Sustaining Urban Green Spaces: Can Public Parks Be Protected Under the Public Trust Doctrine?

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SUSTAINING URBAN GREEN SPACES: CAN PUBLIC PARKS BE PROTECTED UNDER THE PUBLIC TRUST DOCTRINE?

Professor Serena M. Williams

INTRODUCTION

Public parks were once defined as "pleasure grounds" set aside for public recreation and the promotion of health and enjoyment. These public green spaces, however, provide cities with tangible benefits that go beyond serving as an outlet for recreation, physical activity, and relaxation. Parks can mitigate air and water pollution, combat suburban sprawl, stabilize property values, attract businesses, and reduce crime. Parks are also public fora, traditional places for expressive activity. Sadly, urban communities are often devoid of parks and other open green spaces that can provide these tangible benefits. The parks that do exist are often threatened with destruction when the publicly owned spaces are sacrificed for other public projects or even sold to private entities for residential or commercial development. Such public spaces, however,
should be preserved as natural resources because of their availability for
general use by the public for numerous public purposes and consequently,
because of their importance in enhancing the quality of life in cities.

Urban residents seeking to sustain parks could assert that the state and
its municipalities have a duty under the public trust doctrine to protect and
preserve parks as a natural resource held in trust for the public.
Application of the doctrine would place limits on attempts by state and
local governments to transfer property held in trust or to devote it to a
private use. It could even place limits on the government’s ability to
divert trust property from one public use to another. Although the roots of
the doctrine lie in the protection of navigable waters for commercial uses,
it has been expanded to include the protection of other uses, such as
recreation and aesthetics, and the protection of other resources, such as
beach lands. This article argues that the public trust doctrine should be
further expanded to preserve and maintain the parks as urban green spaces
open to the public for significant public uses, from providing recreational
activities to providing a public forum for expression.

Part I revisits the 1971 Supreme Court case *Citizens to Preserve
Overton Park, Inc. v. Volpe*, a case usually cited for its administrative law
holdings, to illustrate a citizen-led struggle for the preservation of a park
in an urban area. In this case, Memphis citizens fought against the
construction of a highway that would have physically divided the park.
The citizens used a federal statute, section 4(f) of the Department of
Transportation Act of 1966, to challenge, and ultimately prevent, the
construction of the highway. In 1995, Overton Park again became the
center of controversy in Memphis when the city government proposed
building a senior center in a portion of the park. Since section 4(f) only
governs the protection of parklands from highway construction, another
legal doctrine would be needed to protect that park and others from
development.

Part II briefly traces the development of the American public trust
doctrine from the protection of navigable waters to the protection of public

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7 23 U.S.C. § 138 (2002) (enacted under the Department of Transportation Act of
1966, 49 U.S.C. 1653(f)).
8 *Overton Park*, supra n. 6. Van Cortlandt Park in New York City is another
example of a park that has been at risk for several projects. In its one hundred years of
existence, highways and a railway were built through it. It was at risk again in 1999
when the city proposed siting a filtration plant in the park. Christopher Rizzo, Student
Author, *Environmental Law and Justice in New York City, Where a Park is Not Just a
Park*, 18 Pace Envtl. L. Rev. 167 (2000). In 2001, the Court of Appeals held that since
the park was held in the public trust, use of the park even for a temporary period for the
water treatment plant required the direct and specific approval of the state legislature.
parks. It also compares the public trust doctrine to the charitable trust doctrine under which parkland can be donated for public use.

Part III discusses two tests that courts use when determining whether the alienation or diversion of a park violates the public trust doctrine. It then analyzes the use of the public trust doctrine in alienation cases where the government proposes to convey the public parkland to a private entity. Courts should be reluctant to allow a park, as a public resource, to be removed from public use and access, then transferred to a private entity for a private purpose. Part III further analyzes the use of the doctrine in diversion cases, where the government seeks to divert the use of parklands from one public purpose to another. Parkland may be targeted for diversion because of the lower financial and political costs involved in diverting public parkland for public projects compared to the costs of acquiring private property for those projects. Nevertheless, courts should view such diversions with skepticism and allow them only in circumstances where the public purpose of the diverted use either is consistent with the park use or outweighs the park use, where a public entity maintains control over the diverted use, and where the public continues to have access under the new use.

Urban parks should be treated as a scarce natural resource. Once depleted, this resource is practically irreplaceable and is irrevocably removed from use by the public. Under the public trust doctrine, states and municipalities serving as public trustees holding the parks in trust for the benefit of the public would acquire a duty of loyalty to the trust beneficiaries (the public) and a duty of care over the trust assets (the park).9 Residents could seek redress from courts when governmental bodies do not fulfill their trustee duties: "The very purpose of the public trust doctrine is to police the legislature's disposition of public lands."10 This concept could provide the protection needed to sustain public parks in urban areas.

PART I: REVISITING OVERTON PARK

The 1971 Supreme Court decision in Overton Park11 has been called the "most frequently cited decision in the history of environmental law."12 It is usually cited for the proposition that courts that review agency actions

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11 Overton Park, 401 U.S. 402.
12 William H. Rodgers, Jr., Environmental Law § 1.8, 91 (2d ed., West 1994).
affecting environmental values must be "aggressive overseers."\textsuperscript{13} The hard-look doctrine of the case has become a basic tenet of administrative law and a "catechism of environmental law."\textsuperscript{14} The doctrine allows courts to ensure that administrative discretionary judgments are fairly conceived, fully explained, and rationally based.\textsuperscript{15}

Often overlooked is the underlying factual controversy of the case which involved a fight for the preservation of a city park. The case centered on the efforts of a citizens group to prevent the destruction of twenty-six acres of Overton Park for the creation of a six-lane expressway.\textsuperscript{16} The outraged citizens fought back using section 4(f) of the Department of Transportation Act of 1966.\textsuperscript{17}

\textit{A. History of Overton Park}

Overton Park is a 342-acre city park located in the heart of Memphis, Tennessee.\textsuperscript{18} It was designed at the turn of the twentieth century by landscape architect George Kessler.\textsuperscript{19} At that time, the concept of city parks was new.\textsuperscript{20} Kessler, following the principles of the City Beautiful movement, created a park with a lake, monuments, a formal garden, and a dance pavilion.\textsuperscript{21} Followers of the City Beautiful movement were urban reformers who sought to beautify cities as a means of social control: "When they [City Beautiful reformers] trumpeted the meliorative power of beauty, they were stating their belief in its capacity to shape human

\textsuperscript{13} Id. at 91-92. For a discussion of the political nature about the fight over Overton Park, see Peter L. Strauss, \textit{Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community}, 39 UCLA L. Rev. 1251 (1992).

\textsuperscript{14} Rodgers, supra n. 12, at 93.

\textsuperscript{15} Id.

\textsuperscript{16} Overton Park, 401 U.S. at 406.

\textsuperscript{17} 49 U.S.C. § 1653(f) (1966) (The statute's sections were amended to conform, and the current citation is 23 U.S.C. § 138 (2002)).

\textsuperscript{18} One commentator describes it this way: "If one imagines a boll of cotton oriented east from a Mississippi River stem, the commercial center of town was where the boll joins the stem; . . . Overton Park lay in the center of the cotton." Strauss, supra n. 13, at 1290-1291.

\textsuperscript{19} Kevin Robbins, \textit{A Natural Place for People, A Civilizing Force - As Park Ages, Timeless Issues About Man's Place in it Revive}, The Commercial Appeal 1A, (Nov. 13, 1995).

\textsuperscript{20} Id.

