

WHAT CAN BE DONE, IF ANYTHING,
ABOUT THE DANGEROUS PENCHANT OF
PUBLIC TRUST SCHOLARS TO
OVEREXTEND JOSEPH SAX'S ORIGINAL
CONCEPTION: HAVE WE PRODUCED A
BRIDGE TOO FAR?¹

HOPE M. BABCOCK*

I suspect I'm not alone in conducting research and writing projects with only occasional thoughts about issues of integrity. Yet a few moments' reflection reveals that the scholarly enterprise in the legal academy is riddled with integrity issues that we wrestle with and resolve routinely, if only semiconsciously.²

This Article examines the tendency of many legal scholars to overextend the scope of a previous scholar's original idea—in this case, Professor Joseph Sax's reconceptualization of the largely moribund common law public trust doctrine. Legal scholars are induced to write immoderately either to enhance their standing within the academic community or, more selflessly, to achieve law reform. These expansionist tendencies, however, are not without risk—a common law doctrine that becomes too unmoored from its historical shackles may lose the support of the courts that is required for its implementation. The Article examines whether a combination of academic norms and hortatory institutional

* Professor of Law at Georgetown University Law Center. This Article grew out of a presentation Professor Babcock made to the American Society of Environmental History in March 2015. She wishes to thank her colleague Professor J. Peter Byrne for lending her his expertise on academic freedom and for his hugely helpful substantive contributions to the Article, Professor Zygmunt Plater for urging her to write the Article as well as the participants at the March ASEH conference for their thoughtful comments, and her research assistant Charissa Morningstar for her invaluable assistance in chasing down some of the more elusive supporting citations. Professor Babcock has written numerous articles on the public trust doctrine as noted at various points in the Article.

¹ Cf. A BRIDGE TOO FAR (United Artists 1977) (depicting a failed initiative in World War II to penetrate German lines and capture several bridges in the occupied Netherlands. The title has become an idiom for an act regarded as so drastic as to put the whole enterprise in peril.).

² Harold S. Lewis, Jr., *Integrity in Research*, 42 J. LEGAL EDUC. 607, 607 (1992).

standards might minimize that risk by encouraging derivative scholars to think critically about the impact of their writings on the original idea lest they unintentionally jeopardize the initial author's objectives. The purpose of the Article is not to discourage derivative, even revisionist scholarship, but only to make second generation scholars more reflective about the potential real world consequences of their writings.

INTRODUCTION

Forty-five years ago, Professor Joseph Sax published a paradigm-shifting article, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*,³ in which he resuscitated a long dormant property law doctrine rooted in Roman and English common law. The public trust doctrine protects, in perpetuity, land possessed in common for free and unimpeded public access under a trust held by the sovereign. In effect, the doctrine acts like an easement that permanently burdens the ownership of trust resources with an overriding public interest in their preservation. Until the appearance of Professor Sax's article, state courts had limited their use of the public trust doctrine to protecting traditional uses of coastal resources and tidelands—like navigation, fishing, and oystering—against privatization.⁴

Professor Sax suggested that the public trust doctrine should be used more broadly to safeguard natural resources because existing laws were not protecting the environment.⁵ By bringing a real

³ Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

⁴ See, e.g., *Shively v. Bowlby*, 152 U.S. 1, 57–58 (1894) (applying the public trust doctrine to block development of private claims in submerged lands); *Martin v. Waddell's Lessee*, 41 U.S. 367, 413–14 (1842) (applying the public trust doctrine to block private claims to shellfish beds); *McQueen v. S.C. Coastal Council*, 580 S.E.2d 116, 120 (2003) (applying the public trust doctrine to protect coastal tidelands).

⁵ See Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 488 (1983) (describing the public trust doctrine as “largely moribund” doctrine which had been “often ignored in the mid-nineteenth century”). Like Professor Chayes, who ended the “malaise in procedural scholarship” with his article and arguably started an “academic renaissance” by “set[ting] the tone for so much procedural scholarship” that followed, Richard Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. Mich. J.L. Reform 647, 682–83 (1988), Professor Sax also blew new life into property law by reconceiving the modern view of property as radical revisionism. See Joseph L.

problem to the attention of legal scholars and courts and suggesting a possible theoretical basis for a solution,⁶ the article rose to fame. State courts applied the public trust doctrine not only to traditional trust resources, like tidelands, but also to lakes,⁷ beaches,⁸ groundwater,⁹ and even mountains,¹⁰ and were protecting not just fishing and oystering, but non-traditional uses of trust resources like recreation, scientific study, bird watching, and aesthetics.¹¹

Sax, *Environmental Law and Its Mortal Enemy: The Rise and Decline of the Property Rights Movement*, 28 U. HAW. L. REV. 7, 12 (2005).

⁶ See Marcus, *supra* note 5, at 692 (suggesting among other things that Chayes “called the attention of the academy to actual phenomena that need to be consider” and “offered an analytical framework that could provide a starting point for future work by identifying the problems to be addressed”).

⁷ Nat'l Audubon Soc'y v. Superior Court (Mono Lake), 658 P.2d 709 (Cal. 1983).

⁸ *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984).

⁹ *Env'tl. Law Found. v. State Water Res. Control Bd.*, No. 34-2010-80000583, 2014 WL 8843074, at *11 (Cal. App. Dep't Super. Ct. 2014).

¹⁰ Although the decision in *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114 (Mass. 1966), applying the public trust doctrine to the expansion of a ski resort on a mountain top, was issued four years before Sax's article and, therefore, his article cannot claim to have influenced it, he thought the decision was particularly important in understanding the broader importance of the public trust doctrine because the decision reflected a use of the doctrine to democratize the administrative process by placing on administrative agencies “the burden of establishing an affirmative case before the legislature in the full light of public attention.” Sax, *supra* note 3, at 499. Sax explains further “[t]hat state's supreme judicial court has penetrated one of the very difficult problems of American government-inequality of access to, and over, administrative agencies. It has struck directly at low-visibility decision-making, which is the most pervasive manifestation of the problem. By a simple but ingenious flick of the doctrinal wrist, the court has forced agencies to bear the burden of obtaining specific, overt approval of efforts to invade the public trust.” *Id.* at 498–99.

¹¹ See, e.g., *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893) (recognizing recreational uses as within the scope of the public trust doctrine); *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972) (applying the public trust doctrine to recreational uses); *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (finding that the public trust doctrine applied to collection of scientific information, wildlife habitat, and aesthetics). Not surprisingly, the doctrine's expansion drew critics. See Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 631–33 (1986) (complaining the doctrine was the equivalent of an oxymoron in an age of environmental protection laws and noting that “modern trends . . . are currently weaving a new fabric for natural resources law that is more responsive to current social values and the physical characteristics of the resources. By continuing to resist a legal system that is otherwise being abandoned, the public trust doctrine obscures analysis and renders more difficult the important process of reworking natural resources law.”); William D. Araiza, *Democracy, Distrust, and the Public*

Professor Sax's article quickly gained iconic, nearly totemic, status among legal scholars and public interest litigants.¹²

In this expansionist tradition, I have argued for using the public trust doctrine to prevent the enclosure of the Exclusive Economic

Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value, 45 UCLA L. REV. 385, 402–03 (1997) (noting worries that expansion of the doctrine makes more acute its undemocratic nature, the freedom it gives non-expert courts to second guess administrative decisions on complex, highly technical matters, and the danger that courts will denigrate private property rights in favor of public trust uses); James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1, 8–9 (2007) (purporting to debunk the popular historical account of the doctrine's origins and migration to the United States); see also James L. Huffman, *A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527, 567 (1989) (criticizing judicial expansion of public trust doctrine); Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 722 (1986) (“Despite its popularity, the modern public trust doctrine is notoriously vague as to its own subject matter; cases and academic commentaries normally fall back on the generality that the content of the public trust is ‘flexible’ in response to ‘changing public needs.’”). Even Professor Sax conceded that the doctrine's legal provenance was “dubious.” Sax, *supra* note 3, at 484 (“Other than the rather dubious notion that the general public should be viewed as a property holder, there is no well-conceived doctrinal basis that supports a theory under which some interests are entitled to special judicial attention and protection.”).

¹² From 1970, the date of publication of Professor Sax's public trust article in the Michigan Law Review to the time of this writing (3/15/2015), the article has been cited in 46 judicial opinions and in 1,179 law journal articles. See E-mails from Georgetown University Law Center Reference Librarians to author (Mar. 25–27, 2015) (on file with author). It is interesting to compare the iconic status of 1976 article by Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976), which puzzled Professor Richard Marcus sufficiently to write his own article trying to understand how a piece that had at best “mixed” doctrinal impact, contained little doctrinal analysis, and made no doctrinal prescriptions, left many unanswered questions. Marcus, *supra* note 5, at 648. Despite these seeming weaknesses, Professor Marcus concluded that Professor Chayes' article “contributed to new and innovative ways of addressing legal issues,” an effect that alludes “most legal academics.” *Id.* at 640. Professor Sax's 1970 Michigan article had none of the weaknesses that Professor Marcus identified in Chayes' work, has had a profound impact on how property is conceived, and thus without question has earned the title of being a classic and is, like Chayes' article, a “doctrinal breakthrough” that would be embraced by courts and scholarly commentators. *Cf. id.* at 653. It also helped in both cases that the timing of the publication of both articles was perfect for their wide dissemination—for Chayes, the growing concern about the social implications of judicial decisions; for Sax, the ineffectiveness of common law relief for environmental harms. This resulted in readers recognizing that the description of the problem in both situations was accurate, and that both offered a “framework for analysis that allowed subsequent scholars to pursue the matter further.” *Cf. id.* at 658–59.

Zone (EEZ) for fish ranching,¹³ to protect wildlife,¹⁴ and to block application of the takings doctrine to wetlands and coastal resources.¹⁵ Recently, I advocated its use to protect Palisades Interstate Park from visual pollution created by the construction of a commercial building near the park's boundaries.¹⁶ In all of these articles, I principally relied on Professor Sax's work to justify the infinite malleability of the doctrine. But upon the publication of my Palisades Park article, and in light of recent litigation using the public trust doctrine as a legal basis for compelling the U.S. Environmental Protection Agency to limit greenhouse gas emissions,¹⁷ I began to question the doctrine's expansion.

Rereading Professor Sax's 1970 Michigan article, I focused for the first time on his concerns about pushing the doctrine too far—his worries about potentially “squeeze[ing] it to death”¹⁸ and ill-advisedly inviting “sharp confrontations between courts and legislatures.”¹⁹ Professor Sax's caution in inviting the courts to engage in what had been thought the domain of the other branches of government²⁰ and his recognition that the doctrine “has no life on

¹³ See generally Hope M. Babcock, *Grotius, Ocean Fish Ranching, and the Public Trust Doctrine: Ride 'Em Charlie Tuna*, 26 STAN. ENVTL. L.J. 3 (2007).

¹⁴ Hope M. Babcock, *Does Lucas v. South Carolina Coastal Council Protect Where the Wild Things Are? Of Beavers, Bob-O-Links, and Other Things that Go Bump in the Night*, 85 IOWA L. REV. 849, 889–98 (2000).

¹⁵ Hope M. Babcock, *Has the Supreme Court Finally Drained the Swamp of Takings Jurisprudence: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 49–55 (1995).

¹⁶ Hope M. Babcock, *Is Using the Public Trust Doctrine to Protect Public Parkland from Visual Pollution Justifiable Doctrinal Creep?*, 42 ECOLOGY L.Q. 1, 24–35 (2015).

¹⁷ See Alec L. *ex rel* Looorz v. McCarthy, 561 Fed. App'x 7 (D.C. Cir. 2014) (dismissing suit by two California teenagers and two environmental organizations to compel EPA to cap greenhouse gas emissions on the ground that the public trust doctrine does not establish federal question jurisdiction).

¹⁸ Sax, *supra* note 3, at 553.

¹⁹ Joseph L. Sax, *Liberating the Public Trust from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185, 194 (1980); see also Joseph Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 259 (1976) (questioning the application of the public trust doctrine to compel Congress to enact protective regulation of national parks).

²⁰ See, e.g., Sax, *supra* note 3, at 551 (“This article has been concerned largely with the judicial function only because it has been so widely believed that the task is essentially one for legislative and administrative action and that the scope for judicial action is limited to remedying blatant and express departures from specific statutory standards.”); see also *id.* at 558 (“Understandably courts are reluctant to intervene in the processes of any given agency.”).

its own and no intrinsic content”²¹ reflects his awareness of the risk of taking a common law doctrine too far from its historical roots where it could lose the courts and legislatures that enable its application and discourage future uses of the doctrine. But, overextension of the doctrine also raises more inchoate concerns about scholarship, particularly any obligations of subsequent scholars to heed the pleas of the original authors to protect their ideas so as not to squander the opportunities offered.²² While scholars must continue to build upon the work of their predecessors, they should do so with thoughtful circumspection and an awareness of the original author’s concerns. When the architect of an idea urges prudence in regard to the danger of overextending a doctrine, caution should be cast aside only when the benefits are warranted.²³

This Article examines these concerns in the context of the public trust doctrine, in the hope of learning whether limits should be placed on how far subsequent users of another’s original idea should go in expanding its reach and how such limits, if warranted, might be imposed. Part I briefly provides some background on the public trust doctrine and Professor Sax’s public trust scholarship, including his concerns about overextending the doctrine. Part II discusses how courts have expanded the doctrine beyond its original geographic scope and purpose, as well as some representative scholarship on the wisdom or folly of what the courts are doing. Parts III and IV of the Article examine academic norms and the pressure of outside institutions as possible restraints on scholars from going beyond what the original author envisioned.

The Article concludes that, while there are no definitive solutions to the problems raised here, some help may lie in legal scholars internalizing a new academic norm cabining their tendency to overreach. But internalization of any new norm is unlikely to happen without outside assistance—for example, having a professional association republish the new norm as a hortatory

21 Sax, *supra* note 3, at 521.

22 See Marcus, *supra* note 5, at 693 (saying that Owen Fiss, among others, has “gone much further than Chayes in constructing alternative theories”).

