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# Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?, The

Darren K. Cottriel

*University of the Pacific; McGeorge School of Law*

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# The Right to Hunt in the Twenty-First Century: Can the Public Trust Doctrine Save an American Tradition?

Darren K. Cottriel\*

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\* B.A., Southern California College, 1991; J.D., McGeorge School of Law, University of the Pacific, 1996.

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## INTRODUCTION

A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends to do otherwise.<sup>1</sup>

Do Americans have a right to hunt? The answer to this question could help resolve a bitter debate. In recent years, many have fought to end the hunting of animals in our country, while others have fought to preserve this traditional pursuit.<sup>2</sup> Most sources of law are unclear regarding the extent to which governmental restrictions and prohibitions should protect the activity of hunting.<sup>3</sup> Many times the protection an activity receives depends greatly on the public view of whether the activity is correct or beneficial; much in accord with Aldo Leopold's equation quoted above.<sup>4</sup> Thus, it is possible that a right to hunt will receive protection only to the extent that it is viewed by the public as beneficial to wildlife.

The public trust doctrine is consistent with this tendency, as the doctrine seeks to protect the public's interest in certain common resources.<sup>5</sup> In light of recent expansions of the public trust doctrine, the doctrine should be seen as providing an implied right to hunt.<sup>6</sup> This right to hunt should be protected to the extent that hunting is beneficial to and consistent with the public's interest in the

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1. ALDO LEOPOLD, A SAND COUNTY ALMANAC 224-25 (1949).

2. See *infra* notes 25-39 and accompanying text (discussing arguments against hunting and analyzing the current hunting debate in America).

3. See *infra* notes 40-147 and accompanying text (discussing various possible sources of a right to hunt and concluding that it is unclear what protection hunting receives under those sources).

4. See A. Mark Woodward, *Convict the Careless in Hunting Accidents*, BANGOR DAILY NEWS, Nov. 18, 1995 (stating that the right to hunt is only as secure as society's level of comfort with the activity).

5. See *infra* notes 176-238 and accompanying text (surveying the public trust doctrine and its protections of common resources).

6. See *infra* notes 239-86 and accompanying text (arguing that the modern public trust doctrine serves as a source of an implicit right to hunt).

enjoyment and conservation of wildlife.<sup>7</sup> Accordingly, the public trust doctrine can provide hunters with a means by which they may legally challenge certain restrictions and prohibitions on hunting.

This Comment will examine the possibility of an existing right to hunt under various sources of law, including the public trust doctrine. Part I will examine hunting in the United States, focusing on the changing cultural acceptance and views of hunting during the past two hundred years.<sup>8</sup> Part II will examine possible sources of the right to hunt, including case law, natural law, the United States Constitution, and statutory law; and conclude that, under those sources of law, there exists merely a privilege to hunt.<sup>9</sup> Part III will provide a general survey of the public trust doctrine, including its history and development, its modern application and expansion, and the inclusion of wildlife as a trust resource.<sup>10</sup> Part IV will examine the public trust doctrine as a source of a right to hunt and the various protections the doctrine can provide for and against hunting.<sup>11</sup> Section V will propose two specific future applications of the public trust doctrine to hunting: providing an implicit right to hunt and a means to resolve disputes between hunters and nonhunters.<sup>12</sup> Finally, this Comment will conclude that the public trust doctrine should become the focal point of the hunting debate, providing an implied right to hunt and a judicial means of resolving disputes between hunters and anti-hunters.<sup>13</sup>

## I. HUNTING IN THE UNITED STATES

Hunting is generally defined as the act, practice, or instance of chasing, taking, or killing wild animals, especially game animals.<sup>14</sup> While the means by which hunting is carried out in the United States have changed over time, the basic activity of hunting remains much the same today as it was when the earliest inhabitants of North America pursued animals for food and clothing. However, hunting's acceptance and place in American culture has seen great change during the past two hundred years.

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7. See *infra* notes 261-86 and accompanying text (discussing hunting as an essential wildlife management tool that serves the public's interest in the conservation and enjoyment of wildlife).

8. See *infra* notes 14-39 and accompanying text.

9. See *infra* notes 40-175 and accompanying text.

10. See *infra* notes 176-238 and accompanying text.

11. See *infra* notes 239-303 and accompanying text.

12. See *infra* notes 304-40 and accompanying text.

13. See *infra* notes 341-43 and accompanying text.

14. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1103 (Philip B. Drove ed. 1980).

*A. The Past*

Historically, hunting has been a widely recognized and encouraged activity in America. Since the first humans settled upon this continent, Americans have hunted.<sup>15</sup> Whether for the purpose of securing food and clothing or for the sheer enjoyment of the activity, hunters have enjoyed the outdoors with the goal of taking game.<sup>16</sup> In early America, hunting was a community focal point, with entire villages joining and participating in collective drives for "taking game."<sup>17</sup> In fact, hunting was so fundamental in early American life that at least one of the original states, Pennsylvania, considered requiring a constitutional right to hunt prior to ratifying the United States Constitution.<sup>18</sup>

*B. The Present*

During the past 200 years, our nation has seen overwhelming changes in population, demographics, and technology. The growing human population and urban development have altered the average American lifestyle such that it is now

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15. See JAMES SWAN, *IN DEFENSE OF HUNTING* 57-71 (1995) (discussing the hunting practices of the Native Americans); Gary Turbak, *500 Years of American Wildlife*, *AMERICAN FORESTS*, Sept. 1992, at 26 (discussing the hunting practices of early America, concluding that Native Americans, with their primitive hunting instruments, low numbers, and simple lifestyles, had little effect on wildlife populations).

16. See SWAN, *supra* note 15, at 17-19 (reporting the results of a survey carried out by Dr. Stephen Kellert of Yale University which concludes that 45.5% of hunters today hunt for the purpose of obtaining meat for the table, 38.5% of hunters today hunt for sport or hobby, and 17% hunt for the enjoyment of being outdoors due to their deep "affection, respect, and reverence" for nature); Turbak, *supra* note 15, at 26 (stating that for impoverished colonists, wildlife represented food and clothing, as a family could feed for a long time on one deer and make a tough leather coat from the hide).

17. See Eric T. Freyfogle, *Land Use and the Study of Early American History*, 94 *YALE L.J.* 717, 722 n.13 (1985) (book review) (reporting that village hunts involving collective drives with anywhere from twenty to three hundred men were the most efficient method of harvesting the abundant flocks of turkeys and deer herds each fall).

18. See 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 665 (1971) (setting forth provisions of the Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents in 1787, asserting the proposition that the people should have the right to bear arms for the defense of themselves and their own state or the United States, or for the purpose of killing game); see also STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* 81 (1984) (stating that the Constitutional Convention's rejection of a proposal to limit the Second Amendment's recognition of the right to bear arms "for the common defence" meant to preclude any limitation on the individual right to have arms for self defense or hunting). But see *PENN. EVE. POST*, Oct. 22, 1776, at 527, col. 1 (setting forth a resolution deeming constitutional protection for hunting inappropriate). See generally *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337-38 (1983) (holding that Native American tribes' authority to regulate hunting and fishing preempts state jurisdiction, as such control was granted to the tribes under treaties). As hunting upon reservation lands held by Native American Tribes is an activity outside of the states' regulatory power, and because such hunting is primarily for subsistence purposes, this Comment shall not address hunting upon these lands.

separate and detached from the remaining wild lands of rural America.<sup>19</sup> With these changes has come a yearly decrease in the number of individuals taking part in the activity of hunting.<sup>20</sup> Nonetheless, for 16 million Americans, hunting is still a way of life, a passionately valued activity.<sup>21</sup>

To a vast majority of hunters, conservation and perpetuation of wildlife and its habitat is a vital and central goal.<sup>22</sup> Hunters believe that hunting is an important means by which this goal is accomplished—by raising vital funds for habitat conservation and by managing wildlife populations.<sup>23</sup> The accomplishment of this goal will ensure that there will always be wild game to hunt so that today's hunters and future generations of hunters may pursue game in perpetuity.<sup>24</sup>

However, for at least one-third of the American population, hunting is considered to be an immoral and repugnant activity that should be completely

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19. See John A. Baden, *Hunting Plays a Key Role in Habitat Conservation*, SEATTLE TIMES, Feb. 1, 1995, at B5 (stating that the demographic changes in our country have insulated urbanites from nature's unpleasant realities, with most people not understanding that predators, harsh winters, and an extensive range are necessary to preserve healthy wildlife populations); George Reiger, *Our Troubled Tradition: Could the Present Anti-Hunting Movement Date Back Not to Bambi But to the Manicured Suburban Lawn?*, FIELD & STREAM, Feb. 1994, at 20 (stating that after World War II, as the population shift from rural to urban centers escalated, many in the growing upwardly mobile group gave up hunting, largely from a lack of time and opportunity, but also because they became scornful of country customs, including hunting).

20. See SWAN, *supra* note 15, at 3 (reporting the results of the National Survey of Fishing, Hunting, and Wildlife-associated Recreation as showing a drop from 16.7 million hunters in 1985 to 14.1 million hunters in 1991); *id.* (reporting that in California, the number of hunters has dropped from 750,000 in 1969 to 415,000 in 1993); Reiger, *supra* note 19, at 20 (reporting that after World War II, as the population shift from rural to urban centers escalated, many Americans gave up hunting); Michael Satchell, *The American Hunter Under Fire*, U.S. NEWS & WORLD REP., Feb. 5, 1990, at 30 [hereinafter Satchell, *The American Hunter*] (reporting that the ranks of hunters has dwindled by 700,000 since 1975); Pete Thomas, *Hunting Is Under the Gun, Groups Say That Animal Rights Advocates Eventually Might Eliminate the Sport Altogether*, L.A. TIMES, Jan. 29, 1992, at C6 (reporting the results of a recent study by the American Shooting Sports Foundation, showing an overall reduction in hunting frequency, with 27% of those surveyed saying they were hunting less, 15% hunting more, and 58% were hunting about the same).

21. Satchell, *The American Hunter*, *supra* note 20, at 30; see *id.* (reporting that 7% of the American population bought hunting licenses in 1990 to pursue what for some is a pastime, and for others a passion); see also Tom Vanden Brook, *Is the Hunter on the Verge of Extinction?*, SACRAMENTO BEE, Dec. 23, 1992, at E7 (claiming that in Wisconsin, deer hunting runs a close second to motherhood in most rankings of family values).

22. See Turbak, *supra* note 15, at 26 (surveying hunters' participation and leading role in the development of game management strategies in the United States, which seek to protect habitat and wildlife).

23. See Leo Banks, *Where Buffalo Still Roam, and So Do Hunters*, L.A. TIMES, Oct. 19, 1992, at 5A (quoting a regional supervisor for the Arizona Department of Game and Fish Department as claiming that the state's annual buffalo hunt is the best way to thin the herd to healthy levels and raise badly needed funds for maintaining habitat); Michael Levy, *Students Divided Over the Pros and Cons of Hunting*, BUFFALO NEWS, Dec. 21, 1993, at 2 (stating that deer hunting is needed to help prevent overpopulation on the nation's ever diminishing wild lands); Satchell, *The American Hunter*, *supra* note 20, at 30 (reporting that without hunting, hunters and many conservationists believe game species will decrease, since the millions of dollars generated annually from hunting that are used to preserve habitat and preserve and restore game populations would be lost).

24. Rod Chandler, *Hunters: Fight for Your Rights*, OUTDOOR LIFE, June 1992, at 8.

banned.<sup>25</sup> This Comment will refer to this segment of Americans as "anti-hunters," which would include animal rights activists, anti-hunting groups, and persons who are actively opposed to hunting. Anti-hunters place a high value upon the lives of animals, considering it inhumane and unacceptable for any individual to inflict pain and suffering onto any living creature.<sup>26</sup>

Furthermore, anti-hunters argue that hunting causes diminished wildlife populations in an age of extinction, and prevents the enjoyment of wildlife by all Americans.<sup>27</sup> Anti-hunters therefore believe that wildlife should not be killed and exploited by hunting.<sup>28</sup>

25. See *Linking Hunting With Murder Way Off Target*, AUSTIN AMERICAN-STATESMAN, Sept. 3, 1995, at C12 (reporting on a public meeting of the Texas Parks and Wildlife Commission during which citizens voiced their opinion that hunting is murder, and linking crime and gang violence on the streets to hunting); *They Are Bloodthirsty Nuts*, U.S. NEWS & WORLD REP., Feb. 5, 1990, at 35 (quoting Cleveland Amory, founder and president of Fund for Animals, as saying that hunting is an antiquated expression of macho self-aggrandizement, with no place in a civilized society); Bob Wyss, *The Great Swamp: Through the Seasons Deer Hunters Want a Sporting Chance*, PROVIDENCE JOURNAL-BULLETIN, Dec. 10, 1995, at 1A (noting that hunting is increasingly under attack by anti-hunters, who say it is immoral, unnecessary, inhumane, and wrong); *infra* note 323 and accompanying text (discussing a recent survey that found that 93% of the American population does not participate in sport hunting). But see SWAN, *supra* note 15 (providing a comprehensive defense of hunting against the claims of anti-hunters that hunting is immoral, cruel, and harmful to wildlife populations).

26. See LORENZO OTTO LUTHERER & MARGARET S. SIMON, TARGETED: THE ANATOMY OF AN ANIMAL RIGHTS ATTACK 10-12 (1992) (stating that the basic premise of the animal rights movement is that any animal with a nervous system and a capacity to feel pain has a right not to experience pain, and that humanity does not have the right to use any animal for any purpose); Aileen Ugalde, Comment, *The Right to Arm Bears: Activists' Protests Against Hunting*, 45 U. MIAMI L. REV. 1109, 1113 (1991) (noting that animal rights activists believe hunting is cruel to animals, bad for the ecosystem, and morally wrong); *Golf Course Calls Off Hunt to Get Rid of Pesky Geese*, ORLANDO SENTINEL, Jan. 7, 1995, at A12 (reporting that animal rights activists believe that hunting is a needless slaughter); Levy, *supra* note 23, at 2 (quoting seventh grade student essays relating to hunting, and finding that half the class hates hunting because hunting is an unfair and cruel activity; only the big, strong animals are killed, and that the activity is inhumane in today's society); Reiger, *supra* note 19, at 20 (stating that Matt Cartmill, professor of biological anthropology and anatomy, in his book THE BAMBI SYNDROME, defines hunting as butchery); Lonnie Williamson, *Razing Arizona: Potential for Laws That Prevent Hunting on Public Lands*, OUTDOOR LIFE, May 1992, at 32 (discussing from Arizona's 1992 Proposition 200, which states that its proponents appreciate wildlife of the state and acknowledge wildlife's existence for its own sake and not for human exploitation).

27. See Banks, *supra* note 23, at A5 (reporting on a state-sponsored buffalo hunt in Arizona, which animal rights activists protested as an unnecessary slaughter); *Hemmed In By Hunters*, ORLANDO SENTINEL, Jan. 27, 1995, at A12 (relating one nature lover's frustration with sport hunting because it causes animals to hide more, thus interfering with one's enjoyment of nature); *id.* (claiming that a nature lover's right to enjoy public lands conflicts with hunting rights); *They Are Bloodthirsty Nuts*, *supra* note 25, at 35 (arguing that hunting does not prevent animals from overpopulating, except for deer populations, and that the sport causes millions of animals to be crippled or orphaned, many dying a painful, lingering death).

28. See Baden, *supra* note 19, at B5 (noting that many environmentalists oppose hunting because they find the idea of killing animals for sport repulsive and incomprehensible, believing that sport hunting is an obsolete remnant of our barbaric past, one excised by civilized cultures). But see WALTER HOWARD, ANIMAL RIGHTS VS. NATURE 134 (1990) (stating that most people condone the natural brutality of nature's predators cruelly feeding upon fairly helpless prey but object to hunters humanizing these events); *id.* (arguing that one cannot equate the suffering of animals that are shot by hunters with the suffering of animals that are slowly dying of starvation, disease, or any of the other causes of death that are often brought on by members of the same species); George Reiger, *We Aren't Thoughtless Thugs*, U.S. NEWS & WORLD REP., Feb. 5, 1990, at 34

Finally, there is a third group related to the hunting debate, the general public.<sup>29</sup> This group is best described as those persons who do not hunt nor actively oppose hunting.<sup>30</sup> While this group is not actively involved in the hunting debate, it plays and will continue to play an important role, as both hunters and anti-hunters seek to win the support of this group in an effort to fortify their respective views.<sup>31</sup>

Therefore, in America today, in addition to the undecided or neutral group of citizens, there exists two substantial and opposing groups: hunters and anti-hunters.<sup>32</sup> Both groups believe consistently with Aldo Leopold's formula for biotic communities, that they are right and that the other group is wrong.<sup>33</sup> Hunters argue that hunting is the most efficient means of conserving and perpetuating wildlife populations,<sup>34</sup> while anti-hunters argue that prohibitions on hunting best allow wildlife populations to be sustained and expanded.<sup>35</sup> Both groups believe that if the opposing side gets its way, grave adverse effects on wildlife populations will result.<sup>36</sup>

The result of this dichotomy is the current and heated debate as to what extent hunting should be allowed to continue in the United States.<sup>37</sup> The resolution of

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(asking if it is more inhumane to kill an individual deer with a single shot or to let the entire herd die slowly from disease and starvation).

29. See Shannon Tompkins, *Polls Are In: Perception of Hunters, Anglers Not Good*, HOUSTON CHRON., Dec. 28, 1995, at 11 (discussing the results of polls given to the "general public," those who don't hunt or fish or actively oppose either).

30. *Id.*

31. See RICHARD THOMAS, *THE POLITICS OF HUNTING* 1-5 (1983) (discussing the battle between hunters and anti-hunters in trying to influence the opinion of the general public, in order to influence governmental decisions regarding hunting).

32. See Baden, *supra* note 19, at B5 (discussing the current debate and tensions between anti-hunters and hunters in the United States); Michael Satchell, *The American Hunter, Killing on the Nation's "Inviolable Sanctuaries" Provokes Ire of Wildlife Lovers; Refuge Hunting: Perverse Use or Logical Harvest*, U.S. NEWS & WORLD REP., Jan. 12, 1987, at 26 [hereinafter Satchell, *Refuge Hunting*] (reporting that there is an impassioned debate between anti-hunters and hunters).

33. See Satchell, *The American Hunter*, *supra* note 20, at 30 (commenting that lost in the hunter versus anti-hunter debate is the fact that many proponents on both sides of the issue share the same basic goal: preserving wildlife and wildlife habitat); *infra* note 343 and accompanying text (discussing the common issues hunters and anti-hunters are battling in order to save wildlife and wildlife habitat); see also *supra* note 1 and accompanying text (recounting Leopold's "formula").

