

Judicial Resources and the Common Law: The Public Trust Doctrine as Jurisdictional Hybrid

Abstract

UK Supreme Court justice Robert Carnwath has urged the judiciary to develop “common laws of the environment,” that can operate within differing legal frameworks tailored where necessary towards specific constitutions or statutory codes.¹ One such mechanism with potential for repositioning environmental discourse in both common law and civil law jurisdictions is the doctrine of public trust.

Basing their arguments upon a claimed heritage of civil law and common law descent, supporters are currently testing the scope of the doctrine in US federal courts in ground breaking litigation aimed at forcing the federal government to uphold its duty to protect the atmosphere.²

This paper now asks whether common law judicial resourcefulness can transform a transatlantic hybrid of uncertain parentage into a transformative tool of environmental protection.

Introduction

This paper is set against two specific contemporary political realities. The first is the election of Donald Trump as US President. The second is the decision of the British people to leave the European Union. Both have potentially negative implications for environmental regulation generally and specifically for an effective response to the problem of climate change. In the United States, President Trump has already begun to deliver on his election promise to unshackle the fossil fuel industry from burdensome regulation. On March 2017 he signed an Executive Order designed to begin the process of dismantling a wide array of Obama-era policies on global warming — including emissions rules for power plants, limits on methane leaks, a moratorium on federal coal leasing, and the use of the social cost

¹ Robert Carnwath, ‘Judges and the Common Laws of the Environment – At Home and Abroad’ J. Env’tl. L. 1(2014).

² *Juliana v. United States*, 6:15-cv-1517-TC.

of carbon to guide government actions.³ In the United Kingdom, withdrawal from a European Union regulatory regime of strict standards and long-term targets raises the prospect of a loosening of “environmental fetters” and the loss of an important mechanism for calling Government to account on environmental commitments; these mechanisms, writes one observer, citing to the recent litigation about air quality in London⁴ “may be far from perfect, but the EU does enable action to be taken to ensure that governments do meet their obligations, even when that is difficult or expensive or just not viewed as a top priority.”

The question this paper explores is this: if in the US there is at best a political failure and at worst a political animus in respect of environmental regulation, while in the UK, political will or no, the existing mechanisms of environmental regulation face dismantling or undermining, can the common law step up to the breach? Can our judges on both sides of the Atlantic, find within our shared legal heritage and tradition doctrinal resources that can fill the gap?

In the United States, the existence of a regulatory regime has so far proved a significant barrier to federal common law actions in respect of global warming. In *American Electric Power v Connecticut*,⁵ the US Supreme Court ruled that corporations cannot be sued for greenhouse gas emissions (GHGs) under federal common law, primarily because the Clean Air Act delegates the management of carbon dioxide and other GHG emissions to the Environmental Protection Agency (EPA). In *Kivalina Village*

³Presidential Executive Order on Promoting Energy Independence and Economic Growth, March 28 2017 available at <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1> last visited 20 August 2017.

⁴ See Colin Reid, ‘Environmental Law Outside the EU: An Attempt to Set out the Continuing Ground Rules and the New Influences Under Which Environmental Law Will Operate When the UK Leaves the EU’ *Journal of the Law Society of Scotland* (18 July 2016) <http://www.journalonline.co.uk/Magazine/61-7/1021967.aspx>, last visited 19 August 2017. In April 2015 the UKSC made a declaration that the UK was in breach of Article 13 of the EU Air Quality Directive (2008/50/EC) (requiring production of a plan for combating air pollution) (*R (ClientEarth) v Secretary of State for Environment, Food and Rural Affairs* [2015] UKSC 28); In 2016, the UK High Court (Garnham J.) ruled that the 2015 Air Quality Plan published by the Secretary of State failed to comply with Article 23(1) of the Air Quality Directive 2008 and its domestic manifestation, Regulation 26(2) of the Air Quality Standards Regulations 2010 (*ClientEarth v Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin)); in April 2017, the U.K. High Court (Garnham J), declined the Secretary of State’s request to extend the deadline for producing a plan to after the election (*R.(ClientEarth) v Secretary of State for Environment, Food and Rural Affairs*, Case No: CO/1508/2016 (transcript available at <https://www.judiciary.gov.uk/judgments/the-queen-on-the-application-of-clientearth-v-secretary-of-state-for-the-environment-food-and-rural-affairs/> last visited 4 May 2017).

⁵ 564 US 410, 424 (2011) (holding that “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants). For commentary see Haydn Davies, ‘From Equal Protection to Private Law: What Future for Environmental Justice in US Courts?’ (2013) 2 Br J Am Leg Studies 163, 180 and sources cited at 180 fn 105; For a more general discussion of the failure of ‘first-wave’ climate change suits see R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe* (2017) <https://ssrn.com/abstract=2965084>, concluding: “[w]hether through deference, displacement, or deliberate sabotage, anxious courts have found ways to ignore the climate change plaintiff.”

v Exxonmobil,⁶ the US Court of Appeals for the Ninth Circuit employed similar reasoning in a claim for common law damages brought against Exxon Mobil by a group of Alaskan villagers whose village was inundated due to the effects of climate change. Reversals though these cases undoubtedly were, under an Obama administration committed to tackling climate change via regulation, common law principles were not the tactic of choice for environmentally-motivated court challenges. Under a Trump administration and a Congress controlled by Republicans with a very different environmental agenda, climate change litigation is once more on the table but this time a different set of common law principles is in play.

On November 10, 2016 federal judge Ann Aiken of the US District Court for the District of Oregon issued an opinion and order denying the US government and fossil fuel industry's motions to dismiss a ground-breaking climate change lawsuit filed by 21 youth, age 9 to 20 and from all over the United States. Filed initially against the United States, President Barack Obama, and numerous executive agencies, plaintiffs allege that despite knowledge "for more than fifty years" that the use of fossil fuels "was destabilizing the climate system in a way that would 'significantly endanger plaintiffs, with the damage persisting for millennia' ... defendants, '[b]y their exercise of sovereign authority over our country's atmosphere and fossil fuel resources, ... permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels, ... deliberately allow[ing] atmospheric CO₂ concentrations to escalate to levels unprecedented in human history[.]'"⁷ Plaintiffs argue defendants' actions violate their substantive due process rights to life, liberty, and property. They also argue that defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations.⁸

Both arguments seek to break new ground; the first is constitutional and derives from the guarantees of the Fifth Amendment of the US Constitution. The second is an assertion of a federal obligation of public trust and derives from common law principles. Both will be heavily contested - the Trump administration in conjunction with fossil fuel companies is currently seeking an appeal of Judge Aiken's order.

Backing the litigation is Our Children's Trust, an environmental nonprofit with a mission "to protect earth's atmosphere and natural systems for present and future generations."⁹ Its founder is Julia Olsen, now Executive Director and Chief Legal Counsel, who represents the Trust in the *Juliana* litigation and leads a team of lawyers committed to advocate on behalf of youth and future generations and for legally-binding, science-based climate recovery policies. Influencing their strategy and arguments is the work of University of Oregon law professor Mary Wood, and specifically her conception of what she terms atmospheric trust litigation. Atmospheric trust litigation finds its roots in the public trust doctrine, which Wood calls "the oldest doctrine of environmental

⁶ 696 F.3d 849 (9th Cir 2012).

⁷ *Juliana v United States*, No 6:15-cv-01517-TC (Dist OR 10 Nov 2016).