23 I am indebted to my colleague Zygmunt Plater for framing this obligation as one of “thoughtful circumspection” and “a duty to society, that the legal system’s ongoing recognition and integration of significant public trust doctrine values” be carefully shepherded, “treating Joe as the initiator of a remarkably important doctrine lying latent within our legal system.” Email from Zygmunt Plater, Professor of Law, B.C.L. Sch., to author (Mar. 25, 2015) (on file with author).

standard or academic institutions providing supportive incentives. As the unintended risks scholars face when they borrow the work of others to justify their own contribution to the scholarly literature are identified, they will recognize they have some form of social duty to think more deeply about those risks and how to minimize them before they proceed.²⁴

I. A MODEST LITTLE IDEA AND PROFESSOR SAX'S VIEW OF HOW IT COULD BE USED

*"The public trust . . . is based on a set of modest beliefs . . . a belief that words like 'trust' ought to be taken seriously."*²⁵

The essence of the public trust doctrine is the idea that the sovereign holds certain common properties in trust in perpetuity for the free and unimpeded use of the general public.²⁶ The public's rights in trust resources are never lost, and neither the government nor private individuals can alienate or otherwise adversely affect those rights unless for a comparable public purpose.²⁷ One of the core protected rights is that of public access to trust resources.²⁸

²⁴ By way of disclaimer, this Article is largely impressionistic. At most, it resembles the "armchair empiricism" that Richard Marcus attributed to Abram Chayes, *supra* note 12, at 1281. I also recognize that the line between pursuing original scholarship and 'going too far' is neither clear nor hard, which is why the Article does not try to define where that line is. Rather, its purpose is to alert its readers to a possible problem and to urge them to write more consciously to minimize those consequences; not to refrain from writing at all.

²⁵ Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 471–72 (1989).

²⁶ See Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 351 (1998) ("Until it was revived and re-invented by Sax, the doctrine held that some resources, particularly lands beneath navigable waters or washed by the tides, are either inherently the property of the public at large, or are at least subject to a kind of inherent easement for certain public purposes. Those purposes are foremost navigation and travel, to a lesser extent fishing, and lesser still recreation and public gatherings."); see also Sax, *supra* note 3, at 477 (saying public trust doctrine requires that first "property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public; second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses").

²⁷ Babcock, *supra* note 14, at 889–98; see also Mary Christina Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 ENVTL. L. 605, 612 (2004) ("[G]overnment trustees are required to preserve wildlife assets and protect them against damage.").

²⁸ See Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 731–34 (1989) (noting that, "[i]n essence, the courts protect access rights to public trust resources"

The public trust doctrine places on governments “an affirmative, ongoing duty to safeguard the long-term preservation of those resources for the benefit of the general public.”²⁹ As such, the doctrine fundamentally limits government power³⁰ on behalf of both present and future individuals, and it enjoins the government to manage trust resources for public benefit, not private gain.³¹ Government agencies have the non-rescindable power to revoke private uses of trust resources that are inconsistent with the doctrine.³² That power is equivalent to a permanent easement over trust resources that burdens their ownership with an overriding public interest in their preservation.³³ This is not to say the public trust resources can never be alienated;³⁴ indeed, lands impressed with the public trust can be transferred to private owners, but only if the conveyance will serve the public interest in those resources and will not interfere with trust uses in the non-conveyed land.³⁵

And that the public trust doctrine is a “transcendent legal principle” with “roots . . . in natural law”); *see also* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892) (affirming that since absolute private dominion over property impressed with the public trust interferes with public access, it can never be granted unless it is in the public interest to do so).

²⁹ Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 667 (2012); *see also* J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 U.C. DAVIS L. REV. 915, 918 (2012) (“Public trust rights are understood to precede and constrain legislative action to a larger extent than do private property rights.”).

³⁰ *See* Mary Christina Wood, “*You Can’t Negotiate with a Beetle*”: *Environmental Law for the New Ecological Age*, 50 NAT. RESOURCES J. 167, 201 (2010); *see also* Wood, *supra* note 27, at 612 (explaining that this capacity to “constrain the natural tendency of governmental officials to exhaust resources in the present generation” acts like “a normative anchor . . . geared towards sustaining society for generations to come”).

³¹ *See* Wood, “*You Can’t Negotiate with a Beetle*,” *supra* note 30, at 201.

³² *See* Babcock, *supra* note 14, at 892.

³³ *Id.* at 893 (“One cannot construct a common law canon more offensive to the notion of absolute private rights in property than the public trust doctrine.”); *see also* Ill. Cent. R.R. Co., 146 U.S. at 453 (A state “can no more abdicate its trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of the peace”).

³⁴ *See* Sax, *supra* note 19, at 186 (“[I]t can hardly be the basis of any sensible legal doctrine that change itself is illegitimate.”); *see also id.* (“[I]t is inconceivable that the trust doctrine should be viewed as a rigid prohibition, preventing all dispositions of trust property or utterly freezing as of a given moment the uses to which those properties have traditionally been put.”).

³⁵ Ill. Cent. R.R. Co., 146 U.S. at 453 (“The control of the State for the

Professor Sax considered the tension between allowing some conversions of trust resources to accommodate modern public needs and protecting historical uses of trust resources as “the central problem of public trust controversies.”³⁶

According to Professor Sax, at the doctrine’s “heart” was more than “just a set of rules about tidelands, a restraint on alienation by the government or an historical inquiry into the circumstances of long-forgotten grants.”³⁷ He thought that the doctrine could contribute to intelligent management of natural resources, especially in the absence of laws promoting that end.³⁸ As his 1970 article predated most of the federal laws protecting natural systems, the doctrine could create breathing room for those systems until such laws were adopted.³⁹ He also saw in the doctrine the means to avoid

purposes of the trust can never be lost, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.”); see also *Nat’l Audubon Soc’y v. Superior Court of Alpine County (Mono Lake Case)*, 658 P.2d 709, 724 (Cal. 1983) (“The public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people’s common heritage[,] . . . surrendering that right . . . only in rare cases when the abandonment of that right is consistent with the purpose of the trust.”).

³⁶ Sax, *supra* note 3, at 495. He also noted that courts generally “look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate [a public] resource to more restricted uses *or* to subject public uses to the self-interest of private parties” because one *raison d’être* for governments is to provide widely available public services like schools, police protection, and parks. *Id.* at 490.

³⁷ Sax, *supra* note 19, at 186.

³⁸ Sax, *supra* note 3, at 474 (“Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.”); see also Harry R. Bader, *Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law*, 19 B.C. ENVTL. AFF. L. REV. 749, 761 (1992) (“The marriage of absolute ecological protection with absolute access for the purpose of utilizing natural resources comes the closest to the true essence of the public trust doctrine.”); Rose, *supra* note 26, at 355 (“Sax’s goal was to loosen the public trust doctrine from its historical connection with navigation and waterways, and turn the doctrine instead into a more general devise for managing change and recognizing community values in diffuse resources.”). Indeed, Sax believed recognition of “long-standing public uses have an important place” in any judicial analysis of the “justness of property claims” and would “integrate legal doctrine and fundamental principles of intelligent resource management, instead of treating basic social decisions as if they were merely the province of a title examiner.” Sax, *supra* note 19, at 194.

³⁹ *Cf.* Sax, *supra* note 19, at 188–89 (discussing the role of the public trust doctrine in assuring that “the legal system is pursuing a substantive goal identical

“destabilizing disappointment of expectations held in common,”⁴⁰ when less severe intrusions might be pursued.⁴¹ He identified a government process benefit to the doctrine’s application because it could democratize agency and legislative decision-making by requiring publication of decisions that lessened the doctrine’s protective effect.⁴² He saw in public trust law “not so much a substantive set of standards for dealing with the public domain as a technique by which courts may mend perceived imperfections in the legislative and administrative process.”⁴³ Thus, in Professor Sax’s mind, the modern public trust doctrine potentially served many needs.⁴⁴

But, at the same time, Professor Sax worried about uses of the doctrine that might provoke “sharp confrontations between courts and legislatures.”⁴⁵ He counseled advocates not to search for a constitutional mandate for the doctrine, but instead to use it to encourage courts to search for “less disruptive alternatives below the constitutional level.”⁴⁶ Yet, at the same time, Professor Sax believed the doctrine contained “the seeds of ideas whose importance is only beginning to be perceived, and that the doctrine’s use in encouraging “needed legal development, can hardly be doubted.”⁴⁷ However, even at his most enthusiastic, Professor Sax

for the management of natural resources”).

⁴⁰ *Id.*

⁴¹ *Id.* at 193 (the public trust doctrine insulated “social, economic, and ecological systems from avoidable destabilization and disruption”).

⁴² Sax, *supra* note 3, at 498; *see also* Marcus, *supra* note 5, at 663 (discussing Judge Lord’s decision to allow individuals to intervene in *United States v. Reserve Mining Co.*, 60 F.R.D. 406 (D. Minn. 1972), because a court should allow the people who might be affected by a decree to be heard).

⁴³ 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.”).

⁴⁴ Professor Rose comments that Professor Sax “effectively treated the public trust as a common-law version of the then-novel hard look doctrine for environmental impacts.” Rose, *supra* note 26, at 355.

⁴⁵ Sax, *supra* note 19, at 194.

⁴⁶ *Id.* at 193–94. *But see* George P. Smith II & Michael W. Sweeney, *The Public Trust Doctrine and Natural Law; Emanations within a Penumbra*, 33 B.C. ENVTL. AFF. L. REV. 307, 313 (2006) (commenting that “although the Supreme Court has never expressly stated so, the concept of the public trust and the resulting affirmative duties seem to emanate from the Constitution. While other interpretations of the public trust source exist, this is the most reasonable explanation considering the ‘heavy overlay of constitutional doctrine’ concerning watercourse regulation”).

⁴⁷ *Id.* at 485. Professor Sax envisioned many uses of the public trust doctrine,

viewed the doctrine primarily as a judicial goad to legislatures to fill gaps in the web of laws protecting the environment, not for courts to undertake that gap-filling role themselves.⁴⁸

II. HOW COURTS TOOK THE PUBLIC TRUST DOCTRINE IN THEIR TEETH AND BOLTED

*Humpty Dumpty sat on a wall,
Humpty Dumpty had a great fall;
All the king's horses and all the king's men
Couldn't put Humpty together again.*⁴⁹

In its original incarnation, the public trust doctrine's scope and its uses were quite narrow. The doctrine's original incarnation covered only that "aspect of the public domain below the low-water mark on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence."⁵⁰ Largely in response to Professor Sax's suggestion that the doctrine could be used to address a variety of environmental harms,⁵¹ the courts expanded the traditional doctrine to protect new

such as enhancing the transparency of governmental decision-making, creating space for natural systems to adapt before protective laws were adopted, and avoiding destabilizing public expectations about communal resources and the need for less damaging alternatives to their destruction. *See id.* at 556–65 (discussing the role of the courts in applying the public trust doctrine and the various uses to which the doctrine can be put).

⁴⁸ Sax, *supra* note 3, at 544 (noting that without "pressing for direct confrontation between the court and the legislature, a considerable opportunity for fruitful judicial intervention can be created").

⁴⁹ WALTER CRANE, MOTHER GOOSE'S NURSERY RHYMES 49 (1877).

⁵⁰ Sax, *supra* note 3, at 556.

⁵¹ *Id.* at 556–57 ("[I]t seems that the delicate mixture of procedural and substantive protections which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies involving air pollution, the dissemination of pesticides, the location of rights of way for utilities, and strip mining or wetland filling on private lands in a state where governmental permits are required."); *see also* Byrne, *supra* note 29, at 918 ("Sax saw the public trust doctrine primarily as a device whereby courts could correct the tendency of parochial administrative agencies and legislatures to respond to well organized minorities and slight the public interest in natural resource protection."). Sax also thought the doctrine might be applied to the poor and consumer groups who are also "often particularly dramatic examples of diffuse public interests and contain all their problems of equality in the political and administrative process" that arise in cases involving natural resources. Sax, *supra* note 3, at 557. He goes on to say, "Only time will reveal the appropriate limits of the public trust doctrine as a useful judicial instrument." *Id.*

trust resources,⁵² such as dry sand beaches,⁵³ inland lakes,⁵⁴ groundwater,⁵⁵ dry riverbeds,⁵⁶ wildlife,⁵⁷ and urban parks.⁵⁸ Gone was the traditional link to navigable water or tidelands.⁵⁹ The courts

⁵² See generally Frank, *supra* note 29 (discussing the following and other modern public trust cases).

⁵³ *Matthews v. Bay Head Improvement Ass'n.*, 471 A.2d 355, 365 (N.J. 1984) (“[R]ecognizing the increasing demand for our State’s beaches and the dynamic nature of the public trust doctrine, we find that the public must be given both access to and use of privately-owned dry sand areas as reasonably necessary.”); see also Frank, *supra* note 29, at 674 (citing *Matthews* as in essence giving the public a “trust-based easement right to cross privately-owned shoreline property to get to the ocean”); *Raleigh Ave. Beach Ass’n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 120 (N.J. 2005) (affirming *Matthews* and declaring that the public had a right to sunbathe and picnic on the privately-owned sand).

⁵⁴ *Nat’l Audubon Soc’y v. Superior Court of Alpine County (Mono Lake Case)*, 658 P.2d 709, 719 (Cal. 1983).

⁵⁵ *In re Water Use Permit Applications*, 9 F.3d 409, 445–47 (applying public trust doctrine to groundwater); *Env’tl. Law Found. v. State Water Res. Control Bd.*, No. 34-2010-80000583, 2014 WL 8843074, at *10 (Cal. App. Dep’t Super. Ct. 2014) (applying the public trust doctrine to groundwater hydrologically connected to navigable river).

⁵⁶ See, e.g., *Lawrence v. Clark Cty.*, 254 P.3d 606 (Nev. 2011) (applying the doctrine to some former riverbeds).

⁵⁷ *Cal. Trout v. Superior Court*, 266 Cal. Rptr. 788, 801–02 (Cal. Ct. App. 1990).

