action adversely affects a suspect class.¹²⁷

124. See *id.* at 509–23. It should be noted that the relationship between local interests and a public trust resource is not as unambiguous as Sax or the Wisconsin cases suggest. For example, in his discussion of *Illinois Central*, Epstein suggests that the relationship may in fact run in the opposite direction—that is, that local interests may be the primary beneficiaries of the trust resource’s public status, while nonlocal interests might not benefit from the resource’s public status but would gain from the sale of the resource to a private interest. In such a situation, it would be the local interests that would favor retention of public ownership. See Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 424 n.5 (1987).

125. See *United Plainsmen Ass’n v. North Dakota State Water Conservation Comm’n*, 247 N.W.2d 457, 462–64 (N.D. 1976); see also *National Audubon Soc’y v. Superior Court*, 658 P.2d 709, 728 (Cal. 1983) (holding that the public trust doctrine requires the state to consider public trust interests when planning and performing water resource allocation).

126. The uncertainty in this sentence arises from the difficulties a court would face in determining the “appropriate” level of public resource representation in a given decision-making process. See *infra* page 423423.

127. Another difference between the equal protection and public trust contexts is that challenges under the latter could easily be limited to administrative action when judicial restructuring of the process might be more easily and legitimately accomplished than restructuring of the legislative process. Given separation of powers concerns, a court attempting to restructure the legislative context might be limited to remanding the statute to the legislature, with the requirement of either simple repassage, or repassage with an explicit acknowledgment of the public trust impairment. See Guido Calabresi, *The Supreme Court, 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 103–09 (1991) (outlining simple repassage requirement); Sax, *supra* note 3, at 496–502 (outlining repassage with an acknowledgment requirement).

An additional issue is the question of whether courts could hear cases alleging a defective process when the outcome was not adverse to the plaintiff resource. This is not so much the question of whether the resource itself would have standing, *cf.* Stone, *supra* note 113, but rather whether any pro-resource plaintiff could sue when the government decision was favorable to the resource. After a successful suit, however, the process would be subject to restructuring on a prospective basis, thus obviating the problem in the future.

This is virtual representation of a different sort, placing the trust resource in the restructured political/administrative process in a position analogous to that which Christopher Stone suggests for such resources in the adjudicative process: just as Stone would give natural objects standing to defend their own interests in courts, "virtually" represented by an articulate person or group,¹²⁸ so too resources would be the participants in the governmental decision-making process, again represented by an articulate person or group.¹²⁹

128. See Stone, *supra* note 113, at 464-73 (arguing that natural objects should be able to sue through analogues to guardians ad litem).

129. Cf. Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 315-16 (1980) (arguing that the public trust doctrine focuses not on "some ill-defined public interest," but on the public trust resources themselves).

As a more general matter, Brilmayer's analysis, *supra* notes 119-122 and accompanying text, may not adequately consider the possibility, most forcefully presented by Judge Calabresi, of a process remedy for equal protection violations analogous to that crafted in the public trust context. This sort of remedy would entail a court remanding a constitutionally suspect statute to the legislature, with the possibility that repassage would be constitutionally valid either because the repassage would occur with inevitable attention paid to the court's constitutional suspicions about the statute's first version, or because the repassage would occur in the present, when the burdened group may enjoy more effective political participation than at the time the original version was enacted. See, e.g., Calabresi, *supra* note 127, at 103-09 (suggesting that the invalidation of statutes is not the only option for judicial review of allegedly discriminatory laws and suggesting that instead courts may be justified in remanding the statute to the legislature for reconsideration and repassage that would then be immune from judicial review); see also *Quill v. Vacco*, 80 F.3d 716, 731 (2d Cir. 1996) (Calabresi, J., concurring in the result) (concurring in the decision to strike down New York's 168-year-old assisted-suicide law as violating the Equal Protection Clause, but leaving open the possibility that the same statute repassed by the modern New York legislature might be constitutional), *rev'd*, 117 S. Ct. 2293 (1997); ELY, *supra* note 18, at 169-70 (holding that the modern repassage of a constitutionally suspect statute enacted during a period when the burdened group was denied effective representation may justify upholding the statute).

This analysis is also helped by the fact that, unlike citizens, public trust interests have no inherent right to vote. The fact that citizens have this right to vote means, according to Brilmayer, that virtual representation can never be a fully satisfactory justification for allowing the assertion of governmental authority against an individual, because the point of the right to vote is not to have a legislator who represents your interests despite your inability to vote, but instead the right to exercise your own autonomy to vote for someone who will represent your interest. It is for this reason that an examination of legislative outcomes may not be the most appropriate way to determine whether there has been a process defect in the equal protection context: Even if someone did represent your interests in the legislature, if you did not have a hand in choosing that representative you are still, in a real way, not "represented." This concern also reflects, in part, the idea that citizens' interests and preferences should not be assumed given our belief in a citizen's right to decide what her own interests are. The situation in the public trust context is not as complicated. The concern in that context is simply to restructure the government decision-making process so that the trust interest can be expected to have such representation. Because there is no corresponding right of trust interests to select representatives, virtual representation is all that is required.

There may also be a more straightforward answer to Brilmayer's argument. Many government decisions coming under public trust scrutiny are made by agencies whose primary mission at

Thus, the idea of virtual representation makes it possible to think of public trust resources as possible beneficiaries of a process-based jurisprudence. But to what end?

2. The Public Trust Doctrine and the Political Process

While the anthropomorphic problem discussed above does not automatically make it impossible to justify special judicial solicitude for public trust resources by reference to a quasi-political-process theory of judicial review, there nevertheless remains the question of whether that theory does in fact fit the situation posed by government resource-allocation decisions. In other words, now that public trust resources can *theoretically* be characterized in a manner analogous to discrete and insular minorities, the next question is, do they *in fact* satisfy the criteria for being so characterized? After a brief recapitulation of Ely's suspect class theory, this Article considers the applicability of that theory to public trust resources.

Briefly stated, Ely's theory posits that legislation should be suspect, and thus subject to searching judicial scrutiny, when it burdens groups that are unable fully to participate in the political process due to some prejudice against them. Prejudice plays a crucial role in Ely's analysis because, according to Ely, it blinds legislators to the existence of common interests between them (or their constituencies) and the victim of the prejudice. For Ely, it is prejudice that differentiates "perfectly respectable"¹³⁰ refusals

best ignores, or, more usually, is implicitly hostile to, public trust values. Commentators have noted the tendency of agencies to suffer from a sort of tunnel vision, obscuring values that are tangential to their primary mission. See, e.g., Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 763 (1977) [hereinafter Stewart, *Lessons*]. Indeed, judicial recognition of this tendency has been a major factor behind the increased rigor of judicial review of agency action starting in the 1970s. See, e.g., *id.*; see also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1698-1702 (1975) [hereinafter Stewart, *Reformation*]. The Supreme Court's decision in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983), suggests that this more rigorous review appears to have survived the Court's restriction on other forms of judicial scrutiny of agency action. Cf. *Heckler v. Chaney*, 470 U.S. 821 (1985) (enunciating the presumption of unreviewability of agency decisions not to prosecute); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978) (restricting judicial imposition, in the context of informal agency rule making, of procedural requirements beyond those required by the APA). This insight suggests that the virtual-representation problem posed by Brillmayer is less compelling in this context, where it can be reasonably presumed that action taken by certain types of government agencies may not take public trust values fully into account. In other words, the existence or absence of virtual representation may be easier to perceive in this context, based on insights about administrative agency behavior, than in the normal legislative context.

130. ELY, *supra* note 18, at 152.

to deal with other groups from reasons that are constitutionally "discreditable."¹³¹ Such prejudice-based refusals to deal in turn result in a malfunction of the pluralist political process—that is, the process by which the desires of numerous interest and/or affinity groups are mediated through a bargaining process that produces legislation.¹³² At this point, Ely's analysis is vulnerable to the charge of encouraging judicial self-aggrandizement to the extent it allows courts to determine when such blinding prejudice exists and when it corrupts the political process. Recognizing this problem, Ely suggests that courts employ strict scrutiny only when the legislature's classification "involv[es] a generalization whose incidence of counter-example is significantly higher than the legislative authority appears to have thought it was."¹³³ According to Ely, such legislative "mistakes" can be expected to appear most often when the legislature's generalizations embody stereotypes that reflect favorably on groups that dominate the legislature and unfavorably on less powerful groups.

Ely then discusses the method for determining which groups might fall victim to the stereotyping process outlined above. His discussion makes heavy use of the concept of discrete and insular minorities, introduced in *Carolene's* footnote four. As noted above, Ely suggests that strict scrutiny should be reserved for legislation reflecting stereotypes that burden those unlike the legislators, on the theory that most humans—including legislators—are, as a psychological matter, more prone to adopt inaccurate stereotypes when they flatter the particular individual or her group or, conversely, when they denigrate other groups.¹³⁴ In Ely's argument, however, the concept of "other groups" encompasses the idea of social distance, so that a group's discreteness and insularity become key criteria for whether a group is prey to such inaccurate legislative denigration and, thus, a suspect class. As he puts it, "[o]ne can empathize without having been there,"¹³⁵ suggesting that social interaction with a group's members allows the correction of mistaken stereotypes. By contrast, a group's discreteness and insularity make social distance both possible (because the group's discrete-

131. *Id.*

132. *See, e.g.,* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 17–21 (1991) (describing the pluralist content of American politics). Of course, this is not the only description of a well-functioning political process. For example, in recent years, scholars have shown new interest in "republican" theories of government characterized not by the sort of bargaining noted above, but instead by the search for the "general good," or "republican virtue." *See, e.g., id.* at 42–47 (describing the basic tenets of republicanism).

133. ELY, *supra* note 18, at 157.

134. *See id.* at 158–60.

135. *Id.* at 160.

ness makes the group socially identifiable) and likely (because the group's insularity makes its social segregation easier).¹³⁶

With the theory thus sketched, the question is framed: to what extent do the insights of Ely's process-based equal protection¹³⁷ theory apply to governmental decision making affecting public trust resources?

a. Public Trust Resources as Discrete and Insular Minorities

First, can public trust resources be conceptualized as discrete and insular minorities? Certainly, the anthropomorphic problem arises again, this time at the more focused level of suspect class analysis. Specifically, Ely's focus on stereotyping and social interaction as important indicia of discreteness and insularity seems, at best, only remotely applicable to non-human resources. Legislators may or may not utilize, appreciate, or even know of the existence of particular public trust resources, but even if it made sense to speak of such unawareness as the lack of *social* interaction, it certainly makes no sense to speak of the results of such unawareness as "inaccurate stereotyping." This conclusion is buttressed by the Supreme Court's illustration of various indicia of suspect class status: a history of purposeful unequal treatment or subjection to disabilities based on inaccurate stereotyping;¹³⁸ social stigmatization;¹³⁹ and possession of an immutable defining characteristic¹⁴⁰ that bears no rational relation to a legitimate state purpose.¹⁴¹ These indicia again reflect an underlying focus on *social*

136. Curiously, Ely does not use his idea of social distance to explain the very deferential quality of judicial review of social and economic legislation. That is, instead of arguing that competing social and economic forces are normally present in society and able to correct any inaccurate stereotypes held by the legislature, Ely argues that the lack of "self-serving generalizations" in these statutes suffices to render the classification "constitutionally unsuspecting." ELY, *supra* note 18, at 159–60 & nn.*. This alternative explanation, based on the same realities of social intercourse Ely identifies, seems at least as valid as his own rationale for suggesting only deferential review of such classifications.

137. The best-known application of this theory is, of course, in equal protection analysis; however, it has also found its way into other areas of constitutional law, such as the dormant commerce clause and the privileges and immunities clause. See, e.g., *Austin v. New Hampshire*, 420 U.S. 656, 662–63 (1975) (alluding to this theory in the context of the privileges and immunities clause); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938) (alluding to this theory in the context of the dormant commerce clause).

138. See, e.g., *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

139. See, e.g., *Edwards v. California*, 314 U.S. 160, 181 (1941) (Douglas, J., concurring).

140. See, e.g., *Parham v. Hughes*, 441 U.S. 347, 353 (1979) (noting the unfairness of punishing an illegitimate child based on illegitimacy given the fact that the child was not responsible for that condition) (quoting *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972)).

141. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (describing as indicia of suspectness whether a class possesses an "immutable characteristic determined solely by the accident of birth [or] is . . . saddled with such disabilities, or subjected to such a history of purposeful

oppression that seems far removed from the concern that public trust values are systematically ignored in the political and administrative process. If an analogy is to be drawn between this latter concern and Ely's theory, it must lie in an alternative conceptualization of the criteria for suspect class status.

