### Resolved: The United States ought to expand the application of the Public Trust Doctrine to wildlife habitats.

Notes:

The Public Trust Doctrine exists to guarantee that certain recourses on private land might still be accessed and claimed by non-owners of the land. Based in ancient Roman ideology that was later memorialized by the Magna Carta, land and recourses are universal constructs that all people should have access to. It utilizes legal doctrine of Res Nullius, or that anything not currently claimed as private is common property until it is ‘transformed’ into private property. Examples include exerting effort to catch a fish, which transforms the fish from public to private property. The importance of this doctrine lies within its ability to establish exceptions from true private property ownership while allowing passage, collection, and personal usage of certain recourses that exist on private land.

PTD is not utilized in an entirely widespread manner, with two major examples. Firstly, it is applied in the context of beaches to allow people to go to the beach on private beachfront property, and utilize said beach for swimming, or the collection of recourses, such as fishing. Secondarily, PTD is often applied in the context of natural recourses. For instance, hunting on public land is regulated but justified due to it being a recourse that is publicly useable. Other examples are fish stocks, water, and in some cases oil.

Potential expansion of PTD to protect wildlife is a current legal discussion. It is important to realize that PTD is very much a judicial concept, but legislation might affect it, as will executive relations with the EPA. The doctrine could be legally applied to protect wilderness as a public good within itself, meaning that action would be taken by States specifically to protect animals more aggressively. There is, however, great complexity to this concept, as ‘wilderness’ is boundless and overapplication of the PTD could make vast swaths of land unusable. Publicizing land becomes a slippery slope. Does the U.S reclaim all of the wilderness land that is privately held? How does it enforce? That is the questions you will answer in this debate. In the Hughes v. Oklahoma case, it was ruled that States do in fact have the power to impose restrictions, it’s simply a question of why and how.

Particular questions of mechanisms are quite important, balancing the action of the affirmative with realistic questions of industry will be more successful than radical legal changes. Further research into court cases such as Normal Parm, et al. v. Sheriff Mark Shumate as well as Kramer v. Clark Wis. will provide further understanding of the legal standing presently imposed on wilderness in the context of PTD

Sources for further reading:

<https://www.perc.org/2019/06/19/the-limits-of-the-public-trust-doctrine/>

<https://nctc.fws.gov/courses/csp/csp3112/resources/Related_References/Overview_of_Public_Trust_Doctrine.pdf>

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## AC

#### Text: The USFG should legislate that under Public Trust doctrine, wildlife should be considered publicly protected when stationary or migrating

### Value/Criterion

#### We value utilizing legal standards to protect nature

#### Public trust is a deeply historical concept, but its application is limited and should be applied further to wildlife habitats-legislation is key

Huffman 19

James Huffman is dean emeritus of the Lewis & Clark Law School, The Limits of the Public Trust Doctrine Published by PERC 6/19/19, https://www.perc.org/2019/06/19/the-limits-of-the-public-trust-doctrine/)//LED

The public trust doctrine has its origins in English law and was later applied in the North American colonies as well as part of the common law by the individual states after the American Revolution. Historically, the public trust doctrine guaranteed a public right to commercial navigation and fishing on navigable waters. Over the past few decades, however, courts in several states have expanded the doctrine beyond its historical reach. But despite frequent proposals to apply the doctrine to upland resources, including wildlife, those expansions have been limited to public uses of waters. The rights guaranteed by the public trust doctrine are understood to have existed from time immemorial. As a result, judicial expansions of the doctrine have the effect of curtailing vested private property rights. Takings claims under the Fifth Amendment to the U.S. Constitution (and under similar provisions in every state constitution) are thus circumvented because the private rights are, by definition, subject to the theoretically preexisting public rights. Broadening the set of preexisting public rights protected by the doctrine dramatically expands the scope of regulation. What might have been considered a regulatory taking—in which the value of someone’s property is diminished as a result of regulation—is rendered a case in which the property owner never possessed the right claimed to be taken. If property owners never had a right to exclude those seeking access to such resources, for example, there can be no taking when the government enforces that public right. Over the past few decades, courts in several states have expanded the doctrine beyond its historical reach. But those expansions have been limited to public uses of water. In addition, an expanded public trust doctrine would impose affirmative duties on government to act for the purpose of protecting public rights. Failure of governments to meet such duties can, in turn, result in enforcement actions in the courts. Thus, an expanded public trust doctrine increases the power of the courts and puts courts in the position of overriding the actions of the legislative and executive branches of government. For advocates of a broader government role in the conservation and management of wildlife, the public trust doctrine thus holds great promise—as long the historic doctrine can be expanded beyond what legal scholar Joseph Sax called its “historical shackles.” It expands the power of government, imposes duties of government to exercise those powers, and eliminates the costs of defending against or compensating for takings claims.