⁸ *ibid*.

⁹ See <https://www.ourchildrenstrust.org/mission-statement/>, accessed 20 April 2017.

law”—the idea that governments must hold certain things in trust for public use, such as rivers, seas, and the seashore. It’s a concept, she claims, “as old as the Romans, but in the United States, it was used to first great effect by the Supreme Court in 1892 to declare that navigable waters and submerged lands constituted part of the public trust—the government, in other words, had to preserve them for its citizens.”¹⁰ For Wood and the scholar advocates of Our Children’s Trust the doctrine has a much broader application with transformative potential for fighting climate change. “What [the Oregon] litigation does is it fast forwards that ... principle to the modern urgency of climate crisis, ... It’s a very simple extension of logic. If navigable waters were crucial to the public back then, certainly the air, atmosphere, and climate systems warrant protection as public trust systems as well.”¹¹

Joseph Sax and the Reinvention of the Public Trust

The story of the doctrine of public trust in its modern form in the United States is closely associated with Professor Joseph Sax whose exhumation, reinvention, reformulation, call it what you will, of the doctrine has been well rehearsed. Heavily cited; his 1970 seminal article features in the Shapiro list of 100 most cited law review articles of all time,¹² but as his critics point out, the doctrine is amorphous, its jurisprudential basis unclear and its democratic claims questionable.¹³

In effect, Sax’s article was a call to arms with an avowed purpose: to promote a then little known doctrine, as a powerful tool for “effective judicial intervention” on behalf of environmental protection and natural resource conservation,¹⁴ “[T]he idea of a public trusteeship” he wrote:

rests upon three related principles. First, that certain interests--like the air and the sea--have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, that they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principal

¹⁰ <https://thinkprogress.org/can-this-group-of-kids-force-the-government-to-act-on-climate-change-349abc0809ab>. (The case she is referring to is *Illinois Central Railroad Co v. Illinois*, 146 US 387(1892)).

¹¹ *ibid*. For a full account of the *Juliana* litigation and a discussion of the ‘pathbreaking’ nature of the case see Michael C. Blumm & Mary Christina Wood ‘ “No Ordinary Law Suit”: Climate Change, Due Process and the Public Trust Doctrine ’ (2017) 67 Am. U. L. Rev. 1. See more generally Mary Christina Wood, ‘Nature’s Trust: Environmental Law for a New Ecological Age’ (CUP 2013); Mary Christina Wood & Michael C. Blumm, ‘The Public Trust in Environmental and Natural Resources Law’ (2d ed. CAP 2015).

¹² See Fred R. Shapiro and Michelle Pearce, ‘The Most-Cited Law Review Articles of All Time’ (2012) 110 Mich L Rev 1483 (listing Joseph Sax, ‘The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention’ (1970) 68 Mich L Rev 471 at joint 46th in their list of the most-cited law review articles.). A Westlaw search conducted on 9 May 2017 revealed 3174 articles in which the term “public trust doctrine appears.”

¹³ See James L. Huffman, ‘Why Liberating the Public Trust Doctrine Is Bad for the Public’ (2015) 45 Envtl L 337, 346, 348-49.

¹⁴ Joseph L. Sax, ‘The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention’ (1970) 68 Mich L Rev 471, 473

purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit¹⁵

As Carol Rose's retrospective appraisal explains, his ideas drew on his own intellectual hinterground of water law, and reflected a politically contemporary frustration with the ability of vested interests to manipulate or even subvert the mechanisms of agency regulation. From this point of view they were as much about empowering a democratic citizenry as environmental protection.¹⁶ As extrapolated from generalized principles and nineteenth century precedent¹⁷ recognizing and protecting public rights of access, navigation and fishing, the 'public trust' conception became for Sax "a vehicle for insisting that public bodies pay attention to--and adequately vindicate--the changing public interest in diffuse resources."¹⁸

However, as Rose argues, while his public trust began as "a common-law version of the then-novel "hard look" doctrine for environmental impacts," in effect a rule requiring close attention to the procedural aspects of environmental decision-making,¹⁹ as his ideas developed, he began to argue for a broader application with a normative emphasis that would "liberate" the doctrine from the "historical shackles"²⁰ that tied the doctrine to its roots in water law in favour of its "core" idea of justice expressed in terms of trust and trusteeship. Thus ten years after the publication of his seminal article he was writing:

The public trust doctrine is not just a set of rules about tidelands, a restraint on alienation by the government or an historical inquiry into the circumstances of long-forgotten grants. ... The essence of property law is respect for reasonable expectations. The idea of justice at the root of private property protection calls for identification of those expectations which the

¹⁵ Joseph L. Sax, 'Defending the Environment: A Strategy for Citizen Action' (1971) 47 Ind L Rev 165.

¹⁶ Sax (n 12) 473-74; 484 (stating that "certain rights are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than serfs.").

¹⁷ See James L. Huffman, 'Why Liberating the Public Trust Doctrine is Bad for the Public' (2015) 45 Env'tl L 337, 346, 348-349 (discussing *Arnold v Mundy*, 6 NJL 1 (1821) *Martin v. Waddell*, 41 U. 367 (1842); *Illinois Central Railroad Co v Illinois*, 146 US 387 (1892)).

¹⁸ Carol M. Rose, 'Joseph Sax and the Idea of the Public Trust' (1998) 25 Ecology LQ 351

¹⁹ Such a rule would assume a legislative intent to maintain a broad public use, and [bring] with it requirements of attention to matters such as "the collection of adequate information, public participation in decisions, informed and accountable choices, and close scrutiny of private giveaways of environmental resources," Rose, (n18) 355 (quoting Sax, (n 14) 557-65). See Sax, (n 14) 491-95 (citing *Gould v Greylock Reservation Commission*, 215 NE2d 114, 117-19 (Mass 1966) holding that lease of 4,000 acres of reservation land and management agreement exceeded the statutory grant of authority); *ibid* 509-10 (citing *Priewe v Wisconsin State Land and Improvement Co*, 67 NW 918 (Wis 1896)); *ibid* 528-30 (discussing development of tidelands protections in California).

²⁰ Joseph L. Sax, 'Liberating the Public Trust Doctrine from Its Historical Shackles' (1980) 14 UC Davis L Rev 185.

legal system ought to recognize.²¹

As it became then, the task should be “to identify the trustee's obligation with an eye toward insulating those expectations that support social, economic and ecological systems from avoidable destabilization and disruption.”²² In the hands of its current proponents, the doctrine is recast in the form of an inherent limitation on sovereign power that applies to both states and federal government alike and a judicial mechanism for calling governments to account for failing to effectively tackle air pollution and climate change.²³

At federal level, the United States Court of Appeals for the DC Circuit has given this argument short shrift, citing to the US Supreme Court decision in *PPL Montana, LLC v Montana* to the effect that “the public trust doctrine remains a matter of state law” and that “the contours of that public trust do not depend upon the Constitution.”²⁴ In *Alec L ex rel Loorz v McCarthy*, the DC Circuit dismissed the argument that *Montana* applied “only to the *state* public trust doctrine and thus casts no doubt on the potential existence of any *federal* public trust doctrine.”²⁵ The *Juliana* case currently now set down for trial in Oregon will pick up this argument which will in the end be for the US Supreme Court to resolve if the case gets that far.²⁶ At state level however, as Professor Robin Kundis Craig’s work demonstrates, the doctrine is alive and well and in some states has developed well beyond its origins in water rights law to the point where, she argues, it is not unreasonable to conclude there is not one but 50 public trust doctrines.²⁷

In its classic form, as recognised by the US Supreme Court in the nineteenth

²¹ *ibid* at 185-186.