\textsuperscript{21} The City Beautiful movement can be viewed in two ways. It has been critiqued as "a short-lived thrust toward neoclassical design [with] an eye cast on creating an uplifting, civilizing environment . . . [and] a direct assault on the perceived inhumanity of the industrial city." Id. On the other hand, the movement has been criticized for not "attempt[ing] to integrate the city and nature in a harmonious way" and for ignoring the urban poor and "subordinating social equity" to aesthetics. A. Dan Tarlock, \textit{City Versus Countryside: Environmental Equity in Context}, 21 Fordham Urban L.J. 461, 474, (1994).
thought and behavior." Beauty was important not only for itself, but also for its impact on city dwellers, inducing calm and order and creating a sense of community. Parks were conceived as an answer to an increasingly industrialized and alienated urban society.

The City of Memphis formed the Memphis Park Commission in 1900. In 1901, the commission spent $110,000 to purchase thickly forested land on what was then the eastern edge of Memphis; construction began in 1902. A public golf course and a zoo were built in 1906; in 1907, an urban meadow was created; in 1911, a playground was added; and in 1916, an art gallery was constructed. The park included 13 entrances and a network of carriageways including a forested scenic drive. The park also contained an outdoor theater, nature trails, and 170 acres of forest. The park was clearly intended to provide respite in the midst of an industrial city.

Overton Park was planned at the same time as another city park in Memphis, Riverside Park. The two parks were connected by the Parkways, a planned system providing a ring of roads around the edge of the city, roads that were intended to wind through the park in a "picturesque" manner. Roads to and through the park were a concern from the very beginning.

B. The Proposed Highway Plan

Beginning in 1956, the tranquility and openness of Overton Park were threatened by a proposed six-lane high-speed expressway that would sever the zoo from the rest of the park and destroy twenty-six acres of parkland. Construction of the highway would provide Memphis with a major east-west expressway to allow easier access to downtown Memphis.

23 Id. at 92.
24 Central Park, the New York City park designed by Frederick Olmsted, was the first urban area created for recreation and reflection inside city blocks. Robbins, supra n. 19.
26 Id. The park was named for Judge John Overton who in 1819 designed a plan for Memphis which included park squares and a river promenade.
27 Id.
28 Overton Park, 401 U.S. at 406.
29 Johnson & Russell, supra n. 25, at 269. Kessler was amongst the first to propose a park and boulevard system. He circled a park in Kansas City with a road to encourage homebuilders to front their residences upon the park; otherwise, the park would have been a "collective backyard." Wilson, supra n. 22, at 100. He also proposed a park and boulevard system for a Dallas park. Id. at 265.
from the city's eastern edge. The route was approved in 1956 by the Bureau of Public Roads, then a part of the Department of Commerce, and by the Federal Highway Administration in 1966. However, the enactment of section 4(f) of the Department of Transportation Act prevented distribution of federal funds for the section of the highway designated to go through Overton Park until the Secretary of Transportation determined if the section 4(f) requirements had been met.

The policy underlying the enactment of section 4(f) arose from public concern about the increasing degradation of the nation's natural resources: "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites." To that end, the Secretary was prohibited from approving any highway program or project that required the use of publicly owned parkland unless there was no feasible and prudent alternative to the use of the parkland, and the proposed program included plans to minimize harm to the parkland.

In 1968, the Secretary concurred with local officials that the highway, Interstate 40, should be built through the Park. In 1969, the State of Tennessee paid the city $2 million for the 26-acre right-of-way and paid the Memphis Park Commission $206,000 to replace park facilities that would have been destroyed by the highway. The city used $1 million to pay for a new 160-acre park. The Highway Transportation Act required that the state provide a certain percentage of the highway construction, which the state did by providing the twenty-six acres.

Final approval for the project was announced in November 1969, after Congress reinforced its policy in section 138 of the Federal Aid Highway Act that restricted highway construction through public parks. The announcement lacked any statement of factual findings; the Secretary of Transportation neither indicated why he believed that no feasible and prudent alternative routes existed nor why design changes could not be

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31 Id. at 407.
32 Id. The route required the state to acquire a right-of-way on both sides of the park; the Secretary approved those acquisitions in 1967. Id. at 407, n. 14.
33 Id.
34 49 U.S.C. § 1653(f) (1966) (The statute's sections were amended to conform, and the current citation is 23 U.S.C. § 138 (2002)).
35 Id.
36 Overton Park, 401 U.S. at 407, n. 15. Note that the land, however, was in the northern part of the city. That the land was not in the vicinity of the Overton Park neighborhood raises the question whether this would be a true replacement of an urban park. Real property resources such as public parks should be protected where they are. Otherwise, the needs of urban residents for park space go unfulfilled.
37 Id. at 407.
made to reduce the harm to the park. The citizens’ group contended that the Secretary merely relied upon the judgment of the Memphis City Council, ignoring the “feasible and prudent” alternatives that existed, including rerouting the highway either to the north or the south, to build under the park, or to build the highway depressed below ground level. The Supreme Court’s analysis turned on affidavits prepared for litigation, stating that the Secretary made the decision, and that the decision was supportable. Characterizing the affidavits as “post hoc rationalizations,” the Court remanded the case for plenary review based on the full administrative record before the Secretary at the time he made his decision. In reaching that conclusion, the Court initially addressed the threshold question of whether the citizens’ group was entitled to any judicial review under the Administrative Procedure Act, which provided for judicial review of agency action except where the “agency action is committed to agency discretion by law.”

In holding that the Secretary’s decision did not fall within the exception for action committed to agency discretion, the Court scrutinized section 4(f) to determine whether “there was law to apply.” Finding that the Secretary had specific law to apply, and thus had no discretion, the Court analyzed why a statute protecting parkland was necessary:

It is obvious that in most cases considerations of cost, directness of route, and community disruption will indicate that parkland should be used for highway construction whenever possible . . . [T]here will always be a smaller outlay required from the public purse when parkland is used since the public already owns the land and there will be no need to pay for right-of-way. And since people do not live or work in parks, if a highway is built on parkland no one will have to leave his home or give up his business . . . Congress clearly did not intend that cost and disruption of the community were to be ignored by the Secretary. But the very existence of the statutes indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present

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39 Overton Park, 401 U.S. at 408.
40 Id. The group argued that either a bored tunnel or a cut-and-cover tunnel could be built. The Secretary countered that construction of the tunnel by either method would greatly increase project costs, create safety hazards, and because of increased air pollution, not reduce harm to the park. Id. at 408, n. 18.
41 Id. at 420.
43 Overton Park, 401 U.S. at 413.
in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes.\textsuperscript{44}

The Supreme Court recognized that governments could all too easily sacrifice parkland for purposes of financial and political expediency when constructing public projects. Protection of the park, a public resource, was necessary through statutory and judicial means.

\textit{C. Another Proposal for Overton Park}

Using section 4(f) of the Department of Transportation Act as a shield, the Citizens to Preserve Overton Park protected the park from the highway. The park remains a part of the landscape of the City of Memphis. The Memphis City Council accepted a master plan outlining twenty years of park improvements in 1988.\textsuperscript{45} The plan called for adding a jogging trail, moving a playground to a picnic area, and putting a new picnic area near the lake. It also provided for a pedestrian plaza and for a second “greensward,” a grassy clearing among the trees.\textsuperscript{46}

In September 1995, the park was once again threatened when the Parks and Recreation Committee of the City Council voted to build a 40,000-square foot senior center on 9.3-acres in the Southeast corner. Reminiscent of arguments for the highway proposed in 1956, supporters of the center suggested the area because the city already owned the land.\textsuperscript{47} Opponents argued that such a center would cause traffic congestion, go against the master plan, and restrict the intended use of Overton Park. In other words, locating the senior center in Overton Park would breach the public trust established when the park was created in 1901: “It would sully that indefinable relationship the residents of a city form with their parks.”\textsuperscript{48} Although the proposal for building a senior center was eventually vetoed, the question of using the public trust doctrine to preserve Overton Park and other cities’ parks from having their uses diverted still remains.