#### **The legal system has failed public trust doctrine and needs to change, tangible action is needed to protect wildlife, not just leave it to be utilized arbitrarily**

Huffman 19

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The assertion that the public trust doctrine applies—or should apply—to wildlife rests on shaky legal ground. A familiar argument in favor of applying the public trust doctrine to wildlife has been that states own wildlife on behalf of the public. But the argument is founded on a mistaken understanding of the law relating to ownership of wildlife. Under the common law, wildlife is considered res nullius—meaning it is unowned until it is captured and reduced to private possession. Thus, living wildlife species are neither owned by the state nor by private individuals. The concept of state ownership emerged from several state statutory and constitutional declarations of public or state ownership. It was encouraged by dicta in the 1896 U.S. Supreme Court case of Geer v. Connecticut but later dismissed in 1948 in Toomer v. Witsell “as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.” In 1979, the Supreme Court overruled Geer in Hughes v. Oklahoma, stating that “the general rule we adopt in this case makes ample allowance for preserving . . . the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership.” Thus, the states’ authority with respect to wildlife derives from their police power, not ownership, and is therefore limited by the constitutional enumeration of federal powers and the constitutional protections of private property. Clearly, states can regulate the hunting of wildlife, including on private lands, but they cannot impose regulations that would result in an unconstitutional taking of those lands. Correspondingly, private landowners can prohibit and permit access to their lands by hunters, just as they can control access for any other purpose, with very narrow exceptions. Thus, the concept of the “public trust” imbued in the North American Model of Wildlife Conservation is only tangentially related to the common law public trust doctrine. Both have to do with the public’s interest in the use and conservation of natural resources. But in the case of wildlife, the public merely “trusts” that its interests in wildlife conservation will be advanced, like all other democratically declared interests, by a responsible and accountable government; whereas the public trust doctrine recognizes public rights in the form of easements on navigable waters and their associated submerged lands. The public trust of wildlife conservation is enforceable only at the ballot box. The public rights guaranteed by the public trust doctrine are enforceable in the courts.

#### Our criterion is environmentalism, issues of saving the environment should be at the forefront of our conversation as it is proximal to the topic and a very pressing issue.

### Contention: Environmental Protection

#### Public doctrine is the gateway issue to protecting the environment

Babcock 17

Hope Babcock is Professor of Law; Director, Environmental Law and Justice Clinic at Georgetown Law, Using the Federal Public Trust Doctrine to Fill Gaps in the Legal Systems Protecting Migrating Wildlife from the Effects of Climate Change, published by GU Law center 2017, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2996&context=facpub)//LED

Change Not unlike before the biblical flood, the world stands on the brink of catastrophe awaiting rescue by a virtual ark. The most vulnerable to this looming catastrophe are the world’s wildlife. Changes in global temperature and precipitation as well as sea level rise and acidification of the ocean are already affecting wildlife by limiting the availability and quality of habitat and the abundance of prey, and by increasing predation and disease.2 Sea level rise and unstable storm patterns threaten coastal wildlife, while changing precipitation and temperature patterns are drying out habitat, making some habitat more susceptible to wildfires, and other habitat too cold or too hot. These weather changes are creating pressure on wildlife to move from the increasingly inhospitable places they currently occupy to more suitable locations.3 As wildlife move, human obstacles make their journey harder. Neither federal laws nor private land protection mechanisms, like conservation easements or land trusts, have sufficient elasticity to protect migrating wildlife from interference during their journey to more suitable habitat. This Article’s supposition is that unless flexibility can be found in either public or private law to protect wildlife as it moves, many species of wildlife may not survive. The Article examines how law might be used to protect shifting wildlife habitat needs when it is not known when and where those new needs will arise. One thing that climate change does is challenge the capacity of existing federal laws and private property mechanisms to loosen their attachment to a particular geographic place so that wildlife are still protected when they move to avoid the effects of climate change—a need not envisioned when these measures were put into place. Rather than parse existing federal laws to see if they might be interpreted to protect new, as-yet unoccupied habitat and migratory corridors, this Article searches for elasticity in common law property principles, like the public trust doctrine, to see if they might be more effective. The public trust doctrine is firmly embedded in state law and has been used at the state level for centuries to protect water-based trust resources and traditional public uses of those resources without having to actually acquire or condemn the land.4 But relying on states to use the doctrine to protect moving wildlife is problematic as migration corridors may cross multiple political boundaries, including national ones, and may encounter local opposition that is hard for a state to overcome. These problems with the doctrine’s application at the state level could result in a patchwork of protected property too small and isolated to be successful as alternative habitat for many species and in fragmented migratory corridors that lack the necessary connectivity between segments. A federal version of the public trust doctrine, however, could transcend political borders and protect sufficient land to assure migrating wildlife safe passage.5 A federal public trust doc trine would also sidestep the need to achieve political consensus among competing stakeholders, as would be required for any collaborative effort at the state or local level. However, the existence of a federal public trust doctrine is untested in the courts and very controversial. Additionally, although the doctrine has evolved through the centuries to reflect modern values, its application to upland wildlife habitat is uncertain

#### **The timeframe is now, climate change is progressing and creates a substantial need for the plan**

Babcock 17

Hope Babcock is Professor of Law; Director, Environmental Law and Justice Clinic at Georgetown Law, Using the Federal Public Trust Doctrine to Fill Gaps in the Legal Systems Protecting Migrating Wildlife from the Effects of Climate Change, published by GU Law center 2017, https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2996&context=facpub)//LED