34. See *infra* notes 261-81 and accompanying text (discussing hunting as the most efficient and essential means of managing wildlife populations and preserving habitat).

35. See *infra* note 296 and accompanying text (discussing anti-hunter arguments that hunting is detrimental to wildlife populations).

36. See *infra* notes 261-81 and accompanying text (discussing views and evidence as to what adverse effects to wildlife populations would occur if hunting were banned); *infra* note 296 and accompanying text (discussing the adverse effects of hunting to wildlife populations argued by anti-hunters).

37. See Satchell, *The American Hunter*, *supra* note 20, at 30 (describing the current debate between anti-hunters and hunters and explaining each side's arguments in the debate); *id.* (reporting that the debate has culminated in our nation's fields, forests, and wetlands, where anti-hunting demonstrators are following and interfering with hunters in the field in an effort to discourage hunting); *id.* (quoting one hunter as saying that if the face to face confrontation of hunters and anti-hunters continues to occur at the hunting grounds, someone



this debate depends on whether hunters have an existing and recognizable right to hunt.<sup>38</sup> A right to hunt would provide assurance to hunters that regardless of how the hunting debate works out in the future, hunting will be protected to some extent from restrictions and prohibition.<sup>39</sup>

## II. POSSIBLE SOURCES OF THE RIGHT TO HUNT

For any right to be recognized and enforceable, there must be a source from which the right emanates or is created. Four possible sources of a right to hunt are case law, natural law, the United States Constitution, and statutory law. However, an examination of these sources gives rise to no clear conclusion that there in fact exists a right to hunt.<sup>40</sup> It seems that, under these sources, the only right to hunt which exists is that of an access or property right.<sup>41</sup> Aside from that, hunting is better characterized under these sources of law as a mere privilege, which does not arise until granted by a government, in its discretion, to its citizens.<sup>42</sup>

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is going to get accidentally killed); *see also* THOMAS, *supra* note 31, at 1-5 (discussing the passionate debate in England between hunters and anti-hunters).

38. *See* John Barsness, *Private Game; Treating Wildlife as a Commercial Commodity*, FIELD & STREAM, July 1995, at 44 (stating that every American hunter believes that he or she has the right to hunt, to take a share of our nation's wildlife); Jim Fergus, *Posewitz's Law: Hunting Doesn't Depend on Owning an Estate—Being an American Is Enough*, OUTDOOR LIFE, Sept. 1995, at 13 (quoting Jim Posewitz, a retired wildlife biologist for the Montana Department of Fish, Wildlife, and Parks, as stating that hunting is "common man's" inalienable right); Levy, *supra* note 23, at 2 (quoting a seventh grade student as stating that hunting is a sport for people to use their historical rights to stalk and shoot game); Ray Sasser, *Watchdog Ensures Portrayal of Sportsmen Letter Perfect*, DALLAS MORNING NEWS, Feb. 11, 1993, at 10b (reporting that sportspersons are apathetic toward anti-hunters, and won't get excited about the hunting debate until they lose their right to hunt); George Snyder, *Outdoor Enthusiasts Fear Public Backlash; Sport Hunters Favor Gun Control*, S.F. CHRON., May 12, 1994, at A1 (reporting that during his January State of the Union address, President Clinton sought to allay hunters' concerns when he referred to the "right to hunt").

39. *See* Dennis Anderson, *Group Wants Rights to Fish, Hunt Guaranteed*, STAR TRIB., Dec. 22, 1995, at 1C (reporting on the Minnesota Outdoor Heritage Alliance (MOHA), an umbrella group which is seeking a state constitutional amendment that would ensure that Minnesota citizens have the right to hunt and fish); *id.* (quoting the leader of MOHA, Jim Klatt, as saying that the hunting laws can be changed, year to year, at the whim of the legislature, and that a constitutional amendment would be considerably more difficult to change or dilute).

40. *See infra* notes 43-145 and accompanying text (exploring possible sources of the right to hunt, and finding no such right, but rather only a privilege).

41. *See infra* notes 43-65 and accompanying text (discussing the right to hunt in case law as an access right, inherent in land ownership and enforceable against others).

42. *See infra* notes 66-145 and accompanying text (analyzing natural law, the United States Constitution, and statutory law, and concluding that under those sources of law, there exists merely a privilege to hunt).

A. Case Law

The right to hunt can refer to the right of a person to enter upon a private parcel of land to carry out the activity of hunting.<sup>43</sup> When used in this context, the right to hunt is considered to be either an inherent right of the landowner or a *profit a prendre* granted to a person not owning the land.<sup>44</sup> A *profit a prendre* is a right exercised by one person on the soil of another, accompanied with the right to take a part of the produce of the land.<sup>45</sup> This contextual use of the phrase “right to hunt” can be compared to the other use of the phrase “right to hunt,” meaning the right to pursue game with the goal of taking it into one’s possession.<sup>46</sup> For purposes of this Section, the phrase “right to hunt” refers strictly to the right of access land for the purpose of hunting.

In England, from the mid-fourteenth century until the mid-eighteenth century, only landed gentry were vested with the right to carry out the activity of hunting of most wild game under the qualification statutes in effect at that time.<sup>47</sup> These laws embraced the attitude that hunting was a gentleman’s sport, allowing only prominent citizens to take game, to possess certain weapons, and to eat certain

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43. See *infra* notes 44-46 and accompanying text (setting forth the use of the phrase “right to hunt” as a description of the right to enter upon the land of another in order to carry out the activity of hunting).

44. See *Nelson v. State*, 883 S.W.2d 839, 842 (Ark. 1994) (stating that wild animals are subject to private ownership arising from ownership of the soil such that one who owns the land may hunt game on the land); *id.* (holding that the right to hunt, known as a *profit a prendre*, is a qualified ownership in the land for the limited purpose of hunting, and is a valuable interest in land which may be transferred); *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong*, 516 N.W.2d 410, 412-16 (Wis. 1994) (reviewing the common law rule that a property owner may convey to another the right to hunt on the owner’s property in the form of a *profit a prendre*); *infra* notes 59-60 and accompanying text (discussing the right of a land owner to hunt upon his own land); see also *Bonner v. Oklahoma Rock Corp.*, 863 P.2d 1176, 1182 (Okla. 1993) (stating that a *profit a prendre* is analogous to the right to hunt on the land of another, which is an incorporeal right that may be conveyed in fee or for a term of years); *Figliuzzi*, 516 N.W.2d at 416 (holding that hunting and fishing rights conveyed as a *profit a prendre* are an easement under the state’s law).

45. *Reeves v. Alabama Land Locators, Inc.*, 514 So. 2d 917, 918 (Ala. 1987).

46. See *State v. Fertterer*, 841 P.2d 467, 471 (Mont. 1992) (using the phrase “right to hunt” to mean the right to carry out the activity of hunting animals and bringing them into the hunter’s possession); *Waller v. Engelke*, 741 P.2d 385, 391 (Mont. 1987) (stating that while there is a right to hunt, that is to carry out the activity of hunting, it may be restricted by the state); *infra* notes 157-75 and accompanying text (discussing the statutory right to hunt, that arises after a state chooses to grant the privilege of hunting to individuals). *But see infra* notes 131-45 and accompanying text (concluding that there is in fact no right to hunt, rather there is a privilege to carry out the activity, granted by the state to an individual).

47. THOMAS LUND, *AMERICAN WILDLIFE LAW* 8-10 (1980); see *infra* note 48 (setting forth several English exclusionary statutes).

animals.<sup>48</sup> The effect of these statutes was to withhold the right to take game from all but the landed gentry.<sup>49</sup>

In early America, hunting was not a sport but an essential way of securing food and clothing.<sup>50</sup> Since hunting was so vital to life in the new unconquered world, a custom of free taking of game by all members of the community was recognized and acknowledged by most citizens.<sup>51</sup> This custom recognized everyone's right to hunt and enjoy the local animals, which thus allowed for the most efficient harvest of wildlife.<sup>52</sup> The result of the free taking policy was a great debate between roaming hunters and landowners. Landowners claimed that their private property interests allowed the exclusion of the hunters, while hunters argued that they could lawfully enter private land to exercise their right to hunt.<sup>53</sup>

To encourage the policy of free taking, early American courts held that hunters could enter another's unenclosed and undeveloped lands.<sup>54</sup> Thus, hunters

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48. LUND, *supra* note 47; see 9 Anne, c.25, § 2 (1710) (providing that gamekeepers who are not registered with the king to hunt may not hunt wild game nor may they sell wild game); 5 Anne, c.14, § 2 (1706) (prohibiting inn keepers and alehouse keepers from offering pheasant, partridge, or grouse to their customers, with a violation of this law bringing a fine of 5 pounds per illegal bird possessed); 22 & 23 Car. 2, c.25, § 2 (1670) (declaring that persons not owning land worth a yearly value of at least 100 pounds, nor persons holding a 99 year lease worth a yearly value of at most 150 pounds are not allowed to possess any specified weapon or device that could be used for hunting); *id.* (providing that an heir apparent of an esquire or a person of higher degree and the owners and keepers of forests, in addition to the persons owning or leasing land over a specified value, have the authorization to hunt wild game); 33 Hen. 8, c.6, § 1 (1541) (setting forth that no person making less than 100 pounds per year may possess nor shoot a crossbow or handgun); 32 Hen. 8, c.8, § 8 (1540) (declaring that no person shall buy or sell a pheasant or partridge, except that qualified persons may sell pheasant to officers of the royal household); 13 Rich. 2, c.13, § 1 (1389) (providing that neither priests nor persons not owning land or tenements of a specified value shall possess a hunting hound, or shall they hunt any rabbits nor any other gentlemen's game, with the violation of this law bearing a punishment of one year in prison).

49. LUND, *supra* note 47, at 20-21.

50. See *supra* notes 17-18 and accompanying text (noting the importance of hunting for survival to the European colonists of North America).

51. LUND, *supra* note 47, at 20-21; see *id.* (reporting that because most game animals were spread out over rural and wild lands, many hunters were needed to stalk or flush game to exploit the resource efficiently).

52. LUND, *supra* note 47, at 20; see W. CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 63-64 (1983) (recounting that during the 17th and early 18th centuries, flocks of turkeys and deer herds were so abundant in the fall that the most efficient means of hunting was by collective drives involving up to three hundred men, and that in such hunts, the entire village territory was the hunting region, to which all those involved in the hunt had an equal right to a share of the take).

53. LUND, *supra* note 47, at 24; see *id.* (explaining that the American belief in common claims to wildlife was manifested in doctrines that rejected landowner claims of special rights to exclude others and allowed free taking even on private lands, but that this policy forced American lawmakers to address and overcome obstacles posed by the law of private property).

54. *M'Conico v. Singleton*, 4 S.C.L. (2 Mill) 244, 246 (1818); see *id.* at 244 (stating that since the inception of our nation, the right of hunters to enter unenclosed and uncultivated lands has been recognized, and that any law to the contrary would likely cause a civil war); *Fripp v. Hasell*, 13 S.C.L. (1 Strob.) 173, 175-76 (1847) (opining that barriers, whether natural or artificial, that clearly separate one's land from adjoining lands, and that are sufficient to prevent the inroads of horses, cattle and hogs, are sufficient to render hunters who enter the land trespassers, and that a river is such a barrier); *Broughton v. Singleton*, 5 S.C.L. (2 Nott & McC.) 338, 340 (1820) (holding that a hunter who entered a parcel of land, enclosed by a dilapidated fence,

under the free taking policy had substantial rights to pursue game, regardless of where the game was found.<sup>55</sup>

By 1900, the massive agricultural and industrial development of the United States rendered hunting an activity no longer essential to survival, as it had been for Americans prior to that time.<sup>56</sup> There was also no longer abundant open land available for development, resulting in a growing recognition of the importance of private property rights.<sup>57</sup> These developments, as well as the realization that game populations were being greatly diminished due to market hunting and habitat depletion, prompted lawmakers not only to restrict and regulate hunting, but also to end the free taking policy.<sup>58</sup>

The resulting stance of the law was, and remains today, that the exclusive right to hunt upon privately owned land is vested in the landowner as a right incident to ownership of the soil.<sup>59</sup> With this right, landowners can exclude hunters from hunting wild game upon their land.<sup>60</sup> Since this right is inherent in the ownership of land, a landowner may grant or convey the right to hunt upon

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was not a trespasser); *see also* *Shellnut v. Arkansas State Game & Fish Comm'n*, 258 S.W.2d 570, 575 (Ark. 1953) (declaring that it is still the law in Arkansas that hunters may enter the unenclosed land of another to hunt game).

55. *Shellnut*, 258 S.W.2d at 575; *see* JAMES SHAW, INTRODUCTION TO WILDLIFE MANAGEMENT 7 (1985) (stating that in the Early America of 1600-1899 there was such an abundance of game that over-exploitation was not regarded as a threat, nor were its effects apparent).

56. LUND, *supra* note 47, at 57-60.

57. *See infra* notes 59-60 and accompanying text (discussing the right to hunt as a property right, incident to ownership of land, which allows a landowner to exclude others from hunting upon his land).

58. *See* SHAW, *supra* note 55, at 20 (stating that legal protection for wildlife emerged as a conservation tool in the United States during a period when direct, deliberate killing was thought to pose the greatest threat to wildlife, and that the resulting laws eradicated market hunting); *id.* at 8 (reporting that some of the first state steps toward game management to curb over-exploitation occurred in Maine, when that state employed the first salaried game wardens in the nation in 1852); Turbak, *supra* note 15, at 26 (recounting that during the 19th century, at the urging of sport hunters, states began passing laws to prohibit spring waterfowl shooting, boat-mounted battery guns, plume collecting, and eventually all market hunting, with closed seasons for hunters and the revolutionary notion of daily bag limits soon following).

59. *See* *Hanson v. Fergus Falls Nat'l Bank*, 65 N.W.2d 857, 863 (Minn. 1954) (noting that the right of hunting on premises is an incorporeal right growing out of the soil, and "may be segregated from the fee of the land and conveyed in gross to one having no interest ownership in the fee, and when so conveyed it may be assigned and inherited"); *Herrin v. Sutherland*, 241 P. 328, 332 (Mont. 1925) (holding that the exclusive right of hunting on land owned by a private owner is in the owner of the land); *see also* *Hamilton v. Williams*, 200 So. 80, 81 (Fla. 1941) (stating that the owner of the soil has a special and qualified interest in wild game on his property, and that this property right is the right to hunt exclusively such wild game upon his soil, subject to any state regulations); *Hanson*, 65 N.W.2d at 862 (opining that the right of the landowner to hunt and fish on his own lands is a special property right, subordinate only to the state's ownership and regulation of wildlife); *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 59 S.E.2d 132, 142 (S.C. 1950) (noting that the landowner's right to hunt and fish on his property is subject to reasonable government regulations, as the fish and game are owned by the state).

60. *See* *Hanson*, 65 N.W.2d at 863 (following the Restatement of Property § 450, comment g, to find that if a trespasser shoots wild game upon the land of another, the landowner may claim the game or recover damages for its conversion); *Herrin*, 241 P. at 332 (holding that an owner, who has properly posted on the owner's land, has the right to recover damages from those who commit trespass by hunting and fishing on the land without the owner's consent).

his land to another.<sup>61</sup> In the same respect, the right to hunt upon another's land may be acquired by a hunter through prescription.<sup>62</sup>

From this discussion of existing case law regarding hunting, it is apparent that the right to hunt has historically been addressed as an access right, limited to the lands upon which hunters may legally enter to pursue game.<sup>63</sup> The result is that much of the prime land for hunting in the United States is held by private landowners.<sup>64</sup> This leaves hunters with three viable options: (1) Seek permission or execute a lease for the right to hunt upon private land; (2) purchase one's own land upon which to hunt; or (3) limit one's hunting to those lands held by the government upon which hunting is allowed.<sup>65</sup> Thus, a person's right to carry out the activity of hunting is limited in proportion to his or her access to land, be that land private or public.

### B. Natural Law

"[A]nd God said unto them . . . have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth."<sup>66</sup>

A natural right is generally defined as that which grows out of the nature of humankind and depends upon its personality as distinguished from a right that is created by positive law.<sup>67</sup> Many believe that hunting is a natural right of

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61. *Rice Hope Plantation*, 59 S.E.2d at 142; see *id.* (declaring that it remains true that the right to hunt on one's own premises is a right of property that may even be granted or leased to others); see also, e.g., *Hanson*, 65 N.W.2d at 863; *Herrin*, 241 P. at 332 (stating that the exclusive right of hunting on land owned by a private individual is in the owner of the land or in those who have the right by permission, as guests, or by grant).

62. See *Harvat v. Clear Creek Drainage Dist.*, 249 N.W.2d 209, 210 (Neb. 1977) (opining that hunting rights, as property rights, may be acquired by prescription). In *Harvat*, the plaintiffs claimed a prescriptive right to hunt and fish on the defendant's land due to the fact that the plaintiffs had hunted and fished on the defendant's land for 12 years. *Id.* at 210. However, the court held that the plaintiffs failed to establish an entitlement by prescription on the grounds that their use was not exclusive, and the extent of their claim was too indefinite for a determinate prescription. *Id.*

63. See Jim Zumbo, *The Price War: With the Rising Cost of Hunting, Will Sportsmen Be Priced Right Out of the Game?*, OUTDOOR LIFE, Jan. 1994, at 34 (reporting that a common lament among sportspersons is that they are unable to find places to hunt in states where there is little public land).

64. *Id.*

65. See *id.* (proposing that with more private land being closed to hunting each year, sportspersons have no choice but to keep looking for new public lands, to start paying lease fees, to buy land, or to give up hunting altogether).

66. *Genesis* 1:28 (King James Version).

67. BLACK'S LAW DICTIONARY 1027 (6th ed. 1990). See generally RICHARD TUCK, NATURAL RIGHTS THEORIES 5-31 (1979) (analyzing the development of natural law theories).

humanity.<sup>68</sup> Proponents of this view argue that because it is humankind's essence and nature to hunt, any positive law that restricts or forbids hunting is void because it contravenes the natural law.<sup>69</sup>

One of the best examinations of this theory is found in the Supreme Court's opinion in *Geer v. Connecticut*.<sup>70</sup> In *Geer*, the Supreme Court addressed the constitutionality of a Connecticut statute forbidding the transportation of wild game outside state borders, when the game had been lawfully killed by hunters during hunting season.<sup>71</sup> The plaintiff was a hunter who had attempted to transport woodcock, grouse, and quail he had lawfully killed in Connecticut.<sup>72</sup> After being convicted of violating the anti-transport statute, the plaintiff challenged the statute as violative of the Commerce Clause.<sup>73</sup> In upholding the statute under the Commerce Clause, the Court stated that state ownership of wild game within the limits of the state is for the benefit of all the people in common, and that the police power residing in the state authorizes it to forbid the killing of game with the intent to transport it outside the state limits.<sup>74</sup> Although *Geer* has since been overruled due to the expanding scope of interstate commerce,<sup>75</sup> Justice White's opinion analyzing the natural right to hunt is worth examination.