⁵⁸ *Brooklyn Park Comm’rs v. Armstrong*, 45 N.Y. 234 (N.Y. 1871) (applying the public trust doctrine to block Brooklyn from transferring land which it had taken title to without approval of the State legislature); *Williams v. Gallatin*, 128 N.E. 121, 122 (1920) (stating that parks need not be open spaces, but “no objects, however worthy, such as court houses and school houses which have no connection with park purposes should be permitted to encroach upon it without legislative authority plainly conferred”).

⁵⁹ See, e.g., *Hoffman v. City of Pittsburgh*, 75 A.2d 649 (Pa. 1950) (upholding an injunction against sale of public square for development based on public trust doctrine); *In re Conveyance of 1.2 Acres of Bangor Mem’l Park to Bangor Area Sch. Dist.*, 567 A.2d 750 (Pa. Commw. Ct. 1989) (blocking attempted transfer of parklands for construction of an elementary school); *Williams*, 128 N.E. 121 (invalidating a ten-year lease of part of Central Park for a museum for impermissibly diverting park resources without the state legislature’s approval); *Ackerman v. Steisel*, 480 N.Y.S.2d 556, 558 (App. Div. 1984) (ordering removal of city sanitation equipment from a park); *Ellington Constr. v. Zoning Bd. of Appeals*, 152 A.D.2d 365, 378–79 (N.Y. App. Div. 1989) (prohibiting the reconveyance of parkland for redevelopment); *Paepcke v. Pub. Bldg. Comm’n of Chi.*, 263 N.E.2d 11, 19 (Ill. 1970) (allowing conveyance of two percent of Washington Park for a middle school and recreational facilities leased to the Chicago Park District only after showing that public rights in remaining parkland protected and use was for public purpose); *Big Sur Props. v. Mott*, 62 Cal. App. 3d 99, 103 (1976) (revoking permit to cross public parkland to access private property); *Save the Welwood Murray Mem’l Library Comm. v. City Council*, 215 Cal. App. 3d 1003, 1017 (1989) (invoking public trust doctrine to block conversion

simultaneously expanded protected uses of trust resources from navigation, commerce, and fishing to include a variety of passive public uses of those resources, including recreation, bird watching, aesthetics, and gathering of scientific information.⁶⁰ These doctrinal leaps all occurred in the penumbra of multiple environmental laws at all levels of government.⁶¹ Arguably, Congress has filled many of the gaps that faced Professor Sax when he wrote his Michigan article or, at least, has demonstrated that it was capable of doing so.⁶²

Legal scholars participated in this doctrinal revisionist trend,⁶³ writing enthusiastically about potential new uses of the doctrine, not unintentionally providing support for litigants eager to expand the doctrine's protective reach.⁶⁴ Soon proponents of the doctrine were

of a public library to improve access to nearby commercial areas).

⁶⁰ *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971) (holding public trust doctrine protects environmental and ecological values); *Lamprey v. Metcalf*, 53 N.W. 1139, 1143 (Minn. 1893) (first state recognizing public recreation rights as being within the scope of the public trust doctrine); *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972) (applying public trust doctrine to recreational use, with "no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend . . . to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit"); *see also Raritan Baykeeper Inc. v. City of New York*, 984 N.Y.S.2d 634 (Sup. Ct. 2013) (holding that the use of a municipal park for solid waste processing (leaf composting) was an alienation of park resources that, under the public trust doctrine, could only be authorized by the Legislature).

⁶¹ Professor Sax attributed the malleability of the public trust doctrine to the fact that property is "inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing." Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 152 (1971); *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964) ("Property is not a natural right but a deliberate construction by society.").

⁶² *See, e.g.*, Clean Water Act, 33 U.S.C. § 1251 (1972); Solid Waste Disposal Act, 42 U.S.C. § 6901 (1976), Clean Air Act, 42 U.S.C. § 7401 (1977); Coastal Zone Management Act, 16 U.S.C.A. § 1451 (1972). An example of a gap that has not yet been legislatively or administratively filled is global climate change, which has provoked the use of the public trust doctrine by environmental litigators to goad EPA into filling a perceived legislative gap. *See, e.g.*, *Alec L. ex rel Loorz v. McCarthy*, 561 Fed. App'x 7 (D.C. Cir. 2014).

⁶³ Ironically, Professor Sax commented on another type of "radical revisionism," namely the efforts of the property rights movement "to radically restructure property law." *See* Sax, *supra* note 5, at 11–12.

⁶⁴ *See, e.g.*, Erin Ryan, Comment, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL. L. 477, 480 (2001) ("Scholars and practitioners have responded to

advocating that it be applied to “wildlife, parks, cemeteries, and works of fine art,”⁶⁵ and even to the atmosphere.⁶⁶ By far the most adventuresome of public trust scholars writing today, Professor Mary Christina Wood has suggested that there is a “planetary public trust in the atmosphere,”⁶⁷ and has promoted her concept in a series

Sax’s call and have advocated extending public trust protection to wildlife, parks, cemeteries, and even works of fine art.”); Eric T. Freyfogle, *Ownership and Ecology*, 43 CASE W. RES. L. REV. 1269, 1289–90 (1993) (arguing for expanding the settings in which the legal concept of public trust could be applied); see generally Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393 (1991) (explaining various theoretical bases for expansion of the doctrine to protect naturally functioning ecosystems); Patrick S. Ryan, *Application of the Public-Trust Doctrine and Principles of Natural Resource Management to Electromagnetic Spectrum*, 10 MICH. TELECOMM. & TECH. L. REV. 285 (2004) (proposing the application of the public trust doctrine to the electromagnetic spectrum to improve public access and perhaps return some of the spectrum that has been allocated to special interests back to the public).

65 Erin Ryan, *supra* note 64, at 480 (“Scholars and practitioners have responded to Sax’s call and have advocated extending public trust protection to [cultural assets].”).

66 See, e.g., Frank, *supra* note 29, at 679 (“In many ways, our air resources would seem the natural resource most susceptible of treatment as a foundational public trust resource. After all, it is by its physical nature incapable of private ‘ownership,’ and science has demonstrated how the private degradation of air quality can have demonstrable, harmful impacts on public health and aesthetic values.”). Some courts have not found the idea to be so far-fetched. See, e.g., Payne v. Kassab, 312 A.2d 86, 93 (Pa. Commw. Ct. 1973) (citing public trust doctrine and Pennsylvania Constitution as sources of mandate to preserve “clean air . . . [and] the preservation of the natural, scenic, historic and esthetic values of the environment.”); Save Ourselves Inc., v. Louisiana, 452 So. 2d. 1152, 1154 (La. 1984) (recognizing public trust doctrine potentially protects all natural resources, including air).

67 Byrne, *supra* note 29 at 926 (citing Mary Christina Wood, *Atmospheric Trust Litigation*, in CLIMATE CHANGE READER 4–6 (W.H. Rodgers, Jr. & M. Robinson-Dorn eds. 2009), <https://law.uoregon.edu/images/uploads/entries/atmo.pdf>); see also Chris Evans, *Atmospheric Trust Litigation*, W. COAST ENVTL. L. (June 14, 2011), <http://wcel.org/resources/environmental-law-alert/atmospheric-trust-litigation> (discussing litigation filed by environmental activists in 2011 against all 50 states and the federal government for their failure to reduce greenhouse gas emissions, a deficiency plaintiffs claim violates public trust principles). Professor Wood’s articles and the ensuing litigation maintain their creative reading of the public trust doctrine is merely applying existing doctrine and that their capacious interpretation of that doctrine is strongly supported by precedent. See David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 868–69 (1986) (“The tension between proffering a new vision and following the precedential line, between greatness and legitimacy, is distilled at the point where the justice, though a misreading, simultaneously revises the law and insists that he or she is doing nothing more than applying the law.”).

of lawsuits around the country.⁶⁸ Chafing against a restrictive view of the doctrine's scope, she has also argued for the doctrine's "complete re-conceptualization," proposing that it be converted into "Nature's Trust."⁶⁹ Her eagerness to expand the doctrine is born out of justified frustration at the inability of both Congress and the Administration to respond effectively to the crisis of global climate change.⁷⁰

But some scholars sounded a warning about the doctrine's expansion, criticizing its broad use to protect the environment precisely because doing this ignores the doctrine's traditional roots.⁷¹ Among them is Professor William Araiza, who worries that this expansionist trend has put into question the doctrine's "precise legal foundation, its democratic legitimacy, and judicial competence

68 See James Hansen, *Legal Action*, OUR CHILDRENS' TRUST, <http://ourchildrenstrust.org/legal> (last visited Oct. 15, 2015) (providing links to lawsuits filed across nation). To date, these lawsuits have been largely unsuccessful. See, e.g., *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 17 (D.D.C. 2012) (dismissing claim against EPA Administrator for failing to protect the atmosphere under the public trust doctrine for failing to state a claim because, since that claim is grounded in state law, it does not raise a federal question). But see *Forster v. Washington Dep't of Ecology*, No. 14-2-25295-1 (Wash. Super. Ct. King Cnty. filed Nov. 19, 2015).

69 Wood, "You Can't Negotiate with a Beetle," *supra* note 30, at 202–03 ("Courts have repeatedly invited expansion of the doctrine by emphasizing its flexibility to accommodate emerging societal needs. Nature's Trust invites a re-conceptualization of the public trust doctrine . . ."); *id.* at 205 (arguing that limiting public trust to streambeds and water-related areas is "superficial and at odds with the overriding truth of nature that all ecological resources are interconnected and interdependent"); see generally, Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part 1): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43 (2009) (calling for the public trust doctrine to be expanded to system of protection for natural resources against threats of climate change and ecological collapse). In this Professor Wood is engaging in a typical legal analytical methodology, reinterpreting and tailoring "a standing body of law" to fit "novel facts." Cole, *supra* note 67, at 858; RONALD DWORKIN, *LAW'S EMPIRE* 8 (1986) (discussing the differences in opinion over whether judges should "follow the law and not improve upon it").

70 See DWORKIN, *supra* note 69, at 53 ("[A]ll interpretation strives to make an object the best it can be, as an instance of some assumed enterprise, and that interpretation takes different forms in different contexts only because different enterprises engage different standards of value or success"); see generally Michael P. Vanderbergh & Kaitlin T. Raimi, *Climate Change: Leveraging Legacy*, 42 *ECOLOGY L.Q.* 139 (2015) (discussing the use of social norms to motivate private individuals and companies to fill the gap in climate change governance).

71 Smith II & Sweeney, *supra* note 46, at 342 ("Expansion of the public trust doctrine for no other reason than to protect the environment simply ignores the economic precedent established by the original doctrine itself.").

to implement it.”⁷² Professor Peter Byrne has qualms that these doctrinal leaps expose “the public trust doctrine’s greatest weakness: it simply claims too much.”⁷³

One of the greatest worriers about overextending the doctrine, however, was Professor Sax. He warned lawyers not to exceed a court’s comfort level because they will not intervene if plaintiffs “press for direct confrontation between the court and the legislature.”⁷⁴ To Professor Sax, “[a] litigation theory which begins with a sophisticated analysis of public trust principles—setting out alternatives for the achievement of a reasonable development of trust lands with minimal infringement of public use—is likely to obtain a far more sympathetic response from the bench than is one which takes a rigorous legal principle and squeezes it to death.”⁷⁵ He even set out criteria for when doctrinal expansion was appropriate.⁷⁶ The fact that legal scholars, like the author, have

⁷² William D. Araiza, *The Public Trust Doctrine as an Interpretive Canon*, 45 U.C. DAVIS L. REV. 693, 711 (2012); see also *id.* at 738 (identifying as a paradox of the doctrine that at one time it is both “a deeply felt principle established in venerable law, but at the same time, an incompletely worked-out legal doctrine that, in its more aggressive forms, threatens to provide courts with wide-ranging authority poorly cabined by legal rules”); *id.* at 737–38 (“[The expansion] may also test the competence of courts [which must] . . . decide complex land use and ecosystem-management questions, and evaluate the real costs and benefits associated with conflicting resource uses.”). But see Sax, *supra* note 3, at 552 (finding courts perfectly able to distinguish between appropriate and inappropriate “dealings with trust lands”).

⁷³ Byrne, *supra* note 29, at 927; see also Seth Jaffe, *Two Strikes Against Common Law Approaches to Climate Change: The Atmosphere Is Not a Public Trust*, L. & ENV’T (June 1, 2012), <http://www.lawandenvironment.com/2012/06/01/two-strikes-against-commonlaw-approaches-to-climate-change-the-atmosphere-is-not-a-public-trust/> (decrying the use of the public trust doctrine to compel agencies to protect the atmosphere from climate change by reducing carbon dioxide emissions).

⁷⁴ Sax, *supra* note 3, at 544; see also Sax, *Liberating the Public Trust from Its Historical Shackles*, *supra* note 19, at 194 (warning that “sharp confrontations between courts and legislatures should be avoided wherever possible, suggesting instead that courts can encourage legislatures to “search for less disruptive decisions below the constitutional level,” can also “assure” decisions made by administrative agencies cannot impair the public trust “in the absence of explicit, fully considered legislative judgments,” and protect trust resources from pressures from private landowners by being mindful of “the history of common rights”).

⁷⁵ Sax, *supra* note 3, at 553; see also *id.* at 566 (“If lawyers and their clients are willing to ask for less than the impossible, the judiciary can be expected to play an increasingly important and fruitful role in safeguarding the public trust.”).

⁷⁶ See *id.* at 484–85 (setting out three criteria for determining whether the public trust doctrine should be expanded—“certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as

ignored his concerns about overextending the doctrine at the same time we relied on his work for our own scholarship is what stimulated this Article.