\textbf{PART II: DEFINING THE PUBLIC TRUST DOCTRINE}

The doctrine of public trust may initially be explained by using the terms used in a private trust: \textit{res}, trustee, settlor, and beneficiaries. A public trust employs these same elements: a “\textit{res},” the thing about which

\textsuperscript{44} Id. at 411-413.
\textsuperscript{45} Robbins, supra n. 19.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
the trust is concerned; a trustee, the entity charged with responsibilities and rights; terms; beneficiaries, who have standing to seek an accounting from the trustees in court; and a settlor, who creates the trust.\textsuperscript{49} In this scenario, the parkland is the res, the state is the trustee, and the public is the beneficiary. However, the theory underlying the public trust doctrine extends beyond those basic concepts. Under the public trust doctrine, certain environmental resources are treated as property entitled to maintenance and protection for the public by the government. The state holds the resource in trust for the public and must apply a public trust concept to the management of the resource, fulfilling its duty to promote and maintain a healthy environment on behalf of its citizens.\textsuperscript{50}

Professor Joseph L. Sax, in his seminal 1970 work on the public trust doctrine, offers three ideas in conceptual support for the public trust doctrine. First, “certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than of serfs.”\textsuperscript{51} Second, “certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace.”\textsuperscript{52} Third, certain uses have a “peculiarly public nature that makes their adaptation to private use inappropriate.”\textsuperscript{53} The interests protected by the public trust doctrine are theoretically so important that “their protection cannot be entrusted entirely to unfettered control by state legislatures.”\textsuperscript{54} The public trust doctrine would limit the uses of public trust property, providing a common law form of environmental protection for natural resources.

Historically, the scope of the public trust doctrine covered the lands below the low-water mark of the ocean and Great Lakes, the waters covering these lands, and the “waters within rivers and streams of any


\textsuperscript{50} Peter Manus, \textit{To A Candidate In Search of An Environmental Issue: Promote the Public Trust}, 19 Stan. Envtl. L.J. 315, 318 (2000).


\textsuperscript{52} \textit{Id.} at 484. Sax states that this same principle led to “the creation of national parks built around unique natural wonders and set aside as national museums.” \textit{Id.} at 485.

\textsuperscript{53} \textit{Id.} at 485. Sax offers as an example the rule of water law, that one does not own a property right in water the same way one owns shoes, but that one owns an interest that incorporates the rights of others. The government thus regulates water uses for the general benefit of the community and takes account of “the public nature and interdependency which the physical quality of the resource implies.” \textit{Id.}

consequence."\(^{55}\) The purposes of the doctrine included protection of "commerce, navigation, and fisheries."\(^{56}\) The scope of protection extended to other water-related uses, such as water quality and recreation. Some states then extended the concept of public trust from protection of waters for navigation and recreation to include broader environmental protection of natural resources.

A. From Navigation to Environmental Protection

One basis for the American public trust doctrine is found in *Illinois Central Railroad Co. v. Illinois*,\(^{57}\) called by Professor Sax the "lodestar" of American public trust law.\(^{58}\) The General Assembly of Illinois in 1869 granted to the Illinois Central Railroad more than one thousand acres of submerged lands constituting the bed of Lake Michigan. In 1873, the General Assembly repealed the earlier grant and brought an action to have the original grant declared invalid. The Supreme Court phrased the question in the case as "whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago."\(^{59}\) The Supreme Court held the grant ending state ownership and control of the submerged lands was inoperative, explaining that the state held title to the land in trust for the people of the state for navigational purposes, free from the obstruction or interference of private parties.\(^{60}\) Thus, the state cannot contract to convey the property in disregard of the public trust, under which the state is bound to hold and manage the property.

The public trust doctrine also arises in some state constitutions, again reflecting the doctrine's roots in the protection of waters for the purpose of navigation. The Wisconsin Constitution, for example, imposes a public trust on navigable waters:

The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same; and the river Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of

\(^{55}\) Sax, *Public Trust Doctrine, supra* n. 51, at 556.


\(^{57}\) *Ill. C. R. R. Co. v. Ill.*, 146 U.S. 387 (1892).

\(^{58}\) Sax, *Public Trust Doctrine, supra* n. 51, at 556.

\(^{59}\) *Ill. C. R. R. Co.*, 146 U.S. at 452.

\(^{60}\) Id.
the state as to the citizens of the United States, without any tax, impost or duty therefore.\textsuperscript{61}

The Northwest Ordinance of 1787 required the Wisconsin Constitution to include the section as a condition of statehood.\textsuperscript{62} The importance of navigable water to trade and commerce in the Northwest Territory was discussed by the Wisconsin Supreme Court in \textit{Lundberg v. University of Notre Dame},\textsuperscript{63} when it noted that maintaining navigable waters was not only important to interstate and foreign commerce, but also to the trade in furs and other products from the territory. If the well-established trade routes over river and lakes were obstructed either "physically or politically \[,\] . . . the end of that profitable trade was inevitable."\textsuperscript{64} The property was held in trust for the public for the protection of economic activities rather than reasons of environmental protection. Initially, this limited the scope of the trust solely to navigational purposes.

Over time, however, the public trust as applied in Wisconsin and similar jurisdictions was extended to protect not only commercial navigation, but also recreational uses, including swimming, fishing, pleasure boating, sailing, and enjoyment of scenic beauty.\textsuperscript{65} Physically, the doctrine was extended not only to navigable waters, but also to the beds underlying navigable waters and the appurtenant lands.\textsuperscript{66} The extension on land, however, was limited; under the Wisconsin constitutional definition of public trust, the concept does not apply to other lands.\textsuperscript{67}

In other states, the public trust doctrine evolved into a broader form of environmental protection, where its protection extended beyond navigable waters for commercial and recreational activities to become a doctrine that protects all natural resources. For example, article I, section 27 of the Pennsylvania Constitution states the following:

\begin{quote}
The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the
\end{quote}

\begin{footnotes}
\item[61] Wis. Const. art. IX, § 1.
\item[63] \textit{Lundberg v. Univ. of Notre Dame}, 282 N.W. 70, 74 (Wis. 1938).
\item[64] Id.
\item[66] \textit{Linn}, 556 N.W.2d at 402.
\item[67] See also Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improvement Dist., 733 P.2d 733, 737 (Idaho 1987), aff'd, 17 P.3d 260 (Idaho 2000), where the court held that the public trust arises only in land below the natural high water mark of navigable waters, not in lands which are "wholly independent or unconnected with such navigable waters." \textit{Id.}
\end{footnotes}
common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people. 68

This provision of the Pennsylvania Constitution was added as an amendment in 1971 in response to the public cry for environmental protection that sounded in the 1970s. 69 Parks are part of the “public natural resources” covered by the public trust in this constitutional provision. 70 Courts have rejected reading section 27 in absolute terms since, theoretically, all human activity could in some degree impair the natural, scenic, and aesthetic values of an environment. Instead, this section of the Pennsylvania Constitution has been interpreted to allow for the development of property with a public trust concept of managing public natural resources: “controlled development of resources rather than no development.” 71