²² *ibid* at 193.

²³ See 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. Appx 7 (DC Cir 2014) (No. 14-405) [hereinafter Amicus Curiae Brief], 2014 WL 5841697 arguing that the doctrine is an “inherent limit on sovereignty which antedates the US Constitution and was preserved by the Framers as a reserved power restriction on both the federal and state governments.”

For Professor Richard J Lazarus’ critique of the value of “atmospheric trust advocacy” and a response from Michael C. Blumm, see Richard J Lazarus, ‘Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make a Right?’ (2015) 45 *Envtl L* 1139 (reviewing his earlier article: ‘Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine’, (1986) 71 *Iowa L Rev* 631 (arguing that the public trust doctrine was outdated and should make way for federal and state statutory regulation). For Michael C. Blumm’s response see ‘Two Wrongs? Correcting Professor Lazarus’s Misunderstanding of the Public Trust Doctrine’ (2015) 46 *Envtl L* 481, 489: “Properly understood, the PTD’s sovereign ownership is not only a defense for government regulators, but an antidote to government inaction, preventing privatization and calling for protection of select resources to preserve them for the beneficiaries: the public, including future generations.”

²⁴ *Alec L ex rel Loorz v McCarthy*, 561 F. Appx 7 (DC Cir 2014) (citing to *PPL Montana LLC v Montana*, ___ U.S. ___, 132 S Ct. 1215, 1235, 182 L Ed.2d 77 (2012)).

²⁵ *ibid*.

²⁶ *Juliana v United States*, No. 6:15-cv-01517-TC (Dist OR 10 Nov 2016).

²⁷ Robin Kundis Craig, ‘Climate Change, State Public Trust Doctrines and *PPL Montana*,’ (January 17 2014) The Water Report, February 2014; University of Utah College of Law Research Paper No 57 available at SSRN: <https://ssrn.com/abstract=2380754> last visited 19 August 2017..

century case of *Illinois Central*,²⁸ the American public trust doctrine replicated the English common law of public rights in respect of navigable waters, including rights of commercial navigation and fishing and rights of access to submerged lands for the purpose of exercising those rights. The only significant change from the English law was to extend the definition of navigable waters to include waters that were navigable-in-fact as well as waters that were tidal.²⁹ In *Illinois Central* itself, the doctrine also operated to restrain alienation by the state on the basis that ownership of submerged lands was an attribute of sovereignty that could not be divested. As Professor Huffman has argued, the decision was an extreme case and “most courts understood that the public rights functioned in the nature of an easement or servitude without regard to ownership of the submerged lands.”³⁰

While this may have remained the case in most states “through the first many decades of the twentieth century,”³¹ recent research undertaken by Professor Kundis Craig reveals the flexibility and adaptability of twenty-first century public trust state doctrines that, she asserts in the hands of a willing state judiciary, have the capacity to provide an effective judicial response to the environmental challenges of climate change. As of 2010, she reports, at least sixteen states

have at least nascent ecological public trust doctrines, representing an evolution of the American public trust doctrine far beyond its classic protection of public rights to navigate, fish in, and engage in commerce on navigable waters. In addition, since 1971, courts in at least six states have consciously characterized their states' public trust doctrines as adaptive and evolutionary, and four of these states have used those evolutionary doctrines to rebalance private rights and public values in public trust waters.³²

²⁸ *Illinois Central Railroad Co v Illinois*, 146 US 387 (1892).

²⁹ This paralleled the definition in federal law for the purposes of commerce clause regulation and reflected a geographical imperative, namely that many of the big American inland water systems e.g. the Mississippi and the Missouri, while essential for the purposes of trade and commerce, were not tidal.

³⁰ Huffman, (n 15) 358-49.

³¹ *ibid.*

³² See Robin Kundis Craig, ‘Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines’ (2010) 34 Vt L Rev 781, 850; Robin Kundis Craig, ‘A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust’, (2010) 37 Ecology L.Q. 53; Robin Kundis Craig, ‘A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries’ (2007) 16 Penn St. Env'tl. L. Rev. 1. See also Michael C. Blumm, ‘The Public Trust Doctrine: A Twenty-First Century Concept’ (2010) 16 Hastings W.-N.W. J. Env'tl. L. & Pol'y 105 (discussing the evolution of the public trust doctrine); Michael C. Blumm, ‘Public Property & the Democratization of Western Water Law’ (1989) 45 Env'tl L. 573 (predicting that state courts will continue to expand the public trust, relying especially on constitutional provisions declaring water to be publicly owned.)

This is not the place to rehearse the range and detail of these responses. For this the interested reader should consult Professor Craig's research, subject to one observation which I pick up on later, namely that some states have amended their constitutions to mandate environmental protection,³³ thereby, as the Pennsylvania Supreme Court observed, "installing the common law public trust doctrine as a constitutional right to environmental protection, subject to enforcement by an action in equity."³⁴

The Public Trust and a Narrative of Origin

Across the pond, in 2015, these US state cases attracted the attention of UK Supreme Court Justice Lord Carnwath in a case concerning public rights of access and recreational use over coastal beaches.³⁵ At issue was the decision of a County Council to register an area of beach as a village green pursuant to the provisions of the Commons Act 2006. This required establishing that public rights of access and recreation had been enjoyed 'as of right' (*ie* without right) as opposed to 'by right' (*ie* in the exercise for example of rights conferred by common law).

The only reported case directly on point was the 1821 decision of *Blundell v Catterall*.³⁶ In that case, the defendant had used the beach "between the high-water mark and the low-water mark of the River Mersey" at Great Crosby in Lancashire for the purpose of providing bathing facilities, including bathing machines and carriages for members of the public who wished to swim in the sea. The Supreme Court endorsed the *Blundell* majority ruling that, absent a right established by usage and custom, there was no "common-law right for all the King's subjects to bathe in the sea and to pass over the seashore for that purpose"³⁷ but paid some attention to a strong dissent from Best J. Lord Neuberger summarized his views thus. The judge, he said:

"in effect followed the view expressed in *Bracton's De Legibus et Consuetudinibus Angliae*, where it is written "*Naturali vero iure communia*

³³ *eg* Rhode Island; Louisiana; Vermont; Pennsylvania; Illinois., Alaska, Florida, Hawaii. According to Mary Turnipseed et al. at least 42 states now either expressly mention public trust principles or contain some mention of environmental protection or natural resources. See Mary Turnipseed et al, 'The Silver Anniversary of the United States' Exclusive Economic Zone: Twenty-Five Years of Ocean Use and Abuse, and the Possibility of a Blue Water Public Trust Doctrine' (2009) 36 Ecology LQ 1, 70 (citing generally to Alexandra B. Klass, 'Modern Public Trust Principles: Recognizing Rights and Integrating Standards' (2006) 82 Notre Dame L Rev 699, 714 ("While some state constitutional provisions do no more than authorize the legislature to enact environmental laws (which it already has authority to do under its inherent police power), others codify the common law public trust doctrine or set out a constitutional policy to protect the environment. Yet others grant rights to all citizens for a 'clean and healthful environment' or place mandatory duties on the state to protect the environment.") (footnote omitted); Matthew Thor Kirsch, 'Upholding the Public Trust in State Constitutions' (1997) 46 Duke LJ 1169.