One possible alternative conception centers on Ely's idea of empathy. Ely suggests that a legislator's empathy for a group may suffice to prevent stereotyping of the sort Ely condemns, even though the legislature may not be composed of such groups.¹⁴² Empathy in this sense refers to an appreciation for the position a potentially burdened group finds itself in, based not on the legislator's current life position, but on his emotional closeness either, first, to that position or, second, to others who disclose that they are in that position. Ely uses the concept of age to illustrate the first of these situations. As Ely notes, most legislators are not young, but they were young once, and many legislators are not old, but they all hope and to some degree expect to become old.¹⁴³ Thus, Ely suggests that legislation classifying on the basis of age should not be subject to strict scrutiny.¹⁴⁴ But as to the second situation, as Ely says, "[o]ne can empathize without having been there,"¹⁴⁵ thus, he also argues that a legislator's social contact with members of a group can break down barriers of ignorance, thus dissuading the legislator from supporting legislation based on inaccurate stereotyping. To illustrate this idea, Ely uses two examples: hypertension sufferers and homosexuals. Ely suggests that a hypertensive could be expected to disclose her condition to a legislator considering a bill reflecting inaccurate and denigrating stereotypes of hypertension sufferers (for example, a bill prohibiting them from driving). This social contact reduces the chance that such laws will be enacted even though the legislature itself may include no hypertensives. The limits of this idea of social contact are illustrated by Ely's example of homosexuals. While a legislator might have social contact with both hypertensives and homosexuals, Ely suggests that the former would be far more likely to disclose to the legislator their char-

unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process") (quoting *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)) (internal quotations omitted); see also Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 938 (1991).

142. See ELY, *supra* note 18, at 160.

143. See *id.* But see Calabresi, *supra* note 127, at 149 (suggesting that laws burdening the young may be constitutionally suspect under a constitutional analysis focusing on an anti-discrimination value).

144. See ELY, *supra* note 18, at 160.

145. *Id.*

acteristic than the latter, given the underlying societal prejudice that would likely impose a cost on a homosexual should he disclose. Thus, while the legislator may have social contact with both groups, the social prejudice against the homosexual makes it more likely that the legislator will not be made aware of that contact, and that, unlike in the case of hypertensives, preexisting antihomosexual stereotypes will not be corrected. For these reasons, Ely suggests that hypertensives should not be a suspect class and that homosexuals should be.¹⁴⁶ More importantly for the present analysis, in this way Ely brings the discussion back to current equal protection doctrine, identifying discreteness, insularity, and existing prejudice as factors in determining whether a group is a suspect class.

Can the concept of empathy link process theory to natural resource decision making? At first glance the analogy is not particularly close. Most obviously, we again have a slightly different version of the anthropomorphism problem discussed earlier.¹⁴⁷ Again, the problem is that the concept of empathy, at least as Ely uses it, refers to *social* relations, such as the feelings legislators might have for groups of *persons*, such as racial or religious minorities. It makes sense to speak of empathy, or lack thereof, based on whether the legislator has first-hand experience with individuals he knows have a particular attribute. It is quite a different thing to speak of a legislator's or an administrator's empathy for a tree. One may certainly feel affection for trees or other natural objects and may feel very strongly about the need to protect them, but this is simply not the same as feeling as though you were "of" the tree, in the way suggested by Ely's use of the term "empathy."¹⁴⁸

On another level, however, there is something to the idea of empathy for trees. It may be logical to think of "bureaucratic empathy" in the sense of whether the governmental decision-making process is structured to ensure consideration of public trust values. Under this view of empathy,

146. See *id.* at 162–64.

147. See *supra* Part II.C.1.

148. Dictionary definitions of the word "empathy" actually suggest that the term applies both to feelings for humans and for nonhuman objects. See, e.g., AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 603 (3d ed. 1992) (defining "empathy" as "[i]dentification with and understanding of another's situation, feelings, and motives" and "[t]he attribution of one's own feelings to an object"); RANDOM HOUSE COLLEGE DICTIONARY 433 (rev. ed. 1975) (defining "empathy" as "intellectual identification with or vicarious experiencing of the feelings, thoughts, or attitudes of another person" and "the imaginative ascribing to an object, as a natural object or work of art, feelings or attitudes present in oneself"). Even conceding that the theoretical idea of empathy could transfer to feelings for natural objects, the difficulty and intrusiveness of a judicial inquiry into whether decisionmakers had sufficient empathy for natural resources strongly counsels against a literal transfer of Ely's concept into natural resources law.

the issue is not whether decisionmakers feel sufficiently "close" to resources so as to ensure that they not impose burdens on such resources due to inappropriate stereotyping or even hostility. Instead, the question would be whether the decision-making process is structured to allow for careful consideration of public trust resources when decisions might impair them. This type of empathy, then, is not created by the preexisting ties that bind legislators to particular groups and that, conversely, estrange them from others. Instead, the empathy is of a virtual sort, created by structuring decision-making processes so that forces expected to favor resource conservation do in fact have a voice in such decisions.¹⁴⁹ To the extent that governmental structures do not feature such built-in public trust advocates, it could be suggested that public trust resources suffer from a lack of empathy at the decision-making level, in roughly the same way that discrete and insular groups of individuals may suffer such lack of empathy in the legislature.

Ely's idea of empathy and the idea of empathy offered here play analogous roles in their respective inquiries. For Ely, the idea of empathy traces back—through the ideas of discrete and insular minorities, suspect classes, and strict scrutiny—to provide a more feasible method of ferreting out the intentional discrimination that Ely sees as the heart of the Equal Protection Clause's prohibition.¹⁵⁰ Analogously, the lack of a voice in favor of the preservation of public trust resources—that is, the lack of "bureaucratic empathy"—could be viewed as a surrogate for a determination of whether the government is in fact fulfilling its duty to manage the trust resources consistent with their protected character. Rather than examining the substance of the trust-impairing decision to determine whether that decision did in fact satisfy some substantive level of resource protection (the analog,

149. This analysis leaves open the major empirical question of whether such forces can, in fact, be relied upon to lobby effectively in favor of resource conservation. For example, at the federal level, to what extent can the Environmental Protection Agency (EPA) actually be expected to be a solid voice in favor of resource conservation and, conversely, to what extent has the agency been captured by the interests it was intended to regulate? In the actual case of the EPA, a strong argument can be made that, as an empirical matter, the agency has not been captured and does in fact represent a strong voice for the environment. See, e.g., Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1277-78 (1996) (concluding that the EPA is less liable to capture than other agencies because of the diversity of industries it regulates). Presumably, this same rationale would apply to state environmental protection agencies. Conversely, this rationale is less applicable to the extent that the entity entrusted with the trust-protection function was more focused on one particular subject-matter area.

150. See ELY, *supra* note 18, at 153 (describing the "functional significance of a theory of suspect classifications" as that of "flushing out unconstitutional motivations").

in terms of judicial intrusiveness and difficulty of proof, of an equal protection inquiry into the ultimate question of whether the legislature intended to discriminate¹⁵¹), the court would instead inquire into whether the decision-making process was characterized by empathy—in this case, the “bureaucratic empathy” of a built-in voice for trust preservation. In both doctrines, the test employed by the courts is viewed as a surrogate for determining compliance with the ultimate value. This indirection is necessary given the difficulty of judicial determination of the ultimate issue, be it intentional discrimination or an appropriate level of public trust protection.

This idea of empathy is at least theoretically plausible. But what does it mean?

b. The Implications of an Empathy-Based Theory of Public Trust Protection

The analysis thus far brings the discussion to a familiar place, namely, the interest-group theory of administrative law. That theory, set forth comprehensively in Richard Stewart’s 1975 analysis of American administrative law,¹⁵² notes the breakdown of earlier models of administrative action that centered either on a formalistic conception of administrative agencies as mere transmission belts for legislative policy directives,¹⁵³ or, alternatively, as apolitical bodies applying specialized expertise to essentially technical problems.¹⁵⁴ In place of these discredited¹⁵⁵ theories, Stewart describes and analyzes a new paradigm for administrative law, one based on the theory that administrative agencies legislate, and do so in an atmosphere marked by sharp clashes between a variety of interests that have a stake in the agency’s decision. He proposes a model of administrative law primarily concerned with ensuring representation for all interests affected by an agency’s action. The model envisions this access concern as influencing not just requirements for the agencies’ procedure, but also the availability of judicial review of agency action through then-

151. See *id.* at 136–45; *cf.* *Rogers v. Lodge*, 458 U.S. 613, 628–53 (1982) (suggesting the difficulty of the discriminatory intent issue); *Washington v. Davis*, 426 U.S. 229, 238–42 (1976) (holding that an Equal Protection Clause violation requires discriminatory intent).

152. See Stewart, *Reformation*, *supra* note 129.

153. See *id.* at 1671–88 (describing the “traditional” model and noting reasons for its decline).

154. See *id.* at 1702–11 (describing the expertise model and noting reasons for its decline).

155. See *supra* notes 153 and 154.

recent innovations such as relaxed standing requirements and increased reviewability of agency action.¹⁵⁶

It is through this concern with access to the decision-making process that Stewart's analysis of administrative law intersects with the political-process view of the public trust doctrine developed in this Article. Both of these ideas propose the possibility of restructuring governmental decision-making processes so that otherwise unrepresented or underrepresented interests may participate in and influence the ultimate decision. Stewart himself notes a number of methods of restructuring the process, from agency-initiated decisions to provide "public interest" representation,¹⁵⁷ to various theories of judicial review of agency action. Among the options considered by Stewart are those that: require that the agency give "adequate consideration" to the information provided by interested parties;¹⁵⁸ interpret agency-authorizing statutes so as to construe agency discretion narrowly;¹⁵⁹ involve the court directly in weighing the conflicting interests affected by the agency's decision making;¹⁶⁰ protect interests the court considers to be underrepresented in the agency's decision-making process;¹⁶¹ and remand questionable agency actions for approval by the legislature.¹⁶² The sort of suspect class analysis developed by this Article finds distinct echoes in at least the first and fourth of these possible remedies, suggesting again the familiar nature of the spot at which this Article's analysis has arrived.

Stewart is ultimately pessimistic about the workability of these methods. Most importantly for present purposes, Stewart considers a suspect class type of administrative law theory to be too indeterminate. Specifically, he doubts whether courts could develop coherent and principled criteria for determining when in fact an interest is underrepresented and thus eligible for heightened judicial solicitude.¹⁶³ Thus, in terms of this Article's equal protection analogy, Stewart expresses concern about courts' ability to determine whether a group is a "suspect

156. See Stewart, *Reformation*, *supra* note 129, at 1711-16.

157. See *id.* at 1763.

158. See *id.* at 1781-84.

159. See *id.* at 1785-86.

160. See *id.* at 1786-87.

161. See *id.* at 1787-88.

162. See *id.* at 1788-89.

163. See *id.* at 1787.

class.”¹⁶⁴ He also expresses concern that such a “suspect class” determination requires a judicial assessment of the importance of the interest alleged to be underrepresented.¹⁶⁵ If so, the court essentially decides the ultimate substantive correctness of the agency’s action while purporting to determine only whether an interest is eligible for judicial scrutiny.¹⁶⁶ These concerns lead Stewart to doubt the workability and coherence of importing suspect class analysis into the administrative process.

Stewart’s objections must be met if the equal protection analogy is to hold. Most importantly, this sort of process review must provide a principled and coherent methodology for determining when a government decision should receive special judicial scrutiny while simultaneously avoiding judicial prejudice of any particular agency action.¹⁶⁷ Blanket strict scrutiny of every agency decision potentially affecting a public trust resource is far too broad a role for the courts, since most any governmental action can be conceived of as affecting the environment.¹⁶⁸ This is especially true when one considers the difficult policy and value issues that would have to be determined by a court faced with a public trust-based

164. Stewart also wonders whether “[e]ven the very concept of interests ascertainable apart from the institutions which define them and realize their purposes” is coherent. See *id.* at 1787–88.

165. See *id.*

166. See *id.* at 1787. Indeed, the contrast between the modest aspirations of the proposed judicial review and its actual intrusiveness becomes even starker when one considers that the process remedy suggested by this Article (that is, the judicial restructuring of the agency’s process as opposed to the review of the substance of the agency’s decision) promises not even to concern itself with, let alone overturn, the actual substantive decisions made by agencies.

167. Of course, this may be an unfairly stringent criterion. Even the Supreme Court has recognized that the level of scrutiny accorded legislation challenged under the Equal Protection Clause effectively determines whether it is struck down or upheld. See *Bernal v. Fainter*, 467 U.S. 216, 219 n.6 (1984) (“As one commentator observed, strict-scrutiny review is ‘strict’ in theory but usually ‘fatal’ in fact.”) (citing Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)). But see *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”).