Nearly all climate scientists agree that human driven climate change is happening.8 Many believe that “we have passed the point where mitigation efforts alone can deal with the problems that climate change is creating.”9 This is the result of a phenomenon called “committed warming”—a situation in which sufficient greenhouse gases have already accumulated in the atmosphere ensuring that temperature increases and climate instability will continue regardless of any global mitigation measures the world might take.10 Ongoing emissions will only make matters worse by increasing the Earth’s energy imbalance.11 Climate scientists are predicting temperatures in the United States will increase as much as eleven degrees Fahrenheit by the end of the current century.12 They also forecast that sea levels may rise up to two meters by the same date.13 Although the Earth’s average surface temperature has warmed only 0.8 degrees since the 1900s,14 the current rate at which temperatures are increasing is more than ten times faster than previously and is projected to continue at a faster, more intense rate than what is currently being experienced.15 “Tropical areas will be the first to experience historically unprecedented climate because of the[ir] relatively small natural climate variability,” with the result that by 2050, “most tropical regions will have every subsequent month outside of their historical range of variability.”16 Changes in the basic elements of ecological systems prompt shifts and rearrangements of species, food webs, ecosystem functions, and ecosystem services, complicating and even obliterating recognizable ecologies.17 The impact on temperatures is not uniform,18 making any prediction about those impacts close to impossible.19 One thing that seems more certain is that “many of these climate change-driven ecological changes are likely to become both worse and more complex in the coming decades . . . .”20 As land, air, and water temperatures rise, the amount and timing of precipitation changes as do hydrology, soil conditions, and vegetation. “We are moving along an at least somewhat unpredictable path to an as yet unpredictable final destination . . . . Fundamental metamorphosis of the natural world, and of the ecosystem services upon which human societies depend, is becoming our largely uncontrollable reality.”21 Climate change is changing humanity’s sense of what is “natural.”22

#### This specifically affects wildlife, the impact is catastrophic

Babcock 17

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Global climate change’s impact on wildlife may be even more profound than the impact on people, if they are separable. Sea levels along the United States Coasts of the Atlantic Ocean and Gulf of Mexico are rising at a pace that exceeds the global average established during the past fifty years.23 Human fortifications in response to rising seas are trapping and squeezing coastal species out of transitional habitat between the land and the sea.24 The intensity of “high severity storms” in the Atlantic Ocean is escalating, “as are the frequency of storm-generated large surge events and wave heights.”25 Storm surges coupled with rising seas flood coastal wildlife habitats and push water inland threatening those habitats as well.26 Increasing temperatures in the arctic are melting ice and eliminating critical hunting ground for polar bears.27 Warmer water temperatures bleach coral and adversely affect cold-water fish species like salmon and trout,28 which causes the collapse of critically important ecosystems that sustain large populations of fish and other aquatic species.29 Larger and more frequent floods increase soil erosion, which decreases both water quality and the quality of aquatic habitat.30 Severe droughts, which also appear to be increasing,31 kill plants that wildlife depend on for food and shelter and shrink water sources.32 “Droughts caused by climate change could also desiccate up to ninety percent of central wetlands . . . that provide breeding, resting, and nesting habitat for millions of waterfowl, shorebirds, grassland birds, and other wildlife.”33 Climate change affects the availability of food for migrating birds that arrive on schedule, only to find the insects, seeds, and flowering plants on which they depend “have hatched or bloomed too early or not at all. Milder winters cause seasonal food caches to spoil, so wildlife species that depend on food stores to survive the winter are left without sustenance.”34 A recent study of climate records from 1980 to 2010 that compared climate information with population trends of 145 common European bird species and 380 common American bird species concluded that even small changes in the abundance of common bird species, which dominate ecosystems, “can lead to large changes in ecosystem structure, function, and service provision.”35 Excessive heat appears to be the cause of a 90% decline in the population of the northwestern Minnesota moose in the past twenty years36 and the 36% die-off in the American Pika, a small rabbit-like mammal that inhabits cold, wet boulder-strewn fields in the mountains of the western United States, which has shifted its range upslope 900 feet in response to higher temperatures.37 “As different species respond to changes in climate in idiosyncratic ways, ecological communities will begin the process of disassembling.”38 Since there is no historical precedent for this, there is considerable uncertainty about how these communities may reassemble in new places, and how, once reassembled, they might function, if at all.39

#### **Expansion of current legislation key to protecting crucial predator populations**

Treves et al 17

Adrian Treves, Nelson Institute for Environmental Studies, University of Wisconsin, Guillaume Chapron 2Grimsö Wildlife Research Station, Jose V. López‐Bao 3Research Unit of Biodiversity (UO/CSIC/PA), Oviedo University, Chase Shoemaker 4University of Wisconsin Law School, Apollonia R. Goeckner 5University of Oregon School of Law,, Jeremy T. Bruskotter 6School of Environment and Natural Resources, The Ohio State University, Predators and the public trust, Feb 2017, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5245106/)//LD

Many democratic governments recognize a duty to conserve environmental resources, including wild animals, as a public trust for current and future citizens. These public trust principles have informed two centuries of U.S.A. Supreme Court decisions and environmental laws worldwide. Nevertheless numerous populations of large‐bodied, mammalian carnivores (predators) were eradicated in the 20th century. Environmental movements and strict legal protections have fostered predator recoveries across the U.S.A. and Europe since the 1970s. Now subnational jurisdictions are regaining management authority from central governments for their predator subpopulations. Will the history of local eradication repeat or will these jurisdictions adopt public trust thinking and their obligation to broad public interests over narrower ones? We review the role of public trust principles in the restoration and preservation of controversial species. In so doing we argue for the essential roles of scientists from many disciplines concerned with biological diversity and its conservation. We look beyond species endangerment to future generations' interests in sustainability, particularly non‐consumptive uses. Although our conclusions apply to all wild organisms, we focus on predators because of the particular challenges they pose for government trustees, trust managers, and society. Gray wolves Canis lupus L. deserve particular attention, because detailed information and abundant policy debates across regions have exposed four important challenges for preserving predators in the face of interest group hostility. One challenge is uncertainty and varied interpretations about public trustees' responsibilities for wildlife, which have created a mosaic of policies across jurisdictions. We explore how such mosaics have merits and drawbacks for biodiversity. The other three challenges to conserving wildlife as public trust assets are illuminated by the biology of predators and the interacting behavioural ecologies of humans and predators. The scientific community has not reached consensus on sustainable levels of human‐caused mortality for many predator populations. This challenge includes both genuine conceptual uncertainty and exploitation of scientific debate for political gain. Second, human intolerance for predators exposes value conflicts about preferences for some wildlife over others and balancing majority rule with the protection of minorities in a democracy. We examine how differences between traditional assumptions and scientific studies of interactions between people and predators impede evidence‐based policy. Even if the prior challenges can be overcome, well‐reasoned policy on wild animals faces a greater challenge than other environmental assets because animals and humans change behaviour in response to each other in the short term. These coupled, dynamic responses exacerbate clashes between uses that deplete wildlife and uses that enhance or preserve wildlife. Viewed in this way, environmental assets demand sophisticated, careful accounting by disinterested trustees who can both understand the multidisciplinary scientific measurements of relative costs and benefits among competing uses, and justly balance the needs of all beneficiaries including future generations. Without public trust principles, future trustees will seldom prevail against narrow, powerful, and undemocratic interests. Without conservation informed by public trust thinking predator populations will face repeated cycles of eradication and recovery. Our conclusions have implications for the many subfields of the biological sciences that address environmental trust assets from the atmosphere to aquifers.