³⁴ *Commonwealth v. National Gettysburg Battlefield Tower, Inc.* 311 A.2d 588, 596 (Pa. 1973) (Jones CJ dissenting) (emphasis omitted).

³⁵ *R (on the application of Newhaven Port and Properties Limited) v East Sussex County Council* [2015] UKSC 7.

³⁶ 106 ER 1190 (1821).

³⁷ [2015] UKSC 7 ¶33 (quoting Holroyd J, *Blundell v Catterell*, 106 E.R. 1190, 1197 (1821).

sunt omnium haec: aqua profluens, aer et mare et litora mare, quasi mari accessoria. Nemo igitur ad litus maris accedere prohibetur” (By natural law these are common to all: running water, air, the sea, and the shores of the sea, as though accessories of the sea. No one therefore is forbidden access to the seashore).³⁸

Lord Neuberger took the view that for the *Blundell* majority, led by Holroyd J, Best J was stating the civil law rather than the common law position³⁹ but with respect, this is oversimplification. Best J’s decision is not a model of clarity but at its conclusion comes this passage:

My opinion is founded on these grounds. The shore of the sea is admitted to have been at one time the property of the King. From the general nature of this property, it could never be used for exclusive occupation. It was holden by the King, like the sea and the highways, for all his subjects. The soil could only be transferred, *subject to this public trust*; and general usage shews that the public right has been excepted out of the grant of the soil.⁴⁰

It was this passage that led Lord Carnwath, who agreed with the overall decision but wrote separately in search of a comparative dimension, to the US state court decisions concerning the existence and contours of a doctrine of public trust. These US state court cases he suggested, offered an “illustration of how the law in this country might have developed (*and might yet develop*) if the view of Best J had prevailed over that of the majority.”⁴¹

Having mooted the possibility, Lord Carnwath ultimately did not pursue the capacity of the doctrine of public trust to resolve English common law disputes concerning public rights of access to the foreshore for recreational use. English law as it currently stands does not recognize a doctrine of public trust either in terms of rights of common ownership or of restrictions upon alienation and certainly not -as yet – in terms of a public obligation of environmental protection. Nevertheless – and this is the irony that prompted this paper, - on the other side of the Atlantic, commentators and indeed courts at both state and federal level continue to rehearse in mantra-like fashion a narrative that ties the doctrine to asserted roots in English common law. As recounted by Professor Huffman, the “generally accepted storyline” goes something like this:

Roman law, as communicated to us across the centuries by Justinian, recognized and protected public rights in especially important natural resources. These public rights constituted the *jus publicum*. ... Justinian recorded - to paraphrase - that air, flowing water, the sea and the shores of the

³⁸ *ibid* at ¶ 34.

³⁹ *ibid*.

⁴⁰ *Blundell v Catterall*, 106 E.R. 1190 (Best J dissenting) (emphasis added).

⁴¹ [2015] UKSC 7 ¶ (Lord Carnwath JSC).

sea are by natural law common to all.⁴²

...

Commentators and the occasional judge pick up the story about seven centuries later with the English judge Henry of Bracton who reported in his *De Legibus et Consuetudinibus Angliae* that the *jus publicum* of Roman law was also the law of England. Sometimes *Magna Carta* is part of the story ...

“British settlers brought the concept of the public trust to America when they claimed ownership by the right of discovery.” ... Lord Chief Justice Matthew Hale’s treatise *De Jure Maris et Brachiorum Ejusdem* is most often cited as the authority relied upon by American courts The New Jersey Supreme Court decision in *Arnold v. Mundy* is generally cited as the first case to apply the doctrine on American soil. But it is always best to have a United States Supreme Court opinion to rely upon, even when we are talking about state law, so the story of the history of the public trust doctrine concludes with *Illinois Central Railroad Co. v. Illinois*.⁴³

The problem, claims Professor Huffman is that much of the story is either distortion or wrong. Relying on extensive but largely overlooked research, he concludes that *Arnold v. Mundy* “announced an American law of title to submerged lands that reflected neither the law nor the fact of English practice,” an error that *Illinois Central Railroad* then compounded.⁴⁴ Nevertheless, the fact that this is a narrative that is largely fictitious and its claims to historical accuracy have been comprehensively debunked⁴⁵ does not appear to have diminished its force or prevented its repetition, not just by Professor Sax, forty years ago, and now by contemporary advocates of his “expansive public trust doctrine” but also in more recent statements of the judiciary and at the highest level. Thus in *Idaho v. Coeur d’Alene Tribe of Idaho* (1997),⁴⁶ we find the US Supreme Court affirming that the principle, (of public trust) arose from “ancient doctrines” – the Court cited to the Institutes of Justinian⁴⁷ and came into English law via Bracton, *Magna Carta* and Lord Hale,⁴⁸ while as recently as 2012, in *PPL Montana LLC v. Montana* the Court asserted: “The public trust doctrine is of ancient origin. Its roots

⁴² Huffman, (n17) 9-10.

⁴³ *ibid* 9-11 (internal citations omitted).

⁴⁴ See Huffman, (n 17) 30 and generally 29-93.

⁴⁵ See *ibid* 12 (n.32) 13, (explaining that he has relied heavily on the historical research and analyses of Patrick Deveney and Glenn MacGrady whose work he claims has been generally ignored. “Before them, Stuart Moore’s comprehensive treatise was similarly ignored.” See Patrick Deveney, ‘Title, Jus Publicum, and the Public Trust: An Historical Analysis’ (1976) 1 *Sea Grant L J* 13; Glenn J MacGrady, ‘The Navigability Concept in the Civil and Common Law: Historical Developments, Current Importance, and Some Doctrines That Don’t Hold Water’ 3 *Fla St U L Rev* 511 (1975); Stuart A Moore, ‘A History of the Foreshore and the Law Relating Thereto’ (1888).

⁴⁶ 521 US 261(1997).

⁴⁷ *Ibid* (citing Institutes of Justinian, Lib. II, Tit. I, § 2 (T. Cooper tr, 2nd ed. 1841) (“Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common”).

⁴⁸ *ibid*.

trace to Roman civil law and its principles can be found in the English common law on public navigation and fishing rights over tidal lands and in the state laws of this country.”⁴⁹

Given the meticulous research of his sources and the compelling nature of his analysis it is difficult to refute Professor Huffman’s conclusion: an initial misunderstanding of English law has given rise to a myth of common law origin that is now firmly established at both state and federal level and has received the imprimatur of the US Supreme Court. His admonition - “[t]hey (the judiciary) are making it up as they go” – is similarly difficult to resist but note his rider; they may indeed be making it up as they go, but in so doing, he adds, they are acting “in the tradition of some of the common law’s greatest lawyers.”⁵⁰

The last part of his article and the thrust of a more recent (2015) article then focuses on the requirement of common law precedential reasoning and its potential for non-democratic lawmaking.⁵¹ These arguments are often rehearsed, are well-known and no less significant for that. In the words of Indiana Supreme Court Justice Donald Hunter “[t]he strength and genius of the common law lies in its ability to adapt to the changing needs of the society it governs.”⁵² In the words of Professor Huffman, “American courts function within a constitutional separation of powers that assigns the lawmaking function to the legislative branch of government.”⁵³ Judicial recognition of an expanded public trust doctrine will, he claims, constitute not only a usurpation of the legislative function; it will also require the courts to declare new public rights at the expense of existing private rights in “double violation of the principle of the rule of law.”⁵⁴ Given the opportunity, the US Supreme Court may or may not rule on this issue;⁵⁵ the question I now want to pick up concerns the potential of a public trust doctrine, in “traditional” or “expanded” form in its alleged alma mater jurisdiction, the common law of England.

