The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?

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The future of the public trust doctrine should provide a basis to overcome regulatory takings limitations on environmental regulation. The doctrine can and should be understood to constitutionally support reasonable legislative or regulatory limitations on the use of private property that would protect the public interest in maintaining or restoring a healthy environment. Acknowledging human civilization's dependence on a functioning environment should encourage an accommodation of private dominion with ecological protection. Historically, legal acceptance of the public trust dramatically defeated plausible claims of fundamental protection of private property by privileging public rights. The public trust protects the collective rights all people share in environmental resources, such as the sea and, as I argue, the atmosphere. This recognition restores the Takings Clause of the Fifth Amendment to its proper constitutional scope, negating the damaging expansion of takings by willful judicial invention.

The public trust doctrine has grown capacious in modern times, housing a variety of commonly held public rights.[1] For present

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[1] *See* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and*

purposes, let us consider two ends of the spectrum. On the one hand, the doctrine refers to public rights of use or access that amount to public ownership, such as in the surface of navigable waters. On another hand, the doctrine also requires public officials to take into account the public interest in preserving a natural resource while recognizing or allocating private rights to the resource. The former branch protects public use, while the latter protects the public interest. The public-use branch recognizes a commons that facilitates a variety of public purposes, such as navigation. Alternatively, the public interest branch creates a duty for governmental entities to conserve vital common resources, such as wetlands. The public use rights do not provide a general template for modern property law because they do not provide a broad enough scope for private property, breaking down the central right of property to exclude. The public interest branch, however, could be broadly incorporated into modern property law, limiting private property uses inconsistent with the public interest in sustaining the natural system. Moreover, extending the public use branch of the public trust doctrine confers too much power on judges, while extending the public interest branch, as I argue below, recognizes the primary authority of legislatures in balancing property with the environment.

This Essay argues that the future of the public trust doctrine should provide a pervasive ground for rejecting regulatory takings challenges to reasonable environmental regulation of land use. Specifically, the public trust doctrine should be used to protect environmental regulation from regulatory takings barriers for two reasons. First, it provides a normative legal answer to recent libertarian innovations in regulatory takings doctrine, which distort the relation of people to nature. In this respect, the doctrine builds on ideas first developed in an essay on "Green Property."[2] Second, it addresses the public trust doctrine's problematic reliance on judicial activism by employing the doctrine to sustain environmental legislation against judicial hostility. The complexity of modern society's relationship with the natural world requires numerous legislative judgments at all levels of government, which expert agencies implement. Judicial review can require legislatures and agencies to carefully consider the balancing between development and preservation. However, only popularly accountable bodies can make decisions that incorporate scientific understandings and enjoy democratic legitimacy.

Integrating Standards, 82 Notre Dame L. Rev. 699 (2006) (providing a careful exposition of the modern development of the public trust doctrine).

[2] *See* J. Peter Byrne, *Green Property*, 7 CONST. COMMENT. 239, 244 (1990).

This Essay uses the example of the atmosphere to argue that courts should recognize a collective, property-like interest of all people in functioning ecosystems. It then identifies the problems with the public trust doctrine that limit its acceptability as a general paradigm for property law. Humanity's collective interest in preserving the healthy functioning of the atmosphere makes it suitable for public trust rights; but, making this interest operational raises complex regulatory issues beyond the capacity of judicial lawmaking. Judicial review of legislation, which regulates the use of resources to protect the atmosphere, such as limiting green house gas emissions to mitigate climate change or reordering land use to adapt to such changes, should be limited to determining whether the legislature has reasonably considered tradeoffs between private rights and the protection of nature.

From the time of the adoption of the Fifth Amendment until 1922, courts upheld regulations of property use whenever they reasonably protected the public from harm and rejected strained analogies of regulations of land use to confiscation of land.[3] The public trust doctrine helps update this traditional approach. It asserts that the public has collective property rights in the atmosphere and other natural systems. Legislation reasonably protecting those rights does not "take" private property rights but balances them against public rights of equal stature.[4] Rather than relying on the elusive police power to provide a conceptual basis for sustaining legislation limiting private property rights, the public trust doctrine protects public rights in environmental resources. Thus, challenged legislation does not diminish property rights but resolves conflicts among competing public and private rights. Invoking the public trust doctrine supports the claim that regulatory takings law should not prevent the adoption of laws that reasonably address environmental problems. Legislation can accommodate private ordering through property and public control for environmental protection.