168. The lower Pennsylvania courts have noted this fact as support for a rather meager interpretation of that state’s constitutional provision establishing Pennsylvania’s trusteeship over the state’s public natural resources. See *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, 895 (Pa. Commw. Ct. 1973), *aff’d*, 311 A.2d 588 (Pa. 1973); see also *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff’d*, 361 A.2d 263 (Pa. 1976). For more in-depth discussions of these decisions, see *infra* Part IV.A.3.

challenge to an agency action.¹⁶⁹ Can there be a principled stopping point to such strict scrutiny?

Sax offers an analysis that may yield such a point. In his article, Sax suggests a two-stage test for public trust doctrine-based challenges to governmental action. The first step is the identification of situations in which a political imbalance exists at a systemic level. For Sax, the existence of that situation justifies judicial refusal to indulge in the usual presumption of administrative regularity¹⁷⁰ (which appears to be nothing but a rewording of the idea of strict scrutiny¹⁷¹). After application of the first step establishes that a particular decision requires closer judicial scrutiny than usual, the second step envisions courts testing the challenged action against four criteria that, according to Sax, shed light on whether or not the action was "properly handled."¹⁷² For present purposes, the important part of Sax's proposed method is the first step, which attempts to discern whether there exist in the political or administrative decision-making entity systemic biases against appropriate consideration of public trust interests.

By itself, Sax's analysis provides an insufficient method for determining which interests have been underrepresented and, of those, which are worthy of judicially mandated representation and in which contexts. Sax argues that an interest's diffuse character—for example, being held by all members of the public—signals the existence of underrepresentation justifying judicial intervention,¹⁷³ an argument that finds echoes in the literature of interest-group theory.¹⁷⁴ As commentators on that theory have noted, however, it is impossible to characterize an outcome as the result of inappropriately disproportionate influence on the decision-making process

169. Cf. Stewart, *Reformation*, *supra* note 129, at 1785 (casting doubt on the judicial practice of narrowly construing agency-authorization statutes to ensure consideration of underrepresented interests, based on a concern that such practice "tends to multiply the issues for decision in a way that diminishes the odds of finding a clear statutory directive to resolve the controversy").

170. See Sax, *supra* note 3, at 561.

171. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (phrasing the analysis later interpreted as strict scrutiny as a "narrower scope for operation of the presumption of constitutionality").

172. See Sax, *supra* note 3, at 562. Those four criteria are the following: (1) "has public property been disposed of at less than market value under circumstances which indicate that there is no very obvious reason for the grant of a subsidy;" (2) "has the government granted to some private interest the authority to make resource-use decisions which may subordinate broad public resource uses to that private interest;" (3) "has there been an attempt to reallocate diffuse public uses either to private uses or to public uses which have less breadth;" and (4) "whether the resource is being used for its natural purpose—whether, for example, a lake is being used 'as a lake.'" *Id.* at 562–65.

173. See *id.* at 561.

174. See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 127 (2d ed. 1971); see also FARBER & FRICKEY, *supra* note 132, at 72.

merely because a more narrowly held interest was vindicated at the expense of a broader but more diffuse one.¹⁷⁵ Their insight—that a well-functioning political process may in fact vindicate such narrow interests, if those interests are intensely held—makes it impossible merely to “count heads” and conclude that aggressive judicial review is appropriate simply because a decision impairs a broadly held public interest—for example, a decision to alienate a public trust resource.

This problem, serious enough at the theoretical level, applies with special force in the public trust context, where considerations of resource conservation and alienation collide at a variety of different angles. Several hypothetical situations illustrate this point. In the first, the issue before an agency is whether to open a wilderness area for oil exploration. In the second, the issue is whether to make that same area accessible to tourists by the construction of roads, hotels, and campgrounds, and the normal associated service establishments. In the third situation, the issue is whether to bring a complaint in the appropriate international forum against a foreign nation for alleged noncompliance with the environmental provisions of a particular free-trade treaty. Environmental issues arise in each of these situations but in different contexts and with different countervailing interests. The first of these situations is the classic “economic exploitation versus wilderness preservation” conflict, which clearly seems to require some sort of consideration of pure trust conservation values. Any administrative decision that failed to consider such values would be illegitimate under a theory like Sax’s. The second presents a case in which environmental interests arguably exist on both sides: preservation of areas as wilderness and public access to such areas.¹⁷⁶ The third hypothetical presents a situation in which trust preservation interests conflict with qualitatively different interests dealing with foreign affairs. How is a court to evaluate in each of these cases whether a systematic bias existed that had the effect of denying the “appropriate” amount of administrative consideration to trust-protection interests? These examples make it hard to disagree with the conclusion that determination of the appropriate amount of administrative consideration depends, more than anything else, on one’s sense of the appropriate *substantive* balance to be drawn between the competing considerations.¹⁷⁷

175. See, e.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 48–59 (1991).

176. Cf., e.g., Thompson, *supra* note 38, at 889 (discussing the types of rights the public should have in land held as commons).

177. See Elhauge, *supra* note 175, at 49–50. The fact that the public trust doctrine discussed in this Article does not envision judicial dictation of the substance of government decision, but

Beyond the possibility that the inquiry into systemic decision-making bias may lack generally applicable decisional criteria, the scope of such inquiry may be nearly infinite. Sax notes that his theory of judicial review would justify strict scrutiny of administrative action in other areas, for example, consumer protection and regulations affecting the poor.¹⁷⁸ While not strictly the concern of this Article, the objection must still be answered that a suspect class type of analysis, if applied to public trust issues, would logically justify strict judicial scrutiny of a variety of subject areas, creating a uniquely powerful, and possibly ungovernable, judicial tool. Again, commentators on interest-group theory have also made this observation.¹⁷⁹ The possibility that this theory's logical implications require a radical reworking of the judicial role in administrative law,¹⁸⁰ while not necessarily fatal to the theory, nevertheless strains the theory past the breaking point.

In searching for principles that limit the scope of this theory, one final issue requires attention. Suspect class analysis assumes that the party benefiting from strict judicial scrutiny is particularly unsuccessful in the political arena. How can we analogize public trust resources to discrete and insular minorities when the environment is a political winner?

c. The Problem of Political Success

Assuming the validity of the analogy to Ely's process theory, political success should at least call into question any suggestion that public trust resources deserve heightened judicial protection. The relationship between process theory and political success is complex. Ely notes, for example, the electoral successes of the African-American community, the quintessential suspect class.¹⁸¹ On a more theoretical level, Bruce Ackerman questions the coherence of political-process theory based in part on the difficulty of determining "how much" political success should be

only scrutiny of the process by which it was made, does not solve the problem. Even with such a process-based remedy there is the problem that the reviewing court will perceive an illegitimate imbalance in the decision-making process and thus require a "fairer" process simply because the court has a sense that substantively the decision should reflect a more pro-trust value.

178. See Sax, *supra* note 3, at 557.

179. See, e.g., FARBER & FRICKEY, *supra* note 132, at 63-87.

180. While this Article confines itself to administrative law, interest-group theorists have used arguments akin to Sax's to justify a vastly increased judicial role in other areas as well, from statutory interpretation to constitutional law. See *id.* at 67 nn.12 & 13 (citing scholars calling for increased judicial constitutional scrutiny of economic legislation); Elhauge, *supra* note 175, at 45-46 (citing scholars calling for use of courts' statutory interpretation power to limit the power of interest groups).

181. See ELY, *supra* note 18, at 151-52.

“enough” to reflect a lack of suspect class status, given the fact that a well-functioning pluralist political bazaar *should* result in small groups suffering frequent losses.¹⁸²

Ely himself, after raising the example of African-American political success, never provides a satisfactory response to the political success “problem.”¹⁸³ But any application of a process-based theory of judicial review to natural resource conservation requires such an answer, given the unquestioned potency of environmental conservation as a political value in contemporary America. It has been suggested that this political success may be due to the rise of environmental advocacy groups in American politics.¹⁸⁴ These organizations, by educating, mobilizing, and providing a focal point for otherwise-dormant public opinion, may in fact directly cure one of the major process defects Sax identifies—namely, the diffuse nature of resource-conservation interests.¹⁸⁵ Regardless of the reasons for the environment’s political success, the question remains the same: What are the grounds for protecting natural resources on the theory that they are voiceless in the political process when the last fifteen years “have witnessed a fantastic effort to develop a framework of legal rules reflecting this nation’s increased awareness of the adverse impacts of environmental pollution and degradation?”¹⁸⁶

182. See Ackerman, *supra* note 18, at 719–22.

183. After noting the issue, Ely does not do much more than suggest that a theory that did not result in suspect class status for African Americans “is at least in need of some reexamination.” ELY, *supra* note 18, at 152. However, he does append to that statement a cross-reference to his discussion of empathy and his thesis that social interaction with an outsider group should mitigate that group’s discreteness and insularity. See *id.* at 152 n.62 (cross-referencing a later discussion at pages 160–161 of the book). The cross-referenced discussion to empathy suggests, in fact, that political success could even potentially work against the minority by exacerbating preexisting prejudices against that group. See *id.* at 161. Ely thus seems to suggest that political success, by itself, will not disqualify a group from suspect status.

The problem with Ely’s analysis is that it decouples his justification for judicial review from what is arguably his only value-neutral criterion, that is, the burdened group’s political access, as measured by political success. It is thus perhaps unsurprising that Ely immediately follows his discussion of African-American political success by introducing the idea of “prejudice,” as used in footnote four of *Carolene Products*. See ELY, *supra* note 18, at 152–53. It is only by introducing such a value-laden concept that Ely is able to justify judicial review. Cf. Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 735 (1991) (describing Ely’s discussion of prejudice as a “slide into substance”).

184. See Thompson, *supra* note 38, at 892.

185. See *id.* But see *id.* at 899 (arguing that “public saliency of most resource issues is not as high as is public appreciation for pollution and health issues”). It may bear repeating at this point that such public opinion may function as the surrogate voice for the resources themselves, as discussed earlier. See *supra* Part II.C.1.

186. Lazarus, *supra* note 2, at 631; see also Stewart, *Lessons*, *supra* note 129, at 714–15 (suggesting that “discrete and insular minority” analysis is inapplicable to environmental claims

It is possible to quarrel with the premise that public trust interests have found effective protection in the political arena. Most importantly, states have been slow to follow the federal government's lead in enacting provisions paralleling the National Environmental Policy Act (NEPA),¹⁸⁷ the statute most consistent with the view of the public trust doctrine as a requirement that public trust values be considered in every governmental decision.¹⁸⁸ It is also possible, although not obvious, that states lag in the techniques, discussed more generally below,¹⁸⁹ for ensuring the transmission of political values to the agency decision-making process.¹⁹⁰ Nevertheless, no one can deny that the environment is a topic that commands political attention at both the state and national level. How can courts be justified in giving it special protection?

One answer to this question is to deny the relevance of the environment's political success on the grounds that natural resource decision making is most often made by administrative agencies and not directly by popularly elected legislatures. This argument even has its own process ring to it, as it suggests that agencies are not implementing the pro-environment mandates that the well-functioning legislature is producing.

because of clear evidence of legislative concern for such interests). Lazarus wrote in the mid-1980s and referred to the 15 years between 1970 and 1985; however, his comment could just as well be updated to take into account the last decade and, indeed, the last few years. See, e.g., Richard L. Berke, *In a Reversal, GOP Courts the "Greens,"* N.Y. TIMES, July 2, 1997, at A1 (noting the political losses suffered by the Republican Party based on its perceived anti-environmental stance); John H. Cushman, Jr., *Environment Gets a Push from Clinton,* N.Y. TIMES, July 5, 1995, at A11 (noting the continued political popularity of environmental protection despite an otherwise antigovernment political trend after the 1994 elections).

187. National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1994).

188. Twenty-five years after NEPA's enactment, only 16 states, plus the District of Columbia and Puerto Rico, have enacted "little NEPA" analogues. See David Sive, *National Environmental Policy Act, "Little NEPAs," and the Environmental Impact Assessment Process*, in ENVIRONMENTAL LITIGATION 1191, 1193 (ALI-ABA Course of Study June 26, 1995), available in WESTLAW, C127 ALI-ABA.