III. PROBLEMS CREATED WHEN SCHOLARLY IDEAS ARE OVEREXTENDED⁷⁷

Scholarship is legal academe's jade; we sing its glories and genuflect before it, bedizen it with jewels and then demean it by pretending to make it the gate keeper of the profession. It becomes the price we must pay to be a law professor, rather than the prime privilege of that calling. And, most justly, it reciprocates in kind, by forcing us to accept as scholarship work that is little more than ritualized diligence.⁷⁸

Author and scholar Umberto Eco defends what he calls the “interpretative virtue of ‘moderateness.’”⁷⁹ Some scholars who value moderation believe that judges who follow a minimalist interpretative approach reduce the opportunities for clashes with the legislative branch over their own interpretative judgments.⁸⁰

one of citizens rather than of serfs,” “certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace,” and “certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate”); *see also* Babcock, *supra* note 16 at 24–31 (applying Professor Sax’s criteria to justify expansion of the doctrine to protect scenic views of Palisades Inter-State Park).

⁷⁷ The author is not choosing between various interpretations of the public trust doctrine, nor arguing that any specific interpretation of the doctrine is wrong or even “objectively better than another,” but rather that any interpretation of the doctrine that ignores the risks set out in this Part is problematic and should be discouraged. *Cf.* DWORKIN, *supra* note 69, at 76 (“Can one interpretative view be objectively better than another when they are not merely different, bringing out different and complementary aspects of a complex work, but contradictory, when the content of one *includes* the claim that the other is wrong?”).

⁷⁸ Kenneth Lasson, Commentary, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, HARV. L. REV. 926, 934, n.43 (1990) (quoting Bard, *Scholarship*, 31 LEGAL EDUC. 242 (1981)).

⁷⁹ Robert F. Blomquist, *Overinterpreting Law*, 116 PENN STATE L. REV. 1081, 1115 (2012) (quoting UMBERTO ECO, *Interpretation and History*, in INTERPRETATION AND OVERINTERPRETATION 236, (Stefan Collini ed. 1992)).

⁸⁰ *Id.* at 1117 (quoting MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 150 (2008)); *see also* Farber, *infra* note 86, at 377 (quoting W. QUINE & J. ULLIAM, THE WEB OF BELIEF, 66–68 (“The truth may indeed be radically remote from our present system of beliefs, so that we may need a long series of conservative steps to attain what might have been attained in one rash leap. The longer the leap, however, the more serious an angular error in the direction.”)); Cole, *supra* note 67, at 859 (discussing the tension between adhering to tradition, as exemplified in precedent, and breaking “radically” from it “by acts of ‘misreading,’” attributing to Harold Bloom the idea that “creativity is necessarily revisionist” and that those whom we consider ‘great,’ ‘strong,’ or ‘influential’ are those whose views stand

Professor Robert Blomquist echoes that thought in his recommendation that “good legal interpreters . . . should live prudently by embracing limits to interpretation.”⁸¹ The same might be said of scholars who take it upon themselves to interpret the work of prior scholars. Immoderate interpretations of prior scholarship transformed into litigation or legislative initiatives might lead to rejection not only of the overextended text, but also of the original, more moderate concept, once its expansive capabilities are understood.⁸² Professor Eco’s fear animates this Article and lends a sense of urgency to finding a way to cabin immoderate interpretations.⁸³

out as the most revisionary).

81 Blomquist, *supra* note 79, at 1118; *see also* Daniel A. Farber, *The Case Against Brilliance*, Commentary, 70 MINN. L. REV. 917, 917 (1986) (arguing that “the current academic bias in favor of brilliant, ‘paradigm shifting’ work should be abandoned in favor of the more pedestrian activity of ‘normal sciences.’”).

82 *See* Blomquist, *supra* note 79, at 1092 (quoting Stanley Fish as saying the “‘interpretative community’—the immediate and foreseeable legal audiences who are likely to judge the interpretation—may disagree with an outlier interpretational performance and consider it over the top”); *id.* at 1091 (“[T]hese actors [referring to clients, lawyers, inside counsel, law clerks, and judges, among others] must advance and defend an interpretational situation of the law in the course of performances to achieve litigation victories, transactional successes, preferred legal outcomes, legislative wins, and regulatory objectives.”). For examples of where the Supreme Court has limited a principle because of a perception it might have been overextended, *see* *Industrial Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (plurality decision adopting a limited interpretation of the Occupational Safety and Health Act to avoid having to find that benzene, a known carcinogen, presented a significant risk); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (finding it was unclear whether the Age Discrimination in Employment Act covered appointed state judges and dismissing a suit challenging the Missouri Constitution for violating the federal statute and the Fourteenth Amendment); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012) (limiting Congress’s spending power by striking down the threat of draconian cuts to state Medicaid grants unless states significantly expanded the program).

83 *See* Sax, *supra* note 3, at 552–53 (explaining that lawyers invite bad decisions by courts “when they assert extreme and doctrinaire positions such as any project which involves a lease to private interests is thereby illegal. One must provide a court with room to maneuver”). *But see* Cole, *supra* note 67, at 866 (noting although “legitimacy rests on following precedent . . . greatness lies in breaking from precedent”).

Yet there are pressures on law faculty not only to produce scholarship,⁸⁴ but also to write immoderately.⁸⁵ Daniel Farber complains that the standards used in evaluating the worth of scholarship perversely honor “the ‘brilliantly novel and counterintuitive rather than the sensible.’”⁸⁶ Many law schools support scholarship with incentives like merit-based salary increases, summer research grants, sabbatical leaves, travel stipends, and student research assistants.⁸⁷ Ego and the “expectations of university image-makers” not only encourage law professors to write, but also to write expansively.⁸⁸ To many law professors “image is easily as important as substance” and to have an Ivy League law review publish, or even cite an article, is “a feather in one’s professional cap.”⁸⁹ The personal motivation to

84 While some in the academy bemoan the number of articles that law professors write, others think there should be more articles produced, especially by “free-riding” tenured members of the faculty. Compare Lasson, *supra* note 78 (1990), with David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993 (1991), and Andrew Phang, *Scholarship in Perspective*, 2 LEGAL EDUC. REV. 277 (1991).

85 Daniel A. Farber, *Gresham’s Law of Legal Scholarship*, 3 CONST. COMMENT. 307, 310 (1986) (“Scholarship is expected to be original, and defense of the conventional wisdom provides few opportunities for brilliance.”). Blomquist writes that, when it comes to interpretation of legal text, some scholars, like Adam Gearey, believe that there are “no limits other than the injunctive gestalt to ‘make it new.’” Blomquist, *supra* note 79, at 1114 (citing ADAM GEAREY, *LAW AND AESTHETICS* 75 (2001)).

86 Daniel A. Farber, *Brilliance Revisited*, 72 MINN. L. REV. 367, 367 (1987). *But see* Cole, *supra* note 67, at 863 (citing HAROLD BLOOM, *THE ANXIETY OF INFLUENCE* (1973) 29, in which Bloom explains that “for a novice or ‘ephebe’ to emerge a strong creator, he must constructively misread his most important precursors”).

87 See Gregory, *supra* note 84, at 1002 (mentioning several of these incentives); Dan Subotnik, *Scholarly Incentives, Scholarship, Article Selection Bias, and Investment Strategies for Today’s Law Schools*, 30 TOURO L. REV. 615, 617 (2014) (listing among faculty incentives diminished class loads, sabbaticals, leaves, research assistantships, and travel allowances); *id.* at 618 (noting that Touro used to provide a one-time bonus to faculty who successfully published their articles, which increased depending on the law review’s ranking). Subotnik credits U.S. News & World Report’s ranking system for law schools, which includes “prestige” as a metric, which in turn translates to scholarship’s publication in “high ranking journals.” *Id.* at 620.

88 Lasson, *supra* note 78, at 927 (saying in addition that “these traits are fueled by faculty-self-studies, administrative mission statements, and fiats laid down by the Association of American Law Schools”).

89 *Id.* at 948–49. Although Lasson attributes the preoccupation of law scholars with irrelevant and obscure matters to narcissism, the same drive to impress one’s colleagues can apply to showing cleverness at taking a well-researched and

write big combines with pressure in the academy for law professors to write something original on a new topic⁹⁰ to distinguish themselves from other scholars—“the innocent ersatz” producing potentially mediocre articles for publication in less prestigious law journals.⁹¹ As this is hard to do in the area of public trust scholarship when the original idea has already been written, the solution is to push the doctrinal concept to hitherto unimagined heights.

There are also legal scholars who write specifically to encourage law reform, where the law professor’s two callings—that of a scholar and a lawyer—are blended into a form of advocacy scholarship.⁹² Legal scholars who advocate for law reform may push an idea in their writings to influence litigation, and thus achieve a policy goal that might otherwise not be met.⁹³ Even Professor Sax’s 1970 Michigan article has been cited in forty-six judicial opinions since its publication.⁹⁴ It is this nexus between advocacy scholarship and litigation where the risks from writing immoderately are most manifest and, therefore, of greatest concern.⁹⁵

analyzed topic a step beyond where previous scholars have taken it. *Id.*

⁹⁰ *Id.* at 934 n.43 (quoting Farber, *supra* note 85 (“suggesting that the principle of ‘adverse selection’ operates in legal scholarship to ensure ‘law review literature will be dominated by articles taking silly positions’”).

⁹¹ *Id.* at 927. Professor Lasson attributes this to what he calls the “academic imperative” by their school’s promotion and tenure committees, which have “whipped [them] into a hack’s frenzy,” forced them “to jump through hoops,” and “to shimmy down the chutes of the publication process.” *Id.*; *see also* Farber, *supra* note 81, at 930 (“There is a tendency today for high-flying theorists to scoff at those whose work stays closer to the ground. Icarus, too, was undoubtedly scornful of pedestrianism.”). Farber in his article justifies why “‘brilliance’ should count heavily against an economic or legal theory.” *Id.* at 917.

⁹² There is a risk that a professor who engages in advocacy scholarship is no longer a “dispassionate scholar who observes and explores without a stake in the particular outcome,” and thus in some way devalues the scholarship. Marcus, *supra* note 5, at 694. An example of advocacy scholarship can be found in a 2006 foreword to a symposium on an experience law student editors of the Harvard Civil Rights-Civil Liberties Law review had editing a piece by an inmate, in which he describes his experiences with habeas corpus review, in which the author of the forward warns editors of law journals who have the capacity to tell stories “to create the space in which others can tell theirs as well.” *See* Jocelyn Simonson, Foreword, *Breaking the Silence: Legal Scholarship as Social Change*, 41 HARV. C.R.-C.L. L. REV. 289, 298 (2006).

⁹³ An example of this is the Children’s Trust litigation provoked by the scholarship of Professor Wood. *See* discussion *supra* note 17 and accompanying text.

⁹⁴ *See supra* note 12.

⁹⁵ Another factor motivating particularly scholars interested in law reform is the strongly held belief that the current status quo should be changed, again most

A “breakthrough article” like Professor Sax’s provides a foundation for subsequent scholars, already motivated to write expansively in furtherance of their own careers or to encourage law reform, to extend the scope of the article beyond its original framework. But each extension of the core doctrine creates a risk that the original idea, which was tenuous if for no other reason than it was new, might become too far removed from common understandings or so unconnected to shared experiences that it becomes unsustainable in the real world.⁹⁶ Thus, scholars proposing ever-expanding public trust doctrine interpretations, unmoored from Professor Sax’s original vision, encourage litigants to press these theories in court. But these novel theories may push courts beyond their comfort level—the doctrine’s distance from its origins may disrupt settled expectations regarding commonly understood property law concepts— and judges may reject or constrain the doctrine.⁹⁷

clearly manifested in the recent writings and actions of Professor Wood. *See, e.g.,* Wood, *Advancing the Sovereign Trust of Government*, *supra* note 69 (arguing for a planetary trust). According to Professor Farber “[b]ecause we evaluate abstract theories largely by examining their concrete implications, there is little reason to abandon strongly held concrete beliefs simply because they conflict with theory.” Farber, *supra* note 86, at 373.

⁹⁶ *See* Marcus, *supra* note 5, at 695 (questioning whether “it is desirable to promote such breakthroughs since law is a human endeavor and insights that never occurred to anybody before may be too remote from experience”). Marcus goes on to say that “no one should expect this sort of scholarship as steady work” as “[s]ea changes in law are relative rare, and few are positioned to seize the time and attach their names to such changes.” *Id.*; *see also* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (announcing the circumstances in which a prior understanding may be abandoned, saying that it is “common wisdom that the rule of *stare decisis* is not an “inexorable command, and certainly it is not such in every constitutional case,” and saying when a prior holding is reexamined the Court’s opinion is “informed by a series of prudential and practical considerations,” such as “whether the rule has proved to be intolerable simply in defying practical workability, . . .; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, . . .; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, . . .; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification”).

⁹⁷ The exchange between Justices Brennan and Scalia over the application of the public trust doctrine in *Nollan*, which led to Justice Brennan withdrawing his discussion of the application of the public trust doctrine to the facts of that case in his dissent, after Scalia included a rejoinder in a draft opinion, illustrates the reality of this risk. *See* Byrne, *supra* note 29, at 921–22; *see also* Ralph G. Steinhardt, *Determining Which Human Rights Claims “Touch and Concern” the United States: Justice Kennedy’s Filartiga*, 89 NOTRE DAME L. REV. 1695, 1703 (2014)

A second risk is that the proliferation of spinoff articles constructing ever more fantastic new applications for Professor Sax's work, by sheer volume and eccentricity, might leave the original idea "lost in the constant flux of novel theories."⁹⁸ Unfortunately, Professor Farber's hope in this situation that "only truly valid insights would survive" might be defeated by Gresham's Law, which essentially says that "bad money drives out good." Applying Gresham's Law means that Professor Sax's explication of the public trust doctrine will be driven out while only "bad coins [the extreme uses of his concept] will circulate."⁹⁹

With respect to the litigation risk that might be triggered by intemperate, heedless scholarship, this Part has suggested that since the public trust doctrine is a common law precept, its use as a vehicle for protecting natural resources, as envisioned by Professor Sax, depends on the support of both the judicial and legislative branches of government. If this support is lost, so will be the capacity of the doctrine to goad legislators and administrators to fill gaps in environmentally protective laws. Going too far with a common law

(discussing how the Court closed the door to overly creative applications of the Alien Tort Statute of 1789 (ATS), "with the result that excessively restrictive interpretations of the statute and excessively expansive ones are equally disapproved"); *id.* at 1698 (saying the Court deployed "a rhetoric of caution" in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), directed at plaintiffs who had sought relief under the statute when it involved not only an alien plaintiff, but an alien defendant and alien conduct). The ATS relies on the common law to create a cause of action under the ATS, *id.* at 1697, which strengthens the analogy to the common law public trust doctrine and makes the cautionary message relevant.

