THE "PUBLIC TRUST"

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ABSTRACT

It seems as if no one really knows the meaning of the term "public Trust" used in the Religious Test Clause of Article VI of the U.S. Constitution. This Article is the first scholarly attempt to define the term by exploring historical evidence pre-dating the nation’s founding through the Constitution’s adoption, including British and colonial trust law that influenced the Founders’ conception of the term. Today, one can find the term used only in the cases and scholarship concerning environmental law, tax law and museum law. After a thorough analysis of the old and new sources, this Article proposes the following original definition of term "public Trust": "Any entity given special privilege by the government, beyond the simple grant of a state corporate charter often coupled with state or federal tax waivers, so long as that entity is legally obligated to engage in conduct that could traditionally have been performed by the government itself for the public’s benefit."

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INTRODUCTION

The term "public Trust" used in the No Religious Test Clause of Article VI, clause 3, of the U.S. Constitution largely has been ignored since the Constitutional Convention of 1787-1791. To date, no scholarship or jurisprudence has defined the "public Trust" as it is used in Article VI. It has been under-theorized in primary and secondary sources. Nonetheless, the term is being used with increasing frequency in three distinct areas of legal jurisprudence and scholarship: tax exemptions, environmental law and museum law. The purpose of this Article is to analyze the historical and modern usage of the term to define it and its future significance.

U.S. CONST. art. VI, cl. 3 (emphasis added)
One article written by Professor Robert G. Natelson in 2004 explains the prevalent idea of a fiduciary government among the founders, which they referred to generally as "public trust." His work cites use of the term during the Constitutional Convention; however, it is a background discussion of the development of concepts of "public trust" fiduciary government predating the Constitution, rather than an analysis of what an Article VI "public Trust" actually is within its Constitutional meaning. A few cases, books and other articles have touched upon the phrase in passing, but none have sought to define it. They focus on other terms in Article VI, such as what constitutes a "religious Test."

Quite a few sources simply conflate the terms "Office" and "public Trust" without asking the question whether the terms should, indeed, be construed as having identical meaning. Such conflation is not supported by basic principles of statutory and constitutional construction. Nor does historical evidence seem to support such equivalence, although that evidence is sparse and ambiguous.

This Article is the first scholarly attempt to define the term "public Trust." Part I of this Article will set forth the limited historical context surrounding the term, dating back through the reign of the Stuarts, the Colonial Era, the Constitutional Convention and the new Republic's early years. The term has been touched upon only in three areas of law: (1) environmental regulations; (2) tax law (specifically charitable trusts, non-profit theory and tax exemptions); and (3) museum law. Part II analyzes these three legal fields to provide a theoretical framework to conceive of a modern-day "public Trust." Part III provides the following recognized original definition of the "public trust": "Any entity given special privilege by the government, beyond the simple grant of a state corporate charter often coupled with state or federal tax waivers, so long as that entity is legally obligated to engage in conduct that could traditionally have been performed by the government itself for the public's benefit." Future litigation and scholarship could consider whether modern public trusts are subject to the limitations of Article VI's No Religious Test Clause and how the clause potentially interacts with both the Establishment Clause and the Free Exercise Clause of the First Amendment.

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3 Id. at 1091.
I. HISTORICAL BACKGROUND OF ARTICLE VI

Extraordinarily little historical evidence pertains to Article VI's No Religious Test Clause, which concludes with the term "public Trust." Modern usage of the term seems surrounded in myth. There is an oversimplified belief among the populace that colonialists were fleeing religious persecution to build a society where all were free to worship as they saw fit, which is a falsity. Official discrimination against minority religious groups persisted throughout the Colonial Era and beyond. The No Religious Test Clause was an attempt to stop such discrimination in the new Republic, at least at the federal level.

As demonstrated below, British and colonial history leading up to the Constitutional Convention’s adoption of the No Religious Test Clause shows that the Clause’s purpose was to eliminate any oath or profession of faith to a state religion as a prerequisite for serving the public interest. However, an oath of allegiance to the Constitution is required before individuals may take an office, and during the Founding Era, only those with religious convictions could take a valid oath, with the effect of excluding atheists, agnostics, and other religious skeptics who could not profess a valid oath of faith. The historical record thereafter shows significant change in governmental practices through the present day, but there has not been a steady progression towards tolerance of diverse beliefs concerning God and faith. Change came in fits and starts, with some steps forward and some back (depending on one’s perspective, of course). The Supreme Court explained some of this history in Torcaso v. Watkins in 1961, where it summarized:


6 Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution (July 30, 1788) (remarks of James Iredell), reprinted in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 196–97 (Jonathan Elliot e.d., 2d ed., Philadelphia, J.B. Lippincott Co. 1891) (Federalist James Iredell Sr. stated: “It was long held that no oath could be administered but upon the New Testament, except to a Jew, who was allowed to swear upon the Old. According to this notion, none but Jews and Christians could take an oath; and heathens were altogether excluded.”); see also 5 U.S.C. § 3331 (stating that individuals “elected or appointed to an office of honor or profit” shall take an oath swearing or affirming their defense of and allegiance to the U.S. Constitution).
When our Constitution was adopted, the desire to put the people “securely beyond the reach” of religious test oaths brought about the inclusion in Article VI of that document of a provision that “no religious Test shall ever be required as Qualification to any Office or public Trust under the United States.”

This Part fleshes out the historical evidence concerning the meaning of the term “public Trust” from the Stuart Period through today and sets forth interpretational principles to begin defining the term with the precision lacking in prior scholarship.

A. The Stuart Period & Colonial Era

In 1660, Charles II became the head of the newly-restored English monarchy following the collapse of Oliver Cromwell’s republic. Though King Charles II had previously stated a desire to encourage religious tolerance of Catholic and Protestant dissenters, he was ultimately convinced by his advisors that religious freedom would lead to political rebellion. In 1661, he issued the Corporation Act. The Act prohibited anyone from holding public office who had not, within one year of being elected, “taken the Sacrament of the Lord’s Supper according to the rites of the Church of England.” The Corporation Act was followed in 1673 by the anti-Catholic “Test Act,” which required all public officials to declare “belief against transubstantiation in Holy Communion.”

It is true that one reason that the early colonists fled Europe to settle in the “new world” was to escape the heavy burden of such acts. Throughout the Colonial period, however, many colonial leaders engaged in the very same oppressive behavior to support their own faiths. Delaware, Maryland, Massachusetts, North Carolina, and

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7 Torcaso, 367 U.S. at 491 (quoting U.S. CONST. art. VI, cl. 3.). See generally Donald Drake- man, What’s the Point of Originalism, 37 HARV. J.L. & PUB. POL’Y 1123 (2014) (discussing originalism and adherence to the Framers’ intentions); Michael A. Helfand, Litigating Religion, 93 B.U. L. REV. 493 (2013) (discussing how courts deal with resolving religious questions). The historical significance of Torcaso is debatable, however, and Constitutional originalists may argue its holding was wrongly decided.
8 Angus Stroud, Stuart England 152 (1999) (discussing the collapse of the republic).
9 Id. at 157 (discussing Charles’s policy of religious toleration and the reaction of local elites to it).
11 Id.
12 An Originalist Analysis, supra note 5, at 1650–51; Hunter, supra note 10, at 6. Transubstantiation is the Catholic belief in the changing of bread (the host) and wine to the body and blood of Christ during mass.
13 See Torcaso, 367 U.S. at 490 (delving into historical analysis). But see Loewen, supra note 5, at 76–97 (discussing myths about the Pilgrims).
14 Loewen, supra note 5, at 89–92; accord An Originalist Analysis, supra note 5, at 1660.
Pennsylvania required public officials to declare themselves Christians. \(^{15}\) New York effectively excluded Catholics from office by requiring all public officials to disavow allegiance to the Pope. \(^{16}\) Georgia, New Hampshire, and South Carolina permitted only Protestants to hold office. \(^{17}\) In colonial Virginia, Governor Thomas Dale decreed that breaking the sabbath, cursing, or "speaking impiously" about the Christian faith was punishable by death; under the Statute of Religious Freedom, Virginia required one to be a member of the Anglican Church to vote. \(^{18}\) A law passed in 1647 punished a Quaker priest who entered Massachusetts for the second time by putting him to death. \(^{19}\) While Rhode Island permitted Protestants to achieve citizenship and hold public office, it denied citizenship to Jews. \(^{20}\) Jews were denied the right to hold political office throughout the colonies. \(^{21}\) In sum, sanctioned discrimination was widespread throughout the colonies. Consequently, the politically strong religious groups prevailed over the politically unpopular religious groups. \(^{22}\)

**B. The Founding and Early Republic**

In the era leading to the Constitutional Convention of 1787, it was still a minority viewpoint that religious tests are incongruous with democracy. \(^{23}\) In the eleven years between the signing of the Declara-

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\(^{15}\) AN ORIGINALIST ANALYSIS, supra note 5, at 1651–1652.

\(^{16}\) Id. at 1652.


\(^{19}\) Sweet, supra note 4. A litany of similar examples are discussed in Brief for Madalyn Murray O'Hair, supra note 18, at *9.

\(^{20}\) JOSEPH L. BLAU, CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA 43 (1949) ("Let none now think that the passage to New England by Sea, or the nature of the Country can do what only the Key of David can do, to wit, open and shut the Consciences of men. Beside, how can this be a faithful and upright acknowledgement of their weakness and imperfection, when they preach, print, and practice such violence to the souls and bodies of others, and by their Rules and Grounds ought to proceed even to the killing of those whom they judge so dear unto them, and in respect of godliness far above themselves?").

\(^{21}\) Stanley F. Chyet, The Political Rights of Jews in United States: 1776-1840, AMERICAN JEWISH ARCHIVES, April 1958, at 19 (explaining that Jews in Pennsylvania were naturalized, but were not permitted to vote or hold public office, and that although Jews in South Carolina and Georgia could vote, they could not attain public office after 1716).

\(^{22}\) Torcaso, 367 U.S. at 490 ("The effect of all this was the formal or practical 'establishment' of particular religious faiths in most of the Colonies, with consequent burdens imposed on the free exercise of the faiths of unfavored believers.").

tion of Independence in 1776 and the start of the Constitutional Convention in 1787, most states cashiered their colonial charters in exchange for state constitutions that included religious tests for public office except Rhode Island and Connecticut, which revised their liberal colonial charters rather than putting forth state constitutions like the other states after the Revolution. Although "virtually all" of these new constitutions "included sweeping affirmations of religious liberty," most also continued to require religious tests for public servants. Though religious tests continued to resonate with states, federal conceptions diverged from the religious test requirement. By the time of the Constitutional Convention, religious diversity among the colonies as a whole was an "undeniable reality." While most early American settlers were Protestants, Roman Catholics and Jews made up sizable minorities. One contemporary noted the ex-

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24 Dreisbach, supra note 23, at 264-69 (detailing the evolution of religious tests in state constitutions); see also ALBERT H. PUTNEY, INTRODUCTION TO THE STUDY OF LAW LEGAL HISTORY 193-95 (Cree Publ’g Co., 2d ed. 1910) (noting that Massachusetts, Rhode Island, and Connecticut were charter colonies and were granted a great degree of freedom for self-government by the Crown during the Colonial Era).

25 Dreisbach, supra note 23, at 265; see also STANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 510 (1902) (discussing how the Constitution only prohibited the federal government from implementing a religious test for public office, not the States, who applied religious tests to those seeking state offices).

26 See Bradley, supra note 17, at 680, 696 (describing the differing views on religious tests between the federal and state governments).


28 See Catherine L. Albanese, Religious Diversity in Early America, 13 EJOURNAL USA 7, 8-9 (2008), http://photos.state.gov/libraries/amgov/30145/publications-english/EJ-faith-0808.pdf (debunking the myth that early American settlers were exclusively Protestants). Charles I gave the charter to settle Maryland to George Calvert, a Roman Catholic; the charter’s very existence is "testimony to the power of religious minorities in the colonial era." Id. Pennsylvania, a Quaker colony, also welcomed Catholics. Id. at 9. Thomas Dongan, governor of New York from 1682 to 1689, was a Roman Catholic, and Catholics were tolerated in New York "for at least part of its history." Id.

29 Id. at 8. The first Jews in America settled in New York. Id. at 9. By 1692, they established North America’s first synagogue. Id. Later, Jewish immigrants “dotted East Coast cities with their small communities and religious congregations as far south as Charleston, South Carolina.” Id.

30 Id.
istence of atheists in colonial America.\textsuperscript{31} And, while Protestants collectively held the religious majority, members of that majority fell into a vast array of religious sects, including Puritan, French Calvinist, Quaker, Baptist, German Lutheran, and Anglican.\textsuperscript{32} Religious tests were therefore highly impractical. Any sect-based constitutional religious test on a federal level would effectively “incapacitate more than three-quarters of the American citizens for any public office”\textsuperscript{33} and result in great regional schisms as different sects colonized different parts of the new territory.

It was against this backdrop that South Carolina delegate Charles C. Pinckney introduced the No Religious Test Clause at the Constitutional Convention of 1787, noting that it was a provision that the world would expect in “an age so liberal and enlightened.”\textsuperscript{34} Convention delegate Oliver Ellsworth (later Chief Justice of the United States) defined a religious test as “an act to be done, or profession to be made . . . for the purpose of determining whether his religious opinions are such, that he is admissible to a publick [sic] office.”\textsuperscript{35}

Maryland delegate Luther Martin observed that the clause “was adopted by a great majority of the convention, and without much debate.”\textsuperscript{36} In fact, aside from one delegate’s assertion that the clause was “unnecessary, the prevailing liberality being a sufficient security [against] such tests,” there was no debate, and only North Carolina voted against the Clause.