Quoting Pothier, the eighteenth-century French legal commentator and scholar of Roman Law, Justice White explained that many individuals contend that as God has given them domain over the beasts, the government cannot deprive them of this divine right.<sup>76</sup> Further, any civil law forbidding hunting is contrary to the natural law, and governments, who ultimately receive their authority from the natural law, have no authority to do so.<sup>77</sup> Quoting Blackstone, the renowned English law commentator, Justice White went on to decide that domain over wild animals was given to humankind as a community, not as individuals.<sup>78</sup> While the ownership of wild animals belongs to all, it is the

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68. See *Arnold v. Mundy*, 6 N.J.L. 1, 70 (1821) (stating that common property, including the air and running water, belongs not to the sovereign, but to the people in common by the very law of nature itself); 2 WILLIAM BLACKSTONE, COMMENTARIES \*416 (arguing that all humankind has by the original grant of the Creator a right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field); see also LUND, *supra* note 47, at 24 (suggesting that the argument that hunting is a natural right due to the fact that there is common ownership of wildlife was the primary justification for the development of the free taking custom of early America).

69. See *Geer v. Connecticut*, 161 U.S. 519, 524 (1896) (setting forth the argument of the proponents of hunting as a right created by natural law).

70. 161 U.S. 519 (1896).

71. *Geer*, 161 U.S. at 520.

72. *Id.*

73. *Id.*

74. *Id.* at 521.

75. See *Huges v. Oklahoma*, 441 U.S. 322, 325 (1979) (expressly overruling the holding in *Geer* relating to the Commerce Clause).

76. *Geer*, 161 U.S. at 524.

77. *Id.*

78. *Id.* at 526.

sovereign that holds the ownership in trust for the benefit of the community.<sup>79</sup> Thus, it follows that individuals of the community do not have an absolute right to kill and possess wild animals, but merely have a qualified right or privilege, subject to the control of the sovereign as representative of the community.<sup>80</sup> Justice White, again quoting Blackstone, concluded that the natural right to hunt, as well as many other natural rights belonging to individuals, may be restrained by positive laws enacted for state reasons or for the benefit of the community.<sup>81</sup>

Therefore, while the Supreme Court has recognized hunting as a right permitted by natural law, the Court has declared that the civil law may restrict that right for the good of the community.<sup>82</sup> Under *Geer*, hunters cannot challenge state and federal restrictions on hunting as violations of their natural rights. Nonetheless, *Geer* is important in stating that there is at least a natural law right to hunt. However, it may be better to call the natural right to hunt a privilege rather than a right, due to the fact that the activity can only be carried out when permitted by positive law or by way of the absence of positive law to the contrary. Furthermore, according to Justice White's opinion in *Geer*, the natural right to hunt can be restrained only by positive laws enacted for the preservation of the public good.<sup>83</sup>

Therefore, if the language of *Geer* is taken at face value, every governmental restriction placed upon hunting must be only for the purpose of the public good.<sup>84</sup> Any restriction not furthering the public good would be a violation of natural law.<sup>85</sup> Thus, the public interest would be a basis of restricting hunting under natural law, a theme which will be picked up again in Parts III and IV, which discuss the public trust doctrine.

### C. The United States Constitution

The right to hunt does not appear on the face of the United States Constitution or on any state constitution. Still, it has been asserted by some that the right to hunt could be implied and protected under certain broad provisions of the United

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79. *Id.*

80. *Id.* at 526-27.

81. *Id.* at 527.

82. *Id.* at 535; *see id.* at 524 (stating that the greater part of all civil laws is nothing but restrictions upon things that the natural law would otherwise permit).

83. *See id.* at 529 (holding that the power to control wild game is to be exercised for the public benefit, not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good).

84. *Id.*

85. *Id.*

States Constitution, such as the Equal Protection Clause,<sup>86</sup> the Privileges and Immunities Clause,<sup>87</sup> or Procedural Due Process rights.<sup>88</sup>

### 1. *Equal Protection Clause and Privileges and Immunities Clause*

A claim that the right to hunt was protected under the Equal Protection Clause and Privileges and Immunities Clause was asserted in the United States Supreme Court case of *Baldwin v. Fish and Game Commission of Montana*.<sup>89</sup> In *Baldwin*, a licensed professional hunting guide and four nonresident elk hunters challenged a Montana hunting licensing scheme that required nonresident elk hunters to pay a license fee seven and one-half times the amount paid by resident hunters.<sup>90</sup> The licensing scheme also required nonresident elk hunters to purchase a combination license that would allow the taking of one deer, a black bear, game birds, and fish, even if a nonresident hunter desired to only hunt elk in Montana.<sup>91</sup> The plaintiffs attacked Montana's scheme as violative of the Privileges and Immunities Clause in that the scheme denied nonresident hunters the same privileges as resident hunters.<sup>92</sup> Further, the plaintiffs claimed that the licensing scheme also violated the Equal Protection Clause.<sup>93</sup>

In a six-to-three opinion, the Supreme Court held that Montana's licensing scheme violated neither the Privileges and Immunities clause nor the Equal Protection Clause.<sup>94</sup> In so holding, Justice Blackmun, writing for the majority, stated that recreational or sport hunting of elk was not a basic and essential activity bearing on the vitality of the nation as a single entity that would be protected under the Privileges and Immunities Clause.<sup>95</sup> Thus, Montana did not have to provide access to nonresident elk hunters on equal terms with resident elk hunters and could charge a higher license fee for nonresidents.<sup>96</sup>

The Montana licensing scheme was also upheld under the Equal Protection Clause. The majority found that the scheme was reasonably related to the preservation of a finite resource and to a substantial regulatory interest of the

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86. See U.S. CONST. amend. XIV, § 1 (providing that "no State . . . shall deny to any person within its jurisdiction the equal protection of the laws").

87. See U.S. CONST. amend. XIV, § 1 (setting forth that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States").

88. See U.S. CONST. amend XIV, § 1 (declaring that no state shall deprive any person of life, liberty, or property, without due process of law).

89. 436 U.S. 371 (1978).

90. *Baldwin*, 436 U.S. at 372.

91. *Id.* at 373-74.

92. *Id.* at 373.

93. *Id.*

94. *Id.* at 371.

95. See *id.* at 383 (stating that whatever rights or activities may be "fundamental" under the Privileges and Immunities Clause, elk hunting by nonresidents in Montana is not one of them).

96. *Id.*



State.<sup>97</sup> Justice Blackmun concluded the majority opinion by quoting from the Supreme Court's opinion in *Lacoste v. Department of Conservation*,<sup>98</sup> stating that "the protection of the wildlife of the State is peculiarly within the police power, and the State has great latitude in determining what means are appropriate for its protection."<sup>99</sup> This is not to say that there are no limitations on the states' police power when it comes to wildlife protection. Justice Blackmun made it clear that had hunting been a means to the nonresident's livelihood, the Montana licensing scheme would violate the Privileges and Immunities Clause, as one's right to pursue a livelihood is a fundamental right under the Clause.<sup>100</sup> Because one's pursuit of a livelihood is a fundamental right under the Privileges and Immunities Clause, when a state interferes with a nonresident's participation in occupational hunting, it necessarily interferes with a resident's participation.<sup>101</sup>

In his concurrence, Justice Burger sought to limit the Court's definition of a fundamental right under the Privileges and Immunities Clause to those privileges of trade and commerce that were protected under the Fourth Article of the Articles of Confederation.<sup>102</sup> For example, according to Justice Burger, the Privileges and Immunities Clause would not permit a state to give its residents preferred access to activities and services offered for sale by private parties.<sup>103</sup> Justice Burger concluded by stating that "[t]he Clause assures noncitizens the opportunity to purchase goods and services on the same basis as citizens; it confers the same protection upon the buyer of luxury goods and services as upon the buyer of bread."<sup>104</sup>

Writing for the dissent and joined by Justice White and Justice Marshall, Justice Brennan argued that the Montana licensing scheme violated the Privileges and Immunities Clause.<sup>105</sup> Although Justice Brennan did not find that recreational elk hunting in Montana was a fundamental right protected under the Clause, he did find that nonresidents have a constitutionally protected Privileges and Immunities right to equal treatment under Montana's game laws.<sup>106</sup> This constitutional right overrides a state's police power interest in its wildlife.<sup>107</sup> The point of Justice Brennan's dissent was that, in addressing state regulations that discriminate against nonresidents, the Court should not focus on whether the

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97. *Id.* at 388-90.

98. 263 U.S. 545 (1924).

99. *Lacoste*, 263 U.S. at 552.

100. *Baldwin*, 436 U.S. at 386.

101. *Id.* at 388.

102. *Id.* at 394 (Burger, C.J., concurring).

103. *Id.*

104. *Id.*

105. *Id.* at 406 (Brennan, J., dissenting).

106. *Id.* at 395-406.

107. *Id.* at 406.

restricted activity is a fundamental right, but rather whether a state can justify the discrimination.<sup>108</sup>

To justify discrimination against nonresidents, Justice Brennan proposed a two prong test for a state to meet.<sup>109</sup> First, a state must show that the presence or activity of the nonresidents is the source or cause of the problem or effect that a state seeks to address.<sup>110</sup> Second, a state must show that the discrimination practiced against nonresidents bears a substantial relation to the problem presented.<sup>111</sup> Justice Brennan went on to find that Montana had failed both prongs in charging nonresidents higher licensing fees.<sup>112</sup> First, Justice Brennan found that the evidence indicated that nonresident hunters, comprising 13% of the total hunters in Montana, created no particular danger to Montana's elk population.<sup>113</sup> Second, the dissent found that there was no substantial relation between the extra costs imposed upon nonresident elk hunters and the impact those hunters have on Montana's conservation efforts.<sup>114</sup>

The holding and opinions in *Baldwin* have significant impact upon the possible existence of a constitutional right to hunt for a couple of reasons. First, a majority of the Court implied, or left the door open for, the recognition of a constitutional right to occupational hunting. The majority opinion specifically stated that a state's interest in its wildlife and other resources is limited by a person's fundamental right to pursue a livelihood.<sup>115</sup> Thus, the Montana licensing scheme would not withstand constitutional muster when applied to a nonresident whose profession is hunting. From this conclusion, one could argue that there exists a fundamental right to occupational hunting under the Privileges and Immunities Clause.

On the other hand, the Court in *Baldwin* made clear that if a right is fundamental under the Privileges and Immunities Clause, a state cannot interfere with that right in a way that would frustrate the Clause.<sup>116</sup> However, this would leave states with the option of restricting or banning hunting completely, so long as it was restricted or banned equally against residents and nonresidents alike. Thus, the opponent of hunting would argue that under the holding in *Baldwin*, there is no fundamental right to occupational hunting; rather a state can choose to grant the privilege to occupational hunting, but it must grant it equally to all hunters, resident or nonresident.

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108. *Id.* at 401.

109. *Id.* at 402.

110. *Id.*

111. *Id.*

112. *Id.* at 402-06.

113. *Id.* at 403-04.

114. *Id.* at 404-05.

115. *Id.* at 386.

116. *Id.* at 387.

*Baldwin* is also important in that recreational elk hunting in Montana was found to be protected by the Privileges and Immunities Clause by three of the nine Supreme Court Justices in 1978.<sup>117</sup> As the composition of the Supreme Court has seen substantial changes since 1978, the Court's disposition on a similar case involving recreational hunting could be decided contrary to *Baldwin*, finding a constitutionally protected right to recreational hunting. However, any such case would again depend on whether the state had decided to grant persons the right to hunt, only to offer the grant to nonresidents on conditions that were different from those imposed on residents. There would still be no restriction on a state's power to prohibit recreational hunting altogether for both residents and nonresidents. Therefore, it appears that for the present time, and most likely in the future, there is no protected right to hunt under the Equal Protection Clause and the Privileges and Immunities Clause, by which hunters could require a state to allow hunting.

## 2. Procedural Due Process

In the recent Pennsylvania Supreme Court consolidated case of *Pennsylvania Game Commission v. Marich* and *Pennsylvania Game Commission v. Engleka*<sup>118</sup> ("Marich"), two hunters asserted that revocation of a hunting license is subject to the procedural due process requirements of the Pennsylvania and United States Constitutions.<sup>119</sup> In *Marich*, two duck hunters were found by a state game warden to possess of sea ducks in excess of the legal limits.<sup>120</sup> The hunters pleaded guilty on a Field Acknowledgment of Guilt form, and the state subsequently revoked the hunters' licenses for one year.<sup>121</sup> The hunters requested and were granted a hearing before the Bureau of Law Enforcement of the Pennsylvania Game Commission, at which a Commission hearing officer upheld the revocation of their licenses.<sup>122</sup> The hunters then filed a petition for review, claiming, among other things, that the hearing commingled the prosecutorial and adjudicative functions of the Commission, thus depriving them of procedural due process.<sup>123</sup>

The trial court reversed, finding that, in fact, the hunters' due process rights had been violated.<sup>124</sup> Upon a grant of *allocatur*, the Pennsylvania Supreme Court reversed the trial court, holding that the right to hunt is not a liberty or property interest to which due process attaches.<sup>125</sup> In support of its holding, the court stated

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117. See *id.* at 394-406 (setting forth the dissent of Justices Brennan, White, and Marshall).

118. 666 A.2d 253 (Pa. 1995).

119. *Marich*, 666 A.2d at 254.

120. *Id.*

121. *Id.*

122. *Id.* at 254-55.

123. *Id.* at 255.

124. *Id.*

125. *Id.* at 257.

that the recreational sport of hunting has not been recognized as a constitutionally protected liberty or property interest by state or federal law.<sup>126</sup> Furthermore, the court stated that no cases have held that provisions of the federal or state constitutions establish or protect a right to hunt.<sup>127</sup> In support of its holding, the court provided two justifications. First, the court discussed *Baldwin*, in which the United States Supreme Court held that elk hunting is not a fundamental activity protected under the Privileges and Immunities Clause.<sup>128</sup> Similar to the *Baldwin* holding, the *Marich* court felt that the activity of hunting should not receive protection under procedural due process.<sup>129</sup> As a second justification, the court held that there is no more than a privilege to hunt, stating that, "[t]he right to hunt game is but a privilege given by the legislature, and is not an inherent right in the residents of the State . . . . [The State's] power to regulate and prohibit the hunting and killing of game has always been conceded."<sup>130</sup>

Thus, hunting is not protected under the Equal Protection and Privileges and Immunities Clauses of the federal constitution according to the holding in *Baldwin*. Further, under *Marich* and *Engleka*, hunting fails to be recognized even as a liberty or property interest subject to minimal procedural due process requirements.

#### D. *Statutory Law*

As a result of the unrestricted hunting permitted under the free taking policy and other developments such as reductions in habitat and ignorance of game management practices, game populations in America substantially decreased from their once abundant numbers.<sup>131</sup> The need for wildlife conservation and management prompted states as well as the federal government to adopt laws regulating hunting.<sup>132</sup> Federal laws, such as the Migratory Bird Treaty Act,<sup>133</sup>

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126. *Id.* at 256.

127. *Id.*

128. *Id.*; see *supra* notes 89-117 and accompanying text (discussing the *Baldwin* courts' opinion).

129. *Marich*, 666 A.2d at 256.

130. *Id.*

131. See LUND, *supra* note 47, at 57-61 (surveying the effects of free taking and the laissez-faire attitude toward wildlife conservation during the 19th century); *id.* at 58 (stating that some of the main factors that caused the devastation of wild game populations in 19th century America were ignorance, commercial excesses, sporting excesses, reduction of habitat, and nonexistence and nonenforcement of wildlife laws); *id.* at 58-60 (concluding that a lack of enforcement of wildlife laws allowed sport and market hunting activities to go unchecked, which led to grossly excessive harvests of game animals, in combination with other factors such as loss of habitat to farming, to cause the near extinction of many species); see also Patrick Dugan, *The World's Wetland Resources—Status and Trends*, in LEGAL ASPECTS OF THE CONSERVATION OF WETLANDS 7 (1987) (reporting that in the United States, 87 million hectares or 54% of the nation's original wetlands have been lost).

132. *Geer v. Connecticut*, 161 U.S. 519, 528 (1896); see 16 U.S.C.A. §§ 703-715r (West 1996) (setting forth the provisions of the Migratory Bird Treaty Act); see also SIMON Lyster, *INTERNATIONAL WILDLIFE LAW* 299 (1985) (stating that most early American treaties relating to the protection of wildlife were almost

which prohibit or restrict hunting, are enacted as an exercise of Congress's power to regulate commerce.<sup>134</sup> On the other hand, state laws relating to wildlife are enacted under the *Geer* and *Baldwin* rationale that all wildlife within a state is owned by the state, in its sovereign capacity, as trustee to protect and preserve wildlife for the public good and benefit.<sup>135</sup> Under this rationale, states have the authority to regulate, restrict, and even prohibit hunting within their borders as an exercise of their police powers, so long as such an exercise does not violate the Constitution.<sup>136</sup> This power extends beyond public property to private property, where private landowners possess the right to hunt on their land as an incident to

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entirely concerned with limiting the killing of animals that either had been, or were in danger of, becoming seriously depleted by human exploitation).

133. 16 U.S.C.A. §§ 703-715r (West 1996).

134. *Cochrane v. United States*, 92 F.2d 623, 627 (7th Cir. 1937); see U.S. CONST. art. 1, § 8, cl. 3 (providing that Congress shall have the power to regulate commerce with foreign nations, and among the several states); *Cochrane*, 92 F.2d at 627 (holding that the Migratory Bird Treaty Act is a valid exercise of the Commerce Clause as well as of the Treaty Power); *id.* (opining that the Commerce Clause allows Congress to legislate to protect game that migrate with the changing seasons); see also *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 385-86 (1978) (stating that a state's control over its resources does not preclude the proper exercise of federal power); *id.* (concluding that the states' interest in regulating and controlling those things they claim to own, including wildlife, is by no means absolute, and that regulations designed to protect wildlife may not impede interstate commerce).

