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ARTICLE

Judicial Resources and the Public Trust Doctrine: A Powerful Tool of Environmental Protection?

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Abstract
United Kingdom Supreme Court Justice Robert Carnwath has urged the judiciary to develop 'common laws of the environment', which can operate within different legal frameworks, tailored where necessary towards specific constitutions or statutory codes. One such mechanism with the potential for repositioning environmental discourse in both common law and civil law jurisdictions is the doctrine of the public trust. Basing their arguments upon a heritage of civil law and common law, supporters of the public trust doctrine are currently testing its scope in United States federal courts via groundbreaking litigation aimed at forcing the federal government to uphold its duty to protect the atmosphere. This article considers whether common law judicial resourcefulness can transform a transatlantic hybrid of uncertain parentage into a powerful tool of environmental protection.

Keywords: Public trust doctrine, Fiduciary obligations, Common law constitutionalism, Common laws of the environment, Jurisdictional hybrid

1. INTRODUCTION

This article is set against the backdrop of two contemporary political realities. The first is the election of Donald Trump as President of the United States (US). The second is the decision of the British people to leave the European Union (EU). Both have potentially negative implications for environmental regulation generally and specifically for developing an effective response to the problem of climate change. In the US, President Trump has already begun to deliver on his election promise to unshackle the fossil fuel industry from burdensome regulation. In 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

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cost of carbon to guide government actions.[1] In the UK, withdrawal from the EU 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. This mechanism, writes one observer, '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'.[2]

This article explores the following question. If, in the US, there is at best a political failure and at worst a political animus in respect of environmental regulation, and if, in the UK, the existing mechanisms of environmental regulation face dismantling or undermining, can the common law step up to the breach? Can judges on both sides of the Atlantic find doctrinal resources within our shared legal heritage to fill the gap?

In the US, 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*,[3] the US Supreme Court ruled that corporations cannot be sued for greenhouse gas (GHG) emissions under federal common law, primarily because the Clean Air Act[4] delegates comprehensive authority to address air pollution to the US Environmental Protection Agency (EPA). In *Kivalina Village* v. *ExxonMobil Corp.*,[5] the US Court of Appeals for the Ninth Circuit employed similar reasoning in a claim for common law damages brought against ExxonMobil by a group of Alaskan villagers whose village was inundated as a result of the effects

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1 Presidential Executive Order on Promoting Energy Independence and Economic Growth, 28 Mar. 2017, available at: https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1.

2 C. 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' (2016) *Journal of the Law Society of Scotland* online articles, available at: http://www.journalonline.co.uk/Magazine/61-7/1021967.aspx. In April 2015, the UK Supreme Court (UKSC) made a declaration that the UK was in breach of Art. 13 of EU Directive 2008/50/EC on Ambient Air Quality and Cleaner Air for Europe [2008] OJ L 152/1 (EU Air Quality Directive 2008), which requires 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 Art. 23(1) EU Air Quality Directive 2008 and its domestic transposition, the Air Quality Standards Regulations 2010 (UKSI 2010/1001), reg. 26(2): *ClientEarth* v. *Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin). In April 2017, the UK High Court (Garnham J) declined the Secretary of State's request to extend the deadline for producing a plan until 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.

3 564 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 H. Davies, 'From Equal Protection to Private Law: What Future for Environmental Justice in US Courts?' (2013) 2(1) *British Journal of American Legal Studies*, pp. 163–203, at 180, and sources cited at 180, n. 105. For a more general discussion of the failure of 'first-wave' climate change suits, see R.H. Weaver & D. Kysar, 'Courting Disaster: Climate Change and the Adjudication of Catastrophe', 8 May 2017, p. 32, available at: 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').

4 42 USC §7401

5 696 F.3d 849 (9th Cir. 2012).

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of climate change. Disappointing though these outcomes 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. This time, however, a different set of common law principles is in play.