“Internationalizing” the Public Trust

As the United Kingdom prepares to leave the European Union and with it the supervisory and compliance mechanisms of the Commission and the CJEU, it faces a potential weakening of the regulatory frameworks of environmental law.⁵⁶ In this context,

⁴⁹ *PPL Montana LLC v Montana*, 565 US 576, 603 (2012).

⁵⁰ Huffman, (n 17) 8.

⁵¹ See James L. Huffman, ‘Why Liberating the Public Trust Doctrine Is Bad for the Public’ (2015) 45 *Envtl L* 337.

⁵² *Brooks v Robinson*, 284 NE 2d 794, 797 (Ind 1972).

⁵³ Huffman, (n 51) 339.

⁵⁴ *ibid.*

⁵⁵ See *Juliana v United States*, No. 6:15-cv-01517-TC (Dist OR 10 Nov 2016).

⁵⁶ For a discussion of “[t]he long reach of EU governance mechanisms” in environmental law, with specific reference to the post-Brexit vulnerability of the EU Habitats Directive, see Maria Lee, ‘Brexit: Environmental Accountability and EU Governance’ (OUPblog Oct. 17th 2016), <https://blog.oup.com/2016/10/brexit-environment-eu-governance/> last visited 19 August 2017 (noting that

Lord Carnwath is not alone in recognizing the attractions of a doctrine of public trust. Marc Willers QC of the English Bar and Emily Shirley, UK representative of Our Children's Trust have recently advocated the 'resurrection' of the English public trust.⁵⁷ "Now is the time" they argue, "for lawyers and judges to revitalize the PTD so that there is proper oversight and supervision of decisions taken by the UK Government which affect the environment as well as its environmental policy and legislation."⁵⁸ In similar vein, Bradley Freeman and Emily Shirley have argued that the public trust doctrine offers a mechanism for climate change litigation going forward.⁵⁹ Both pieces repeat the same narrative myth; the doctrine is an "ancient common law principle;"⁶⁰

[t]he history of the [public trust doctrine] shows that it is universal. Indeed, its roots lie in a melding of civil law and common law. The concept of *res communes* ... originated in Roman Law and was transported to English common law when English jurists read and applied *Justinian's Institutes* ... In the 13th century, Lord Bracton incorporated parts of Justinian's *Institutes* into his own treatise ... Lord Chief Justice Matthew Hale's 1667 treatise *Concerning the Law of the Sea and its Arms* had a huge influence on English law ... The PTD also finds its roots in Magna Carta As seen above, both Justinian and Magna Carta influenced the common law doctrine of Public Trust during this period in time.⁶¹

As discussed previously, the narrative of descent from English common law origins is largely myth and there is no doctrine of 'public trust' currently recognized in English law that can subject government to a fiduciary duty of environmental protection. Indeed *Tito v Waddell (No 2)*,⁶² invoked in aid by Freeman and Shirley, in many ways does the reverse. Governmental obligations, such as those owed by the British Government to Ocean Islanders in respect of royalties due under mining agreements, while they may give rise to what might be termed 'trusts in a higher sense,' do not, in

the "multi-level dense relationship" of reporting, Commission scrutiny and publicity set up by the Directive is "far from unique" in environmental matters generally and will be hard to replace. She finds some cause for optimism in the "highly structured system of mandatory (probably justiciable) planning and reporting requirements" of the UK Climate Change Act 2008 which, in conjunction with the establishment of the UK Climate Change Committee offer the "beginnings of a national model for post-EU governance." A reviewer of this article adds the thought that, "though the EU has assumed collective responsibility for negotiating member states' International treaty obligations, and has fairly ambitious mitigation commitments, successive UK administrations from Blair through to May have pursued and maintained considerably more ambitious greenhouse gas reduction targets. This, in turn, may explain why the UK does not (yet) need something like the public trust doctrine in this field, and why common law nuisance has not been invoked as it has in the US."

⁵⁷ See Marc Willers and Emily Shirley, 'The Public Trust Doctrine's Role in Post Brexit Britain', UKELA e-law newsletter March/April 2017, Issue 99, available at https://www.gardencourtchambers.co.uk/the-public-trust-doctrines-role-in-post-brexit-britain/#_ftnref4 last visited 19 August 2017.

⁵⁸ Ibid.

⁵⁹ Bradley Freeman and Emily Shirley, 'England and the Public Trust Doctrine' (2014) 8 JPL 839.

⁶⁰ Willers and Shirley (n 5757).

⁶¹ Freeman and Shirley, (n 59) 841.

⁶² (1977) Ch. 106 (Megarry J, discussing *Kinloch v Secretary of State for India* (1882) 7 App Cas 619).

general, give rise to fiduciary obligations enforceable in a court of law.⁶³ As Justice Finn explains, in English law and also his own jurisdiction, Australia, the language of trust, when used in respect of government and agency responsibilities, operates by way of political metaphor only and imposes no legally binding obligation.⁶⁴ Even in its traditional form, as Charles Sampford insightfully argues, the classic trust or trust in the lower sense still reflects an eighteenth century Chancery model of specific property held by nominated trustees upon trust for the benefit of ascertainable beneficiaries, a model that is not well suited to the task that public trust proponents urge for it.⁶⁵ I return to this point presently.

Justice Finn, albeit more optimistic than his compatriot concerning the “allure” of public trust, nevertheless concedes that the doctrine “has had almost no discernible impact in Australian law.”⁶⁶ This allure has not gone unnoticed in Canada, another common law jurisdiction. In 2004 the Canadian Supreme Court “flirted” briefly with the doctrine when considering a compensation claim in respect of environmental damage to public lands brought by the Crown against the company largely responsible for the loss.⁶⁷ Rejecting the claim for environmental loss for lack of supporting evidence, the Canadian court noted that the doctrine of public trust had led in the United States to successful claims for monetary compensation. Citing specifically to *New Jersey Department of Environmental Protection v Jersey Central Power and Light Co.*,⁶⁸ in which the State of New Jersey successfully sought compensatory damages from a power plant operator for environmental harm for which the operator was responsible,⁶⁹ Binnie J. noted the development potential of the common law as a tool of environmental protection but cautioned that absent a statutory regime to address environmental loss, the Court must proceed in a “principled and incremental way” which was not possible in that case.⁷⁰

Other jurisdictions have been less cautious. US public trust advocate Michael Blumm and his co-researcher Rachael Guthrie have recently claimed that the public trust has become “internationalised”⁷¹ and leads “a vibrant and significant life abroad.”⁷²

⁶³ *ibid* at 211-16.

⁶⁴ Paul Finn, ‘Public Trusts and Fiduciary Relations’ in Ken Coghill, Charles Sampford and Tim Smith (eds) *Fiduciary Duty and the Atmospheric Trust* 34. (Ashgate 2012).

⁶⁵ Charles Sampford, ‘Trust Governance and the Good Life’ in Coghill et al. (n 64) 47-55.

⁶⁶ Finn, (n 64) 36 (emphasis added).