#### Federal action to protect migration is important

Babcock 17

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Habitat loss and barriers to migration that impede the movement of wildlife mean that simply conserving migratory species will not preserve actual migrations.92 “[D]evelopment in the matrix surrounding public lands may block ecological processes and animal movements from one land unit to another. Climate change, in particular, raises the stakes for maintaining and restoring connectivity in order to promote resilience.”93 To assure the survival of climate migrants, new habitats and corridors connecting those areas need to be protected. However, much of the land required for this effort is in private hands. This creates a problem because the scope of federal laws protecting public lands and wildlife is too limited to safeguard most climate mi grants on private lands.94 Private land conservation mechanisms similarly fall short in this regard. A. Federal Lands and Federal Laws While some species are able to adapt to changing conditions,95 wildlife laws in the United States are not so adaptable.96 The stress placed on natural systems by climate change is also stressing the responsive capacity of existing federal laws. The place- and speciesbased focus of these laws make it difficult to stretch their words to cover the changing environment, and the current dystopian political environment has made them almost impossible to modify. Current federal public lands laws protect only lands that have been withdrawn by Congress generally for a specific purpose, like a national wildlife refuge or forest, and function only within their rigid geographic boundaries regardless of changing circumstances that may make the land within those boundaries less useful for their designated purpose.97 The Endangered Species Act (ESA), which protects habitat that is critical to the survival of listed protected species,98 is not sufficiently flexible to protect additional land as the original land becomes less critical for the species’ survival. Habitat Conservation Plans (HCPs), which are a perquisite to getting a permit to incidentally take an endangered species under section 10 of the ESA,99 contain no assurances that new land will be protected once important habitat for those species no longer serve their mitigation purposes. In a world of global climate change, it is entirely conceivable that land set aside as wildlife habitat in a section 10 HCP or as a national wildlife refuge could by mid-century no longer have any wildlife, let alone any suitable habitat. Climate change will affect all our major public lands systems, including those with high value wildlife habitat. For example, sea level rise is expected to adversely affect 173 national wildlife refuges, sufficiently altering habitat in coastal refuges to separate wildlife from key habitats.100 The U.S. Geological Survey is predicting that some of the biggest glaciers in Glacier National Park may be gone by 2030 and with them the species that are dependent on them.101 Climate change may exacerbate existing stressors like wildfires, droughts, and invasive species on Bureau of Land Management (BLM) lands, causing changes in management practices, for example forcing BLM to curtail livestock grazing to protect plants and wildlife stressed by drought.102 Yet as bad as these projected physical impacts of climate change are, the combination of the high level of uncertainty from the confounding and poorly understood variables involved in climate change and “the limited adaptive capacity of existing natural resource laws and management institutions” is even more worrisome.103 Additionally problematic, most natural resources laws incorporate a preservation and restoration paradigm that is fundamentally at odds with the dynamic, unstable world we find ourselves in.104 The laws governing national parks and wilderness areas, according to Camacho and Glicksman, are “rooted in historical and wildness preservation goals that impair agencies’ ability to meet climate-related threats.”105 Craig finds examples of the restoration paradigm in the goals of the ESA and in the requirements of section 404 of the Clean Water Act (CWA), and of the preservation paradigm in the movement towards an ecosystem management approach by public land managers to preserve ecosystem functions and services.106 But, this new cli mate-driven world makes illusory the goal of returning to and then preserving any particular “historical ecological state of being,”107 especially as climate change modifies baseline conditions.108 To what exactly would the world be returning? Assumptions underlying both the preservation and restoration norms about the stability of natural systems have long been replaced by norms of instability.109 According to Craig, climate change-driven ecological transformations will almost certainly outpace natural dynamism in several respects—faster and greater accumulation of greenhouse gases than has ever occurred before; faster melting of polar ice and glaciers; more rapidly increasing air and water temperatures; abruptly changing air and ocean currents—with results that will be more dramatic and visible than “normal” ecosystem dynamics.110 Moreover, these paradigms erroneously assume the predictability and reversibility of human-caused ecological change regardless of the reasons for those changes.111 The impacts of climate change are way beyond what little adaptive capacity federal natural resources laws have. Camacho and Glicksman talk about the need to have “a legal system characterized by significant substantive legal adaptive capacity” that may function better when circumstances are unanticipated or changing.112 Yet, a “fundamental re-envisioning”113 of environmental and natural resources law seems unlikely because of the rigidity of the laws them