On 10 November 2016, federal judge Ann Aiken of the US District Court for the District of Oregon denied the motions of the US government and fossil fuel industry to dismiss a groundbreaking climate change lawsuit filed by 21 young people, aged between 9 and 20 and coming from all over the US. Filed initially against the US, President Barack Obama, and numerous executive agencies, the 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', the 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 [carbon dioxide] CO_2 concentrations to escalate to levels unprecedented in human history'.[6]

The plaintiffs argue that the defendants' actions violate their substantive due process rights to life, liberty, and property. They also argue that the defendants have violated their obligation to hold certain natural resources in trust for the people and for future generations.[7] Both arguments seek to break new ground. The first is constitutional and derives from the guarantees of the Fifth Amendment to the US Constitution. The second is an assertion of a federal public trust obligation and derives from common law principles. Already heavily contested by fossil fuel companies and the Trump administration, the case is currently set down for hearing on 29 October 2018.

Backing the litigation is Our Children's Trust, an environmental non-profit organization with a mission 'to protect earth's atmosphere and natural systems for present and future generations'.[8] 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 for legally binding, science-based climate recovery policies. Influencing their strategy 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 law' – the idea that governments must hold certain things in trust for public use, such as rivers, seas, and the seashore. It is a concept, she claims:

> as old as the Romans, but in the [US], it was used first to great effect by the Supreme Court in 1892 to declare that navigable waters and submerged lands constituted part

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

7 Ibid.

8 Our Children's Trust, 'Our Mission', available at: https://www.ourchildrenstrust.org/mission-statement.

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> of the public trust – the government, in other words, had to preserve them for its citizens.[9]

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.[10]

This article proceeds as follows. In the next section (Part 2) I introduce the work of Joseph Sax, which provides the basis for the arguments upon which the *Juliana* litigators now draw. I then consider, in Part 3, the often repeated claim that the doctrine is an attribute of sovereignty inherited from the English common law and suggest that this narrative of origin is largely myth. I comment in Part 4 on the interest shown by UK Supreme Court Justice Lord Carnwath in the potential UK application of the doctrine and note the claim that the doctrine is now equated with environmental protection. In Part 5, I consider the connection between common law principles and the constitutional values or *nomos* within which they operate. I argue that the doctrine of public trust as an attribute of sovereignty can have traction in the US where sovereignty is conceptualized in fiduciary terms but, as I discuss in Part 6, this is not the case in the UK, which continues to define sovereignty in terms of authority rather than obligation. In conclusion, I note the observations of US Supreme Court Justice Oliver Wendell Holmes Jnr on the capacity of the common law to respond to 'the felt necessities of the times',[11] but suggest that, absent a significant change in UK constitutional formulations, the public trust doctrine is unlikely to sustain arguments in environmental litigation in the UK in the foreseeable future.

2. JOSEPH SAX AND THE REINVENTION OF THE PUBLIC TRUST

The doctrine of public trust in its modern form in the US is closely associated with Joseph Sax, whose exhumation, reinvention, reformulation – call it what you will – of the doctrine has been well rehearsed. His seminal 1970 article features in the Shapiro list of the 100 most-cited law review articles of all time.[12] However, as his critics

[9] N. Geiling, 'Can This Group of Kids Force the Government to Act on Climate Change?', *ThinkProgress*, 25 Nov. 2015, available at: https://thinkprogress.org/can-this-group-of-kids-force-the-government-to-act-on-climate-change-349abc0809ab (the case referred to by Wood is *Illinois Central Railroad Co.* v. *State of Illinois*, 146 US 387 (1892).

[10] Ibid. For a full account of the *Juliana* litigation and a discussion of the 'pathbreaking' nature of the case, see M. Blumm & M. Wood, '"No Ordinary Law Suit": Climate Change, Due Process and the Public Trust Doctrine' (2017) 67(1) *American University Law Review*, pp. 1–87. See more generally M. Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge University Press, 2013); M. Wood & M. Blumm, *The Public Trust in Environmental and Natural Resources Law*, 2nd edn (Carolina Academic Press, 2015).

[11] O.W. Holmes, *The Common Law* (Little, Brown & Company, 1881), p. 1.