I. THE PUBLIC TRUST DOCTRINE: BACKGROUND

The public trust doctrine provides a conceptual basis to understanding that the public's interest in the use or protection of natural resources are property rights. Public trust rights can supersede

[3] *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887). The regulatory takings doctrine was born in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[4] *See* Daniel H. Cole, Pollution & Property: Comparing Ownership Institutions for Environmental Protection 13-18 (2002).

private rights in the same resource, either granting the public a right of access or justifying restrictions on private use. Public trust rights are understood to precede and constrain legislative action to a larger extent than do private property rights. For example, legislatures cannot permanently alienate public trust property[5] but can confiscate private property so long as they pay just compensation.[6] Public trust rights originally attached to certain assets, thought to be both incapable of private ownership and capable of sustaining public use without succumbing to the "tragedy of the commons," whereby open access degrades a resource to ruin.[7] Thus, sea navigation provided the traditional paradigm of open use of a public resource. The state-owned navigable waters, the land beneath, and the foreshore in trust for the public and could not readily permanently alienate them.

Joseph Sax's remarkably fecund scholarship initiated two decades of judicial activism expanding application of the public trust doctrine to new resources and clarifying the centrality of environmental protection as its normative core.[8] Sax saw the public trust doctrine primarily as a device whereby courts could correct the tendency of parochial administrative agencies and legislatures to respond to well-organized minorities and slight the public interest in natural resource protection. Sax's thoughtful analysis focused on courts and concerned a world without legislative corrections like the National Environmental Policy Act to force consideration of environmental

[5] *See* Ill. Central R.R. Co. v. Illinois, 146 U.S. 387, 452-54 (1892) (holding that the Illinois legislature could not permanently alienate Lake Michigan shorefront).

[6] *See* U.S. CONST. amend.V.

[7] Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property,* 53 U. Chi. L. Rev. 711, 712-13 (1986) (citing Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243) (1968), *reprinted in* ECONOMIC FOUNDATIONS OF PROPERTY LAW 2 (Bruce A. Ackerman ed., 1975)) (providing context to the "tragedy of the commons" phrase).

[8] *See, e.g.*, Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) (examining the public trust doctrine as a legal standard in environmental-quality controversies). Tom Merrill and Henry Smith pithily characterized his contributions:

> Sax did not advocate a rigid rule against privatization of public resources; he was more concerned with developing new forms of public participation and judicial oversight to act as a counterweight to capture of state and local legislatures by developers . . . . [The public trust article] transformed the public trust from a doctrine about public access to commercial navigation, into a doctrine about preservation of natural resources.

THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND PRACTICES 323 (2007).

impacts. A stirring emblem of this phase is the *Mono Lake Case*,[9] where the California Supreme Court required the state water bodies to adjust powerful consumptive water rights to protect natural ecosystems.[10] Sax continues to argue that environmental regulations should be characterized as efforts to protect public resources.[11]

For various reasons, despite the wave of judicial activism following Professor Sax's work, the public trust doctrine's expansion has effectively ceased. Economic anxiety certainly increased skepticism about rules perceived to burden economic growth. Critics saw the public trust doctrine as a mysterious judicial device protecting both too much and too little, and without the normative sanction of democratic choice. In 1986, Richard Lazarus wrote an important article, where he argued that the public trust doctrine had outlived its usefulness now that Congress and state legislatures had created environmental laws and agencies capable of addressing complex problems with scientific expertise.[12] Lazarus also expressed concern about judicial competence and worried that reliance on judges could backfire — their perceived solicitude for the environment could change to solicitude for individual property rights.[13]

Indeed, just after publication of Lazarus's article, conservative lawyers began to refashion the Taking Clause to provide enhanced protection against environmental regulation. Property rights advocates waged a law reform campaign of their own, seeking to promote a libertarian view of the Fifth Amendment's Takings Clause, under which restrictions on the use of natural resources would be held unconstitutional without regard to the environmental protection, public health, or other goals that they serve. These advocates emphasized autonomy and economic opportunity, values long associated in American ideology with private property.[14] Doctrinally, they argued that the goals of environmental and resource protection are constitutionally permissible, but that government should pay

[9] *See generally* Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983) (holding that the public trust doctrine offers independent basis for challenging water diversions).

[10] *Id.* at 728-29.