#### Plan is realistic, migration doctrine protects wildlife while not converting the entire U.S into public land

Babcock 17

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To avoid placing huge swaths of the United States landmass under the shadow of the public trust doctrine, the Article recommends that as the trust moves to keep pace with migrating wildlife, land that is no longer useful as habitat could be released. This proposal would allow formerly trust-protected lands to reenter the market place and tax rolls unencumbered. In this way, as new lands come within the doctrine’s reach, the release of other land could potentially achieve a rough regional balance of trust-protected lands along various migratory routes. The Article develops these thoughts in Part II by describing the impact of climate change generally and on wildlife, specifically. It also introduces the reader to the importance and precariousness of migration corridors. Part III explores deficiencies in both federal land and wildlife laws and private land preservation mechanisms—like conservation easements, land banks, and land trusts—in an era of climate change. In Part IV, the Article discusses both the public trust doctrine and the federal government’s trust responsibilities over public lands and resident wildlife, including when wildlife leaves those lands. Part V develops the three rationales supporting the existence of a federal public trust doctrine identified above—the doctrine’s jurisdictional capaciousness, parallelism in state and federal governance responsibilities, and the Ninth Amendment. Part V also introduces the idea that courts might use the doctrine as a source of interpretative principles to evaluate the legality of any barriers to wildlife migration and as a basis for a hard look at these barriers. Part VI introduces the reader to suggested modifications of the doctrine to make it more politically salient. The Article concludes by suggesting that federal land managers and conservationists modestly use the federal public trust doctrine to fill gaps in existing federal wildlife protection laws and to counter deficiencies in private land preservation tools, and that courts use public trust principles to evaluate disputes involving barriers to wildlife migration.

### Block

#### **Plan is not politically contentious but still protects wildlife**

Babcock 17

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To make the use of a federal public trust doctrine more politically palatable, the Article proposes to deploy it cautiously and modestly by anchoring its use to wildlife migrating off public lands. A combination of a strong protective federal interest in wildlife that resides even temporarily on public lands and trust responsibility over public lands may provide a basis for protecting wildlife as it moves across unprotected land to the next federal preserve. Additionally, the Article suggests that the doctrine should be used only to prevent complete conversion of private lands to a use that is hostile to migrating wildlife or to encourage the temporary removal of migratory barriers. Private landowners could prevent the doctrine’s application by entering into an agreement with the appropriate federal agency. These agreements would function like restrictive covenants that attach to the property’s title, and would be duly recorded—hence enforceable if the restrictions were ignored. This flexibility would allow development of trustimprinted lands where development can be designed in a way that does not impede migrating wildlife.

#### Common law doctrine solves

Babcock 17

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The common law doctrine of public trust is based on the proposition that the sovereign holds certain common properties in trust in perpetuity for the free and unimpeded use of the general public.158 The government in essence is merely a usufructuary rights holder who cannot allow resources protected by the trust to be damaged.159 “The public trust doctrine is a ‘principle of vital importance’ that refers to the general fiduciary obligation of government toward its citizens, and to the related, fundamental understanding that no legislature can abdicate or irrevocably alienate its core sovereign powers.”160 The doctrine requires that property to which the trust applies must be used for a public purpose and must be available to public use, that trustprotected property cannot be sold, even for a fair price, and that the holder of trust-protected property must maintain it for particular uses like for recreation or wildlife habitat.161 The doctrine protects public rights in trust resources in perpetuity and prevents the government or private individuals from alienating or otherwise adversely affecting those rights unless for another equivalent public purpose.162 The doctrine places on governments “an affirmative, ongoing duty to safeguard the long-term preservation of those resources for the benefit of the general public.”163 This makes the doctrine “a fundamental limitation on governmental power,”164 the beneficiaries of which are “present and future generations of citizens.”165 The essence of the doctrine requires management of trust resources for public benefit, not for private gain or political advantage.166 The fact that the public trust doctrine is a restraint on how private property can be used makes it extremely controversial.167 “Imposing highly concentrated costs of habitat protection on a small number of landowners in order to provide a broad public environmental benefit is a recipe for backlash.”168 According to Jamison Colburn, “[t]he problem is not that our federalism or anything else in our Constitution deprives us of the authority needed to build larger or more integrated systems of public reserves,” rather that the American land ethic has remained basically possessory and divisionary in nature.”169 The public trust doctrine is in fundamental tension with this core belief. But a right to real property: societal needs and efficiency.171 While property rules protect the expectations of property owners, “those expectations are bounded by what a state chooses to recognize as entitled to protection.”172 In other words, “while there are some bedrock principles that protect property, those same principles are not etched in that bedrock. Instead, as human needs change so do property rights. Communities created property and communities can curtail it.”173 Indeed, humanity’s adaption to the effects of climate change could become a matter of global survival, warranting a “rebalancing of public and private interests,”174 toward a less individualistic view of property. Craig argues that the threat of climate change should by itself “be sufficient to prompt revitalized legal attention to the public and community values of private property and to the legal doctrines that give cognizance to those values: nuisance, the public trust doctrine, and public necessity.”175 The public trust doctrine has been part of American jurisprudence for centuries.176 Something like the public trust doctrine was referenced in Article III of the 1783 Peace Treaty between Britain and the United States ending the Revolutionary War, in which the parties “agreed that the People of the United States shall continue to enjoy unmolested the Right to take Fish” at various identified spots and “also on the Coasts, Bays & Creeks of all other of his Britannic Majesty’s Dominions in America . . . .”177 And, while the Massachusetts Bay Colony’s Ordinances of 1641–1647 bestowed on riparian landowners the right to build structures below the high water mark on tidal waters, it explicitly withheld “the public trust right of the public to cross such underwater lands for navigation, fishing, and fowling.”178 Later, the Northwest Ordinance stated that the Mississippi and St. Lawrence Rivers should be “common highways, and forever free,” re flecting public trust principles of open access.179 Some scholars contend that the public trust doctrine is an “inherent right[] that predates the United States Constitution,” functioning like “the chalkboard on which the Constitution was written,” and that the doctrine provides “the background and context for the Constitution” itself.180 One feature of common law doctrines is their inherent nimbleness, surpassing both statutes and executive orders in that regard.181 The public trust doctrine has illustrated this malleability by evolving over time to meet changing social circumstances.182 Courts originally applied the doctrine to traditional uses of coastal resources and tidelands—like navigation, fishing, and oystering—but now the doctrine is applied to lakes,183 beaches,184 groundwater,185 and even mountains,186 and is used to protect non-traditional uses of trust resources like recreation, scientific study, bird watching, and aesthetics.18