Despite the ease with which the No Religious Test Clause was adopted by the Convention, it became “one of the more controversial


\textsuperscript{32} Albanese, supra note 28, at 10. Professor Albanese notes that “[t]hinking of the Protestant settlers collectively . . . belies the situation of religious difference that actually characterized these European immigrants. Many of them exhibited a cultural Protestant Christianity but lived, too, in touch with a series of metaphysical beliefs and behaviors akin to those of Indians and blacks—turning to the magical practice of cunning folk, to astrological forms of guidance, and to elite forms of esotericism.” Id. at 9.

\textsuperscript{33} Wood, supra note 27, at 204 (quoting Oliver Ellsworth) (internal quotations omitted).


\textsuperscript{35} Note, supra note 5, at 1654 (quoting Oliver Ellsworth, Landholder, No. 7 (Dec. 17, 1787), reprinted in 4 THE FOUNDERS’ CONSTITUTION 640 (Philip B. Kurland & Ralph Lerner eds., 1987)).

\textsuperscript{36} Bradley, supra note 17, at 688 (quoting Statement of Luther Martin to his state Legislature on Nov. 29, 1787, reprinted in C. Antineau, A. Downey & E. Roberts, FREEDOM FROM FEDERAL ESTABLISHMENT 100 (1964)).

\textsuperscript{37} 2 M. Farrand, supra note 34 (noting that North Carolina voted against Pinckney’s proposal, while Maryland was divided in its vote).
features" of the Constitution during ratification. Antifederalists wholeheartedly opposed it. This opposition was primarily rooted in fear that “a Turk, a Jew, a Roman Catholic, and what is worse than all, a Universalist may be President of the United States.”

Many felt it would be “at least decent” to make some distinction between Christians and “downright infidelity or paganism.”

One scholar of the No Religious Test Clause concluded: “At this juncture Jefferson (and perhaps a few others) maintained their view that a man’s religious belief had no bearing on his fitness for public station. There is... no doubt[, however,] that the publicly-aired opinions on both sides of the dispute over article VI placed no stock in this proposition.” For example, Federalists seem to have defended the clause on grounds of political practicality, even though many Federalists believed that there are good men of every religion. Take the following quote from Ellsworth, for example:

[I]t will be honest men, men of principle, who will rather suffer an injury, than act contrary to the dictates of their consciences. If we mean to have those appointed to public offices, who are sincere friends to religion, we, the people who appoint them, must take care to choose such characters....

38 Note, supra note 5, at 1653 (quoting Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 WM. & MARY L. REV. 2105, 2178 (2003)).
39 Id.
42 Bradley, supra note 17, at 697.
43 See, e.g., THE DEBATES IN THE SEVERAL STATE CONVENTIONS, supra note 6, at 208 (Influential Federalist Richard Dobbs Spaight stated: “Every man has a right to worship the Supreme Being in the manner he thinks proper. No test is required. All men of equal capacity and integrity, are equally eligible to offices.”); see also PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA, CONVENED AT HILLSBOROUGH, ON MONDAY THE 21ST DAY OF JULY, 1788, FOR THE PURPOSE OF DELIBERATING AND DETERMINING ON THE CONSTITUTION RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, THE 17TH DAY OF SEPTEMBER, 1787, at 223-35 (1789) (James Iredell, Sr. and Spaight were particularly eloquent on this point in North Carolina, as were Federalist ministers in the Massachusetts Convention. In the Massachusetts and North Carolina ratifying conventions, Federalists took a strong, principled stand to the effect that a religious test was wrong, and that there are just people in all religions).
Instead of a religious test, Ellsworth proposed that the entrustment of the office or public trust come simply from "secur[ing] the confidence" of the very religious public. In the end, of course, the No Religious Test Clause was included in the final version of Article VI.

Post-ratification, the No Religious Test Clause "initiated a liberalizing trend in the states" and many began to abandon religious tests. Though initially a minority position, the federal ban on religious tests "contributed to a growing public perception that religious test oaths had no place in republican governments." This liberalization, however, did not shed light upon the meaning of the term "public Trust" to which a religious test may not apply under the text of Article VI, clause 3.

C. Interpretational Foundations

While there is little existing scholarship examining the No Religious Test Clause, there is even less which examines the "public Trust" phrase within the clause. Most authors assume without examination that "public Trust" ought to be conflated with "office." But such a reading is unsupported by "canons of construction [which] ordinarily suggest that terms connected by a disjunctive be given separate meanings." Because the No Religious Test Clause separates "Office" and "public Trust" with the disjunctive "or," the terms should be given separate meanings (just as the Supreme Court has given the "states or the people" different meanings under the Tenth Amend-

45 An Originalist Analysis, supra note 5, at 1654.
46 Dreisbach, supra note 23, at 272 (emphasis added).
47 Id. at 273.
48 Seth Barrett Tillman, Interpreting Precise Constitutional Text: The Argument for a "New" Interpretation of the Incompatibility Clause, the Removal & Disqualification Clause, and the Religious Test Clause—A Response to Professor Josh Chafetz's Impeachment & Assassination, 61 CLEV. ST. L. REV. 285, 348–50 (2013) [hereinafter Tillman, Interpreting Precise Constitutional Text] (identifying a myriad of sources); see also Benjamin Cassady, "You've Got Your Crook, I've Got Mine": Why the Disqualification Clause Doesn't (Always) Disqualify, 32 QUINNIPAC L. REV. 209 (2014); Seth Barrett Tillman, Originalism and the Scope of the Constitution's Disqualification Clause, 33 QUINNIPAC L. REV. 59 (2014). Much of Volumes 32 and 33 of the Quinnipiac Law Review, as well as Professor Tillman's work, is dedicated to related constitutional law questions. Professor Tillman also pointed out to me that many law review articles and books have employed a typo to use the term "Office of [sic] public Trust."
49 Tillman, Interpreting Precise Constitutional Text, supra 48, at 348–50 (identifying a myriad of sources).
50 Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979); see also United States v. Sprague, 282 U.S. 716, 733 (1931) (construing the Tenth Amendment as reserving un-enumerated powers to the states "or" the people).
The No Religious Test Clause's "public trust" language may be more expansive than the Clause's "officer" language, possibly extending to federal contractors, grantees of federal funds, broadcasting license holders, and federal elected officials.

It is axiomatic that constitutional interpretations begin with the text itself and must consider the traditional usage of its terms. Moreover, it is held by the Supreme Court that the Framers wrote the Constitution to be understood by the "voters," and its "words and phrases were used in their normal and ordinary . . . meaning," not "technical meanings that would not have been known to ordinary citizens in the founding generation." The ordinary meaning that was "known to ordinary citizens in the founding generation" confirms that "office" and "public Trust" should be given separate meanings.

Sprague, 282 U.S. at 733; see also Loughrin v. United States, 134 S. Ct. 2384, 2389-90 (2014) (explaining that a federal bank fraud statute, which makes it a crime to obtain bank property "by means of false or fraudulent pretenses" does not require proving that the defendant intended to defraud the bank, because of the disjunctive "or" between "false" and "fraudulent"); FCC v. Pacifica Foundation, 438 U.S. 726, 740 (1978) (interpreting a statute authorizing the FCC to impose sanctions on broadcasters who engage in "obscene, indecent, or profane" broadcasting, and holding that the disjunctive "or" implies that each word has a separate meaning).

Michael S. Ariens & Robert A. Destro, Religious Liberty in a Pluralistic Society 667-70 (2d ed. 1996) (suggesting that the Religious Test Clause's public trust language is "broader" than the Clause's officer language and may extend to federal contractors, grantees of federal funds, and holders of "broadcast license[s]").


District of Columbia v. Heller, 554 U.S. 570, 576-77 (2008) ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.' Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.") (quoting Sprague, 282 U.S. at 731).

Heller, 554 U.S. at 576-77. While this is the Supreme Court's position, the Constitution contains many terms of art with legal meanings outside of their substantive terms. And although the public may recognize the physical form of such words, technical training is required to fully understand their legal meanings.

See id. But see, DIRECTIONS TO THE ELECTORS OF THE ENSUING PARLIAMENT, WHICH IS TO MEET ON TUESDAY THE 30TH OF DECEMBER, AGREEABLE TO THE LATE ADDRESSES PRESENTED TO HIS MAJESTY 16 (London, 1702), available at Gale Eighteenth Century Collections Online ("Men also who are unquiet in their Natures, and Litigious in their Practices, ought to give more than ordinary Proofs of their Integrity, before their Electing into a publick [sic] Trust can be justify'd.") (emphasis added) (noting that "office" and "publick [sic] Trust" sometimes seemed to have similar meanings).
Samuel Johnson’s classic 1755 dictionary defines “public,” when used as an adjective, as “regarding not private interest, but the good of the community.” Additionally, in 1755, the word “trust,” when used as a noun, meant, “confidence, reliance on another” and the “State of him to whom something is entrusted.” Therefore, understood together, the phrase “public trust” likely meant, as understood by the Founding Fathers, an entrustment of confidence and reliance for a public or community interest.

Significant contemporaneous sources support concluding that the terms “public Trust” and “office” were not synonymous to the Constitutional Framers. First, the Constitution itself distinguishes between offices of trust and offices of profit in the context of emoluments, impeachment, and presidential electors. Second, prominent literature of the day supports the conclusion that officers and public Trusts


58 JOHNSON, supra note 57, at 2106-07. Alternative definitions in Samuel Johnson’s dictionary include: "charge received in confidence;" “confidence in supposed honesty;” and “Deposit; something committed to charge of which an account must be given." Id. See also JACOB GILES, A NEW LAW-DICTIONARY 746 (1739) (“Trust: is a Confidence which one Man reposes in another; and if a Person in whom a Trust is reposed, breaks or doth not perform the same, the Remedy is by Bill in Chancery, the Common Law generally taking no Notice of Trusts.”). In addition to developing concepts of the "public trust," the public would likely have been familiar with the concept of equitable trusts, referenced in the latter definition of "trust."

59 See, e.g., A HELP TO A NATIONAL REFORMATION. CONTAINING AN ABSTRACT OF THE PENAL LAWS AGAINST PROFANENESS AND VICE 94 (5th ed. London, J. Downing 1720), available at Gale Eighteenth Century Collections Online (collecting the oaths and rules for eighteenth century British officials). Magistrates took "an Oath, and publick Trust upon [them] to execute the laws" in their service of the public. Id. See also An Act for Dividing and Inclosing the Open Fields, Common Pastures, and other Commonable Places, in Burton Overy, in the County of Leicester, 1765, 5 Geo. 3, c. 61, at 7 (Eng.), available at Gale Eighteenth Century Collections Online (listing churches, hospitals, and schools as eighteenth century examples of “publick Trust[s]”).

60 Officers of the United States within the Meaning of the Appointments Clause, 2007 WL 1405459, at *16 (U.S.A.G. Apr. 16, 2007) (citing U.S. CONST. art. I § 9, cl. 8 ("No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."); U.S. CONST. art. I § 3, cl. 7 ("Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."); U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.").
are different. For instance, Blackstone distinguished "offices of public trust" from "ministerial offices," or those in which "little or nothing is left to the discretion of the officer[]." In The Federalist, Alexander Hamilton distinguished the terms: "If it be a public trust or office in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity."

The authors of The Federalist understood the phrase "public trust" to mean not precisely the office itself, but an embodiment of a collection of intangible qualities: "blood and friendship," "a personal influence among the people," a "wisdom to discern and . . . virtue to pursue the common good," "pride and consequence," and "reputation and prosperity."

Finally, the No Religious Test Clause as we know it today differs in one key respect from the clause Pinckney introduced to the Convention. The Convention more or less unanimously agreed to the following language: "but no religious Test shall ever be required as a Qualification to any Office or public Trust under the authority of the United States." The Committee of Style removed the words "the authority of," leaving "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." The implication of this change is that, while "the authority of" was considered superfluous and could be removed, "public Trust" differed from "office" more than just stylistically and should remain.

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62 Id. (quoting LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 448 (1948)).
64 THE FEDERALIST NO. 49 (James Madison).
65 Id.
66 THE FEDERALIST NO. 57 (James Madison).
67 THE FEDERALIST NO. 63 (James Madison).
68 Id.
69 Rofes, supra note 43, at 12; Bradley, supra note 17, at 689 (noting that only North Carolina voted against the clause).
70 Rofes, supra note 46, at 12.
71 Professor Seth Barrett Tillman recently explored the meaning of office, as opposed to officer, and concluded the phrase was dropped for intentional reasons concerning differences in meaning of these two words, particularly as applied to emoluments—in other words, profit, salary, or compensation. See Seth Barrett Tillman, Six Puzzles for Professor Akhil Amar, Loy. U. Chi. L. School, Fourth Annual Const. L. Colloquium Conference Paper 1–34 (Nov. 1, 2013); National U. of Ir. Maynooth Legal Studies Research Paper Series No. 2013-17-03, http://ssrn.com/abstract=2173899,
D. Fiduciary Underpinnings

Other literary sources concerning fiduciary duties shed light on the original meaning of "public Trust." The fiduciary ideal reflected in the phrase "public Trust" seems to have ranked "just below 'liberty' and 'republicanism' as an element of the ideology of the day."\(^{72}\) The Constitutional Framers' imposition of fiduciary standards on government officials was neither accident nor "empty metaphor."\(^{73}\) In fact, "[r]ecent legal-historical work supports the view that the Framers intended even noncriminal breaches of trust by public officials to be remediable by impeachment and removal."\(^{74}\)

Many of the original colonial charters were granted "upon Trust," and fiduciary language was a common component of state constitutions by the time of the 1787 Constitutional Convention.\(^{75}\) The royal charters of Connecticut and Rhode Island, for instance, were issued by Charles II to the respective colony governors "upon trust," for the benefit of the governors, their contemporaries, and the future freemen of the colony.\(^{76}\) Following the Declaration of Independence, many states incorporated trust language into their state constitutions.\(^{77}\) Some states used "trust" interchangeably with "office." For instance, Delaware's constitution specified that state legislators were to serve as justices of the peace "during their continuance in trust."\(^{78}\)
However, other state constitutions, such as Maryland’s, imposed more explicit fiduciary duties on public officials:

That all persons invested with the legislative or executive powers of government are the trustees of the public, and, as such, accountable for their conduct; wherefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old or establish a new government.79

There was virtually no disagreement that government agents were instilled with fiduciary responsibilities: Federalists and Anti-Federalists alike based their respective Constitutional arguments on fiduciary principles.80 This vision of government as trustee was expressly affirmed in *The Federalist*:

- [T]he members of the legislative branch are connected to the public by blood and friendship. The nature of their public trust implies . . . that they are more immediately the confidential guardians of the rights and liberties of the people.81
- [T]he aim of every political constitution is . . . first to obtain for rulers men who possess the most wisdom to discern, and most virtue to pursue, the common good of society . . . whilst they continue to hold their public trust.82

John Locke also characterized government officials as holders of a trust, with the people as beneficiaries.83 Locke believed that a government is dissolved when a legislature, as representative of the people, acts “contrary to [its] trust”.84

The reason why men enter into society, is the preservation of their property; and the end why they chuse [sic] and authorize a legislative is, that there may be laws made . . . as guards and fences to the properties of all the members of the society . . . whenever the legislators endeavor to take away, and destroy the property of the people, or to reduce them to slav-

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79 *Id.* at 1135 (citing Md. Const. of 1776, art. IV, available at http://www.yale.edu/lawweb/avalon/states/ma02.htm).
80 *Id.* at 1083–35 (2004) (examining the common agreement even among political rivals during the founding era that government has a fiduciary responsibility to its citizenry).
81 *The Federalist* No. 49 (James Madison).
82 *The Federalist* No. 57 (James Madison); see also *The Federalist* No. 63 (James Madison) (“[a sense of national character] . . . can only be found in a number so small that a sensible degree of the praise and blame of public measures may be the portion of each individual; or in an assembly so durably invested with the public trust, that the pride and consequence of its members may be sensibly incorporated with the reputation and prosperity of the community.”).
ery under arbitrary power, they put themselves into a state of war with the people . . . . By this breach of trust, [the legislators] forfeit the power the people had put into their hands for quite contrary ends, and it devolves to the people, who have a right to resume their original liberty.\(^{85}\)

Locke posited that the executive holds a "double trust . . . both to have a part in the legislative, and the supreme execution of the law . . . [and that he] acts against both, when he goes about to set up his own arbitrary will as the law of society."\(^{86}\) Locke utilized the trust analogy in the context of slavery ("[T]he liberty of man, in society, is to be under no . . . dominion of any will, or restraint of any law, but that what the legislative shall enact, according to the trust put in it . . . ."\(^{87}\)) and the source and extent of legislative power ("[T]hese are the bounds which the trust, that is put in them by the society . . . . have set to the legislative power of every commonwealth, in all forms of government . . . ."\(^{88}\)).

In summary, the "public Trust"—a community's entrustment of an entity to serve the public interest—was understood by the Founding Fathers as a necessary duty of a republican government. Contemporaneous sources also demonstrate that "public trust" and "office" were distinct terms.\(^{89}\) Before offering a complete definition of the term to serve as a cornerstone for future jurisprudence, this Article will now explore how the term has evolved in the modern era.

\section*{II. MODERN SIGNIFICANCE OF THE PUBLIC TRUST}

As one might imagine, judicial interpretations of the No Religious Test Clause are scarce. But there are some sources concerning public interest law interpreting jurisprudential history that shed some light on the Clause's original meaning and modern significance.\(^{90}\) This

\begin{footnotes}
\footnote{85}{Id. at 197.}
\footnote{86}{Id.}
\footnote{87}{Id. at 114.}
\footnote{88}{Id. at 162.}
\footnote{89}{This distinction between "offices" and "public trusts" is reflected in current government hiring practices. By federal regulation, government positions of "high or moderate risk" are designated "Public Trust positions." 5 C.F.R. § 731.106 (2014). Such positions typically demand a "significant degree of public trust" or "significant risk for causing damage or realizing personal gain." Id. Federal sentencing guidelines permit judges to increase the sentences of those convicted of abusing positions of public trust by two levels. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 ("If this adjustment is based upon an abuse of a position of trust, it may be employed in addition to an adjustment under §3B1.1 (Aggravating Role). ").}
\footnote{90}{AN ORIGINALIST ANALYSIS, supra note 5, at 1660; Bradley, supra note 17, at 714 (stating that except for one holding where there was no violation of the clause found, no particular case has rested upon the clause).}
\end{footnotes}
Part begins with a discussion of the two legal entities private actors most commonly use to try to benefit the public—judicially recognized trusts and state-licensed non-profit corporations. This Part next analyzes the only three distinct areas of public interest law (beyond general fiduciary principles discussed in Part I above) in which the term has been used with any regularity (and perhaps at all). Those areas are (1) environmental regulation, (2) tax exemptions, and (3) museum law. Each is discussed in turn below.

A. Judicially Recognized Trusts and Non-Profit Corporations

A trust is a property arrangement that assigns legal title to the trust property to the trust manager or trustee while establishing the right to benefit from the trust property to another person, group or entity. The trustee manages the trust property in accordance with the trust document. To be classified as a charitable trust, as opposed to a private trust, the trust must provide a social benefit to the public. Unlike private trusts, a charitable trust receives preferential

91 The terms “non-profit” and “not-for-profit” are often used interchangeably to refer to organizations bound by a “non-distribution constraint” (i.e., the organization’s directors, members, or officers may not earn a profit from the activities of the organization). Patty Gerstenblith, Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public, 11 CARDozo J. INT’L & COMP. L. 409, 412 (2003). The not-for-profit corporation falls underneath the non-profit umbrella, which also encompasses “individual enterprises, partnerships, associations and foundations.” H. H. Oleck, Nonprofit Corporations, Organizations, and Associations 18-20 (5th ed. 1988). The term “not-for-profit” is perhaps more accurate, as non-profit organizations may take in a profit, but must use the profits to further the mission of the organization. Robert S. Pasley, Organization and Operation of Non-Profit Corporations—Some General Considerations, 19 CLEV. ST. L. REV. 239, 241 (1970). This Article will use the term non-profit for the sake of simplicity, as the distinction is insignificant to its analysis.

92 A. Scott et al., SCOTT AND ASCHER ON TRUSTS § 2.1.3 (5th ed. 2006).


94 E.g., id. (quoting Bogert’s Trusts and Trustees (6th ed. 1987)). "The way American museums’ educational and scientific purposes are understood has changed significantly over time. Museums in the post-World War II era have been described as being in the ‘salvage and warehouse business.’ Their goal was to gather, acquire, preserve and study the record of human and natural history. In that sense, museums were certainly fulfilling an educational and scientific purpose by adding to the store of human knowledge about a wide range of subjects, including the history of human civilization, broader definitions of life, and the natural sciences. However, understanding of this educational purpose has shifted significantly. Most museums now view their educational mission to be one of interpretation and presentation, not just to a narrow scholarly community or to those already accustomed to visiting museums, but to the neighborhood community and the public at large. As such, museums have been forced to reach out into the community and to become part of it through novel exhibits that are not always focused on the presentation of
tax treatment in recognition of the public service it provides. However, it is managed by an elected board of directors, under the supervision of the state's attorney general and in accordance with the corporation's charter and by-laws.

While the terms of the trust document or non-profit charter dictate the management of the trust or non-profit, the trustee or director is also bound by certain fiduciary duties—generally speaking, the duty of loyalty ("to administer the trust solely in the interest of the beneficiaries") and the duty of care (to exercise "care and diligence"). Notably, while the fiduciary duties of a trustee and a director "do not differ in kind[,]... the trustee is [often] expected to satisfy a higher standard with respect to both duties." For instance, while the duty of loyalty prohibits a trustee from conducting any transaction between himself and the organization ("self dealing"), whether or not it is in the interest of the trust, corporate directors are only prohibited from such a transaction if it is not in the organization's best interest. In sum, fiduciary obligations comprise the foundation of public trusts and provide theoretical underpinnings for the other areas of law discussed below.

objects. This evolving understanding of the mission of museums as educational institutions raises new questions as to the interpretation of whether and how museums are fulfilling their educational purpose." Gerstenblith, supra note 91, at 414 (internal citations omitted).

95 White, supra note 93, at 1049.
96 Id. at 1049-50.
97 Id. at 1050.
98 Id. at 1052 (quoting RESTATEMENT (THIRD) OF TRUSTS § 78 (2007)).
99 Id.
100 Id. at 1051. For a thorough explanation of the disparate fiduciary standards between trustees and business corporate directors, see Gerstenblith, supra note 91, at 419.
101 White, supra note 93, at 1052 (quoting RESTATEMENT (THIRD) OF TRUSTS § 78 (2007)); see also S. Cotter, A TREATISE OF EQUITY 167 (1756) (The law of equity in England used to require that tutors appointed to administer the estates of infants take an oath to see that the heir was well raised, "his Estate be safely kept," and that the minor's affairs be administered solely "for the Profit and Benefit of the Infant." Trust administrators and executors of wills had to take similar oaths, swearing to only act for the "Profit and Benefit" of their respective trusts or estates.).
B. Environmental Regulation

In the context of environmental law, the public trust doctrine maintains that certain natural resources are to be held “in trust to be protected by the sovereign . . . for future generations.”102

[T]he doctrine can be viewed as an inherent limitation on the sovereign power to convert public resources into private property. The underlying principle is that certain natural resources are of such fundamental value, as the common heritage of humankind, that special and immutable stewardship responsibilities are incumbent even on national governments.108

As discussed below, certain environmental resources are held in a modern day “public trust,” but the doctrine concerning natural resources has long roots.

1. Historical Origins of the Environmental “Public Trust Doctrine”

The environmental public trust doctrine’s roots have been said to stretch back to the time of the Justinian Code.104 The scholars who codified classical Roman law in the sixth century under Justinian’s commission found that: “By natural law, these things are common property of all: air, running water, the sea, and with it the shores of the sea.”105 This expression of the public trust principle seems to have been adopted into the legal code and customs throughout Europe during the Middle Ages.106

A “reluctance” to allow private acquisition of certain natural resources is widespread among human civilizations.107 The public interest doctrine thrived in North America even before European settlers arrived, as “most American Indian cultures wholly denied the

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105 Id. at 633-34 (quoting J. INST. 2.1.1).
106 Id. at 634. Some scholars, however, question whether Justinian’s Institutes truly serve as the basis for the modern environmental public trust doctrine. See e.g., James L. Huffman, Speaking of Inconvenient Truths—A History of the Public Trust Doctrine, 18 DUKE ENVTL. L. & POL’Y F. 1, 3 (2007) (citing Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471, 474 (1970)) (arguing that recent encouragement of judicial intervention in natural resource management marked the beginning of the modern concept of the environmental public trust doctrine).
possibility of ownership of land, air, and water." Going forward in early U.S. history, the doctrine played "a central role ... in public law and policy," particularly as it related to waterways. One of the earliest actions of the First United States Congress was to reenact the Northwest Ordinance, which provided that the "navigable waters leading into the Mississippi and St. Lawrence [rivers], and the carrying places between the same, shall be common highways and forever free, as . . . to . . . the citizens of the United States . . . without any tax, impost, or duty therefor."

Early American courts adopted the divisions of water rights first expressed in Lord Chief Justice Hale's key English treatise, De Jure Maris: (1) *jus publicum* (the rights of the public), (2) *jus regium* (the state's right to use land for health and welfare), and (3) *jus privatum* (the right to hold private title). The U.S. Supreme Court first fully delineated the parameters of the environmental public trust doctrine in 1892 in *Illinois Central Railroad v. Illinois*. In that case, the Court was asked to settle the ownership of submerged lands extending out from Chicago under Lake Michigan. In 1869, the Illinois legislature passed an act which gave the Illinois Central Railroad Company the right to use and develop the land. However, in 1873 the state repealed the act. When the railroad company continued to develop the land, the Illinois Attorney General filed suit against it.

The Court found for the state of Illinois, holding that the rights granted by the statute were revocable. The Court acknowledged that the state of Illinois held the title to the lands under the water of Lake Michigan, and that, in general, title carries with it freedom of

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108 Id. at 430 ("Tecumseh, the Shawnee Chief, asked rhetorically, 'Sell the earth? Why not sell the air, the clouds, the great sea?").

109 Id. at 436.

110 Id.

111 Lazarus, supra note 104, at 636; see, e.g., Shively v. Bowlby, 152 U.S. 1, 11–14 (1894).

112 See Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892). The "public trust" language was first used in Martin v. Waddell's Lessee, 41 U.S. 367, 368 (1842). Martin spawned a line of similar cases which was incorporated into and expanded upon in the *Illinois Central* decision, which restricted the government from making corrupt gifts to private interests. See Pollard v. Hagan, 44 U.S. 212 (1845); see also McCready v. Virginia, 94 U.S. 391 (1876); Smith v. Maryland, 59 U.S. 71 (1855).


114 See id. at 448–49.

115 See id. at 449.


alienation. But the title the state holds in public lands is “different in character . . . [because] it is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein.” The state may grant parcels of the property in this public trust for the construction of “wharves, piers, and docks” to the extent that the structures improve the people’s interest in the land. But, the Court observed, this is “a very different doctrine from the one which would sanction the abdication of the general control of the state over lands.” It held that “the state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.” In other words, the state may grant control of the trust to a private organization in order to improve the land, because private organizations may be in a better position than the state to effectuate that improvement. But any such improvements must be for the benefit of the people, who are the beneficiaries of the land. Such grants to private organizations are “necessarily revocable,” and “the power to resume the trust whenever the state judges think best is . . . incontrovertible.”