[12] F. Shapiro & M. Pearse, 'The Most-Cited Law Review Articles of All Time' (2012) 110(8) *Michigan Law Review*, pp. 1483–520 (listing J. Sax, 'The Public Trust Doctrine in Natural Resource Law:

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] He wrote:

> [T]he idea of a public trusteeship 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 purpose of government to promote the interests of the general public rather than to redistribute public goods from broad public uses to restricted private benefit.[15]

As Carol Rose's retrospective appraisal explains, Sax's ideas drew on his own intellectual background of water law, and reflected a contemporary frustration with the ability of vested interests to manipulate or even subvert the mechanisms of agency regulation. From this point of view, his ideas were as much about empowering a democratic citizenry as about environmental protection.[16] As extrapolated from 19th century precedent[17] 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]

As Rose argues, the public trust doctrine for Sax 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, Sax began to argue for a broader application

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Effective Judicial Intervention' (1970) 68(3) *Michigan Law Review*, pp. 471–566, at joint 46th in their list of the most-cited law review articles). A Westlaw search conducted on 9 May 2017 revealed 3,174 articles in which the term 'public trust doctrine' appears.

13 See J. Huffman, 'Speaking of Inconvenient Truths: A History of the Public Trust Doctrine' (2007) 18(1) *Duke Environmental and Policy Forum*, pp. 1–102. See also J. Huffman, 'Why Liberating the Public Trust Doctrine Is Bad for the Public' (2015) 45(2) *Environmental Law*, pp. 337–77, at 346, 348–9.

14 Sax, n. 12 above, p. 473.

15 J. Sax, *Defending the Environment: A Strategy for Citizen Action* (A. Knopf, 1971), p. 165.

16 Sax, n. 12 above, pp. 473–4, 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 Huffman (2015), n. 13 above, pp. 346, 348–9 (discussing *Arnold* v. *Mundy*, 6 NJL 1 (1821); *Martin* v. *Waddell*, 41 U. 367 (1842); *Illinois Central Railroad Co*., n. 9 above).

18 C.M. Rose, 'Joseph Sax and the Idea of the Public Trust' (1998) 25(3) *Ecology Law Quarterly*, pp. 351–62.

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, ibid., p. 355 (quoting Sax, n. 12 above, pp. 557–65). See Sax, n. 12 above, pp. 491–5 (citing *Gould* v. *Greylock Reservation Commission*, 215 N.E.2d 114, 117–19 (Mass. 1966), which held that a lease of 4,000 acres of reservation land and management agreement exceeded the statutory grant of authority), pp. 509–10 (citing *Priewe* v. *Wisconsin State Land and Improvement Co*., 67 NW 918 (Wis. 1896)); and pp. 528–30 (discussing the development of tideland protection in California).

with a normative emphasis that would 'liberate' the doctrine from the 'historical shackles'[20] which tied the doctrine to its roots in water law, and bring out instead its 'core' idea of justice expressed in terms of trust and trusteeship. Thus, ten years after the publication of his seminal article he wrote:

> 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 legal system ought to recognize.[21]

The task, then, became '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, which applies to states and federal government alike, coupled with a judicial mechanism for calling governments to account for failing to effectively tackle air pollution and climate change.[23]

At federal level, the US Court of Appeals for the DC Circuit has given this argument short shrift, citing 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 scheduled for trial in Oregon will address this argument. Ultimately, it may be for the US Supreme Court to resolve if the case gets that far.[26] At the state level,

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20 J. Sax, 'Liberating the Public Trust Doctrine from Its Historical Shackles' (1980) 14(2) *UC Davis Law Review*, pp. 185–94.

21 Ibid., pp. 185–6.

22 Ibid., p. 193.

23 See Brief of Law Professors in Support of Granting Writ of Certiorari as Amicus Curiae for Petitioners, *Alec L. ex rel Loorz* v. *McCarthy*, 561 F. Appx 7 (DC Cir. 2014) (No. 14-405) 2014 WL 5841697, p. 1 (*Amicus Curiae* Brief) (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 Richard Lazarus' critique of the value of 'atmospheric trust advocacy' and a response from M.C. Blumm, see R.J. Lazarus, 'Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make a Right?' (2015) 45 *Environmental Law*, pp. 1139–62 (reviewing his earlier article 'Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine' (1986) 71 *Iowa Law Review*, pp. 631–716, in which he argued that the public trust doctrine was outdated and should make way for federal and state statutory regulation). For Blumm's response see M. Blumm, 'Two Wrongs? Correcting Lazarus's Misunderstanding of the Public Trust Doctrine' (2015) 46(3) *Environmental Law*, pp. 481–9, at 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*, ibid. (citing *PPL Montana LLC* v. *Montana*, 565 US 576, 603 (2012)).