[11] *See* Joseph Sax, *Some Unorthodox Thoughts About Rising Sea Levels, Beach Erosion, and Property Rights*, 11 VT. J. ENVTL. L. 641, 643-44 (2010).

[12] *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine in a Constitutional Democracy,* 71 Iowa L. Rev. 631, 715-16 (1986).

[13] *See id.* at 712-13.

[14] The foundational text is RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

private owners for losses suffered because of legal regulations securing such public benefits. Despite mixed litigation results, property rights advocates have won some notable judicial victories and shifted rightward public discourse about the sanctity of private property. The latter phenomenon is evident in the many legislative and initiative battles over property rights legislation requiring compensation for decreases in property market values attributed to regulations or legislation prohibiting the use of eminent domain.[15]

II. THE PUBLIC TRUST DOCTRINE IN REGULATORY TAKINGS LAW

The public trust doctrine can make a significant contribution to regulatory takings law, but that contribution will be severely limited unless it evolves in the manner advocated by this Essay. The opportunity and the barriers are evident in considering several of the Supreme Court's regulatory takings decisions. In most of these cases, the public trust is a dog that does not bark; it is most conspicuous by its omission.

One example of a case where the Court failed to discuss the public trust is *Nollan v. California Coastal Commission*. In *Nollan* the Court first addressed constitutional limits on "exactions," conditions imposed on land owners for granting development permits.[16] The Court struck down the California Coastal Commission's requirement that the property owners convey to the public a lateral right of way over the dry sand portion of their beach as a condition for a permit to construct a larger house. The Court held that the condition lacked a rational nexus with a permissible ground for denying the permit.

Much has been written about the Court's reasoning and language, but it remains remarkable that the Court never addressed the public trust doctrine. Although the California Supreme Court held that the public trust extended only to the mean high tide line, the California Court of Appeal reasoned that the public had an interest in access to "tidelands and the sea." These areas were certainly subject to the public trust, and the statute authorized the California Coastal Commission to secure such access in issuing permits for new development.[17] Courts in other states have found that some version of

[15] *See, e.g.,* John D. Echeverria & Thekla Hansen-Young, *The Track Record on Takings Legislation: Lessons From Democracy's Laboratories,* 28 STAN. ENVTL. L.J. 439 (2009) (analyzing various examples of the effect of takings on property values).

[16] *See generally Nollan* v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (holding that the California Coastal Commission may not condition a building permit, without compensation, on the owners' transfer of a public easement across their property).

[17] *Nollan*, 223 Cal. Rptr. at 31 (Ct. App. 1986), *rev'd*, 483 U.S. 825 (1987).

the public trust doctrine creates public rights of access to or across dry sand beaches.[18] Yet, the *Nollan* Court's opinion, as well as Justice Brennan's dissent, makes no reference to the public trust.

Nollan's failure to consider the public trust was not an accident. Justice Brennan drafted a dissent in *Nollan* that explicitly and extensively invoked the public trust under California law, including article X, § 4 of the California Constitution, to uphold the exaction of a public right of access.[19] The draft dissent expansively described the history of the public trust doctrine and celebrated its new embrace of environmental values. It noted with apparent approval: "States also increasingly acknowledge that preservation of public rights may require limitations on the use of property not traditionally part of the public trust."[20] Justice Brennan did not argue that the public trust applies to dry sand beaches or itself provides a right of access to tidelands. Instead, Brennan used the public trust doctrine to uphold the California Coastal Commission's practice for obtaining access as a condition of granting building permits. He argued that the Court's opinion failed to appreciate that "the State has employed its regulatory power not to acquire a 'classic right-of-way easement,' but to fulfill its public trust duty to preserve the common resources of the State for the use of its citizens."[21] Thus, although Brennan supported a right of access, which falls under the public use branch of the public trust doctrine, he used it to support the constitutionality of legislative and regulatory actions. Moreover, he did not adhere to bright line boundaries between private and public resources, but instead, he allowed regulatory action upon private land. He also quoted generously from Professor Sax's observation about "property . . . being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing."[22]

Justice Scalia, the author of the Court's opinion in *Nollan*, replied to Brennan's dissent in a revised draft.[23] Scalia argued that the California

[18] *See, e.g.*, Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355 (N.J. 1984) (holding that public trust requires public right of access across dry sand beach even if owned by quasi-public private owner's association).