189. See *infra* notes 192-203.

190. Most notably, oversight of agencies by legislatures or executives may remain somewhat less developed at the state level, although this is far from clear. On state legislatures' oversight, see L. Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79 (1982). By 1985, at least 37 states provided for some type of legislative review of administrative rule making. See Barbara L. Borden, Comment, *Legislative Review of Agency Rules in Arizona: A Constitutional Analysis*, 1985 ARIZ. ST. L.J. 493, 526 n.275. Governors also enjoy some control over agency rule making. See, e.g., *infra* note 196 (noting governors' use of executive orders aimed at administrative agencies). For a review of one state's experience with executive oversight, see Jonathan Rose, *Executive Oversight of Rulemaking in Arizona: The Governor's Regulatory Review Council—The First Three Years*, 1985 ARIZ. ST. L.J. 425. Finally, at least some state laws provide for citizen enforcement. See Frona M. Powell, *The Public Trust Doctrine: Implications for Property Owners and the Environment*, 25 REAL EST. L.J. 255, 264 (1997) (noting that "a number" of state environmental laws include citizen suit provisions).

This last point aside, though, the main idea here is that the administrative (as opposed to legislative) context of the relevant decision making renders the electoral potency of environmental conservation irrelevant for purposes of determining underrepresentation. This response makes sense at least as a theoretical possibility. Certainly, battles won in the legislature have often been lost again in the bureaucracy, specifically in the area of environmental protection.¹⁹¹

This is not a complete answer, however. First, the political popularity of environmental conservation should, other things being equal, motivate politicians to keep a careful watch on any backsliding by administrative agencies. As an empirical matter, it is not clear that such watchdog actions are normally as politically visible (and thus attractive to politicians) as the enactment of new laws;¹⁹² nor is it clear that legislatures are institutionally capable of conducting meaningful oversight, even assuming that legislators have a political motivation to do so.¹⁹³ Nevertheless, the potential for legislative oversight and correction of agency action or inaction suggests that there may be less of a role for activist judicial review in this area based on a political-process concern. Second, at least at the federal level, the executive can influence agency action, especially through the White House Office of Management and Budget (OMB).¹⁹⁴ While executive oversight has its own limitations,¹⁹⁵ it nevertheless provides another mechanism by which a politically responsive institution can influence the conduct of an

191. See, e.g., *Natural Resources Defense Council v. Train*, 545 F.2d 320, 327–28 (2d Cir. 1976) (interpreting the Clean Air Act as requiring the EPA to include in its list of hazardous air pollutants any pollutant that the agency had already determined to be a health risk, based in part on concern that a contrary interpretation would frustrate congressional intent); cf. *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971) (“Our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”) (interpreting the National Environmental Policy Act of 1969).

192. For general discussions of the problems of legislative oversight, see CHRISTOPHER H. FOREMAN, JR., *SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION* (1988); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1 (1994).

193. See Shapiro, *supra* note 192, at 9–10, 13–15 (noting the institutional difficulties limiting effective congressional oversight).

194. The OMB has played a crucial role in White House oversight of administrative agencies at least since the Reagan administration promulgated executive orders providing OMB with that authority. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981); Exec. Order No. 12,498, 50 Fed. Reg. 1036 (1985). Subsequent Presidents have promulgated similar orders that, while altering some of the details of OMB's role, retain OMB's basic oversight authority. See Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).

195. See generally Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533 (1989).

administrative agency.¹⁹⁶ Third, the "framework of legal rules"¹⁹⁷ enacted to protect the environment quite often includes provisions authorizing citizen-initiated lawsuits to force a recalcitrant agency to comply with its statutory mandate.¹⁹⁸ Such provisions thus provide a virtual voice that can seek to influence administrative decisions through the threat or reality of judicial enforcement. Through these means, politically responsive groups can attempt to ensure that the political value of environmental preservation is appropriately credited in "the vast hallways of the . . . bureaucracy."¹⁹⁹

Finally, a statute may explicitly structure the administrative process so as to take account of trust conservation values. For example, the federal Endangered Species Act (ESA) requires that federal action that may cause the extinction of a species be approved by a committee of agency heads.²⁰⁰ This committee consists of the heads of several agencies, sitting *ex officio*, as well as a temporary membership for an individual from the affected state.²⁰¹ Among the agencies provided with a seat at the table are the Envi-

196. In fact, a number of state governors have issued executive orders requiring enhanced environmental awareness in state agency decision making. See Sive, *supra* note 188, at 1214 (Appendix).

197. Lazarus, *supra* note 2, at 631.

198. The constitutionality of citizen suits against the government alleging as the basis for standing only the citizen-suit provision and a general interest that the government act according to the law, has been called into question by the Supreme Court's decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). In *Lujan*, the Court held that the plaintiffs lacked standing to sue under the statutory citizen-suit provision of the Endangered Species Act (ESA) when the only injury they could allege was a "procedural injury" from the government's improper application of the law, based only on the citizen suit's provision that any citizen could sue the government to enjoin it from violating any provision of the ESA. See *id.* at 571-78. The majority opinion suggested that such provisions might be unconstitutional whenever the plaintiff could not show a separate, "concrete" interest of its own. See *id.* at 576-77. A concurrence by two members of the six-member majority, however, left the door open for greater congressional latitude in identifying the injury in such a way as to allow a court to conclude that the plaintiffs had suffered an injury of the sort required by Article III's standing requirements. See *id.* at 579 (Kennedy, J., concurring in part and concurring in the judgment). For more information about *Lujan*'s possible consequences, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 223-35 (1992).

199. *Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971); see Michael D. Axline & Patrick C. McGinley, *Universal Statutes and Planetary Programs: How EPA Has Diluted the Clean Water Act*, 8 J. ENVTL. L. & LITIG. 253, 287 (1993) (arguing that citizen enforcement compensates for the EPA's lack of adequate resources and capture).

200. See 16 U.S.C. § 1536(e) (1994).

201. See *id.* § 1536(e)(3) (identifying the members of the committee to be the Secretary of Agriculture, Secretary of the Interior, Secretary of the Army, Chairman of the Council of Economic Advisors, Administrator of the Environmental Protection Agency, Administrator of the National Oceanic and Atmospheric Administration, and an individual from the affected state).

ronmental Protection Agency and the National Oceanic and Atmospheric Administration. The clear intent of this structure is to provide a voice for preservation interests in decisions to trump the act's otherwise strict preservationist bent. Even more striking is a Mississippi law, discussed by Sax,²⁰² which required not only that oyster dredging in state-trust waters be approved by a state commission, but that any such approval include the affirmative vote of the commission's marine biologist member.²⁰³ Both of these structures require that trust-impairing decisions be made only after consideration (or, in the case of the Mississippi law, the actual approval) of what can be viewed as the public trust resource's "virtual voice."

Thus, methods—though imperfect—exist for ensuring that administrative agencies vindicate political values.²⁰⁴ This fact only increases the justification required for process-justified protection for public trust interests: how can stringent judicial scrutiny of trust-impairing decisions be justified as process-correcting when environmental protection is politically popular and the means exist to translate that political popularity into influence over agency action?

Ultimately, process theory has no satisfactory answer to this question. As noted above,²⁰⁵ Ely skirts the issue. The evasion is understandable because political success neither does nor should correlate precisely with the ideas underlying equal protection doctrine. As Ackerman notes,²⁰⁶ even under a perfectly functioning political system (indeed, perhaps especially under such a system), no minority can expect to win every battle. On the other hand, in many imperfect systems some minorities can win a significant number of battles.²⁰⁷ This cannot mean, however, that as soon as a minority wins a few battles it should no longer be considered a candidate for judicial solicitude, or in equal protection parlance, a "suspect class."²⁰⁸ Ely's theory simply has no answer to this argument. This failure

202. See Sax, *supra* note 3, at 555.

203. See MISS. CODE ANN. § 49-15-49 (1972) (originally designated as MISS. CODE ANN. § 6048-03 (Supp. 1968)) (repealed 1974).

204. See also *supra* note 190 (discussing the existence of these oversight techniques at the state level).

205. See *supra* note 183.

206. See Ackerman, *supra* note 18.

207. See, e.g., ELY, *supra* note 18, at 151–52 (noting the electoral success of African Americans).

208. See, e.g., *id.* at 151–52 (noting the increasing political power of African Americans but concluding that discrete and insular minority analysis must nevertheless protect that group). For an example of the confusion surrounding the relationship between political success and suspect class status, compare *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (holding that homosexuality is not a suspect class in part because of success of legislative efforts to combat antihomosexual discrimination), with *High Tech Gays v. Defense*

has especially serious consequences in the public trust context, since, again, environmental conservation fares quite well in the political process. The consequences of this failure are increased even more given the uncertain legal foundation for the public trust doctrine. By contrast, suspect class theory at least has as a foundation the Fourteenth Amendment's textual commitment to equal protection.²⁰⁹

The difficulties noted above suggest that the equal protection-based analogy has foundered. Accordingly, the remainder of this Article considers other bases for a public trust doctrine that authorizes judicial scrutiny of government's decision-making processes.

III. THE PUBLIC TRUST DOCTRINE AND JUDICIAL DECISION MAKING

A. The Need for a Substantive Value of Public Trust Protection

So far, so bad. The attempt to superimpose a suspect class type of analysis on the public trust doctrine, even if theoretically sound, appears to founder on several points when suspect class analysis is actually applied. The first problem is the elusiveness of standards governing the determination whether a government decision is characterized by inappropriate discounting of public trust values. Moreover, methods that do logically indicate when such discounting has occurred do not seem susceptible to principled limitations on the judicial role. Second, public trust resources, and environmental conservation generally, are far from the pariah or outsider status normally associated with suspect classes. Indeed, this political popularity has resulted not only in substantive protection, but also in the creation of processes by which public trust resources enjoy effective virtual advocacy in decision-making circles. Finally, stringent judicial scrutiny of

Indus. Sec. Clearance Office, 909 F.2d 375, 377-78 (Canby, J., dissenting from denial of rehearing en banc) (arguing that the legislative successes discussed by the panel opinion do not necessarily mean that homosexuals are not a suspect class). See also *United States v. Virginia*, 116 S. Ct. 2264, 2296 (1996) (Scalia, J., dissenting) (arguing against considering gender as suspect classification on the grounds that women constitute a majority of the electorate and have been the beneficiary of significant amounts of federal legislation).

209. Cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (contrasting the Supreme Court's abortion rights jurisprudence with the Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), on the grounds that while both abortion and interracial marriage may have been traditionally proscribed, enactment of "an Equal Protection Clause that explicitly establishes racial equality as a constitutional value" justifies the result in *Loving* without supporting the result in *Roe v. Wade*, 410 U.S. 113 (1973)).

trust-impairing decisions seems to enjoy no legitimizing basis akin to the textual mandate of the Equal Protection Clause.

At this stage, analogies between the public trust doctrine and equal protection law fail. Most importantly, the idea that has carried the discussion much of the way so far, Ely's idea of empathy, fails to resolve the problems noted above. Recall that in Ely's theory, empathy assists in the identification of discrete and insular minorities and thus helps inform judicial decisions about which legislation should be subject to heightened scrutiny.²¹⁰ Earlier,²¹¹ this Article suggested that Ely's idea of empathy could be analogized to governmental decision making affecting public trust resources through an idea of "bureaucratic empathy," which inquired whether the decision-making structure allowed consideration of resource-conservation interests. This analogy allowed a transfer of Ely's insights regarding suspect class doctrine onto public trust decision making, avoiding both the conceptual difficulty inherent in speaking of empathy for non-human objects as well as the problem that trust-impairing decisions are usually made not directly by the legislature, but by administrative agencies.

Nevertheless, the concept of bureaucratic empathy cannot resolve the problems noted above. Reliance on this idea as the criterion for determining when a court should carefully scrutinize a resource-impairing decision would lead to an enormous scope for essentially standardless judicial intervention in governmental decision making. This problem mirrors one of the major criticisms of Ely's theory. Just as use of the idea of empathy generates this objection in the public trust analysis, so too critics have argued that Ely's theory provides no value-neutral basis on which to justify strict scrutiny in the equal protection context.²¹² Ely himself recognizes the challenge and argues that the legislation should be subjected to strict scrutiny when it burdens a group that continually loses in the political process "for reasons that in some sense are discreditable."²¹³ Ely characterizes as "discreditable" those reasons that make it impossible for interest groups to cooperate based on a true understanding of their interests.²¹⁴

210. See ELY, *supra* note 18, at 160–61.

211. See *supra* Part II.C.2.a.

212. See, e.g., Ackerman, *supra* note 18, at 737–40; Ortiz, *supra* note 183, at 735–41; Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064–65 (1980) (arguing that Ely's analysis fails to provide a value-neutral rationale for strict scrutiny); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045–57 (1980).