25 Ibid.

26 *Juliana* v. *United States*, n. 6 above.

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however, as Robin Kundis Craig's work demonstrates, the doctrine is alive and well. In some states it has developed well beyond its origins in water law to the point where, she argues, it is not unreasonable to conclude that not one but 50 public trust doctrines exist.[27]

In its classical form, as recognized by the US Supreme Court in the 19th 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, as well as 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 Huffman has argued, the facts of the case were extreme 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 Kundis Craig reveals the flexibility and adaptability of 21st-century public trust state doctrines that, she asserts, in the hands of a willing state judiciary have the potential to provide an effective judicial response to the environmental challenges of climate change. As of 2010, she reports, at least 16 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]

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27 R. Craig, 'Climate Change, State Public Trust Doctrines and *PPL Montana*', *The Water Report*, Feb. 2014, University of Utah College of Law Research Paper No. 57, available at: https://ssrn.com/abstract=2380754.

28 *Illinois Central Railroad Co*., n. 9 above.

29 This parallelled the definition in federal law for the purposes of commerce clause regulation and reflected a geographical imperative: many of the big American rivers (such as the Mississippi and the Missouri) were not tidal.

30 Huffman (2015), n. 13 above, pp. 348–49 (although 'Justice Field's opinion in *Illinois Central* is routinely cited for the proposition ... that the sovereign cannot alienate submerged lands affected by the public trust ... [t]hat is not what the case holds. ... What the case holds is that while the state can alienate submerged lands for the purposes of promoting navigation and commerce or for any private purpose so long as it does not interfere with the public interests in navigation, commerce, and fishing, it cannot alienate the entire present and future harbor of the state's largest city (citing *Illinois Central Railroad Co*., n. 9 above, p. 452 (Fields J)).

31 Ibid.

32 R. Craig, 'Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines' (2010) 34 *Vermont Law Review*, pp. 781–853, at 850; see also R. 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(1) *Ecology Law Quarterly*, pp. 53–197; R. Craig, 'A Comparative Guide to the Eastern Public Trust Doctrines: Classifications of States, Property Rights, and State Summaries' (2007) 16(1) *Penn State Environmental Law Review*, pp. 1–112. See also

This is not the place to rehearse the range and detail of state-level responses to climate change. It suffices to note that some states have amended their constitutions to include a commitment to 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]

3. THE PUBLIC TRUST AND A NARRATIVE OF ORIGIN

In 2015, these US state cases attracted the attention of UK Supreme Court Justice Lord Carnwath in *Newhaven*, a case concerning public rights of access and recreational use of 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 a finding that public rights of access and recreation had been enjoyed 'as of right' (i.e., without express or implied right or licence) as opposed to 'by right' (i.e., 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] The defendant in that case 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

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M. Blumm, 'The Public Trust Doctrine: A Twenty-First Century Concept' (2010) 16(1) *Hastings West-Northwest Journal of Environmental Law and Policy*, pp. 105–10 (discussing the evolution of the public trust doctrine); M. Blumm, 'Public Property & the Democratization of Western Water Law' (1989) 45 *Environmental Law*, pp. 573–640 (predicting that state courts will continue to expand the public trust, relying especially on constitutional provisions declaring water to be publicly owned).

33 E.g., Rhode Island, Louisiana, Vermont, Pennsylvania, Illinois, Alaska, Florida, Hawaii. According to Mary Turnipseed and her co-authors, at least 42 states now either expressly mention public trust principles or contain some mention of environmental protection or natural resources: M. 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(1) *Ecology Law Quarterly*, pp. 1–70, at 23, n. 129 (citing generally A. Klass, 'Modern Public Trust Principles: Recognizing Rights and Integrating Standards' (2006) 82(2) *Notre Dame Law Review*, pp. 699–754, at 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); M. Kirsch, 'Upholding the Public Trust in State Constitutions' (1997) 46(5) *Duke Law Journal*, pp. 1169–210.

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 Ltd)* v. *East Sussex County Council* [2015] UKSC 7 (*Newhaven*).

36 106 ER 1190 (1821).