⁹⁸ Farber, *supra* note 86, at 377. Authors on the cusp of writing similar breakthrough articles might also be discouraged from doing so by the fear that their ideas might be overextended by subsequent scholars and jeopardize what they had hoped to achieve. For example, subsequent scholars misconceived Professor Chayes' *Public Law Litigation* as a description of "a new breed of litigation that resulted from judicial activism" after *Brown v. Board of Education II*, 349 U.S. 294 (1955). Marcus, *supra* note 5, at 668–69 (arguing that Chayes was "more circumspect on this point"). Professor Chayes felt a need to correct the false impression the derivative scholarship created, even as it was lauded. *Id.*

⁹⁹ Farber, *supra* note 85, at 307. Gresham's Law is an observation in the field of economics that when coins composed of metals of different values have the same value as legal tender, than those made of cheaper metal will be used for payment, while the ones containing more expensive metal will be hoarded and eventually disappear from circulation. JOHN BLACK ET AL., A DICTIONARY OF ECONOMICS 179 (4th ed. 2013). Farber also refers to Darwin's theory of natural selection and says that, contrary to that theory, selection in economics can weed out the fittest members of a particular group, leaving only the less fit ones, which in some circumstances can "lead to the total collapse of a market."

doctrine invites a court to turn away from the doctrine or a legislature to limit it.¹⁰⁰ Enough acts by courts and legislatures negating the doctrine's use could cast a pall over its viability other than as an interesting artifact of ancient law¹⁰¹ and lead to its ultimate demise.

IV. IS THERE AN INTERNAL OR EXTERNAL CHECK TO REQUIRE SCHOLARS TO THINK BEFORE THEY LEAP?

*Moral order is, therefore, an interactional phenomenon. Violations of expectations become violations of obligations and are thus subject to social sanctions.*¹⁰²

Accepting for argument's sake the severity of the risk to the continued viability of the public trust doctrine, this Part of the Article examines whether academic norms might temper the zeal of legal scholars to overextend a prior scholar's original contribution to the scholarly literature.¹⁰³ The Part discusses norms and some

¹⁰⁰ See, e.g., *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1983) (abolishing federal general common law as judicial overreach, and saying "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable to a state whether they be local in their nature or general, be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts"); see also *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (establishing that there is a constitutional limit for punitive damages that a court may award); *accord TXO Prod. Corp. v. Alliance Res. Corp.*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 4008 (2003). Courts may also address overreach concerns about a doctrine less direct than undermining the doctrine itself, instead claiming that a statute prevents the use of the doctrine. See, e.g., *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (declining to decide whether plaintiffs could use a federal common law nuisance claim to seek the curtailment of greenhouse gas emissions because any such claim would be displaced by the Clean Air Act). As an example of legislative limits placed on common law doctrines when there is a concern that the doctrine may have been over-used, some state legislatures, in the context of broader tort reform, have limited joint and several liability to specific factual situations. See James J. Scheske, *The Reform of Joint and Several Liability Theory: A Survey of State Approaches*, 54 J. Air L. & Com. 627, 635–36, 642–50 (1988).

¹⁰¹ But see Cole, *supra* note 67, at 905 ("Our traditions are born from breaks with past tradition, and are given new life from the continuing redefinitions that strong misreadings confer.").

¹⁰² David R. Karp, *The New Debate About Shame in Criminal Justice: An Interactionist Account*, 21 JUST. SYS. J. 301, 314 (2000).

¹⁰³ For a discussion of the difference between individual and social norms, see Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 135–136 (2009).

problems with their use before moving onto an examination of the efficacy and robustness of two existing norms, the norm of academic integrity and the norm against over-interpretation.¹⁰⁴ This Part also explores the possibility of creating a new specific norm to discourage overextending the work of a prior scholar into the real world danger zone.

A. Norms in General

Norms are social rules promulgated and enforced by the community to which they apply.¹⁰⁵ They provide “social meaning” for individuals in communities and thus the framework in which people live.¹⁰⁶ Social norms function as “nonlegal rules or obligations that certain individuals feel compelled to follow despite the lack of formal legal sanctions, whether because defiance would subject them to sanction from others (typically in the form of disapproval, lowered esteem, or even ostracism) or because they would feel guilty for failing to conform to the norm (a so-called internalized norm).”¹⁰⁷ Concern about esteem is especially

¹⁰⁴ Academic freedom is an obvious norm, but functions more as one that enables academic scholarly zeal than one that would restrain it as are norms that govern faculty in non-law disciplines, like medicine or the humanities. See Emily M. Calhoun, *Academic Freedom: Disciplinary Lessons from Hogwarts*, 77 U. COLO. L. REV. 843 (2006) (discussing the relevance of the reality of discipline to debates on academic freedom and saying “faculty in our universities also live their professional lives within disciplinary constraints and norms”).

¹⁰⁵ See Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, with Special Reference to Sanctions*, 19 INT’L. L. & ECON. 369, 369 (1999) (“A norm is a social rule that does not depend on government for either promulgation or enforcement.”); see also Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 5 (2000) (defining a social norm as “an obligation backed by a social sanction”; an obligation, as “a statement about what people ought to do, such as pay taxes and clean up after their dogs”; a social sanction as a “punishment imposed, not by state officials, but by ordinary people, such as shunning a litigious lawyer or refusing to deal with a flaw firm that organizes hostile takeovers”); Vandenberg & Raimi, *supra* note 70, at 146 (“Social norms can lead to social ordering in the absence of law, and can complement, undermine, displace, or encourage legal formation and enforcement.”).

¹⁰⁶ Michael P. Vandenberg, *The Social Meaning of Environmental Command and Control*, 20 VA. ENVTL. L.J. 191, 200 (2001).

¹⁰⁷ Ann E. Carlson, *Recycling Norms*, 89 Cal. L. Rev. 1231, 1231–32, 1238 (2001); see also *id.* at 1239 (“In rational actor terms, violating a social norm imposes a cost on the violator that can tip the cost-benefit balance in favor of conformity with the norm.”); Alex Geisinger, *A Group Identity Theory of Social Norms and Its Implications*, 78 TUL. L. REV. 605, 608 (2004) (“The sanctions can be based on shame or some other type of social ostracism.”); Vandenberg, *supra*

important in close-knit groups, like academic institutions, because most people care what their peers think about them. Concomitantly, compliance with a norm improves when there are “opportunities to communicate esteem (or lack of it) within the group.”¹⁰⁸ Often people engage in behavior that may not be important to them in their individual capacity to show allegiance to a group “with which they have their most valuable interactions” or in some cases to establish a network with them.¹⁰⁹ Thus, even legal scholars who would prefer to immoderately expand the ideas of a prior scholar might restrain themselves in order to show they are part of the dominant group established around a norm of scholarly restraint, should one arise.¹¹⁰ This is not to say that external rules or policies play no role in directing behavior; indeed they can still serve an expressive function, even when unenforced, and can “reconstruct norms and the social meaning of action,”¹¹¹ as discussed later in this Part.

Close-knit communities where there are sufficient “iterative relations or information exchange to enable social norm sanctioning to occur” are conducive to norms functioning as behavioral controls.¹¹² Law schools are examples of such communities where

note 106, at 200 (A social norm is “an informal obligation that may be internalized (and enforced through guilt) or that may arise without internalization (and be enforced through external non-legal sanctions such as stigma or ostracism).”).

¹⁰⁸ Carlson, *supra* note 107, at 1290; *see also* Calhoun, *supra* note 104, at 853 (“[A] faculty member’s work is deemed worthy, not because some miscellaneous external consumer of information might choose to buy it . . . but because the affiliates of a discipline as a whole choose to accept it.”).

¹⁰⁹ Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. LEGAL Stud. 553, 554 (1998) (explaining that “signaling theory” is “a version of rational choice theory, . . . in which people engage in behavior that they may not value, such as saluting the flag or denouncing Bosnians, in order to signal their loyalty to the group with which they have their most valuable interactions or, more broadly, in order to establish a network . . .”).

¹¹⁰ Professor Margo Schlanger comments that how a person defines what it is she must do may be more responsive to their external reference group than to the preferences of her supervisors. *See* Margo Schlanger, *Offices of Goodness: Influence without Authority in Federal Agencies*, 36 CARDOZO L. REV. 53, 114 (2014) (quoting JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 60 (1989) and saying “the way a person defines his or her task may reflect more the standards of the external reference group than the preferences of internal management”).

¹¹¹ Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2034–35, 2032 (1996).

¹¹² Michael P. Vandenbergh, *Order Without Social Norms: How Personal Norm Activation Can Protect the Environment*, 99 NW. U.L. REV. 1101, 1105 (2005) (Social sanctions for breaching a norm will not occur in “situations in which the individual’s actions are not observable by others and situations in which

interaction can and often does generate habits, which can turn into reciprocal obligations that other members of the group can sanction.¹¹³ This transformation happens when individuals identify themselves as belonging to a particular group, which, in turn, can lead the individual to identify and assimilate the group prototype (or norm), where “individual behavior is replaced by group-guided behavior.”¹¹⁴ Professors in this instance might change their behavior by refraining from writing articles that overextend a prior scholar’s work, or, more modestly, evaluating the consequences of expansionist writings before publication—a “stop, look, and listen” cautionary moment for academic scholars.¹¹⁵

the actions are observable but occur in non-close knit groups as loose-knit group situations”); *see also* Karp, *supra* note 102, at 313 (“Repeated interactions give rise to habits. They are perceived by the actors and become expectations in the sense of predictions or anticipations of behavior [E]ach actor feels constrained to live up to the expectations, partly out of a feeling that the other will be irritated, offended, or disappointed if the expectation is not fulfilled.”).

113 Karp, *supra* note 102, at 313 (“[I]nteraction generates habits; perceived, they become reciprocal expectations; in addition to their purely predictive and anticipatory nature, sensitivity to them endows them with a constraining or even an obligatory character Thus do norms grow in unplanned fashion out of ongoing interaction.”); *id.* at 314 (“[I]dentity is constructed interactionally as others attempt to ascertain the identity of a person, and that person’s own identity is developed in response to others’ expectations.”); *see also* Michael P. Vandenberg, *Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 STAN. ENVTL. L.J. 55, 68–69 (2003) (noting educational institutions can be sources of internal norms that can “inculcate” members of the group through contacts – membership in the group creates the environment within which internal norms can be enforced through “feelings of guilt, anxiety, loss of self-esteem and other related emotions”).

114 Geisinger, *supra* note 107, at 632. Although writing about government employees, Professor Margo Schlanger’s comments about the importance of professional identifications and groupings appear equally relevant to law professors. *See* Schlanger, *supra* note 110, at 113 (“Numerous scholars have written about professional identification in government agencies, and how professional commitments and professional reference groups, and the cultural distinctions they produce, can be outcome-determinative.”).

115 Some professional codes guiding scientific research have adopted as an informal rule, a norm of foreseeability “in so far as humanly possible.” *See* Nicholas H. Steneck, *Fostering Professionalism and Integrity in Research*, 5 U. ST. THOMAS L.J. 522, 534 (2008) (citing a provision in the Society for Social Responsibility in Science’s code requiring individual researchers “to foresee, insofar as possible, the results of his professional work”). *Cf.* *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927) (announcing Justice Holmes’ rule for what people should do when they approach a railroad track, finding plaintiff responsible for his own death by not checking to see if a train was approaching). Asking that legal scholars stop and think about the broader consequences of their writings is similar to environmental laws like section 102(2)(C) of the National

B. *Existing Norms of Possible Relevance*

A scholar's discipline contains its "own norms for determining what counts or is valuable and when one can trust in the truth of a particular matter."¹¹⁶ It also "determines what 'counts' as an important question or topic to pursue in research or teaching."¹¹⁷ A "discipline takes its identity from an internal disciplinary consensus on ethical norms and professional behavior."¹¹⁸ Members of a discipline who conform their behavior to "their role obligations," or norms, are considered to be living "appropriately within the discipline"; those who do not "are in trouble," no matter how "brilliantly and effectively [they have] made use of a complicated body of theoretical knowledge."¹¹⁹ Thus, norms adopted by the discipline of law might constrain how expansively a legal scholar treats another's ideas.¹²⁰ Two such norms are discussed below.¹²¹

1. *The Norm of Academic Integrity*¹²²

This discussion assumes that there is linkage between the idea

Environmental Policy Act of 1969, 42 U.S.C. § 4332(c)(ii) (2012), and section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536 (2012), which both require agencies to think about their actions before they engage in them.

¹¹⁶ Calhoun, *supra* note 104, at 848.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 849.

¹¹⁹ *Id.* Professor Calhoun continues by saying that "these role obligations are the reason for the standard assertion that privileges, such as academic freedom, entail responsibilities." *Id.*

¹²⁰ *See id.* at 863–71 (proposing that a discipline's norms be used in evaluating academic freedom arguments); *see also id.* at 854 (complaining that debates about academic freedom "convey no sense of the possibility that when academic freedom is threatened, it is because the integrity of a discipline, not only individual liberty, is at risk."); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L. J. 251, 258 (1989) (explaining that the unique value of academic speech is due to "the disciplinary and ethical constraints under which it is produced").

¹²¹ In a review of the literature on potential academic norms, these are the only two that surfaced of potential applicability.