213. ELY, *supra* note 18, at 152.

214. See *id.* at 153.

Leaving aside the question of whether this rationale provides a value-neutral basis for strict scrutiny of laws burdening racial and other groups,²¹⁵ it should be clear that this rationale does not suffice to justify such review in the public trust context. Ely envisions as a goal a "perfect politics,"²¹⁶ in which all groups know and promote their "true" interests by means of alliances with other groups, unencumbered by irrational prejudices or stereotypes. This goal finds a distant echo in Sax's suggestion that the public trust doctrine should aim at removing "imperfections in the legislative and administrative process"²¹⁷ on resource issues. Nevertheless, Sax's suggestion, like Ely's vision in the opinion of his critics, fails to recognize the need for a substantive commitment to the underlying value—in the public trust context, resource conservation. For how are we to conclude that the democratic process is imperfect if we do not have a substantive baseline value against which to judge it?²¹⁸ The problem is even greater in the public trust context, for three principal reasons. First, various legitimate goals must be balanced whenever a decision is made to impair or protect a public trust resource, making purely process-based flaws more difficult to uncover.²¹⁹ Second, the environment's political popularity, and the existence of means for translating that popularity into influence over administrative decision making, casts doubt on the premise that systemic "imperfections" in the process actually exist. Third, the uncertain legal foundation for the doctrine makes a speculative process-based flaw that much more difficult to defend against a charge of inappropriately intrusive judicial review.

Sax's characterization of the modern public trust doctrine never fully confronts this problem. His description of the doctrine envisions purely procedural remedies (for example, the Wisconsin courts' requirement that certain resource-impairing decisions be made at the state, as opposed to the local, level) in support of a substantive goal—that is, some appropriate ordering of trust preservation and trust impairment. Thus, he argues that one approach of which he approves provides information allowing the legislature to determine "the optimum public interest,"²²⁰ and refers to the

215. See *supra* note 212.

216. The term is taken from Ortiz. See *supra* note 183, at 721.

217. Sax, *supra* note 3, at 509.

218. Cf. Tribe, *supra* note 212, at 1077–78 (suggesting that equal participation in the political process, rather than being a value-neutral goal that process theory can attempt to promote, can also be conceived of as a substantive value choice).

219. See, e.g., Thompson, *supra* note 38, at 894–95 (arguing that environmental issues inherently require trade-offs between legitimate goals).

220. Sax, *supra* note 3, at 518.

interplay of judicial, legislative, and executive influence over resource-allocation decisions as “a powerful force for more informed and rational decision making.”²²¹ Despite the technocratic flavor of his comments, the general thrust of Sax’s analysis remains toward politics, that is, political ordering, choices, and access. For Sax, a major goal of the doctrine is to “equalize” the political playing field in order to ensure that pro-trust interests be able to attempt to influence the decisionmakers.²²² While such an equalization may indeed result in more protection for trust resources, without more such a result cannot be characterized as anything but a political shift.²²³

If there is to be justification for stringent judicial review under the public trust doctrine, it must therefore be found in some theory that accords a substantive preference for the preservation of public trust resources. The remainder of this Article examines possible sources for this substantive preference.

B. The Public Trust as Public Property

One source of a substantive pro-trust value may be found in the theory of inherently public property. According to Carol Rose, nineteenth-century American courts used doctrines such as prescription, custom, and (especially after *Illinois Central*) the public trust doctrine to find roadways and rivers to be inherently public property because of their commerce-enhancing functions.²²⁴ As interpreted by Rose, those decisions reflected a conclusion that the highest use of those resources lay in public ownership, open to public use. No compensation was required, as this “condemnation” was not the act of organized government, but rather of the unorganized

221. *Id.* at 551.

222. *See, e.g., id.* at 557–65.

223. There is another explanation, namely, that there is a substantive commitment, enforceable by the courts, to the pluralist political bazaar on all issues. This explanation motivates at least some of the developments in administrative law since the 1970s and finds expression in the interest-group theory of administrative law. *See generally* Stewart, *Reformation*, *supra* note 129. However, without a substantive commitment to a particular value (in this case, resource preservation), this theory cannot justify more stringent scrutiny than is afforded administrative action generally. *Cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (prohibiting federal courts from imposing more stringent procedural requirements on an agency based on the court’s perception of the social importance of the subject of the agency action). *But cf. Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (narrowly construing the agency’s discretion under a statute based in part on a conflict between the agency’s primary mission and the statute’s purpose).

224. *See* Rose, *supra* note 28, at 731–49.

public, appropriating resources that were then deemed public by virtue of one of the three theories noted above.

As Rose observes, the link between these early public trust cases and more modern ones is not the minor commercial use that public trust resources might have today, such as the public's right to harvest oysters from a bed that would otherwise be an individual's private property.²²⁵ Instead, the real analogy is to the socializing and democratizing effects that commerce was thought to have in the nineteenth century (and still may have today) and that recreation may have today.²²⁶ Under this analysis, the social benefits created by public ownership of and/or access to a resource may justify scrutiny of government decisions to alienate such resources, or at least scrutiny of the procedure by which those decisions are reached. Certainly, courts have evaluated the relative value of this use of property, deciding, for example, that property is "used" for a charitable purpose even when the owner leaves it in its natural state because, according to the court, the property has significant value as undisturbed virgin land.²²⁷ It has been suggested that this conception of the public trust doctrine renders it the mirror image of the takings clause of the Fifth Amendment since both ensure that property be put to its most valuable use.²²⁸ If so, then some sort of judicial scrutiny may be justified to ensure that a decision to alienate a trust resource not result in the transfer of a resource to a private party that will use it in a way less valuable than its use as public property.

Nevertheless, this analysis raises as many questions as it answers. While it arguably provides a general idea about when judicial scrutiny is appropriate, it does not offer any detailed guidance for courts engaging in this scrutiny. Indeed, at least one economist has questioned the workability of a calculus designed to measure the competing private and public trust uses of property.²²⁹ In addition, another commentator has expressed concern about an institutional judicial bias in favor of public trust uses at the expense of private property rights.²³⁰

225. Cf. *Arnold v. Mundy*, 6 N.J.L. 1, 65-78 (1821) (relying on the public trust doctrine to restrict a private party's ability to own oyster beds submerged in a river).

226. See Rose, *supra* note 28, at 777-81. At least one commentator has questioned the socializing or democratizing role of such public property, although he suggests that such property has at least symbolic value as a commons. See Thompson, *supra* note 38, at 887.

227. See *Turner v. Trust for Pub. Land*, 445 So. 2d 1124, 1126 (Fla. 1984) ("[W]ithout question [the parcel at issue] serves the greatest public good if left in its natural state. . . . [I]t is an important element in the ecological balance of east-central Florida. . . . By holding the land in its natural state, the greatest public good was achieved.").

228. See generally Epstein, *supra* note 124, at 417-22.

229. See Cohen, *supra* note 9, at 247-49.

230. See Thompson, *supra* note 38, at 911-12.

Sax has offered some guidance for judicial consideration of these issues. Sax identifies four questions courts have asked in the past when considering public trust-based challenges to government resource-allocation decisions. The first three are especially relevant here. The first asks whether “public property [has] been disposed of at less than market value under circumstances which indicate that there is no very obvious reason for the grant of a subsidy.”²³¹ The second questions whether “the government [has] granted to some private interest the authority to make resource-use decisions which may subordinate broad public resource uses to that private interest.”²³² The third inquires whether “there [has] been an attempt to reallocate diffuse public uses either to private uses or to public uses which have less breadth.”²³³

Sax interprets these questions as addressing concerns about resource misallocation. The first asks, quite straightforwardly, whether the resource-allocation decision makes economic sense or is justified by a policy need to grant a subsidy. This concern with unjustified below-market government grants also reflects a suspicion that the resource’s value may have been inappropriately discounted in the decision-making process. The second and third questions shift the focus away from the *value* to the public of alienating the resource (expressed either as the sale or rental price of the property or the public value of the subsidized private activity), and toward the public *cost* of such alienation, by examining the extent to which the government’s decision impairs the previous public trust character of the resource.²³⁴

These criteria provide a more precise, if still relatively rough, guide as to when the “reverse takings clause” aspect of the doctrine²³⁵ may justify

231. Sax, *supra* note 3, at 562.

232. *Id.*

233. *Id.* at 563.

234. Sax’s fourth criterion relates to this analysis, but only tangentially and quite possibly in a way that undercuts some of his previous analysis. This criterion asks “whether the resource is being used for its natural purpose—whether, for example, a lake is being used ‘as a lake.’” *Id.* at 565. Sax suggests that this criterion also speaks to the question of reallocation of a resource from a broad public use to a narrower one, the surrogates for broad and narrow uses being, respectively, “natural” uses and “unnatural” ones. This relationship does not seem logically compelling, however, at least when natural uses war not with commercial development or non-“environmental” uses, but instead with “environmental development”—for example, the provision of more public access into previously remote wilderness areas. In such a case, the unnatural use may well lead to more use by the public than the natural use (except as the public may reap hedonic value just by knowing the natural, unspoiled—and inaccessible—area is there).

235. The analogy to the takings clause should be briefly examined here. The point of that clause, of course, is not just to empower government to convert private property to a higher use as public property, but to ensure, through the compensation requirement, that the public use is in

judicial scrutiny, that is, when a court should be concerned that a resource's highest use—as a public resource—is about to be destroyed.²³⁶ Moreover, his idea of “diffuse interests”²³⁷ suggests a link to the “unorganized public” aspect of Rose’s historical analysis. Indeed, the combination of these two ideas suggests a possible way out of the substantive-value conundrum that has plagued much of this analysis. The idea is that there is a substantive value underlying the public trust doctrine—namely, that there is substantial worth in the unorganized public’s custody of a resource—and that the nature of this value as inhering in a diffuse group makes judicial intervention necessary, given the difficulty of effectuating that interest in the political-administrative process.²³⁸

So stated, the justification for judicial review has an ironic relationship to Ely’s theory of equal protection. For, the diffuseness of the

fact a more valuable use. To the extent that courts employ the public trust doctrine to convert previously private property rights to public property without compensation, this “highest use” goal is not guaranteed, as the value of the conversion is not tested against the market value of the property. Cf. Thompson, *supra* note 38, at 909 (noting that other problems are created when courts employ the public trust doctrine to limit private property rights). Still, the characterization of the doctrine as a “reverse takings clause” does hold when the question is whether the government is allowed to alienate a resource into private hands; in this situation, the court’s application of Sax’s criteria can be viewed as performing the same value comparison as the compensation requirement of the takings clause when property is moving from private to public ownership.

236. Because this scrutiny looks toward a process remedy, that is, a judicial decision that does not purport to review the actual outcome, the theory sketched in this Article does not need to answer the questions posed by Thompson regarding the particular rules the court should employ in reviewing the substance of the challenged governmental actions. See Thompson, *supra* note 38, at 888–90 (discussing what resources should be included in this sort of “commons trust;” what types of rights the public should enjoy in the protected lands; and the circumstances, if any, under which the government should be able to remove resources from their protected status as trust resources).

237. Sax, *supra* note 3, at 563.

238. Rose’s and Sax’s conceptions are not perfectly coterminous. Rose’s conception of “inherently public property” applies to all property, regardless of whether it is held by the government or by a private person. With government-owned property, her conception of inherently public property would presumably justify the retention of such property in government hands and open to the public, despite government attempts to alienate it. This is also Sax’s conception. With privately owned property, Rose’s theory would justify a judicial determination that the land, or at least some right to use the land, had passed from private to public ownership, under a theory of custom, prescription, or public trust. Sax also seems to believe that the doctrine limits both governmental and private-party owners of trust resources, but his process-based view of the doctrine appears to be limited to governmental owners. By comparison, in the case of private owners, at least owners of water rights, Sax simply views those rights as limited in the sense that they do not include a right to use water in ways that do not serve current conceptions of the public interest. See, e.g., Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 475 (1989).

interest—the characteristic that makes it most in need of judicial protection—also makes it quite dissimilar to the sort of discrete and insular minority Ely discusses. On the other hand, empirical observation suggests that large but diffuse interests quite often seem to be the sort systematically undervalued by the political process; indeed, scholars have relied on this insight in calling for a reconceptualization of suspect class analysis.²³⁹

Nevertheless, this analysis does not provide criteria cabining the judicial role. The problem, again, is that a large number of interests probably fit under the characterization “widely held but diffuse;” indeed, at one point Sax notes that his process-based public trust analysis would apply to areas as disparate as consumer protection and legislation affecting the poor.²⁴⁰ Presumably, this analysis would justify judicial review in any area in which the government transfers some sort of right to a private party under circumstances raising suspicion that public rights are being sacrificed to rent-seeking interests without a countervailing increase in public welfare. This sort of situation could be expected to appear whenever the public’s interest can be described as diffuse.²⁴¹ Thus, even this analysis raises, once again, the spectre of searching judicial review of a wide range of administrative action, since in most cases a colorable case can be made that the decision-making process is structured so as to undervalue diffuse interests.

