WHY LIBERATING THE PUBLIC TRUST DOCTRINE IS BAD FOR THE PUBLIC

BY

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Since the beginning of the modern environmental movement in the 1960s, environmental advocates have been in search of ways to circumvent the twin obstacles of political compromise and vested property rights. In a 1970 article, Professor Joseph Sax suggested that the common law public trust doctrine might provide an avenue for judicial intervention in the name of claimed public rights in a wide array of natural resources. Because the traditional doctrine was narrowly limited in terms of both public rights and affected resources, Sax published a second article ten years later, calling for courts to liberate the public trust doctrine from its historical parameters. While a few judges responded with generally limited extensions of the doctrine, Sax's plea has been ignored by most courts—but not by academics. A flood of law review articles have resorted to shoddy history, retrospective theorizing about the origins and purposes of the doctrine, appeals to higher law and moral imperatives, and confusion of the idea of public trust in representative government with the public rights protected by the public trust doctrine in efforts to persuade courts to liberate the doctrine. Implicit, if not explicit, in all of these arguments is the claim that the common law origins of American law and the American judicial system vest courts with authority to amend old law and make new law. At risk in this vast and imaginative effort to liberate the public trust doctrine from its common law confines are the constitutional separation of powers, the rule of law, due process and secure property rights, and the economic prosperity on which environmental protection ultimately depends.

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I. INTRODUCTION

Many years ago my friend, colleague, and best man at my wedding, Mike Blumm, described me as the Darth Vader of the public trust doctrine.[1] I assume it is to play that role that I have been included in this symposium. I will try not to disappoint, though my true mission is more in the spirit of Vader's son Luke Skywalker—as defender of judicial restraint, representative democracy, individual liberty, and the common law method.

The core purpose of this Article is to critique, and caution against, the efforts over the past four decades to reinvent the public trust doctrine. In the course of that critique I will touch on the history of the doctrine, a topic I have explored in depth elsewhere,[2] and its legal substance. Because much of the Article is devoted to explaining and critiquing several imaginative theories about the possible future of the doctrine, it will be useful to summarize its substance at the outset. That is easily done.

As it was received in American law and as it existed well past the middle of the twentieth century, the public trust doctrine recognized a right held in common by every member of the public to navigate and fish on navigable-in-fact waters.[3] The doctrine thus imposed a corresponding duty on both public and private owners of riparian and submerged lands not to obstruct the exercise of that right.[4] Most questions arising under the doctrine related to the definition of navigable waters, the scope of the navigation and fishing rights, and the determination of what constitutes obstruction.

The theories discussed below share in common with this traditional public trust doctrine a claim of public right. But the substance of those rights claims and the settings and circumstances to which they are said to apply have little, if any, foundation in the traditional doctrine. Thus, to be effective as enforceable rights claims, they require courts to declare them so.

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1 Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENVTL. L. 573, 597 n.108 (1989). In one of the longest footnotes ever devoted to a critique of a single person's views on a narrow topic (over 1,000 words), Blumm explains why I warrant the appellation.

2 James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENVTL. L. & POL'Y F. 1 (2007).

3 *Id.* at 94.

4 *Id.*

But new rights claims imply new duties. A public right where there was once a private right, and vice versa, turns existing expectations on their head unless there is just compensation. Yet that is what the proponents of a much-expanded public trust doctrine propose for courts to do.

Even if it were possible to create new public rights without limiting the scope of existing private rights, we should ask by what authority courts may declare such rights to exist. Many of the theories discussed below mistakenly presume that such judicial lawmaking is part of the common law tradition. But even if it were, American courts function within a constitutional separation of powers that assigns the lawmaking function to the legislative branch of government.

Thus the core concern of this Article is that the judicial declaration of new public rights at the expense of existing private rights constitutes a double violation of the principle of the rule of law. Proponents of an expanded public trust doctrine claim otherwise, asserting that the public rights they wish for the courts to declare are in fact antecedent to any existing private rights. But saying it is so does not make it so. The rule of law presumes that the law, including rights and responsibilities, is transparent and not to be changed retroactively.

II. THE PUBLIC TRUST DOCTRINE RISES FROM OBSCURITY

The most influential article ever written on the public trust doctrine was authored by Professor Joseph Sax in 1970.[5] Westlaw reports 2,822 articles in which the term "public trust doctrine" appears.[6] Because the most influential of all articles on the public trust doctrine does not appear in that list, I can say with confidence there are more than 2,822 articles that have discussed or referenced the term public trust doctrine. HeinOnline reports 291 articles with "public trust doctrine" in the title.[7] This list does include the most influential article ever written on the subject. Every article identified by HeinOnline appeared after that date, making the article truly seminal. Every article but one on the Westlaw list appeared after that seminal article.

The Public Trust Doctrine in Natural Resources Law has been cited in nearly 917 articles, and probably will be cited in at least eight more when the papers from this conference are published.[8] A second public trust doctrine article by Professor Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, published in 1980, has been cited in 179 articles as well.[9]

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

6 This number was determined by searching for references to "public trust doctrine" in Westlaw's database of law review and journal articles, conducted on January 10, 2015.

7 This figure was based on a search through the HeinOnline database of law review and journal articles, conducted on January 10, 2015.

8 This figure based on a search of HeinOnline conducted January 10, 2015.

9 Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980). This figure was based on a search through the HeinOnline database, conducted on January 10, 2015.

That's a lot of citations. Indeed, in a 1985 ranking of the most-cited law review articles of all time, Sax's 1970 article already ranked thirty-first.[10]

By contrast, Sax's 1970 article has been cited by three dozen state and federal courts, and his 1980 article has been cited in only six judicial opinions.[11] Perhaps this only underscores that we academics are largely talking to ourselves, but it is worth noting that Sax's article, *Takings and the Police Power*,[12] has been cited in law reviews over one thousand times—roughly the same number as his two public trust articles combined—but has been cited in state and federal court a total of 72 times.[13] What should we make of the fact that the ratio of academic to judicial citations of Sax's 1964 takings article is 14 to 1, and of his two public trust articles is 26 to 1? Probably not a lot. But the difference is nevertheless striking, particularly in light of the fact that both of Sax's public trust articles were explicit calls for judicial action.

The explanation, I will argue below, is that Sax's invitation to liberate the public trust doctrine from its historical shackles—so enthusiastically embraced by many in the academy—has been largely rejected by the courts. It has been rejected because it would require the courts to exceed both their traditional and their constitutional powers, and to make up a lot of law while treading on the vested rights of a lot of people. Both the law and the limited role of the judiciary stand firmly in the path envisioned by Professor Sax.

The apparent lack of judicial enthusiasm for throwing off the public trust doctrine's shackles might lead defenders of the rule of law, the rights of individuals, and the constitutional separation of powers to assume they can safely ignore the fanciful pleas of those who would have the courts rewrite the laws in service to objectives both noble and ignoble. But they do so at the peril of these core values of American law and governance. Somewhere there is always a judge unable to resist the invitation to do good, even where the legal path is obstructed by an absence of authority, the will of the people, or the rights of individuals. And once these self-anointed guardians of the public good commit their opinions to the case reporters, judges less confident in their role as lawmakers can appeal to precedent, and so on, until the law becomes unrecognizable to those who will have relied on it in the organization and conduct of their affairs. Indeed, the public trust doctrine has already been stretched beyond recognition even within its traditional aquatic home.

It will be said that the stretching of the doctrine that has occurred over the past few decades is only the common law at work.[14] The common law is,

10 Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540, 1551 (1985). By 2012, Sax's 1970 article had fallen to a tie for forty-sixth place in an updated ranking. Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1490 (2012).

11 These figures were based on a search through HeinOnline, conducted on January 10, 2015.

12 Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

13 These figures were based on a search through HeinOnline, conducted on January 10, 2015.

14 Huffman, *supra* note 2, at 95–96.

we are told, judge-made law. It follows, therefore, that today's judges have not only the authority but the responsibility to amend and rewrite the law in light of present day circumstances and demands. This is particularly so, we are further told, because legislators and administrators have utterly failed to address the urgent challenges we face.[15]

I attribute no ill motives to those who advocate for an expansive public trust doctrine pursuant to which judges must overrule the political branches of government and constrain the exercise of long-vested individual rights. Indeed, I am sympathetic with many of their objectives. But I do believe their method is a lawless one. It is borne of a whatever-it-takes approach to advocacy, politics, and governance. Law students are encouraged, even taught, to imagine how laws written for one purpose might be turned to wholly different purposes. Lawyers, aided by the immense power of digital search engines, sift through our vast heritage of statutes, regulations, cases, and commentaries for words and phrases that, when taken out of historical context, are claimed to support an interpretation the authors of those words and phrases could never have imagined and might well have opposed. Government officials institute policies and programs with the expectation that, if their authority is challenged, creative lawyers will persuade well-meaning judges that all is well with the law. It is all done in the name of the rule of law but without any of the constraints inherent in the rule of law.

Even in the face of disappearing landscapes, threatened species, rising seas, and urban sprawl, this blatant disregard for the rule of law is a dangerous business. Good intentions, even asserted moral imperatives, do not outweigh the risks to liberty and the public good inherent in judicial lawmaking. Even if one is persuaded that the common law courts of old were lawmaking courts—a persuasion I will refute—ours is a constitutional republic in which the courts play an important but limited role. That role is limited not only by the constitutional separation of powers, but also by the constitutional liberties of the American people. Alexander Hamilton suggested in Federalist 78 that the judiciary is the "least dangerous" branch[16]—a phrase later adopted as the title of a book by Alexander Bickel[17]—but the judiciary is less dangerous than the other two branches of government only if judges confine themselves to the business of judging. When they assume the role of lawmakers, judges join legislators and administrators as threats to liberty, and leave individuals without recourse in the defense of their rights.

No doubt the foregoing plea for judicial restraint will be viewed by some as hyperbole. After all, judges have rendered many consequential decisions that have upset private expectations and altered the social landscape, yet the republic still stands and America remains a beacon of prosperity and freedom to people from around the world. True enough, but as Justice Felix Frankfurter wrote in the Steel Seizure case: "The accretion

15 *See* Sax, *supra* note 5, at 474.

16 THE FEDERALIST NO. 78, at 380 (Alexander Hamilton) (Lawrence Goldman, ed., 2008).

17 ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[18] Frankfurter was writing in reference to the abuse of executive power, but the risk to freedom is no less when the judiciary abuses its authority.

A common and often effective strategy of those who would usurp power is to assert with confidence that the power they wish to exercise, or wish to have exercised by others, actually exists. Two examples drawn from the writings of my friends Mike Blumm and Mims Wood will illustrate the practice. Professor Blumm co-authored an amicus brief filed by Professor Bill Rodgers in the U.S. Supreme Court in support of a petition for certiorari in the case of *Alec L. v. McCarthy*.[19] In that brief, joined by fifty-three law professors, Professor Blumm asserts that "[t]he [public trust] doctrine is in fact an inherent limit on sovereignty which antedates the U.S. Constitution and was preserved by the Framers as a reserved power restriction on both the federal and state governments."[20] Professor Wood is the author of *Nature's Trust: Environmental Law for a New Ecological Age*, recently published by Cambridge University Press.[21] An article celebrating Wood's atmospheric trust theory in the current issue of *Oregon Quarterly* poses this question: "Does the public trust doctrine that protects air, water, and endangered species apply to climate?"[22] Of course it does, answers Wood. "Since the beginning of this nation . . . courts have declared that government is a trustee of the natural resources we all depend on."[23]

Neither Professor Blumm's nor Professor Wood's assertions have any basis in the public trust doctrine. Both are representative of a much wider effort to transform an important but limited common law doctrine into a powerful trump over both private rights and popular sovereignty as guaranteed in the U.S. Constitution. As the author of the *Oregon Quarterly* article put it, "Wood has devised nothing less than a brilliant end run around any U.S. president, governor, senator, agency, committee, or politically deadlocked Congress."[24] In other words, Professors Wood and Blumm, along with dozens of others in and outside the academy, are urging judges to reinvent the public trust doctrine as a legally mandated circumvention of private rights, popular sovereignty, and the constitutional separation of powers.[25]

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18 Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 594 (1952).

19 Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014).

20 Brief of Law Professors in Support of Granting Writ of Certiorari as Amicus Curiae for Petitioners at 1, Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014) (No. 14-405) [hereinafter Amicus Curiae Brief], 2014 WL 5841697.

21 MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2013).

22 Mary Democker, *Natural Law*, OREGON Q. 30, 31 (Autumn 2014), *available at* http://www.oregonquarterly.com/natural-law.

23 *Id.* at 34.

24 *Id.*

25 *See generally* James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL.