#### **Aff is consistent with court precedent**

Blumm 17

Michael C. Blumm is a faculty Scholar & Professor of Law, Lewis and Clark Law School, The Public Trust as an Antimonopoly Doctrine, Published by Boston College 4/6/17, https://pdfs.semanticscholar.org/6733/dde2aa95ec059c9f90e26d8c5f288a122c9d.pdf)//LED

By the end of the nineteenth century, the PTD had evolved to restrict privatization of resources beyond navigable waters. For example, in addition to protecting public access to waterways, both Arnold and Waddell’s Lessee preserved public rights to harvest oysters on commonly owned submerged lands.107 Then, four years after its decision in Illinois Central Railroad, the United States Supreme Court ratified state claims of sovereign ownership of all wildlife as part of the public trust.108 In 1896, in Geer v. Connecticut, the Court ratified state claims of sovereign ownership of all wildlife, which the Court recognized as part of the public trust.109 Accordingly, the Court upheld Connecticut’s right to restrict privatization of wild animals.110 The state charged Edward Geer with violating a state law that criminalized the transport of certain bird species across state lines.111 Although Geer’s possession of the birds was legal, because he had shot them during hunting season, the statute prohibited their out-ofstate transport.112 The state successfully prosecuted Geer in the lower courts, and he appealed to the United States Supreme Court, arguing that Connecticut’s law violated the U.S. Constitution’s Commerce Clause.113 The Court rejected Geer’s argument and affirmed the state conviction in an opinion by Justice Edward White, who recounted “numerous” examples of judicial recognition of the states’ right to regulate wild animals,114 explaining that “the right to reduce animals ferae naturae to possession has [long] been subject to the control of the law-giving power.”115 As with lands under navigable and tidal waters, Geer traced the state’s ownership of wild animals to rights transferred from the King of England, and consequently clarified that wild animals are a public trust resource.116 Like navigable waters, states own wildlife in their sovereign capacity, in trust for the people. At the turn of the twentieth century, Geer expanded the PTD beyond the limits of navigable waters, recognizing wildlife as a trust resource.117 Thus states may restrict privatization of wild animals, including preventing wildlife harvests or transportation. Like Illinois Central Railroad, Geer was fundamentally an antimonopoly decision.p

#### New electricity production=threats

Noel and Firestone 15

Lance Noel and Jeremy Firestone both work with the University of Delaware, Public Trust Doctrine Implications of Electricity Production, Published by the University of Michigan 2015, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1046&context=mjeal)//LED

The wildlife impacts of electricity production are widespread and substantial, impacting fish and aquatic organisms as well as birds and bats. Both conventional and renewable electricity have direct impacts on wildlife, including fatalities from CWIS, collision mortality, and mercury bioaccumulation. While comparisons of wildlife impacts across electricity types are appropriate and necessary, the intrinsic inequality of weighing the death of one species against the death of another species complicates such comparisons. Differences in lifetime and reproduction rates imply that one fatality can have different population impacts across various types of wildlife. Nevertheless, the scientific literature attests that renewable energy is substantially less detrimental to wildlife. The most direct impacts of conventional electricity production include fatalities from the water cooling process and mercury bioaccumulation. First, water withdrawals for CWIS operations cause the impingement and entrainment (I&E) of aquatic organisms, with each power plant’s CWIS killing at least hundreds of thousands of fish per gigawatt-hour (GWh).171 Due the lack of effective rulemaking by the U.S. Environmental Protection Agency (EPA),172 I&E remains prevalent, and as one commentator has noted, thermoelectric power plants and their CWIS “are the largest single predator of our nation’s waters.”173 Second, conventional electricity production impacts birds, fish, and other aquatic organisms through mercury emissions and bioaccumulation. Of particular concern is the mercury bioaccumulation from coal generation, which emits over half of all the mercury in the United States.174 In 2005, the average freshwater fish had a mercury concentration of 0.23 μg/g, 175 and over 30% of the locations studied had fish tissue mercury concentrations over the EPA advisory level for protection of human health of 0.30 μg/g. 176 Fishery consumption advisories, 80% of which were issued due to mercury contamination,177 limit humans’ use of natural resources by causing people to eat other types of fish that are safe or forego eating fish at all.178 Various species of songbirds across the Mid-Atlantic and Northeast have also been put at risk due to mercury,179 which has decreased populations by as much as 20%.180 Throughout the Northeast United States, mercury bioaccumulation levels in songbirds “are high enough to cause detrimental effects to populations.”181 Fish-eating birds are also substantially impacted. Reproduction rates for the common loon, for example, could decrease as much as 50% due to current mercury levels in fish,182 and 14 to 27% of bald eagles studied in the Great Lakes region are at risk of neurological impairment due to mercury contamination in their diet.183 Likewise, a study of mercury in bats on the east coast of the United States found that 81% of all adult bats sampled near point sources had unsafe mercury levels.184 In addition, the five bat species that are listed, pend ing, or under consideration as endangered under the Endangered Species Act (ESA), all had elevated mercury concentrations, a potential cause for concern.185 In comparison, the three bats impacted most by wind turbines186 are all listed as “Least Concern” in the International Union for Conservation of Nature’s (IUCN) Red List.187 Lastly, it should be noted that mercury bioaccumulation can cause consequential, albeit non-lethal, impacts on various other mammals, including river otters,188 beavers,189 and Florida panthers.190