The Court extended the public trust doctrine to wildlife in 1896 in Geer v. Connecticut. In that case, the defendant lawfully killed a variety of game birds, but was charged with possessing the birds with intent to transport them outside the state in violation of a Connecticut statute. The Court traced the history of the law related to wild animals and concluded that “by the law of nature, every man, from the prince to the peasant, has an equal [right] of pursuing and taking to his own use all such creatures as are ferae nature . . . .” The state may enact “positive laws” to harness this right for the benefit of the community. This power results from the “common ownership” of

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118 See id. at 452.
119 Id.
120 Id. at 455.
121 Id. at 452.
122 Id. at 453.
124 See id.
125 Id.
126 See 161 U.S. 519, 522 (1896), overruled by Hughes v. Oklahoma, 441 U.S. 322 (1979) (overruling Geer to extent that Geer held that state ownership of game and fish permitted states to defeat interstate commerce clause challenges to state regulation of wildlife)
127 See Geer, 161 U.S. at 521.
128 Id. at 527.
129 Id.
the people and is to be exercised "as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good."\textsuperscript{130}

While the state may regulate and grant rights to natural resources, such grants must be qualified to "subserve the public welfare."\textsuperscript{131} The legislature has the responsibility to enact laws to protect the trust and "secure its beneficial use in the future" to the people of the state.\textsuperscript{132} But whatever rights are granted by the state to effectuate the trust, "the question of individual enjoyment is one of public policy and not of private right."\textsuperscript{133} The corpus of the public trust "can only become the subject of ownership in a qualified way, and . . . can never be the object of commerce except with the consent of the state, and subject to the conditions which it may deem best to impose for the public good."\textsuperscript{134}

Although the "state ownership" fiction enunciated in \textit{Geer} was overruled in 1979 in \textit{Hughes v. Oklahoma}, the \textit{Hughes} court left \textit{Geer}'s public trust doctrine intact, stating, "[T]he general rule we adopt in this case makes ample allowance for preserving . . . the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership."\textsuperscript{135} Even after \textit{Hughes}, \textit{Geer} still imposes "unequivocal" fiduciary duties on the state.\textsuperscript{136}

\section*{2. Modern Development of the Public Trust Doctrine}

The seminal work on the public trust doctrine is \textit{The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention}, by Joseph L. Sax. Professor Sax noted that recent decades have seen a "proliferation of lawsuits" in which citizens sue to enforce environmental regulations.\textsuperscript{137} In outlining the public trust doctrine, Profes-
sor Sax observed that it has no clearly defined parameters. There is no blanket prohibition against the state conveying public lands to private entities, for instance. Although courts disfavor such grants, public trust doctrine cases do not require a “niggling preservation of every inch of public trust property against any change.” Still, public trust doctrine jurisprudence reveals this unifying principal: “a court will look with considerable skepticism upon any governmental conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.”

Indeed, Professor Sax argued that the public trust doctrine is useful “whenever governmental regulation comes into question,” and, although historically the public trust doctrine was focused on waterways, the modern doctrine is an efficient tool for managing air pollution, pesticides, strip mining, and wetland filling, among others.

In recent decades, the doctrine has gained prominence as a method of enforcing public rights in natural resources. Though initially a common law doctrine, many states recognize the doctrine explicitly by constitution or statute. On a federal level, the doctrine is codified in a constellation of statutes and regulations promulgated by agencies tasked with protecting the environment. As discussed

mental public trust concept is “enjoying a moment in the sun as a reasonable organizational template somewhere between the inefficiencies of government bureaucracy and the rapaciousness of global capitalism.” Sally K. Fairfax & Andrea Issod, Trust Principles as A Tool for Grazing Reform: Learning from Four State Cases, 33 ENVTL. L. 341, 344 (2003).

See generally Sax, supra note 137, at 486–88.

See id. at 488 (noting that courts have permitted the transfer of some portions of the public trust into private ownership).

Id.

Id. at 490.

Id. at 556–57.

See id. at 474.

"Almost all states, through constitutions and judicial opinions, require government management of natural resources for the benefit of the public. In so doing, many states have imposed upon the government an implied or express duty of loyalty in the management of the public trust." Lords, supra note 102, at 525–26. For detailed comparisons among a variety of state statutory schemes, see Nelea A. Absher, Constitutional Law and the Environment: Save Ourselves, Inc. v. Louisiana Environmental Control Commission, 59 TUL. L. REV. 1557 (1985); Horner, supra note 136, at 58–65; Sax, supra note 137, at 548–51.

above, the Supreme Court has repeatedly affirmed that the state is the trustee of environmental resources, which are held in trust for the benefit of the public.\textsuperscript{146} Though governmental agencies routinely grant environmental management contracts to private organizations, thereby changing the trustee of these resources, the public beneficiary does not change.\textsuperscript{147}

Lower courts have had opportunity to apply the doctrine. For example, the United States Court of Claims has stated that "[t]ransactions relating to the expenditure of public funds require the highest degree of public trust."\textsuperscript{148} It has also determined that the government agency grants for construction of certain public works projects created a "public trust."\textsuperscript{149} After Hughes, in 1980, the U.S. District Court for the Eastern District of Virginia reaffirmed that "under the public trust doctrine, the [states] and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people."\textsuperscript{150} In 1981, the U.S. District Court for the District of Massachusetts held that when the federal government or the State conveys public trust property to a private individual, that individual takes subject to the terms of the trust—"[t]he trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign."\textsuperscript{151}

Since Geer, the public trust doctrine has expanded beyond water and wildlife to incorporate beaches, parks, and even a historic battlefield into the corpus of the trust, "evinc[ing] even greater confirmat-
tion of the modern public trust thesis.”¹⁵² This expansion of the properties subject to fiduciary management has been codified by most states and the federal government.¹⁵³ As the trustee of our natural resources, the government is accountable to the public for its management of those natural resources.¹⁵⁴ While the government can and does contract with private entities to perform work that the government itself is responsible to do, those private organizations merely become trustees of the natural resource corpus.¹⁵⁵ Indeed, the Federal Acquisition Regulations, which govern all federal acquisitions of goods and services, state that the “expenditure of public funds require[s] the highest degree of public trust.”¹⁵⁶ Thus, though private organizations that contract with the government to perform traditionally governmental functions are not office holders, they are holders of a “public Trust,” which may implicate Article VI of the U.S. Constitution.

3. Conclusion

The public trust doctrine is likely to play a key role in environmental law jurisprudence, but it also could expand to other delegations from government to private entities to manage properties in the public trust. As stated by Professor Sax, “[o]f 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.”¹⁵⁷ In environmental law, the environmental public trust concept is “enjoying a moment in the sun,” which many environmentalists view as a “reasonable organizational template somewhere between the inefficiencies of government bureaucracy and the rapaciousness of global capitalism.”¹⁵⁸ Though the origins of the environmental public trust doctrine in Roman law pre-exist the Anglo-American concept of the environmental public trust, the modern adaptation has been a devel-

¹⁵² Lazarus, supra note 104, at 649.
¹⁵⁴ Fairfax & Issod, supra note 137, at 344.
¹⁵⁷ Sax, supra note 137, at 474.
¹⁵⁸ Fairfax & Issod, supra note 137, at 344.
opment of the past century rather than a deeply rooted concept in
the Anglo-American legal system.\textsuperscript{159}

Given the growing prominence of the modern doctrine, it very
well may be the case that future public trust property delegations may
be subject to the No Religious Test Clause of the U.S. Constitution.
One could imagine in this era of governmental outsourcing property
being conveyed to and managed by a private entity while another en-
tity claims it lost out because of its status as a church or religious non-
profit organization.\textsuperscript{160} One also can imagine the environmental public
trust doctrine expanding over many years beyond its environmen-
tal roots to other legal fields encompassing delegated public benefits
administration.

C. Tax Exemptions

This Part traces the history of charitable tax exemptions in the
United States and notes how public trust and fiduciary concepts have
influenced key statutes and case law in this area. It outlines how fu-
ture litigation and jurisprudence in the field could confront the No
Religious Test Clause in Article VI of the U.S. Constitution.

1. Common Law Foundations

In enacting the first federal tax exemptions for non-profit organi-
zations in 1894, Congress was “guided by the common law of charita-
ble trusts.”\textsuperscript{161} The two cornerstones of this body of common law date
back quite far and are actually statutory in nature.

First, in 1279, Edward I enacted the first of two Statutes of Mort-
main, which prohibited private donations of land to the church.\textsuperscript{162}
These laws were based on the same principle as the rule against per-
petuities: because the church as an organization never “dies,” any

\textsuperscript{159} Some scholars have recently argued that concepts of environmental public trust do not
predate the Constitution, but merely hearken to the Roman origins of environmental
public trust as a claim of legitimacy for the modern doctrine. \textit{See}, e.g., Huffman, \textit{supra}
ote 106.

(finding that the plaintiff's standing had been established by lower courts and had be-
come an unreviewable issue).

\textsuperscript{161} \textit{Bob Jones Univ. v. United States}, 461 U.S, 574, 588 n.12 (1983).

\textsuperscript{162} Leonard Shelford, \textit{A Practical Treatise of the Law of Mortmain and Charitable Uses and Trusts},
26 (1842). Alienation of land “in mortmain” means to alienate land into “dead hands”
\textit{(in mortua mansa)}; \textit{WILLIAM BLACKSTONE, COMMENTS} \textit{ARYS *268, available at
http://avalon.law.yale.edu/18th_century/blackstone_bk2ch18.asp.}
land transferred to it would be rendered unalienable in perpetuity. Mortmain laws ensured that the land would remain within the king's control.¹⁶³

Second, in 1601, England enacted the Statute of Charitable Uses Act.¹⁶⁴ While the Act did not create a tax benefit for charitable donations, it did repeal the mortmain statutes and provide a mechanism for regulating charitable organizations and charitable gifts.¹⁶⁵ Throughout the years, courts attempting to define "charitable" (or "charity") frequently have cited the preamble of the Act, which reads:

[Some]²⁶⁶ for Relief of aged, impotent and poor People, some for Maintenance of sick and maimed Soldiers and Mariners, Schools of Learning, Free Schools, and Scholars in Universities, some for Repair of Bridges, Ports, Havens, Causeways, Churches, Sea-Banks and Highways, some for Education and Preferment of Orphans, some for or towards Relief, Stock or Maintenance for Houses of Correction, some for Marriages of poor Maids, some for Supportation, Aid and Help of young Tradesmen, Handicraftsmen and Persons decayed, and others for Relief or Redemption of Prisoners or Captives, and for Aid or Ease of any poor Inhabitants concerning Payments of Fifteens, setting out of Soldiers and other Taxes.

Although easing the lives of the impoverished appears to be the most unifying characteristic among the charitable causes recognized by the Statute of Charitable Uses, the development of educational and infrastructural projects is individually listed. A key English case clarifies that poverty is not a necessary element to "charity" or sufficient on its own to characterize "charity."¹⁶⁸ In Jones v. Williams, the English High Court of Chancery held that a bequest in trust to improve a town's water works was for a public, and therefore charitable, use.¹⁶⁹ Charity was defined as "a gift to a general public use, which extends to the poor as well as to the rich."¹⁷⁰ The British conceptions carried over into the United States.

¹⁶⁴ Statute of Charitable Uses Act, 1601, 43 Eliz., c. 4 (Eng.).
¹⁶⁵ Gustafsson, supra note 163, at 605.
¹⁶⁶ The preamble of the Act begins by noting that the Queen and other "well disposed persons" have, in the past, made charitable gifts that have been misused. The preamble then lists the types of charitable gifts that have been made ("Some for relief of aged, impotent and poor people," etc.). Statute of Charitable Uses Act, 1601, 43 Eliz., c. 4 (Eng.).
¹⁶⁷ Gustafsson, supra note 163, at 606 (quoting Statute of Charitable Uses Act, 1601, 43 Eliz., c. 4 (Eng.).
¹⁶⁸ Id. at 608.
¹⁶⁹ Id. (citing Jones v. Williams, 27 Eng. Rep. 422 (Ch. 1767) (emphasis added)).
¹⁷⁰ Jones v. Williams, 27 Eng. Rep. 422 (Ch. 1767); see S. Cotter, A TREATISE OF EQUITY 161 (1756) (showing that under English concepts of equity concerning public trusts, a "Cor-
2. Charitable Tax Exemptions in America

American courts adopted these British principles of charitable donations. In 1860, the Supreme Court of the United States quoted *Jones v. Williams* with approval and held that charity is a “gift to a general public use.”171 In *Ould v. Washington Hospital for Foundlings*, the Court noted that “[a] charitable use . . . may be applied to almost any thing that tends to promote the well-doing and well-being of social man.”172 State courts were also instrumental in developing this definition of the meaning of “charity.” For example, in 1858, the Pennsylvania Supreme Court stated that a charitable use of property is one for “promoting public works for the convenience or benefit of the public.”173 In 1867, the Massachusetts Supreme Judicial Court defined charity as “a gift . . . for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease . . . by assisting them to establish themselves in life, by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.”174 In sum, the common law of charitable trusts developed by early American courts established that a charity fundamentally was an entity that helped the general public by serving a public interest to lessen the burden of government (yet governmentally permissible acts would, of course, be limited by the Establishment Clause).

In 1894, Congress passed an income tax statute known as the “Wilson Tariff Act.”175 The purpose of the Act was to reduce tariff rates and raise revenue for the government, which it did by imposing a 2% income tax.176 The Act also contained the first charitable tax exemption for “corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes.”177 The floor debate over the Act “leaves no doubt that Congress deemed the specified organizations entitled to tax benefits because they served desirable public purposes.”178

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171 Gustafsson, supra note 163, at 610 (quoting Perin v. Carey, 65 U.S. 465, 494 (1860)).
173 Cresson’s Appeal, 30 Pa. 437, 439 (1858).
176 Id.
177 Bob Jones Univ. v. United States, 461 U.S. 574, 615 (1983) (quoting Ch. 349, § 32, 28 Stat. 509, 556 (1894)).
178 Id. at 589 (citing 26 CONG. REC. 585–86 (1894)).
The Wilson Tariff Act was deemed an unconstitutional “direct tax” by the Supreme Court in *Pollock v. Farmers’ Loan and Trust*. However, in 1913 the ratification of the Sixteenth Amendment enabled Congress to once again collect income tax, and it promptly enacted the Revenue Act of 1913. Like the Wilson Tariff Act, the 1913 Act exempted charitable non-profits. Congress has included an exemption for charitable organizations in every subsequent income tax. In doing so, it has continually reaffirmed the view that charitable deductions are “based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from other public funds . . .”