We are thus back to where we started, without a theory explaining why public trust resources are so special as to justify judicial scrutiny beyond the normal review of an agency’s decision-making process²⁴² and

239. See, e.g., Ackerman, *supra* note 18, at 742 (arguing that diffuse majorities, such as women, should be brought into equal protection analysis); *id.* at 723–24 (arguing more generally that the insularity of a group, far from being a criterion of suspectness, actually aids that group’s political power). For a brief discussion of the empirical evidence, see Thompson, *supra* note 38, at 891–92, 910–11.

240. See Sax, *supra* note 3, at 557; see also Stewart, *Lessons*, *supra* note 129, at 721 (noting that agency interest-bias analysis theoretically applies to any number of policy issues).

241. For example, this sort of situation probably describes much United States foreign trade policy, in which organized domestic interests (usually manufacturers or labor unions) succeed in influencing government decisions to protect domestic industry and thereby impose a cost on the general public that is not outweighed by the aggregate benefit the protected industry receives. See generally Craig R. Giesse & Martin J. Lewin, *The Multifiber Arrangement: “Temporary” Protection Run Amuck*, 19 *LAW & POLY INT’L BUS.* 51, 81–98 (1987) (describing the domestic textile industry’s political success in obtaining protection from foreign competition); *id.* at 155–61 (discussing the costs of the textile industry protection to American consumers).

242. See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (setting forth the appropriate judicial review of an agency’s decision-making process under informal notice-and-comment procedures under the federal Administrative Procedure Act).

the decision's substantive rationality.²⁴³ Where is the substantive commitment to the preservation of public trust resources?

IV. THE PUBLIC TRUST DOCTRINE AND STATE CONSTITUTIONS

This part of the Article suggests that state constitutional provisions dealing with the environment can furnish the substantive commitment to resource conservation that, in turn, justifies judicial application of the public trust doctrine. The constitutions of approximately two-thirds of the fifty states include provisions that, in some way or another, aim at the protection of natural resources.²⁴⁴ While these provisions vary widely in the scope and type of protection they provide, none has formed the basis for serious judicial protection of public trust resources. This Article suggests the possibility of a symbiotic relationship between these provisions and the process-based public trust doctrine sketched above: while the former provide the substantive political value justifying special judicial solicitude for public trust resources, the latter provides an analytical method, and a justification for that method, that allows courts to engage in this review while respecting the technical and ultimately political nature of the challenged decisions. This part reviews courts' treatment of these types of provisions and then considers which types lend themselves to an interpretation incorporating this Article's process-based analysis. It will then consider whether the existence of nonconstitutional state law enactments, specifically, state law versions of NEPA, moots a public trust gloss on these constitutional provisions.

243. See, e.g., *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (establishing and applying the appropriate level of review of the substance of an agency's decision made pursuant to informal notice-and-comment procedures under the federal Administrative Procedure Act).

244. See ALA. CONST. amend. 395, 543, § 1; ALASKA CONST. art. VIII; ARK. CONST. amend. 35, § 1; CAL. CONST. art. X, §§ 2, 3; COLO. CONST. art. XVIII, § 6, art. XXVII, § 1; FLA. CONST. art. 2, § 7, art. X, §§ 11, 16; GA. CONST. art. III, § 6, ¶ 2; HAW. CONST. arts. VII, IX, XI, XII; IDAHO CONST. art. XV; ILL. CONST. art. XI; LA. CONST. art. IX; ME. CONST. art. IX, § 23; MASS. CONST. amend. art. XLIX, § 179; MICH. CONST. art. IV, § 52; MINN. CONST. art. XI, § 14; MO. CONST. art. III, § 37(b), (c), (e); MONT. CONST. arts. II, § 3, IX; NEB. CONST. art. III, § 20; NEV. CONST. art. IX, § 3; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV, § 1; N.C. CONST. art. XIV, § 5; OHIO CONST. art. II, § 36; OKLA. CONST. art. XXVI, § 4; OR. CONST. art. VIII, § 5; PA. CONST. art. I, § 27; P.R. CONST. art. VI, § 19; R.I. CONST. art. I, § 17; S.C. CONST. art. XII, § 1; TENN. CONST. art. XI, § 13; TEX. CONST. art. XVI, § 59; UTAH CONST. art. XVIII, § 1; VA. CONST. art. XI; WASH. CONST. art. XVII, § 1; WYO. CONST. art. XVI, § 10. Many of these provisions are discussed in more detail in the remainder of this Article.

A. State Constitutional Provisions and Their Treatment by the Courts

Courts have consistently refused to interpret the Constitution as providing protection to natural resources or a general right to a clean environment.²⁴⁵ However, approximately two-thirds of state constitutions do speak in some way to environmental concerns. Although these provisions vary widely, they can be described as falling into seven types, presented here in rough order from the weakest to the strongest protection afforded the environment: (1) authorizations for legislative action (normally for preservation activities or the contracting of indebtedness to pay for preservation); (2) creation of a decision-making body charged with resource preservation; (3) creation of a trust fund or other funding mechanism for preservation purposes; (4) broad statements of a state's pro-preservation policy or directions to the legislature to protect certain resources; (5) restrictions on the legislature's power to alienate certain resources; (6) establishment of certain resources as the public domain; and (7) conferrals of a right to a clean environment on individuals.

The record thus far is not encouraging to those who had hoped that state constitutions could be used to provide significant environmental protection. When confronted with legal challenges alleging violations of these provisions, courts have generally either held that the provisions are not self-executing, or, if self-executing, that they embody such a lenient standard of review of the challenged action as to provide no legally independent grounds for scrutinizing the challenged action.²⁴⁶ Nevertheless, the remainder of this Article suggests that several categories of these provisions can be reasonably read so as to provide a basis for judicial application of the process-based public trust doctrine previously outlined.

1. Legislative and Administrative Authorizations

The first two types of constitutional provisions identified above, authorizations of legislative action and creation of natural resource decision-making bodies, provide the least secure foundations for the type of judicial scrutiny previously described. Authorizations of legislative action to protect public trust resources merely make explicit the existence of legis-

245. See Tammy Wyatt-Shaw, *The Doctrine of Self-Execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something,"* 15 PUB. LAND L. REV. 219, 230 & n.116 (1994).

246. See generally, *id.*

lative power that undoubtedly exists already as part of the legislature's general powers.²⁴⁷ Similarly, provisions establishing a decision-making body responsible for resource conservation, to the extent they do not require particular actions or actions pursuant to a policy set forth in the constitution, can be viewed as mirrors of legislative authorization provisions. Just as legislative authorization provisions simply authorize the legislature to act, provisions establishing decision-making bodies merely delegate this power, in greater or lesser part, to these newly created bodies.

The key point here is that neither type of provision sets forth a policy that the government's decisions must reflect. The lack of such a binding policy makes the provisions susceptible to the conclusion that they provide no rights that can be enforced by a court, that is, are not self-executing. For example, in *Sutter Hospital v. City of Sacramento*,²⁴⁸ the California Supreme Court held to be not self-executing a state constitutional provision that read, in relevant part, that the "Legislature may exempt from taxation all or any portion of property used exclusively for . . . hospital . . . purposes . . ."²⁴⁹ At one level, the rationale for the court's holding is quite straightforward: by definition, a nonmandatory provision such as this one does not require the government to act or refrain from acting in any particular way, and thus cannot provide an aggrieved party with a right that a court could enforce. Indeed, the court in *Sutter Hospital* described this provision as "purely permissive,"²⁵⁰ noting that under it, "the Legislature could refrain from exempting any of the property referred to in the amendment or it could exempt only such property as might meet the conditions specified in the amendment and such further conditions as the Legislature might see fit to impose."²⁵¹ Underlying this straightforward reading of the provision, though, is an understanding that, as a matter of separation of powers, the provision commits to the legislature

247. See, e.g., Thompson, *supra* note 38, at 871. Such provisions would have more significance if they freed the legislature to act without concern over consequences mandated by other parts of the constitution—for example, if they authorized the legislature to preserve public trust resources without the need for compensating property owners for property taken in the process. See, e.g., R.I. CONST. art. I, § 17. These provisions, however, almost uniformly do not include such features. More commonly, such authorizing provisions merely purport to grant the legislature the power to act in this area. See, e.g., GA. CONST. art. III, § 6, ¶ 2(a) ("[W]ithout limitation of the powers granted under Paragraph 1, the General Assembly shall have the power to provide by law for: (1) Restrictions upon land use in order to protect and preserve the natural resources, environment, and vital areas of this state.").

248. 244 P.2d 390 (Cal. 1952).

249. *Id.* at 391 (quoting CAL. CONST. art. XII, § 1(c)).

250. *Id.*

251. *Id.* at 392.

the discretion to determine when the public good demands such exemptions and when it does not.

Legislative and administrative authorizations reflect a similar commitment of discretion to bodies other than courts. These provisions cannot reasonably be read as embodying the political commitment in favor of resource conservation needed to support judicial embrace of the public trust doctrine.

2. Policy Statements

The fourth category²⁵² of constitutional provisions, statements setting forth a state's pro-preservation policy, provide a stronger foundation for the public trust doctrine.²⁵³ By setting forth a substantive policy, these provisions go farther than mere legislative authorizations toward providing a judicially discernible rule that a court could then interpret and enforce. Still, courts construing such provisions have held them to be non-self-executing. For example, in *Robb v. Shockoe Slip Foundation*,²⁵⁴ the Virginia Supreme Court held to be non-self-executing Virginia's constitutional provision establishing a state policy in favor of historic preservation.²⁵⁵ The court noted both the important substantive and procedural questions the provision left unanswered²⁵⁶ and the fact that the following section of the same article of the constitution authorized the legislature to act to implement the policy.²⁵⁷ These concerns reflect traditional self-execution analysis, which considers provisions to be non-self-executing if they are vaguely worded²⁵⁸ or commit implementation of the mandate to the

252. The third category of provisions, which establishes funding mechanisms for resource-conservation purposes, is discussed *infra* note 262.

253. For examples of such provisions, see ALA. CONST. amend. 543, § 1; FLA. CONST. art. II, § 7; ILL. CONST. art. XI, § 1; LA. CONST. art. IX, § 1; MICH. CONST. art. IV, § 52; N.M. CONST. art. XX, § 21; N.C. CONST. art. XIV, § 5; P.R. CONST. art. VI, § 19; VA. CONST. art. XI, § 1.

254. 324 S.E.2d 674 (Va. 1985).

255. That provision—article XI, section 1 of the Virginia Constitution—reads as follows: To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

VA. CONST. art. XI, § 1.

256. See *Robb*, 324 S.E.2d at 676.

257. See *id.* at 676–77.

258. See, e.g., John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323, 337–38 (1996) (discussing the traditional

legislature.²⁵⁹ At least one other state court construing an environmental policy provision has reached a similar conclusion.²⁶⁰

Nevertheless, such provisions, which express the fundamental preferences of the state's citizenry²⁶¹ but that neither commit the government to take a particular action nor establish legal rights, seem particularly amenable to a process-based analysis. It is in such a fluid legal regime, characterized by a fundamental political commitment to a broadly worded policy, that courts are at their most legitimate in ensuring that government decisions affecting the environment take trust resources into account while disclaiming any authority to pass judgment on the substance of the final action.²⁶² The Louisiana Supreme Court has provided an example of this type of analysis of a policy statement type of constitutional provision. In *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*,²⁶³ the

self-execution doctrine); see also *In re V*, 306 S.W.2d 461, 463 (Mo. 1957) (holding that a constitutional provision is not self-executing if its terms are "so vague as not to admit of an understanding of its intended scope"); *Scopes v. State*, 289 S.W. 363, 366 (Tenn. 1927) (concluding that a constitutional provision is unenforceable by the court if it is too vague); cf. *Miller v. Police Jury*, 74 So. 2d 394, 398 (La. 1954) (rejecting the argument that the terms of the state constitutional provision were so vague as to be non-self-executing).

259. See Horwich, *supra* note 258, at 336-37; see also *Brooksbank v. Roane County*, 341 S.W.2d 570, 573 (Tenn. 1960) (noting that the right of eminent domain in the Tennessee Constitution "is not self-executing but leaves it to the Legislature to determine the method of the exercise of the right of eminent domain and the manner of compensation or remedy"); *Shields v. Gerhart*, 658 A.2d 924, 928 (Vt. 1995) ("Ordinarily a self-executing provision does not contain a directive to the legislature for further action.").