## NC

### Value/Criterion

#### Our value is technological innovation to protect nature

#### **This political overstep puts inept politicians in charge of the environment, sapping the potential of the aff and destroying the wilderness. Legalism is not the answer**

Huffman 15

James L. Huffman is Dean Emeritus of Lewis & Clark Law School and a Visiting Fellow at the Hoover Institution, WHY LIBERATING THE PUBLIC TRUST DOCTRINE IS BAD FOR THE PUBLIC, Published by Lewis and Clark 5/14/20)//LED

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 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.

#### The criterion is net benefits, we should weigh the benefits versus disadvantages of the affirmative?

### Contention: renewable energy

#### **States are aggressively pursuing alternative energy to counter global warming**

Motta 14

Michael Motta jr is a Doctoral Candidate, School of Public Policy and Urban Affairs, Northeastern University; J.D., Boston College Law School, The Walking Dead or Weekend at Bernie’s? How the Public Trust Doctrine Threatens Alternative Energy Development, published by WLU 2014, http://law2.wlu.edu/deptimages/journal%20of%20energy,%20climate,%20and%20the%20environment/7%20-%20Motta.pdf)//LED

An overabundance of greenhouse gases in the atmosphere and ocean threatens coastlines and offshore waters, areas protected by the public trust doctrine.54 This overabundance causes the disruption of climate patterns, heavier rainfall, the alteration of river flows, changes in the temperature and chemistry of the ocean, and higher sea levels which threaten barrier islands, coastal marshes, and wildlife.55 The burning of fossil fuels for energy accounts for most of the United States’ greenhouse gas emissions.56 To mitigate harm caused by fossil fuels, states are pursuing alternative energy.57 Alternative energy, however, imposes its own harms, implicating environmental laws.58 Offshore wind is a promising source of alternative energy.59 While the United States does not yet have commercial-scale offshore wind capacity, Massachusetts and Texas lead a number of coastal states pursuing significant wind farms.60 Developers often site offshore wind projects in federal waters.61 Nonetheless, transmission lines travel through state waters, requiring state approval.62 Turbine rotors can reach over 400 feet high and spin nearly 170 miles an hour, harming bird and bat populations.63 Offshore wind energy development can also interfere with navigation lanes, fishing and recreational areas, marine habitats, and other public trust protections.64 As Craig observed: States’ overall public trust philosophies . . . vary widely, both rhetorically and in application . . . . As one obvious example, climate change effects threaten coasts throughout the United States. In light of such changes, coastal states viewing their public trust doctrines as evolutionary may . . . decide that the public trust doctrine gives the state extensive authority . . . [to protect] the coast. Alternatively . . . states may . . . [provide] greater protections to marine species and marine ecosystems.65

#### New renewable projects will implicate Public Trust doctrines, expansion crushes projects

Motta 14

Michael Motta jr is a Doctoral Candidate, School of Public Policy and Urban Affairs, Northeastern University; J.D., Boston College Law School, The Walking Dead or Weekend at Bernie’s? How the Public Trust Doctrine Threatens Alternative Energy Development, published by WLU 2014, http://law2.wlu.edu/deptimages/journal%20of%20energy,%20climate,%20and%20the%20environment/7%20-%20Motta.pdf)//LED

Offshore wind energy offers long-term benefits, but it also imposes short-term harm.17 The harm, though minimal relative to the harm imposed by fossil fuels, implicates the public trust doctrine.18 The doctrine’s ambiguity makes it unclear how courts should apply it to offshore wind energy.19 This article argues that such indeterminacy undermines alternative energy development and harms the public interest. art II presents adoption and subsequent interpretation of the public trust doctrine in the United States Part III explores alternative energy development, the first federally-approved offshore wind energy project, and a public trust challenge that the project faced. Part IV identifies major areas of indeterminacy in public trust law. Part V suggests how courts should make the doctrine more reliable. This article concludes in Part VI by arguing that ambiguity in the public trust doctrine represents larger paradigmatic problems in environmental law.