37 *Newhaven*, n. 35 above, [33] (quoting Holroyd J in *Blundell* v. *Catterell*, ibid., p. 1197.

dissent from Best J. In *Newhaven*, Lord Neuberger summarized the views of Best J by explaining that the latter:

> in effect followed the view expressed in *Bracton's De Legibus et Consuetudinibus Angliae*, where it is written '*Naturali vero iure communia 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 position,[39] but, with respect, this is oversimplification. The decision of Best J 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 in terms of a public obligation of environmental protection. Nevertheless – and this is the irony that prompted this article – 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 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 sea are by natural law common to all.[42]

38 *Newhaven*, n. 35 above, [34].
39 Ibid.
40 *Blundell* v. *Catterall*, n. 36 above, (Best J dissenting) (emphasis added).
41 *Newhaven*, n. 35 above, [130] (Lord Carnwath) (emphasis added).
42 Huffman (2007), n. 13 above, pp. 9–10.

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> [...]
>
> 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 ...
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> '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 Huffman, is that much of the account 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 narrative is largely fictitious[45] does not appear to have diminished its force or prevented its repetition, not just by Sax 40 years ago and now by contemporary advocates of his 'expansive public trust doctrine', but also in more recent statements at the highest judicial 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 the Institutes of Justinian[47] – 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 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 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

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43 Ibid., pp. 9–11 (internal citations omitted).

44 Ibid., p. 30, and generally pp. 29–93.

45 See ibid., pp. 12 (n. 32) and 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 P. Deveney, 'Title, Jus Publicum, and the Public Trust: An Historical Analysis' (1976) 1 *Sea Grant Law Journal*, pp. 13–81; G. MacGrady, 'The Navigability Concept in the Civil and Common Law: Historical Developments, Current Importance, and Some Doctrines that Don't Hold Water' (1975) 3 *Florida State University Law Review*, pp. 511–615; S. Moore, *A History of the Foreshore and the Law Relating Thereto* (Stevens & Haynes, 1888).

46 521 US 261(1997) (*Idaho*).

47 Ibid. (citing Institutes of Justinian, Lib. II, Tit. I, § 2 (T. Cooper tr, 2nd edn, 1841) ('Rivers and ports are public; hence the right of fishing in a port, or in rivers are in common').

48 *Idaho*, n. 46 above pp. 284–86.

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

Supreme Court. His admonition – '[t]hey (the judiciary) are making it up as they go' – is similarly difficult to resist. However, note his rider: they may indeed be making it up as they go, but in so doing they are acting 'in the tradition of some of the common law's greatest lawyers'.[50]

The final part of his article then focuses on the requirement of common law precedential reasoning and its potential for non-democratic lawmaking.[51] The 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 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, he claims, will 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 for a public trust doctrine, in 'traditional' or 'expanded' form, in its alleged alma mater jurisdiction, the common law of England.

4. 'INTERNATIONALIZING' THE PUBLIC TRUST DOCTRINE

As the UK prepares to leave the EU and, with it, the supervisory and compliance mechanisms of the Commission and the Court of Justice of the EU (CJEU), it faces a potential weakening of the regulatory frameworks of its environmental law.[56] In this context, Lord Carnwath is not alone in recognizing the attractions of a doctrine of

50 Huffman (2007), n. 13 above, p. 8; Huffman (2015), n. 13 above.

51 Ibid.

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

53 Huffman (2015), n. 13 above, p. 339.

54 Ibid.

55 See *Juliana* v. *United States*, n. 6 above.

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 (Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L 206/7), see M. Lee, 'Brexit: Environmental Accountability and EU Governance', 17 Oct. 2016, *OUPblog*, available at: https://blog.oup.com/2016/10/brexit-environment-eu-governance. Lee notes that 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'.

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 Freedman 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 origins 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 argument by Freedman and Shirley, in many ways suggests the reverse. Governmental obligations, such as those owed by the British government to Ocean Islanders in respect of royalties payable under mining agreements, while they may give rise to what might be termed 'trusts in a higher sense', do not, in general, give rise to fiduciary obligations enforceable in a court of law.[63] As Justice Finn explains, in English law and that of 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 18th century Chancery model of specific property held by nominated trustees upon trust for the benefit of ascertainable beneficiaries – a model that is not

57 M. Willers & E. Shirley, 'The Public Trust Doctrine's Role in Post Brexit Britain', *UKELA e-law newsletter*, Mar./Apr. 2017, Issue 99, available at: https://www.gardencourtchambers.co.uk/the-public-trust-doctrines-role-in-post-brexit-britain/#_ftnref4.