260. See *County of Delta v. Michigan Dep't of Natural Resources*, 325 N.W.2d 455, 457 (Mich. 1982) (concluding that a constitutional provision stating that "conservation of the natural resources of the state is a paramount concern" is not self-executing until the legislature enacts a law implementing it).

261. The fundamental nature of state constitutional provisions is called somewhat into question by the insertion of relatively mundane provisions more appropriate for statutory enactments, whose backers were able to muster the support necessary to enact as a (more difficult to repeal) constitutional provision. See, e.g., Thompson, *supra* note 38, at 915-18 (discussing the problem of "constitutional hyperlegislation" and using as an example the California Constitution's detailed regulations on the use of certain fishing nets that injure noncommercial marine life). Nevertheless, it should still be possible to distinguish between such "legislative" provisions and more fundamental principles. Specifically, it is reasonable to characterize as fundamental broad statements of a state constitution's pro-preservation policy, even when those statements appear in a document replete with other provisions more appropriately found in statute books.

262. By contrast, the third category of provisions—creating funding mechanisms for environmental-preservation purposes while also evincing this fundamental commitment to resource conservation—is nevertheless so narrowly focused as to make such provisions inappropriate as foundations for the broad-ranging judicial review contemplated by this Article. For an example of such a provision, see MINN. CONST. art. XI, § 14.

263. 452 So. 2d 1152 (La. 1984).

court considered a provision in the state constitution that established a policy of environmental conservation explicitly balanced against public health, safety, and welfare.²⁶⁴ The court concluded that this provision, as well as state statutory law,²⁶⁵ required the government to determine that adverse environmental impacts of proposed governmental action had been minimized as much as possible consistent with the public welfare.²⁶⁶ According to the court, this standard "require[d] a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors."²⁶⁷ The court understood its primary role not as a second-guesser of the decisions made, but instead as a guardian of the decision-making process in which environmental interests were given fair consideration, based in large part²⁶⁸ on the policy enunciated in the constitutional provision. Applying the standard to the factual record of the case before it, the court concluded that it could not determine if the governmental decisionmaker had understood these legal requirements and therefore remanded the case.²⁶⁹

The opinion in *Save Ourselves* reflects this Article's view that the most appropriate judicial role in resource conservation may be guardianship of the process by which decisions affecting the environment are made. It also supports the idea that policy statements in state constitutions can serve as the legal bases for such review, by singling out environmental conservation as a goal to which the citizens of the state have made a fun-

264. See *id.* at 1154 & n.2 ("The natural resources of the state . . . shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people. The legislature shall enact laws to implement this policy.") (quoting LA. CONST. art. IX, § 1).

265. Specifically, the court relied on the Louisiana Environmental Affairs Act (LEAA), LA. REV. STAT. ANN. §§ 30:1051-1150.96 (West 1979) (redesignated as the Louisiana Environmental Quality Act, LA. REV. STAT. ANN. §§ 30:2001-2391 (West 1989)), the state's equivalent to the federal National Environmental Policy Act (NEPA). The court concluded, in fact, that the LEAA represented the legislature's satisfaction of the Louisiana Constitution article IX, section 1 command that the legislature implement section 1's environmental conservation policy. See *Save Ourselves*, 452 So. 2d at 1154-55. Nevertheless, the court viewed the constitutional provision's policy statement as providing distinct legal content, most notably by incorporating the public trust doctrine. See *id.* at 1158 (finding distinct legal content in article IX, section 1); *id.* at 1156 (concluding that article IX, section 1 "imposes a duty of environmental protection on all state agencies and officials [and] establishes a standard of environmental protection"); *id.* at 1154 (holding that article IX, section 1 incorporated the public trust doctrine). For discussion of the more general issue of state NEPA analogues' affect on this Article's constitutional analysis, see *infra* Part IV.B.1.

266. See *Save Ourselves*, 452 So. 2d at 1157.

267. *Id.*

268. The court reached this conclusion based on the standard of review applicable to decisions subject to both the LEAA and article IX, section 1. See *id.* at 1159.

269. See *id.* at 1161.

damental commitment. Other state court decisions reflect the same idea in different factual contexts.²⁷⁰ In this sort of case, it is the commitment to environmental conservation, reflected in a policy statement, that justifies stricter-than-normal judicial review.

A number of these policy statements feature a provision charging the legislature with authority to carry out the policy.²⁷¹ This feature might be viewed as limiting judicial willingness to rely on these provisions, on the theory that the provision should be viewed as directed to the legislature, with a concomitant requirement that deference be paid to the legislature's decisions on how to comply. For example, in *Forseth v. Sweet*,²⁷² a Wisconsin citizen asserted a constitutional right to sue the state in tort based on a provision of the state constitution that read, "The legislature shall direct by law in what manner and in what courts suits may be brought against the state."²⁷³ Despite this provision, the Wisconsin Supreme Court refused to allow the tort plaintiff to sue the state because the legislature had not enacted legislation on this issue. The court acknowledged that the legislature "ha[d] been remiss in its failure to implement" the provision,²⁷⁴ but concluded that the provision gave the legislature a great deal of discretion in determining the best method by which to implement it. The court concluded that this discretion removed from the courts any power to enforce the provision's bare, unimplemented terms.²⁷⁵ Thus, even when the court could have enforced the constitutional provision without a direct conflict with the legislature (for instance, here, by simply recognizing a cause of action and developing jurisdictional and procedural rules to implement the constitutional command), respect for the legislature's role in implementing the provision led the court to decline to do so. In the field of natural resource decision making, courts might be expected to be even more deferential to the legislature given the technical complexity and difficult policy trade-offs involved.

Nevertheless, courts have relied on constitutional provisions establishing a pro-conservation policy even when those provisions have charged

270. See, e.g., *Seadade Indus. v. Florida Power & Light Co.*, 245 So. 2d 209, 214 (Fla. 1971) (holding that the Florida Constitution's statement of pro-conservation policy justifies the consideration of environmental protection as a required factor in condemnation proceedings).

271. See, e.g., ILL. CONST. art. XI, § 1 ("The public policy of the State . . . is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy."); see also FLA. CONST. art. II, § 7; LA. CONST. art. IX, § 1; MICH. CONST. art. IV, § 52.

272. 158 N.W.2d 370 (Wis. 1968).

273. *Id.* at 371 (quoting WIS. CONST. art. IV, § 27).

274. *Id.* at 376.

275. See *id.* at 376-77.

the legislature with their implementation. For example, the provision relied on by the *Save Ourselves* court expressly charged the state legislature with the duty to enact laws implementing the pro-conservation policy. Similarly, the Florida Supreme Court has relied on the Florida Constitution's environmental policy provision, which sets forth a pro-conservation policy but also requires that the provision for pollution abatement "be made by law," as support for its consideration of environmental factors in condemnation cases.²⁷⁶

Judicial reliance on such provisions makes sense because those provisions do not simply charge the legislature with enacting laws on a given subject, but also establish a substantive state policy, albeit a broadly worded one. Thus, there should be no separation of powers reason prohibiting courts from taking note of this fundamental state policy, so long as the judicial action was otherwise within the competence of the courts. In the Louisiana and Florida cases noted above, the courts' actions—respectively, reviewing an administrative agency's decision and deciding an eminent domain claim—were clearly within their competence. On the other hand, the vagueness of these provisions could be an obstacle to their judicial enforcement.²⁷⁷ It is here, however, that this Article's proposal that the judicial role be limited to imposing a process remedy²⁷⁸ becomes useful, by ensuring, as in *Save Ourselves*, that courts do not second-guess the substantive governmental decision. This limited scope for judicial action avoids the lack of legitimacy that would attend substantive judicial review purportedly based on vaguely worded provisions such as these constitutional policy statements.

3. Limits on Government Authority

A number of state constitutional provisions impose a substantive limit on governmental action affecting the environment. These provisions vary in form from grants of individual rights to a clean environment,²⁷⁹ to the denomination of some or all of the state's natural resources as property

276. See *Seadade Indus. v. Florida Power & Light Co.*, 245 So. 2d 209, 214 (Fla. 1971); see also 1969–1970 MICH. ATT'Y GEN. BIENNIAL REP. 17 (noting that a constitutional provision, declaring a state policy valuing natural resources, prohibits the legislature from enacting any law which would violate that policy).

277. See Horwich, *supra* note 258, at 337–38 (noting vagueness as a concern in traditional self-execution analysis).

278. See *supra* page 391.

279. See, e.g., HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; MASS. CONST. amend. XLIX, § 179; MONT. CONST. art. II, § 3; PA. CONST. art. I, § 27.

vested with some sort of public trust,²⁸⁰ to explicit restrictions on the government's authority to alienate certain resources.²⁸¹ However worded, the provisions all share the characteristic of establishing an explicit limit on governmental discretion to act in ways affecting the environment, by establishing a new relationship between the government and either the people of the state (as with the granting of rights to individuals) or the resource itself (as with restrictions on the legislature's power to alienate certain resources).

These provisions seem to be prime candidates for interpretation based on the process-based principles previously discussed. Such provisions alter the legal relationship between the government and the resource, or between the government and the people of the state (third-party beneficiaries of the resource preservation).²⁸² For example, in *Payne v. Kassab*,²⁸³ the Pennsylvania Supreme Court held that a provision of the Pennsylvania Constitution that declared the state's public natural resources to be a public trust of which the state was a trustee created legal relationships that the court had the power to defend. Moreover, because such provisions limit the government's authority to act, they do not present the same separation of powers obstacles to judicial enforcement as those provisions directing the government to act.²⁸⁴

280. See, e.g., ALASKA CONST. art. VIII, § 3 ("fish, wildlife, and waters"); HAW. CONST. art. XI, § 1 ("all natural resources, including land, water, air, minerals and energy sources"); *id.* § 6 ("[f]isheries in the sea waters of the State not included in any fish pond, artificial enclosure or state-licensed mariculture operation"); *id.* art. XII, § 4 (public land); MONT. CONST. art. IX, § 3(3) ("[a]ll surface, underground, flood and atmospheric waters within the boundaries of the state"); PA. CONST. art. I, § 27 (state's "public natural resources"); R.I. CONST. art. I, § 17 (rights of "fishery, and the privileges of the shore" and "use and enjoyment of the natural resources of the state"); WASH. CONST. art. XVII, § 1 (state ownership of "beds and shores of all navigable waters in the state").

281. See, e.g., LA. CONST. art. IX, § 3; ME. CONST. art. IX, § 23; MASS. CONST. amend. XLIX, § 179.

282. See, e.g., *Payne v. Kassab*, 361 A.2d 263, 272 (Pa. 1976) (holding that the state constitutional provision dealing with the environment "creates a public trust of public natural resources for the benefit of all the people (including future generations as yet unborn)").

283. *Id.*

284. The issue of public-school financing furnishes an illustrative example of the separation of powers difficulties inherent when courts attempt to enforce provisions directing legislative action. Courts attempting to require the legislature to develop an equitable public-school financing scheme, growing out of court decisions finding such a requirement in state constitutions, have had to balance their concern of enforcing this constitutional mandate with the legislature's clear authority in this area. To take one example, the Texas Supreme Court resorted to a classic "prohibitory" remedy: an injunction against further state use of the old school-financing scheme after a particular time period designed to give the legislature a chance to enact a new, constitutional scheme, combined with the implicit threat of future injunctions should the legislature fail to enact an acceptable scheme. See *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). The court was explicit about the reason for its embrace of

Nevertheless, the conclusion that such provisions can be judicially enforced does not end the inquiry. Instead, it only raises the next question—that of the level of scrutiny courts will employ. For example, in *Payne*, the court, after determining that the constitutional provision at issue was capable of judicial enforcement, went on to interpret it as requiring judicial review exactly co-extensive with a Pennsylvania statute establishing procedures with which the state had to comply before it could proceed with that type of project.²⁸⁵ To the extent that future cases might deal with factual situations in which those statutory safeguards might not apply, the state supreme court's opinion is unclear as to whether those considerations would apply as constitutional requirements.²⁸⁶ Lower Pennsylvania courts, however, have held that the constitutional provision does not authorize an agency to take into consideration factors that its authorizing statute does not mention.²⁸⁷

Even if the constitutional provision did include its own requirements, the lower appellate court's statement of these requirements makes clear that the requirements do not encompass particularly careful judicial scrutiny of administrative action. The intermediate appellate court in *Payne* crafted a three-part test, examining whether: (1) there was compliance with statutory and administrative law relevant to environmental protection; (2) the record demonstrated "a reasonable effort to reduce the environmental incursion to a minimum;" and (3) the environmental harm so outweighed the benefit from the action as to constitute an abuse of discretion.²⁸⁸ The state supreme court noted this test with apparent approval.²⁸⁹ It is hard to disagree with the commentator who concluded that the *Payne* test "strips the [Pennsylvania constitutional] provision of much substantive impact."²⁹⁰

Payne reflects the problem courts will inevitably face if they attempt to engage in a substantive review of agency action in areas as complex as natural resource use. In turn, this difficulty illustrates the importance of

this rather indirect method of achieving compliance with the constitutional mandate: "The legislature has primary responsibility to decide how best to achieve an efficient [school financing] system. We decide only the nature of the constitutional mandate and whether that mandate has been met." *Id.* at 399.