III. VERY BRIEF HISTORY OF THE PUBLIC TRUST DOCTRINE

There are two versions of public trust doctrine history, one heroic and the other, like most legal history, humdrum. I will not dwell on the heroic version, which I have summarized elsewhere.[26] Suffice to say that the heroic version always begins with the Roman emperor Justinian, whose wisdom was revived seven centuries later by English Judge Henry of Bracton, and subsequently affirmed in the Magna Carta.[27] A few centuries later the doctrine crossed the Atlantic, where it was received by state courts and eventually embraced by the U.S. Supreme Court in *Illinois Central Railroad Co. v. Illinois*.[28] Although the applications of the doctrine over these many centuries were narrowly limited by geography and the scope of protected public rights, according to the heroic account the doctrine was always broad in its guarantee of what we might call unenumerated, even natural, rights rooted in a prehistoric Golden Age.

The humdrum history of the public trust doctrine has a less inspiring beginning. As I explained in an article published several years ago, if Roman law had anything to do with it, the tracks have long since disappeared:

> Roman law was innocent of the idea of trusts, had no idea at all of a "public" (in the sense we use the term) as the beneficiary of such a trust, allowed no legal remedies whatever against state allotment of land, exploited by private monopolies everything (including the sea and the seashore) that was worth exploiting, and had a general idea of public rights that is quite alien to our own.[29]

Chapters 16 and 23 of the Magna Carta are sometimes cited as precedent for broad public rights in the use of natural resources but the reality is that the former was a response to the Crown's insistence that riparian property owners pay for improvements to facilitate the King's exclusive fishing expeditions,[30] and the latter served to prohibit the King from blocking fish passage to the detriment of the exclusive fisheries of upstream landowners.[31] The idea that navigable waters and submerged lands were held by the Crown in trust for the public is belied by the fact of the Crown's private title to the entire foreshore from the Norman Conquest and the extensive transfers of title to other private owners over the succeeding

LAW 171 (1987) (discussing how the public trust doctrine circumvents constitutional protections of private property).

26 *See generally* Huffman, *supra* note 2.

27 Huffman, *supra* note 2, at 9–10.

28 146 U.S. 387, 460 (1892).

29 *See* Huffman, *supra* note 2, at 18 (quoting Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L. J. 13, 17 (1976)).

30 MAGNA CARTA, CHAPT. 16, art. 20 (Eng. 1225) ("No embankments shall from henceforth be defended, but such as were in defence in the time of King Henry our grandfather."); *see* Huffman, *supra* note 2, at 19.

31 MAGNA CARTA, CHAPT. 23 (Eng. 1225) ("All Kydells (wears) for the future, shall be quite removed out of the Thames and the Medway, and throughout all England, excepting upon the sea coast."); *see* Huffman, *supra* note 2, at 20.

centuries.[32] Some present-day proponents who claim that the public trust doctrine forbids the alienation of submerged lands and other natural resources by the federal or state governments cite the early seventeenth century English rule[33] that ownership of submerged and tidal lands is prima facie in the Crown. While the suggestion is that this rule reflected a public right held in trust by the King in his sovereign capacity, the rule was actually invented to allow the Crown to claim title to submerged and tidal lands long possessed by private parties lacking documentation of prior royal grants.[34] To the extent this ruse was successful, the effectively expropriated lands were sold for royal profit, not retained for public benefit.[35]

Public trust advocates often link the doctrine to the Roman and common law concepts of *res communes* and *jus publicum*.[36] But in Roman law things held in common (*res communes*) did not imply a public right except in the sense that resources so described were free for the taking. As stated in Justinian's Digest, appropriation of things not owned (also *res nullius*) established title: "If I drive piles into the sea . . . and if I build an island in the sea, it becomes mine at once, because what is the property of no one becomes that of the occupier."[37]

Jus publicum in Roman law had nothing to do with public rights; rather, it served only to distinguish the laws relating to the constitution and functions of government from the laws relating to the rights, conduct, and affairs of individuals (*jus privatum*).[38] In English law, however, the term *jus publicum* has been applied to interests in submerged lands and tidal lands. In Lord Chief Justice Matthew Hale's 1670 treatise *De Jure Maris et Brachiorum Ejusdem*, Hale identified three types of coastal properties: *jus publicum*—the rights of the general public; *jus regium*—the royal rights that would equate with the police power today; and *jus privatum*—rights held by individuals including the Crown.[39] In Hale's accounting, the *jus publicum* right of "passage and repassage with . . . goods by water"[40] functioned as a limit on the scope of the *jus privatum*, but the very existence of a *jus privatum* in submerged and tidal lands underscored that the Crown had

32 *See* Huffman, *supra* note 2, at 22.

33 *See, e.g.*, Susan Morath Horner, *Embryo, Not Fossil: Breathing Life into the Public Trust in Wildlife*, 35 LAND & WATER L. REV. 23, 33–34, 38, 74 (2000); Michael L. Wolz, Note, *Applications of the Public Trust Doctrine to the Protection and Preservation of Wetlands: Can It Fill the Statutory Gaps?*, 6 BYU J. PUB. L. 475, 482 (1992).

34 Huffman, *supra* note 2, at 24.

35 *Id.*

36 *See, e.g.*, Stephen A. Deleo, Phillips Petroleum Co. v. Mississippi *and the Public Trust Doctrine: Strengthening Sovereign Interest in Tidal Property*, 38 CATH. U. L. REV. 571, 574–75 (1989); Donna Jalbert Patalano, *Police Power and the Public Trust: Prescriptive Zoning Through the Conflation of Two Ancient Doctrines*, 28 B.C. ENVTL. AFF. L. REV. 683, 703 (2001).

37 Deveney, *supra* note 29, at 30 (citing Digest of Justinian 41.1.30.4).

38 *See* Huffman, *supra* note 2, at 93–94 (discussing how *jus publicum* related to the emperor's power and how *jus privatum* related to private interests).

39 MATTHEW HALE, A TREATISE DE JURE MARIS ET BRACHIORUM EJUSDEM (1670), *reprinted in* STUART A. MOORE, A HISTORY OF THE FORESHORE AND THE LAW RELATING THERETO 370, 372–74 (3d ed. 1888).

40 *Id.* at 404.

authority to alienate such lands. Nowhere in Hale's treatise is there any suggestion of a public trust.[41]

Of course the laws of England had full force in the American colonies and were received by the states after independence.[42] The received law with respect to title to submerged lands was stated in 1805 by Chancellor Kent: "by the rules and authorities of the common law, every river where the sea does not ebb and flow, was an inland river not navigable, and belonged to the owners of the adjoining soil."[43] All lands under navigable—or tidal—waters were presumptively owned by the individual states unless a private claimant could prove otherwise.[44] Consistent with longstanding common law recognition of public rights in "passage and repassage with . . . goods by water," state courts gradually abandoned the tidal test for navigability in favor of a navigable-in-fact test, in recognition of the distinctive hydrography of the North American continent.[45] But otherwise the laws of England with respect to public and private rights in waters and submerged lands remained unchanged.

At the time of the founding of the American nation, the public rights that would later be identified in American courts with the public trust doctrine were well understood. Every individual shared in common with every other individual a right to navigate for commercial purposes, to fish and bathe (according to at least a few courts) and to pass over and occupy navigable waters and the associated submerged lands for those purposes.[46] Navigable waters were those affected by the tides and fresh waters that were navigable-in-fact.[47] These rights existed in the nature of an easement or servitude without regard for ownership of the submerged lands. As with all

41 Deveney, *supra* note 29, at 48.

42 *See generally* William Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393 (1986) (discussing the reception of English common law by the American colonies during the colonial and post-independence periods).

43 Palmer v. Mulligan, 3 Cai. 307, 318 (N.Y. Sup. Ct. 1805).

44 *See, e.g.*, Ex parte Jennings, 6 Cow. 518 (N.Y. Sup. Ct. 1826) (holding that private property had been invaded when overflow from a state dam destroyed a waterfall in a tributary).

45 Shively v. Bowlby, 14 S. Ct. 548, 552 (1894). There is reason to believe that the state courts were actually wrong in concluding that English law limited navigability to tidal waters. *See* Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines that Don't Hold Water*, 3 FLA. ST. U. L. REV. 511, 567 (1975). In fact, Chancellor Kent acknowledged that Lord Hale's recognition that "fresh rivers . . . may be under the servitude of the public interest . . . . They are called public rivers, not in reference to the property of the river, but to the public use." *Palmer*, 3 Cai. at 319. Whether or not the American rule with respect to title to submerged lands was founded on a mistaken understanding of English law, the geographical reach of the public right to commercial navigation should be unaffected. But by linking the public right to state title, courts risked compromising the public right where state title was absent, while inviting state claims of title purely on the basis of asserted navigability in fact. On the latter point, see *PPL Montana L.L.C. v. Montana*, 132 S. Ct. 1215 (2012), in which the state of Montana asserted title to long vested private and federal lands on the basis of what the U.S. Supreme Court concluded was an implausible claim of navigability.

46 *See* Huffman, *supra* note 2, at 30.

47 *Id.* at 29–30.

legal rules, there were occasional disputes arising from the exercise of these public rights—i.e., distinguishing commercial from noncommercial navigation or navigable from non-navigable waters—but there was broad agreement about the general parameters circumscribing the rights.

Unfortunately, a few early and prominent American cases[48] muddied the waters, so to speak, by confusing questions relating to title to submerged lands with questions relating to the scope of public rights in the use of waters. Because resolution of the title question turned on navigability of the overlying waters, and navigability defined the geographical extent of public rights in the use of waters, perhaps the confusion is not too surprising. But it has led many a court astray in adjudicating modern public trust doctrine claims.

Two early nineteenth century cases—both involving disputed claims to New Jersey oyster beds and both often cited as foundational to the modern public trust doctrine—were instrumental to later misunderstandings of the English doctrine of public rights in the use of navigable waters.

In *Arnold v. Mundy*,[49] Chief Justice Kirkpatrick rejected a claim of private right to particular oyster beds on the ground that the original grantor in the chain of title (the Duke of York, who had acquired title by grant from the King) held sovereign but not proprietary title to the land in question.[50] Kirkpatrick distinguished three types of property arising from the original grant to the Duke: private (already granted to individuals), public (available for grant to individuals) and common (available for all to share).[51] Citing Blackstone and Vattel, the Chief Justice described common property as including "the air, the running water, the sea, the fish, and the wild beasts."[52] These lands and resources, therefore, could not be alienated by the Crown, by the Duke to whom the Crown's authority had been delegated, or presumably by the state that succeeded to the Crown's authority—and to limits on that authority—after the revolution.

Visionary as it was, a problem with Kirkpatrick's ruling was that extensive submerged lands no different from those at issue in *Arnold* were privately owned pursuant to pre-revolutionary royal grants and both royal and state grants in New Jersey. Indeed a New Jersey law enacted in 1820 specifically allowed individuals owning lands adjacent to waters "wherein oysters do or will grow" (tidal waters) to plant and have the exclusive right to harvest oysters.[53] Kirkpatrick ignored the New Jersey statute and dismissed the pervasive grants to private parties in England and America as usurpations of public rights. After asserting that the people of New Jersey succeeded to the crown's sovereign powers and limitations, Kirkpatrick

48 Notably, *Arnold v. Mundy*, 6 N.J.L. 1 (1821), *Martin et al. v. Waddell*, 41 U.S. 367 (1842), and *Gough v. Bell*, 2 N.J.L. 441 (1850). These cases are discussed in detail in the section below.

49 6 N.J.L. 1 (1821).

50 *Id.* at 1.

51 *Id.* at 71.

52 *Id.*

53 Act of June 9, 1820, 1820 N.J. Laws 162 § 9. Consistent with the English understanding of the *jus publicum*, the Act also excepted waters leading to "any public landing" and prohibited obstruction to free navigation. *Id.*

failed to address the difficult question, also ignored by present day admirers of Kirkpatrick's expansive language, of how the powers of a democratic sovereign might be different from those of a king.