135. See *Geer*, 161 U.S. at 529 (declaring that the states are correct in concluding that the wild game within their borders is owned by the state in its sovereign capacity, as a representative of, and for the benefit of, the people); *Takahashi v. Fish & Game Comm'n*, 30 Cal. 2d 719, 728, 185 P.2d 805, 811 (1947) (stating that the wild game within a state belongs to the people of the state in their collective capacity); *Cummings v. Commonwealth*, 255 S.W.2d 997, 998 (Ky. 1953) (opining that the state, as trustee for the people, may conserve wild life); *Leger v. Louisiana Dep't of Wildlife & Fisheries*, 306 So. 2d 391, 394 (La. 1975) (holding that the wild birds and wild quadrupeds found within the state are owned by the state in its sovereign capacity, and that it owns them solely for the benefit of the people of the state), *cert. denied*, 310 So. 2d 640 (La. 1975).

136. See *Baldwin*, 436 U.S. at 391 (stating that so long as constitutional requirements are met, protection of the wildlife of a state through regulation is within the state's police power, and the state has great latitude in deciding what means are appropriate for protecting wildlife); *Geer*, 161 U.S. at 529 (concluding that the state may absolutely prohibit the taking of wild game within its borders); see also *Bishop v. United States*, 126 F. Supp. 449, 451 (1954) (holding that no citizen has a right to hunt wild game unless authorized by the state), *cert. denied*, 349 U.S. 955 (1955); *Lewis v. State*, 161 S.W. 154, 155 (Ark. 1913) (declaring that when necessary for the propagation and preservation of wild game and fish for the use of the public, the state may pass laws to regulate the right of each individual to enjoy wild game); *Aikens v. Conservation Dep't*, 184 N.W.2d 222, 223 (Mich. 1970) (opining that the state, representing the people, has the authority to regulate or even prohibit the taking of animals *ferae naturae* if such action is deemed necessary for the public good); *Ex parte Crosby*, 149 P. 989, 990 (Nev. 1915) (stating that wild fowl and fish in public waters are the subjects of public protection, control and regulation, with those taking such fowl and fish doing so by way of privilege, subject to such conditions and limitations as the state sees fit to impose); *Dieterich v. Fargo*, 87 N.E. 518, 520 (N.Y. 1909) (concluding that the legislature, for the purpose of protecting the wild game, birds, and fish within the state, has the right to establish the open seasons during which game may be taken, and to prescribe the methods of taking to be employed as well as to proscribe the taking of game); *State v. Herwig*, 117 N.W.2d 335, 337 (Wis. 1962) (holding that hunting regulations in the interest of conservation may be enacted in the exercise of the police power).

ownership, subject to any state or federal regulations.<sup>137</sup> From this it seems evident that the right to hunt is not actually a right; rather, it is a privilege granted by the state to the hunter at the discretion of the government.<sup>138</sup>

A "privilege," in the legal sense of the word, generally indicates that someone or something has been singled out for advantageous treatment.<sup>139</sup> A privilege is necessarily reserved for a certain group of persons; it is not given to all.<sup>140</sup> Furthermore, privileges are created at the discretion of the grantor of the privilege, and can subsequently be taken away or lost.<sup>141</sup> A privilege has been compared to a gift, which can be given and taken away by the giver.<sup>142</sup>

A "right," on the other hand, is different from a privilege in that a right is generally assured some measure of protection from being abridged, altered, or taken away by the grantor of the right or by any other person.<sup>143</sup> Rights are generally granted to a general group of people, unlike privileges, which are granted to a select group.<sup>144</sup>

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137. See *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.*, 59 S.E.2d 132, 142 (S.C. 1950) (declaring that every landowner has the right to hunt and fish upon his property, subject to reasonable governmental regulations, since the game and fish are really the property of the state, and the preservation thereof is a matter of public interest); see also *Rogers v. State*, 491 So. 2d 987, 990 (Ala. Crim. App. 1985) (opining that state regulation of the taking of game extends, and always has extended, to land privately owned); *Lewis*, 161 S.W. at 155 (declaring a landowner's right to hunt upon his property is bounded by the limitation that it must always yield to the state's ownership and title in game, which is held by regulation in preservation for public use); *Collopy v. Wildlife Comm'n, Dep't of Nat. Res.*, 625 P.2d 994, 1000 (Colo. 1981) (holding that because the right to hunt game upon one's land is not "property," the closure of hunting in a region in which the land is located cannot constitute a taking of that right, for which just compensation would be required). But see *SHAW*, *supra* note 55, at 20 (setting forth that it is ironic that private landowners cannot legally take game out of season on their own property, yet they can alter land use practices which in turn have a far more profound impact upon wildlife populations than the hunting of a few out-of-season animals).

138. See *Geer*, 161 U.S. at 533-34 (holding that to hunt and kill game is a boon or privilege granted by the sovereign authority of the state, and therefore nothing is taken away from the individual when a person is denied the privilege); *United States v. Greenhead, Inc.*, 256 F. Supp. 890, 893 (N.D. Cal. 1966) (stating that the pursuit of wild fowl is a privilege granted by the people and is subject to immediate withdrawal); *Bishop*, 126 F. Supp. at 451 (explaining that no citizen has a right to hunt, except as permitted by the state.); *People v. Zimberg*, 33 N.W.2d 104, 106 (Mich. 1948) (concluding that since wild game belongs to the state, an individual may only acquire the limited or qualified property interest in game as the state chooses to permit); *Hervig*, 117 N.W.2d at 337-38 (declaring that hunting, the privilege of reducing wild life to possession and ownership by lawful means, is a privilege as against the state, which may be granted, denied, or regulated). But see *Baldwin*, 436 U.S. at 406 (Brennan, J., dissenting) (arguing that a state's police power interest in its wildlife cannot override the constitutionally protected privileges and immunities right to hunting in that state). In *Baldwin*, three out of the nine Supreme Court Justices believed hunting in a state to be a fundamental right, protected by the privileges and immunities clause. *Id.*

139. ALAN WHITE, *RIGHTS* 156 (1984).

140. *Id.*

141. See *id.* (stating that privileges can be granted or taken away, held, enjoyed, won, or lost).

142. *Id.* at 158.

143. See BLACK'S LAW DICTIONARY 1324 (6th ed. 1990) (defining a "right" as a "power, privilege, or immunity guaranteed under a constitution, statutes, or decisional laws, or claimed as a result of long usage"); *id.* (describing a "right" as a power, faculty, or demand inherent in one person and incident upon another).

144. See WHITE, *supra* note 139, at 17 (explaining that a right can be general because of how widely it is possessed, and that general rights are usually based on some general characteristic).

Hunting is viewed under the law as a privilege because, generally, only persons who buy hunting licenses are allowed to hunt. Furthermore, hunting is seen as an activity that can be permitted, regulated, or restricted at the discretion of the legislature, with no recourse for deprived hunters.<sup>145</sup> If hunting were a right, the legislature would be limited in its ability to regulate or prohibit the activity, giving hunters a means of asserting some sort of entitlement to hunt. Thus, the conclusion by courts that hunting is merely a privilege has great impact on the hunting debate and hunters' ability to protect their activity.

This realization, although known to many in the legal community, could be a rude awakening for hundreds of thousands of hunters in the United States, many of whom believe they have a recognized and protected right to hunt.<sup>146</sup> Furthermore, this realization could be used by anti-hunting groups as an important weapon in the fight against hunting.<sup>147</sup> Anti-hunters can argue that since hunters have no right to hunt, there would be no impairment of individual rights if hunting were completely banned. In response, hunters appear to have no basis upon which to demand the grant of the privilege to hunt.

Since hunters depend on the state's discretion to grant the privilege to hunt, two important questions come to mind. First, by what standard can a state allow, regulate, or prohibit hunting? Second, once a state has granted the privilege to hunt to its citizens, what protection does an individual's exercise of that privilege receive?

### *1. Standards for a State's Grant or Denial of the Privilege to Hunt*

The standard of review under which state legislation grants, regulates, or prohibits hunting is scrutinized in quite a variety of ways from state to state.<sup>148</sup> Nonetheless, regardless of what standard hunting legislation must meet, it still must not violate the Constitution's Privileges and Immunities Clause, the Commerce Clause,<sup>149</sup> the Equal Protection Clause, Due Process, or any other provision of the Constitution.<sup>150</sup>

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145. See *Pennsylvania Game Comm'n v. Marich*, 666 A.2d 253, 256 (Pa. 1995) (noting that the right to hunt game is a privilege given by the legislature, which can be regulated and prohibited as an exercise of the legislature's power to protect wild game).

146. See *supra* note 38 (setting forth reports and statements, including one by President Clinton, that refer to a "right to hunt").

147. See *infra* notes 287-303 and accompanying text (discussing the use of the public trust doctrine by anti-hunters to utilize the judicial and political system to restrict and abolish hunting).

148. See *infra* notes 151-56 (exploring the various standards courts use in reviewing state laws regulating and preserving wildlife).

149. U.S. CONST. art. I, § 8, cl. 3 (providing that the Congress shall have the power to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes).

150. See U.S. CONST. amend V, cl. 2 (declaring that no person shall be deprived of life, liberty, or property without due process of law); U.S. CONST. amend XIV, § 1 (stating that no state shall deprive any person of life, liberty, or property without due process of law, nor deny any person within its jurisdiction equal

Case law, such as that in *Baldwin*, requiring states to pass only rational basis review, the lowest level of judicial review, leaves states with broad power in affecting hunting through legislation.<sup>151</sup> Some states appear to have adopted this low standard as their own.<sup>152</sup> Still, other states have adopted a more scrutinizing standard of review for the regulation of hunting. Some of these standards are as follows: (1) Rational relation;<sup>153</sup> (2) substantial relation;<sup>154</sup> (3) conformity with organic law;<sup>155</sup> and (4) necessity.<sup>156</sup> Still, under any of these standards, a state is left with broad discretion as to whether it will allow, prohibit, or restrict hunting.

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protection of the laws); *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 385-86 (1978) (holding that in protecting the state's wildlife through regulation, a state may not impede interstate commerce); *Begay v. Sawtelle*, 88 P.2d 999, 1000 (Ariz. 1939) (opining that a state may regulate the taking or killing of game in the state so long as such regulation does not deny due process of law and the equal protection of law guaranteed to all persons by the state and federal constitutions).

151. See *Judd v. Bernard*, 304 P.2d 1046, 1049 (Wash. 1956) (explaining that because the wildlife within a state is the state's property, the courts will not review the state's regulation of its wildlife, since it is within the state's discretion to decide the disposition of its own property).

152. See *Takahashi v. Fish & Game Comm'n*, 30 Cal. 2d 719, 728, 185 P.2d 805, 811 (1947) (stating that the people may prohibit the taking of wild game if deemed necessary for its protection or preservation for the public good); *State v. Suess*, 52 N.W.2d 409, 415 (Minn. 1952) (holding that the state may regulate the taking of wild animals in any manner the legislature sees fit); *State v. Willers*, 130 S.W.2d 256, 257 (Mo. Ct. App. 1939) (opining that the legislature may pass such laws granting or denying to individuals the right to kill wild birds as the legislature may deem best); *Graves v. Dunlap*, 152 P. 532, 533 (Wash. 1915) (declaring that the state, through its legislature, has the right to control for the common good the taking of game, so long as the rights guaranteed by the state or federal constitution are not encroached upon).

153. See *Collopy v. Wildlife Comm'n*, Dep't of Natural Resources, 625 P.2d 994, 999 (Colo. 1981) (setting forth that the legislature has the power and the duty to enact reasonable measures to protect and conserve wild game within its borders); *State v. Saurman*, 413 N.E.2d 1197, 1201 (Ohio 1980) (holding that the state legislature may pass laws for the protection of wild game that limit the killing of such game, so long as those laws are rationally related to the protection of game).

154. See *Aikens v. Conservation Dep't*, 184 N.W.2d 222, 223 (Mich. 1970) (explaining that the state has the power to prohibit hunting of wild animals if the action is deemed necessary for the public good); *State v. Stewart*, 253 S.E.2d 638, 640 (N.C. App. 1979) (opining that if a statute regulating the taking of wildlife is to be sustained as a legitimate exercise of police power, it must be substantially related to the protection of game).

155. See *Le Clair v. Swift*, 76 F. Supp. 729, 733 (D. Wisc. 1948) (declaring that the state may conserve fish and wildlife by regulating or prohibiting the taking of game, so long as the action does not violate the organic law of the land); *Cummings v. Commonwealth*, 255 S.W.2d 997, 998 (Ky. 1953) (setting forth that the state, as trustee for the people, may conserve wildlife and regulate or prohibit its taking in any reasonable way the state may deem necessary for the public welfare, so long as such regulation does not violate organic law).

156. See *Begay*, 88 P.2d at 1000 (opining that the Legislature of Arizona may pass, as it thinks proper for the preservation and conservation of game animals of the state, regulations relating to the taking of game); *Sherwood v. Stephens*, 90 P. 345, 346 (Idaho 1907) (explaining that it is within the police power of the legislature to enact laws as may be necessary for the protection and regulation of the public's right in fish and game); see also *Connor v. Andrus*, 453 F. Supp. 1037, 1041 (W.D. Tex. 1978) (holding that a federal statute prohibiting all duck hunting in certain areas is arbitrary and capricious, as loss of habitat, not hunting pressure, is to blame for the target species' population decline).



## 2. Protection of the Privilege to Hunt Once Granted by the State

Once a state legislature, or more likely the state's fish and wildlife department, grants to its citizens the privilege to hunt, there is created in effect a conditional statutory right to carry out the activity in a lawful manner.<sup>157</sup> At the time of this Comment, all fifty states provide for hunting seasons during which hunters may lawfully pursue their sport. Thus, every state in the United States creates a conditional statutory right to hunt. While this statutory right to hunt might be limited to specific times, by specific means, in specific places, for specific game, it is a recognized right nonetheless, which receives governmental protection.<sup>158</sup>

Over the past several years, anti-hunting groups have become more aggressive, choosing to express their opposition to hunting by holding demonstrations at various hunting grounds during legal hunting season in an effort to prevent the killing of animals.<sup>159</sup> As a result of this activity, laws have been

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157. See CAL. FISH & GAME CODE § 200 (West 1984) (delegating to the California Fish and Game Commission the power to regulate the taking of birds, mammals, fish, amphibia, and reptiles); *id.* at § 202 (West Supp. 1996) (providing that the California Fish and Game Commission shall exercise its power to regulate the taking of wildlife by enacting regulations); *id.* at § 3037 (West 1984) (declaring that a hunting license authorizes the person to whom it is issued to take birds and mammals for a period of one year, subject to other constraints).

158. See *Dorman v. Satti*, 678 F. Supp. 375, 379 n.4 (D. Conn. 1988) (stating the general rule that every person has the right to take game wherever and whenever one chooses to do so, subject to statutory regulations and so long as the person does not infringe upon the rights of others); *id.* (setting forth that common law provides a remedy on trespass against anyone interfering with another's right to hunt or take game if a person does anything with the intent of destroying that right); *Ainsworth v. Munoskong Hunting & Fishing Club*, 116 N.W. 992, 993-94 (Mich. 1908) (holding that the hunting of waterfowl in accordance with the game laws of the state is a right that hunters are entitled to exercise and against which no person may lawfully interfere, lest an action for damages should arise); *infra* note 160 (listing various statutes prohibiting the harassment of hunters by other persons).

159. See *State v. Lilburn*, 875 P.2d 1036, 1044 (Mont. 1994) (describing how the defendant, an animal rights activist, repeatedly jumped in front of a hunter's rifle just before the hunter was about to lawfully shoot a bison), *cert. denied*, 115 S. Ct. 726 (1995); Ugalde, *supra* note 26, at 1114 (reporting that an increasing number of anti-hunting activists have taken to the field to interfere with the killing of animals by hunters, using tactics such as encouraging farmers to post no trespassing signs on their land, spreading deer repellent and human hair in the woods to scare off game, entering the woods with loud radios and dogs to scatter game, and protesting at wildlife refuges); *Animal Rights Gang Club Hunting Dog to Death*, EVENING STANDARD, Dec. 29, 1994, at 19 (reporting that an elderly foxhound too weak to hunt was bludgeoned to death with a crowbar by suspected hunt saboteurs in a raid on kennels, with two other dogs also being bludgeoned in the raid, one of which was later put down by vets); *Bomb Drama at Hunt Hotel*, PRESS ASSOCIATION NEWSFILE, Jan. 30, 1995 available in LEXIS, News Library, Curnws File (copy on file with the *Pacific Law Journal*) (explaining that animal rights activists planted a bomb in a hotel in which a hunting organization was about to hold its annual meeting); Jim Efstathiou, *2 Sides Clash in Goose Shoot at State Park: Hunters vs. Jeering Protestors*, THE RECORD, Jan. 29, 1995, at A1 (stating that twenty men and women "screaming wildly into bullhorns and blasting airhorns" showed up at a state park to protest a special goose hunt designed to reduce an overpopulation of nonmigratory Canadian geese which posed a problem to local yards, golf courses, and parks); Satchell, *The American Hunter*, *supra* note 20, at 30 (setting forth that increasingly, the sound of air horns, loud music and angry shouting is augmenting the sound of gunfire in our nation's hunting fields); *id.*

enacted that protect the statutory right to hunt by prohibiting the harassment of hunters in the field during the hunt by anti-hunting protestors.<sup>160</sup> The federal government has enacted a hunter harassment statute that prohibits persons from intentionally engaging in physical conduct that significantly hinders a lawful hunt.<sup>161</sup> State hunter harassment statutes are similar to the federal statute; however, the state laws tend to be limited to hunting areas. Generally, the state laws prohibit persons from going into designated hunting areas and intentionally interfering or intentionally harassing hunters for the purpose of disturbing a lawful hunt. At the time this Comment was written, all fifty states had enacted hunter harassment statutes.<sup>162</sup>

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(recounting one hunting trip in which the hunters were closely followed by animal rights protestors, who grabbed the hunters' guns, heckled the hunters about the evils of hunting, and promised to annoy the hunters until they left the woods); Michael Sissons, *In the Field of Fury: Concern for Animal Welfare Has Been Exploited by Animal Rights Groups on a Tide of Political Correctness*, DAILY TELEGRAPH, Nov. 27, 1993, at 17 (quoting an animal rights protestor as saying that his duty is to look after the animals, even if that involves infringing on people's civil or legal rights).