⁶⁷ *British Columbia v Canadian Forest Products Ltd* (2004) 240 DLR (4th) 1, ¶155 (Binnie J).

⁶⁸ 336 A2d 750 (NJ Super Ct App Div 1975).

⁶⁹ Specifically, to public resources arising from a fish kill in tidal waters due to water temperature variations caused by negligent pumping.

⁷⁰ *British Columbia v Canadian Forest Products Ltd*, (2004) 240 DLR (4th) 1, ¶155. Also cited were *State of Washington, Department of Fisheries v Gillette*, 621 P.2d 764 (Wash Ct App 1980), *State of California, Department of Fish and Game v SS Bournemouth*, 307 F Supp 922 (CD Cal 1969), *State of Maine v M/V Tamano*, 357 F Supp 1097 (D M. 1973), *State of Maryland, Department of Natural Resources v Amerada Hess Corp*, 350 F Supp. 1060 (D Md 1972). Binnie J observed that “[t]hese were all cases decided under the common law, not CERCLA.” (2004) 240 DLR (4th) 1, ¶81.

⁷¹ Michael C Blumm and Rachael D Guthrie, ‘*Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*’ (2012).45 UC Davis .L Rev 741 See also David Takacs, ‘The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property’ (2008) 16 NYU Env’tl LJ 711, 737.

They identify “ten diverse countries on four continents: India, Pakistan, the Philippines, Uganda, Kenya, Nigeria, South Africa, Brazil, Ecuador, and Canada” in which in their view “the doctrine has become equated with environmental protection.”⁷³ As previously noted, the doctrine in Canada is embryonic and in the other countries, as Blumm and Guthrie acknowledge, the doctrine is at least supported by and in many cases explicitly derives from constitutional or statutory provisions or both and this is true also of India and the Philippines, the two countries they identify with the most substantial public trust doctrine jurisprudence. The Indian doctrine is the most extensive and draws explicitly on the shared English common law heritage. In the seminal case *M.C. Mehta v Kamal Nath* (1997), the Indian Supreme Court said:

Our legal system--based on English common law--includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.⁷⁴

However this paragraph comes at the conclusion of a long recitation of the American case law entrenched narrative of doctrinal descent and Professor Sax’s article and subsequent cases have expressly linked the doctrine to constitutional requirements including specifically the right to life.⁷⁵

UK Supreme Court Justice, Lord Carnwath, who has himself “flirted” briefly with the doctrine of public trust⁷⁶ has spoken positively of the important role that judges can play in the development and enforcement of environmental law at both national and

⁷² *ibid* at 741.

⁷³ *ibid*.

⁷⁴ *M C Mehta v Kamal Nath*, (1997) 1 SCC 388 ¶ 34 (India) available at <https://indiankanoon.org/doc/1514672/>.

⁷⁵ See Blumm and Guthrie (n 71) 762 fn105 (citing to *M I Builders Private Ltd v Radhey Shyam Sahu*, (1999) 6 SCC 464, 466 (India), available at <http://www.indiankanoon.org/doc/1937304/>. and stating : “A year before the MI Builders decision, the High Court of Jammu and Kashmir declared that the public trust doctrine “is now considered as part and parcel of Article 21 of the Constitution of India.” *Th. Majra Singh v Indian Oil Corp*, 1999 AIR 81 (JK) 82, para. 6 (Jammu and Kashmir HC) (India), available at <http://indiankanoon.org/doc/201603/>. Earlier, the High Court of Kerala interpreted Article 21 to include the right to a healthy environment, stating: “The right to life is much more than the right to animal existence and its attributes are many fold, as life itself. A prioritisation of human needs and a new value system has been recognised in these areas. The right to sweet water, and the right to free air, are attributes of the right to life, for these are the basic elements which sustain life itself.” *Attakoya Thangal v Union of India*, 1990 AIR 1 (KLT) 580, 583 (Kerala HC) (India).” Blumm and Guthrie, *ibid* 762 fn 105.

See also Mary Wood, *Atmospheric Trust Litigation Across the World*, in Coghill et al. (n 64) 114-122 (examining the public trust doctrine in legal systems around the world).

⁷⁶ See nn 35-41 and associated text.

international levels.⁷⁷ Writing for the Guardian in 2012 in the immediate aftermath of the Rio Earth Summit, he commended the “decade of progress” that followed the “unequivocal” recognition of this crucial developmental role by the UNEP sponsored global judges’ symposium that took place in Johannesburg in 2002. The “widespread acknowledgment of an international ‘common law’ of the environment based on principles such as sustainability, and inter-generational equity”⁷⁸ represented a major achievement. Ten years later, the presence in Rio of “more than 150 judges, prosecutors, public auditors and enforcement agencies from some 60 countries” was testament to the efforts of “judges in courts and tribunals across the world to give practical effect to laws for the protection of the environment.”⁷⁹ However, what is now required is a system of “common laws of the environment,” i.e. doctrinal mechanisms that can operate within differing legal frameworks albeit tailored where necessary towards specific constitutions or statutory codes.⁸⁰

Jurisdictional Hybrids, Common Law Fictions and Constitutional Nomos

This paper began as a search for a doctrine of public trust as just such a mechanism, a jurisdictional hybrid, with roots in both civil and common law and the potential to provide a conceptual framework for considerations of intergenerational equity and fiduciary obligation to have a role in matters of environmental justice. It uncovered an example of what the doctrine’s first promoter termed “judicial cleverness”⁸¹ with a largely fictitious foundational narrative that the US Supreme Court has recognized, that some jurisdictions now accept, but others and notably the UK Supreme Court, so far cannot. The question then becomes less about doctrinal origins, roots or ancestry and more about the interaction between common law development and the doctrinal narratives within which it must operate.

In one of the most cited observations in legal literature⁸² Robert Cover memorably remarked:

“We inhabit a *nomos* – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and

⁷⁷ Robert Carnwath, ‘Judges for the Environment: We Have a Crucial Role to Play’ <https://www.theguardian.com/law/2012/jun/22/judges-environment-lord-carnwath-rio> Friday 22 June 2012 19.28 BST last visited 20 August 2017.

⁷⁸ *ibid*

⁷⁹ Carnwath, n 77.

⁸⁰ Robert Carnwath, ‘Judges and the Common Laws of the Environment – At Home and Abroad’ (2014) J. Env’tl. L. 1.

⁸¹ Joseph L. Sax, ‘The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention’ (1970) 68 Mich. L. Rev. 471, 509.

⁸² By one count, *Nomos and Narrative* is the fifth most-cited law review article written in the 1980s. See Fred R. Shapiro ‘The Most-Cited Law Review Articles Revisited’ (1996) 71 Chi.-Kent L. Rev. 751, 767-69.

void. [...] No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”⁸³

Professor Cover’s account of “jurisgenesis” or the creation of legal meaning⁸⁴ is particularly appropriate to common law jurisdictions where judges draw on historical narratives to ground assertions of principle and deploy fictions rooted in ancient forms and precedents as legitimising tools of legal development. I referred earlier to the words of Indiana Supreme Court Justice Donald Hunter concerning the adaptability of the common law as jurisprudential strength.⁸⁵ The United States and the United Kingdom are common law countries with a normative universe that draws on a common legal ancestry and narrative sources but the doctrine of public trust flourishes in the one but not in the other. Public trust law, wrote Joseph Sax, “is not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process.”⁸⁶ Judges in a common law system are no strangers to the task of mending perceived legal imperfections but the doctrine of judicial precedent that they work with is a normative dynamic of both strength and limitation. Doctrinal continuity ensures legitimacy but requires a narrative of origins and uninterrupted genealogical descent; change or adaptation disrupt the narrative and threaten law’s normative claims. When common law judges attempt to work the dynamic they must first recast the foundational narrative. The historical narrative that supports the doctrine of public trust in the United States has largely been debunked; I suggest that the fact that it continues to be repeated, in many ways no longer matters because it has been supplemented by and reframed within another narrative, that of state sovereignty that is, in its own way, also fictitious but which has significance in US constitutional arrangements that does not apply in the same way in the so-called alma mater – the UK.