#### Current court doctrine creates a balance, expansion overcorrects

Motta 14

Michael Motta jr is a Doctoral Candidate, School of Public Policy and Urban Affairs, Northeastern University; J.D., Boston College Law School, The Walking Dead or Weekend at Bernie’s? How the Public Trust Doctrine Threatens Alternative Energy Development, published by WLU 2014, http://law2.wlu.edu/deptimages/journal%20of%20energy,%20climate,%20and%20the%20environment/7%20-%20Motta.pdf)//LED

Courts, recognizing the ambiguity of the doctrine, have alternately described the scope as “expanding” or “evolutionary.”104 An “expanding” doctrine risks rendering the doctrine’s bounds unknowable since courts have already expanded it to include areas ranging from streets to prehistoric fossil beds, and to include uses as diverse as aesthetic enjoyment and cultural considerations.105 As Huffman warned: “[I]f a public right to fish implies a public right to camp and a navigable waterway implies a prairie pothole . . . then there can be no rule of law because there is no bounded concept to constrain the judge.”106 Further, expansion implies continuous growth.107 What if the public interest requires contraction? The doctrine has also been described as “evolutionary” or “flexible” and subject to changing public needs: “The public trust doctrine, like all common law principles, should not be considered fixed or static but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.”108 Though the “evolutionary” view allows for both expansion and contraction, there is no clear path forward. States, citizens, and courts may disagree about how the doctrine should evolve.109 Rather than an expanding or evolving doctrine, courts can also balance competing values. A California court allowed offshore oil and gas development only if: [T]he board first found that the particular lands are not required and with reasonable certainty will not be required for a period of twenty-five years for the promotion of commerce, navigation or fishing. The section also provides that money derived . . . shall be used exclusively for improvement and maintenance of the harbor.110 In that case, the doctrine did not expand or evolve to preserve offshore oil and gas.111 The court instead balanced competing values: protection of public uses, protection of natural resources, and energy development.112 All three approaches to the doctrine can hypothetically involve a state considering the effects upon one individual resource, or upon all state resources collectively. In National Audubon Society v. Superior Court, 113 the California high court held that the state may consider state resources in their totality.114 The Massachusetts high court decided Alliance on narrow grounds and did not firmly state whether “in-state impacts” referred to impacts on Nantucket Sound or protected areas throughout the state.115 The dissent noted the importance of transitioning to alternative sources of energy, but only mentioned harm to Nantucket Sound.116

#### **In a legal framework, any program that can help fight climate change is a priori**

Motta 14

Michael Motta jr is a Doctoral Candidate, School of Public Policy and Urban Affairs, Northeastern University; J.D., Boston College Law School, The Walking Dead or Weekend at Bernie’s? How the Public Trust Doctrine Threatens Alternative Energy Development, published by WLU 2014, http://law2.wlu.edu/deptimages/journal%20of%20energy,%20climate,%20and%20the%20environment/7%20-%20Motta.pdf)//LED

Many scholars argue that the public trust doctrine and other environmental laws must adapt for climate change.167 The problem, though, is one of uncertainty rather than unwillingness. Ambiguity creates several reasonable but competing interpretations of how the law should adapt. Some scholars argue that the severity of climate change warrants an “any means necessary” approach allowing any state action that mitigates or adapts to climate change.168 This approach, however, wrongly presumes hat we know the means by which to mitigate climate change.169 Moreover, environmental law rarely takes such an approach.170 As with the public trust doctrine, courts weigh environmental values against each other171 and against non-environmental values.172 Other scholars suggest the opposite, arguing that environmental values should be balanced against all other societal values in one all-encompassing balancing test.173 That balancing, however, compounds the problem by introducing more amorphous values with no predictable way to weigh them. If environmental law is to continue serving the public interest, it must expressly define and incorporate more than just environmental values. Doing so in a consistent way will inform states and private parties of their obligations, and citizens of their rights. Sustainable development provides a means of clarifying environmental law. As one scholar describes it: During the past twenty years . . . an increasing number of law firms, public officials, and scholars [view] environmental, land use, real estate, energy, and other related fields of law as an integrated area of practice and scholarship . . . . [This serves as] a unifying concept that provides the insights and strategies needed to address the nation’s heightened concern over climate change.174 Sustainable development recognizes that resources are finite, and that states must base decisions on the needs of both current and succeeding generations.175 Sustainable development explicitly balances environmental, economic, and social values.176 Thus, a shift towards a sustainability model would allow for a balancing of specific economic and social values from within the law itself, rather than as elements of an amorphous public interest.177 Will environmental law continue to protect natural resources for current and future generations? Or will it cease being a coherent body of law? The public test doctrine, perhaps the oldest environmental law, serves as the test case

### case

#### Expansion of Public Trust Doctrine is dangerous

Huffman 15

James L. Huffman is Dean Emeritus of Lewis & Clark Law School and a Visiting Fellow at the Hoover Institution, WHY LIBERATING THE PUBLIC TRUST DOCTRINE IS BAD FOR THE PUBLIC, Published by Lewis and Clark 5/14/20)//LED

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.

#### Because the doctrine is based in the judicial system, courts can twist the affirmative beyond recognition, creating precedent that destroys court liberty

Huffman 15

James L. Huffman is Dean Emeritus of Lewis & Clark Law School and a Visiting Fellow at the Hoover Institution, WHY LIBERATING THE PUBLIC TRUST DOCTRINE IS BAD FOR THE PUBLIC, Published by Lewis and Clark 5/14/20)//LED

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, 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 wellmeaning 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” branch16—a phrase later adopted as the title of a book by Alexander Bickel17—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.

### Block

#### Judges are ill-suited to create protections

Huffman 15

James L. Huffman is Dean Emeritus of Lewis & Clark Law School and a Visiting Fellow at the Hoover Institution, WHY LIBERATING THE PUBLIC TRUST DOCTRINE IS BAD FOR THE PUBLIC, Published by Lewis and Clark 5/14/20)//LED

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. 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.