160. ALA. CODE § 9-11-2 (1995); ALASKA STAT. § 16.05.790(a) (1995); ARK. CODE ANN. § 5-71-228(a) (Michie 1987); CAL. FISH & GAME CODE § 2009(a) (West Supp. 1996); COLO. REV. STAT. § 33-6-115.5(1), (2) (1995); CONN. GEN. STAT. ANN. § 53a-183a(a) (West 1994); DEL. CODE ANN. tit. 7, § 731(a) (1991); FLA. STAT. ANN. § 372.705(1)(a), (b) (West Supp. 1996); GA. CODE ANN. § 27-3-151(a) (Michie 1993); HAW. REV. STAT. § 183D-27.5(a)(1), (4) (1995); IDAHO CODE § 36-1510(1) (1994); ILL. ANN. STAT. ch. 720, para. 125/2, § 2(a), (c) (Smith-Hurd Supp. 1996); IND. CODE ANN. § 14-22-37-2(a), (c) (West Supp. 1996); IOWA CODE ANN. § 481A.125(1) (West Supp. 1996); KAN. STAT. ANN. § 32-1014(a) (1993); KY. REV. STAT. ANN. § 150.710(1) (Baldwin 1996); LA. REV. STAT. ANN. § 56:648.1(1), (3) (West Supp. 1996); ME. REV. STAT. ANN. tit. 12, § 7541 (1), (2) (West 1994); MD. CODE ANN., NAT. RES. § 10-422(b)(1), (2) (1990); MASS. GEN. LAWS ANN. ch. 131, § 5C (West Supp. 1996); MICH. COMP. LAWS ANN. § 324.40112(1) (West Supp. 1996); MINN. STAT. ANN. § 97A.037(1), (2) (West Supp. 1996); MISS. CODE ANN. § 49-7-147(1) (Supp. 1994); MO. ANN. STAT. § 578.151(1), (2) (Vernon 1995); MONT. CODE ANN. § 87-3-142(1), (3) (1995); NEB. REV. STAT. § 37-528.01 (1993); NEV. REV. STAT. § 503.015(1) (1995); N.H. REV. STAT. ANN. § 207:57(I) (Supp. 1995); N.J. STAT. ANN. § 23:7A-2 (West Supp. 1995); N.M. STAT. ANN. § 17-2-7.1(A) (Michie 1995); N.Y. ENVTL. CONSERV. LAW § 11-0110(2)(a), (b) (McKinney Supp. 1996); N.C. GEN. STAT. § 113-295(a) (1995); N.D. CENT. CODE § 20.1-01-31 (Supp. 1995); OHIO REV. CODE ANN. § 1533.03(A)(1), (3) (Anderson 1995); OKLA. STAT. ANN. tit. 29, § 5-212(A) (West Supp. 1996); OR. REV. STAT. § 496.994(1) (1987); PA. CONS. STAT. ANN. § 2302(a) (Supp. 1995); R.I. GEN. LAWS § 20-13-16(a), (b) (Supp. 1995); S.C. CODE ANN. § 50-1-137 (Law Co-op. 1995); S.D. CODIFIED LAWS ANN. § 41-1-8 (1991); TENN. CODE ANN. § 70-4-302(1), (4) (1995); TEX. PARKS & WILD. CODE ANN. § 62.0125(c), (d) (West Supp. 1996); UTAH CODE ANN. § 23-20-29(1) (1987); VT. STAT. ANN. tit. 10, § 4708(a), (b) (1994); VA. CODE ANN. § 29.1-521.1(A) (Michie 1995); WASH. REV. CODE ANN. § 77.16.340(1) (1996); W. VA. CODE § 20-2-2a (1996); WIS. STAT. ANN. § 29.223(2) (West 1995); WYO. STAT. § 23-3-405(a)(I), (ii) (1995); *Harassing Hunters Still Illegal in U.S.A.*, REUTERS WORLD, Jan. 11, 1995, available in LEXIS, News Library, Curnws File (copy on file with the *Pacific Law Journal*) (reporting that 48 states and the federal government have enacted hunter harassment laws); see e.g., 16 U.S.C.A. § 5201 (West Supp. 1996) (prohibiting a person from intentionally engaging in physical conduct that significantly hinders a lawful hunt); ARIZ. REV. STAT. ANN. § 17-316(B) (1996) (providing that it is a misdemeanor for a person while in a designated hunting area to intentionally interfere with the lawful taking of wildlife by another or to intentionally harass, drive or disturb any game animal for the purpose of disrupting a lawful hunt).

161. See 16 U.S.C.A. § 5201 (West Supp. 1996) (prohibiting a person from intentionally engaging in physical conduct that significantly hinders a lawful hunt).

162. See *supra* note 160 and accompanying text (listing various state hunter harassment statutes).

Opponents of hunter harassment laws believe that the laws violate anti-hunting protestors' constitutional right to free speech.<sup>163</sup> Opponents argue that anti-hunting protests are a form of political speech, and thus are beyond restriction by hunter harassment statutes.<sup>164</sup> Proponents of these laws claim that there is a proper time and place to protest hunting to bring about social change, but that doing it in the woods during hunting season is the wrong time and the wrong place.<sup>165</sup>

At least one hunter harassment statute has been found to be unconstitutional.<sup>166</sup> In *Dorman v. Satti*,<sup>167</sup> a federal court, using strict scrutiny, held that not only was Connecticut's hunter harassment statute overbroad, but that the state did not have a compelling interest in protecting hunters from such harassment.<sup>168</sup> Specifically, Connecticut's statute provided that no person shall interfere with or harass another person who is involved in the lawful taking of wildlife or acts in preparation for such taking, with intent to prevent the taking.<sup>169</sup> The court held that the statute could not be enforced as a valid time, place, and manner restriction, due to the fact that the statute's prohibition extended to conduct that interferes with the preparation for a hunt.<sup>170</sup> The court said preparation could encompass buying supplies prior to a hunt, consulting a road map while en route to the hunting ground, or even getting a good night's sleep before embarking on a hunting trip.<sup>171</sup> Thus, the court held that, under this test, the statute was overbroad.<sup>172</sup> The court also held that the statute could not stand under a strict scrutiny

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163. See Ugalde, *supra* note 26, at 1109 (arguing that hunter harassment statutes violate the First Amendment right to free speech by proscribing a form of political speech); *Harassing Hunters Still Illegal in U.S.A.*, *supra* note 160 (reporting that animal rights activists challenge hunter harassment laws by arguing that they are too broad, vague, and improperly infringe on animal rights activists' First Amendment free speech rights).

164. Ugalde, *supra* note 26, at 1109.

165. *Id.*; see *id.* at 1110-11 (proposing that hunter harassment statutes outlaw the legitimate protests of those who seek to protect animals from hunters, and are thus violative of the First Amendment right to free speech).

166. See *infra* notes 167-73 and accompanying text (reviewing Connecticut's hunter harassment statute, which was struck down as unconstitutional).

167. 862 F.2d 432 (2d Cir. 1988), *cert. denied*, 490 U.S. 1099 (1989).

168. *Dorman*, 862 F.2d at 436; see *id.* (holding that Connecticut's hunter harassment law, which provides that no person shall harass another person engaged in the lawful taking of wildlife or acts in preparation thereof, is content-based and inadequate to pass strict scrutiny as the state has no compelling interest in protecting hunters from harassment); see also *Dorman v. Satti*, 678 F. Supp. 375, 383 (D. Conn. 1988) (opining that because Connecticut's hunter harassment statute proscribes acts such as interfering with a hunter's preparation for a hunt, which could include buying supplies, making plans during a workplace coffee break, or even getting a good night's sleep, the statute sweeps beyond the scope of the state's regulatory power over hunting and taking wildlife, and is thus overly vague and overbroad), *aff'd on other grounds*, 862 F.2d 432 (2d Cir.).

169. CONN. GEN. STAT. ANN. § 53a-183a (West 1994).

170. *Dorman*, 862 F.2d at 437.

171. *Id.*

172. *Id.*

standard, since there was no showing that protecting hunters from harassment constituted a compelling state interest.<sup>173</sup> Nonetheless, the Supreme Court has denied certiorari to the Montana Supreme Court on a decision upholding a hunter harassment statute which prohibits a person from intentionally interfering with the lawful taking of game by another.<sup>174</sup>

If a right to hunt cannot be found in the sources of law discussed previously in this Part, the creation and enforcement of hunter harassment statutes by the federal government and all fifty states demonstrates that at least hunting is a valued activity in the eyes of many states' citizens and legislatures.<sup>175</sup> Furthermore, the enactment of these statutes seems to indicate something more than just a privilege to hunt, because states here enacted specific protection for the activity. However, one will have to look to sources of law other than case law, natural law, the United States Constitution, and statutory law to find something more than a mere privilege to hunt. The public trust doctrine is the next source of law that should be examined.

### III. SURVEY OF THE PUBLIC TRUST DOCTRINE

#### A. *History and Development*

Before examining the application of the public trust doctrine as a source of the right to hunt, it is first helpful to examine the doctrine's history and development, as well as its broad expansion during the past twenty-five years.

The public trust doctrine refers to the duty of sovereign states to hold and preserve certain resources, primarily navigable waters, for the benefit of its citizens.<sup>176</sup> This doctrine traces its roots to Roman law, which provided that the air, running water, the sea, and consequently the shores of the sea, were things

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173. *Id.*

174. *Lilburn v. Montana*, 115 S. Ct. 726 (1995). The Montana Supreme Court held that the statute was constitutional in that it was neither content-based nor overbroad. *State v. Lilburn*, 875 P.2d 1036, 1043-44 (Mont. 1994). See Linda Greenhouse, *Supreme Court Roundup, Justices Reject Challenge to Law on Harassing Hunters*, N.Y. TIMES, Jan. 10, 1995, at A14 (reporting that the Montana Supreme Court upheld the state's hunter harassment statute on the ground that it served the state's legitimate interest in avoiding confrontation in the field).

175. See *supra* notes 160-61 and accompanying text (setting forth various hunter harassment statutes and the reasons for their enactment).

176. Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, in *THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCES LAW AND MANAGEMENT* 43 n.3 (Harrison C. Dunning ed., 1981). See generally ZYGMUNT PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 365-412 (1992) (discussing the past and recent application of the public trust doctrine to traditional resources such as navigable waters as well as to non-navigable and non-water resources); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter Sax, *Effective Judicial Intervention*] (providing a comprehensive survey of the public trust doctrine and its judicial development).

common to all humankind.<sup>177</sup> Under Roman law, all rivers and ports were public, and the right of fishing was common to all people.<sup>178</sup> From the Roman law, the common law in England adopted the concept of the public trust, under which the sovereign owned all navigable waterways and lands lying beneath them as a trustee for the public's benefit.<sup>179</sup> Along with sovereign ownership came a duty not to alienate the property of the trust to private interests that are contrary to the public good.<sup>180</sup>

Upon gaining independence from England, the United States succeeded to the navigable waters<sup>181</sup> that had belonged to the crown, and any grant purporting to divest the citizens of the common rights in land was void.<sup>182</sup> Upon a state's admission to the Union, the state took such lands in trust for the benefit and good of the public. The public rights, historically protected by the trust include

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177. Institute of Justinian 2.1.1; see J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 129 (1976) (discussing *res communes*, or things which were commonly owned by all living persons, including the air, the sea, and the sea shore).

178. Institute of Justinian 2.1.4; see THOMAS, *supra* note 177, at 166-67 (exploring the *res publicae*, which is the concept of property belonging to the state, such as public roads, bridges, ports, baths, and flowing rivers).

179. *Colberg, Inc. v. People ex. rel. Dep't of Pub. Works*, 67 Cal. 2d 408, 416, 432 P.2d 3, 8, 62 Cal. Rptr. 401, 406 (1967); Stevens, *supra* note 176, at 29; see *id.* (stating that one of the motives of sovereign ownership was that the common law abhorred lack of ownership in any object).

180. Stevens, *supra* note 176, at 29.

181. See *United States v. Holt State Bank*, 270 U.S. 49, 56 (1926) (holding that a stream or lake is navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water); *Giddings v. Rogalewski*, 158 N.W. 951, 953 (Mich. 1916) (stating that the test for finding a waterway navigable is whether the waters under consideration are capable of being used by the public as thoroughfares or highways for purposes of commerce, trade, and travel by the usual and ordinary modes of navigation); *State v. Bollenbach*, 63 N.W.2d 278, 289 (Minn. 1954) (opining that under the federal test for navigability, travel on a body of water for purposes of private fishing and hunting and for some trapping is not commerce and therefore does not qualify as navigable); *Hillebrand v. Knapp*, 275 N.W. 820, 822 (S.D. 1937) (concluding that the test of whether a waterway is navigable cannot be confined to a narrow test of actual navigation, but rather the term should be extended to include waterways that are used for commercial navigation, whether they could be used by the people presently or in the future for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and city purposes, as well as other unanticipated public uses); *Diana Shooting Club v. Husting*, 145 N.W. 816, 819 (Wis. 1914) (defining "navigable waters" as those that allow navigability in fact for products of the forest, field, or commerce for regularly recurrent annual periods); Sax, *Effective Judicial Intervention*, *supra* note 176, at 556 (suggesting that the term navigability, as a term describing the coverage of the public trust, is a vague concept which may be so broad as to include all waters suitable for public recreation); see also *Barboro v. Boyle*, 178 S.W. 378, 379 (Ark. 1915) (setting forth that whether a lake is a navigable water is a question of fact to be determined from the condition of the lake and the surrounding circumstances).

182. *Arnold v. Mundy*, 6 N.J.L. 1 (1821); see *Wisconsin's Envtl. Decade, Inc. v. Department of Natural Resources*, 271 N.W.2d 69, 72 (Wis. 1978) (stating that the public trust duty requires the state not only to promote navigation but also to protect and preserve its waters for fishing, hunting, recreation, and scenic beauty).

navigation, commerce and fishing and are enforced as easements.<sup>183</sup> Within these rights are the public uses of fishing, bathing, swimming, and hunting.<sup>184</sup>

As a trustee, a state is under the duty to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.<sup>185</sup> If the public is deprived of public trust uses, the public trust doctrine can be invoked by the public to reinstate the right to a specific use or to enjoin an individual from continuing to violate the trust.<sup>186</sup>

### *B. Modern Application and Expansion*

In his famous law review article of 1970, Professor Sax developed the modern theory of the public trust doctrine as a tool of judicial intervention to address the inadequacies of governmental and private management of environmental resources.<sup>187</sup> Since 1970, the public trust doctrine has become a common means by which private citizens can question the validity of actions by government agencies relating to natural resources.<sup>188</sup> Such private action is usually based on a claim that the governmental agency has made a decision relating to a public trust resource, that is detrimental and adverse to public uses and rights in the resource.<sup>189</sup> Along with an increasing number of private litigants bringing claims under the public trust doctrine, courts and state legislatures have recognized the public trust doctrine with increasing frequency.<sup>190</sup>

While the frequency of public trust doctrine litigation has seen an increase in the past twenty-five years, the doctrine has also experienced an expansion in its scope.<sup>191</sup> Specifically, the public trust doctrine has been expanded in two ways. First, the resources included in the public trust doctrine have been expanded

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183. *Marks v. Whitney*, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

184. *See id.* (noting that public trust easements have been held to include the rights to fish, hunt, bathe, swim, and use for boating and general recreation purposes the navigable waters of the state); *Wisconsin's Envtl Decade*, 271 N.W.2d at 73 (mandating that the state protect and preserve its waters for public activities, such as fishing, hunting, recreation, and scenic beauty pursuant to the public trust duty).

185. *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 441, 658 P.2d 709, 722, 189 Cal. Rptr. 346, 358 (1983).

186. *See id.* at 425, 658 P.2d at 712, 189 Cal. Rptr. at 348 (describing a plaintiff's petition to enjoin the Department of Water and Power from diverting water from Mono Lake's tributaries on the theory that the shores, bed, and waters of the lake are protected by the public trust).

187. *See generally* Sax, *Effective Judicial Intervention*, *supra* note 176.

188. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 643-44 (1986).

189. *Id.* at 642.

190. *See id.* at 643-44 (noting the increasing frequency of litigation involving the public trust doctrine in the United States since 1970); *id.* at 644 n.77 (listing cases brought under the public trust doctrine in various states from 1970 to 1986).

191. *See infra* notes 192-216 and accompanying text (discussing the expansion of the public trust doctrine).

beyond just navigable rivers and lakes.<sup>192</sup> This expansion was predicted by Professor Sax when he stated that the scope of the doctrine could, and would, be expanded to include resources other than navigable rivers and lakes.<sup>193</sup> Prior to 1970, courts had applied the doctrine to public resources such as state parks,<sup>194</sup> fish,<sup>195</sup> and fossil beds.<sup>196</sup> Since 1970, the public trust doctrine has been applied to resources such as marine life,<sup>197</sup> sand and gravel in water beds,<sup>198</sup> all waters capable of recreational use,<sup>199</sup> the dry sand area of a beach,<sup>200</sup> rural parklands,<sup>201</sup> national parks,<sup>202</sup> wildlife,<sup>203</sup> a historic battlefield,<sup>204</sup> archaeological remains,<sup>205</sup> and non-navigable streams.<sup>206</sup>

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192. See *infra* notes 193-266 and accompanying text (reviewing the expansion of the public trust doctrine beyond navigable rivers and lakes).

193. See Sax, *Effective Judicial Intervention*, *supra* note 176, at 556-57 (analyzing the potentially broad scope of the public trust doctrine as applied to resources other than navigable waters, as well as to nonresource contexts).

194. See *Gould v. Greylock Reservation Comm'n*, 215 N.E.2d 114, 121-26 (Mass. 1966) (applying the public trust doctrine to forested land within a state park).

195. *Nash v. Vaughn*, 182 So. 827, 828 (Fla. 1938). The court in *Nash*, quoting from *State v. Stoutamire*, 179 So. 730, 732 (Fla. 1938), stated that "[f]ish are classified in the law . . . as animals *ferae naturae*. Their ownership, while they are in a state of freedom, is in the state, not as a proprietor, but in its sovereign capacity as the representative and for the benefit of all its people in common." *Nash*, 182 So. at 828.

196. See *Defenders of Florissant v. Park Land Dev. Co.* (unpublished), as reported in V. YANNAKONE, ENVIRONMENTAL LAW 47-60 (1970). *Defenders of Florissant* involved an environmental interest group that halted a subdivision development on lands containing nationally-famous fossil beds for a duration of time necessary for the federal government to enact legislation making the fossil beds a national monument. *Id.* The environmentalists based their claim for injunctive relief upon the assertion that the fossil beds are held in trust for the full benefit, use, and enjoyment of all the people of this generation, and those generations yet unborn. *Id.* The United States Court of Appeals for the Tenth Circuit granted the injunction for an indefinite period based upon the plaintiff's application. *Id.* at 401.