In 1917, in discussing a provision similar to the modern I.R.C. § 501(c)(3) that evolved from the 1894 Act, Senator Hollis stated: “For every dollar that a man contributes to these public charities, educational, scientific, or otherwise, the public gets 100 percent.” The Internal Revenue Service has also applied this principle to charitable deductions on estate taxes, stating that “bequests for the benefit and advantage of the general public are valid as charities.” The Supreme Court confirmed that the history of congressional tax exemptions unmistakably reveals that the current charitable exemption, § 501(c)(3), “depends on meeting certain common law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”

In interpreting charitable tax exemption provisions, courts and the IRS have “referred consistently to principles of charitable trust law.” In 1924 in *Trinidad v. Sagrada Orden de Predicadores*, the Su-

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179 158 U.S. 601, 637 (1895); see also id. at 638 (Harlan, J., dissenting) (holding that the income tax imposed by the Wilson Tax Act violated Article I’s prohibition against “direct taxes”).


181 Id.

182 Id.

183 *Bob Jones Univ.*, 461 U.S. at 590 (quoting H.R. REP. NO. 75-1860, at 19 (1938)).

184 The Supreme Court traces the history of the modern charitable tax exemption statute in *Bob Jones Univ. v. United States*, 461 U.S. 574, 615–16 (1983) (Rehnquist, J., dissenting). The Court notes that, from the Tariff Act of 1913 to the adoption of the Internal Revenue Code of 1954, the tax exemption was left essentially unchanged, except to expand upon the types of organizations that could claim the exemption. Id.

185 *Bob Jones Univ.*, 461 U.S. at 590 (quoting 55 CONG. REC. 6728 (1917)).

186 Id. at n.15 (quoting Sol. Op. 159, III-1 C.B. 480 (1924)).

187 Id. at 586.

188 Id. at 597.
The Supreme Court noted that the purpose of the charitable exemption from the income tax was “recognition of the benefit which the public derives.” As recently as 1983 in *Bob Jones Univ. v. United States*, the Court stated that under the common law of charitable trusts, to reach exemption status as a charity, an entity must be “in harmony with the public interest” and not “at odds with the common . . . conscience.”

The Circuit Courts of Appeal have expanded upon *Trinidad*. For instance, in 1964 the Second Circuit stated “we think it only fair to determine a particular organization’s right to [a tax] exemption largely on the basis of the effect its operations have on the public.” Additionally, the U.S. Court of Appeals for the Sixth Circuit has relied upon *Trinidad*’s rationale and stated that the purpose of the charitable exemption has been to recognize that the exempted entity “performs a public service and benefits the public or relieves it of a burden which otherwise belongs to it.”

The United States Tax Court also has had opportunities to apply *Trinidad* in its decisions. Most recently, in 1982, the Tax Court held that “it is the purpose of serving private interests which is prohibited [in] an organization seeking qualification under § 501(c)(3). The fundamental reason for granting an organization tax exemption is that it serves a public benefit.”

3. *Internal Revenue Code § 501(c)(3) and the First Amendment*

Since § 501(c)(3)’s evolution from the Act of 1894, the Supreme Court has repeatedly been called upon to describe its purpose and constitutionality in Establishment Clause cases. As explained above, to be eligible for tax-exempt status under § 501(c)(3) an entity “must serve a public purpose and not be contrary to established public policy.” Legislative history, court rulings, and the common law of chari-

189 263 U.S. 578, 581 (1924).
190 *Bob Jones Univ.*, 461 U.S. at 592.
192 *St. Louis Union Trust Co. v. United States*, 374 F.2d 427 (8th Cir. 1967).
193 *Retired Teachers Legal Def. Fund v. Comm’r*, 78 T.C. 280, 286 (1982); see also, e.g., *Coastal Club v. Comm’r*, 43 T.C. 783, 783, 805 (1965) (holding that a duck hunting club was a private club and therefore did not qualify for an exemption under *Trinidad*); *People’s Educ. Camp Soc’y v. Comm’r*, 39 T.C. 756, 768, 772 (1963) (holding that an educational camp did not qualify for a tax exemption because its activities “were not directed to, and did not result in, providing benefits either for the public at large, or for any community as a whole”).
194 E.g., *Bob Jones Univ.*, 461 U.S. at 587 n.10 (explaining that the meaning of § 501(c)(3) can be traced back to 1894).
195 *Id.* at 586.
ties support the conclusion that § 501(c)(3) entities help the general public by serving a public interest that the government would otherwise perform. Religious organizations are often recipients of § 501(c)(3) exemptions. While Americans differ in their opinions concerning whether churches and religious organizations serve or fill a public need, obviously the First Amendment's Establishment Clause prohibits the U.S. from establishing a religion.

Still, religious organizations have been at the heart of the Internal Revenue Code tax-exemptions, which echo the purpose of the common law of charitable trusts. The Supreme Court has stated that the exemptions are not granted as a result of the organizations' religious efforts. Instead, religious organizations have been considered akin to charities because of their secular activities. For instance, in recognizing the secular value of religious organizations, the Supreme Court has noted that the benefits "derived from religious organizations [have] flowed to a large number of nonreligious groups as well." In Texas Monthly v. Bullock, the Court stated that the reason it has upheld tax exemptions provided religious organizations under § 501(c)(3) is because the benefits are not "confined to religious organizations."

These favored secular activities include not just such classically recognized charity like feeding the poor, but also those activities that "[benefit] the community's moral and intellectual diversity and encourag[e] private groups to undertake projects that advanced the community's well-being and that would otherwise have to be funded

196 See id.; Harding Hosp., 505 F.2d at 1071 ("The exemption is conferred in recognition of the benefit which the public derives from the activities of such organizations.").
197 E.g., Erika King, Tax Exemptions and the Establishment Clause, 49 SYRACUSE L. REV. 971, 983 n.60 (1999).
199 King, supra note 197, at 981–82, 1036–37.
200 Id.
202 Id.
by tax revenues or left undone."203 Not only do many religious organizations help the poor, but they have been conceived of as also providing the benefits of improving the community's intellectual and moral development and strengthening diversity.204

There are many criticisms of tax policy subsidizing asymmetric, ad hoc quasi-private ordering of societal benefits. For example, the Court itself has noted "[e]very tax exemption constitutes a subsidy that affects non-qualifying taxpayers, forcing them to become 'indirect and vicarious donors.'"205 To paint with a bit of a broad brush, this is largely considered constitutionally permissible under present Establishment Clause jurisprudence so long as the government fairly treats both religious groups and "nonsectarian groups" pursuing a legitimate secular end.206 In contrast, when government directs a subsidy exclusively to religious organizations... that either burdens non-beneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion... it provides unjustifiable awards of assistance to religious organizations and cannot but convey a message of endorsement to slighted members of the community.

Also important to note, however, is that churches and religious organizations also may be entitled to state tax income and property tax exemptions under current law specifically because of their religious nature and that the Internal Revenue Code treats churches and religious organizations somewhat differently from other non-profits

203 Id. at 12.
204 Id. at 15 n.3. The Court also has mentioned that constitutional tax exemptions apply equally to "antitheological, atheistic, or agnostic" groups. Id. at 13.
205 Id. at 14 (quoting Bob Jones Univ., 461 U.S. at 591).
207 See Texas Monthly, 489 U.S. at 15 (internal quotations omitted).
and trusts. Some differences in treatment are commonplace under current law.

4. Conclusion

The history and purpose of charitable trusts and modern tax exemptions under I.R.C. § 501(c)(3) indicate that public trusts are entities designed to serve a public interest, as opposed to a private interest, thereby (at least theoretically) alleviating the cost to the

208 In Texas Monthly, the Court considered a Texas statute that provided a state sales tax exemption for publishers of religious periodicals. Id. at 5. Publishers of non-religious periodicals contended that the statute violated the Establishment Clause. Id. at 6. The Court struck down the statute. Id. at 14. Compared to a New York property tax exemption, which the Court upheld in Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970), and which did not single out “one particular church or religious group or even churches as such,” but rather “granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups,” the Texas statute was too narrowly focused on religious organizations to pass Constitutional muster. Id. at 12-14. The Court said: “How expansive the class of exempt organizations or activities must be to withstand constitutional assault depends upon the State’s secular aim in granting a tax exemption. If the State chose to subsidize, by means of a tax exemption, all groups that contributed to the community’s cultural, intellectual, and moral betterment, then the exemption for religious publications could be retained, provided that the exemption swept as widely as the property tax exemption we upheld in Walz. By contrast, if Texas sought to promote reflection and discussion about questions of ultimate value and the contours of a good or meaningful life, then a tax exemption would have to be available to an extended range of associations whose publications were substantially devoted to such matters; the exemption could not be reserved for publications dealing solely with religious issues, let alone restricted to publications advocating rather than criticizing religious belief or activity, without signaling an endorsement of religion that is offensive to the principles informing the Establishment Clause.” Id. at 15–16. In his dissent, Justice Scalia provides an exhaustive list of state sales and property tax exemptions. Id. at 30–33, nn.1–3 (Scalia, J., dissenting); see also, e.g., Reka Potgieter Hoff, The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?, 11 VA. TAX. REV. 71 (1991).

209 Additionally, tort immunity for charitable organizations is premised by some courts on the “trust fund theory,” which is the theory that a charity’s funds are held in trust, either expressly or impliedly, for the benefit of the public, and that to permit a tort claimant to recover from these funds is impermissible because it would thwart the intent of the donor. See, e.g., Montrose Christian Sch. Corp. v. Walsh, 770 A.2d 111, 121 (Md. 2001); James v. Prince George’s County, 418 A.2d 1173, 1185 (Md. 1980); Wood v. Abell, 300 A.2d 665, 678 (Md. 1973). As the Supreme Judicial Court of Maryland held in 1967, “funds donated for charitable purposes are held in trust to be used exclusively for those purposes, and . . . to permit the invasion of these funds to satisfy tort claims would destroy the sources of charitable support upon which the enterprise depends.” Rhoda v. Aroostook Gen. Hosp., 226 A.2d 530, 532 (Md. 1967). In recent decades, most but not all states have abrogated the charitable immunity doctrine, rationalizing that most modern charitable organizations are run like corporations and have the same access to liability insurance. Note, Charitable Immunity: A Diminishing Doctrine, 23 WASH. & LEE L. REV. 109, 117 (1966).
government of providing certain services. Although religious organizations are at the heart of tax exemptions in the United States, this is primarily because of their secular contributions, not their religious activities limited to their faithful members.210

Potentially, modern public trust theory in the tax field could conflict with Article VI’s No Religious Test Clause. First, there is limited contemporary scholarly support to concluding that a modern 501(c)(3) entity, which fills charitable voids that otherwise would be likely to burden the government, amounts to a “public trust.” Professor Robert A. Destro briefly (in two paragraphs) contemplated that non-profit entities receiving public funds could be “public trusts.”211

210 King, supra note 197, at 981–82; see also Citizens United v. FCC, 558 U.S. 310 (2010). Citizens United is a non-profit conservative lobbying group that produced a film critical of Hillary Clinton’s candidacy for president. Id. at 319–20. The McCain-Feingold Act prohibited Citizens United from broadcasting or advertising an “electioneering communication” within sixty days of a general election or thirty days of a primary election. Id. at 320–21. Citizens United contended that this provision of the McCain-Feingold Act violated its First Amendment free speech rights. Id. at 330. In prior cases, the Court had held that Congress may ban political speech based upon the speaker’s corporate identity. Id. at 319. However, in Citizens United, the Court overturned those prior rulings and held that (1) political speech is a critical component of a healthy democracy, and (2) the value of such speech is not diminished by the speaker’s corporate status. Id. at 334–62. In Burwell v. Hobby Lobby Stores, the Green family, owners of Hobby Lobby craft stores, objected to the Affordable Care Act’s requirement that Hobby Lobby’s employment-based health plans include contraceptive care. 134 S. Ct. 2751, 2765–67 (2014). The Green family believed that contraception use contradicts the Christian Biblical precepts under which it operated Hobby Lobby stores, and that forcing Hobby Lobby to provide contraception violated its rights under the First Amendment. Id. Additionally, Hobby Lobby argued that the Religious Freedom Restoration Act (RFRA), which applies a strict-scrutiny test to any federal law that substantially burdens one’s ability to practice his or her religion, invalidated the contraception mandate. Id. at 2767. The Court held that Hobby Lobby could use RFRA to challenge the mandate because (1) other federal laws specifically include “corporations” in the definition of “persons,” (2) the Court had previously held that non-profit corporations could “exercise religion,” and (3) there is no logical basis for claiming that for-profit corporations cannot do what non-profit corporations can do. Id. at 2768–70. Together, these cases stand for the idea that corporations operate in the constitutional realm much like individual people do, and thus have the same or similar rights. However, on other occasions, the Court has held that a corporation’s constitutional rights are not coextensive with those of natural persons. See, e.g., Hale v. Henkel, 201 U.S. 43, 69–70 (1906) (“The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person.”). For a compelling argument against the Supreme Court’s holding that corporations are persons that can exercise religion, see Zachary J. Phillipps, Non-Profets: Why for-Profit, Secular Corporations Cannot Exercise Religion Within the Meaning of the First Amendment, 46 CONN. L. REV. ONLINE 39 (2014).

Two additional scholars pondering the manner in which American society provides care to child abuse victims via religiously affiliated entities expressed the same thought in passing. They noted, “It is unclear what standards a private, religious organization must meet in fulfilling a public trust.”