The public trust doctrine has also been judicially applied to parks. Citing Illinois Central, the Illinois Supreme Court ruled that parks are held by the state in trust for park uses and purposes and for the benefit of the public. 72 Because the park in that case had been dedicated by the Illinois General Assembly for use as a public park, the agencies created by the state to manage the park must hold the property in trust for the uses and purposes specified and for the benefit of the public. 73

In New York, courts have also held that dedicated park areas in the state are “impressed with a public trust.” 74 Instead of referring to the Illinois Central case, New York courts looked to the language in a case decided in 1871, twenty-one years prior to Illinois Central, as the basis for the park public trust doctrine in that state. 75 In that case, the city of Brooklyn, through its park commissioners, acquired a tract of land for

69 John Dernbach, Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part I - An Interpretative Framework for Article I, Section 27, 103 Dick. L. Rev. 693, 695 (1999). Dernbach notes that two other environmental amendments had been adopted earlier, one which authorized the state to create debt and issue bonds for land acquisition for “state parks and other conservation, recreation, and historic preservation purposes.” Id. at 695, n. 3.
71 Payne, 312 A.2d 86, 94.
73 Paepke, 263 N.E.2d at 15.
75 Brooklyn Park Commrs. v. Armstrong, 45 N.Y. 234 (1871).
public park purposes by right of eminent domain. The commissioners sold one lot of the tract to Armstrong who refused to take title on the grounds that the city did not have the power to convey clear title. In its discussion, the court agreed, stating:

Though the city took the title to the lands by this provision, it took it for the public use as a park, and held it in trust for that purpose. Of course, taking the title, had it taken it also free from such trust, it could have sold and conveyed it away, when and as it chose. Receiving the title in trust for an especial public use, it could not convey without the sanction of the legislature; ... 77

Although this New York court did not reference the navigational roots of the public trust doctrine, it applied to public parks the same concept of the public trust as a doctrine to protect a natural resource for public use.

B. The Public Trust vs. The Charitable Trust

States obtained title to lands underlying navigable waters from the United States upon admission to the Union, subject to the traditional public trust doctrine. Each state succeeded to the trusteeship originally held by the federal government. Unlike title to navigable waters, title to parkland may have been acquired by a state and its municipalities in several ways. States may create parks by purchasing land with public funds and then dedicating that land for the purpose of creating a park. Parks may also be created through the exercise of a state's right of eminent domain. Finally, parks may be created from land donated as a charitable trust gift to municipalities for the purpose of creating and maintaining a park. The issue then arises whether the public trust doctrine applies to all publicly owned parks, regardless of their method of creation.

Generally, city land purchased with public funds directly set aside for the express purpose of creating a park is held in trust for the public. The trust would only protect parks purchased for that specific public use. Land acquired in fee for general purposes, without restrictions, is not placed into

76 Id.
77 Id. at 243.
a trust for park purposes.\textsuperscript{81} Thus, where the property is paid for by the city, through the use of general funds, the land is not held in a public trust that would limit the diversion or alienation of the parkland.\textsuperscript{82}

The public land must be dedicated as a park for the public trust doctrine to apply. Only land so dedicated requires legislative authority for diversion or alienation. Courts often require that the dedication be found in a legislative enactment or in a written instrument such as a deed.\textsuperscript{83} However, courts may also look at actions surrounding the acquisition of the property to determine the purpose for which the land was acquired.\textsuperscript{84} If the actions indicate that the land was acquired for the purpose of creating a park and a park is then created, the public trust applies even in the absence of specific language in the instruments conveying the property.\textsuperscript{85} In one instance, a city took steps before acquiring land to obtain federal funds to finance measures such as the reconstruction of a boardwalk; shortly thereafter, the city created a park from the land acquired and the public used the land as a park for three decades.\textsuperscript{86} The court found that the city held the property subject to the public trust. Thus, the city’s freedom of action was circumscribed, and it could not alienate the property without the express legislative permission.\textsuperscript{87}

Confusion arises when land is donated to the city under a charitable trust with the purpose of giving land that may only be used as a park. The problem of diversion of those parks for another public purpose also surfaces:

Not infrequently, wealthy individuals, intending both to promote the common wealth and to memorialize themselves, give property to a city on the condition that it is to be used in perpetuity for some specified purpose. With disturbing regularity, however, the city soon tires of using the donated property for the purpose to which it agreed when it accepted the gift, and instead seeks to convert the property to some other use.\textsuperscript{88}

\textsuperscript{81} Id. at 26.
\textsuperscript{82} Id.
\textsuperscript{83} Paepcke, 263 N.E.2d 11.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 774-775. The property in question, beachfront lands, had been used for more than three decades by the public as a park.
\textsuperscript{87} Id. at 775.
\textsuperscript{88} City of Palm Springs v. Living Desert Reserve, 70 Cal. App. 4th 613, 617 (1999). In this case, the City of Palm Springs built a golf course on 30 acres of donated property which it had accepted on the express condition that the property be used in perpetuity as a desert wildlife preserve. Id.
A court then may be forced to struggle with the issue of whether the park is governed solely under the terms of the express charitable trust, governed solely under the principles of the public trust doctrine, or governed under both. The public trust is often analogized to the charitable trust doctrine; an analogy intended to "serve primarily as a device for better understanding and utilizing the public trust, an essentially separate doctrine."  

"A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of intention to create it," subjecting the person who holds the trust property "to equitable duties to deal with the property for a charitable purpose."  The three elements essential to the creation are a manifestation by the settlor of an intention to create a trust," trust property, "and a charitable purpose." 

The charitable trust doctrine and the public trust doctrine incorporate similar concepts, specifically, "a public purpose, a government trustee, and generalized beneficiaries." Charitable trust purposes include governmental or municipal purposes and other purposes that are beneficial to the community, such as the relief of poverty or the advancement of education. A charitable trust, thus, can have "the purpose of supplying a community with facilities ordinarily supplied at the expense of taxpayers." Charitable trusts include providing for public parks or for developing and maintaining such parks. Further, as with the public trust doctrine as applied to parks, the public must benefit from the creation of the charitable trust: "A trust is not a charitable trust if the persons who are to benefit are not a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust." To be a charitable trust, the trust property cannot be devoted to a private use.

The two concepts present at least one crucial difference, standing. "[C]haritable trusts are generally not enforceable by potential beneficiaries or by members of the general public." "The proper party to enforce the

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89 Manus, supra n. 50, at 325 n. 40.
90 Palm Springs, 70 Cal. App. 4th at 620, quoting Restatement (Second) of Trusts § 348 (1959).
92 Manus, supra n. 50, at 324.
93 Restatement (Third) of Trusts § 28 (3rd tent. draft 2001).
94 Id., cmt. k.
95 Restatement (Second) of Trusts § 373 cmt. a (1959).
96 Restatement (Second) of Trusts § 375 (1959).
97 Hinton v. City of St. Joseph, 889 S.W.2d 854, 859 (Mo. Ct. App. 1994). The plaintiffs in this case were neighbors seeking to bring an action against the city, which held title to the property, and the trustees, to prevent the sale of the trust land back to the trustees for commercial purposes, with the restriction that any proceeds derived from the sale would be used for future city parks and recreation purposes. Plaintiffs claimed that they had standing as taxpayers and as nearby property owners to challenge the handling of the public property. See 15 Am. Jur. 2d Charities § 135 (2000 and 2001 Cum. Supp.).
interest of the general public” in a charitable trust is usually the state attorney general. The rule that confers exclusive jurisdiction on the state attorney general to enforce a charitable trust is not absolute; beneficiaries with a special interest, receiving a benefit that is not merely the benefit to which members of the general public are entitled, may initiate a suit as to that charitable trust. Some courts have loosened standing requirements under the public trust doctrine:

If the ‘public trust doctrine’ is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.