¹²² Integrity is of major concern in the field of scientific research. *See* Steneck, *supra* note 115, at 522 ("While the ambiguity surrounding the proposed new norm of restraint makes it difficult to determine when a violation of that norm has occurred, a clear institutional standard or rule eliminates that ambiguity."). Although science provides the most opportunities for research, the experiences with various scientific disciplines in trying to assure the integrity of research done in their fields and the problems encountered are not so unique to make studying

of fealty to a prior author's original concept and the norm of academic integrity.¹²³ Accepting for the moment the correctness of that linkage, Professor Harold Lewis identifies three issues of academic integrity, which are helpful in understanding how the norm might function in the context of overextending a prior author's original concept. They are: (1) whether to write at all, given conflicting pressures on law professors to write, teach, and provide service to their school; (2) topic selection, which can involve some career risk for untenured faculty and a risk to post-tenure compensation and writing grants for tenured professors; and (3) integrity issues raised by the methods and means of scholarship.¹²⁴ If, as Professor Peter Byrne suggests, "[t]he disinterested search for knowledge fosters a manner of discourse that, at its best, is careful, critical and ambitious,"¹²⁵ then the question whether scholarly ambition is limitless is encountered, if at all, at the third tier of academic integrity on Professor Lewis' list—"methods and means of scholarship." Plagiarism, falsifying data, and "stooping to uncivil discourse" are typical examples of third-tier academic integrity issues,¹²⁶ but none of them touches on what is at issue here—overextending a prior scholar's idea.

While overextending Professor Sax's concept of public trust may approach Professor Lewis' third-tier integrity issue of "consciously distorting legal materials to conform to predetermined

how the discipline of science has approached the norm of research integrity. *See id.* at 523 (noting that science "is, by most measures, the dominant component of research," especially when the social sciences are included); *id.* at 524 (saying "the fundamental principles underlying scientific research and shaping its ethic are applicable to all research, whatever the field").

123 What is not at issue here is plagiarism or copyright infringement. With respect to the latter, an author of an original idea cannot protect "elements that naturally flow from the subject more than from the author's creativity" under the *scènes à faire* doctrine. That doctrine "prevents protecting elements of a work derived from expressions or representations that necessarily flow from one common idea." Carlos Castellanos Rubio, *Columbia's Poetic World of Authors' Moral Rights: Considerations of Imprisoning a Professor for Plagiarism*, 22 PAC. RIM L. & POL'Y J. 141, 154 (2013).

124 *See generally* Lewis, *supra* note 2. Professor Farber makes the additional point that for the "untenured beginner," who has "to work hard to attract attention," the decision to push the scholarship envelope and take "a shocking position is a manifestly reasonable strategy." Farber, *supra* note 85, at 310.

125 *See* Byrne, *supra* note 120, at 334.

126 Lewis, *supra* note 2, at 611. Steneck notes that these problems and others are rampant in scientific research. *See* Steneck, *supra* note 115, at 528 ("The gap between ideals and reality exists in all aspects of research.").

views,”¹²⁷ for the most part, it is not a good fit for any of the third-tier offenses. A “distortion” could be driven by personal ambition or by the desire to promote law reform in another venue, but generally, legal materials are not being misrepresented, falsified, or altered; they are merely being stretched to fit a new set of facts.¹²⁸ Even if a fit could be found, it is harder than in cases of obvious threats to academic integrity like plagiarism or data falsification to see exactly where a line has been crossed—when does extension become overextension?¹²⁹ Thus, the norm of academic integrity seems not particularly helpful in limiting risky scholarship, and is not analyzed further.

2. *The Norm of Refraining from Rhetorical Excess*

Some scholars have expressed concern about the penchant for interpretative excesses in judicial opinions and law journal articles.¹³⁰ According to Professor Blomquist, the concept of rhetorical competence, the obverse of rhetorical excess, “involves, at its core, a *moral* pursuit of the ‘art of understanding,’ dedicated to advancing a robust ‘scholarly enterprise’ entailing the interpreter’s good faith interpretation that clearly discloses to the audience ‘any truth claim regarding the authorial intentions of a given text.’”¹³¹ On the positive side, rhetorical excesses can be used

¹²⁷ Lewis, *supra* note 2, at 611.

¹²⁸ The Office of Research Integrity (ORI), a statutory office created by Congress in 1993, defines “falsification,” in its Public Health Service Policies on Research Misconduct Rule, 40 C.F.R. § 93.103 (2005), as “manipulating research materials, equipment of processes, or changing or omitting data or results such that the research is not accurately represented in the research record.” See Chris B. Pascal, *The Office of Research Integrity: Experience and Authorities*, 35 HOFSTRA L. REV. 795, 796 (2006).

¹²⁹ See DWORKIN, *supra* note 69, at 410 (explaining that “integrity does not enforce itself: judgment is required,” and “that judgment is structured by different dimensions of interpretation and different aspects of these”). Dworkin goes on to say that this is what makes legal judgments “pervasively contestable.” *Id.* at 411.

¹³⁰ See generally Blomquist, *supra* note 79. Blomquist identifies the tendency to “overinterpret law” within “America’s fascination with excess.” *Id.* at 1084.

¹³¹ *Id.* at 1086; see also Subotnik, *supra* note 87, at 616 n.4 (quoting ANTHONY T. KRONMAN, EDUCATION’S END: WHY OUR COLLEGES AND UNIVERSITIES HAVE GIVEN UP ON THE MEANING OF LIFE 111 (2007) (“[T]he equation of scholarly specialization with duty and honor . . . makes the development of one’s place in the division of intellectual labor a spiritually meaningful goal, and not just an economic organizational imperative.”), quoted in RICHARD ARUM & JOSIPA ROSKA, ACADEMICALLY ADRIFT 10 (2011)). According to Subotnik, Arum adds that academic writing is a “moral imperative.” *Id.*

to test common interpretations, find new meanings in tired text, and lead to new understandings.

Although Blomquist is referring to lawyers, judges, and legislators when he writes that they all must “advance and defend an interpretational situation of the law,” legal scholars are no different when they advance interpretations of prior scholarly work.¹³² Interpretational excesses create a risk that an interpretation that is considered excessive will be rejected.¹³³ This risk suggests that there may be a need to cabin interpretations of legal doctrine by adhering to a norm of avoiding rhetorical excesses.¹³⁴ While this norm is more applicable to the problem of overextension of prior scholarship than is the norm of academic integrity, relying only on the creation of the norm would still leave, among other problems, a significant hurdle because of conflicting norms and widespread noncompliance with such a norm by public trust scholars, as discussed in more detail below.

A social norm only begins to control behavior when “a significant proportion of people in a community internalize [it].”¹³⁵ However, within any one individual there may be conflicting norms competing for control of that individual’s behavior.¹³⁶ Any one of these competing social norms might command greater community or social approval.¹³⁷ Thus, if what Professor Vandenberg calls the “autonomy norm,”¹³⁸ encompassing academic freedom, is held in high esteem, the likelihood that scholars will internalize a contrary

132 Blomquist, *supra* note 79, at 1091–92 (explaining that lawyers function like actors and “must strategically decide upon an interpretational approach for each material issue” in a conflict, noting in addition that “common sense and pragmatic interpretational approaches are likely to have the highest probability of success”).

133 *Id.* at 1092; *see also* notes 71–73, 96–97 and accompanying text.

134 Blomquist, *supra* note 79, at 1085–86 (citing Umberto Eco for support of this proposition).

135 Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1665 (1996).

136 *See* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 897 (1998) (“New norms never enter a normative vacuum but instead emerge in a highly contested normative space where they must compete with other norms and perceptions of interest.”).

137 *Id.* at 892 (noting also that “[e]ven within a community norms are continuous, rather than dichotomous, entities”).

138 Vandenberg, *supra* note 113 at 99 (“The norm of autonomy . . . can be expressed simply as follows: ‘An individual should be left alone unless events suggest that the individual has done or will do something morally blameworthy.’”).

norm, like scholarly restraint, is diminished.¹³⁹ Indeed, one might actually expect legal scholars to increase their non-conforming behavior in reaction to pressure that restricts their academic freedom.¹⁴⁰

Additionally, since scholars are praised for bold ideas and there are few incentives for moderation or incrementalism in their writings, few will be observed adhering to a more moderate use of earlier ideas.¹⁴¹ If the prevailing norm is to be immoderate, then, in all likelihood, new scholars will adhere to that norm.¹⁴² In fact, rhetorical excesses enable scholars to distinguish themselves, and to earn rewards.¹⁴³

Enforcing norms in the legal academy can also be difficult. Professor Alex Geisinger says “norm ‘enforcement’ results from an individual’s identification with a group.”¹⁴⁴ Group identification “results in the process of depersonalization, where the individual self becomes less cognitively prominent than the group self,” resulting in actions and behaviors conforming to the group norm.¹⁴⁵ While law professors are part of an institutional group, a law faculty, the dynamic of depersonalization hardly fits what happens to them in the legal academy, where individual excellence is rewarded.¹⁴⁶ Therefore, it is unlikely that a law faculty would function as a group to enforce against deviation from a group norm by any individual member of the faculty.

¹³⁹ See Babcock, *supra* note 103, at 152 (discussing conflicting norms within any one individual); see also Finnemore & Sikkink, *supra* note 136, at 897.

¹⁴⁰ Vandenberg, *supra* note 113, at 101; see also Steneck, *supra* note 115, at 539 (“Researchers have, however, a strain of independence and blind faith in truth that sometimes stands in the way of taking steps to foster professional development.”).

¹⁴¹ See *supra* notes 84–95 and accompanying text (discussing academic incentives encouraging law professors to write immoderately).

¹⁴² Vandenberg calls this the “conformity norm,” which he explains as requiring that “[a]n individual should act as others do.” Vandenberg, *supra* note 113, at 112.

¹⁴³ See *supra* notes 84–95 and accompanying text (discussing pressure on academic scholars to be provocative and excessive).

¹⁴⁴ Geisinger, *supra* note 107, at 638.

¹⁴⁵ *Id.*

¹⁴⁶ See Jay Newman, *Academic Freedom and the Power of the Guild*, 30 IMPROVING COLLEGE AND UNIV. TEACHING 8, 10 (1982) (“[M]embers of an academic department or professional association are involved in a competitive situation: they are competing for prestige in the department, university and academic field; and they are also competing for promotion, opportunities, research grants, etc.”).

The fact that guilt is the primary “internal enforcement mechanism” inhibiting norm violations¹⁴⁷ is also a challenging circumstance here. The meaning of a norm is “contextual,” reflecting the environment in which it emerges, and it accretes interpretative content from arising in that environment.¹⁴⁸ Here, the interpretative content of a norm urging moderation in scholarship is sufficiently ambiguous to create confusion about precisely what specific positive behavior is required and what constitutes acceptable moderation. This ambiguity lessens the guilt an offender might otherwise feel from her deviant behavior and presents fertile ground for developing rationales to excuse noncompliance.¹⁴⁹ Examples of “mechanisms that neutralize guilt” are “redefining the problem in a way that does not trigger the applicable norm,”¹⁵⁰ such as suggesting that the questionable article was written to test the limits of an idea as a provocation for other scholarship, or that everyone is engaging in the unwelcome behavior.

One way to increase positive conforming behavior and individual compliance with a norm is to provide positive feedback about how others are performing as well as feedback on each scholar’s own comparative performance.¹⁵¹ But, if the people who

147 Vandenberg, *supra* note 112 at 83 (“Empirical studies suggest that guilt is the principle internal enforcement mechanism that sanctions violations of the norm of law compliance.”).

148 Deborah Waire Post, *Academic Freedom as Private Ordering: Politics and Professionalism in the 21st Century*, 53 LOY. L. REV. 177, 181 (2007) (referring to the 1940 Statement of Principles on Academic Freedom and Tenure, endorsed by the AALS, and saying that, “[l]ike most norms or contract terms, their meaning is contextual”).

149 Vandenberg, *supra* note 113 at 85 (suggesting “a number of ways in which guilt can be neutralized, including the lack of an identifiable victim, complexity of the law, the defense of necessity, condemnation of the system, denial of responsibility and appeal to higher loyalties. . . . [Of these], complexity and the lack of an identifiable victim are perhaps most important for environmental compliance”).

150 *Id.* at 77. Another version of this problem is that people may feel overwhelmed “by the challenge [presented by the scope and size of an environmental problem], and ultimately helpless to address it.” Michael Specter, *Big Foot: In Measuring Carbon Emissions, It’s Easy to Confuse Morality with Science*, NEW YORKER, Feb. 25, 2008 at 53, <http://www.newyorker.com/magazine/2008/02/25/big-foot>; see also John C. Dembach, *Harnessing Individual Behavior to Address Global Climate Change: Options for Congress*, 26 VA. ENVTL. L.J. 107, 127 (2008) (“[A]ny effort to engage individuals must focus on (1) real choices that are available to individuals, and (2) increasing the number, attractiveness, and awareness of those choices.”).

151 See Carlson, *supra* note 107, at 1289–90 (“The feedback mechanisms,

conform are seen as odd or as a minority, observers are less likely to change their own behavior, until the compliant behavior becomes more widespread.¹⁵² Given how few public trust scholars are cabining their use of the doctrine in their writings,¹⁵³ it is unlikely that they will be able to change anyone else's behavior. The fact that writing expansively about the public trust doctrine is currently the firmly embedded behavior also means that there is almost no possibility that any scholar who tries to enforce a new norm of restraint—Sunstein's norm entrepreneurs¹⁵⁴—would be heeded. It is more likely that these self-appointed enforcers of a more cabined approach to the doctrine would be ostracized by their peers for engaging in what the majority believes to be inappropriate behavior.¹⁵⁵

People will not change their behavior in response to a norm if they do not believe the reason for the behavior change or if they question the legitimacy of the norm.¹⁵⁶ All it takes is the resistance

which demonstrate to individual households how they measure up to others, work best for those who are not carrying their weight. When households learn they are cooperating less than their neighbors, a norm of cooperation may trigger increased cooperative behavior. Alternatively, households may feel competitive with other households and want to best, or at least equal, their neighbors' performance. Either way, feedback seems to work.”)