Three years after *Arnold*, and with total disregard for Chief Justice Kirkpatrick's ruling that submerged lands could not be alienated, the New Jersey Legislature enacted a statute authorizing the state to grant exclusive rights in oyster beds in return for payments to the state.[54] It was pursuant to a claim under this law that the case of *Martin v. Waddell*[55] arose and eventually worked its way to the U.S. Supreme Court. The plaintiff in *Martin* claimed an exclusive right under the same royal grants as did the plaintiff in *Arnold*,[56] while the defendant claimed an exclusive right under the 1824 New Jersey law.[57] In his opinion for the majority, Chief Justice Taney relied on Kirkpatrick's public rights dicta while ignoring that the dispute was between two individuals, each asserting an exclusive right.[58]

Although both *Arnold* and *Martin* are cited as the foundational cases in American public trust law, the central legal issue in *Martin* was whether the so-called proprietors of New Jersey, who had acquired title from the Duke of York, or the State of New Jersey had authority to grant exclusive rights of use in the state's oyster beds. In both cases it was held that, since the Magna Carta, the King and his successors in title lacked authority to grant title to submerged lands underlying navigable waters in which there was a common right to navigate and fish.[59] Yet New Jersey law provided for grants of exclusive right by the state, and in *Martin* the Supreme Court affirmed the exclusive right claimed by Martin.[60] Whether or not Taney and Kirkpatrick were correct in their understandings of English law (they were not[61]) it is difficult to understand how Kirkpatrick was able to ignore the legislature's explicit authorization of exclusive grants and how Taney was able to assert that the Crown and its successors in title lacked authority to grant exclusive private rights in oyster beds yet uphold the exclusive rights granted by the state to Martin.

Nine years after *Martin*, the New Jersey Supreme Court overruled *Arnold v. Mundy* in *Gough v. Bell*.[62] "The view . . . expressed by the Chief Justice, in *Arnold v. Mundy*," wrote the then-Chief Justice Green, "is incompatible with very numerous acts passed by the legislature of this state. The acts which authorize [dams, bridges, piers, docks and] . . . the exclusive appropriation of oyster beds to private use, are all grants or appropriations of the waters of the state destructive to some extent of common rights."[63] Green cited numerous authorities, including two of America's most eminent

54 Act of November 25, 1824, 1824 N.J. Laws 28 §§ 3–5.
55 41 U.S. 367 (1842).
56 *Id.*
57 *Id.*
58 *Id.* at 434.
59 *See* Arnold v. Mundy, 6 N.J.L. 1, 73 (1821); *Martin*, 41 U.S. at 410–13.
60 *See Martin*, 41 U.S. at 367, 418.
61 *See* Huffman, *supra* note 2, at 46–50.
62 Gough v. Bell, 22 N.J.L. 441, 459 (1850).
63 *Id.*

jurists (Massachusetts Chief Justice Lemuel Shaw and United States Chief Justice John Marshall) in rejecting Chief Justice Kirkpatrick's holding that "[t]he sovereign power itself cannot . . . make a direct and absolute grant of the waters of the state."[64]

> [If Kirkpatrick] meant only to assert that a grant of all the waters of the state, to the utter destruction of the rights of navigation and fishery, would be an insufferable grievance, it is undoubtedly true. . . . But if it be intended to deny the power of the legislature, by grant, to limit common rights or to appropriate lands covered by water to individual enjoyment, to the exclusion of the public common rights of navigation or fishery, the position is too broadly stated.[65]

In this statement, Chief Justice Green anticipated the holding four decades later in what is generally viewed as the lodestar of the modern public trust doctrine, *Illinois Central Railroad Co. v. Illinois*.[66] Justice Field's opinion in *Illinois Central* is routinely cited for the proposition stated by Justice Taney in *Martin*, that the sovereign cannot alienate submerged lands affected by the public trust.[67] That is not what the case holds, but Justice Field invited this mistaken understanding by quoting language from *Arnold*: "'The sovereign power, itself . . . cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.'"[68] What the case holds is that while the state can alienate submerged lands for the purposes of promoting navigation and commerce or for any private purpose so long as it does not interfere with the public interests in navigation, commerce, and fishing, it cannot alienate the entire present and future harbor of the state's largest city.[69] What the law does not sanction, wrote Fields, is "the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake."[70]

After *Illinois Central*, the American public trust doctrine looked pretty much like its roots in the centuries-old English common law of public rights in navigable waters. It recognized that members of the public share in common a right to commercial navigation and fishing on navigable waters, including access to submerged lands where necessary to the exercise of those rights. The only significant change from the received English law was in the definition of navigable waters to include navigable-in-fact fresh waters as well as waters affected by the tides. Although the most prominent

64 *Id.* at 458–59 (quoting Arnold v. Mundy, 6 N.J.L. 1, 53 (1821)).

65 *Id.* at 459.

66 146 U.S. 387 (1892).

67 *See, e.g.*, West Indian Co. v. Gov't of V.I., 844 F.2d 1007, 1018–19 (3rd Cir. 1988); United States v. 32.42 Acres of Land, 683 F.3d 1030, 1037 (9th Cir. 2012); Alaska Dep't of Natural Res. v. Alaska Riverways, Inc., 232 P.3d 1203, 1211 (Alaska 2010).

68 *Illinois Central*, 146 U.S. at 456.

69 *Id.* at 453.

70 *Id.* at 452–53.

litigation in American courts related to alienation of submerged lands by the states or by predecessor sovereigns, the doctrine of public rights in navigable waters was of at least equal importance to the protection of navigation from obstacles erected on privately held submerged lands. Regrettably, the prominence of alienation cases led some courts to conclude that the public rights of navigation and fishing derive from state title to the underlying lands,[71] but most courts understood that the public rights functioned in the nature of an easement or servitude without regard to ownership of the submerged lands.[72] Only in extreme cases like *Illinois Central* did the public trust doctrine function as a restraint on alienation by the state. This remained the law in most states through the first many decades of the twentieth century, although a few courts expanded the doctrine to include recreational navigation and other water-related leisure activities.[73]

IV. LIBERATING THE PUBLIC TRUST DOCTRINE

Not until Sax's 1964 article did the public trust doctrine come to the attention of activists in the freshly minted environmental movement. As a general matter the new environmentalists inherited the public ownership and government subsidy methods of their predecessor conservationists, but their central focus was on reducing, if not eliminating, pollution from industry and other private enterprises. To that end they were quick to embrace command-and-control regulation, having concluded that the traditional common law remedies of nuisance and trespass were inadequate to the task at hand. But the common law public trust doctrine showed promise for two powerful reasons. It purported to function as a limit on government where government acted contrary to alleged public rights, even when government was acting pursuant to legislative mandates. And it promised a failsafe escape from any takings clause limitations on regulations intended to protect those public rights, because whatever public rights were found to exist would, by definition, be prior in time to any and all private rights.

Although there were a few early calls for extension of the public trust concept to non-navigable waters, and beyond that to all resources in which a

71 *See, e.g.*, Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 718–19 (Cal. 1983); PPL Montana, L.L.C. v. Montana, 229 P.3d 421, 450 (Mont. 2010).

72 *See, e.g.*, Glass v. Goekel, 703 N.W.2d 58, 65 (Mich. 2005) (ruling that public trust applies to privately held littoral lands); 5F, LLC v. Dresing, 142 So. 3d 936, 947 (Fla. Dist. Ct. App. 2014) (ruling that Florida's responsibilities under the public trust doctrine are not extinguished by alienation of submerged lands to private owner).

73 *See, e.g.*, Weden v. San Juan Cnty., 958 P.2d 273, 283 (Wash. 1998) (holding that the public trust doctrine protects public rights including recreation in navigable waters); Mont. Coal. for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984) (holding that public trust doctrine extended to all waters that could be used for recreation).

public interest might be claimed,[74] state courts generally respected the historic confines of the doctrine, both with respect to geographic scope (navigable waters) and substantive public rights (navigation, fishing, and bathing).[75] There were exceptions, but the Sax-inspired ambitions for a general purpose environmental protection tool were stymied by state courts unwilling to rewrite the common law doctrine. Recognizing that his project had stalled, Sax authored his 1980 article calling for the liberation of the public trust doctrine from its historical shackles.[76] The historical shackles were simply the existing common law doctrine, so what was needed were advocates willing and able to persuade judges that the shackles must be loosened if not thrown off.

Many theories have been devised to accomplish this liberation by distancing the public trust doctrine from the common law. Some, illustrated below with reference to the works of Carol Rose[77] and Richard Epstein,[78] suggest overarching policy objectives that might have been promoted by much of the case law, but without regard for whether those objectives had any influence in the actual judicial rulings. Others, illustrated below with reference to works by Charles Wilkinson[79] and Mike Blumm,[80] assert that the doctrine derives not from the common law but from a higher source of positive law that trumps the common law and makes its history irrelevant. Still others, illustrated below with reference to works by Mary Wood[81] and the ubiquitous and dexterous Mike Blumm,[82] find within the existing law a high moral principle that overrides not only the doctrine's historical shackles but also the constitutional separation of powers and the rule of positive law.

A. Retrospective Theorizing

Professor Rose has observed that in legal and political discourse there is an organized public and an unorganized public.[83] The former is represented by, and acts via, government.[84] It is often said and generally accepted, for example, that government's responsibility is to serve the public

74 *See, e.g.*, RICK APPLEGATE, PUBLIC TRUSTS: A NEW APPROACH TO ENVIRONMENTAL PROTECTION 31 (1976) ("The trusts should include the entire body of resources and interests worthy of protection.").

75 *See e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (1971); State *ex rel.* Rohrer v. Credle, 369 S.E.2d 825, 828 (1988).

76 *See* Sax, *supra* note 5.

77 See *infra* notes 81–88 and corresponding text.

78 See *infra* notes 95–105 and corresponding text.

79 See *infra* notes 109–111 and corresponding text.

80 See *infra* notes 114–120 and corresponding text.

81 See *infra* notes 122–139 and corresponding text.

82 See *infra* notes 142–150 and corresponding text·

83 Carol Rose, *The Comedy of the Commons: Commerce, Custom, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 721 (1986).

84 *See id.* at 720–21 (explaining that acting through the unorganized public is sometimes preferable, given the difficult problems that can arise from working through government).

interest.[85] By definition, and because it is indefinite in number and identity, the unorganized public has no formal representation or means of acting.[86] The public right to navigate and fish in navigable waters, for example, exists as an abstract claim of right that everyone, including government, is obliged to respect.[87] In the absence of formal representation, contends Rose, the rights of the unorganized public have been recognized and legally protected via three common law doctrines: custom, public prescription, and public trust.[88] These doctrines arose, Rose speculates, from an understanding of the importance of the unorganized public to community.[89]

Rose explains the importance of the unorganized public to community in economic terms. There are, she says, significant economic rents realized by the unorganized public through commerce and other community activities that are dependent on public access to "inherently public" resources.[90] Navigable waters, highways, and parks are among those resources. When the public is excluded, the rents are foregone. Public trust, public prescription, and custom thus preserve these rents for the unorganized public.

That commerce and other community activities generate economic rents is clear, but it is not clear from Rose's account whether those rents accrue to the unorganized public as an amorphous entity or to the unidentified and unidentifiable individuals who constitute the unorganized public. It is also not clear why the unorganized public or its individual members are entitled to (as opposed to desirous of) these rents, which they must be if their denial is to be remedied in court rather than the legislature. The absence of answers to these questions does not diminish Rose's insight that the doctrines of public trust, public prescription, and custom, all preserve economic rents experienced by the unorganized public. But they are questions any court would ask before acting to protect those rents. In other words, the decisions that have confirmed these doctrines and established their parameters have arisen from discrete cases involving claims of right by particular parties (even if in the name of the public) not from a grand theory of economic rent maximization.

The public trust doctrine arose from the customary practices of ordinary people making use of a valuable resource that is easily shared by many and from which it is difficult for any one individual to exclude others

85 *See, e.g.*, Sax, *supra* note 5, at 473 (explaining that public concern over environmental quality has caused private citizens to "sue the very governmental agencies which are supposed to be protecting the public interest").

86 *See* Philips v. City of Stamford, 71 A. 361, 363 (Conn. 1908) (describing the unorganized public as those "who by the circumstances of the situation cannot express themselves by vote or other formal action").

87 *See* Rose, *supra* note 83, at 713 ("The land between the low and high tides has traditionally been considered 'public property,' or at least subject to a public easement for navigational and fishing purposes.").

88 *Id.* at 714.

89 *Id.* at 776.

90 *Id.* at 769. Inherently public resources are those where "returns to scale" resulting from "'interactiveness' of use" are higher than the aggregate returns from private ownership.

while maintaining the valued use. In economic terms, the customary uses that became the public rights of the public trust doctrine were nonexcludable and nonrivalrous—classic public goods.[91] Public trust law arose not from disputes among the many sharing use of a public good, but from exclusionary efforts by the Crown for its own or its favorites' benefit.[92] Although the navigating or fishing public in general was excluded in those cases, challenges to the exclusion were brought by affected individuals.[93] This required them to have standing in court, meaning each complainant asserted an individual claim of right based on the personal injury of having been excluded from use of a resource in which all members of the public share a right.[94] Thus, the resolution of a public trust case had nothing to do with rents to the unorganized public. Rather it had to do with enforcing a particular complainant's right, a right that happens to be shared with all members of the public. Presumably most judges are aware that ruling in one person's case will benefit others who share the right, but that is not peculiar to public trust, public prescription, or custom cases. The enforcement of economic liberties generally yields economic rents for the public in general.[95]

Accepting that the public trust doctrine does protect against the loss of economic rents enjoyed by the unorganized public, perhaps the doctrine should become amphibious and protect even more economic rents. The unorganized public benefits from particular uses or non-uses of resources having no connection to navigable waters or waters of any sort. Does Rose's theory suggest that the public trust doctrine should guarantee public rights in forests, deserts, prairies, scenic vistas, and wildlife? At least the latter might qualify if there is a reason to limit the doctrine to public goods, but does Rose see such a limit? Certainly environmentalists would see no reason for limiting the application of the public trust doctrine to public goods as defined by economic theory. Indeed some will claim that all resources are public goods, that none should be subject to private ownership.