Federalism US style, as currently envisaged, requires a constitutional narrative of state power which casts the fifty several states as sovereigns within their own borders and seized of a state police power that does not depend upon the federal constitution but is assertable” if not “interposable”⁸⁷ against encroachments by the federal government. This conceptualization of state power depends in its turn upon a narrative of transmission from the English king in consequence of the Treaty of Paris 1783 which acknowledged the sovereignty of the thirteen named colonies and ceded to them all claims to their government, propriety and territorial rights.⁸⁸ The narrative is fictionalized in relation to the 37 states that came into the union at a later date by means of the so-called Equal Footing doctrine which

⁸³ Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

⁸⁴ See Cover, (n 83) 11.

⁸⁵ 284 NE 2d 794, 797 (Ind 1972).

⁸⁶ *ibid.*

⁸⁷ See Anne Richardson Oakes and Ilaria Di Gioia, ‘Dinosaur Constitutionalism or Uncooperative Federalism, The Affordable Care Act and the Language of States’ Rights’ (2017) *Nomos* (1).

⁸⁸ Definitive Treaty of Peace, US-GB, art 1, Sept 3 1783.

governs the terms of their admittance and endows them with all the attributes of sovereignty enjoyed by the original thirteen.⁸⁹

In relation to the doctrine of public trust, the twin narratives of common law “ancient descent” and transmission of sovereign power came together in mutual support in the nineteenth century “foundational cases.” Thus in *Arnold v Mundy* (1821), from New Jersey, Kirkpatrick CJ said:

[U]pon the Revolution, all those royal rights vested in the people of New Jersey, as the sovereign of the country, ... are now in their hands; and ... they, having themselves both the legal estate and the usufruct, may make such disposition of them, and such regulation concerning them as they may think fit; ... this power of disposition and regulation can be exercised only by the legislative body, who are the representatives of the people for this purpose; but ... they cannot make a direct and absolute grant, divesting all the citizens of their common right; such a grant, or a law authorizing such a grant, would be contrary to the great principles of our constitution, and never could be borne by a free people.⁹⁰

A year later in *Illinois Central*, Professor Sax’s “lodestar” case the Supreme Court quoted with approval:

prior to the Revolution the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain, as part of the jura regalia of the crown, and devolved to the state by right of conquest. ... [A]fter the conquest the said lands were held by the state, as they were by the king, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were publici juris; in other words, they were held for the use of the people at large.⁹¹

More recently, in *Idaho v Coeur d’Alene Tribe of Idaho*,⁹² the US Supreme Court has affirmed that public trust principles derive from state ownership of the beds and banks of navigable waters; that this ownership is an attribute of state sovereignty; that this sovereign title was recognized by English common law principles prevailing within the former thirteen colonies before the Revolutionary War and is now attributable to all states by virtue of the Equal Footing doctrine, the constitutional basis on which all states

⁸⁹ See *Pollard v Hagan*, 44 US 212 (1845).

⁹⁰ *Arnold v Mundy*, 6 NJL 1, 13 (1821) (Kirkpatrick, CJ).

⁹¹ *Illinois Central Railroad Co v State of Illinois*, 146 US 387, 457 (1892) (quoting *Stockton v Baltimore and NY R Co*, 32 Fed Rep 9 (1887), Bradley J.). See also *Martin v Waddell*, 16 Pet 367, 410 1842 (Taney CJ): ‘When the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.’

⁹² 521 US 261(1997).

were subsequently admitted to the Union. As the court explained, “[t]he principle which underlies the equal footing doctrine and the strong presumption of state ownership is that navigable waters uniquely implicate sovereign interests.”⁹³

However, because sovereignty in US constitutional arrangements is dual and the fifty states share their sovereignty with the people via their directly elected representatives, they are not the only repositories of sovereign attributes and obligations. As the Supreme Court explained in *U.S. Term Limits, Inc. v Thornton* “the Congress of the United States is not a confederation of nations in which separate sovereigns are represented by appointed delegates but is instead a body composed of representatives of the people.”⁹⁴

In *Alec L v McCarthy* (2014), a group of respected constitutional scholars and advocates trialled the claim currently being pursued by the *Juliana* claimants, that the federal government was subject to a public trust duty to protect the atmosphere. The DC Circuit dismissed for lack of standing and the claim that the doctrine is an “inherent limit on sovereignty which antedates the US Constitution and was preserved by the Framers as a reserved power restriction on both the federal and state governments”⁹⁵ has yet to be heard by a higher court. At federal level, however, the twin narratives of descent and inherited sovereign power and obligation do not work quite so well; the federal government is entirely the creature of the federal constitution. If the doctrine is to succeed it must be cast in broader terms.

In 1980, Professor Charles Wilkinson, writing for the same symposium at which Professor Sax called for the “liberation” of the public trust, attempted to locate an underlying basis for the doctrine in a model of popular sovereignty whereby the federal government acts as trustee on behalf of the general population. Arguing from cases relating to the nature of federal ownership of public lands he claimed to detect a nineteenth century jurisprudential shift away from the idea that the United States held newly acquired lands only temporarily and upon trust to transfer them to future states, in favour of the idea of permanent holding and management upon trust for the benefit of the population as a whole.⁹⁶ By about 1970, he claimed, the idea of public trust in relation to federal lands was sufficiently established to function not just as a source but more significantly as a limit on federal power.⁹⁷

As Professor Huffman has pointed out the fallacy in this argument lies in confusing the classic model of the proprietary trust with the legitimate confidence of the

⁹³ *ibid* at 284.

⁹⁴ *US Term Limits Inc v Thornton*, 514 US 779, 821 (1995) (Stevens J).

⁹⁵ See Petition for Writ of Certiorari, *Alec L ex rel Loorz v McCarthy*, 561 F. Appx 7 (DC Cir 2014) (No 14-405), 2014 WL 5017962 (US), 15-16. See also 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 Appx 7 (DC Cir 2014) (No 14-405) 2014 WL 5841697.

⁹⁶ See Charles F Wilkinson, ‘The Public Trust Doctrine in Public Land Law’ (1980) 14 UC Davis L Rev 269, 277-78.

⁹⁷ *ibid* 284.

nation's people that their elected representatives will act in the public interest.⁹⁸ The classic proprietary trust cannot work, he explains, where the alleged trustee is at the same time beneficiary and ultimate creator of the obligation.⁹⁹ It is for this reason, he argues, that current advocates seek to frame their claims of "inherent limits of sovereignty" by reference to a higher imperative of "nature's law," or, in the words of Mary Wood, an approach that "defines government's duty in natural resources management as obligatory and organic to governmental power [and suggests] a trust limitation as an attribute of government itself."¹⁰⁰

As Huffman points out, appeals to natural law, which this must be, are by no means unknown in U.S. constitutional jurisprudence but carry with them a history that has not always been positive and remains controversial.¹⁰¹ Should a higher U.S. court rule favourably on these grounds, the case will indeed be "the case of the century." The question for this paper however is whether similar arguments can be satisfactorily deployed in the UK alma mater and if not, why not.