58 Ibid.

59 B. Freedman & E. Shirley, 'England and the Public Trust Doctrine' (2014) 8 *Journal of Planning and Environment Law*, pp. 839–48.

60 Willers & Shirley, n. 57 above.

61 Freedman & Shirley, n. 59 above, p. 841.

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

63 Ibid., pp. 211–16.

64 P. Finn, 'Public Trusts and Fiduciary Relations', in K. Coghill, C. Sampford & T. Smith (eds), *Fiduciary Duty and the Atmospheric Trust* (Ashgate, 2012), pp. 31–41, at 34.

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 US to successful claims for monetary compensation. Citing specifically *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 doctrine has become 'internationalized'[71] and leads 'a vibrant and significant life abroad'.[72] They identify 'ten diverse countries on four continents: India, Pakistan, the Philippines, Uganda, Kenya, Nigeria, South Africa, Brazil, Ecuador, and Canada' where, in their view, 'the doctrine has become equated with environmental protection'.[73] 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 is explicitly derived from) constitutional or statutory provisions or both. This is true also of India and the Philippines, the two countries they identify as having the

65 C. Sampford, 'Trust Governance and the Good Life', in Coghill, Sampford & Smith, ibid., pp. 43–68, at 47–55.

66 Finn, n. 64 above, p. 36.

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

68 336 A.2d 750 (NJ Super. Ct App. Div. 1975).

69 Specifically, the harm was to public resources arising from a fish kill in tidal waters as a result of water temperature variations caused by negligent pumping.

70 *British Columbia* v. *Canadian Forest Products Ltd*, n. 67 above, para. 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': ibid., para. 81.

71 M. Blumm & R. Guthrie, 'Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision' (2012) 45(3) *UC Davis Law Review*, pp. 741–808. See also D. Takacs, 'The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property' (2008) 16(3) *NYU Environmental Law Journal*, pp. 711–5, at 737.

72 Ibid., p. 741.

73 Ibid.

most substantial public trust 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*, 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 American case law, including the entrenched narrative of doctrinal descent, and 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 himself 'flirted' briefly with the doctrine of public trust,[76] has spoken positively of the important role that judges can play in the development and enforcement of environmental law at both national and 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 role during the United Nations Environment Programme (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

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

75 See Blumm & Guthrie, n. 71 above, p. 762, n. 105 (citing *M.I. Builders Private Ltd* v. *Radhey Shyam Sahu* (1999) 6 SCC 464, 466 (India), available at: http://www.indiankanoon.org/doc/1937304, 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 prioritization of human needs and a new value system has been recognized 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).') See also M.C. Wood, 'Atmospheric Trust Litigation Across the World', in Coghill, Sampford & Smith, n. 64 above, pp. 99–164, at 114–22 (examining the public trust doctrine in legal systems around the world).

76 See nn. 35–41 and associated text.

77 R. Carnwath, 'Judges for the Environment: We Have a Crucial Role to Play', *The Guardian*, 22 June 2012, available at: https://www.the guardian.com/law/2012/jun/22/judges-environment-lord-carnwath-rio.

78 Ibid.

79 Ibid.

'common laws of the environment:', doctrinal mechanisms that can operate within different legal frameworks, albeit tailored where necessary towards specific constitutions or statutory codes.[80]

5. JURISDICTIONAL HYBRIDS, COMMON LAW FICTIONS AND CONSTITUTIONAL *NOMOS*

This article began with a query. As a jurisdictional hybrid with roots in both civil and common law, can the public trust doctrine offer a conceptual framework capable of infusing considerations of intergenerational equity and fiduciary obligation into questions of environmental justice? It has 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 for this section 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 literature[82] 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 void. … No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.[83]

Cover's account of 'jurisgenesis', or the creation of legal meaning,[84] 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 legitimizing tools of legal development. I referred earlier to the words of Indiana Supreme Court Justice Hunter concerning the adaptability of the common law as jurisprudential strength.[85] The US and the UK are common law countries with a normative universe that draws on a common legal ancestry; yet, the doctrine of public trust flourishes in one but not in the other. Public trust law, wrote 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

[80] R. Carnwath, 'Judges and the Common Laws of the Environment: At Home and Abroad' (2014) 26(2) *Journal of Environmental Law*, pp. 177–87, at 177, 184.