Theory aside, environmental activists—always in search of legal detours around the give and take of politics and the obstructions of constitutionally protected property rights—likely find Rose's theory appealing. After all, their mission is to represent the public interest and assert public rights. If courts are willing to entertain their claim to represent the unorganized public in the assertion of claimed rights, they will have a trump on both politics and property rights. But if they or any self-proclaimed

91 Rose does not equate "inherently public property" with public goods in the economic sense of that term; rather, she suggests that some resources amenable to private ownership yield greater total returns when owned publicly rather than privately. *Id.* at 781.

92 *See* Huffman, *supra* note 2, at 19 (explaining how Chapter 16 of the Magna Carta was a reaction to the King reserving certain waters for his own use, and that this limitation on the Crown would eventually come to resemble the modern public trust doctrine).

93 *Id.* at 15.

94 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (stating that each individual plaintiff must have suffered an injury to support standing for that plaintiff).

95 Increased economic rents for the public are generally unevenly distributed among the members of the public, underscoring the difficulty of distinguishing public from private benefits and the risks of private rent seeking in the name of the public.

representative of the public interest is allowed to sue for the enforcement of claimed public rights, the public will no longer be unorganized. In fact, is there any longer anything we can call the unorganized public? No doubt there are many members of the public who feel unorganized, but from the perspective of the courts and government in general there must seem to be no interest unrepresented, and all claim to speak for the public. When the public trust, public prescription, and custom doctrines emerged there was little incentive for the public to organize because there were few avenues of influence on those in power. Today, there are so many avenues for public input that government can scarcely act.

Professor Epstein has theorized that public trust is the mirror image of eminent domain. "The eminent domain rules" says Epstein, "govern the forced conversion of private to public property. Rightly understood, the public trust rules do the reverse, and govern the forced conversion of public to private property."[96] Eminent domain is the power of government to take private property for a public purpose, so long as just compensation is paid.[97] Epstein explains that this prevents one or a few private property owners (holdouts) from hijacking government's efforts to provide public services like highways.[98] The public trust, says Epstein, precludes government from transferring public rights to private parties without just compensation.[99] The theory, like Rose's, is rooted in the idea that some resources are better owned privately and others are better owned by the public.[100] While the mutual gains of trade between private parties usually will assure that privately owned resources are put to their optimal use, contends Epstein, private ownership of resources like navigable lakes and rivers usually will prevent their optimal use.[101] But "usually" is not "always," so eminent domain and public trust allow transfers from private to public and vice versa without sacrificing the social good that generally results from appropriate private and public ownership. According to Epstein, the guarantee that only welfare-improving transfers from private to public and vice versa will occur is the requirement of just compensation.[102]

It is a logical theory with beautiful symmetry but there is no evidence that judges or advocates have ever connected the two doctrines as Epstein does. Epstein suggests that the *Illinois Central* case is illustrative,[103] but nowhere in the majority or minority opinions is it even hinted that just compensation from Illinois Central Railroad to Illinois would have made the

96 Richard A. Epstein, *The Public Trust Doctrine*, 7 CATO J. 411, 414 (1987).

97 BLACK'S LAW DICTIONARY 637 (10th ed. 2014).

98 Epstein, *supra* note 96, at 415.

99 *See id.* at 421 (stating that the requirement of just compensation helps limit the possibility that rights will be given away "for a song").

100 *Id.* at 414. In the case of navigable lakes and streams, says Epstein, "any system of divided private ownership, based on first possession, tends to create the very bargaining and holdout problems that the institution of private property is designed to overcome." *Id.* at 415.

101 *Id.* at 415.

102 *Id.* at 416.

103 *See id.* at 426–28 (theorizing that the public trust doctrine is the mirror image of eminent domain, and explaining the proposition in the context of *Illinois Central*).

original grant enforceable against the state. Perhaps there is an implied public use requirement in the public trust doctrine's limiting state alienations of submerged lands to those that do not obstruct the public right of navigation, but there is nothing in public trust law suggesting that compensation must be paid when submerged lands are alienated.[104] In most cases there will be public benefits—which Epstein would properly count as implied compensation[105]—flowing from the privatization of state lands, and in some cases there might be a transfer of cash, but the public trust doctrine requires neither. Epstein's transaction-avoidance explanation for why some resources are better public and others are better private is consistent with the general theory that the common law has tended to efficient rules and may therefore help explain why navigable lakes and rivers are presumptively public in the common law.[106] But such post hoc explanations of the common law are often just that—after the fact theorizing with little if any connection to the motivations of individual judges in individual cases.

B. Higher Law

Given that the eminent domain principle has a constitutional home in the Fifth and Fourteenth Amendments, Epstein goes beyond positing that public trust and eminent domain are borne of the same policy purpose to inquire as to the possible constitutional home of the public trust doctrine. "In principle," concludes Epstein, "the public trust doctrine should operate at the constitutional level, as a parallel to the eminent domain clause. Nevertheless the basis for the public trust doctrine in the United States Constitution is difficult to identify."[107] He suggests the Fourteenth Amendment due process and equal protection clauses as possible "constitutional home[s]" for the public trust doctrine—the due process clause because it can be and has been interpreted to prohibit uncompensated takings[108] and the equal protection clause because the explicit eminent domain clause prohibition on takings "bar[s] Government from forcing some people alone to bear public burdens which, in all fairness

104 *See* Rose, *supra* note 83, at 761 (recognizing some instances where public prescription and public trust require no compensation).

105 Epstein views any regulatory constraint (or tax imposition) on private property as a taking. In many cases these regulations have the character of what Justice Holmes called "reciprocity of advantage," which occurs when regulations of property provide benefits to those whose property is regulated. Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922). While the regulation is a taking according to Epstein, it is not unconstitutional because just compensation in the form of these reciprocal benefits has been effectively paid. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND POWER OF EMINENT DOMAIN 195 (1985).

106 "In the original position property should be subject to that form of ownership that minimizes the bargaining problems associated with moving the asset to its highest-valued use." Epstein, *supra* note 96, at 414. On the efficiency of the common law, see Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL. STUD. 51 (1977) and George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977).

107 Epstein, *supra* note 96, at 426.

108 *Id.* at 427 (citing Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 236 (1896)).

and justice, should be borne by the public as a whole."[109] Perhaps Epstein seeks a constitutional home for the public trust doctrine, allowing it to trump ordinary law, but it is unclear why public trust is any different from the entire range of common, statutory, and regulatory laws that must comply with due process, equal protection, and every other relevant constitutional guarantee.

Charles Wilkinson agrees with Epstein that the public trust doctrine derives from the Constitution, but Wilkinson bootstraps not from eminent domain but from the navigation servitude implicit in the commerce clause.[110] "The navigation servitude and the public trust doctrine are parallel doctrines," says Wilkinson, "both affording complementary protections to major watercourses."[111] Noting that the equal footing doctrine guarantees to each state the "extraordinary implied [submerged] land transfer," Wilkinson says that "[i]t follows that the trust, a 'servitude' or 'easement' on the underlying land title, is also imposed by the same source, the Constitution."[112] Because "the Supreme Court has consistently given a constitutional cast to state and federal prerogatives and obligations with regard to waters navigable for title, due ultimately to the key role of these watercourses in the country's commerce and society and in the formation of the national government," concludes Wilkinson, "the fairest and most principled conclusion is that the public trust doctrine is rooted in the commerce clause and became binding on new states at statehood."[113]

From a purely historical perspective, Wilkinson's claim is demonstrably wrong. What American courts came to call the public trust doctrine in the post-constitutional era had direct common law lineage to public rights in navigable waters under the English law that governed in every American colony prior to independence. English law was received in all of the original states independent from the constitutional allocation of sovereign powers between the federal and state governments.[114] The rights recognized in the public trust doctrine, like all rights of Englishmen, were secured, not granted, by government. The Constitution, as amended by the Bill of Rights and later by the Fourteenth Amendment, obliged the federal and state governments to respect what had been the rights of Englishmen. The Constitution was never understood to ratify or be the source of those rights.

Putting aside that Wilkinson's claim contradicts the history of Anglo-American liberties, it also fails as a matter of constitutional law. Although both the navigation servitude and the public trust doctrine limit the property rights new states acquired at statehood from the federal government, and therefore limit the rights of private successors to title, it does not follow that

109 *Id.* at 428 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

110 Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENVTL. L. 425, 459 (1989).

111 *Id.* at 458–59.

112 *Id.* at 459 (footnotes omitted).

113 *Id.*

114 *See* Stoebuck, *supra* note 42, at 426 (characterizing the common law exception process as "indigenous" and pre-independence).

both doctrines derive from the Constitution. Because the power to regulate interstate and foreign commerce is among the enumerated powers of the federal government, and thus not among the powers of the state governments, it is reasonable to view the navigation servitude limit on state authority as arising from the constitutional allocation of sovereign authority in the federal system. The public trust doctrine, however, has nothing to do with the allocation of sovereign power between the federal and state governments. Correctly understood, it recognizes a servitude or easement in any and all properties underlying navigable waters without regard for what sovereign has authority over those waters or which, if any, sovereign holds title to the associated submerged lands. Where the navigation servitude is a limit on state title to submerged lands that arises from the commerce regulation power of the federal government, the public trust servitude exists independent from the allocation of commerce regulating authority or from current or prior sovereign title.

Professor Blumm does not claim, as do Epstein and Wilkinson, that the public trust doctrine derives from particular provisions of the Constitution. Rather, he suggests a more subtle path for constitutional liberation of the doctrine. Drawing on an earlier suggestion from Bill Rodgers,[115] Blumm argues that the public trust doctrine functions as a guide to constitutional and statutory interpretation.[116] The argument is similar to the levels of scrutiny and balancing methodologies employed in constitutional interpretation and analysis. In equal protection law, for example, alleged discrimination on the basis of race receives more intense scrutiny in the courts then does alleged discrimination on the basis of place of residence or occupation.[117] Differing levels of scrutiny are usually explained on one of three grounds: the perceived likelihood based on historical experience that differential treatment is ill-motivated, the importance of the individual rights affected, and the importance of the public end sought to be achieved.[118] The latter two necessarily imply a balancing of individual liberties against public purposes with a thumb on one side or the other depending on the perceived importance of the rights and public purposes at stake.

Blumm argues that the public trust doctrine requires or warrants a similar thumb on the judicial scales when public trust rights are threatened. "While all common-law rules benefit from the maxim that legislation in derogation of the common law is to be strictly construed," writes Blumm, "courts construing statutes terminating public trust restrictions take a particularly narrow view."[119] This especially narrow construction, argues Blumm, reflects a "presumption favoring public ownership and control."[120]

115 1 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER § 2.20 164 (1986).

116 Blumm, *supra* note 1, at 587.

117 *See, e.g.*, Oxford House-C v. City of St. Louis, 77 F.3d 249, 251 (8th Cir. 1996) (using rational basis review to determine if a zoning ordinance discriminated against the disabled in violation of the Equal Protection Clause).

118 See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 714–15 (4th ed. 2013) (describing the rationale behind different levels of scrutiny).

119 Blumm, *supra* note 1, at 587.

120 *Id.*

While it is arguable that the general maxim referenced by Blumm has constitutional provenance in the sense that legislation in derogation of the common law will likely affect individual liberties guaranteed by the Constitution, it is difficult to conjure a constitutional basis for Blumm's identification of a "particularly"[121] narrow construction in the case of the public trust doctrine.

Nowhere in the Constitution is there a presumption favoring public ownership and control. If the founding generation presumed anything with respect to public versus private title it was surely the latter. No one imagined that government at any level would hold title to more than those properties necessary for basic government facilities. More generally, the guarantees of property and contract rights, along with the narrow restrictions on the powers of the federal government, imply a presumption favoring private ownership and control. Nor is there anything in the public trust doctrine favoring public ownership and control of submerged lands. Although the *Illinois Central* majority rightly held that the state could not alienate the entire harbor of the City of Chicago, it is theoretically possible, absent governmental corruption, for the public rights of navigation to be fully respected without public ownership of any submerged lands. If there is a presumption that guided the *Illinois Central* Court it was that public authorities are easily corrupted and therefore cannot be trusted to enforce the public's rights against a single and politically powerful private entity. *Illinois Central* posed a monopoly problem, not a choice between public and private ownership.