197. *New Jersey Dep't of Env'tl. Protection v. Jersey Cent. Power & Light Co.*, 308 A.2d 671, 673 (N.J. 1973).

198. *Warren Sand & Gravel Co. v. Commonwealth Dep't of Env'tl. Resources*, 341 A.2d 556, 560 (Pa. 1975).

199. *Montana Coalition for Stream Access v. Curran*, 682 P.2d 163, 167-71 (Mont. 1984).

200. *Van Ness v. Borough of Deal*, 393 A.2d 571, 574 (N.J. 1978).

201. *Paepcke v. Public Bldg. Comm'n*, 263 N.E.2d 11, 15 (Ill. 1970).

202. *Sierra Club v. Department of Interior*, 398 F. Supp. 284, 287 (N.D. Cal. 1975); see *id.* (stating that there is a trust imposed upon the National Park Service of the Department of the Interior to conserve scenery, natural and historic objects, and wildlife in national parks, monuments, and reservations, and to provide for unimpaired enjoyment of them for future generations).

203. *Wade v. Kramer*, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984); *In re Steuart Transp. Co.*, 495 F. Supp. 38, 39 (E.D. Va. 1980).

204. *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, 591 (Pa. 1973).

205. *Wade*, 459 N.E.2d at 1028. But see *San Diego County Archaeological Soc'y v. Compadres*, 81 Cal. App. 3d 923, 927, 146 Cal. Rptr. 786, 788 (1978) (holding that the public trust doctrine does not apply to archaeological artifacts on private property).

206. See *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 437, 658 P.2d 709, 721, 189 Cal. Rptr. 346, 357 (1983) (declaring that the public trust doctrine applies to non-navigable waters that are tributaries to navigable waters); *California Trout, Inc. v. State Water Resources Control Bd.*, 207 Cal. App. 3d 585, 630, 255 Cal. Rptr. 184, 211-12 (1989) (explaining that a variety of public trust interests pertain to non-navigable streams that sustain a fishery); see also *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (stating that

The second expansion the public trust doctrine has experienced is judicial recognition of additional public uses.<sup>207</sup> While the original public uses that are protected by the public trust doctrine are navigation, fishing, swimming, bathing, and hunting, recent court decisions have added uses.<sup>208</sup> In the California case of *Marks v. Whitney*,<sup>209</sup> the California Supreme Court left the door open to expanded public trust uses when it stated that public uses under the trust are sufficiently flexible to encompass the changing public needs.<sup>210</sup>

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all public streets are held in the public trust and are properly considered traditional public fora); *Phillips Petroleum Co. v. Mississippi Inc.*, 484 U.S. 469, 484 (1988) (holding that Mississippi holds title not only to lands under tidewater, but also to waters within the state which are not navigable in fact, but which are influenced by the tide rising in the Gulf of Mexico); *Sierra Club*, 398 F. Supp. at 287 (applying the public trust doctrine to critical upland areas surrounding a redwood forest); *National Audubon Soc'y*, 33 Cal. 3d at 446-47, 658 P.2d at 728, 189 Cal. Rptr. at 364-65 (opining that appropriations from non-navigable feeder streams which result in a destruction of navigation or other public trust uses in navigable waters are subject to the public trust and thus must be constrained); *id.* (stating that the public trust is an affirmation by the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands); *Marks v. Whitney*, 6 Cal. 3d 241, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971) (holding that tidelands are subject to a reserved easement in the state for public trust purposes); *Paepcke*, 263 N.E.2d at 15-16 (applying the public trust doctrine to parkland); *Gould*, 215 N.E.2d at 121-23 (using the public trust doctrine to analyze the appropriations of erecting chairlifts on a mountain within a park); *Montana Coalition for Stream Access v. Hildreth*, 684 P.2d 1088, 1091-92 (Mont. 1984) (applying the public trust doctrine to stream access, including the right to portage around barriers by traversing adjacent private land); *Defenders of Florissant, as reported in YANNAZONE*, *supra* note 196, at 47-60 (demonstrating a possible application of the public trust doctrine to protect ancient fossil beds); *cf. People v. Russ*, 132 Cal. 106, 64 P. 111, 112 (1901) (declaring that dams on non-navigable sloughs, which render a navigable river non-navigable, are public nuisances in that they contravene the public trust and its uses). See generally Joseph L. Sax, *Bringing an Ecological Perspective to Natural Resources Law: Fulfilling the Promise of the Public Trust*, in NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS 150 (Lawrence Macdonnell et al. eds., 1993) [hereinafter Sax, *Ecological Perspective*] (stating that the public trust doctrine has been expanding in scope in response to contemporary problems, and its underlying precept of public entitlement to the benefit of natural systems shows signs of influencing every corner of natural resources law); *id.* at 149 (noting that the California Supreme Court decision in *National Audubon Soc'y v. Superior Court* held for the first time that even established appropriative water rights remained subject to a duty of continuing supervision on the part of the state to protect the public trust in state waters).

207. See *supra* notes 187-206 and *infra* notes 208-16 accompanying text (surveying the judicial expansion of recognized and protected public trust uses).

208. See *supra* notes 187-207 and *infra* notes 209-16 accompanying text (reviewing the expansion of the public trust doctrine pursuant to case law).

209. *Marks*, 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

210. See *id.* (noting that it is not necessary to define precisely all the public uses that encumber waters and lands in the public trust); *id.* at 260, 491 P.2d at 380, 98 Cal. Rptr. at 796 (stating that a state may find and determine that some lands are no longer useful for trust purposes and free them from the trust); *Pennsylvania Coal Co. v. Sanderson*, 6 A. 453, 459 (Pa. 1886) (holding that in order not to stifle the development of the great natural resources of a country, a downstream property owner must tolerate an upstream coal company's pollution of the river, and can not enjoin such activity); Joseph L. Sax, *Symposium on the Public Trust and the Waters of the American West: Yesterday, Today and Tomorrow, The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 476 (1989) (reporting that during our nation's early years of industrialization, there were court cases recognizing the right to pollute water as a means of promoting industrial development, and that these cases recognized the right to pollute water because it was a use that was at the time compatible with the public interest).



Following up *Marks* is the now famous 1983 case of *National Audubon Society v. Superior Court*, in which the California Supreme Court recognized public trust uses that extend to ecological, scenic, and intrinsic public interests.<sup>211</sup> *National Audubon Society* focused on the long-term evaporation and lowering of Mono Lake due to the diversion of Mono Lake's tributaries as a means of providing water to Los Angeles.<sup>212</sup> One of the ecological characteristics of Mono Lake is that it provides habitat for thousands of birds, including the pacific gull.<sup>213</sup> The Court's opinion expanded public trust uses by establishing that the public trust doctrine vests in the public a right or interest in protecting wildlife habitat for the public's enjoyment.<sup>214</sup>

In light of the expansion of the resources to which the public trust doctrine applies and the uses that protects, there is great potential that the doctrine could become an important consideration in state management of wildlife.<sup>215</sup> Should such application of the public trust doctrine occur, and in some cases it already has, the doctrine will play a major role in state management decisions regarding the hunting of wild game.<sup>216</sup>

### C. Wildlife as a Public Trust Resource

As mentioned above, the public trust doctrine has expanded greatly in the past twenty-five years. With the scope of public trust resources expanding, some legal scholars argue that wildlife should also be included as a resource in the public

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211. See *National Audubon Soc'y*, 33 Cal. 3d at 435, 658 P.2d at 719, 189 Cal. Rptr. at 356 (declaring that recreational and ecological values, such as scenic views of a lake and its shore, the purity of the air, and the use of a lake for nesting and feeding by birds, are protected by the public trust).

212. *Id.* at 424, 658 P.2d at 717, 189 Cal. Rptr. at 350.

213. *Id.*

214. *Id.* at 435, 658 P.2d at 719, 189 Cal. Rptr. at 356.

215. See *infra* notes 217-38 and accompanying text (discussing the inclusion of wildlife as a public trust resource and the implications such an inclusion would have upon state wildlife management decisions).

216. See *infra* notes 217-38 and accompanying text (analyzing the inclusion of wildlife as a public trust resource and the implications such an inclusion would have upon state wildlife management decisions).

trust.<sup>217</sup> These scholars are not alone, as at least three courts have formally applied the public trust doctrine to wildlife.<sup>218</sup>

In *California Trout, Inc. v. State Water Resources Control Board*,<sup>219</sup> the California Court of Appeal held that the public trust doctrine applied to trout in navigable and non-navigable waters such that the state could protect its sovereign rights in the fish within its waters.<sup>220</sup> The court went on to state that title to wild fish is vested in the state and held by it as trustee for the common ownership and use of the people.<sup>221</sup>

In *Wade v. Kramer*,<sup>222</sup> an Illinois appellate court was faced with the issue of whether the construction of a highway bridge that would be potentially damaging to wildlife violated the public trust.<sup>223</sup> The Illinois Legislature had carried out a balancing test between the benefits the highway project would impart upon citizens of the state versus the potential damage that would be imposed upon wildlife in the area.<sup>224</sup> The legislature decided that the benefits of the highway outweighed and justified the potential harm to wildlife.<sup>225</sup> The court held that the legislature's decision did not violate the public trust, even though the public trust resource of wildlife would be harmed.<sup>226</sup> The court noted that the State could

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217. See RICK APPLEGATE, PUBLIC TRUSTS: A NEW APPROACH TO ENVIRONMENTAL PROTECTION 57 (1976) (concluding that wildlife should be placed in the public trust, with the national public as beneficiary for all wildlife); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 727-29 (1989) (proposing that the scope of the public trust doctrine be expanded to encompass all wildlife and the habitat upon which it depends, and arguing that the approach is jurisprudentially sound, given the similarity between water and wildlife); *id.* at 728-29 (arguing that the common interest in wildlife is sufficiently like the common interest in water, such that the public trust may offer similar protection); *supra* notes 193-206 and accompanying text (reviewing various cases in which the public trust doctrine has been applied to resources other than navigable waters); see also Brian B. O'Neill, *The Law of the Wolves*, 18 ENVTL. L. 227, 227 n.1 (1988) (suggesting that the Endangered Species Act and its encouragement of active public participation is a development that is fully consistent with the principle of wildlife as a public trust resource).

218. See *California Trout, Inc. v. State Water Resources Control Bd.*, 207 Cal. App. 3d 585, 630, 255 Cal. Rptr. 184, 211-12 (1989) (applying the public trust doctrine to trout fisheries in navigable and non-navigable streams and lakes, and stating that wild fish have always been recognized as a species of property the general right and ownership of which is in the people of the state); *Wade v. Kramer*, 459 N.E.2d 1025, 1028 (Ill. App. Ct. 1984) (balancing the public's interest in wildlife against the public benefit of a highway, pursuant to the public trust doctrine, and concluding that the benefits of the highway justify the detriment to wildlife); *In re Steuart Transp. Co.*, 495 F. Supp. 38, 39-40 (E.D. Va. 1980) (holding that the state and federal governments can bring claims against an oil barge owner for harm done to waterfowl due to an oil leak, based on a public trust doctrine analysis).

219. 207 Cal. App. 3d 585, 255 Cal. Rptr. 184 (1989).

220. *California Trout*, 207 Cal. App. 3d at 629, 255 Cal. Rptr. at 198.

221. *Id.* at 630, 255 Cal. Rptr. at 198.

222. 459 N.E.2d 1025 (Ill. App. Ct. 1984).

223. *Wade*, 459 N.E.2d at 1025.

224. *Id.*

225. *Id.*

226. *Id.* at 1028.

reallocate public property from one purpose to another without violating the public trust.<sup>227</sup>

Finally, in *In re Steuart Transportation Co.*,<sup>228</sup> a federal district court also applied the public trust doctrine to wildlife. In *Steuart Transportation Co.*, the federal government and Virginia brought suit for damages against a vessel owner whose oil spill in Chesapeake Bay killed over 30,000 migratory waterfowl.<sup>229</sup> The court held that the federal government and Virginia could recover damages for loss of the waterfowl under the public trust doctrine.<sup>230</sup> The court stated that, under the public trust doctrine, the Commonwealth of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources.<sup>231</sup>

In addition to case law applying the public trust doctrine to wildlife, several state constitutions have declared wildlife as a public trust resource.<sup>232</sup> Furthermore, as stated earlier, courts have historically recognized the legal fiction that the state holds ownership of all wild game within its borders in trust for the benefit of the public.<sup>233</sup> Thus, while the theory that wildlife belongs to the public trust has existed for some time, in light of the increased value Americans put on animal rights and environmental protection, the importance of the trust concept may be greater today.<sup>234</sup> In other words, it would seem that wildlife has long been

227. *Id.*

228. 495 F. Supp. 38 (E.D. Va. 1980).

229. *Steuart Transp. Co.*, 496 F. Supp. at 39.

230. *Id.* at 40.

231. *Id.* at 40; see *People v. Harbor Hut Restaurant*, 147 Cal. App. 3d 1151, 1154, 196 Cal. Rptr. 7, 8 (1983) (declaring that California holds title to its tidelands and wildlife in public trust for the benefit of its people).

232. See, e.g., ALASKA CONST. art. VIII, § 3 (providing that wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use); LA. CONST. art. IX, §§ 1, 7 (requiring the state to protect, conserve, and replenish all natural resources, including the wildlife and fish of the state, for the benefit of its people); see also N.C. GEN STAT. § 113-133.1 (1994) (providing that the enjoyment of the state's wildlife resources belongs to all of the people of the state, and that the Wildlife Resources Commission is charged with the administration of wildlife in a manner serving equitably the various competing interests of the people regarding the resource).

233. See *Geer v. Connecticut*, 161 U.S. 519, 529 (1896) (holding that the wild game within a state belongs to the state in its sovereign capacity, as the representative and for the benefit of all its people in common); *Harper v. Galloway*, 51 So. 226, 228 (Fla. 1910) (stating that Florida holds the title to game for the use and benefit of all people); *Cummings v. Commonwealth*, 255 S.W.2d 997, 998 (Ky. 1953) (declaring that Kentucky, as trustee for the people, may conserve wildlife and regulate its taking); *Leger v. Louisiana Dep't of Wildlife and Fisheries*, 306 So. 2d 391, 394 (La. 1975) (concluding that Louisiana owns the wild animals in the state solely as a trustee for the use and common benefit of the people of the state); *State v. Saurman*, 413 N.E.2d 1195, 1197 (Ohio 1980) (opining that wild animals are a natural resource of Ohio, that are held and managed for the benefit of all the people); see also *supra* notes 135-38 and accompanying text (discussing state ownership of wildlife and the power that the state derives therefrom for conserving and protecting wildlife).

234. See LAWRENCE MACDONNELL & SARAH F. BATES, NATURAL RESOURCES POLICY AND LAW 11 (1993) (reporting that a recent *New York Times* poll found that three-quarters of Americans agree with the statement that "protecting the environment is so important that requirements and standards cannot be too high, and continuing environmental improvements must be made regardless of cost"); John Balzar, *Creatures Great*

considered a public trust resource, such that the public trust doctrine allows private citizens to bring suits to enforce the public interest in protection and proper management of wildlife.

The effect of incorporating wildlife as a resource into the public trust is that the state cannot abdicate its duty to preserve and protect the public's interest in the resource.<sup>235</sup> The public's interest in wildlife includes the protection and management of wildlife and the use of wildlife in a manner that will promote the public's common needs and values.<sup>236</sup> Thus, the state must carefully consider the common public needs and values when making decisions relating to the regulation and protection of wildlife, with the decision to allow or prohibit hunting being one of those decisions.<sup>237</sup> In the near or distant future, consideration of the majority of views could potentially eliminate or proliferate the sport of hunting, depending upon the demographics and political climate of each state.<sup>238</sup>

#### IV. THE PUBLIC TRUST DOCTRINE AS A SOURCE OF THE MODERN RIGHT TO HUNT

Under the sources of law examined in Part II, hunting is seen as nothing more than a privilege, leaving hunters with little recourse should a state decide to completely prohibit sport hunting.<sup>239</sup> However, under the modern and expanded public trust doctrine, there is a basis for hunters to assert an implied right to hunt and to seek judicial enforcement of hunting as a beneficial and essential tool for

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*and Equal? Activists Have Changed the Way We Look at Everything from Mink Coats to Steaks*, L.A. TIMES, Dec. 25, 1993, at A1 (noting that in the last one and one-half centuries, the animal protection movement has transformed the national consciousness, altering evermore how mainstream Americans regard other creatures); *id.* (citing that several million Americans are members or supporters of animal protection organizations); *id.* (quoting a recent L.A. Times poll that shows 47% of Americans believe that animals are just like humans in all important ways, and 54% of Americans opposed are to hunting for sport).

235. See *supra* notes 176-86 and accompanying text (reviewing the public trust doctrine and a state's inability to alienate public trust resources in a manner contrary to the public good).

236. Meyers, *supra* note 217, at 735; see *id.* at 733 (arguing that when wildlife is included in the public trust, the wildlife itself receives rights, and thus, human interests do not receive such weighted deference when making decisions regarding the disposition of certain aspects of the trust). But see LUTHERER & SIMON, *supra* note 26, at 10 (stating that the ultimate philosophy of the animal rights movement is that humanity has no right to use any animal for any purpose, including keeping animals as pets).

237. See Sax, *Ecological Perspective*, *supra* note 206, at 149 (suggesting that recent public trust cases, such as the Mono Lake decision, have chartered new legal territory by calling on the public trust doctrine to require accommodation between commodity and natural demands).

238. See APPLEGATE, *supra* note 217, at I (noting that public trusts offer a straightforward and powerful way to bring environmental protection under broad citizen control in the coming decades); SHAW, *supra* note 55, at 19 (discussing the crucial role public attitudes play in determining what wildlife management practices, including hunting, will be implemented); *id.* (proposing that if unfavorable attitudes are detected for a particular management program, it may have to be modified, delayed, or even abandoned, no matter how sound its biological basis); JAMES TOBER, *WILDLIFE AND THE PUBLIC INTEREST* 159-89 (1989) (analyzing nongovernmental, nonprofit organizations' impact on state wildlife management decisions and policies).

239. See *supra* notes 40-145 and accompanying text (reviewing possible sources of law for the right to hunt, and concluding that those sources merely provide a privilege to hunt).

the government to manage properly the public resource of wildlife.<sup>240</sup> Still, there is also potential for anti-hunters to use the public trust doctrine as a basis for enjoining state-permitted sport hunting.<sup>241</sup> Therefore, because of the long standing legal fiction that wildlife is held by the state for the benefit of its citizens, the public trust doctrine is a logical focal point of arguments for and against hunting.<sup>242</sup>

#### *A. The Public Trust Doctrine as a Weapon for Hunters*

There are two key arguments hunters can make under the public trust doctrine in support of hunting. First, hunters can argue that under the public trust doctrine, they have an access right to enter private lands in order to exercise the public right to use the trust resource of wildlife. Second, hunters can argue that hunting serves as the most efficient and beneficial tool for managing the public resource of wildlife, with certain state restrictions or prohibitions of hunting being detrimental and adverse to the public's interest in wildlife.