Under the public trust doctrine, standing can be conferred on plaintiffs as residents or taxpayers in a trust of public lands, not simply to those who have a benefit unlike benefits to which the general public is entitled.

A defendant in the Illinois case, Parsons v. Walker, raised the charitable trust/public trust dichotomy where plaintiffs were seeking to enjoin state officials and the trustees of the University of Illinois from entering into agreements with the United States for construction of a reservoir project on a river. Defendants alleged that since the public trust doctrine was distinct from the charitable trust doctrine and the park at issue was created as a charitable trust, only the attorney general had standing to object when the government-trustee attempts to divert the property to another use. While the trial court agreed, the appellate court, comparing several other Illinois cases, did not: “We believe the defendants are exaggerating the distinction between the two terms, if indeed there is any at all.” The court noted that the terms “public trust” and “charitable trust” had been used interchangeably in a previous case and went on to state that “even if there is more than a semantic difference, when categorizing a particular trust for purposes of determining whether members of the public have standing to seek its preservation, the

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99 Grabowski, 1997 WL 375596 at 4.

100 Paepcke, 263 N.E.2d at 18.


102 Id. at 926.
circumstances would dictate rather than a label attached at some time in the past."\(^{103}\)

The Illinois court found a public trust. A private individual originally conveyed the park by a deed, which referred to it as a charitable trust. The University accepted the trust and abided by its terms, operating the park for public as well as educational use for twenty-eight years. Thus, the court held that the park was held as public trust property which individual citizens and taxpayers had an interest in preserving and had standing to do so in court.\(^{104}\) However, the court did not hold that the two doctrines were one. In fact, the court looked to the specific terms of the grant when holding that the plaintiffs stated a cause of action by alleging that the University may have violated the terms of the grant, leaving the inference that the two doctrines were separate, but that public parks created by charitable trusts were imbued with the public trust.\(^{105}\)

Another court recognizing the two concepts as separate did not suggest that parks created by charitable trusts might also be held in public trust. In *Dunphy v. Commonwealth*,\(^{106}\) the town of Rockland entered into an agreement with the Massachusetts state government to convey a park to the state, which would then erect and operate a skating rink on the land.\(^{107}\) According to the court, the decisive issue in the case was whether the town obtained and held title to the land in a trust that permitted the diversion of the property when expressly authorized to do so by the legislature or obtained and held title to the land in a charitable trust “requiring that the land be used only for the purposes of a public park without any power in the Legislature to authorize or require the town to divert the trust property.”\(^{108}\) By phrasing the issue in this manner, the court implied that the two doctrines are separate. Furthermore, by holding that the park was created under the charitable trust doctrine, the court ultimately protected the land from diversion to a skating rink. Under the charitable trust doctrine, the town assumed obligations under the contract, a deed that conveyed land to the town to be kept and used as a public park in perpetuity.\(^{109}\) The legislature had no power to impair those obligations by legislation.\(^{110}\)

Because the public trust doctrine has not been applied as an absolute bar against diversion or alienation of parkland, parks acquired with public

\(^{103}\) *Id.* at 926. The court reviewed *Art Inst. of Chicago v. Castle*, 133 N.E.2d 748 (Ill. App. 1st Dist. 1956) and *Paepcke*, 263 N.E.2d 11.

\(^{104}\) *Parsons*, 328 N.E.2d at 926-927.

\(^{105}\) *Id.*


\(^{107}\) *Id.* at 885.

\(^{108}\) *Id.* at 885.

\(^{109}\) *Id.* at 886.

\(^{110}\) *Id.*.
funds have been subject to development under the doctrine. If these very same parks had been created under a charitable trust, they possibly may not have been developed; the terms of the creating documents as well as the statutes governing charitable trusts controlling the decision may require the land to be maintained as a park in perpetuity. Under these inconsistent results, the charitable trust doctrine may actually protect the park from destruction in situations in which the public trust doctrine would allow for diversion or alienation, a reason for maintaining that the two concepts are separate and distinct.

However, the public trust doctrine could be applied to charitable trust parks in two ways. First, the broader standing allowed to plaintiffs in public trust cases could be extended to plaintiffs seeking to enforce the terms of charitable trust parks. Residents concerned about preserving a park would not be required to wait for an action to be brought by a state official. Second, the public trust doctrine concept of protecting resources for public uses and for public access could guide any interpretation of charitable trust terms if the public trust doctrine is not simply applied as a concept for judicial oversight of a decision by a governmental body to divert or alienate park lands. If it imposes affirmative duties on the state to prioritize park preservation, the public trust doctrine will have a purpose distinct from the charitable trust.

PART III: APPLYING THE PUBLIC TRUST DOCTRINE

The public trust doctrine places limits on the alienation and diversion of public trust property by governmental bodies. The doctrine is not an absolute concept prohibiting any change in parkland, but provides a form of protection and limitation when parkland is alienated or diverted. Because alienation of public land removes the land from public use, it should be viewed with even more skepticism than the diversion of parkland to another public purpose. Parks, however, are more often threatened by the diversion of the land to other public projects since the state or local government may view public parks as land available for a change in public use that is less costly politically and financially than land acquired by eminent domain. The public trust doctrine can prevent public officials from viewing public parks as undeveloped land ripe for commercial development.

A. Two Approaches to Applying the Public Trust Doctrine

Two tests have been applied by courts when analyzing whether a diversion or alienation of parks held in the public trust violate the doctrine:
Both approaches allow for the alienation and diversion of public trust property, but with different requirements.

The first approach, or the legislative approach, prohibits the alienation or diversion of parkland "without plain and explicit legislation to that end." Because the policy "has been to add to the common-law inviolability of parks express prohibition against encroachment," the court will strictly interpret the relevant statutory provisions; it will not permit activities inconsistent with the plain and explicit legislation. However, this rule is not an absolute requiring courts to yield to a specific legislative consideration of public interest. A court will not simply defer to a legislature's determination, but will review it, will "consider it with considerable skepticism," as suggested by Professor Sax. As one court succinctly stated: "If courts were to rubber stamp legislative decisions...the doctrine would have no teeth." A legislative body should not have unfettered discretion to breach the public trust by simply articulating some public gain. To that end, a two-part standard has been set forth to show adequate legislative intent: (1) the legislature must identify the specific land; and (2) a statement of the new use must appear in the legislation along with a statement demonstrating "legislative awareness of the existing public use." This express legislative mandate approach has been criticized as imposing an undue burden on state legislatures which

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112 Gould, 215 N.E.2d at 121. The Supreme Judicial Court of Massachusetts held that a lease of 4000 acres in an 8000-acre park for a tramway, ski lifts, and ski resort was not authorized by the statutes governing the leasing power of the Greylock Reservation Commission. Id. at 124.

113 Sax, Public Trust Doctrine, supra n. 51, at 490.


may not meet frequently enough to draft such exacting legislation for municipal parks.\textsuperscript{116}

The second approach is a substantive test established by the courts that consists of five factors to be weighed in determining whether a diversion or alienation of public trust property violates the trust.\textsuperscript{117} Under this approach, a court may also strike down a legislative declaration of a public purpose. However, the diversion or alienation of public parks would be permitted under conditions demonstrating:

\begin{enumerate}
\item that public bodies would control use of the area in question;
\item that the area would be devoted to public purposes and open to the public;
\item the diminution of the area of original use would be small compared with the entire area;
\item that none of the public uses of the original area would be destroyed or greatly impaired;
\item and that the disappointment of those wanting to use the area of new use for former purposes was negligible when compared to the greater convenience to be afforded those members of the public using the new facility.\textsuperscript{118}
\end{enumerate}

Under this approach, a court using the criteria makes final determination of whether an alienation or diversion of a public trust resource violates the public trust. As with the first approach, the court will not "supplant its judgment for that of the legislature," but "will take a 'close look' at the action to determine if it [the alienation or diversion] complies with the public trust doctrine."\textsuperscript{119} While this test makes more difficult the transfer of parkland to private entities, public land may be more susceptible to publicly owned development if park preservation is not the overriding factor in the balancing.