C. Moral Imperatives and Natural Law

The foregoing are only a few among many efforts to create a home for the public trust doctrine somewhere other than the common law of property. Many years ago I reviewed several of these efforts in an article in this journal.[122] All of these, and the imaginative suggestions that have followed over the intervening years, have been bent on fulfilling Professor Sax's quest for the liberation of the doctrine from its historical common law shackles. Among the most imaginative of the modern liberators are professors Mary Wood and my aging best man Mike Blumm. Wood has inspired a cottage industry of lawsuits based on what she calls the atmospheric trust. Blumm contends that the public trust doctrine derives from an unnamed source of higher law that limits the sovereign powers of the people as exercised by their elected representatives in both Congress and state legislatures, and presumably when exercised directly by citizen initiative.[123]

Professor Wood has written extensively and imaginatively on the public trust doctrine. Indeed, the evolution of thinking in her scholarship provides a

121 *Id.*

122 James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989).

123 Amicus Curiae Brief, *supra* note 20, at 1.

sort of roadmap for how she would have the courts arrive at the recognition of an atmospheric trust. In a two-part article published in 2000 and 2001,[124] Wood asserted that Native American tribes hold a property interest in wildlife in the form of a trust that "inheres in any sovereign."[125] In the second part of that article, Wood asserted that tribes also have a property interest in the form of a "servitude that encumbers ceded lands" that provide habitat for tribal wildlife.[126] In a 2004 article, Wood proposed a reinterpretation of section 7 of the Endangered Species Act[127] in accordance with "wildlife trust principles" that recognize "every sovereign government has a property interest in wildlife, in the form of a sovereign trust."[128] In a 2007 essay, Wood urged environmentalists to recognize that they are spinning their regulatory wheels and need to embrace a new trust paradigm.[129] "The corpus of Nature's Trust encompasses the natural resources vital to our society's welfare and human survival," declared Wood; the trustee is government, the beneficiaries are past, current, and future generations, and it falls to the courts to demand that the government meet its fiduciary responsibilities.[130] In a 2009 article, Wood explained how her Nature's Trust idea would be implemented by bureaucrats and judges, noting that "a public trust encumbrance on private title has never been extinguished and remains an antecedent servitude to preserve natural infrastructure."[131] The latest, though probably not final, stage in Wood's public trust thinking is the atmospheric trust. "The essential doctrinal purpose expressed by courts in public trust cases," says Wood, "compels recognition of the atmosphere as one of the crucial assets of the public trust."[132]

Wood, like all public trust liberationists, regularly references Justinian's description of "the air, running water, the sea, and consequently the shores

124 Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (pt. 1): Applying Principles of Sovereignty to Protect Imperiled Wildlife Populations*, 37 IDAHO L. REV. 1 (2000); Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (pt. 2): Asserting a Sovereign Servitude to Protect Habitat of Imperiled Species*, 25 VT. L. REV. 355 (2001).

125 Wood, *The Tribal Property Right to Wildlife Capital (pt. 2)*, *supra* note 124, at 358.

126 *Id.* at 359. Ceded lands are those claimed by tribes but relinquished to the United States by treaty. *See, e.g.*, Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753, 763 (1985) (discussing use rights that tribes retain in ceded lands).

127 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012).

128 Mary Christina Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 ENVTL. L. 605, 608–09 (2004).

129 Mary Christina Wood, *Nature's Trust: Reclaiming an Environmental Discourse*, 25 VA. ENVTL. L.J. 243, 261–62 (2007) [hereinafter *Nature's Trust*].

130 *Id.*

131 Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (pt. 2): Instilling a Fiduciary Obligation in Governance*, 39 ENVTL. L. 91, 93 (2009) [hereinafter *Advancing the Sovereign Trust of Government*].

132 Mary Christina Wood, *Atmospheric Trust Litigation Across the World*, *in* FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST 99, 112 (Kent Coghill, Charles Sampford & Tim Smith eds., 2012). For a full development of the atmospheric trust concept and strategy see MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2013).

of the sea" as "things common to mankind."[133] Although, as noted earlier, these things were common to mankind because ownership was difficult if not impossible, or in the consequent case of the seashore, a potential obstacle was common access to the unowned sea,[134] the quotation has particular appeal to Wood given her most recent landing on the atmospheric trust idea. But she acknowledges that nothing in the intervening millennia and a half of law, except perhaps a handful of very recent cases, gets her where she wants to be. To be successful, says Wood, the new trust paradigm "must push beyond the current boundaries of the public trust doctrine."[135] Although those boundaries have been pushed a little over the past four decades in terms of both trust resources and protected uses of those resources, for the most part they remain the shackles that Sax recognized.

Beyond apocalyptic warnings that "[e]cological systems are collapsing across the globe, and climate crisis threatens the continued viability of human civilization as we know it"[136] and impassioned pleas to halt "[t]he trajectory of civilization [that] threatens to trigger the planet's sixth mass extinction,"[137] Wood's central argument is that governments are failing to do what needs to be done. Presidents, members of Congress, legislators, governors, mayors, bureaucrats, you name them and they are all failing to do what needs to be done. The problem is not that government officials lack the authority to do what needs to be done. The problem is that they "spend nearly all of their resources to permit, rather than prohibit, environmental destruction."[138] Government officials fail to understand that they are first and foremost trustees responsible to do what needs to be done in the interest of past, current, and future generations. Wood is interested in "urging or forcing government officials to remake their public identities from bureaucrat to trustee."[139]

Another problem Wood's theories would help resolve is that "private property rights rhetoric has cowered officials at every level of government, triggering a 'politics of fear [that] shift[s] our attention toward the personal losses we might sustain rather than collective losses we are all enduring.'"[140]

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133 WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE, *supra* note 132, at 126; *see also, e.g.*, Wood, *Atmospheric Trust Litigation Across the World*, *supra* note 132, at 106 ("[T]he principle finds expression in such venerable codes as the Institutes of Justinian."); *Nature's Trust*, *supra* note 129, at 263 (noting that the doctrine has "roots extending back to Justinian times").

134 Note that the common right to "approach the seashore" was limited by the private rights associated with "habitations, monuments and buildings." J. INST. 2.1.1, *available at* http://thelatinlibrary.com/law/institutes.html.

135 Mary Christina Wood, "*You Can't Negotiate with a Beetle": Environmental Law for a New Ecological Age*, 50 NAT. RES. J. 167, 202 (2010).

136 *Id.* at 167.

137 Wood, *Atmospheric Trust Litigation Across the World*, *supra* note 132, at 99.

138 *Nature's Trust*, *supra* note 129, at 252.

139 *Advancing the Sovereign Trust of Government*, *supra* note 131, at 93.

140 *Nature's Trust*, *supra* note 129, at 257 (alteration in original) (quoting Zach Welcker, *Welcome Speech to the Twenty-Fifth Annual Public Interest Environmental Law Conference: Cultivating Corridors for the People: The Next Twenty-Five Years*, 22 J. ENVTL. L. & LITIG. 197, 198 (2007)).

Why government officials are "cowered" by property rights rhetoric is puzzling given the rare successes of constitutional takings claims, but it is certainly true that one of the best things about the public trust approach is that it trumps any and all takings claims. "It is well settled," writes Wood, "that where the public trust limits a landowner's use of property, there is no 'taking' of private property, because the public ownership is antecedent and superior to the property owner's title."[141]

Professor Blumm's argument is set forth in the aforementioned amicus brief filed by Bill Rodgers on behalf of fifty-three law professors in support of a petition for certiorari to the U.S. Supreme Court in the case of *Alec L. v. McCarthy*.[142] Blumm summarizes the law professors' position in these words:

> In the underlying decision, the public trust doctrine has been misunderstood as purely a matter of state common law. The doctrine is in fact an inherent limit on sovereignty which antedates the U.S. Constitution and was preserved by the Framers as a reserved power restriction on both the federal and state governments.[143]

Much of the brief is devoted to demonstrating that the public trust doctrine, contrary to the prevailing understanding, is part of federal as well as state law. In a nutshell, the argument is that the *Illinois Central* Court's failure to "identify any source of state law that imposed this trust obligation on the state" means "the Court must have been applying federal law."[144] Furthermore, writes Blumm, "[a] majority of state courts citing the decision have considered it binding upon them, presumably due to its federal nature."[145] Never mind that the public trust doctrine has deep roots in the common law and has been long since received as the law of the State of Illinois,[146] and never mind that the Supreme Court has jurisdiction to review questions of state law when necessary to the resolution of a claim under federal law,[147] and never mind that when ruling on state law, state courts routinely cite the common law opinions of other courts, both state and federal.

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141 *Advancing the Sovereign Trust of Government*, *supra* note 131, at 117–18. On this theme, see James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. OF LAND USE & ENVTL. L. 171 (1987).

142 Amicus Curiae Brief, *supra* note 20; *see also* Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014); Alec L. v. Jackson, 863 F. Supp. 2d 11 (D.D.C., May 31, 2012). The plaintiff claims that defendants violated her fiduciary duties under the public trust doctrine to protect and preserve the atmosphere. *McCarthy*, 561 F. App'x at 7–8; *Jackson*, 863 F. Supp. 2d at 12. The cases are part of a nationwide strategy to find a court willing to embrace the atmospheric trust argument.

143 Amicus Curiae Brief, *supra* note 20, at 1.

144 *Id.* at 9–10.

145 *Id.* at 12.

146 *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791, 801–02 (1951) (discussing the adoption of laws by western states shortly after the American Revolution).

147 Judiciary Act of 1789 § 25, 1 Stat. 73, 85–86.

After concluding that the *Illinois Central* Court "must have been applying federal law," Blumm declares: "That source of federal law lies embedded in the U.S. Constitution."[148] Where, precisely, he does not say, but he discusses at some length the "reserved powers doctrine," which he says "recognizes inherent limits on sovereignty."[149] It is a fair question whether the reserved powers doctrine is embedded—in a penumbra, perhaps?—in the U.S. Constitution, but it is incorrect to say that it limits sovereignty. To the contrary, the reserved powers doctrine prohibits states from limiting their own sovereign authority by contractual agreement. The doctrine holds that a contract agreed to by an earlier legislature cannot limit the sovereign authority—police and eminent domain powers—of a subsequent legislature.[150]

Whether it is the reserved powers doctrine or some other implied constitutional mandate should not really matter to Blumm's argument if the public trust limits on federal and states sovereignty are "inherent," as he asserts. Indeed, if such limits are inherent, no constitutional provision, express or implied, could remove them. Blumm's claim is that no sovereign, not a monarch claiming authority from God, nor an elected legislature claiming authority from the Constitution or from the people, has the power to do what the public trust doctrine prohibits. How are we to know what the doctrine prohibits? We must ask the courts. Blumm will surely insist that in enforcing the public trust limits on sovereignty courts are themselves limited by the law of public trust, but he provides no explanation for how, absent a sovereign, a judge is to distinguish authoritative from spurious public trust claims. Under Blumm's theory, the judge is the de facto sovereign.

English law and political theorists—from Aristotle to Bodin to Hobbes, Locke, and Rousseau—taught the framers that sovereignty is both supreme and limited; supreme in that there is no higher lawmaking authority, and limited in that power is only legitimate when exercised on behalf of the people—in Roman law the *populus Romanus*.[151] In Anglo-American law the basic concept is simple: "By the sovereign power . . . ," wrote Blackstone, "is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on."[152]

At the time of the founding of the American nation, it was generally accepted that all sovereignty resides in the people—the *populus Americanus*.[153] Thus, the challenge for the framers of the Constitution was to

148 Amicus Curiae Brief, *supra* note 20, at 10.

149 *Id.*

150 *See* U.S. Trust Co. of New York v. New Jersey, 97 S. Ct. 1505, 1518 (1977).

151 *See* THE OXFORD COMPANION TO AMERICAN LAW 755–57 (Kermit L. Hall ed. 2002), *available at* http://www.oxfordreference.com/view/10.1093/acref/9780195088786.001.0001/acref-9780195088786.

152 1 WILLIAM BLACKSTONE, COMMENTARIES *49.