[19] William J. Brennan, Jr., Supreme Court Justice, First Draft of Dissenting Opinion in *Nollan v. Cal. Coastal Comm'n*, The Harry A. Blackmun Papers (June 3, 1987) (on file with the Collections of the Manuscript Division, Library of Congress).

[20] *Id.* at 8.

[21] *Id.* at 2.

[22] *Id.* at 8-9 (quoting Joseph L. Sax, *Takings, Private Property and Public Rights,* 81 Yale L.J. 149, 152 (1971)).

[23] *See* Antonin Scalia, Supreme Court Justice, Third Draft of Opinion in *Nollan v.*

Constitution itself does not create "a pre-existing right of access" across the Nollan's dry beach.[24] However, the revised draft never grappled with Brennan's use of the public trust as embodied in the California Constitution to support the statutory scheme under which the Commission obtained access as an exaction. Scalia further argued that the Court should not address the significance of the public trust doctrine for this case, a state law question, especially because the California Court of Appeal did not rely on the public trust nor did the California Coastal Commission ask it to. Apparently, Justice Blackmun, although in dissent, agreed with Scalia about addressing the public trust. His published dissent states:

> I do not understand the Court's opinion in this case to implicate in any way the public-trust doctrine. The Court certainly had no reason to address the issue, for the Court of Appeal of California did not rest its decision on Art. X, § 4, of the California Constitution. Nor did the parties base their arguments before this Court on the doctrine.[25]

Brennan dropped all references to the public trust from his dissent as published and Scalia dropped his rejoinder from the Court's opinion. In the end, only Blackmun's argument that it was not implicated survived into the United States Reports.

Whatever the merits of Justice Brennan's decision to delete all reference to the public trust doctrine from his published dissent, it deprived subsequent regulatory takings discourse of the inclusion of the common rights of the public as a touchstone to regulatory authority. As Brennan initially wrote, consideration of the shared property-like interests of the general public in common resources reorients the calculation of interest in regulatory takings cases. Regulations inspired by the public trust do not diminish property rights in general, but accommodate competing property rights: those of the Nollans and those of the public.[26] The regulatory action could be justified by the role of the state to protect the public's property

Cal. Coastal Comm'n, The Harry A. Blackmun Papers 6-7 (June 23, 1987) (on file with the Collections of the Manuscript Division, Library of Congress).

[24] *Id.* at 7.

[25] 483 U.S. 825, 865 (1987) (Blackmun, J., dissenting).

[26] Thus, the regulatory takings question incorporating the public trust doctrine resembles that in the classic case *Miller v. Schoene,* 276 U.S. 272 (1928), where the Court upheld a Virginia statute that ordered diseased cedar trees to be cut down in order to protect the state's apple trees. Property rights in both *Miller* and *Nollan* are on both sides of the equation, and the legislative judgment about where the public interest lay had to be upheld is reasonable.

rights in environmental resources like tidelands. The dissenters in *Nollan,* however, ultimately thought that the Court's traditional reliance on the police power to was sufficient to uphold the Commission's permit condition.

The Court's decision also illustrates the difficulty in seeking to extend the public access branch of the public trust doctrine from tidelands to related environmental resources like the upland beach. Given property law's emphasis on securing the right to exclude, the private owner's loss of that right will often strike a court as too dramatic and severe.[27] Although some state courts have taken steps to provide rights of access across private lands to reach public trust resources, the public use branch of the public trust doctrine largely remains restricted within the boundaries of trust lands or waters.

The Supreme Court has never addressed whether the public interest branch of the public trust doctrine can protect environmental regulation of land use from being held a taking. However, the silence about the public trust doctrine in *Lucas v. South Carolina Coastal Council*[28] makes the case for doing so. In *Lucas,* the Court created a *per se* takings test for regulations that prohibit development and formally deprive an owner of all economic value.[29] South Carolina sought to address shoreline damage from inappropriate development through a comprehensive state-level system.[30] One aspect of the system prohibited new development of permanent structures seaward of a line marking where shorelands had been underwater during the past forty years.[31] This system prevented David Lucas from building on his two vacant oceanfront lots because they were in that zone of shifting shoreline.[32] Large beach houses surrounded the two lots.[33] The South Carolina Supreme Court held that the regulations did not effect a taking because they reasonably prevented environmental harms.[34] However, the U.S. Supreme Court's analysis made the law's purpose irrelevant.[35] The Court's approach eliminated any consideration of the

[27] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419 (1982) (considering a regulation authorizing a permanent physical intrusion is a taking *per se*).