Second, an alleged clash between the No Religious Test Clause and modern non-profit tax treatment has been presented unsuccessfully in recent litigation, which could be expanded upon in future cases. American Atheists, Inc. filed suit in the U.S. District Court for the Eastern District of Kentucky against the Internal Revenue Service. American Atheists alleged that 501(c)(3) gives preferential treatment to religious organizations over secular non-profits, because religious organizations are not required to apply for tax-exempt status or file an annual information return, and ministers’ salaries are tax exempt, among other things. American Atheists argued that 501(c)(3) organizations constitute modern-day public trusts, and that such preferential treatment violated the No Religious Test Clause by effectively requiring a religious test in order to receive preferential treatment under 501(c)(3). The court disagreed, holding without extended analysis, that the clause does not “stretch[] to the lengths suggested by the Atheists,” and was unwilling to hold that the term “public Trusts” under Article VI includes tax-exempt organizations under 501(c)(3) based on “a basic reading of Art. VI, Cl. 3 and the limited case law discussing [it],” rather than an analytical reading of Article VI. However, the Supreme Court also held that interpretations of constitutional provisions that immediately follow their ratification are critical to understanding a basic reading of constitutional provisions and their terms as understood by the general public during the time in which the provisions were ratified.

213 Id. at 30. They also noted, as is a common issue in sovereign and governmental immunity in the outsourcing age, “[i]t is unclear as to when the activity of a private actor becomes state action.” Id. at 31; accord Brentwood Academy v. Tenn. Secondary Sch. Athletic Ass’n, 531 U.S. 288 (2001) (determining whether a private entity has taken on the role of a state actor); Lebron v. Nat’l Rail. Passenger Corp., 513 U.S. 374 (1995).
215 Id. at 859–60.
216 Id. at 870–71.
217 Id. at 871.
218 See D.C. v. Heller, 554 U.S. 570, 605 (2008) (noting the critical importance, in constitutional interpretation, of examining the “variety of legal and other sources to determine
This Article suggests that entities organized under state charter that receive federal tax benefits in exchange for providing a public service actually could amount to modern day "public Trusts" within the meaning of Article VI, and could therefore be subject to its prohibitions of religious tests. But what if the religious test prohibition conflicts with the non-profit organization's free exercise of its religion? This would pit the Free Exercise Clause and the No Religious Test Clause against each other in a way that has not yet presented itself in the courts. Future jurisprudence analyzing this conflict could center around principles raised by *Hobby Lobby* and the Religious Freedom Restoration Act.

**D. Museum Law**

In the museum world, the final field utilizing the term "public trust," the term is "a nebulous concept." The term is used often by museum directors and employees and is starting to appear in the body of cases seeking restitution of art and artifacts previously owned by victims of war, conflict, colonialism, or theft.

For example, Glenn Lowry, director of the Museum of Modern Art in New York, has explained that there is "'very little that defines what constitutes acting within the public trust.' . . . '[I]n many ways it is up to individual . . . museums to establish a relationship with the public . . . and then to act in a way that is consistent with their understanding of the museum. In this sense, the concept of public trust must be seen as negotiable . . ." Some professional organizations have attempted to define this public trust. The Association of Art Museum Directors ("AAMD") Code of Ethics states that museums "hold their collections in public trust," which implicates responsibility to "institutional missions . . . trustees . . . and communities."

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219 Charles A. Goldstein & Yael Weitz, *Claim by Museums of Public Trusteeship and Their Response to Restitution Claims*, 14 ART & ADVOCACY 1, 4 (Winter 2013); see also Allison Anna Tait, *Publicity Rules for Public Trusts*, 33 CARDOZO ARTS & ENT. L.J. 421, 424 (2015) (proposing a definition of "public trust" solely in the museum law context). Professor Tait and Professor Kreder communicated with one another as their articles progressed in the editing process.


Association of Art Museum Curators’ Professional Practices Guide instructs curators to recognize “that they hold positions of trust and should act with uncompromising integrity.”

It seems firm, however, that part of this public trust concept concerns educating the public. Again, the same Professional Practice Guide provides that “[c]urators play a critical role in engaging the public with art through the installation and interpretation of the permanent collection . . . . In addition, curators provide information and expertise on the collections and exhibitions to educators.”

The International Council of Museums (“ICOM”) provides the most explicit guidance:

Museums that maintain collections hold them in trust for the benefit of society and its development. . . . Inherent in this public trust is the notion of stewardship that includes rightful ownership, permanence, documentation, accessibility and responsible disposal. . . . Museum collections are held in public trust and may not be treated as a realizable asset.

Many museum professionals and some scholars have conceived that the phrase “the public trust” encompasses a museum’s purported duty to responsibly collect, preserve, and display the world’s art. In this context, the “public” is generally the community in which the museum is located, and maintaining the trust is “a matter of maintaining the museum’s authority and trustworthiness . . . and having the proper means . . . to carry out [its] mission.”

Museum law is rooted in the laws governing charitable organizations. Whereas European museums are typically state-owned and operated, American museums are commonly conceived of as “private

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223 Id. at 12.
225 See, e.g., Sara Tam, Note, In Museums We Trust: Analyzing the Mission of Museums, Deaccessioning Policies, and the Public Trust, 39 FORDHAM URB. L.J. 849, 862 (2012); Glenn D. Lowery, A Deontological Approach to Art Museums and the Public Trust, in WHOSE MUSE?: ART MUSEUMS AND THE PUBLIC TRUST 129, 143 (James Cuno ed., 2004); AAMC Code of Ethics, supra note 222, at 12 (“The curator has a fundamental role in ensuring that works of art are properly conserved, stored, and exhibited . . . . Curators play a critical role in engaging the public with art . . . . ”); ICOM Code of Ethics, supra note 224, at 8 (“Museums have an important duty to develop their educational role and attract wider audiences from the community . . . they serve. Interaction with the constituent community and promotion of their heritage is an integral part of the educational role of the museum.”).
226 Tam, supra note 225, at 862–63.
institutions with a public role." America}m museums are typically organized as either charitable trusts or non-profit corporations.

As discussed above, trustees are held to a higher fiduciary standard than corporate directors. Many courts apply the less stringent "corporate director" standard to non-profit corporation directors. This has a number of consequences nicely summarized in one fairly recent article.

The societal interest in the beneficial administration of charitable organizations requires the application of a more demanding fiduciary standard. Museums preserve an institution and collection of assets so highly esteemed that they have been dedicated to public use and enjoyment. Yet the general public, as compared with the shareholders of a for-profit corporation, cannot monitor and control effectively the conduct of museum directors. The problem of collective action prevents any concerted action; the costs of organizing the public as a whole are prohibitively high, and individual members generally will not assume this responsibility or expense while others enjoy the benefits of their efforts without participating. The presence of potential free riders generally will dissuade members of the public from attempting individual action. As a result, individuals will fail to take action that would serve the collective good—they will hold out in the hopes that other individuals will bear the burden. For this reason, one commentator suggests that "[i]f a board of directors has no membership to police its actions, enforcement of a trustee standard would provide a necessary substitute."

In addition to the typical fiduciary duties applicable in any corporate (including non-profit) context, museums often have responsibilities to the donors of the museum's property. Donors, especially in the past, placed restrictions on gifts that limit the museum's ability to

227 Id. at 855.
228 White, supra note 93, at 1048.
229 See supra Part II.A. Recently, the Supreme Judicial Court of Massachusetts answered a certified question from the Bankruptcy Court about the extent to which artworks given to a dealer for consignment constitute a trust. Plumb v. Casey, 15 N.E.3d 700, 701 (Mass. 2014). In that case, a number of artists gave artworks to a dealer for consignment. Id. at 701–02. The dealer then filed for Chapter 7 bankruptcy (i.e. total liquidation, as opposed to restructuring). Id. The trustee of the bankruptcy estate argued that the artworks given to the dealer for consignment were now the property of the bankruptcy estate, and could be sold to pay off the dealer's debts. Id. at 702. The Supreme Judicial Court determined that when an artist gives artwork to a dealer for consignment, the dealer holds the artwork in trust for the artist and therefore cannot be liquidated in bankruptcy to satisfy the dealer's own debts. Id. at 706.
231 White, supra note 93, at 1055.
232 Gerstenblith, supra note 91, at 420–21.
use or sell the property later.\textsuperscript{235} When restrictions over time become “impractical, illegal or impossible to carry out,” the museum must seek relief through a \textit{cy pres} action.\textsuperscript{294} The \textit{cy pres} doctrine “allows the court to change the terms for the gift while remaining as close as possible to the donor’s original charitable purpose. Courts generally seem to grant requests to sell objects relatively freely.”\textsuperscript{235}

In sum, a museum’s “public trust” is indeed nebulous. It appears to be a theoretical mix of the undefined understanding that museums ought to use museum resources for public benefit; the duties placed upon museum directors by their non-profit status, corporate charter, or charitable trust document; fiduciary duties; and donor expectations.

1. The Repatriation Debates \& Cases

Compounding the nebulousness of the public trust concept in the museum context is the controversial purpose to which the “public trust” idea has been put in recent years: as a justification not to repatriate art and antiquities.\textsuperscript{296} Many museums have acquired objects

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\textsuperscript{233} Donors may wish for their donated works to remain together as one collection, or to be permanently in the recipient museum. See \textit{id.} at 420. For example, Adelaide Milton de Groot left her collection of Impressionist paintings to the Metropolitan Museum of Art in her will, wherein she expressed a wish that the Met should give any artworks it did not want to other specified museums. However, the Met was ultimately permitted to sell the artworks when it was determined that her desire was not expressed in such a way as to make it a legally-enforceable restriction. \textit{id.} at 421 n.58 (citing KARL E. MEYER, THE ART MUSEUM: POWER, MONEY, ETHICS, 118 (Twentieth Century Fund, 1st ed. 1979)); see also Bd. of Trs. of Museum of Am. Indian, Heye Found. v. Bd. of Trs. of Huntington Free Library \& Reading Room, 610 N.Y.S.2d 488, 495 (N.Y. App. Div. 1994) ("[W]hen it appears that a particular purpose for which a charitable disposition has been made has ceased, or that there is some other impediment rendering literal compliance with the terms of the disposition impossible or impracticable, the proper course is not the summary termination of the disposition . . . but an inquiry pursuant to . . . New York’s statutory articulation of \textit{cy pres} and equitable deviation, to ascertain whether any general purpose of the disposition still admits of achievement by some alteration in the administration or application of the disposition . . . .").
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\textsuperscript{234} Gerstenblith, \textit{supra} note 91, at 421–22. ("Cy pres is an equitable doctrine that applies if the terms of a charitable gift are found to have become impractical, illegal or impossible to carry out and if the court determines that the donor had a general charitable intent.").
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\textsuperscript{235} \textit{Id.}
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which legally belong to someone else, or to which claims have been made on moral grounds when legal grounds are insufficient. For instance, the pillage of art during war is an unfortunate, widespread problem. Even in times of peace, vulnerable archaeological sites, churches and museums without significant security in place are looted with their wares trafficked onto the international market.

When asked to repatriate art, some museums have claimed that to do so—or, at least, to do so without a legal fight—violates their duty to hold the art in their collections “in the public trust.” Citing this conception of duty, museums have responded to claims by asserting defenses such as statute of limitations. Of course, there can be little

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238 See, e.g., Patty Gerstenblith, From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century, 37 Geo. J. Int’l L. 245, 249 (2006) (“The looting of art works has a long history, going back to Roman times and probably earlier. In ancient times and in the Middle Ages, the taking of war booty was considered a normal aspect of the conduct of war and often served as a means of compensating both soldiers and military leaders.”).
239 See, e.g., Merryman, supra note 236, at 831 (discussing how cultural property, a component of human nature, end up across national borders); Gerstenblith, supra note 91, at 441 (discussing what kinds of restitutions have been granted for stolen artwork).
240 Goldstein & Weitz, supra note 219, at 4-5 (“[Take] [f]or example, the Four Cases discussion[, which] refers to a case involving a claim by the heirs of Martha Nathan, a German Jew who had been forced to flee Nazi Germany, in which the Detroit Institute of Arts (DIA) initiated a declaratory judgment to defend its rights to the disputed picture based on statute of limitations grounds. While this, in and of itself, is not notable, the explanation provided by Graham Beal [Director of the Detroit Institute of Arts] as to why the museum raised this defense is significant. According to Beal, the museum had concluded that the sale of the painting had been legitimate, and not under Nazi duress. Nonetheless, the heirs ‘declined to withdraw their claims.’ As a result of ‘these circumstances,’ the DIA determined that it had a ‘fiduciary responsibility to protect the DIA’s ownership [of the painting], using all legal means available, including the statute of limitations and laches.’ As similarly expressed in the DIA’s complaint, it was ‘incumbent upon the DIA to reject [the heirs’] claim and defend the City’s rightful ownership of the Painting . . . .’ Most notably, the DIA explained that the museum had this obligation because of the museum’s responsibility to act for the public, ‘for whom it holds the Painting in public trust.’”) (internal citations omitted) (emphasis added).
241 Sarah Favot, Ownership of Nazi-looted art ‘Adam’ and ‘Eve’ at Pasadena’s Norton Simon Museum disputed, L.A. Daily News (June 25, 2014), http://www.pasadenastarnews.com/general-news/20140625/ownership-of-nazi-looted-art-adam-and-eve-at-pasadena-norton-simon-museum-disputed (describing how Marei von Saher is attempting to reclaim a Lucas Cranach the Elder diptych from the Norton Simon Museum in Pasadena, “Adam” and “Eve”) Ms. von Saher claims the diptych rightfully belongs to her because she is the heir of Dutch art collector Jacques Goudstikker, who died while fleeing the Nazis and lost possession of the painting. The museum has stated that it will pursue all legal options, “consistent with its fiduciary duties.” Id. (emphasis added). Though the case has tied up the courts for seven years with “technical” issues, it has yet to reach a hearing on the merits.
argument that it is within the fiduciary responsibility of museum directors to assure themselves of the validity of a claim before settling. But this author and others have maintained that objectively insuring our venerated institutions do not traffic in stolen property is essential to protecting the public’s faith in these institutions.242

Nazi-era art restitution cases best exemplify the issue. During World War II and the Holocaust, entire families were murdered. Others were “cast to the winds, far from familiar languages, far from family records, and often thrown into hostile new environments.”243 Given this, and the fact that stringent post-World War II privacy policies mandated that many family and property records be sealed, Holocaust survivors were effectively “frozen out” from the records that would have helped them discover their property.244 As a result, many argue that raising technical defenses violates not only the public trust but public policy.245 Some call to better prevent the problem at the acquisition end.246 If a museum does not diligently investigate the

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242 See Raymond J. Dowd, Nazi Looted Art and Cocaine: When Museum Directors Take It, Call the Cops, 14 Rutgers J.L. & Religion 529, 546 (2013) (suggesting that museums that “out-smarted” families and got to keep their “ill-gotten gains” is problematic); Gerstenblith, supra note 91, at 411; Jennifer A. Kreder, The Holocaust, Museum Ethics and Legalism, 18 S. Cal. Rev. of L. & Soc. Just. 1 (2008). But see Simon J. Frankel & Ethan Forrest, Museums’ Initiation of Declaratory Judgment Actions and Assertion of Statute of Limitations in Response to Nazi-Era Restitution Claims—A Defense, 23 DePaul J. Art, Tech. & Intell. Prop. L. 279 (2013) (criticizing commentary that faulted museums for initiating declaratory judgments seeking to quiet title to the works and invoking statutes of limitations or laches defenses, and saying that those commentaries ignore the complex nature of the claims asserted and the museums’ fiduciary duties to protect the assets they hold in trust); Emily A. Graefe, The Conflicting Obligations of Museums Possessing Nazi-Looted Art, 51 B.C. L. Rev. 473 (2010) (discussing how museums must work under ethical guidelines when the claim of alleged ownership is valid and how museums are not ethically obliged to work with the heirs when the claim is invalid).