##### *1. Protection Against Interference With Enjoyment of the Resource*

The common law view that wildlife is owned by the state in public trust for the benefit of the public has been argued by some sportspersons as giving them a right to enter private land in order to hunt wild game.<sup>243</sup> This argument is similar to the free taking policy of the early nineteenth century.<sup>244</sup> Courts since then have consistently held that private property interests prevail, and no hunter may trespass over privately held land to reach wildlife which is in the public trust.<sup>245</sup>

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240. See *infra* notes 261-86 and accompanying text (analyzing hunting as a beneficial wildlife management tool that hunters could argue deserves judicial protection under the public trust doctrine).

241. See *infra* notes 287-302 and accompanying text (exploring anti-hunter arguments for the abolition of hunting under the public trust doctrine).

242. See *supra* notes 135-38 (explaining the case law which holds that ownership of wildlife is vested in a state in its sovereign capacity, as trustee for the benefit of the state's citizens); *supra* notes 176-238 and accompanying text (discussing the public trust doctrine and its broad application to common resources, including wildlife).

243. See *Hamilton v. Williams*, 200 So. 80, 81 (Fla. 1941) (providing a case in which a defendant claimed that his purchase of a hunting license authorized him to enter enclosed land without permission so long as his entry was peaceful and only for the purpose of hunting); *Winans v. Willetts*, 163 N.W. 993, 994 (Mich. 1917) (presenting a defendant who, upon entering a non-navigable, privately-owned pond, claimed that he was not a trespasser as there are fish in the pond, which is owned by the state in trust, and therefore he has a right to pursue those fish, even if he is on private property without the owner's consent).

244. See *supra* notes 50-55 and accompanying text (discussing the free taking practice of the 18th and 19th centuries).

245. See *Hamilton*, 200 So. at 81 (stating that a hunting license does not authorize its holder to enter the enclosed land of another without permission, since the license does not vest title to any game and does not constitute a grant of property in land, nor authorize trespass for the purpose of fishing or hunting); *Winans*, 163 N.W. at 995 (opining that a person fishing has no right to fish on private property simply because the fish located in a pond on the property are owned by the state in public trust); *Herrin v. Sutherland*, 241 P. 328, 329

However, in the wake of the expanding public trust doctrine, some state courts have reached conclusions to the contrary in other contexts.

In *Matthews v. Bay Head Improvement Association*,<sup>246</sup> the New Jersey Supreme Court held that the public trust doctrine mandates public access across privately owned upland sand areas that abut beaches which are within the public trust.<sup>247</sup> In reaching this conclusion, the court first reaffirmed the public's recognized rights to recreational uses, such as bathing, swimming and other shore activities, on public trust lands.<sup>248</sup> The public trust lands in question in that case were public beaches extending up to the high water mark.<sup>249</sup> The court was concerned that, due to increasing private holdings of upland sand areas abutting private beaches, the public was increasingly being deprived of access and thus use of the public beach areas.<sup>250</sup> Furthermore, the court focused on the increasing demand for use of the State's "priceless" beach areas and the State's policy of encouraging greater access to ocean beaches for recreational purposes.<sup>251</sup> The court concluded that in order for the public to exercise its rights guaranteed by the public trust doctrine, the public may have a right to cross privately owned dry sand beaches when essential or necessary to gain access to the foreshore.<sup>252</sup> Thus, the public trust doctrine was extended to mandate access across privately owned land so that the public could have access to public trust resources.<sup>253</sup>

In a similar vein, the Montana Supreme Court held in *Montana Coalition for Stream Access, Inc. v. Hildreth*<sup>254</sup> that the public trust doctrine provided the public with stream access over private property, including the right to portage around barriers by traversing adjacent private land.<sup>255</sup> The court stated that the law in Montana was that any waters that can be used for recreational purposes in the

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(Mont. 1925) (declaring that a hunter who enters private land without permission; for the purpose of hunting waterfowl, which are owned by the people of the state, is a trespasser); *id.* (holding that the fact that all have the right to hunt and take such game as is allowed by statute upon the public domain does not warrant one in entering upon private, enclosed property for that purpose); *Diana Shooting Club v. Lamoreaux*, 89 N.W. 880, 886 (Wis. 1902) (stating that the possession of a state hunting license does not give a person the right to go upon the land of another without the owner's permission).

246. 471 A.2d 355 (N.J. 1984).

247. *Matthews*, 471 A.2d at 365.

248. *Id.* at 363.

249. *Id.* at 359.

250. *Id.* at 364.

251. *Id.*

252. *Id.* at 364.

253. See also *Concerned Citizens of Brunswick County Taxpayers Ass'n v. Rhodes*, 404 S.E.2d 677 (N.C. 1991). In *Concerned Citizens*, the North Carolina Supreme Court disavowed an appellate court's dicta stating that the public trust doctrine will not secure public access to public beaches across the land of private property owners. *Id.* at 688. The court believed that the law of the state was contrary to the appellate court's dicta. *Id.*

254. 684 P.2d 1088 (Mont. 1984).

255. *Montana Coalition for Stream Access*, 684 P.2d at 1091.

state could be so used for the public's benefit.<sup>256</sup> Since the Beaverhead River (the water in question in this case) was capable of being used for recreation, the court held that a private owner of land across which such a river flows cannot interfere with the public's recreational use of that river.<sup>257</sup> The court went a step further, and held that not only could the public use the river up to the high water mark, but the public also had the right to portage around barriers in the stream by traversing the adjacent private land.<sup>258</sup> Again it seems that a court was extending the public trust doctrine to mandate some means of access so that the public could fully enjoy its right to use of the public trust resource.

While the above-mentioned cases are by no means the majority view among jurisdictions, they do stand for the proposition that some courts are open and willing to extend the public trust doctrine to access rights for the public. Accordingly, hunters may have an access argument. Such an argument is quite separate from most of the focus of this Comment, which is whether there is a right to take game in the first place, enforceable against the government.

A hunter's access argument under the public trust doctrine would essentially be a claim against a private party. Similar to the reasoning in *Matthews*, a hunter could argue that while there is a public right to enjoy wildlife, hunters are being inhibited or precluded from enjoying this right due to private property owners denying them access. Thus, in theory, the hunter would be claiming a denial of this public right to enjoyment of wildlife. Such an argument would be especially plausible in a state with few public hunting land holdings.

However, such an argument is not without problems. First, the vast majority of courts have not expanded the public trust doctrine thus far to provide public access rights over private land. Second, in *Matthews*, the public trust resource for which the public wanted access was a public beach, and in *Montana Coalition for Stream Access*, the opinion focused around a river that was arguably navigable. Thus, it would seem that a hunter would have better luck claiming a public trust access right over private property to reach a hunting area on a navigable or public water. Here, the hunter would be seeking access to the public water, not to the public wildlife. A hunter would be in a much weaker position to claim access onto private land to reach wildlife found upon the land. Such access would be seemingly limitless upon the tract wildlife could move around anywhere within the private land. Furthermore, such access would be completely unrelated to public water, the public trust resource to which most judicial expansions of the public trust doctrine cling. Therefore, a hunter's claim to public trust access over private property to reach wildlife upon that land will probably fail, absent some close relation to some navigable or public waterway. Thus, the theory that the public trust in wildlife should allow hunters full access to all wild game fails as

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256. *Id.*

257. *Id.*

258. *Id.*

an argument for public access to private hunting lands.<sup>259</sup> Nevertheless, the second argument hunters can bring under the public trust doctrine may be more compelling because it relates to preserving wildlife, a public resource.<sup>260</sup>

## 2. *Protection of Hunting as an Essential Wildlife Management Tool*

The primary justification for allowing sport hunting to continue is that it serves an invaluable role in managing game populations.<sup>261</sup> Because of the growing human population in the United States and the environmental impacts that accompany such growth, wildlife populations have severely declined.<sup>262</sup> Two of the most obvious causes of this decline have been loss of habitat to human development and market hunting.<sup>263</sup> While great strides have been taken to reclaim and protect suitable habitat for wildlife, humankind has interfered with nature's balance to the extent that leaving nature to manage itself is no longer a viable option.<sup>264</sup>

With fewer predators due to earlier extermination programs and limited habitat, game populations must be controlled by humanity.<sup>265</sup> Without such controls, science demonstrates that game populations become too large for the habitat

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259. See Deborah Beaumont Schmidt, *The Public Trust Doctrine in Montana: Conflict at the Headwaters*, 19 ENVTL. L. 675, 680 (1989) (discussing a legal battle between sportspersons groups and private land owners regarding stream access rights in Montana, in which the argument that wildlife belongs to the public trust has proven unsuccessful in attempts to increase public access to fishing streams).

260. See *infra* notes 261-86 and accompanying text (describing hunters' affirmative arguments under the public trust doctrine).

261. See SWAN, *supra* note 15, at 6-7 (setting forth data indicating that game populations have increased significantly since the advent of modern wildlife conservation, which includes hunting as a management tool); *infra* notes 265-81 and accompanying text (detailing the vital role that hunting plays in wildlife management).

262. See Turbak, *supra* note 15, at 26 (noting the abundance of game during the discovery of North America by European colonists, and the subsequent exploitation of game and habitat resulting in the near extinction, and actual extinction, of some game species).

263. See SWAN, *supra* note 15, at 5 (stating that due to hunting for profit and habitat destruction, in the nineteenth century many species of wildlife were decimated around the world, with some becoming extinct); *id.* (recounting the tragic extinction of the passenger pigeon, the Labrador duck, and the heath hen, and the near extinction of the American bison, all due to market hunting); *id.* at 7 (reporting that America's wetlands, consisting of bogs, swamps, and marshes, are being gobbled up by farms, roads, parking lots, subdivisions, and malls, at a rate of 650 acres per day, which is over 300,000 acres per year); *id.* (lamenting the fact that 53% of the wetlands that existed when the Europeans arrived in North America have disappeared, with states such as California, Illinois, Indiana, and Connecticut losing nearly 90% of their wetlands); Turbak, *supra* note 15, at 26 (explaining the devastating impact market hunting had on North American wildlife populations, eventually resulting in wildlife numbers so low that a new era of wildlife conservation emerged during the early 20th century).

264. See HOWARD, *supra* note 28, at 143 (arguing that once humankind has modified an environment, humanity has a moral obligation to help regulate the balance of nature, and that since humankind can respond to wildlife's needs in altered environments more rationally and ethically than can nature, humankind must be willing to serve as a predator).

265. See Turbak, *supra* note 15, at 26 (stating that in the past, predators such as bears, wolves, cougars, coyotes, bobcats, and hawks, were methodically exterminated, and bounties were placed upon their heads, since they were seen as a threat to game populations and livestock).



to maintain, resulting in habitat destruction, widespread starvation, disease, and suffering.<sup>266</sup>

This cycle was characterized over sixty years ago in Aldo Leopold's classic work *Game Management*,<sup>267</sup> which recognizes the critical role habitat plays in wildlife production and preservation.<sup>268</sup> *Game Management* is based upon the idea that every habitat has a carrying capacity that limits wildlife population size, with the availability of essentials such as food, cover, and water determining a habitat's carrying capacity.<sup>269</sup> Hunting is the most efficient means by which humanity can manage the populations of game animals in conformity with the habitat's carrying capacity so that overpopulation and pestilence does not occur.<sup>270</sup>

An example of a species overpopulating its habitat due to hunting bans occurred in Arizona in 1924.<sup>271</sup> In 1906, Arizona banned the hunting of mule deer on the Kaibab Plateau in an effort to protect the declining population of that species.<sup>272</sup> The result was a population explosion, by which the Kaibab deer population grew from 3000 to 100,000 animals.<sup>273</sup> By 1924, the deer had overpopulated their habitat, causing two-thirds of the animals to die of starvation.<sup>274</sup>

A more recent example of a hunting ban having an adverse impact on wildlife populations is found in California. In 1990, Proposition 117,<sup>275</sup> referred to as the California Wildlife Protection Act, banned mountain lion hunting within the state, after passing by a voting margin of fifty-two percent to forty-eight percent.<sup>276</sup>

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266. See *infra* notes 267-80 (discussing the carrying capacity of wildlife in relation to its habitat, and how wildlife populations must be controlled so as not to exceed the habitat's carrying capacity, to avoid a "die off" due to starvation and disease).

267. ALDO LEOPOLD, *GAME MANAGEMENT* (1933).

268. *Id.* at 86; see Ryland Loos, *Friends of the Hunted: Hunters*, CONSERVATIONIST, Nov. 1993, at 10 (quoting Aldo Leopold, the renowned ecologist, as stating that he believes hunting takes rank with agriculture and nature study as one of the three fundamentally-valuable contacts that humanity has with the soil).

269. LEOPOLD, *supra* note 267, at 86.

270. See HOWARD, *supra* note 28, at 131-56 (proposing that well-regulated hunting is the most efficient and humane way to control animal populations while helping to improve the environment); *id.* at 143 (asking how one can equate the suffering of animals that are shot, trapped, or poisoned with the suffering involved in dying slowly of starvation, disease, or any of the other vicissitudes of living that are often brought on between members of the same species); Loos, *supra* note 268, at 10 (quoting Aldo Leopold, one of the nation's most renowned ecologists and a lifetime hunter, as stating that a thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community, and it is wrong when it tends to do otherwise); *id.* (contemplating the thought that in the natural cycle, deer will die, by a bullet or an arrow, or slow starvation, disease or freezing, and that the latter causes are no more natural nor humane than the former).

271. See Turbak, *supra* note 15, at 26 (recounting the Kaibab deer die-off of 1924).

272. *Id.*

273. *Id.*

274. *Id.*

275. See CAL. FISH & GAME CODE § 4800(a), (b) (West Supp. 1996) (providing that the mountain lion is a specially-protected mammal in California, and prohibiting the hunting or taking of mountain lions); *id.* § 4800(d) (West Supp. 1996) (prohibiting the California Fish and Game Commission from adopting any regulation which allows the hunting of mountain lions).

276. Rich Roberts, *Hunting Is Headed to Extinction*, L.A. TIMES, Aug. 17, 1990, at C1.

According to biologists, the state has experienced an overpopulation of mountain lions as a result of the hunting ban. This overpopulation has resulted in two persons being killed by mountain lions, as well as a dramatic increase in attacks on humans, pets, and livestock, and frequent sightings.<sup>277</sup> This is due to the fact that the available mountain lion habitat in the state is insufficient for the animals' growing population, thereby forcing mountain lions to go into cities and suburbs in search of food.<sup>278</sup> In the wake of these developments, the California Legislature has enacted legislation that, upon approval by the voters, would repeal Proposition 117, allowing the state Fish and Game Commission and the Department of Fish and Game to establish a mountain lion management plan which could include the hunting of mountain lions.<sup>279</sup> Permitting specified, regulated hunting of the lions is seen as a means by which state agencies can reduce the mountain lion population sufficiently to reduce lion and human confrontations.<sup>280</sup>

Controlling wildlife populations to bring about sustainable numbers is not the only positive impact of hunting. Hunting encourages private participation in habitat management and preservation. Each year, hundreds of thousands of acres of prime wildlife habitat is maintained and conserved by private landowners in the form of hunting clubs and wildlife preserves. This land provides vital habitat in areas where the federal and state government have few or no land holdings, or do not have the funds to acquire such holdings. Thus, private land holdings sustain much of each state's wildlife for the specific benefit of the landowner and for the general benefit of all. Should hunting be substantially restricted or prohibited, these private holdings would be put to more profitable uses that would in all likelihood be less conducive for wildlife. A ban on hunting could thus cause the fallout of hundreds of thousands of acres of vital wildlife habitat, leading to drastic declines in wildlife populations.<sup>281</sup>

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277. Ed Zieralski, *Lion Attacks Imperil Prop. 117*, SAN DIEGO UNION-TRIBUNE, Dec. 19, 1994, at A1; see Yumi Wilson & Alex Barnum, *Voters Asked to End Ban on Mountain Lion Hunting*, S.F. CHRON., Oct. 13, 1995, at A1 (reporting that since 1990, mountain lions in California have been responsible for six attacks on people, two of them fatal, and 322 attacks on pets and livestock, a 68% increase from 1993).

278. Wilson & Barnum, *supra* note 277, at A1.

279. 1995 Cal. Legis. Serv. ch. 779, secs. 4-6, at 4733-34 (West 1995); see Wilson & Barnum, *supra* note 277, at A1 (stating that California Senate Bill 28 would allow the state Fish and Game Department to reinstate hunting as a way to control the mountain lion, whose population has gone from about 2400 in 1972, when the first attempts at banning hunting were put into place, to as many as 6000 today). California voters did not approve the repeal of the California Wildlife Protection Act on March 26, 1996.

280. See 1995 Cal. Legis. Serv. ch. 779, sec. 1(h), at 4732 (West 1995) (setting forth the intent of the legislature in stating that in order to maintain a healthy population of mountain lions, and to minimize confrontations with humans and livestock, it is necessary to prepare and implement scientifically-sound management plans).

281. See Chris Dorsey, *Should We Hunt Ducks?*, SPORTS AFIELD, Nov. 1993, at 84 (quoting Dr. Mickey Heitmeyer, manager of Ducks Unlimited's conservation programs, as stating that the loss of hunters could have impacts in several vital waterfowl areas, as for example, over two-thirds of the remaining wetland habitat in California's central valley is owned or managed by private duck clubs); *id.* (reporting that California's central

In public trust doctrine cases in which the state has made a decision or taken an action in regard to a public trust resource that is contrary to the public's interest and rights in that resource, a citizen may bring a claim asking the court to review the state's decision.<sup>282</sup> When wildlife is recognized as a public trust resource, hunters and other members of the public are empowered by law to bring claims against the government agencies that impose restrictions or prohibitions on hunting that are contrary to the public's interest in the conservation of wildlife.<sup>283</sup> Take, for example, a state's prohibition on the hunting of a certain species of game animal. Hunters could go to court with sound biological evidence and argue that the absence of hunting will cause the population of that specific game species to decrease drastically due to overpopulation, starvation, and disease.<sup>284</sup> The hunters' complaint would state that the prohibition on hunting of that species is in contravention of the public good, which seeks to maximize and protect sustainable wildlife populations.<sup>285</sup> Accordingly, the hunters could ask a court to review or invalidate the state's decision to prohibit hunting due to the fact that the decision violates the public trust doctrine. Therefore, the theory that animals are a public trust resource could be used as a tool by hunters to protect their sport due to the fact that hunting is a necessary management and revenue-generating tool which preserves and manages wildlife for the public benefit.<sup>286</sup>

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valley supports over 20% of the wintering waterfowl in North America).