153 *See* PAUL K. CONKIN, SELF-EVIDENT TRUTHS: BEING A DISCOURSE ON THE ORIGINS & DEVELOPMENT OF THE FIRST PRINCIPLES OF AMERICAN GOVERNMENT—POPULAR SOVEREIGNTY, NATURAL RIGHTS, AND BALANCE & SEPARATION OF POWERS 52 (1974) (describing "the almost unanimous acceptance of popular sovereignty at the level of abstract principle" among those

establish a government that would be effective in exercising the powers inherent in sovereignty without compromising the liberties of the people and thereby encroaching on their sovereignty. The framing debates were largely about the appropriate delegation of sovereign powers among the branches of the new national government and between that government and the states, not about what those sovereign powers are. That the framers accepted that the full scope of sovereign authority is made clear by their enumeration only of the powers of Congress. The remaining powers inherent in sovereignty were reserved, without enumeration, to the states or, as the Ninth Amendment declares, to the people.[154] Contrary to Blumm's argument, there was not even a hint that sovereignty, whether delegated or retained exclusively by the people, was limited except by the responsibility of government to exercise its delegated authority for the public good.

But, I can hear Blumm objecting, protection of the public good is precisely why the public trust doctrine should be understood as an "inherent limit on sovereignty." And there can be little doubt that any court willing to embrace Blumm's argument will declare, with due sincerity, that it does so only for the public good. The fatal flaw in any such judicial declaration will be a total lack of judicial capacity to know the public good or authority to proclaim it. Under a Constitution founded on the principle of popular sovereignty, only the people, acting directly or through their elected representatives, have the capacity to know, or the legitimate authority to declare, the public good.

Like Wood, Blumm is left to some higher authority—higher than the sovereign people—to give his argument legal legitimacy. Wood and Blumm both acknowledge that natural law, or something like it, is really all that remains. Blumm concludes his brief asserting that "[t]he public trust doctrine imposes an inherent limit on sovereignty," without offering a clue as to the source of that limit.[155] Wood offers "as a matter of fact" that public trust rights "need not even be written in the Constitution for they are assumed to exist from the inception of humankind."[156] What other than natural law could they be talking about? Wood sums it up with this quotation from Oren Lyons: "You can't negotiate with a beetle. You are now dealing

writing the state constitutions after the American Revolution); Edmund S. Morgan, *The Problem of Popular Sovereignty*, *in* THE AMERICAN PHILOSOPHICAL SOCIETY, ASPECTS OF AMERICAN LIBERTY: PHILOSOPHICAL, HISTORICAL AND POLITICAL 95, 101 (1977) ("The [American] Revolution produced many new affirmations of the idea [of popular sovereignty], especially in the constitutions of the independent states, which generally began with assertions that the government rested wholly on the popular will.").

154 U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

155 Amicus Curiae Brief, *supra* note 20, at 25.

156 Oposa v. Factoran, G.R. No. 101083 (S.C., July 30, 1993) (Phil.), *quoted in Advancing the Sovereign Trust of Government*, *supra* note 131, at 70.

with natural law."[157] But natural law is a dangerous path for Wood, Blumm, and their fellows to travel.

Although the natural law tradition has deep roots in American constitutional history, the legal rights it has supported are not the legal rights imagined by the public trust liberationists. Blackstone identified as "rights of all mankind": "the right of personal security, the right of personal liberty, and the right of private property."[158] Nothing states the American embrace of the natural rights doctrine more clearly than the Declaration of Independence, which "stands as a memorial to the devout belief that . . . a government of laws had for its one and only objective the protection of individual rights against both private and social interference."[159] Justice Joseph Story wrote that "[t]he fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred."[160] Among the most reviled and disparaged decisions of the U.S. Supreme Court are some (for example *Lochner v. New York*[161] and *Muller v. Oregon*[162]) firmly rooted in the natural rights tradition. There are, of course, other natural rights decisions Wood and Blumm might find more appealing (*Griswold v. Connecticut*,[163] for example) but therein lies the failing of natural law jurisprudence in a rule of law system. As Charles Haines observed a century ago: "Natural law, a law to which legislation may or may not conform, is a conception which is constantly taking new form."[164] Where it once served as an extra-constitutional protector of private property rights, Wood and Blumm would now have it serve as an extra-constitutional justification for imposing limits on private property rights and granting judges unbounded coercive authority over the legislative and executive branches of government.

Of course if one rejects that "Governments are instituted among Men . . . to secure [their unalienable] rights"[165] and that property rights are among those to be secured, much of the foregoing will not be persuasive. Professor Wood, for example, has written that "[g]overnment is constituted for the purpose of assigning individuals certain responsibilities as part of a collective society."[166] That wrenching idea is a far cry from the views of those who laid the foundation of Anglo-American law and the founders of the American nation. For Wood's vision of government to take hold in the

157 Oren Lyons, The Ice Is Melting, Twenty-Fourth Annual E.F. Schumacher Lectures (Oct. 2004), http://www.centerforneweconomics.org/publications/lectures/lyons/oren/the-ice-is-melting (last visited Apr. 17, 2015), *quoted in* Wood, *supra* note 135, at 167.

158 1 WILLIAM BLACKSTONE, COMMENTARIES *125.

159 Fowler Vincent Harper, *Natural Law in American Constitutional Theory*, 26 MICH. L. REV. 62, 64 (1927).

160 Wilkinson v. Leland, 2 U.S. 627, 657 (1829).

161 198 U.S. 45 (1905); *see also, e.g.*, Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV. 859 (2005) (discussing some of the controversy surrounding the decision over the years).

162 208 U.S. 412 (1908).

163 381 U.S. 479 (1965).

164 Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 617 (1916).

165 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

166 Wood, *supra* note 128, at 251.

United States, centuries of tradition and the entire U.S. Constitution will have to be liberated from their historical shackles.

V. CONFUSING PUBLIC TRUST WITH THE PUBLIC TRUST DOCTRINE

Many of the efforts to liberate the public trust doctrine from the common law share a confusion of the specific responsibilities of public officials pursuant to the public trust doctrine with the general obligations of all public officials in a democratic republic. The former are legal duties in the Hohfeldian sense, meaning that for every duty there is a reciprocal right that can be enforced in court.[167] The latter are political duties that may be every bit as consequential as legal duties but are enforceable only by voters. Some public trust liberationists argue that at least some political duties should be treated as trust responsibilities enforceable by courts.

Mary Wood expresses the government-as-trustee perspective in the following broad terms:

> The Nature's Trust approach defines government's duty in natural resources management as obligatory and organic to governmental power. It suggests a trust limitation as an attribute of government itself. Properly cast as intrinsic to government, and reaching back to fundamental understandings that are part of sovereign duty, the Nature's Trust framework logically applies to any local, state, regional, or national government. All forms of government are either sovereign themselves or agents of a sovereign. They are thus either trustees themselves or agents of the trustees.[168]

"Simply stated," Wood writes elsewhere, "government trustees [who serve at the will of the public] may not allocate rights to destroy what the people legitimately own for themselves and for their posterity."[169] Peter Manus expresses a similarly broad concept of trust responsibility: "It is at least tacitly agreed that the U.S. government owes some sort of public trust-based responsibilities to the people and that this trust embraces ideas like democracy, sovereign responsibility, and the historical agrarian, maritime, and other wilderness-based elements of American culture."[170]

Illustrative of arguments deriving from an erroneous equation of public trust doctrine duties with the general duties of government in a democratic republic are those constructed to assert that the public trust doctrine applies to public lands and wildlife. Both are resources in which the public has a strong and abiding interest, but there is nothing in the common law to suggest that government's management or alienation of either is somehow limited by the public trust doctrine.

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167 Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–32 (1913).

168 Wood, *supra* note 135, at 203.

169 *Id.* at 201.

170 Peter Manus, *To a Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENVTL. L.J. 315, 320 (2000).

Writing for the 1980 symposium at which Sax called for the liberation of the public trust doctrine, Charles Wilkinson constructed a theory for applying a liberated public trust doctrine to federal public lands.[171] According to Wilkinson, public lands have been subject to "different public trusts at different times, as trust notions have evolved to meet changing needs and attitudes."[172] Through much of the nineteenth century, federal lands were held in trust for future states so they could enter the union on an equal footing with the original states.[173] It was generally expected that the states would, in turn, sell or otherwise transfer the lands to private owners.[174] Beginning in the final decades of the nineteenth century, says Wilkinson, congress and the president implemented a new policy of public lands retention and management pursuant to powers said by the courts to be the natural outcome of the lands being held in trust for all the people.[175] Then, beginning about 1970, the trust idea began to be turned on its head. While acknowledging mixed reactions from the courts, Wilkinson claimed that the public trust doctrine had begun to function as a limit on the powers of the federal government in the use and management of public lands independent from statutory mandates.[176] In effect, argued Wilkinson, the federal government had transitioned from a trustee for future sovereign states to a proprietor to a sovereign owner and trustee for the people of the United States.[177]

While Wilkinson's account of two centuries of public lands history gets the facts right, he is creative in his description of the governing law. In stating that the federal government held lands in trust for future state governments, Wilkinson uses the term trust in its common law sense, meaning that legal title was in the federal government and equitable title was in the future state governments.[178] Although there is currently yet another effort to enforce that trust, the second phase in Wilkinson's history better reflects what the term trust has meant for well over a century. The federal

171 *See* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 177–78 (1980).

172 *Id.* at 278.

173 Pollard v. Hagan, 44 U.S. 212, 224 (1845).

> Whenever the United States shall have fully executed these trusts [relating to lands ceded by the original states], the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever. We, therefore, think the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for that particular purpose.

Id.

174 *See* Wilkinson, *supra* note 171 at 276 (explaining that as the central method of opening the American West for settlement, public lands were sold or otherwise transferred away).

175 Wilkinson, *supra* note 171, at 296.

176 *Id.* at 284.

177 *Id.* at 278–93 (detailing three periods of federal land management).

178 *See* Wilkinson, *supra* note 171, at 280–82, 284, 302 (discussing the federal government's broad power over the land it held in trust for the benefit of future states).

government holds legal and equitable title to virtually all the lands it has retained and is responsible to the people to manage or alienate those lands in the public interest.[179] People trust that their elected representatives will assure that the government will meet its responsibilities in the same sense that people trust their friends and family to be polite, caring, honest, and respectful, etc. The subsequent history described by Wilkinson suggests that, as a general matter, that trust (meaning confidence) is warranted.[180] Although there have been the regular breaches of democratic trust resulting from the inevitable influence of rent seekers in and out of government, the general trend from retention and management to acquisition and preservation reflects the growing political influence of environmental interests and the declining influence of industry and other consumptive users of the public lands. It does not, however, support Wilkinson's claim that the government is now a trustee in the sense of being duty-bound to preserve public lands for particular purposes. As a legal matter, the federal government remains a proprietor of roughly one-third of the nation's lands with responsibility to retain, manage or alienate those lands as the people acting through their representatives direct.[181]

One of the earliest articles advocating the inclusion of wildlife among resources in which the public has rights pursuant to the public trust doctrine was published by my former colleague Gary Meyers. As the title of his article makes clear,[182] Meyers recognized that he was advocating for the expansion of the doctrine, not that wildlife had somehow always been a public trust resource. "I propose," wrote Meyers, "reinvigorating and expanding the public trust doctrine so that its protection is extended to wildlife, and by necessity, to the habitat it depends upon."[183] "Over the past two decades," wrote Patrick Redmond twenty years after Meyers' article, "numerous legal scholars and environmental advocates have lobbied for the recognition of a 'public trust in wildlife' following logically from the common law public trust doctrine."[184]

I suspect Redmond included legal scholars among the "lobbyists" for an expanded public trust doctrine without meaning to be ironic, given that much legal scholarship in many fields is less about what the law is than about what environmentalists might call recycling—salvaging old laws and putting them to new uses. In the case of wildlife as a public trust resource, the recycling starts with the *res nullius* status of wildlife under Roman law

179 KRISTINA ALEXANDER & ROSS W. GORTE, FEDERAL LAND OWNERSHIP: CONSTITUTIONAL AUTHORITY AND THE HISTORY OF ACQUISITION, DISPOSAL, AND RETENTION 1, 3–7 (2007).

180 *See id.* at 298–99 (recognizing that modern federal management of public lands takes into account burdens on state and local taxation, public participation, economic and environmental values, and preservation for future generations).

181 KRISTINA ALEXANDER & ROSS W. GORTE, FEDERAL LAND OWNERSHIP: CONSTITUTIONAL AUTHORITY AND THE HISTORY OF ACQUISITION, DISPOSAL, AND RETENTION 1, 3–7 (2007).

182 Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723 (1989).

183 *Id.* at 724.

