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Informed opinion: Conserving the future is a matter of public trust

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Fall 2016 | By [Adrian Treves](#)

Last May, a group of children persuaded the Massachusetts Supreme Judicial Court to compel the state government to regulate greenhouse gases. Their case was based on a claim that the atmosphere falls under a long-standing legal principle: that the government is obligated to hold some resources in trust for public use, now and in the future.



Adrian Treves

"Atmospheric trust" lawsuits are also advancing in other states and two federal courts. Their arguments arise from common law principles, as well as the U.S. Constitution's guarantees of intergenerational justice for the beneficiaries identified in its Preamble: "to secure the Blessings of Liberty to ourselves and our Posterity."

The U.S. Constitution does not specifically mention the environment, so marshaling it in such cases depends on a common law doctrine called the public trust – the concept that certain assets must be held in trust for our children and theirs. This doctrine has guided almost 200 years of U.S. jurisprudence.

The Massachusetts case is just one of many that might revolutionize how the U.S. and state governments preserve our climate, water and wildlife.

FUTURE OBLIGATIONS

Today's children, and generations yet to come, are voiceless in the political process. Their recourse is to petition the courts that can compel government to act as trustee of their environment. Such petitions aim to prevent current lawmakers from denying future legislatures the resources and authority needed to protect the rights and prosperity of future citizens. Our Constitution thereby guarantees intergenerational justice.

The children suing state and federal governments argue that climate change will be irreversible. Without rapid, vigorous action to regulate greenhouse gases, future legislatures will be impotent to safeguard the climate on which future prosperity and well-being depend. They argue that current generations should not rob the next of a stable and predictable climate that was bequeathed on us by prior generations.

The same argument can be made regarding the extinction of wildlife. There is no de-extinction or Anthropocene remedy that can repair these wrongs in time to protect the rights of our children. Because each state also has a public trust duty, I have argued that statewide impairments of populations such as gray wolves infringe on the rights of future generations. Even if the legal theory has not been tested, the ethical obligation seems clear to me.

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PERSONAL HISTORY

My interest in the public trust doctrine derives from history, both our country's and my own. So let's go back for a moment.

In 1776, as Washington's army turned the tide to defeat the forces of King George III, the authors of the U.S. Constitution began to imagine the new sovereign as the people, including future citizens of the United States. On December 26, exactly 192 years before I was born, the Continental Army began a successful series of battles against the English, including one in my hometown of Princeton, New Jersey.

A few decades later, New Jersey led the way in establishing sovereign rights to our environment. From 1842 to 1896, the U.S. Supreme Court ruled on environmental trusts in New Jersey, Illinois and Connecticut. The justices set precedents that reverberate today.

Without realizing it, my family and I retraced the westward movement of the public trust doctrine when we moved from New Jersey to the Midwest 20 years ago. While visiting Chicago, we made an abortive attempt to swim in Lake Michigan on Lakeshore Drive; it was pre-empted by a placard warning of bacterial contamination.

But our easy access to the water, and the warning sign itself, testified to the public trust doctrine. In a landmark 1892 case, *Illinois Central Railroad v. Illinois*, the U.S. Supreme Court restored public access to Lake Michigan, rolled back the power of the railroads, and clarified the governmental duty to the public interest. The ruling elaborated and affirmed the state's duty to prevent substantial impairment of a trust consisting of "lands, waters, materials, and privileges" in which the public held a permanent interest. That Supreme Court decision is still good law today.

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Children suing state and federal governments argue climate change will be irreversible and current generations should not rob the next of a stable, predictable climate. Treves says the same argument can be made regarding wildlife extinction. Photo: Thomas Good

A LEGACY OF WILDLIFE

State and federal courts have since extended the doctrine to wildlife management in decisions spanning 1896 to 1989, from Connecticut to Oklahoma to Nebraska. I unwittingly stepped into the debate over wildlife trusts when authority for Wisconsin's native gray wolves was handed to the state government following the animal's removal from the federal Endangered Species List in 2012.

In my view, Wisconsin had abdicated its public trustee duty to prevent substantial impairment of wolves by implementing predator bounties and eradication policies as late as 1957. By 1960, all of Wisconsin's wolves were wiped out. The federal government assumed authority under the Endangered Species Act of 1973, and under its protection, the state's wolf population eventually rebounded to 815 wolves by 2012.

However, from 2012 to 2014, the state used its newly regained authority to allow hunters to legally kill hundreds of wolves and to enact laws that made protecting wolves more difficult. At the time, I found that imprudent and argued that the state did not account scientifically for their actions. In retrospect, the state's actions seem unconstitutional as well.

More broadly, was it unconstitutional for Wisconsin and 46 other states to eradicate gray, red, eastern and Mexican wolves? Only 12 states now contain breeding packs of wolves; 49 states once did. Future generations have been robbed of whatever benefits they might gain from the presence of wild wolves in their states, raising basic legal and ethical principles of intergenerational justice and the public trust.



RESEARCH AND ADVOCACY

Teenagers suing in court to safeguard the climate remind us of our obligations. Similarly, the question of how many states should restore wolves or protect any endangered species is a question for impartial, prudent trustees protecting future generations' interests and acting on the best science and independent evidence.

Those of us who work on the environment – whether focusing on safe drinking water, the climate, endangered species or any other asset in the public trust – all share a constitutional duty under the public trust doctrine. That duty was concisely captured by legal scholar Joseph Sax in a 1970 article in the *Michigan Law Review*, where he argued that democratic governments are accountable to the broad public interest to preserve and regulate the use of environmental assets as a trust for current and future generations. Sax contended that prudent accounting should be transparent, sophisticated, careful and challengeable, so as to defeat tyranny of narrow interests and deter governmental ventures into the unknown.



As scientists and scholars, our duty is to the broad public. Our role in support of the public trust is to be scientifically sound, to be transparent in our accounting, and to speak for future generations. All the disciplines of environmental studies will be needed to support prudent, legitimate trustees.

And we are bound to speak out when government abdicates its duty to the public trust. The future of public science depends on our adherence to the public interest and to the generation that will follow us.

Adrian Treves is an associate professor of environmental studies and director of the Carnivore Coexistence Lab in the Nelson Institute.

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