Wood has argued that "properly cast as intrinsic to government, and reaching back to fundamental understandings that are part of sovereign duty" the Nature's Trust framework offers lawyers and judges from all jurisdictions including those outside the common law world the tools "to unearth the public trust doctrine from their own jurisprudential history and mould it to their modern legal architecture."¹⁰² The task, she says, is urgent:

Broadening the jurisdictional reach of the doctrine is essential to arrest the hemorrhage of nature's destruction currently taking place through the instrument of environmental law at all levels of government.¹⁰³

I have argued that the doctrine of public trust has worked in the United States because it taps into and is engrafted upon a constitutional dynamic whereby the States and the federal government define themselves and the extent of their powers largely in opposition to each other. The States possess the inherited police power, and retain sovereignty over their affairs subject to the limits of the Constitution; the federal government represents the people but is endowed with enumerated powers only, the very existence of which can represent the boundaries of state power. The Tenth Amendment is preservative of state sovereign powers to the extent that they have not been taken away by the Constitution thereby ensuring that state sovereignty remains an important driver of

⁹⁸ Huffman, (n 51) 365.

⁹⁹ *ibid* 368.

¹⁰⁰ Mary Christina Wood, "You Can't Negotiate with a Beetle": Environmental Law for a New Ecological Age' (2010).50 Nat Resources J 167, 203

¹⁰¹ Huffman, (n 51) 363(referring to *Lochner v New York*, *Muller v Oregon* and *Griswold v Connecticut*.).

¹⁰² Wood, (n 75) 122-23.

¹⁰³ Wood, (n 100) 203.

contemporary federalism but also and incidentally, the constitutional battleground upon which those parameters are tested.¹⁰⁴

In UK constitutional arrangements however, where sovereignty is unitary and located within a parliamentary system, this internal power sharing dynamic does not arise and this is so, devolution notwithstanding. Devolution, U.K. style is not federalism and does not as yet encroach significantly, if at all, on the constitutional supremacy of the sovereign parliament.¹⁰⁵ In this very different context, debates about inherited attributes of kingship become conceptualized in terms of the survival and remaining extent of prerogative power but this is of course exercisable by government ministers on behalf of the Crown. To the extent that the power does not depend upon a grant of Parliamentary authority and its exercise is subject to only to limited judicial review, a discourse that invokes the prerogative will necessarily be seen as anti-democratic.

As currently deployed and as the Brexit experience points up, sovereignty rhetoric in the United Kingdom is directed externally and, as we see presently directed towards the EU, is formulated largely in terms of control of borders and national autonomy. This means that a discourse of fiduciary obligations as counterpart of inherited regal power that underpins the doctrine of public trust in the United States has not only failed to develop in the United Kingdom but is unlikely to do so absent an alternative narrative.

It is true, as mentioned earlier, that Professor Justice Paul Finn of the federal court of Australia has toyed briefly with the parallels between governmental obligations and the fiduciary nature of trusteeship.¹⁰⁶ His context was a concern with setting standards of behaviour and establishing a culture of accountability in public office and although his work attracted considerable interest at the time, in his later work, he has rowed back from the comparison.¹⁰⁷ “In the age of statutes and of government under statutes” he suggests, the task of “channelling and controlling the exercise of public power” requires a focus upon statutory interpretation and judicial review for which abstract principles drawn from the law of trust are not suited. Thus, contrary to his earlier views, he now considers it unlikely

that the characterisation of the State as a trustee of its powers of government for the people - a trust founded upon the proposition that “the powers of government belong to, and are derived from ... the people” - will provide workable criteria upon which to found judicial review of official decision

¹⁰⁴ US Const. Amend X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. See, eg *Printz v United States*, 521 US 898 (1997) (Provision in Brady Handgun Violence Prevention Act requiring sheriffs to undertake background checks before registering transfers of handguns violated the Tenth Amendment because it sought to “commandeer” state executive functions).

¹⁰⁵ See *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

¹⁰⁶ Paul Finn, ‘The Forgotten “Trust”: The People and the State’ in Malcolm Cope (ed) *Equity Issues and Trends* (Federation Press 1995).

¹⁰⁷ Paul Finn, ‘Public Trusts, Public Fiduciaries’ (2010) 38 Fed L Rev 335.

making, save perhaps in bleak, almost unthinkable circumstances. It is too abstract for everyday use.¹⁰⁸

This is not however, to downplay the role of the trust metaphor as a criterion of legitimacy and as such, arguably, or possibly, a fundamental principle of the common law. Whether, in the UK, a trust metaphor as a mechanism of environmental protection can be deployed by common law judges as a tool of statutory interpretation or judicial review, remains yet to be seen. Recent experiments with referendums in the UK have tempted some commentators to suggest a new constitutional dynamic in which popular sovereignty now trumps that of the sovereign parliament.¹⁰⁹ In *R (Miller) v Secretary of State for Exiting the European Union*¹¹⁰ the suggestion was roundly refuted by the U.K. Supreme Court, but as the Daily Mail intuits and Professor Green explains, when formal constitutionalism threatens to turn them into “enemies of the people,” they should remind themselves that “Parliamentary sovereignty is an institutional device, helpful where it secures important values, but a hindrance when it does not.”¹¹¹ Whatever the outcome of the Brexit negotiations, the UK will, at least for the time being, remain a member of the Council of Europe and a signatory to the European Convention on Human Rights. While it is true that neither the Convention nor the Additional Protocols cover any environmental rights or any interest in the preservation of the environment, there are some indications of a developing right to life jurisprudence that can encompass, at least a duty to protect life against environmental disaster.¹¹² Whether our judges can as Justice Finn suggests “breathe further life into [these] principles by acknowledging that there are emerging public interests and values which warrant protection from legislative or executive encroachment and which should be protected in the same way that we now protect fundamental rights and interests”¹¹³ remains to be seen. There is no doubt of the importance. As Mary Wood herself might say - there is the Earth to play for.

¹⁰⁸ *ibid* at 336.

¹⁰⁹ See Les Green, ‘Should Parliamentary Sovereignty Trump Popular Sovereignty’, *Semper Viridis* (2016-11-03), <https://ljmgreen.com/2016/11/03/should-parliamentary-sovereignty-trump-popular-sovereignty/>

¹¹⁰ [2017] UKSC 5.

¹¹¹ Green, (n 109).

¹¹² See *Öneryıldız v Turkey*, 30 Nov. 2004 (Grand Chamber); *Budayeva and Others v Russia* 20 March 2008.

¹¹³ Finn, (n 64) 39. It has been suggested, for example, that failure to meet carbon reduction budgets under the UK Climate Change Act 2008 would be non-justiciable, which does than potentially open space for public trust litigation. See Colin Reid, ‘A New Sort of Duty? The Significance of “Outcome Duties” in the Climate Change and Child Poverty Acts’ (2012) 4 Public Law 749-767. I am indebted to an anonymous reviewer of this article for the observation that ‘there is no reason in principle why EU ambient air quality objectives addressed to the government would be justiciable (Client Earth litigation) while broadly similar objectives in respect of CO2 etc would not.