184 Patrick Redmond, *The Public Trust in Wildlife: Two Steps Forward, Two Steps Back*, 49 NAT. RES. J. 249, 250 (2009).

and settles firmly on the overruled Supreme Court holding in *Geer v. Connecticut*.[185]

Under Roman law *res nullius* meant only that it was generally not owned, in the case of wildlife because it was often transient or not worth the expense of ownership before actual capture.[186] Indeed, under Roman law, as under the common law, ownership was recognized upon capture. If there was a right held in common by all the people it was the right to acquire title to wild animals by capturing them.[187] In *Geer*, Justice White quoted Blackstone for the same principle in English law with the caveat that the common right of capture "'may be restrained by positive laws enacted for reasons of state or for the supposed benefit of the community.'"[188] White wrote that the "power or control lodged in the State, resulting from this common ownership [of wildlife], is to be exercised, like all other powers of government, as a trust for the benefit of the people."[189] Although it is clear from his preceding reference to "all powers of government" that White used the term "trust" in its political sense, subsequent cases interpreted "common ownership, and its resulting responsibility in the state" as state ownership conveying special status for wildlife and trust-like limits on state power.[190] But in 1979, in *Hughes v. Oklahoma*,[191] the Supreme Court declared the state ownership of wildlife doctrine to convey only that the state has an important interest in the management and conservation of wild creatures.[192] In invalidating a state law prohibiting the export of minnows as an infringement on the commerce powers of Congress, Justice Brennan explained that "the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution."[193]

The overruling of *Geer* has not discouraged public trust liberationists from citing it as foundational to their claim that the doctrine applies, or in Meyer's terms should apply, to wildlife.[194] But even putting *Hughes v. Oklahoma* aside, *Geer* only works for the cause of public trust liberation if one ignores Justice White's clear intention to describe the state's police

185 161 U.S. 519, 521–22 (1896); *see* Michael C. Blumm & Lucas Ritchie, *The Pioneer Spirit and the Public Trust: The American Rule of Capture and State Ownership of Wildlife*, 35 ENVTL. L. 673, 677–78 (2005).

186 *See* Huffman, *supra* note 2, at 80–81.

187 *Id.* at 80.

188 *Geer*, 161 U.S. at 527 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *410).

189 *Id.* at 529.

190 *See e.g.*, Center for Biological Diversity v. FPL Group, 166 Cal.App.4th 1349, 1364 (2012) (holding that the public trust doctrine requires public agencies to consider protection and preservation of wildlife); Citizens for Responsible Wildlife Management v. State, 124 Wash.App 566, 569–70 (2004) (holding that animals *ferae naturae* belong to the state and are held subject to a public trust).

191 441 U.S. 322 (1979).

192 *Id.* at 337–39.

193 *Id.* at 335.

194 Blake Hudson, *The Public and Wildlife Trust Doctrines and the Untold Story of the Lucas Remand*, 34 COLUM. J. ENVTL. L. 99, 112 (2009) ("Geer is the foundational case establishing wildlife as an environmental interest which may be legally protected pursuant to the public interest.").

powers with reference to wildlife, not limitations on those powers. In other words, relying on *Geer* depends on perpetuating the confusion between the legal obligations of the state pursuant to the public trust doctrine and the political responsibilities of government in a democratic republic.

The ever more frequent suggestion that the public trust doctrine is a source of authority for police power regulation derives from the same confusion.[195] While the police power is available to enforce the commonly held servitude or easement of the public trust doctrine, as it is to enforce all property rights, it makes no sense to suggest that the public trust doctrine is a source of authority for exercise of the police power. That is, it makes no sense unless one is seeking to circumvent takings claims that might limit the reach of the police power but will not limit actions taken in the name of enforcing antecedent public rights.

No doubt some of the confusion is knowingly strategic. If government officials are duty-bound under the public trust doctrine to protect the public's use of navigable waters for navigation and fishing, why not claim that the doctrine also obliges officials to guarantee public use of other resources also highly important to the public welfare? It is a classic case of leveraging law intended for one purpose to the achievement of other purposes.

However, some of the confusion of specific public trust doctrine duties with the general obligations of public officials also may arise from the fact that both are often described in terms employed in the law of trusts. But neither the public trust doctrine nor the general concept of government officials as trustees duty-bound to serve the interests of a beneficiary public are related to the law of trusts.

For reasons I have explained in depth elsewhere,[196] the public trust doctrine cannot be explained or understood as a branch of the law of trusts. While we might describe the government as trustee holding legal title and the public as beneficiary holding equitable title, we will search in vain for a creator who, under trusts law, cannot be either the trustee or the beneficiary. Without a creator, we cannot know the terms of the trust. In a government founded on popular sovereignty, where sovereignty implies exclusive jurisdiction over (rather than title to) the geographic territory of the state or nation, the only possible creator of a trust with respect to resources within that territory is the sovereign people. But under the trust law theory of the public trust doctrine, the people are the beneficiary. And in a democratic republic the people are also the trustee acting through the agency of elected officials. Thus, the creator, trustee, and beneficiary are all one in the same, which makes absolutely no sense in trust law terms and helps explain why Wood and Blumm seek some higher authority whose will can be that of the creator.

The commonplace description of public officials as trustees responsible to the people conveys a core principle inherent to all governments founded

195 *See* discussion of this topic in Huffman, *supra* note 122, at 556–60.

196 *Id.* at 534–45.

on popular sovereignty. Although practice too often belies principle in this regard, few will disagree that public officials are responsible to serve the public good, not personal or special interests. But describing the relationship of public officials to the public as one of trust conveys nothing of the fiduciary responsibilities owed by a trustee to a beneficiary under trusts law. The government official's general responsibility to the public is political, not legal. State legislators have the full range of police powers, the eminent domain power, and the powers to tax and spend for the public good. If elected officials fail to adequately employ these powers or fail to deliver on their campaign promises the public has no remedy in court. The ballot box is where the public renders judgment on whether or not public officials have fulfilled these so-called trust responsibilities.

Employing the language of trusts to describe political responsibilities does not transform those responsibilities into fiduciary obligations under the law or trusts. Nor does it transform them into the legal duties the public trust doctrine imposes on both public and private owners of navigable waters and submerged lands.

VI. THE EVOLUTION OF THE COMMON LAW

As elegant and imaginative as some of the foregoing theories may be, they are all post hoc explanations derived not from public trust law as it has been but from visions of what public trust law could have been or could become. A careful reading of the history of English public rights law and American public trust law reveals a simple and straightforward rule of property law recognizing a right, in the nature of an easement or servitude, shared in common by all citizens.[197] For reasons set forth below in a discussion of the demand-side nature of the common law method, it is not surprising that public trust law serves interests similar to those served by other common law doctrines, or by constitutions framed pursuant to the principle of popular sovereignty. But there is no evidence that the public trust doctrine is the product of high moral principle or of a theoretical vision of how the earth's resources are best used or not used. Accepting that it is part of a grand design opens the door to self-proclaimed grand designers claiming rule of law authority for rule by grand design.

Because most would-be grand designers find themselves constrained by a legal system still shackled by a general commitment to the rule of law, actual judicial rulings on the public trust doctrine continue to rely on precedent. Indeed, even the most visionary theorists seem unable to resist appeal to precedents from Justinian to *Illinois Central*.[198] Thus, the final and most pervasive approach to removing the historical shackles of the public trust doctrine, as suggested in Sax's 1980 article[199] and in dozens of subsequent articles by others, is to claim that common law judges have both

197 *See* analysis of alternatives in Huffman, *supra* note 122.

198 *See, e.g.*, Michael C. Blumm & Lynn Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and* Illinois Central Railroad, 45 ENVTL. L. 399 (2015).

199 Sax, *supra* note 9.

the authority and the responsibility to rewrite the common law in light of present-day and future circumstances and public policy considerations.[200]

If asked to explain the difference between the common law and statutory law, most law students and probably many lawyers would say that legislators make the latter and judges make the former. The common law, it is often said, is judge-made law. In a sense, this is true. In their written opinions, judges have articulated rules of law and have sometimes modified them or abandoned them in favor of seemingly new rules of law. But the original rules, their modifications, and the occasional new rules, were not conceived, for the most part, in the minds of judges bent on solving the problems of social existence on a finite planet. Rather, the rules of the common law were adopted, largely, from the customs and practices of ordinary people engaging with each other. There is really no other way it could have worked in a generally free society. The will of the people exercised not at the ballot box but in the choices and actions of day-to-day life is a powerful force. The best common law judges were those who framed the law to suit needs and ambitions of people in their communities, not black-robed oracles with special talents for understanding today's problems and tomorrow's solutions.

Examples of clearly judge-made law can be offered to counter the foregoing description of the common law process, but they are outliers—anomalies in a human process that is complex beyond the capacity of any judge or panel of judges to comprehend and manage.[201] The genius of the common law, the reason it has survived over many centuries, is that it serves the day-to-day needs and aspirations of ordinary and extraordinary people alike. Not perfectly, but well enough, despite interventions by the occasional lawmaking judge.

Those who prefer to think of the common law as the product of judicial wisdom, and therefore in need of ongoing maintenance and reform by today's wise judges, take what Douglas Whitman has called a supply-side view of the common law process. "Supply-side models," says Whitman, "explain the evolution of legal rules primarily in terms of the preferences and behavior of the makers of law, judges."[202]

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200 *See id.* at 194 ("The courts can do much to provoke a search for less disruptive alternatives below the constitutional level. They can assure that decisions made by mere administrative bodies are not allowed to impair trust interests . . . . The courts should recognize that mere unutilized title, however ancient, does not generate the sort of expectations central to the justness of property claims, and that long-standing public uses have an important place in the analysis.").

201 Judges, like other public officials, face what Friedrich Hayek called the knowledge problem. "The economic problem of society is thus not merely a problem of how to allocate 'given' resources . . . . It is rather a problem of how to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know." Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519–20 (1945).

202 Douglas Glen Whitman, *Evolution of the Common Law and the Emergence of Compromise*, 29 J. LEGAL STUD. 753, 776 (2000).

"[D]emand-side models," on the other hand, "explain the evolution of legal rules primarily in terms of the behavior of potential litigants, whose actions are driven in part by the efficiency and other properties of the legal rules that affect them."[203]

To the extent that they rely on common law precedent, which most do, public trust liberationists are all supply-siders. But they would disagree with Whitman in this way. It is not the preferences of judges that guide judge-made law; rather, it is the judge's unique capacity for knowing core public values. Charles Wilkinson expresses the supply-side view as clearly as anyone among public trust liberationists:

> The public trust doctrine is rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles. This is an accepted process in our law: Anglo-American jurisprudence is rife with judicially developed doctrines that reflect the deeply held convictions of our society.[204]

Wilkinson does not explain by what method judges discover these deeply held convictions, nor does he explain why judicial declaration of these convictions is more reliable than the sometimes-conflicting declarations of the people's elected representatives.

Accepting that some, if not most, public trust commentators take the view that judges have both the authority and the capacity to make law in response to changing circumstances and evolving public values, we are left to ask: Then why the incessant citations of Justinian, the Magna Carta, Hale, Blackstone, *Arnold v. Mundy*, *Illinois Central*, and so on? Why does Professor Blumm's law professors' brief cite 50 cases, nearly one for each of the signatory law professors? Why do all of the atmospheric trust petitions rely on precedent? Whether or not they believe in the rule of law themselves, it has to be that they accept that ours remains a rule of law system. Somehow they need to get judges sworn to uphold the laws of the United States to do what the law does not require or allow, what legislatures have declined to do and what the constitutional protection of property rights makes difficult.[205] They need to persuade judges that they can make entirely new law while claiming to be true to the rule of law.

With or without the law professors' brief, the Supreme Court is very unlikely to grant certiorari in *Alec L. v. McCarthy*, so the rule of law is at little risk there. But the strategy of filing claims in all 50 states on the

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203 *Id.* at 775–76; *see also* Todd J. Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1557–58 (2003).

204 Wilkinson, *supra* note 171, at 315.

205 It should be noted that constitutionally protected property rights do not make legislative protections of privately held resources impossible. So long as there is a public purpose in protecting the resources, the Constitution only requires that just compensation be paid. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that, despite a legitimate public purpose, a New York statute requiring landlord to permit cable company to install wires on the building constituted a partial taking of the property, thus entitling landlord to just compensation).

atmospheric trust theory is bound to elicit the interest of a judge or two more enamored of making law than upholding the law. That could be all it takes to get the ball rolling. A single trial court embrace of the atmospheric trust idea will become precedent for judges less confident in their lawmaking authority to rely upon.

VII. LAYING THE FOUNDATION FOR LIBERATION

Over the past four decades a few judges have shown the way by loosening the historical shackles of the common law public trust doctrine. For example, in *State of Oregon ex rel. Thornton v. Hay*[206] the Oregon Supreme Court ruled, on the basis of what it called the doctrine of custom, that coastal property owners holding legal title to the dry sand beaches could not preclude public access to those beaches.[207] Never mind that the laws of Oregon had, since statehood, recognized exclusive private title to dry sand beaches, and never mind that, while only a single property owner was in court, the rights of every property owner on the Oregon coast were at stake.[208] Like its first cousin the public trust doctrine, the doctrine of custom fired the magic bullet of antecedent public rights. Owners of beach property cannot complain of a taking if it turns out they never owned the right to exclude others in the first place.