[81] Sax, n. 12 above, p. 509.

[82] By one count, '*Nomos* and Narrative' (n. 83 below) is the 5th most cited law review article written in the 1980s: Shapiro & Pearse, n. 12 above, p. 1489.

[83] R. Cover, 'The Supreme Court, 1982 Term, Foreword: *Nomos* and Narrative' (1983) 97(1) *Harvard Law Review*, pp. 4–68.

[84] Ibid., p. 11.

[85] *Brooks* v. *Robinson*, n. 52 above, p. 797.

[86] Sax, n. 12 above, p. 509.

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judicial precedent with which they work is a normative dynamic of both strength and limitation. Doctrinal continuity ensures legitimacy but requires a narrative of origin and uninterrupted genealogical descent; change or adaptation disrupt the narrative and threaten law's normative claims. When common law judges attempt to disrupt a precedent, they must first recast the narrative context. The historical narrative that supports the doctrine of public trust in the US has largely been debunked. Continuing judicial references to the doctrine, I would argue, are effectively irrelevant, because it has been supplemented by and reframed within another narrative, that of state sovereignty. The state sovereignty narrative is in its own way also fictitious, but, as I now consider, has significance in US constitutional arrangements that is absent in the doctrine's so-called alma mater – the UK.

Federalism in contemporary US constitutional discourse requires a narrative which casts the 50 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 turn upon a narrative of transmission from the English king in consequence of the Treaty of Paris of 1783, which acknowledged the sovereignty of the 13 named colonies and ceded to them all claims to their government, property, 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 governs the terms of their admittance and endows them with all the attributes of sovereignty enjoyed by the original 13.[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 doctrine's foundational cases of the 19th century. Thus, in the New Jersey case of *Arnold* v. *Mundy* (1821), 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]

Seventy years later, in *Illinois Central* – 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

[87] See A. Richardson Oakes & I. Di Gioia, 'Uncooperative Federalism or Dinosaur Constitutionalism: The Affordable Care Act and the Language of States' Rights' *Nomos, Le attualita' nel diritto*, p. 1 (2017).

[88] Definitive Treaty of Peace, US–GB, 3 Sept. 1783, Art. 1.

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

[90] *Arnold* v. *Mundy*, n. 17 above, p. 13 (Kirkpatrick CJ).

> 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 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 original 13 colonies before the Revolutionary War and that this trust is now attributable to all states by virtue of the equal footing doctrine, the basis on which all states 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 50 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 *US 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 advanced 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 Court of Appeals for the DC Circuit dismissed the claim for lack of standing. Thus 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 the 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, Charles Wilkinson, writing for the same symposium at which 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 19th century jurisprudential shift away

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[91] *Illinois Central Railroad Co.*, n. 9 above, p. 457 (quoting *Stockton* v. *Baltimore and N.Y.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] *Idaho*, n. 46 above.

[93] Ibid., p. 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*, n. 23 above, WL 5017962 (US), pp. 15–6. See also *Amicus Curiae* Brief, n. 23 above, p. 1.

from the idea that the US 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]

The fallacy of this argument, as Huffman has pointed out, lies in confusing the classic model of the proprietary trust with the legitimate confidence of the 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 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 US constitutional jurisprudence but carry with them a history that has not always been positive and remains controversial.[101] Should a higher US court rule favourably on these grounds, the case will indeed be 'the case of the century'. The question for this article, however, is whether similar arguments can be satisfactorily deployed in the UK alma mater and, if not, why not.

6. A PUBLIC TRUST DOCTRINE FOR ENVIRONMENTAL PROTECTION IN THE UK?

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]

[96] C. Wilkinson, 'The Public Trust Doctrine in Public Land Law' (1980) 14(2) *UC Davis Law Review*, pp. 269–316, at 277–8.

[97] Ibid., p. 284.

[98] Huffman (2015), n. 13 above, p. 365.