243 Dowd, supra note 242, at 546.

244 Id.

245 Id. at 545 (“Given the taxpayer subsidies of museum activities and the drain on the public fisc created by this trafficking, I think the case for treating these stolen artworks more like cocaine—a controlled substance, is compelling, particularly where, as here, museums clearly knew better and have been actively engaged in falsifying the historical record.”).

246 See Leila Amineddoleh, Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions, 24 Fordham Intell. Prop. Media & Ent. L. J. 729, 761–63 (2014) (noting that there are no federal civil or criminal penalties for museums that acquire illicit art); Leila Amineddoleh, The Role of Museums in the Trade of Black Market Cultural Property, 18 Art Antiquity & L. 227, 247 (2013) (arguing that because non-profit museums are given tax benefits to provide a public service, “they should use these monetary resources for their intended purpose—the public good. It is in the public’s welfare for museums to properly investigate their acquisitions”); Gerstenblith, supra note 91, at 410; Jennifer A. Kreder, The Revolution in U.S. Museums Concerning the Ethics of Acquiring Antiquities, 64 U. Miami L.
provenance of the artwork it acquires, and later is forced to disgorge itself of that artwork, it can certainly be said that the museum “breach[ed] [its] public and fiduciary obligations.”

In the late 1990s, the AAMD and the American Alliance of Museums (“AAM”) (formerly the American Association of Museums) convened a task force to make recommendations on the repatriation of Nazi confiscated art. The recommendations of that task force led to the foundation of the Washington Conference Principles on Nazi-Confiscated Art, signed by forty-four nations, which encourage museums to be proactive in restituting art confiscated by the Nazis. Current AAM principles urge museum curators to thoroughly research the provenance of artwork being considered for acquisition, to actively seek to identify artwork in existing collections that may have been unlawfully appropriated, and to “waive certain available defenses” when appropriate to achieve an equitable resolution to unlawful appropriations claims. Similarly, ICOM has issued recommendations encouraging museum professionals “to actively address the return of

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247 Gerstenblith, supra note 91, at 453.
all objects of art that formerly belonged to Jewish owners or any other owner, and that are now in the possession of museums, to their rightful owners or their heirs.  

Commentator Simon Frankel has argued that non-binding professional codes collectively call for "just and fair" solutions for all constituents—including museums, which must be allowed to defend themselves against non-meritorious claims. By refusing to allow objective review of the merits of claims to art on the basis of non-verified statute of limitations or laches defenses, however, museums are not preserving the public trust but "subverting" it. "[I]n fact, the opposite is true: museums, archives and libraries gain standing, credibility and competence when they confront the history of their collections." 

At bottom, the ethics codes of most contemporary museum professional associations now authorize waiving technical defenses against Nazi-looted art claims and avoiding litigation in favor of alternative dispute resolution wherever possible. This “fact . . . stands in opposition to the claim that the public trust imposes a ‘fiduciary obligation’ to raise technical defenses where the museum has otherwise determined that the claim lacks merit." While these professional guidelines “would not, of themselves, have the effect of pre-empting the state common law fiduciary obligations [they] would seem to be attempting to establish a standard by which to judge whether the trustees and directors of museums are, in fact, fulfilling these obligations.” 

Future art repatriation cases filed against museums could determine what role the public trust theory will play in this field. Further, as in many other fields, while compliance with industry standards does not necessarily insulate one from liability, such standards can in-

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252 Frankel & Forrest, supra note 242, at 297–98.
253 Goldstein & Weitz, supra note 219, at 7; Dowd, supra note 242, at 549–50 ("By retaining property it knows to be stolen, by concealing provenance documentation, and by accusing Holocaust victims, their kin and their lawyers of greed, the museum community has actively advanced hurtful anti-Semitic stereotypes and has betrayed the public trust.").
254 Goldstein & Weitz, supra note 219, at 7.
255 Id.
256 Gerstenblith, supra note 91, at 444–45. See also HELEN J. WECHSLER, ET AL. MUSEUM POLICY AND PROCEDURES FOR NAZI-ERA ISSUES 87, 108 (2001) (App’x H, defining “[f]iduciary obligation” as “[t]he responsibility of a museum to the collections it holds in trust, for the public”).
fluence the direction of tort law developments (even if ultimately via influencing governmental regulation).\textsuperscript{257}

2. Broader Deaccessioning Debates

The "public trust" concept also arises in the context of museum deaccessioning practices unrelated to provenance (a/k/a chain of title) problems such as prior theft. Cash-strapped museums may sometimes seek to sell part of their collections in order to remain financially solvent.\textsuperscript{258} The practice is completely counter to museum ethics codes, but in dire circumstances deaccessioning may be the only alternative to shuttering the museum.\textsuperscript{259}

The AAM Code of Ethics states that it is unethical to deaccession works of art for any purpose other than the advancement of the museum's mission.\textsuperscript{260} The AAM Code of Ethics, along with codes of ethics of other museum professional organizations, was promulgated in response to a 1972 scandal in which the Metropolitan Museum of Art secretly sold donated works for cash.\textsuperscript{261} The American Alliance of Museums and the American Association of Museum Directors ("AAMD") claim to want to curtail this practice because museums receive tax benefits in recognition of their mission to curate art for the public's benefit. Deaccessioning purportedly thwarts this mission by removing artworks from the public's access and placing them in private hands.\textsuperscript{262}

The AAMD permits museums to deaccession works that are redundant, of poor quality, inauthentic, or of questionable provenance.\textsuperscript{263} Museums are further urged to consider factors such as whether the artwork might be sold to or exchanged with another educational or cultural institution to keep the work in the public trust, whether the artwork has a particular connection to the museum or the geographical area, and, if the artist is still alive, whether to involve

\begin{footnotesize}
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\item[258] Tam, supra note 225, at 851--52.
\item[259] Id. at 852 (citing Reed Johnson, The Fresno Metropolitan Museum of Art & Science Closes its Doors, L.A. TIMES, Jan. 12, 2010, at 1).
\item[261] Tam, supra note 225, at 864--65.
\item[262] See id. at 865--66.
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Museums that deaccession merely to fund operating costs or replenish endowment funds face severe AAMD sanctions. The situation faced by New York’s American Folk Art Museum in 2011 is instructive. The museum defaulted on a $32 million loan that had financed the construction of an “impressive” new location. Ultimately, the Museum of Modern Art purchased the new building, and the American Folk Museum returned to its more modest previous location. But the museum was forced to consider what to do with its collection in the event of closure. Among the options was transferring the collection to the Smithsonian Institution. Such a transfer would have required the approval of the New York State Attorney General, who would have considered “whether the transfer would put New York State residents at a disadvantage.” Within the museum world, such deaccessioning is viewed by most as a breach of the mu-

264 ASS’N OF ART MUSEUM DIRECTORS, ART MUSEUMS AND THE PRACTICE OF DEACESSIONING, https://aamd.org/sites/default/files/document/PositionPaperDeaccessioning%2011.07.pdf; see also, KARL E. MEYER, THE ART MUSEUM 180–92 (Twentieth Century Fund, 1st ed. 1979) (showing how deaccessioning or selling an artwork can have powerful implications on a living artist). Museums’ collection and exhibition practices can greatly influence an artist’s reputation and the value of his work. Art collectors, many of whom serve on museum boards of trustees, can harness the museum’s power in this regard to inflate the value of their personal art collections. Collector Robert Scull’s art collection exploded in value after the Metropolitan Museum of Art showcased his artwork and allowed Scull to publish his views on art in its Bulletin. Having been legitimized by the Met, Scull sold his collection at a “circuslike” Sotheby’s auction in 1973. One piece, which Scull had purchased from artist Robert Rauschenberg only 13 years earlier for $900, sold for $90,000. After the auction, Rauschenberg, angered by the fact that, in his view, he had worked hard merely to make another man rich, approached Scull and hit him in the stomach. Id.


267 Taylor, supra note 266.

268 Id. The attorney general in each state is tasked with protecting the public’s interest in non-profit organizations. One significant distinction between not-for-profit corporations and for-profit corporations is that not-for-profit corporations lack shareholders. Shareholders in for-profit corporations generally oversee management of the corporation and can use their voting power to hold managers accountable. Because not-for-profit corporations do not have shareholders, the state’s attorney general steps in to provide oversight. Additionally, members of the public do not have standing to bring an action against non-profit organizations. Instead, they can bring the issue to the attention of the attorney general, who can litigate against non-profit organizations that mismanage assets. White, supra note 93, at 1044–45.
museum’s duty to the public, and the response to it ranges “from dismay to disgust.”

Recently, the Detroit Institute of Arts ("DIA") was under the national microscope, as Detroit’s creditors targeted the museum’s valuable collection as a potential source of revenue for the ailing city. On July 18, 2013, the city of Detroit became the largest U.S. municipality to file for Chapter 9 municipal bankruptcy protection. The DIA, which opened in 1885, owns a collection that is valued anywhere from $454 million to $8 billion. Creditors and city officials began eyeing the collection as a ticket out of Detroit’s crushing debts—resulting in “a threat to [the DIA’s] existence of a kind never confronted by another American museum of its size.”

Although a settlement was reached that spared the collection, the briefing incidentally demonstrated how the theoretical analysis of

269 Tam, supra note 226, at 852 (citing Johnson, supra note 259, at 1).
270 Id.
273 Christie’s auction house estimated DIA’s collection at between $454 million and $867 million. Kennedy, supra note 271. Artvest of New York appraised the collection on behalf of the city and the museum and put its value at between $2.76 and $4.6 billion. However, one of Detroit’s largest creditors, the Financial Guaranty Insurance Company, hired Victor Weiner Associates ("VWA") to conduct an independent appraisal. VWA valued the collection at $8.5 billion. This was set to become a highly contested issue in Detroit’s bankruptcy case, had it gone to trial. Michael H. Hodges, Report for Detroit Creditor Nearly Doubles Value of DIA Collection at $8.5B, THE DETROIT NEWS July 28, 2014, at A5.
the existence of a public trust could differ depending on the specific organizational structure of a particular museum. Unlike many other museums around the country, which most commonly today are independently-owned not-for-profit organizations, the DIA’s real estate and collection as of today is wholly owned by the city of Detroit, whereas the museum operations are run by a separate non-profit entity known as the Founders Society. The DIA was incorporated as a non-profit charitable corporation in 1885. Initially, the city appropriated funds to support the museum and issued bonds to support building construction. In 1915, however, the Michigan Supreme Court held that these appropriations violated a state constitution restriction on “a city’s lending of credit to an entity other than a public or ‘municipal agency.’” In response, the state legislature enacted a statute that permitted non-profit corporations to convey their property to the city and required the city to use the property for the purposes for which the non-profit corporation was organized. As a result, the DIA transferred its buildings and art collection to the city to enable the city to support its mission. The non-profit corporation remains in existence as the Founders Society.

The museum’s operations have changed a bit throughout the years. Currently, the museum operates pursuant to a 1997 operating agreement, under which the city has legal title to the art collection and museum properties, but the Founders Society manages (and entirely funds) operations. Some of the city’s creditors argued that, because the city had legal title to the collection and buildings, the museum was a wholly municipal asset that ought to be sold to satisfy debts. However, the 1997 operating agreement specifies that, while

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278 Id.
279 Id.
280 Id. at 5.
281 Id.
282 Id.
283 Michigan Attorney General Opinion, supra note 276, at 6
284 Id.
285 Id.
287 In March 2014, Detroit creditor Syncora served an “exhaustive” subpoena to the DIA in its effort to force Detroit to liquidate the DIA’s collection. The subpoena demanded that the DIA produce, among other things, documents detailing its collection, annual financial performance, attendance figures, and artwork appraisals. Nathan Bomey, Bankruptcy Creditor Hits DIA with Massive Subpoena for Artwork Records, DETROIT FREE PRESS, Mar. 29,
the city retains legal title to the museum's artwork, the Founders Society is responsible for acquiring and disposing of art. The Michigan Attorney General argued, therefore, that any city sale of the artwork would "seriously undermine the ability of the Founders Society to fulfill its contractual responsibilities." Additionally, the operating agreement between the DIA and the City of Detroit states that the artwork is to be used to "benefit the community" and "stimulate interest in art," not to pay off city creditors. Furthermore, some of the artwork is burdened with either permanent or temporary restrictions on alienation by the original donors. The Attorney General ultimately asserted that the city of Detroit holds the DIA collection in charitable trust for the benefit of the people of Michigan, and therefore may not sell any piece in the collection to satisfy municipal debts.