If the public trust doctrine is to have any impact on park preservation, courts must be able to review the actions of governmental bodies that divert or alienate public trust properties. As one court stated: "The very purpose of the public trust doctrine is to police the legislature's disposition of public lands."\textsuperscript{120} Under either approach, the public trust doctrine allows for judicial oversight of legislative decisions to alienate or divert property. However, viewing the doctrine as one providing only for protection in the

\begin{footnotes}
\item[117] This approach is often referred to as the Wisconsin approach. \textit{Id.} at 1091.
\item[118] Paepcke, 263 N.E.2d at 19. The factors did not control under the issues presented in the case. The criteria were adopted to parks from two Wisconsin cases, \textit{City of Madison v. State}, 83 N.W.2d 674 (Wis. 1957) and \textit{State v. Pub. Service Commn.}, 81 N.W.2d 71 (Wis. 1957), that applied them to navigable waters and submerged lands.
\item[120] Lake Mich. Fedn., 742 F. Supp. at 446.
\end{footnotes}
courtroom not only raises concerns over entrusting natural resource protection to the discretion of the courts, it also fails to impose an affirmative duty of resource preservation on legislative bodies.\textsuperscript{121} Under the public trust doctrine, park preservation must be given priority in the decision-making process. The balancing approach can give the public trust doctrine substance if it is used to guide legislative and administrative actions concerning parklands.\textsuperscript{122}

\section*{B. Application of the Public Trust Doctrine to the Alienation of Parkland}

When the government attempts to transfer public trust assets to a private entity, the public trust doctrine may be invoked by citizens arguing that the park cannot be alienated. Parks should generally be preserved in alienation cases because courts should be reluctant to allow a public resource to be completely removed from public use. A state should not be permitted to so easily surrender a valuable public resource to a private entity and to relinquish its power over publicly owned property. However, park use has been subject to infringement when some other societal need is paramount. If alienation of the parkland is allowed, courts must rigorously scrutinize the alienation of the parkland from public use to a private entity to ensure that the transfer continues to serve a public use and is carried out with minimum possible harm to the remaining parkland.

One general principle central to public trust litigation is the basis for the alienation category: when a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated “to subject public uses to the self interest of private parties.”\textsuperscript{123} This may suggest that a government may never alienate trust property by conveying it to a private owner; however, there is no general prohibition against the conveyance or other disposition of trust resources.\textsuperscript{124} The public trust doctrine is a flexible doctrine that can be molded “to meet the changing conditions and needs of the public it was created to benefit.”\textsuperscript{125} However, courts must critically examine public trust cases of alienation and restrictively interpret transfer of public trust property to make a determination whether the conveyance is consistent with the public trust.

\textsuperscript{121} Sax himself viewed the doctrine as one that provides procedural protection: “Public trust law is not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process.” Sax, \textit{Public Trust Doctrine}, supra n. 51, at 509.
\textsuperscript{122} \textit{Paepcke}, 263 N.E.2d at 19.
\textsuperscript{123} Sax, \textit{Public Trust Doctrine}, supra n. 51, at 490.
\textsuperscript{124} \textit{Id.} at 486.
Under the public trust doctrine, grants of public lands must fulfill a public purpose. For example, in *Illinois Central*, the Supreme Court stated that no valid objection could be made to grants of submerged lands for the construction of wharves, docks, and piers that further the interest of the people in the navigation of waters and in the aid of commerce over them.\(^{126}\) Grants for such purposes would be sustained as a valid exercise of legislative power consistent with the public trust, but an abdication of the general control of the state over the submerged lands would be inconsistent with the exercise of a trust that requires the government of the state to preserve the waters for public use.\(^{127}\) State control of public trust property cannot be relinquished except to promote the public interest or if the alienation can be accomplished without any substantial impairment of the public interest in the remaining property.\(^{128}\) The public trust is violated when the primary purpose of a legislative grant is to benefit a private interest.

Seventy years after the Supreme Court's decision in *Illinois Central*, the Illinois General Assembly once again provided for the conveyance of submerged lands in the waters of Lake Michigan.\(^{129}\) For a payment of $19,460, the United States Steel Corporation would be granted 194 acres of land on which to construct a steel plant upon the reconveyance by the Chicago Park District to the state of an interest in land it had received by certain legislation.\(^{130}\) U.S. Steel paid the $19,460, but it was returned three days later when the Attorney General sought a declaratory judgment that the bill conveying the land was void on the grounds that it violated the public trust doctrine.\(^{131}\) The Illinois Supreme Court found a private purpose for the grant despite language in the bill that the grant of the submerged lands was made to aid commerce, would create no impairment of the public interest in the remaining lands and water, and would result in the conversion of useless and unproductive submerged land into an

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\(^{126}\) *Id.* In a more recent case, a New Jersey Superior Court agreed. The New Jersey Department of Environmental Protection subleased about 50 acres of Liberty State Park in the New York-New Jersey Harbor to a private corporation for development into a 599-slip public marina. The court found no violation of the public trust doctrine since the marina would be open to the general public on a first-come, first-serve basis. The marina area would also be open to the nonboating public. *Jersey City v. State Dept. of Envtl. Protection*, 545 A.2d 774, 783 (N.J. Super. Ct. 1988).

\(^{127}\) *Ill. C. R. R. Co.*, 146 U.S. at 452-453.

\(^{128}\) *Id.* at 453.


\(^{130}\) *Id.* The steel company planned to construct an additional facility which would extend its plant into Lake Michigan. The area was bordered on the north by a public beach, on the south by a breakwater protecting the harbor, and on the east by the Illinois-Indiana state line in Lake Michigan. *Id.* at 780.

\(^{131}\) *Id.* at 775.
important commercial development to benefit the state's citizens. U.S. Steel also argued that the plant would provide jobs and would boost the economy. The court was not persuaded. They held that while courts should consider legislative declarations of a public purpose, "the self-serving recitation of a public purpose within a legislative enactment is not conclusive of the existence of such purpose."\[134\]

The public purpose served by the transfer of public trust property to private entities cannot be incidental and remote. The benefits of employment and economic improvement were considered too "indirect, intangible, and elusive" to satisfy the public purpose requirement. In almost every instance where submerged land would be granted to a private entity for development, there would be some employment and some economic benefit to the state.\[135\] Because the "direct and dominating purpose here would be a private one," the court voided the grant of the submerged land to U.S. Steel.\[136\]

Under the public trust doctrine, not only have courts invalidated transfers to commercial entities, courts have also invalidated transfers to nonprofit private entities providing a public service. For example, in \textit{Lake Michigan Federation v. United States Army Corps of Engineers}, a federal district court invalidated a transfer by the Illinois legislature of submerged lands under Lake Michigan to Loyola University for athletic facilities. The court found that while the project had some public benefit and the public would have access to the athletic facilities, the purpose of the grant was primarily to serve a private interest; to enlarge the university's campus.\[138\] "[T]he inescapable truth is that the lakebed property will be sacrificed to satisfy Loyola's private needs."\[139\]