[99] Ibid., p. 368.

[100] M. Wood, '"You Can't Negotiate with a Beetle": Environmental Law for a New Ecological Age' (2010) 50(1) *Natural Resources Journal*, pp. 167–210, at 203.

[101] Huffman (2015), n. 13 above, p. 363 (referring to *Lochner* v. *New York*, 198 US 45 (1905); *Muller* v. *Oregon*, 208 US 412 (1908); and *Griswold* v. *Connecticut*, 381 US 479 (1965)).

[102] Wood, n. 75 above, pp. 122–3.

[103] Wood, n. 100 above, p. 203.

I have argued that the doctrine of public trust has worked in the US 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 preserves state sovereign powers to the extent that they have not been taken away by the Constitution, thereby ensuring that state sovereignty remains not only an important driver of contemporary federalism but also the constitutional battleground upon which those boundaries 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, UK 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 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 indicates, sovereignty rhetoric in the UK 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 an incident of inherited regal power, such as that which underpins the doctrine of public trust in the US, has not only failed to develop in the UK but is unlikely to do so absent an alternative narrative.

It is true, as mentioned earlier, that 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 rowed back from the comparison.[107] 'In the age of statutes and of government under

[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, e.g., *Printz* v. *United States*, 521 US 898 (1997) (a provision in the 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] P. Finn, 'The Forgotten "Trust": The People and the State', in M. Cope (ed.), *Equity Issues and Trends* (Federation Press 1995), pp. 131–51.

[107] P. Finn, 'Public Trusts, Public Fiduciaries' (2010) 38 *Federal Law Review*, pp. 335–51.

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

7. CONCLUSION

Regardless of the fate of *Juliana*, the public trust doctrine is unlikely to become a lynchpin for environmental litigation in the UK in the foreseeable future. This is not, however, to downplay the capacity of the common law to develop new concepts and principles in response to what US Supreme Court Justice Oliver Wendell Holmes Jnr has termed 'the felt necessities of the times'.[109] As an explanation of the relationship between the state and its citizens, the trust metaphor has an undoubted attraction. Contemporary fiduciary theorist Evan Fox-Decent has grounded a normative account of environmental rights, including a human right to a healthy environment, in a fiduciary account of governmental obligation that he claims represents a fundamental principle of the common law.[110] Environmental lawyer and campaigner Mary Christina Wood argues forcefully that the public trust doctrine gives lawyers and judges at least some of the tools that they need to respond to the environmental problems that represent the necessities of our times.[111] Her hope is that a 'path-breaking judge' with imagination and courage will 'exert their judicial authority' by exploiting traditional techniques of common law creativity to develop new legal tools of environmental protection.[112] However, like Justice Finn, she acknowledges the problematic legacy of decades of modern environmental law: 'Many judges in common law countries are now so accustomed to issuing rulings within detailed confines of legislation or regulations', that their appetite for remedial creativity has been eroded and may indeed be lost.[113] Whether, in the UK, common law judges can develop a fiduciary account of sovereign obligation, as opposed to authority, with which to ground new legal rights and responsibilities in this climate change adaptation era, currently is unlikely. However, one lesson may be there for the learning: when the formal constitutionalism on display in *R (Miller)* v. *Secretary of*

[108] Ibid., p. 336.

[109] Holmes, n. 11 above, p. 1.

[110] E. Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press, 2011); E. Fox-Decent, 'From Fiduciary States to Joint Trusteeship of the Atmosphere: The Right to a Healthy Environment through a Fiduciary Prism', in Coghill, Sampford & Smith, n. 64 above, pp. 253–68, at 253.

[111] Wood, n. 75 above, p. 152.

[112] Ibid.

[113] Ibid.

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State for Exiting the European Union[114] threatens to turn our judges into 'enemies of the people', they (our judges) might want to remind themselves that 'Parliamentary sovereignty is an institutional device, helpful where it secures important values, but a hindrance when it does not'.[115]

[114] N. 105 above.

[115] See L. Green, 'Should Parliamentary Sovereignty Trump Popular Sovereignty?', *Semper Viridis* (2016-11-03), available at: https://ljmgreen.com/2016/11/03/should-parliamentary-sovereignty-trump-popular-sovereignty.