285. See *Payne*, 361 A.2d at 273.

286. See *id.*

287. See, e.g., *Snelling v. Department of Transp.*, 366 A.2d 1298, 1305 (Pa. 1976); *Commonwealth v. Precision Tube Co.*, 358 A.2d 137, 140 (Pa. 1976); *Community College v. Fox*, 342 A.2d 468, 482 (Pa. 1975).

288. *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff'd*, 361 A.2d at 263.

289. See *Payne*, 361 A.2d at 273.

290. Horwich, *supra* note 258, at 364.

the questions identified by Sax as relevant to judicial review of governmental decision making.²⁹¹ As noted above,²⁹² these questions attempt to uncover situations in which the governmental decision gives rise to a suspicion of inappropriate discounting of trust conservation interests. When considered as the means of giving content to an already-existing commitment to trust resource preservation, Sax's questions can help a court determine when it should demand that a government decisionmaker defend the process by which the decision was reached. Unlike the *Payne* test, this proposed test operates independently of any statutory mandate that may limit agency action. However, as previously noted,²⁹³ this proposed test would not seek to second-guess the substantive decisions. Instead, this test contemplates a remand to the agency as the appropriate response. Thus, the constitutional commitment to government solicitude for the environment would take the form of heightened judicial scrutiny of the process by which decisions affecting the environment were made, with the remand remedy available for agency procedures that failed the test. This test has the effect of keeping the courts out of the business of deciding the appropriate balance between environmental protection and competing values—a balance the courts are ill-equipped to draw—while nevertheless giving effect to unquestionable, if vague, political commitments to resource preservation.

B. Does the Analysis Make Any Difference?

Two objections may be made at this point. First, it could be argued that this analysis adds nothing to state statutory law, specifically, the "little NEPA" state-law analogues to NEPA, which impose many of the requirements that this analysis would impose as a matter of state constitutional law.²⁹⁴ Second, it could be argued that only a few states have the types of constitutional provisions that may be susceptible to an interpretation allowing this sort of process review. These objections must be met: the analysis will have little practical impact if most states have statutes that yield the same effect as this analysis or if few state constitutions contain the provisions to which this analysis can apply.

291. See *supra* notes 231–234 and accompanying text.

292. See *supra* page 435.

293. See *supra* page 445.

294. See, e.g., Lazarus, *supra* note 2, at 685–88 (questioning the need for the public trust doctrine in light of NEPA).

1. Does this Analysis Add Anything to the Little NEPAs?

Sixteen states, the District of Columbia, and Puerto Rico have environmental policy acts modeled on NEPA.²⁹⁵ NEPA requires that the federal government consider the environmental consequences of any action it might take that would have a significant effect on the environment, and that it disclose those consequences.²⁹⁶ NEPA imposes essentially procedural requirements on the government; it does not require particular outcomes, nor does it authorize courts reviewing government compliance with NEPA to second-guess agencies' ultimate decisions to proceed with an action.²⁹⁷ Most little NEPAs are similarly procedural.²⁹⁸

The requirements that little NEPAs impose on state governments appear at first glance quite similar to those this Article suggests can be derived from state constitutions. This should not be surprising: just as NEPA and the little NEPAs reflect a governmental policy of environmental conservation coupled with an acknowledgment of the need for economic development,²⁹⁹ so too the constitutional provisions discussed in this Article enunciate or reflect a broad, but not absolute, policy in favor of environmental conservation.³⁰⁰ Indeed, the little NEPAs may be viewed as legislatures' implementation of the environmental conservation policies embodied in their state constitutions. On the other hand, a number of states whose constitutions establish such a policy do not have a little NEPA.³⁰¹ In these states, the constitutional policy would have to be effectuated by the courts, without the benefit of implementing legislation.

Even in states with little NEPAs, the analysis suggested in this Article may play an independent role. This analysis suggests a methodology by which a court can determine which governmental decisions should arouse judicial suspicion and thus receive heightened scrutiny. This methodology

295. See Sive, *supra* note 188.

296. See 42 U.S.C. § 4332 (1994).

297. See, e.g., *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97–101 (1983).

298. See Sive, *supra* note 188, at 1194–95.

299. See, e.g., 43 U.S.C. § 4331(b)(1), (5) (1994) (reciting NEPA's goals of, among others, "fulfill[ing] responsibilities of each generation as trustee of the environment for succeeding generations," and "achiev[ing] a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities").

300. Indeed, many of these constitutional provisions explicitly acknowledge the need to balance these competing considerations. See, e.g., ALA. CONST. amend. 543, § 1; N.M. CONST. art. XX, § 21.

301. States in this category include Alabama, Illinois, Louisiana, Maine, New Mexico, Pennsylvania, Rhode Island, and Texas.

is analogous to Rose's analysis of judicial decisions that found some ostensibly private property to be "inherently public,"³⁰² and is illustrated by the questions Sax suggests courts should ask when determining whether a particular resource-use decision was inappropriate.³⁰³ This methodology allows a court somewhat more flexibility in reviewing governmental action, by allowing it to tailor that review to circumstances that may change over time or that differ with the particular governmental action at issue. The flexibility in turn makes this methodology particularly appropriate for constitutionalization, as it allows for a dynamic adaptation of a fundamental social value implemented by a governmental branch relatively more insulated from day-to-day political pressures.

Equally importantly, it is significant that constitutional provisions are part of a state's fundamental law. As such, they are beyond legislative overruling in the normal course of legislative business and thus are less susceptible to legislative tinkering in the face of particular actions the legislature may wish to authorize or prohibit.³⁰⁴ Such tinkering can assume various forms, such as amendments to the statute itself, subsequent limitation of the statute's scope, "interpretation" of the statute by means of subsequent legislation,³⁰⁵ or enactment of legislation explicitly authorizing or prohibiting certain action notwithstanding the requirements of more general laws.³⁰⁶ To the extent such tinkering occurs exactly when con-

302. See *supra* text accompanying notes 224–228.

303. See *supra* text accompanying notes 231–234.

304. Cf. Thompson, *supra* note 38, at 915 (noting the increased stability of constitutional provisions as compared with statutes).

305. Cf. Department of the Interior and Related Agencies Appropriations Act of 1990, § 318(b)(6)(A), 103 Stat. 745 (1989).

[T]he Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the [preexisting] statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al. v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al. v. F. Dale Robertson*, Civil No. 89-99 (order granting preliminary injunction) and the case *Portland Audubon Society et al. v. Manuel Lujan, Jr.*, Civil No. 87-1160-FR.

Id. This statute, which under one reading clearly purports to interpret preexisting statutes, see *Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311 (9th Cir. 1990), *rev'd*, 503 U.S. 429 (1992), was held not to violate the judicial role in the separation of powers scheme. See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 437 (1992).

306. See, e.g., Continuing Appropriations Bill for Fiscal Year 1987, Pub. L. No. 99-500, § 114, 100 Stat. 1783 (later reenacted as Pub. L. No. 99-591, 100 Stat. 3341) (directing the Secretary of Transportation to approve a particular highway project "notwithstanding" law requiring that projects not be approved until steps taken to minimize environmental damage). A June 1997 Westlaw search of all unannotated state statutes with the query "notwithstanding any other

sideration of environmental values may be most unpopular (and thus most important), the unique status of a constitutional provision as fundamental law enforceable by the courts becomes most useful.

2. The Lack of Constitutional Provisions

The constitutions of at least twenty states, plus Puerto Rico, include provisions that embody the fundamental commitment to environmental preservation that can, in turn, serve as the source for this Article's proposed analysis.³⁰⁷ At least fifteen constitutions either claim some type of natural resource as the public domain, for reasons other than pure reservation of exploitation rights,³⁰⁸ or restrict or qualify the government's power to alienate such resources.³⁰⁹ At least ten constitutions include a pro-conservation policy statement.³¹⁰ Finally, at least six confer upon their residents some form of a right to a clean environment.³¹¹

Thus, there appears to be significant potential for this Article's analysis to find a basis in American state law. Moreover, the trend toward adopting such provisions is quite pronounced, and suggests an even greater potential. For example, every state constitution enacted since 1959 has included some sort of environmental protection provision.³¹² Adoption of this Article's proposed analysis may well assist in this trend by increasing the possibility that a state polity's adoption of such a provision would in fact have concrete effects, and would not be merely a symbolic gesture.³¹³

provision of law" yielded over 9000 documents. Presumably, at least a significant percentage of these statutes included this language in order to limit the effect of some preexisting statute.

307. The numbers in this paragraph do not add to 21 because some constitutions have more than one type of provision.

308. See ALASKA CONST. art. VIII, § 3; CAL. CONST. art. X, § 3; FLA. CONST. art. X, § 11; GA. CONST. art. I, § 3; HAW. CONST. art. XI, § 1; LA. CONST. art. IX, § 3; MONT. CONST. art. IX, § 3; N.Y. CONST. art. XIV, § 1; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17; WASH. CONST. art. XVII, § 1.

309. See CAL. CONST. art. X, §§ 2, 4; LA. CONST. art. IX, § 3; ME. CONST. art. IX, § 23; MASS. CONST. amend. XLIX, § 179; NEB. CONST. art. III, § 20; N.C. CONST. art. XIV, § 5.

310. See ALA. CONST. amend. 543, § 1; FLA. CONST. art. II, § 7; ILL. CONST. art. XI, § 1; LA. CONST. art. IX, § 1; MICH. CONST. art. IV, § 52; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV, § 4; N.C. CONST. art. XIV, § 5; P.R. CONST. art. VI, § 19; VA. CONST. art. XI, § 1.

311. See ILL. CONST. art. XI, § 2; HAW. CONST. art. XI, § 9; MASS. CONST. art. XLIX, § 179; MONT. CONST. art. II, § 3; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17.

312. See Thompson, *supra* note 38, at 871.

313. For an example of a court dismissing the effect of a constitutional provision as merely symbolic, see *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1044 (9th Cir. 1988) (construing the "official English" provision of the California Constitution), *vacated*, 490 U.S. 1016 (1989). The possibility for abuse of the amendment process is suggested by one commentator, writing about the proposed balanced budget amendment to the federal Constitution. See David E. Kyvig,

At the very least, basing a public trust analysis on such a provision increases the legitimacy of such decisions given the classic public trust doctrine's substantive haziness and unclear legal foundation.³¹⁴

CONCLUSION

This Article has attempted to determine whether the public trust doctrine may be justified as another expression of the political-process model of American constitutional law, whereby heightened judicial scrutiny of some governmental action is justified as a judicial check on a malfunctioning political process. The same objection that attends this model in its original equal protection context—namely, that close judicial scrutiny of certain governmental actions requires an embrace of some substantive value—applies equally to the public trust context. Thus, while at some level of abstraction it might make sense to conceive of public trust resources as “discrete and insular minorities,” that conclusion only postpones the question of why courts should care that such resources in fact are not fully “represented” in the political process.

The reason courts should care is that state polities have expressed a desire to protect such resources through the adoption of state constitutional provisions reflecting this value. Because resource decision making is inherently a technical process that requires the balancing of competing goals, judicial enforcement of these constitutional provisions must refrain from second-guessing those value balances. Instead, courts must restrict themselves to ensuring that the government understood and implemented the polity's concern with environmental conservation, a methodology quite at home with this Article's advocacy of not just a process *justification* for judicial review, but also a process-based methodology for *implementing* such review.

Refining or Resisting Modern Government? The Balanced Budget Amendment to the U.S. Constitution, 28 AKRON L. REV. 97, 100 (1995) (“The balanced budget campaign displayed . . . the willingness of politicians to use the symbol of constitutional change to finesse problems that at the moment seemed intractable.”).

314. See generally Lazarus, *supra* note 2 (criticizing the modern adoption of the doctrine for these reasons).