152 See Carlson, *supra* note 107, at 1239 (saying Robert Cooter “suggests that a large part of a community must internalize a norm for it to direct behavior”); *cf.* Michael P. Vandenberg & Anne C. Steineman, *The Carbon-Neutral Individual*, 82 N.Y.U. L. REV. 1673, 1705 (2007) (“If people perceive carbon-reducing behavior changes as the exclusive province of eccentric, committed environmentalists, they will be less likely to engage in those behaviors themselves. If those carbon-reducing behaviors are perceived as widespread, however, more people are likely to adopt them.”).

153 See, e.g., *supra* notes 57–60 (identifying examples of imaginative uses of the public trust doctrine).

154 Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996) (defining “norm entrepreneurs” as “people interested in changing social norms.” When successful, they produce “norm bandwagons,” which are created when small changes in behavior result in large ones, and “norm cascades,” which happen when there are “rapid shifts in norms”).

155 Finnemore and Sikkink acknowledge that norm entrepreneurs may need to employ “deliberately inappropriate acts,” which may result in “their ostracism,” even though those acts may be “powerful tools for norm entrepreneurs seeking to send a message and frame an issue.” Finnemore & Sikkink, *supra* note 136, at 897.

156 See Christopher Deabler, *The Normative and Legal Deficiencies of “Public Morality,”* 19 J.L. & POL. 23, 34–35 (2003) (“Though we may be motivated to adopt certain normative frameworks, they have to be justified cognitively to ourselves if they are to legitimately govern behavior. This framework must consist of a justification of norms generally and the justification of their societal implementation. Though we might be motivated to accept ‘public morality,’ we

of just a few people for behavioral change not to occur.¹⁵⁷ In the case of the public trust doctrine, there have been many well-established scholars, including the author, who have not adhered to any norm of moderation.¹⁵⁸ For an individual to internalize a norm and change her behavior, the norm must be widely shared.¹⁵⁹ If it is not widely shared, then others will lack esteem for any individual behavioral change.¹⁶⁰ And esteem matters,¹⁶¹ especially in a close-knit community like academia where scholarship is widely read and commented on.¹⁶² Self-esteem is also important. If an individual can feel proud of her behavior, then it is more likely that she will engage

must have a convincing argument for why we must have it to preserve society. . . .”); see also Manik Roy, *Pollution Prevention, Organizational Culture, and Social Learning*, 22 ENVTL. L. 189, 215 (1992) (“An elusive but central characteristic of organization culture is anomie, the confusion over norms or theories in action in the minds of individuals or organization members.”).

¹⁵⁷ Roy, *supra* note 156 at 215 (commenting on how unorganized resistance by just a few people to change can prevent change from occurring).

¹⁵⁸ See *supra* notes 13–16 (listing some examples of the author’s immoderate writings); *supra* notes 57–62 and accompanying text.

¹⁵⁹ See Cooter, *supra* note 105, at 22 (“Social norms influence the response of citizens to law through expression, deterrence and internalization.”); Carlson, *supra* note 107, at 1240. *But see* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 379 (1997) (cited by Carlson for believing that “internalization is not necessary because people react to and desire the esteem of others, whether or not they believe in the correctness of a norm.”).

¹⁶⁰ See Carlson, *supra* note 107, at 1332 (“Recyclers get either intrinsic satisfaction for doing the right thing, approval from friends and neighbors for their environmentally correct behavior, or both.”); *id.* at 1299 (“The recycling evidence shows that norm internalization matters in predicting compliance with a norm for high-effort behavior: the stronger one believes in a norm the more effort she will exert.”).

¹⁶¹ See Vandenberg & Raimi, *supra* note 70, at 149 (citing Sunstein, *supra* note 154, at 914–21) (“[R]eputational incentives are an important component of social sanctions and benefits.”).

¹⁶² Carlson, *supra* note 107, at 1290 (“Cooperative behavior typically increases when opportunities to communicate esteem (or lack of it) increase.”); *id.* at 1299–1300 (“[T]he most effective techniques for increasing norm compliance, face-to-face contact and behavior feedback, play on the human desire to be well-regarded by others. These techniques seem to work on both levels by increasing the opportunities to signal or gather esteem, while simultaneously increasing attitudes in favor of the behavior.”); Paul C. Stern, *Understanding Individuals’ Environmentally Significant Behavior*, 35 ENVTL. L. REP. 10,785, 10,788 (2005) (“[N]orm activation can be enhanced in a community context in which face-to-face communication, mutual interdependence, and the possibility for social influence can build interpersonal norms that buttress personal norms.”); Vandenberg & Raimi, *supra* note 70, at 154 (“[S]ocial norms enforced by contemporaries are a powerful motivator of behavior.”).

in norm-compliant behavior.¹⁶³ But in both the case of external and internal esteem, there will be no outside affirmation of that behavior—there is little likelihood that the moderate article will receive academic recognition or reward or be praised by peers.¹⁶⁴

As in the case of the academic integrity norm, distinguishing between acceptable incremental change in interpretation and an undesirable rhetorical excess is hard to do. The result is that a norm of avoiding rhetorical excess would be difficult to enforce by provoking guilt or shame at violating a norm, either externally or internally, as a check on aberrant behavior. Like the norm of academic integrity, a norm of avoiding rhetorical excesses is difficult to apply and enforce, and it may, in fact, even be counter-indicated to the extent its ambiguity stifles creativity.

C. *Creating a New Specific Norm to Discourage Overextension of Prior Scholarship*

If problems with the existing norms discussed above make them ineffective as a check on public trust scholars overextending Professor Sax's original idea, then perhaps a new norm calling for scholarly restraint and attention to his concerns prior to publication might work, if circumstances exist to encourage its emergence. However, as the analysis below shows, circumstances are not favorable for such a norm to emerge on its own.¹⁶⁵ But if it could emerge, it would then fit within the broader academic freedom norm, becoming part of the accepted behavior protected by that norm.

One unfavorable circumstance inhibiting the emergence of a new scholarship norm like the one proposed here is that the existing normative framework, presented by the norms of academic integrity and against over-interpretation, is too weak to support its

¹⁶³ See, e.g., Carlson, *supra* note 107, at 1282–83 (“[A]ttitudes matter . . . [one study has shown] a significant and positive correlation between whether an individual feels especially proud about being environmentally responsible and her level of recycling intensity.”). For an interesting discussion of how “social influences that might otherwise create pressure for individual and corporate carbon emissions reductions are undermined” by an “intergenerational information problem, see Vandenberg & Raimi, *supra* note 70, at 142.

¹⁶⁴ Lewis, *supra* note 2, at 610 (complaining about the danger posed to “the production of honest useful scholarship,” by “the prevalence of freely adopted faddishness, ideology, and opportunistic provocation in the selection of research topics”).

¹⁶⁵ This discussion is largely drawn from Babcock, *supra* note 103, at 143–55.

attachment.¹⁶⁶ This makes the emergence of a new norm considerably more difficult.¹⁶⁷ Another unfavorable circumstance is that constraining scholarship in any way contradicts the more robust social norm of academic freedom.¹⁶⁸ That norm encourages professors “to research, publish and teach” as they like.¹⁶⁹ The norm reflects a strongly held belief that “[d]isinterested scholarship and research are both goods in themselves and benefits to society as a whole.”¹⁷⁰ Since “[d]isciplined attempts to transcend received or popular opinions provide both weight and depth to academic discourse and to education,” and the time spent on academic pursuits “affirm[s] the worth of free inquiry,”¹⁷¹ arguably scholarship that transcends Professor Sax’s original vision of the modern public trust doctrine is a praise-worthy exercise of “free inquiry.” Moving from a social norm of uninhibited scholarship to one of more constrained application of prior ideas requires the abandonment of preconceived ideas about what is good scholarship, which is extremely hard to do.¹⁷²

The proposed norm also contradicts an equally robust individual norm of self-advancement, as it would defy the entire incentive structure of academic institutions like law schools, which favors bold scholarship and rewards it with tenure and promotion, among other incentives.¹⁷³ Somewhat like a medieval guild,

¹⁶⁶ Finnemore & Sikkink, *supra* note 136, at 908 (“[T]he power or persuasiveness of a normative claim [] is explicitly tied to the ‘fit’ of that claim within existing normative frameworks.”).

¹⁶⁷ *Id.* at 908 (discussing the importance of persuasive connections between existing norms and emergent norms).

¹⁶⁸ See Aziz Huq, *Easterbrook on Academic Freedom*, 77 U. CHI. L. REV. 1055, 1055 (2010) (suggesting “an organizing principle for a constitutional jurisprudence of academic freedom”); see also Julius G. Getman & Jacqueline W. Mintz, *Foreword: Academic Freedom in a Changing Society*, 66 TEX. L. REV. 1247, 1264 (1988) (noting that academic freedom “is an aspect and measure of society’s basic commitment to liberty, dissent, and freedom of debate, and it reflects the increasingly complex relationship between the university and society”).

¹⁶⁹ Byrne, *supra* note 120, at 255.

¹⁷⁰ See *id.* at 334; see also *id.* at 287 (“Academic freedom has taken firm root in American Society because of the widespread view that academic speech matters.”).

¹⁷¹ *Id.* at 287–88.

¹⁷² Babcock, *supra* note 103, at 143.

¹⁷³ In fact, Lasson identifies “lack of moderation” as the root cause for the deluge of footnotes found in most articles, where modern scholars attempt to show their erudition through “both magnitude and multitude of bottom-matter.” Lasson, *supra* note 78, at 937, 940.

academics have created an internal framework of bureaucratic rules and procedures that culminate in the tenure system.¹⁷⁴ That system ensures that “personnel decisions are based largely on scholarship and teaching ability,” as determined by the candidate’s peers, and is preserved under the rubric of academic freedom.¹⁷⁵ If a candidate’s peers are engaged in immoderate scholarship, then that is likely to be rewarded with tenure, reinforcing the norm of self-advancement.¹⁷⁶

In addition to the official institutional barriers to a norm of self-restraint, scholars will observe that the behavior of their peers¹⁷⁷ is exactly the opposite of careful moderation and consideration of the potential consequences of publication.¹⁷⁸ If observed behavior is non-compliance with the proposed norm and is not remarked on negatively by legal scholars or held in disfavor by their institutions,

¹⁷⁴ See generally Newman, *supra* note 146 (discussing how the academic guild constrains academic freedom).

¹⁷⁵ See Byrne, *supra* note 120, at 310–11; see also *id.* at 311 (noting in addition that “[a]cademic freedom encompasses the tensions inherent in individuality and conformity, imagination and coherence, change and hierarchy”).

¹⁷⁶ This results from faculty members controlling the appointment and tenure process and the natural desire to favor those who support their type of scholarship. See Stephen D. Sugarman, *Conflicts of Interest in the Roles of University Professors*, 6 THEORETICAL INQUIRIES IN L. 255, 256–57 (2005) (“Faculty members judge other faculty in the course of the hiring and promotion processes and in connection with the granting of salary increases, awards, and honors. In addition, faculty members judge their colleagues through the peer review process that dominates much of academia—in connection with the publication of articles and books, the awarding of tenure, the awarding of competitive grants, and more.”); see also Farber, *supra* note 85, at 309 (“The point is that articles defending the legal status quo are much less likely to be published than articles attacking the status quo. The more sensible a legal rule, the less will be published supporting it, while articles cleverly attacking it often will be taken as brilliant insights. Thus, the law review literature will be dominated by articles taking silly positions, while the sensible positions held by most law professors usually will be underrepresented.”); *id.* at 310 (“Scholarship is expected to be original, and defense of the conventional wisdom provides few opportunities for brilliance. The professor seeking scholarly recognition is well-advised to steer away from the true but trite, in favor of the false but novel.”); see generally Gregory, *supra* note 84, at 993 (bemoaning the lowering of scholarship standards at law schools).

¹⁷⁷ See *supra* notes 167–177 (discussing the institutional barriers to emergence of a new scholarship norm).

¹⁷⁸ Hope M. Babcock, *Why Changing Norms Is a More Just Solution to the Failed International Regulatory Regime to Protect Whales than a Trading Program in Whale Shares*, 32 STAN. ENVTL. L.J. 3, 70 (2013) (“[C]hanging norms is not easy when there are no shared understandings and when it means abandoning previously acceptable behavior that has been engaged in so long that it has become its own norm.”).

there is little incentive for scholars to comply with it.¹⁷⁹ If people perceive that they are not being treated fairly, that their good behavior is not being rewarded, or, as is more likely in the case of the public trust doctrine, that the bad behavior of others is not being sanctioned,¹⁸⁰ then the impetus to adhere to a new norm of good behavior may be lessened.¹⁸¹ Given how long scholars have been expanding on Sax's 1970 Michigan article with some success and little to no recrimination,¹⁸² it will be extremely difficult to have a contrary norm emerge that encourages a more constrained use of his proposal.

The absence of a robust existing norm or normative framework, the existence of firmly embedded contrary norms, such as the personal norm of self-advancement, and observable, unpunished contrary behavior collectively and individually create unfavorable circumstances for the emergence of a new norm. Additionally, a new specific norm directing public trust scholars to treat the public trust doctrine cautiously would suffer from some of the debilitating problems that the two existing norms described above suffer, such as the existence of strong countervailing norms and enforcement difficulties. Still if a specific new norm could emerge, one calling for scholarly restraint, then it might overcome these problems and be effective.

This Part of the Article has shown that it is unlikely that any norm, old or new, could constrain the behavior of second generation public trust scholars by itself. The next Part of the Article, therefore, discusses whether publication by external professional institutions

179 Social learning theory teaches "that observing unpunished inappropriate behavior reduces the inhibition to engage in that behavior . . . 'Exposure to unpunished transgressions tends to increase prohibited behavior in observers,'" and undermine the social consensus behind the rule. Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 158–59 (1993).

180 Vandenberg, *supra* note 113 at 108 ("[T]hose parties that invest in compliance may react negatively if others do not and are not penalized . . . [, and] the parties that comply may perceive themselves as 'dupes' and their commitment to the law compliance norm may diminish.").