[28] *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (considering the application of a state law that deprived an owner of the economically viable uses of his beachfront property).

[29] *Id.* at 1030-33.

[30] *Id.* at 1007-08.

[31] *Id.* at 1008-09.

[32] *Id.*

[33] *Id.* at 1008.

[34] *Id.* at 1009-10.

[35] *Id.* at 1027-29, 1030-32.

public benefits from the regulation and failed to take seriously the state's concerns about harms from development in the dynamic beachfront area.[36]

Lucas did not squarely address the public trust doctrine's influence on the regulatory takings claim. The lots in question were landward of the mean high tide line separating public trust tidelands from privately owned dry land. If the parcels were seaward of the high tide line at the time of the litigation, the State could have prevented Lucas from building anything on his lot. The State can prohibit construction of anything within public trust lands because its ownership interest trumps that of the private land owner of record.

In a subsequent case, *McQueen v. South Carolina Coastal Council*,[37] the South Carolina Supreme Court held that the denial of a permit to build a levee, although necessary for any development, did not effect a taking because the levee would have stood on public trust land within a tidal wetland. The public trust doctrine inheres in the very title of private ownership and cannot effect a taking, even within the *Lucas* reasoning. This result is consistent with decisions in other courts[38] and anticipated by the *Lucas* language excepting from its rule regulations that "duplicate" the effects of limitations that inhere in the private owner's title.[39] Public trust rights do so inhere.[40]

These cases highlight the all-or-nothing character of the public trust. For resources within the public trust, states can prevent all development to protect trust interests, including environmental protection. For lands outside the public trust, conservative courts have erected constitutional barriers of varying strictness in the course of protecting the interests of private owners, which may frustrate environmental protection. Whatever sense this makes for the public access branch of the public trust doctrine, it makes little sense for the public interest branch. Regulation of development on the landward of the mean high tide line may protect the common interest in the environment just as much as regulation on the seaward side. Property law reflects this: although trespass law relies on distinct boundaries to

[36] *Id.*

[37] *See generally* McQueen v. S.C. Coastal Council, 580 S.E.2d 116 (S.C. 2003) (finding that properties are part of the public trust if they revert to tidelands).

[38] *See, e.g.*, Esplanade Props., LLC. v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) (holding that the city's denial of an owner's application to develop property did not effect an unconstitutional taking).

[39] *See Lucas*, 505 U.S. at 1029.

[40] *See* Hope M. Babcock, *Has the Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of* Lucas v. South Carolina Coastal Council *on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 3-5 (1995).

implement the owner's right to exclude, nuisance law considers the combined harms and benefits of conflicting uses on multiple properties. Lucas's lots highlight the futility of relying on sharp line-drawing because the lots had been and surely again will be seaward of the mean high tide line, as storms and sea level rise continue to reconfigure the coast.[41] South Carolina attempted to regulate this dynamic process to protect the ecological integrity of the coastline. Courts should not prohibit such attempts.

Property rights should not be interpreted to permit owners to harm nature in ways specified in legislation. The public trust doctrine can provide the doctrinal means to recognize such a duty within ownership, to inhere in the title as *Lucas* phrases it.[42] To play such a role, the doctrine needs to be freed from the sharp boundaries that confine it. These boundaries make sense for the doctrine's public use branch, but seem irrelevant to the public interest branch, which seeks to preserve ecological systems. Once the public trust extended to the protection of ecological interests, the relation to navigability became vestigial.[43] Thus, the central value should be protection of the common environment regardless of the location of the harmful activity. Of course, when environmental values are pervasive, they cannot be absolute. To balance property with liberty and economic development, legislation is essential.

III. THE ATMOSPHERE AS EXAMPLE

Let us pursue this argument by considering whether the atmosphere should be considered a public trust resource. The atmosphere may be considered the airspace above the earth and the gases that fill it and make life on earth possible. The atmosphere shares many characteristics with other public trust resources, such as navigable waters. The atmosphere cannot be divided into distinct parcels subject to exclusive individual ownership. While subject to regulations for public safety and convenience, the law has treated the atmosphere as a public highway since the advent of aviation, despite landowners'

[41] *See generally* J. Peter Byrne and Jessica Grannis, *Coastal Retreat Measures*, *in* The Law of Adaptation to Climate Change (Michael B. Gerrard & Katrina F. Kuh, eds.) (forthcoming 2012) (addressing practical problems of regulating land use in advance of sea-level rise).