While the Attorney General was correct in his conclusion that the city may not, in general, sell artwork for a purpose contrary to the museum's mission, he considerably overstated the case by asserting that no piece in the collection may be sold. The Michigan Attorney General based his opinion upon the museum's original authorizing statute, 1885 P.A. 3, "Act for the formation of corporations for the cultivation of art." While the Attorney General construed this statute as having created a charitable trust, in fact it created a private non-profit corporation ("The act provided that a group of individuals could 'become a body corporate' for 'the purpose of founding a public art institute' 'in the manner and for the purposes . . . set forth' in the act."). In 1908, the Michigan Supreme Court concluded that the Founders Society's transfer of ownership of the museum buildings to

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288 Id.  
289 CITY OF DETROIT & DETROIT INST. OF ARTS, supra note 285, at 9.  
290 Id. at 8. At a panel discussion about the DIA hosted by the International Foundation for Art Research, Graham Beal, Director of the DIA, stated: "90% of our collection, despite the City of Detroit purchases, comes from gifts." Graham W.J. Beal, Art for Sale? Bankruptcy and the Detroit Institute of Arts: The Director's Take, 14 IFAR JOURNAL 42–43 (2014). Another panelist, Samuel Sachs II, a former Director of the DIA, stated: "there are a few works of art in the collection that have a 'remainderman clause.' They were given with the understanding that they will never be sold, and if the museum does want to sell them, that the work will go to some other recipient. I expect that we may see more of such clauses in the future." Id. at 57.  
292 The implications of this distinction are obviously quite significant for the deaccessioning debates. See supra Part II.D.2; Michigan Attorney General Opinion, supra note 276, at 9.  
293 Michigan Attorney General Opinion, supra note 276, at 3 (emphasis added).
the city made "no material change in its [the museum’s] character as a private corporation." Non-profit corporations certainly have fiduciary duties to the public, and the statute places some other affirmative duties on the museum. However, the statute ultimately creates nothing more exotic than a garden variety non-profit corporation; the environmental public trust doctrine does not apply in its current state.

A non-profit corporation does not inherently go against its mission (nor thereby invalidate its non-profit status) by selling, for instance, a single piece of artwork. In some instances, doing so may be necessary to promote the non-profit's mission (for example, to cull artwork of poor quality in order to purchase artworks of higher quality). In fact, a museum operating as a non-profit corporation need not necessarily have a collection at all in order to fulfill its duties to educate the public—some museums (for instance, the Contemporary Arts Center in Cincinnati, Ohio) have no permanent collection, but instead serve as art exhibition spaces. While the authorizing statute does require museums incorporated under it to publicly exhibit their collections of art, it is going too far to state that once an artwork becomes a part of the collection it must as a matter of law be displayed in perpetuity.

The Michigan Attorney General also argued that if any part of the collection is held in charitable trust, then the entire collection should be:

295 See supra Part II.A.
296 "The public exhibition of its collection of works of art shall be the duty of every such corporation, and . . . it shall . . . open its buildings and art collection to the general public." Michigan Attorney General Opinion, supra note 276, at 3 (quoting 1885 P.A. 3, §§ 3-4, CL 1915, §§ 10761-62).
297 ASS’N OF ART MUSEUM DIRS., AAMD POLICY ON DEACCESSIONING 1, 3 (2010) ("Most art museums continue to build and shape their collections over time to realize more fully and effectively their mission."); id. ("Deaccessioning is a legitimate part of the formation and care of collections and, if practiced, should be done in order to refine and improve the quality and appropriateness of the collections, the better to serve the museum’s mission.").
298 Id. at 3.
299 "The Contemporary Arts Center is a non-collecting institution. Without a collection, all exhibitions on view are temporary and ever-changing." CONTEMPORARY ARTS CENTER, http://contemporaryartscenter.org/visit/hours-admission (last visited Oct. 4 2014).
300 The DIA describes its own collection as “encyclopedic”; its 60,000-item collection far exceeds available display space (as is true of many art museums). The Science and Techniques of Art Preservation, DETROIT INSTITUTE OF ARTS, http://www.dia.org/art/conservation-department.aspx; Collections, DETROIT INSTITUTE OF ARTS, http://www.dia.org/art/; see also ASS’N OF ART MUSEUM DIRS., AAMD POLICY ON DEACCESSIONING, supra note 297, at 1, 3.
In accepting the trust... the City agreed at its own cost and expense to maintain and operate the trust... Over the years, the museum’s art collection grew through charitable donations of art and direct purchases by the City. As new pieces were added to the collection, the entire collection continued to be dedicated towards the museum’s initial charitable purpose: the public display of its art collection.301

The Attorney General concluded that the suggestion that the art acquired by the museum was held in trust while the art purchased by the city was not is “untenable”—if this were so, he argued, then charitable assets would have been unlawfully commingled with non-charitable assets, thereby breaching the trust.302

The argument is incorrect for a number of basic reasons. Displaying art from a variety of sources in the same space is a routine practice of art museums. Museums routinely lend art to one another for purposes of a special exhibition. Displaying individual artworks near one another certainly cannot be said to inherently violate the fiduciary duties of those organizations as would depositing client funds into an attorney account. Any concern about commingling artwork would in almost any instance be easily overcome by basic record-keeping.

In addition to competing obligations to the city, taxpayers, and donors, the DIA was forced to consider its professional obligations.303 Violating professional ethics codes can lead to significant practical consequences. For example, in 2008, the National Academy Museum in New York deaccessioned artwork to pay its bills, and was “branded a pariah” when the AAMD urged its member institutions not to collaborate with the museum.304 More recently, the AAMD sanctioned the Delaware Art Museum, which sold its 1868 William Holman Hunt painting Isabella and the Pot of Basil at a Christie’s auction for $4.25 million as a way to bolster its endowment and pay down debts.305


302 Id. at *21 n.16.

303 In his opinion, the Michigan Attorney General references the AAM and ICOM codes of ethics in support of his argument that the artwork may not be sold. Michigan Attorney General Opinion, supra note 276 at *10–12. It should be noted that these codes of conduct do not have the force of law—they are standards promulgated by professional organizations that, like any organization, have a self-interest in developing standards that are beneficial to their most influential members.


AAMD also withdrew the Delaware Art Museum’s accredited status for “direct violation of museum standards and ethics.”

In addition to losing professional credibility, the Delaware Art Museum is now ineligible to accept exhibition loans from any other member museum. In a written statement, the AAMD chastised the museum for “violat[ing] one of the most basic and important of AAMD’s principles.”

Though the museum argued that it was forced to sell the painting or close its doors, the AAMD responded by saying that “the museum is treating works from its collection as disposable assets, rather than irreplaceable cultural heritage that it holds in trust for people now and in the future. It also is sending a clear signal to its audiences that private support is unnecessary, since it can always sell additional items from its collection to cover its costs.”

In addition to the possibility of losing professional standing, opponents of deaccessioning in Detroit maintained that it would hurt the city’s chances of revival and equates to selling off part of the city’s cultural heritage.

Of course, the DIA’s most basic duty is to educate the community—a duty that was severely threatened by the prospect of selling its collection. Nonetheless, proponents of each viewpoint argued their way was the best way to preserve the public trust, whatever their conception of that term may be. In the end, the city retained all of its art.

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306 Vankin, supra note 305.
307 Miller, supra note 305.
308 Id.
310 Kennedy, supra note 274.
311 Kreder, supra note 242, at 14.
312 Culture blogger Lee Rosenbaum argues that AAMD sanctions do little to curtail rogue deaccessioning practices. Lee Rosenbaum, Damning DAM: AAMD Sanctimoniously Sanctions the Delaware Art Museum, CULTURE GRRL (June 18, 2014) http://www.artsjournal.com/culturegrrl/2014/06/damning-dam-aamd-sanc-imoniously-sanctions-the-delaware-art-museum.html (“The only way that professional sanctions may have some bite is if they have an economic impact on the institutions that are using to [sic] wrongful methods to right their finances.”). Forbidding its member organizations to associate professionally with the shunned museum only harms art museums’ collective cultural endeavor. To many museums, the prospect of righting the ship financially is enticing enough to risk weathering the (usually temporary) sanctions. Rosenbaum argues that legislation would be a more effective deterrent, a solution that the museum commu-
3. Conclusion

In sum, despite use of the term "public trust" in recent litigation, in the museum context it amounts to an ethical ideal, not a legal standard. While desire to maintain collections for public viewing is understandable, the rhetoric should not be used to justify refusal to allow objective evaluation of restitution claims or even to avoid deaccessioning even being thrust upon the museum. In no case to date could the argument credibly apply.

CONCLUSION

Frankly, it seems as if no one really knows the meaning of the term "public Trust." Existing scholarship provides essentially no analysis of the term used in the No Religious Test Clause of Article’s VI of the U.S. Constitution. Historical context and evidence of the term’s meaning can be found in common law, scholarship and rhetoric pre-dating the Constitution’s ratification, however.

A key social fact of the colonial era was its religious diversity, and the risk it posed for democratic government at the federal level. A fiduciary-type obligation on public officials vis-à-vis the governed was a key concept at the time and espoused by such theorists as John Locke. This seems to be the bedrock definitional principle behind the term “public Trust” as used in Article VI, clause 3.

Fiduciary and trust principles are grounded in statutes and common law dating back to the reign of the Stuarts. Some cases and scholars have used the term “public trust” outside the pure trust context in only three distinct areas of law—environmental law, tax law, and museum law. The term seems not to have been used in any other legal fields.

First, in the environmental law arena, the term has been used to describe property administered by the government for public benefit, not routine use as any private entity could use property. If such property has been conveyed or otherwise delegated by the government to a private entity, the property remains burdened by the obligation to use the property solely to benefit the governed populace,

Id. As AAMD director Christine Anagnos stated to the L.A. Times, “Non-profits such as museums are already governed by many laws, at both the state and federal level. Where an issue as complex and specific as deaccessioning is concerned, our view is that the professional standards of the art museum field are best established and reinforced by those working in the field.” Carolina A. Miranda, Museums Behaving Badly: Are Sanctions Too Little, Too Late?, L.A. TIMES, June 21, 2014, http://www.latimes.com/entertainment/arts/miranda/la-et-cam-museums-behaving-20140619-column.html.
i.e. the public. The duties attached to such administration mirror the
development of those attached to private and public trusts. The concept has been espoused in case law and scholarship to encompass
natural resources, including wildlife. There is a chance that the federal or a state government could transfer public property for admin-
istration by an entity with (or without) a religious mission or that the
environmental public trust doctrine could evolve beyond its envi-
ronmental roots to apply to administration of governmental benefits.
If so, there is potential for future jurisprudence to apply the No Reli-
gious Test Clause to such an administrative arrangement.

Second, in the tax area, exemptions were developed primarily for
the purpose of encouraging non-profit entities to fulfill societal needs
without the need for direct governmental funding. Although tax ex-
emptions amount to an indirect subsidization by government of the
private entities, churches and religious organizations are routine re-
cipients of such tax benefits. Under current law, such generic gov-
ernmental support (without more) is not considered to cross the
boundary of the First Amendment’s Establishment Clause. This
probably has to do with the fact that the primary motivation for the
tax exemptions seems historically to have been societal benefit unre-
lated to religious teaching. The classic example would be feeding the
poor. Yet, there is theoretical potential for such tax exemptions to
violate the U.S. Constitution, Article VI. If such an allegation is taken
up in any depth by a court, the court likely will need to resolve corre-
lating Free Exercise arguments that would arise if current or future
tax exemptions were denied to a church or religious organization
otherwise satisfying public needs in a manner on par with non-
religious exempt entities. Thus, there is potential in the field of tax
exemptions to interpret the No Religious Test Clause, as well as its in-
tersection with the Establishment and Free Exercise Clauses of the
First Amendment.

Third, in the area of museum law, the term has been used to sup-
port development of museum ethics codes applicable to museums’
treatment of their collections, and two cases have attempted to insu-
late a museum collection using public trust principles. It is common-
ly said in the context of debates surrounding repatriation and deac-
cessioning that the museums hold their collections “in the public
trust.” While fiduciary obligations do, indeed, apply to trustees ad-
ministering museums established via trusts, routine corporate duties
(which in many jurisdictions are heightened in the non-profit con-
text) apply to museums set up as non-profit entities. No special “pub-
lic trust” doctrine applies to these run-of-the-mill non-profit entities
as a legal matter, despite the vaulted status museums may have in American society.

Fourth, despite the fact that the term "public Trust" had been altogether undefined up until this Article's publishing, a consistent unifying principle in the common law trust law throughout the Stuart Period and colonial era, as well as in the tax and environmental fields, is that a trust or other non-profit entity is accountable under law to fulfill an obligation to satisfy (in actuality or theoretically) a need for services not otherwise supplied by the government. This commonality is lacking in the museum law arena; such rhetoric has been used therein basically to describe non-profit corporate or private trust status, which is not the same as a "public Trust." This leads to the conclusion that a "public Trust" can be defined as "any entity given special privilege by the government, beyond the simple grant of a state corporate charter often coupled with state or federal tax waivers, so long as that entity is legally obligated to engage in conduct that could traditionally have been performed by the government itself for the public's benefit."

In conclusion, this definition can provide the foundation for future litigation, legal analysis and scholarship in the non-profit, environmental, tax, and museum law arenas. It is possible that new, presently unknown legal fields may emerge wherein this term is important. Perhaps most importantly, the definition is necessary to understand the final two, seemingly overlooked, words of the No Religious Test Clause in Article VI, clause 3 of the U.S. Constitution.