181 *Id.* at 104 ("[P]eople who perceive that they are treated fairly feel respect and more readily adhere to other group norms."). Vandenberg calls this the reciprocity norm. Vandenberg, *supra* note 112, at 1118–19 (defining the reciprocity norm as "the concept that an individual often will cooperate more than narrow rational actor models predict if the individual believes that others are cooperating or will cooperate").

182 *But see generally* Huffman, *A Fish out of Water*, *supra* note 11; Lazarus, *supra* note 11.

of standards governing derivative scholarship might support the emergence of a new norm of scholarly restraint to discourage overextension of the public trust doctrine and encourage behavioral change by public trust scholars.¹⁸³

V. SCHOLARSHIP STANDARDS IMPOSED BY EXTERNAL INSTITUTIONS

This Part examines whether the issuance of a hortatory standard by a professional organization like the Association of American Law Schools (AALS) discouraging scholarship that overextends its theoretical basis might provide the missing normative framework to which the proposed new academic norm of scholarly restraint might attach, allowing its emergence.¹⁸⁴ Such a standard would also provide clarity on the content of the proposed new norm and would signal its importance to the community of concern—law faculty. The likelihood that such a norm might emerge might also improve if law schools rewarded scholarship that is compliant with this new norm the same way they reward scholarship that is not.¹⁸⁵ For purposes of this analysis, the author assumes that such a standard has been adopted.

Rules and standards can express and change social meaning.¹⁸⁶ Steneck argues that “[r]ules in the form of clearly defined best practices, combined with a reasonably detailed code of ethics for all research, would make a difference, particularly for fostering a sense of professional ethical responsibility.”¹⁸⁷ They can create and shape

183 Cass Sunstein and others talk about a special type of non-governmental norm changer, the “norm entrepreneur.” Sunstein, *supra* note 154, at 909; *see also* Finnemore & Sikkink, *supra* note 136, at 897 (“[Lawrence] Lessig uses the term ‘meaning managers’ or ‘meaning architects’ to describe [individuals who] creat[e] norms and . . . social meaning.”).

184 Of course there is a risk, as Professor Post points out, “[l]eaning too far in the direction of standards, often measured in terms of what is known and accepted, poses a risk to new and innovative thinking.” Post, *supra* note 148, at 206.

185 *See supra* notes 84–93 (discussing academic incentives for scholars to write immoderately).

186 Vandenbergh, *supra* note 106, at 203 (“The law can express social meaning directly by taking positions on particular issues.”); *see also* Steneck, *supra* note 115, at 536 (“At the very least, the lack of a clear code of conduct for research makes it difficult to foster ethical responsibility during the professional education of researchers.”).

187 Steneck, *supra* note 115, at 539; *see also id.* (“If truth, fairness, objectivity and the other general principles that are fundamental to all research, as well as to life in general, were self-evident in their application, then further explanation might not be necessary. The fact that they are not self-evident means that someone

information about desired behavior.¹⁸⁸ A clear institutional standard established by the AALS could make it easier to determine when a violation of that norm has occurred.¹⁸⁹

Standards also have a signaling function,¹⁹⁰ such that they can reinforce or change social understandings, which can affect the target population's understanding about a problem and the social norms that develop in response to it.¹⁹¹ They signal a consensus in the affected community, here legal scholars, that behavior contradicting what is recommended in a standard is unacceptable, which, in turn, can strengthen and make more concrete an emergent norm like the one proposed here to write judiciously about a prior scholar's idea.¹⁹² Perception of the existence of a consensus supporting the standard can also help internalize the new norm, which could in the future induce a scholar on the cusp of behaving incorrectly to refrain.¹⁹³ A perception of universality may be

has to help new researchers understand and embrace their responsibilities as professionals.”).

188 Vandenbergh, *supra* note 106, at 200 (quoting Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997)) (“[R]egulation of social meaning . . . include[s] ‘all the ways in which the law creates and shapes information about the kinds of behavior that members of the public hope for and value, as well as the kinds they expect and fear.’”).

189 *See, e.g.*, AALS Bylaw § 6-6(c)(i), which requires law schools to recognize “creative scholarship in the appointment and advancement of members of the faculty,” as part of the school’s obligation to “maintain conditions conducive to the faculty’s effective discharge of its teaching and scholarly responsibilities,” might be modified to encourage restraint in the writing of derivative scholarship.

190 *See* Carlson, *supra* note 107, 1241 (citing ERIC A. POSNER, LAW AND SOCIAL NORMS 24–25 (2000)) (“[I]n some contexts norms or behavior emerge as the result of numerous individuals signaling their propensity to cooperate in some behavior. If the signaling behavior becomes commonplace a norm may emerge.”).

191 Vandenbergh, *supra* note 106, at 201–02 (“[L]aw is expressive in the sense that it can signal, reinforce or change social meaning . . . , [and] the public can receive a message conveyed by law, whether intended or unintended, and that this message can have an impact on perceptions about the sources of a problem and on the social norms that develop in response to those perceptions.”).

192 *Id.* at 216 (“According to McAdams, the expressive function of laws can create or strengthen norms by signaling an existing societal consensus and by ‘providing the concrete norms that define compliance with internalized abstract norms.’”); *see also* POSNER, *supra* note 190, at 43. However, the strength of the signal depends on the importance of contrary norms, like academic freedom or personal self-advancement and noncompliant behavior. *See supra* Parts III.B–III.C (discussing problems with existing norms).

193 Vandenbergh, *supra* note 113, at 75 (“[L]aws and enforcement actions may increase an individual decision-maker’s perceptions of the existence of a consensus regarding a norm. This perception may induce the individual to internalize the norm.”). Professional codes encourage ethical behavior similar to

particularly true in close-knit communities like the legal academy where, if enough people signal their intention to engage in the preferred behavior, the behavior can become the new norm.¹⁹⁴ Thus, if the AALS were to publish a standard of scholarly restraint, it would send a strong signal to the rest of the legal academic community that contrary behavior is undesirable.¹⁹⁵

However, institutional standards, even hortatory ones, must be enforced in some way if they are to have any effect on behavior.¹⁹⁶ Though the norm of academic freedom would likely prevent any imposition of formal sanctions like fines or loss of privileges, some mechanism for enforcement is necessary to signal when a violation has occurred, and to lessen any incentive to violate the standard.¹⁹⁷ However, there are many forms of informal communications about unacceptable behavior far short of punitive sanctions, such as “advice, empathy, admonishment, shaming, stigmatization, confrontation, and retribution,”¹⁹⁸ any of which might work alone or in combination¹⁹⁹ in an academic setting, and any one of which can be imposed informally by the scholar’s home institution or peers.²⁰⁰

that which might be induced by the existence of a law. *See* Steneck, *supra* note 115, at 529 (“[T]he current approach to fostering professionalism and integrity in research relies heavily on universities, professional societies, journals and other local institutions to develop researchers’ sense of right or proper professional behavior—their professional ethical identity.”); *see also id.* at 536 (“Codes define the general principles that shape professional conduct.”).

¹⁹⁴ Professor Miller applies this lesson to norm enforcement. *See* Geoffrey P. Miller, *Norm Enforcement in the Public Sphere: The Case of Handicapped Parking*, 71 GEO. WASH. L. REV. 895, 907 (2003) (“In tight-knit communities, people might conspicuously enforce norms in order to earn the admiration of other members of the community, but this strategy is not effective in noncooperative settings.”).

¹⁹⁵ *See* Steneck, *supra* note 115, at 539 (“Defining those responsibilities more clearly, across different fields of study, institutions and national boundaries, is the most practical and achievable way to begin the important task of fostering a sense of ethical professional responsibility in research.”).

¹⁹⁶ *See* Miller, *supra* note 194, at 899 (“[T]here is the question of establishing a violation”).

¹⁹⁷ *See supra* notes 180–182 and accompanying text.

¹⁹⁸ *See* Miller, *supra* note 194, at 899.

¹⁹⁹ *See* Babcock, *supra* note 103, at 155 (“[A] combination of approaches may be necessary, the precise combination or number of which may vary depending on the targeted behavior. The key is to pick approaches that will be ‘mutually enforcing’ and do not work at cross-purposes.”).

²⁰⁰ *See* Steneck, *supra* note 115, at 537–38 (explaining that “there is considerable room between loosely described ideals and ironclad rules to clarify best practices in research” and noting that before abuse in scientific research became a major concern, individual journals often set their own research

Assuming that the desired behavior is clear enough so a departure from it is easily understood, signaling even by a hortatory institutional standard could overcome many of the barriers to behavior change identified during the discussion of the persuasive power of norms.

Thus, external institutional standards could play a role in both norm creation and behavior change without directly impinging on the dominant norm of academic freedom. Through signaling and the appearance of a supportive consensus behind what is desirable behavior, guidance from external academic accreditation institutions, like the AALS, might encourage adoption of a norm disfavoring overextension of prior scholars' original ideas—here Professor Sax's—beyond the point of their real world sustainability. However, since “[s]ocial meanings are collective goods, and collective action is needed . . . to change collective goods,”²⁰¹ a norm of scholarly restraint may not emerge until academic institutions themselves change and start rewarding that behavior. Because incentives also signal desirable behavior, law schools could promote the norm by rewarding more moderate scholarship that takes an incremental consequentialist approach to prior scholarship.

Together, norms, external professional standards, and internal institutional rewards favoring restraint could combine to extend the longevity of Professor Sax's conception of the public trust doctrine as a useful gap filling tool and goad for law reform by the legislative and executive branches of government. If his warnings against overextending the doctrine are not heeded, courts may abandon it. This would jeopardize the continued existence of an extremely useful doctrine and squander a tool carefully crafted and refined by Professor Sax for future environmental scholars and activists.

CONCLUSION

This Article has presented as a problem the tendency of legal scholars to overextend a prior scholar's breakthrough idea either for personal gain within the legal academy or for more eleemosynary reasons like law reform. It uses as an example of this problem the derivative scholarship that followed Professor Sax's 1970 Michigan Law Review article, in which he modestly suggested that the public

guidelines).

²⁰¹ Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1022 (1995).

trust doctrine might fill gaps in environmental protection until protective laws were enacted.²⁰² Since that article, many scholars, including the author, set out on a path of expanding the doctrine's scope, as did the courts faced with disputes involving the public trust doctrine. Professor Sax worried that heedless expansion of the doctrine would dissuade courts from using it in the ways that he had intended—not to revolutionize the American legal landscape, but to place-hold until legislatures took the steps he was confident they would to protect threatened natural resources.²⁰³

The Article suggests that law professors who feel compelled to expand upon the writings of prior legal scholars to justify their own contribution to the scholarly literature should think critically about the impact their writings may have on the original idea, lest they unintentionally jeopardize the achievement of the initial author's goal. This is not to discourage derivative scholarship, but merely to suggest that it should be informed by the original author's concerns and that these should be cast aside only when the benefits of the extension are warranted.

This has not happened in the case of the public trust doctrine. Today, the doctrine is almost completely unmoored from Professor Sax's 1970 article, and public trust scholars continue to expand the doctrine further.²⁰⁴ Given that this trend may ultimately undermine the doctrine's sustainability, this Article has considered whether the academic norms of academic integrity or the avoidance of rhetorical excess might moderate the enthusiasm of scholars to continue the doctrine's expansion. However, the internal weaknesses of these norms—the fact that it is hard to determine when they have been

²⁰² Sax, *supra* note 3, at 565 (“This Article has been an extended effort to make the rather simple point that courts have an important and fruitful role to play in helping to promote rational management of our natural resources.”).

²⁰³ Sax, *supra* note 3, at 558–59 (describing the role of the courts in democratizing the administrative process “by calling upon the legislature to make an express and open policy decision on the matter in question . . . The closer a court can come to thrusting decision making upon a truly representative body—such as by requiring a legislature to determine an issue openly and explicitly—the less a court will involve itself in the merits of a controversy”); *see also* Sax, *supra* note 19, at 194 (Courts “can assure that decisions made by mere administrative bodies are not allowed to impair trust interest in the absence of explicit, fully considered legislative judgments. Under the rubric of legislative remand, courts can also press a legislature to fortify its decisions with a full consideration of less disruptive solutions”).

²⁰⁴ *See, e.g., supra* notes 67–68 (describing some of the recent writings by Professor Mary Christina Wood, a noted public trust scholar).

violated and their implementation might even result in stifling creativity—make them of limited use.²⁰⁵ It is equally unlikely that a new norm of academic restraint might emerge on its own, because, among other reasons, existing norms are too weak to support it, contrary behavior is rarely if ever seen punished, and there are firmly embedded contrary norms such as academic freedom and self-advancement.²⁰⁶

The only hope for reforming academic behavior lies in the AALS proposing a hortatory standard encouraging academic restraint. Such a standard could, by signaling the importance of compliant behavior, encourage the emergence of a new norm of academic restraint. As only a hortatory standard and not a requirement, it should not trigger the oppositional norm of academic freedom. Nonetheless, through signaling, it might encourage behavioral change.

Professor Sax gave the next generation of scholars and litigators a tool, the modern public trust doctrine—a modest little tool that could be used to protect resources held in trust for all the people from being converted to some private use, and that might democratize government in the process. He only asked that the doctrine be used carefully, lest its power be squandered. Over the years, lawyers and scholars like the author have successfully, albeit heedlessly, advocated for the doctrine's expansion. This Article has suggested the danger of going too far. There should, perhaps, be some limit to legal ingenuity when there is a risk of adverse societal consequences.

The loss of the public trust doctrine as a tool to protect the environment would be a serious loss. Therefore, public trust scholars and litigators should consider curbing their enthusiasm for the doctrine as an environmental cure-all, and respect the bounds Professor Sax placed on the doctrine's use. We should use his gift wisely and only breach those limits after weighing the risks of our actions against the benefits of stretching the doctrine yet one more time.

²⁰⁵ See *supra* Part III.B.1 (discussing the norm of academic integrity and some problems with its application to overextending a prior scholar's original work) and Part III.B.2 (discussing the norm against rhetorical excesses and problems with its application).

²⁰⁶ See *supra* Part III.B.2 (discussing these and other problems with an emergent new norm of academic restraint).