The court not only viewed the transfer as an attempt to give away public trust property to satisfy a private interest, but it also viewed the transfer as an attempt to relinquish state control over the property. When the state relinquishes control over a resource, it relinquishes its ability to

\[132\] \textit{Id.} at 781.
\[133\] \textit{Id.}
\[134\] \textit{Id.} (internal quotations omitted), (quoting \textit{People ex rel. City of Salem v. McMackin}, 291 N.E.2d 807, 812 (Ill. 1972)).
\[135\] \textit{Id.} at 781. \textit{See} Sax, \textit{Public Trust Doctrine, supra} n. 51, at 488-89.
\[136\] \textit{People ex rel. Scott}, 360 N.E.2d at 781.
\[138\] \textit{Id.} at 445. Loyola University has a Lake Shore campus bordering Lake Michigan. Loyola developed plans to construct a lakefill in the waters of Lake Michigan of about 18.5 acres. \textit{Id.} at 443. In the interior portion of the lakefill, the university planned to build athletic facilities, including a running track, a women's softball field, and multi-purpose athletic fields. Along the perimeter, Loyola intended to construct bicycle and walking paths, a seatwall, and lawn areas to which the public would have unrestricted access. \textit{Id.}
\[139\] \textit{Id.} at 445.
safeguard the interests of the public in the land. As owner of land previously belonging to the state, the private entity would have rights superior to those of the public even where the public would have access to the transferred resource.

A related concept is leasing parkland which raises the issue of continued park access by the public. Simply put, if a lease diverts park property to an exclusively private use, the alienation is improper. A New York court found the use of public parkland for private summer cottages to be an improper use to the exclusion of the public. On the other hand, a New Jersey court found that a lease of a portion of a state park to a nonprofit corporation for development of a public marina by a private developer did not violate the public trust since the marina area and some parking would remain open to the non-boating public; the public trust doctrine was substantially satisfied.

B. Application of the Public Trust Doctrine in Diversion Cases

The second category of cases are those in which the government diverts public trust property from one public purpose to another, i.e., the government is effecting a change in the use to which the property has been devoted. This is an attractive option, as governments understandably would prefer to divert public land for public projects rather than expend public funds for the acquisition of private property. Furthermore, the relocation of citizens on that private property not only will cause disruptions in their personal lives, but also could cause a political uproar and even possible Fifth Amendment claims on public use or just compensation. Diversions in the use of public trust land should be approved only when three factors are met: (1) the area would continue to be devoted to a broad public purpose which is either consistent with the public uses of the original area or is one that outweighs the public use of the area as a park; (2) a public body would retain control over the use of the area in question; and (3) the diverted use would be one open to the public. These three factors are the crux of the five-criteria balancing approach. If the park use must succumb to a new public use that is determined to be paramount to the park use, the public must maintain control over the new use and continue to have easy access to it for a general public purpose.

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140 Id.
143 Sax, Public Trust Doctrine, supra n. 51, at 485-486.
144 See Paepcke, supra n. 118.
1. Public Purpose and Public Access

The importance of the park purposes must be compared with the purposes that would be promoted by sacrificing the park. In that comparison, the public trust doctrine should require that park purposes weigh heavily in the balance against other public purposes. The inquiry for legislative, administrative, and judicial decision-making should be whether the municipality no longer needs the parkland for park purposes.

Parks serve a multitude of purposes for the public. First and foremost, parks serve the public purpose of recreation, a purpose fulfilled by granting open access to the public. Professor Sax himself grappled with recreation as a public purpose when he wrote about national parks as natural resources and using the public trust doctrine in preserving those natural public purpose resources. One commentator described Sax’s thinking as “reflections on the question ‘What ought the parks to teach us?’ He moves from an eloquent, but too narrow, focus on contemplative recreation to a still broadening and evolving understanding of parks as a place to teach about sustaining and sustainable human relationships with nature.” The commentator further notes that for Sax, at one point in his thinking, recreational choice was probably a matter of class.

145 Parks have been the subject matter of historic open access litigation to end racial discrimination. See e.g., Evans v. Abney, 396 U.S. 435 (1970); Evans v. Newton, 382 U.S. 296 (1966). The cases involved a park in the city of Macon, Georgia, created when a United States senator conveyed property in trust to the city to be used as a “park and pleasure ground” for whites only. Newton, 382 U.S. at 297. Senator Bacon believed that in “social relations the two races . . . should be forever separate.” Id. The Supreme Court in Newton held that the public character of the park required it to be treated as a public institution and thus operated on a nondiscriminatory basis. Id. at 302. Four years later, however, in Abney, the Supreme Court affirmed a judgment of the Georgia Supreme Court finding that integrating the park meant that Senator Bacon’s intent to provide a park for whites only had become impossible to fulfill and thus the trust failed, reverting under Georgia law to the heirs of Senator Bacon. 398 U.S. at 436, aff’d 165 S.E.2d 160 (Ga. 1968).


148 Id. at 390. She supports her assertion by quoting the following language from Sax:

[T]hose who already have the power in the society (like successful professionals) are attracted to recreation that demonstrates to them that they are above needing power; while those who are powerless need nothing so much as to demonstrate (however pitifully) that they are capable of dominion. Thus the distinguished New York lawyer and fly-fisherman lies by the side of a stream contemplating the bubbles, while the factory worker roars across the California desert on a motorcycle.
Sax’s view, however, did not consider the recreational purpose within the parameters of an urban setting. In 1969, in a book of essays on the development of small city parks as urban amenities and instruments of social advancement, Robert Weaver, Secretary of the Department of Housing and Urban Development from 1966 to 1968 under President Johnson, wrote on the need for recreational facilities in urban areas:

The need for recreational facilities is widely recognized today. Very few people in our enlightened age are against national or city parks, or playgrounds for children, or the theory of preserving land for future use.

However, we do need better understanding of urban recreation needs, . . . we still think of recreational outlets largely in terms of rural values . . . This rural-oriented recreation, to which most of our interpretive programs and much of our recreation budgets have been directed, does not, however, serve the needs of central city people.

Thus, we cannot restrict the development of recreation facilities to outlying areas. We must provide facilities for recreation, rest, and relaxation that are available to all citizens in every walk of life. We must consider the urban citizen who wants his recreation within the city.\textsuperscript{149}

Thus, the recreational purpose of national parks that permits a public trust application for recreational should also apply to urban parks.

Parks, however, can serve more than recreational purposes. Parks may be included within the examples of “public fora,” open spaces (including streets and sidewalks) to which the public generally has unconditional access.\textsuperscript{150} Parks are considered public forums because open access by the public is integral to their function as central gathering places: “Public access is not a matter of grace by government officials but rather is inherent in the open nature of the locations.” Thus, courts balancing the


\textsuperscript{149} Robert C. Weaver, \textit{Recreation Needs in Urban Areas,} in \textit{Small Urban Spaces: The Philosophy, Design, Sociology and Politics of Vest-Pocket Parks and Other Small Urban Spaces} 23, 23-24 (Whitney N. Seymour, Jr., ed., N.Y. Univ. Press 1969). Weaver declares that a rural-oriented approach to recreation overlooks the fact that low-income urban families may not be mobile enough to reach the facilities and that they may not be interested in traditional rural concepts of recreation. \textit{Id.} at 24.