In *Marks v. Whitney*,[209] the California Supreme Court, after noting that the public trust doctrine protected public rights in navigation, commerce, and fisheries, proclaimed that henceforth the trust extended to the "preservation of [tidelands] in their natural state."[210] "In administering the trust," declared the court, "the state is not burdened with an outmoded classification favoring one mode of utilization over another."[211] In *Just v. Marinette County*,[212] the Wisconsin Supreme Court found that no

206 462 P.2d 671 (Or. 1969).

207 *Id.* at 676–78.

208 *See* Oregon State Parks Team, *Celebrating 100 Years of Oregon's Public Shore*, Feb. 13, 2013, https://oregonstateparks.wordpress.com/2013/02/13/celebrating-100-years-of-oregons-public-shore/ (last visited Apr. 17, 2015) (explaining that, before 1913, "[a]lmost 25 miles of beachfront property had already been sold," and that the state legislature responded to this privatization by establishing the wet sand areas of the beach as a public highway); Stevens v. City of Cannon Beach, 510 U.S. 1207, 1213–14 (1994). In a dissent to the Supreme Court's denial of certiorari in *Stevens*, Justice Scalia wrote:

> As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights.

510 U.S. 1207, 1211 (citation omitted).

209 491 P.2d 374 (Cal. 1971).

210 *Id.* at 380.

211 *Id.*

212 201 N.W.2d 761 (Wis. 1972).

unconstitutional taking resulted from state restrictions on the use of privately owned wetlands because "under the trust doctrine [the state] has a duty to eradicate the present pollution and to prevent further pollution in its navigable waters."[213] The court was not concerned that the pollution in question—filling dirt in wetlands—would have no impact on the public's right to engage in commerce, navigation, and fishing on navigable waters, but instead aimed "to prevent harm from the change in the natural character of the citizens' property."[214] In *Montana Coalition for Stream Access v. Curran*,[215] the Montana Supreme Court declared that the public trust doctrine extended to all waters in the state that are susceptible to use for recreation.[216] They accomplished this massive extension of the doctrine's geographical reach, impacting thousands of property owners, by the simple expedient of declaring a new recreation test for navigability.[217] In *Center for Biological Diversity v. FPL Group*[218] the California Court of Appeals, although upholding the lower court's dismissal of plaintiff's lawsuit, proclaimed that "[w]ildlife, including birds, is considered to be a public trust resource of all the people of the state, and private parties have the right to bring an action to enforce the public trust."[219]

These and other recent cases may have the most meritorious and noble of objectives. But is it the role of the courts to decide what existing laws to amend and what new laws to enact? The public purposes said to be served by the foregoing judicial decisions could have been accomplished by other means, namely statutes enacted by state legislatures. They are, after all, the lawmaking branch of government under the constitutional separation of powers.[220]

For public trust liberationists, however, there are at least a couple of problems with relying on legislatures and other governmental entities with proper authority. For one, notwithstanding what Professor Wood has called "mind-blowing urgency,"[221] "[t]he international treaty process will probably fail, the legislature will not act, and the president will do too little too late."[222] But even if legislatures can be persuaded to act, there is another problem. Effectively expanding public rights has the consequence of limiting private rights. Private property owners have a tendency to object when they perceive that their vested rights have been infringed. Sometimes they sue, claiming that their property has been taken without just compensation. That is what happened in the *Just v. Marinette County* case. But the Wisconsin court negated the takings claim by asserting that the public right served by

213 *Id.* at 768.

214 *Id.* at 767–68.

215 682 P.2d 163 (Mont. 1984).

216 *Id.* at 171.

217 *Id.* at 169.

218 83 Cal. Rptr. 3d 588 (2008).

219 *Id.*

220 U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

221 *Quoted in* Democker, *supra* note 22, at 34.

222 *Quoted in* Democker, *supra* note 22, at 35.

the wetlands conservation legislation was antecedent to the property rights of the plaintiff.[223] As explained previously, that is the magic of the public trust doctrine. It evades all takings claims.

Avoiding takings claims and bypassing recalcitrant legislatures seems to suit the public trust liberationists just fine, but it is difficult to square with a commitment to the rule of law. It is also difficult to understand how such judicial lawmaking serves the public good or the individual citizens who share in common not only the rights protected by the public trust doctrine but also private property rights and other individual liberties.

What do judges know about the public good? How is the judicial process suited to hearing and evaluating the multitude of competing and conflicting claims on the public good? In the American system courts hear actual cases and controversies in which the opposing parties have stakes in the outcome.[224] How is a court supposed to decipher the public good from arguments by self-interested public and private litigants about the facts of a particular case and the laws applicable to that case?

Even assuming judges have special wisdom on natural resource-related public policy matters, how is the public good served by an ever-expanding doctrine of public rights that are antecedent to private property rights? It seems easy for public trust liberationists to dismiss private property as antithetical to the public good, but nothing could be further from the realities of public welfare. Absent secure property and contract rights, economic prosperity is illusive at best. Without economic prosperity, governments cannot garner the resources necessary to provide for the public good, whether in the form of infrastructure, education, or environmental protection.

Under the traditional public trust doctrine, affected private property owners know with a reasonable level of certainty what their rights are. If they own riparian land on navigable waters they know that they have wharfing-out rights, for example, but not the right to obstruct navigation while exercising those rights. If they own submerged lands under navigable waters, they know that they have a right to occupy those lands so long as they do not interfere with navigation and fishing. If they own riparian or submerged lands on non-navigable waters they know they have the same rights they and others have on uplands. In other words, their lands are unaffected by the public trust doctrine. Whether or not lands are affected by the public trust, property owners know that they cannot use their land in ways that create a nuisance for their neighbors. These are what Justice Scalia labeled background principles.[225] They are not crystal clear, nor could they be, but at some point they become so variable and uncertain as to lose their effectiveness as sources of security for investors and entrepreneurs.

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223 Just v. Marinette Cnty, 201 N.W.2d 761, 771 (Wis. 1972).

224 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (establishing the constitutionally required elements of standing for a federal court to have jurisdiction to hear the case); U.S. CONST. art. III, § 2, cl. 1 (establishing the jurisdiction of the "judicial Power of the United States").

225 Lucas v. South Carolina Coastal Council, 505 U.S. 1004, 1029 (1992).

A strength of the traditional common law method was in adapting the law to the changing needs and circumstances faced by investors and entrepreneurs while not unreasonably upsetting expectations. If the public trust doctrine is liberated in the manner suggested by the theories described in this Article, or by many others to be found in the vast sea of public trust literature, private property rights will become so contingent as to be all but useless as assurances for those who might produce the wealth necessary for the public good. There is a powerful public interest in a secure and reliable system of property rights. By making private property rights increasingly contingent, a liberated public trust doctrine will not serve the public good.

Putting aside the importance of secure property rights to a free and prosperous society, reliance on the courts to accomplish the sort of major policy changes sought by public trust liberationists is contrary to the basic premises of constitutional government and popular sovereignty. American law functions within a constitutional separation of powers in which the lawmaking authority rests with the legislature. Realists acknowledge that there is not a wall of separation between the branches of government, but when the argument for judicial action is that the executive and legislative branches have failed to act, we can be pretty certain that the courts are being asked to do something beyond their authority. Failure to act when you have authority to do so is a choice, not a license for action by those not authorized to act.

VIII. CONCLUSION

Modern progressives, like their early twentieth century predecessors, tend to be skeptical of democratic policymaking. They prefer to rely on experts, scientific management and expeditious executive action to implement policies they know to be right and good. Democracy, the separation of powers, constitutional rights, and the rule of law all get in the way. It was early frustration with these traditional American principles that led Professor Sax to call for liberating the public trust doctrine from its historical shackles. He recognized that if courts could be persuaded to expand and extend the doctrine, environmentalists could revolutionize American property law while claiming the mantle of the rule of law. Courts would rule for environmentalist claims not because it was the right thing to do but because the law required it.

That barely a handful of courts have even acknowledged Sax's invitation to liberate the public trust doctrine underscores that most judges, most of the time, do their best to interpret and apply the law as those affected by the law would reasonably expect them to. Most judges understand that people rely on those expectations in their interactions with others and in the risks they assume and to which they expose others. If it were otherwise, people would soon lose confidence in the courts as objective arbiters of disputes.

This does not mean that the law is stuck in the past. The common law has always evolved. But it has evolved in a way that respects rather than

undermines expectations. One of the great strengths of the common law method is in "serving the rule of law by adapting legal rules to the demonstrated needs and wishes of those who rely on law to bring at least a degree of certainty to their day-to-day lives."[226]

Perhaps the best indication of widespread commitment to the rule of law is that judges seduced into lawmaking of the kind urged by public trust liberationists, like the liberationists themselves, invariably appeal to precedent in seeking to justify their rulings. This does not mean that the lawmaking judges shy away from explaining the policy benefits of their decisions, but one would be hard pressed to find a case in which a court acknowledges that its new rule has no basis in preexisting law. Rather, lawmaking judges follow the path advocated by Judge Richard Posner in his commentary on the Supreme Court's decision in *Bush v. Gore*.[227] Posner explains that what he calls pragmatic judges should cover their lawmaking tracks by providing "legal-type judgment" as justification.[228]

Anyone who believes in the rule of law as a necessary principle of government in every free society should be troubled by this ends-driven, whatever-it-takes approach to judging in particular, and government in general. Even accepting, for the sake of argument, that we face a global environmental crisis as Professor Wood and many others assert,[229]

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226 James L. Huffman, *People Made Law: Spontaneous Order, Change and the Common Law*, 22 GEORGE MASON L. REV. (forthcoming 2015).

227 531 U.S. 98 (2000). The Democratic candidates for President and Vice President of the United States filed a complaint contesting the certification of state results in the presidential election. The Supreme Court held that: 1) manual recounts ordered by the Florida Supreme Court, without specific standards to implement its order to discern the intent of the voter, did not satisfy the minimum requirement for nonarbitrary treatment of voters necessary under the Equal Protection Clause to secure the fundamental right to vote for President, and 2) remand of the case to the Florida Supreme Court for it to order a constitutionally proper contest would not be an appropriate remedy. The result of this decision was the validation of Florida's Electoral College vote going to Bush and Cheney, making them President and Vice President, respectively. *Id.* at 98–99.

228 Posner defends the Supreme Court's ruling in *Bush v. Gore* on pragmatic grounds—there were many serious consequences if the case was not resolved quickly, but he is nonetheless critical of the majority's legal justification for the decision. RICHARD A. POSNER, BREAKING THE DEADLOCK 144–45 (2001). *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1990) (providing a general overview of critical legal studies, which describes liberal thought as beset by internal contradiction and by systematic repression of these contradictions. Kelman goes on to argue that Law and Economics, of which Posner is a posterchild, has unjustified politically conservative institutional biases that predetermine its conservative conclusions. Kelman also argues that critical legal studies share with legal realism the idea that who decides matters, but rejects the idea that who decides is all that matters).

229 In several articles Professor Wood paints a picture of imminent planetary collapse if extreme measures are not taken immediately. Her disdain for the rule of law as a guarantee of individual liberty and a central institution of any prosperous society is evident in the following declaration:

> This much can be said with a high degree of confidence: the legal, economic, and social paradigms that give structure to our industrial society are fast approaching expiration. . . . [T]he current Business As Usual path is programmed to lead to a collapse of civilization because disasters and the political unrest they create will stress governments beyond their limits. With the fall of legal institutions will come the rapid

experience demonstrates that compromising the rule of law will harm rather than help efforts to meet any serious challenge. Saving a failing planet will require innovative thinking and creativity of the highest sort. History demonstrates that individual liberty and the rule of law are essential to such innovation and problem solving. Absent the rule of law, many a nation has failed to solve much lesser challenges.[230]

Like the public trust liberationists, those seeking exemptions from the rule of law always plead a higher good as their justification. Everyone claims to occupy the moral high ground. But constitutional government under the rule of law has long since proven to be the best means for determining where the moral high ground and the public good lie, while leaving ample space and flexibility for their pursuit.

> demise of the paradigms that buttressed them. Those who advocate policies perpetuating the status quo must come to terms with an earth-rattling truth: the status quo is a transient illusion.

Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (pt. 1): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 54 (2009). No doubt the rule of law is part of that illusion.

230 *See generally* DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL (2012). The authors argue that institutions—and centrally, the rule of law—are critical to national economic success.