[42] *See* Byrne, *supra* note 2, at 244.

[43] This seem implicit in the *Mono Lake* decision, holding that the public trust doctrine applies to diversions from the non-navigable tributaries of the lake, in order to protect its ecological and recreational values. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719-22 (Cal. 1983).

claims that their rights extend indefinitely into the atmosphere.[44] Even transmission frequencies through the atmosphere are deemed public resources that can be assigned by the government for a period. Moreover, all people depend on the maintenance of the atmosphere to live. Thus, normal legal reasoning supports claims that the atmosphere lies within the public trust; the absence of precedent on this point is a testament to the prior lack of need to specify the nature of ownership of atmosphere.

The motive for asserting a public trust in the atmosphere is an outgrowth of pollution, including growing emissions of green house gases, leading toward global warming, sea-level rise, increases in extreme weather events and dislocation of habitats. Before the growth of the industrial economy, people had little occasion to consider ownership of the atmosphere. However, air pollution has necessitated development of regulatory regimes to address the tragedy of the commons, created by the unrestrained right of owners to emit damaging gases and particles. Because of scientific consensus that emissions of carbon and other gases that trap heat are changing the atmosphere to our peril, complex regulatory questions have become urgent. Nonetheless, because of an inability to overcome the power of entrenched interests and the fears of economically vulnerable voters, Congress has failed to craft a regulatory response. Without a doubt, the problem is enormously complex — "super wicked" — with its planetary coverage and long-term consequences affecting virtually every human activity.[45] Invoking a public trust over the atmosphere offers the possibility of some form of collective ownership right that courts can enforce against emitters through the common law of property.

Professor Mary Wood has articulated a theory of a planetary public trust in the atmosphere.[46] Concerned that climate change will bring catastrophe and that environmental law will not adequately address it, she has urged a global effort to secure judicial enforcement of a public

[44] *See* United States v. Causby, 328 U.S. 256, 266 (1946) ("Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of land.").

[45] *See* Richard J. Lazarus, Super *Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 Cornell L. Rev. 1153, 1160-61 (2009) (outlining the exacerbating features of the climate change problem).

[46] *See* Mary Christina Wood, *Atmospheric Trust Litigation, in*, Climate Change Reader 4-6 (W.H. Rodgers, Jr. & M. Robinson-Dorn eds. 2009), *available at http://www.law.uoregon.edu/faculty/mwood/docs/atmo.pdf*. Professor Wood also described this effort in her remarks at the Public Trust Doctrine Symposium at UC Davis School of Law on March 4, 2011.

trust ordering carbon accountings and "enforceable carbon budgets."[47] Professor Wood admirably explains the doctrinal foundation by asserting that "it is no great leap to recognize the atmosphere as one of the crucial assets of the public trust."[48] One must respect the boldness of such an effort to counter looming disaster, based upon a plausible chain of legal reasoning. Yet, the initiative also exposes the public trust doctrine's greatest weakness: it simply claims too much. The purpose of declaring the atmosphere a public trust is to empower judges to employ traditional legal tools, such as nuisance law, to order private entities to reduce harmful emissions and governments to introduce other mitigation measures. Thus, courts around the world would truly become the "Platonic guardians"[49] of society, establishing basic environmental norms on the basis of a valuable yet unfamiliar legal doctrine. Such authority would lack political legitimacy. To respond to climate change, political majorities need to acknowledge the problem and authorize their institutions to take the difficult painful measures necessary to address it.

Pressing for judicial recognition of a public trust in the atmosphere seems impractical in the short run and may be counterproductive in the long run. The Supreme Court's recent decision in *American Electric Power Co. v. Connecticut*[50] demonstrated that courts are unlikely to accept authority to order reductions in emissions without legislative direction and administrative support. The Court unanimously held that because Congress addressed carbon pollution through the Clean Air Act, it had displaced the federal common law of nuisance. As a result, courts were without authority to entertain federal nuisance actions against major emitters of greenhouse gases. Underlying the decision and mirrored in other climate nuisance decisions, Justice Ginsburg's opinion for the unanimous Court expressed strong judgment that tackling climate change requires complex and coordinated judgments about science and economics beyond the judicial capacity:

> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator

[47] *Id.* at 52.