\textsuperscript{150} \textit{U.S. v. Kokinda}, 497 U.S. at 743.
public purpose of parks with the public purpose and access of the use to which the park is being diverted should include in that balancing the broader communicative purpose served by parks that may be lacking by any other public areas. As the Supreme Court has noted, "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."¹⁵¹

If the park purpose must succumb to a new societal need, the area to be diverted must continue to be devoted to a public purpose. Courts generally find such a change in purpose valid when the diversion is from one broad public purpose to another, particularly when the area diverted is relatively small compared to the park area preserved. For example, a road widening project that would require the diversion of a one-half acre of park space was upheld under the public trust doctrine as "merely a diversion of a minimal quantum of public land from one public purpose to another public purpose."¹⁵² Diversion of portions of public park land from park purposes for use in school construction, renovation, and rehabilitation was upheld in an Illinois case where 1.2 acres of one of the diverted parks would be used to construct a gymnasium and recreational facilities which would be leased to the city's park authority.¹⁵³ On the other hand, a Pennsylvania court upheld a lower court finding that the public trust doctrine was not satisfied when the intended use of diverted parkland would be a school or educational facilities even though only 1.2 of 34.35 acres would be diverted.¹⁵⁴

To exercise rights guaranteed by the public trust doctrine that applies to the park, the public must have access to the public trust property. By design, public parks are accessible to large segments of an urban area. A diversion should be permitted only when the public access continues under the diverted use. Continued public access is measured by how much the public is excluded from the diverted use. A new public use for the parkland that is accessible to a narrow segment of the population should weigh against approval of diverting the park to another public use.

¹⁵² Payne, 312 A.2d at 96. The park area in Wilkes-Barre, Pennsylvania, was known as River Common. The area, a tract of land bordering the Susquehanna River, originally consisted of 35 acres and was dedicated in the 1770s as a public common. Id. at 89. In 1779, the common was the site of an encampment against warring elements of the Iroquois Nation. Id. at 88.
¹⁵³ Paepcke, 263 N.E.2d at 14-15.
¹⁵⁴ In re Conveyance of 1.2 Acres of Bangor Memorial Park, 567 A.2d 750.
Public access must be granted to all on equal terms without preference to local residents. For example, municipalities have attempted to limit access to beaches within their jurisdictional limits to only their residents. "The public trust doctrine mandates that the beach be open to all on equal terms without preference."\textsuperscript{155} Likewise, the public trust doctrine would limit a municipality from taking action that operates to exclude the public at large from a public park and to limit use to local inhabitants:

To hold otherwise would be to permit the municipality to achieve a result which violates the public trust principle since as to those who are excluded from the public park the exclusionary policy is as much a diversion of use as would be the case if the municipality changed the use of the park or sold it.\textsuperscript{156}

This open access mandate does not prohibit municipalities from charging reasonable fees for access, but does prohibit a price structure that discriminates against nonresidents, thus limiting public access by the state's citizens.\textsuperscript{157} Arguably, the imposition of fees negatively impacts the public access to the trust property. However, when a park district permitted the construction and operation of a driving range in a city park, the public trust doctrine was not violated by the imposition of fees charged for the use of the facilities because the fees were reasonable for the general population of the community; the fees did not render the facility closed to the public.\textsuperscript{158}

2. Public Control

For a diversion of parklands to another public use to be valid, a public entity should retain control and management of the public trust properties. This factor is easily found in diversion cases when the government, which is changing the use of the property from one public purpose to another, transfers the property from the management of one of its divisions to another. For example, in \textit{Paepcke}, the City of Chicago sought to construct a school and recreational facilities in two parks; such a diversion of use required the city's park district to convey about four acres to the Public Building Commission, which would then lease two and a half acres to the Board of Education.\textsuperscript{159} Although the specific governmental entity

\textsuperscript{156} \textit{Gewirtz}, 330 N.Y.S.2d at 512.
\textsuperscript{157} \textit{Slocum}, 569 A.2d at 317.
\textsuperscript{159} \textit{Paepcke}, 263 N.E.2d at 334.
changed, the property remained under public control. Public control is more of an issue in alienation cases where the parkland is transferred to a private entity.

3. Destruction or Impairment of Public Uses

The diverted use should not impair the public purpose of the park. The diverted public purpose must be consistent with the use of the public area as parkland because the diversion of public property to an inconsistent use is a breach of the trust. One example of inconsistent use is found in a New York case where a county government sought to create a sanitary landfill within a public park owned by the county. The county justified its use of the park as landfill on an engineering and environmental basis. Ostensibly, the purpose of using the park for landfill would be to later convert the landfill area into a ski slope. Not surprisingly, the court found the uses inconsistent.

For the public trust doctrine to apply to prevent the destruction or impairment of the lands, the area must clearly be considered parkland with a public use. That the land is publicly owned open space alone will not permit the land to be designated as trust property; courts will review its specific usage. In one instance, land that a nursing home had leased from New York City for sixty years for use as a private outdoor sitting area for its residents and their visitors was not a dedicated park area entitled to public trust protection under New York law. Thus, the city was not prohibited from selling the land at a public auction to the nursing home, which would construct an addition on the property that was contiguous to its existing structure.

Land that has a public purpose but that is not dedicated to park use or restricted to park use is not entitled to public trust protection. For example, an empty lot with drainage improvements may have the necessary public use of flood control, but if the municipality has not dedicated the open space as a park, such as on a land use plan, or even open to free use by the general public, it is not entitled to the protection of

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160 Id.
161 See Lord v. City of Wilmington, 332 A.2d 414 (Del. Ch. 1975) (city sought to divert parkland for use as a water tank and tower).
163 Id. at 897.
165 Id. at 97-98.
the public trust doctrine. A municipality would not be prohibited from selling such a parcel to a private party for residential development.

PART IV: CONCLUSION

When Robert Weaver wrote in 1969 that "[w]e must consider the urban citizen who wants his recreation within the city," he did not have in mind the public trust doctrine. However, his words provide justification for the use and application of the doctrine to urban parks. The financial and political expediency of alienating such parks or even diverting them for other public purposes cannot always be allowed to outweigh the recreational and public forum purposes of park lands which have also been shown to lower crime, improve air quality, and raise property values.

Overton Park in Memphis is an example of how urban parks are constantly threatened by development of other public projects. It survived the threat of impairment from a bisecting highway only to face the threat of impairment from a senior center. Both of the proposed uses were for the public and for a legitimate state purpose; however, the park itself allows public access and has a legitimate state purpose that should not be periodically at risk. If considered as an affirmative obligation to preserve a natural resource for public use, the public trust doctrine could provide the protection necessary to preserve these needed green spaces within cities. The doctrine is not static and would not prohibit development of the property, but would allow a balance that favors maintaining that property as parkland. A doctrine with the initial purpose of protecting waters for commercial navigational purposes can extend to protect parklands for recreational and other societal purposes.

166 Timothy Christian Schs. v. Village of W. Springs, 675 N.E.2d 168, 175 (Ill. App. 1997). See Pearlman 62 Misc. 2d at 26-27 (where a court held that land was not park land since it was not restricted as such even where a village cleared property, put in a few trees and walkways with benches, and residents used it as a park to some small degree).

167 Pearlman, 62 Misc. 2d at 26-27.

168 Weaver, supra n. 149, at 24.

169 In the aftermath of the World Trade Center attacks in New York City, a former designer of parks for the city wrote an editorial about the importance of parks to the healing process, asserting that parks must be an important part of the rebuilding process:

City life is not just about Midtown excitement; it is also about neighborhoods, green spaces, swings, a baseball diamond and the chance to sit on a bench. Mayor Rudolph Giuliani has said we need to try to return to normal: go back to work, see a show, remember why we are New Yorkers. Our parks are a part of that normalcy. They are our backyards and playgrounds.