[48] *Id.* at 9.

[49] The phrase was used by Learned Hand in arguing against the capacity of judges to choose basic values for society in constitutional decision making. *See* Learned Hand, The Bill of Rights 73 (1958).

[50] *See generally* Am. Elec. Power Co v. Connecticut, 131 S. Ct. 2527 (2011) (holding that Clean Air Act and authorized EPA actions displace any common law right to seek abatement of carbon dioxide emissions).

> of greenhouse gas emissions. The expert agency is surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions. Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located. Rather, judges are confined by a record comprising the evidence the parties present. Moreover, federal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.[51]

Although the case dealt with displacement of federal common law, *American Electric Power* stands as a strong admonishment against employing judicial power to comprehensively address climate change.

Even if judges felt confident enough to order emission reductions based upon a public trust in the atmosphere, such orders might undercut long-term efforts to reach environmental sustainability. There is no substitute for persuading U.S. citizens to support protection of the atmosphere through the democratic political process. Because implementation will require widespread and willing compliance, such measures require political legitimacy, which the courts lack. Reducing emissions substantially and adapting to inevitable climate change will require people to change their preferences and behavior. Political debate and messy compromises will more likely mobilize such change than the judicial extensions of legal principles, notwithstanding the current stalled state of national discussions of climate change.

My disagreement with Professor Wood about which institutions should address climate change does not mean that I think the public trust doctrine cannot play a constructive role in the legal struggle. Legal recognition of public property rights in the atmosphere may improve political discourse and should reduce the threat that courts will find reasonable regulations — reducing emissions or lessening harms from climate change — to constitute regulatory takings. Reasonable legislative adjustment of competing property rights should be judged more generously than regulations that diminish property. In

[51] *Id.* at 2539-40.

my approach, courts are asked to permit rather than command legislative action.

My view relies on the public interest branch of the public trust doctrine. The public use branch of the public trust doctrine appropriately decides who may enter or exploit publicly-owned resources, such as tidelands. But, the public interest branch directs us toward larger questions of how the law can accommodate broader public rights in the functioning of natural systems with economic development and personal liberty. An extension of the public trust to the atmosphere would not mandate exclusive public ownership of productive assets; rather, it provides a rationale for legislation to shape private actions, safeguard environmental health, and call upon courts to permit or encourage the adjustment of private rights necessary to achieve indispensable public ends. For example, a court that accepts public rights in the shore should view the facts in *Lucas* more carefully to accommodate the state's efforts to prevent erosion and manage the sea-level rise, which climate change exacerbates.[52]

Finally, my vision for the public trust is not confined to any particular resource, even one as compendious as the atmosphere. Human life depends upon the entire web of nature, which connects across all boundaries. Our legal ethic similarly cannot be confined to specific resources. The boundary lines that separate public trust resources from other resources may be necessary for demarcating private rights of exclusion; but, they play no sensible role in measuring the propriety of legislation regulating resource use to protect our common interest in nature. At this point, the public trust doctrine would merge into a doctrine of Green Property: a dialectic within property law recognizing the ongoing need to accommodate duties toward the natural world and private dominion. The public use branch of the public trust doctrine cannot dominate private property because it destroys the efficiency and power sharing virtues of private dominion. However, private property cannot address the engulfing environmental externalities of individual choices regarding resources. Harmonization will require years of legislative compromises based on increasingly informative science and shifts in personal habits and attitudes. Green Property is not a settled body of rules, but a dialectic recognizing competing values while promoting sustainability.

[52] *See* Byrne & Grannis, *supra* note 41, at 18.

CONCLUSION

Our current political incapacity to address climate change legislatively must not cause us to abandon the struggle for a new consensus through education and mobilization. Recognizing that natural resources exist both in a natural ecology and in a human economy can advance our political discourse. Such recognition also provides a response to a conservative judiciary's drive to enshrine libertarian notions of property in a constitutional temple. Over time, environmental understanding must drive land use and other environmental legislation toward increasing recognition of duties toward nature that inhere in property rights. Courts would then weigh the environmental consequences when reviewing legislation challenged under the Takings Clause. Such an apotheosis into Green Property would be a beneficial future for the public trust doctrine.