282. See APPLGATE, *supra* note 217, at 57 (discussing the strategic and procedural aspects of the public trust doctrine in enjoining uses of the trust that are contrary to the public good); Sax, *Effective Judicial Intervention*, *supra* note 176, at 473 (stating that the public trust doctrine is a means by which private citizens can demand judicial recognition of their rights as members of the public by suing the very governmental agencies that are supposed to be protecting the public interest in resources).

283. See APPLGATE, *supra* note 217, at 57 (arguing that the national public should be the beneficiary for all wildlife). In building upon Applegate's argument, a hunter could bring a suit on behalf of the public to enjoin a restriction or ban on hunting if such restriction or ban is proven to affect wildlife in a way contrary to the public's interest in conserving and protecting wildlife populations. *Id.*

284. See *supra* notes 265-83 and accompanying text (analyzing the adverse effects that bans on hunting have upon wildlife populations).

285. See Maynard Nelson, *In Defense of the Sport Hunter*, in READINGS IN WILDLIFE CONSERVATION 87 (James Bailey et al. eds., 1971) (proposing that anti-hunting laws have been more of a curse than a blessing for wildlife); Sax, *Ecological Perspective*, *supra* note 206, at 149 (stating that modern public trust law calls upon the public trust doctrine to require accommodation between commodity and natural demand); *id.* at 152-60 (reviewing the case of *Environmental Defense Fund v. East Bay Muni. Util. Dist.*, No. 425955, Superior Court, Alameda County, California (Jan. 2, 1990) (unreported), in which the water needs of Bay Area communities were evaluated and litigated to accommodate natural needs for sufficient water flows that protect vital chinook salmon running up the lower American River); *supra* notes 265-83 and accompanying text (discussing the need for sport hunting as a vital means of controlling wildlife populations that the habitat can sustain, as well as the detrimental impact to many game and nongame species of animals that would occur if hunting were banned).

286. See *supra* notes 261-85 and accompanying text (advancing hunter arguments which support invalidating state prohibitions against hunting); CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING? TOWARD LEGAL RIGHTS FOR NATURAL OBJECTS 10-11 (1974) (arguing that the natural environment should be granted standing to bring lawsuits to enjoin acts that are harmful and destructive to it).

*B. Public Trust in Wildlife as a Weapon Against Hunters*

While the public trust doctrine holds great potential as a tool to protect and expand the sport of hunting,<sup>287</sup> it also holds considerable potential as a weapon against hunting.<sup>288</sup> Anti-hunters, seeking to enforce their rights under the public trust doctrine, could possibly demand broad restrictions and prohibitions on hunting.<sup>289</sup> This possibility is the result of the legal view that all wildlife is owned by the state in its sovereign capacity in trust for the public's benefit.<sup>290</sup> While hunters have claims that the public trust doctrine implies a right to hunt in today's society, anti-hunters, as a substantial portion of the public, also have possible claims to the contrary.

By categorizing wildlife as a public trust resource, it would be a violation of the public trust for the government to grant ownership or control of wildlife to private individuals who use the wildlife in a manner contrary to the public good. This kind of a state action could be enjoined and invalidated by private citizens seeking to enforce the public's right in the wildlife.<sup>291</sup> This action could be used to restrict or prohibit hunting in various ways.

First, anti-hunters could argue that by allowing private individuals to hunt wildlife, the state is alienating the wildlife resource to private individuals who exploit the wildlife in a manner contrary to the public interest.<sup>292</sup> For example, anti-hunters might claim that they will be deprived of the right to observe certain wild game species within their state due to the fact that those species will be hunted and either killed and extracted from the area or scared and driven to areas

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287. See *supra* notes 243-86 and accompanying text (suggesting hunters' arguments for the protection of hunting as an implied right under the public trust doctrine).

288. See *infra* notes 289-303 and accompanying text (discussing the use of the public trust doctrine by anti-hunters as a means to restrict and prohibit hunting).

289. See *infra* notes 290-303 and accompanying text (proposing that sportspersons could use the public trust doctrine as a basis for judicially invalidating hunting prohibitions).

290. See *supra* notes 135-37 (reviewing that case law the established the ownership of wildlife is vested in the state as trustee for the benefit of the state's citizens).

291. See *APPLEGATE*, *supra* note 217, at 57-58 (exploring the strategy and procedure of using the public trust to enjoin activities that use the trust resources in a manner contrary to the public good); *Hemmed In By Hunters*, *supra* note 27, at A12 (interviewing a nature lover who claims that his right to enjoy public lands and to view wildlife is infringed upon by hunting); Turbak, *supra* note 15, at 26 (reporting that the newest public trend relating to wildlife is promoting watchable wildlife, where the public enjoys wildlife not by exploiting it, but rather by looking at wild animals and respecting their inherent value and existence upon the earth); see also *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 435, 658 P.2d 709, 719, 189 Cal. Rptr. 346, 356 (1983) (stating that the public trust protects values such as ecological and aesthetic enjoyment by the public).

292. See *supra* note 25 and accompanying text (discussing the values that anti-hunters place on wildlife, and how anti-hunters believe hunting interferes with the enjoyment of wildlife by all); see also Thomas, *supra* note 20, at C6 (quoting a wildlife biologist with the Colorado Division of Wildlife as stating that the animal rights movement has affected the Division because a lot of people are in that movement, and the Division is mandated to manage wildlife for all people, so they must listen to the claims of animal rights groups).

away from where the public may observe them.<sup>293</sup> Such an argument would be well-founded since scenic beauty and intrinsic enjoyment of trust resources are recognized uses that are protected by the public trust doctrine.<sup>294</sup> Furthermore, the fact that the state is allowing hunters to kill game animals presents a very obvious example of an alienation of public trust resources.<sup>295</sup> Allowing hunters to kill and remove wildlife from the environment makes for a compelling argument that hunting is an interference with the public interest in enjoying wildlife.

Second, anti-hunters could argue that hunting has a detrimental effect on wildlife populations, contrary to what hunters as well as fish and wildlife agencies claim.<sup>296</sup> If true, then the hunting of wildlife would be contrary to what the public interest would dictate.<sup>297</sup> However, the validity of this argument as well as the alienation argument could be overcome by the vast amount of research supporting the proposition that hunting is a beneficial practice that serves as the most efficient tool for the conservation, management, and proliferation of wildlife

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293. See Don Drysdale, GANNETT NEWS SERV., Feb. 18, 1995, available in LEXIS, News Library, Curnws File (copy on file with the *Pacific Law Journal*) (quoting Larry Freilich of the Sierra Club as stating that there is a definite difference between areas where people hunt and where they do not). Freilich goes on to claim that at Yosemite, animals come near people, while at Sequoia, where there is hunting nearby, it is hard to see any deer. *Id.*

294. See *National Audubon Soc'y*, 33 Cal.3d at 435, 658 P.2d at 732, 189 Cal. Rptr. at 357 (stating that the public trust doctrine protects recreational, ecological, and scenic values); *Marks v. Whitney*, 6 Cal. 3d 251, 259-60, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971) (listing public uses protected by the public trust doctrine, which include the preservation of trust lands for ecological and scenic purposes).

295. See Satchell, *The American Hunter*, *supra* note 20, at 30 (reporting that some 200 million birds and animals are killed annually by hunters, with the species by species harvest numbers for the 1988-89 season being: 25 million rabbits, 22 million squirrels, 4,600,000 deer, 350,000 wild turkeys, 250,000 coyotes, 115,000 pronghorn antelope, 102,000 elk, 21,000 black bears, 21,000 caribou, 12,000 moose, 10,000 javelina, 2400 bighorn sheep, 1500 mountain lions, 1200 mountain goats, 1100 brown grizzly bears, 1000 wolves, 750 bison, 700 wolverines, 90 musk oxen, 50 million doves, 28 million quails, 20 million pheasants, 6 million grouse, 5.2 million ducks, 1.3 million geese, and 1 million partridges).

296. See *Division Mismanages Deer to Hunters' Liking*, COLUMBUS DISPATCH, Jan. 29, 1995, at E2 (claiming that the Ohio Wildlife Division mismanages and manipulates the deer population in the state in a manner that is not conducive to a balanced number but is favorable to hunters, whose hunting license fees fund the Division); Michael Sangiacomo, *Foes of Dove Hunting Want Issue on Ballot*, PLAIN DEALER, Feb. 2, 1995, at B6 (quoting Ritchie Laymon, President of the Ohio Legislation for Animal Welfare Coalition, as claiming that because politicians get substantial contributions from hunters and hunter lobbying groups, and not from animal lovers, the people should choose whether the state will permit hunting); Satchell, *The American Hunter*, *supra* note 20, at 30 (quoting a member of the Legal Defense Fund as claiming that some states' requirement that fish and wildlife agency boards be composed of hunters or trappers is like having Dracula guard the blood bank).

297. See *Baden*, *supra* note 19, at B5 (noting that animal rights activists claim that animal populations will naturally regulate themselves without degrading their habitat); Satchell, *The American Hunter*, *supra* note 20, at 30 (explaining that animal rights activists argue that silencing the guns will help regionally hard-pressed species such as black bears, antelope, mountain lions, and bighorn sheep, as well as bring respite for the nation's ducks); see also *STONE*, *supra* note 286, at 10-11 (arguing that the natural environment should be granted standing to bring lawsuits to enjoin acts by humans that are harmful or destructive to it).

populations.<sup>298</sup> Therefore, until more efficient ways of managing wildlife populations and generating desperately needed funds for conservation are created, sport hunting will continue as a beneficial management practice of public trust resources.<sup>299</sup>

Besides arguing that hunting violates the public trust because it alienates wildlife and decreases its populations, anti-hunters may also be able to create compelling moral and philosophical arguments against hunting under the public trust doctrine. As discussed earlier, in an effort to flex the public trust doctrine to meet the public's changing needs, courts have recognized intrinsic and ecological values as rights that are protected by the public trust doctrine.<sup>300</sup> According to reports and surveys, a substantial number of Americans are opposed to the sport of hunting.<sup>301</sup> Therefore, depending on the demographics and political climate of a state, one could safely say that there is a public interest and value in ecology and the prevention of the killing of wildlife by hunting.<sup>302</sup> This somewhat recent public value runs counter to one of the more traditional uses protected by the public trust: hunting.<sup>303</sup> The resolution of this conflict depends upon how the sport of hunting is reconciled with the public trust doctrine.

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298. See *supra* notes 261-81 and accompanying text (discussing hunting's role as the most efficient means of managing wildlife populations, and further discussing the relationship between habitat preservation and protection and the money generated by hunters).

299. See Ben Brown, *Battling Animal Overpopulation*, USA TODAY, Mar. 25, 1993, at 8A (reporting on the development of immunocontraception, a birth control method that can temporarily inoculate wild animals against reproduction); *id.* (quoting one anti-hunting advocate as stating that a successful wildlife contraception program could eliminate the key justification for sport hunting—the need to control wildlife populations).

300. See *National Audubon Soc'y*, 33 Cal. 3d at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357 (declaring that environmental values are protected as public needs by the public trust); *Marks*, 6 Cal. 3d at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796 (stating that the public uses that the public trust protects are flexible enough to encompass the changing public needs, some of which are ecological preservation and intrinsic enjoyment of natural scenery).

301. See Balzar, *supra* note 234, at A1 (reporting that several million Americans are members or supporters of animal protection organizations); *id.* (citing that an *L.A. Times* poll that found 47% of Americans believe that animals are just like humans in all important ways, and 54% oppose hunting for sport); Levy, *supra* note 23, at 2 (noting that a survey of 125 seventh graders in New York found that 50% oppose sport hunting); Roberts, *supra* note 276, at C1 (reporting on California's passage of Proposition 117, banning mountain lion hunting within the state, by a margin of 52% to 48%); Satchell, *The American Hunter*, *supra* note 20, at 30 (explaining that 80% of Americans feel hunting for trophy heads to mount on walls is wrong, and 60% disapprove of hunting merely for sport or recreation, with about one in three Americans favoring a total ban on hunting); Gary Voet, *Get Better Perspective on F & G's Duty, '56 Hunt*, SACRAMENTO BEE, Jan. 29, 1995, at C7 (suggesting that California county boards of supervisors vote politically on hunting issues, not desiring to incur the wrath of their anti-hunting constituents, seldom asking biologists for data, or even a layperson's explanation of how hunting works to thin properly herds). But see Gary Voet, *Common Ground?*, SACRAMENTO BEE, Dec. 28, 1994, at E1 (citing a *Sacramento Bee* survey of more than 200 readers that found those surveyed supported the practice of hunting by a margin of 8 to 1).

302. See *supra* note 301 (listing various newspaper articles that explore the public's opinion regarding hunting).

303. See *supra* note 184 and accompanying text (discussing the public uses traditionally protected under the public trust doctrine, which includes hunting).

## V. APPLICATION OF THE PUBLIC TRUST DOCTRINE TO HUNTING IN THE FUTURE

Today, in our increasingly urban society, the remains of America's wildlands and wildlife have become a commodity in high demand.<sup>304</sup> Decreased game populations, diminishing habitat, and the concept of state ownership of wildlife in trust for the public benefit has resulted in substantial restrictions on hunting.<sup>305</sup> The sport may be carried out in limited areas, at limited times, by limited means, and for specific species of animals.<sup>306</sup> While hunters support this state regulation of their sport as a means of conservation, such limitations hold the potential for further restriction and prohibition in the present and future.<sup>307</sup>

However, the public trust doctrine may have two significant impacts on hunting in the years to come. First, the public trust doctrine should be interpreted to provide an implicit right to hunt. Second, the public trust doctrine should provide a means by which courts may resolve disputes over hunting, by carrying out a balancing of the equities.

### A. *Providing an Implicit Right to Hunt*

The modern public trust doctrine provides an implicit public right to hunt, so long as hunting is beneficial and consistent with the public interest in conservation and enjoyment of wildlife. This interpretation and application of the public trust doctrine is consistent with the use of the doctrine over the past twenty-five years for judicial intervention in governmental and private decisions relating to natural resources.

There are several reasons for this conclusion. First, the application of the public trust doctrine to wildlife issues is recognized in recent case law and state constitutions. Second, the common language in case law prior to the "discovery" of the public trust doctrine in 1970 repeatedly states that wildlife is held in trust by the state for the benefit of its citizens. Therefore, it is not unfounded to say that

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304. Michael Hanback, *Left Out In the Cold; Lawsuit Threatens Hunter Access to National Wildlife Refuges*, OUTDOOR LIFE, Dec. 1994, at 48 (stating that dwindling access to America's public waters and public lands has become a serious concern to people who fish and hunters); *Hemmed In By Hunters*, *supra* note 27, at A12 (voicing the frustration of hikers and nature lovers, whose enjoyment of wildlife and public lands is interfered with by hunting); Satchell, *Refuge Hunting*, *supra* note 32, at 26 (reviewing the debate between hunters and anti-hunters over whether hunting on federal wildlife refuges interferes with the purpose of the refuges as well as with other users of the refuges, such as bird watchers); Turbak, *supra* note 15, at 26 (noting that wildlife today enjoys a newfound prominence in our society, with hunting, fishing, birdwatching, and wildlife photography being a few of the popular ways of enjoying wildlife).

305. See *supra* notes 131-38 and accompanying text (discussing the enactment of state and federal laws regulating hunting as a response to decreasing habitat and wildlife populations and as a means of managing wildlife populations).

306. See *supra* notes 131-38 and accompanying text (discussing the authority of states, under their police power, to regulate where, when, how, and for what one may legally hunt).

307. See *supra* notes 148-56 and accompanying text (analyzing the states' ability to regulate and prohibit hunting so long as various standards are met).

wildlife is a public trust resource. The third reason that the public trust doctrine should apply to hunting is that it is a recognized public use under the doctrine. Finally, the public trust doctrine should apply to hunting in that hunting can serve as an activity beneficial to or contrary to the public interest in the state conservation and management of wildlife. When beneficial to and consistent with that interest, hunting should be allowed and protected as a public right. When contrary to and detrimental to the public interest in conserving and managing wildlife, hunting should be restricted or prohibited so that the state does not violate its public trust duty.

*B. Resolving Disputes Involving Competing Public Rights Under the Public Trust Doctrine*

Reality is rarely reflected in a perfectly recognizable right or wrong. In future controversies involving hunting, hunters and anti-hunters will seek two opposing goals, both appearing to be consistent with the public interest. With anti-hunters seeking to eliminate hunting and hunters seeking to protect the activity, the public trust in wildlife should become the focal point of the debate.<sup>308</sup> This would provide courts with an effective means by which to settle the competing claims and interests of hunters and anti-hunters in our nation's wildlife.<sup>309</sup>

Hunters carry the backing of millions of dollars, which states stand to lose should hunting be abolished.<sup>310</sup> Furthermore, invalidating hunting prohibitions is supported by substantial data demonstrating that hunting is a necessary activity for wildlife conservation, not only in terms of managing and increasing wildlife populations, but also in terms of the enormous amount of public and private habitat that exists in our nation solely because of hunting.<sup>311</sup>

Anti-hunters are supported by the enormous tide of anti-hunting sentiment carried by a large segment of the public.<sup>312</sup> Anti-hunters believe that the killing of animals is no longer an acceptable public value and use under the public trust

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308. See *supra* notes 243-303 and accompanying text (reviewing the hunter and anti-hunter arguments under the public trust).

309. See *infra* notes 310-40 and accompanying text (analyzing the means by which disputes between competing public trust interests or values are resolved under the public trust doctrine by means of a balancing of the equities, and applying such a balancing test to the hunting versus anti-hunting debate).

310. See Dorsey, *supra* note 281, at 84 (describing that more than \$400 million has been raised by the federal duck stamp program since its inception in 1934); Hanback, *supra* note 304, at 48 (stating that revenue from the Pittman-Robertson Act excise tax has been used to acquire more than 4 million acres of fish and wildlife habitat); *Shooting & Hunting in the 90's*, SPORTS AFIELD, Oct. 1993, at 51 (noting that the Pittman-Robertson Act generates \$150 million per year for wildlife restoration programs); *id.* (relating that each year, hunters pay over \$481 million in hunting license fees); Turbak, *supra* note 15, at 26 (recounting that to date, the Pittman-Robertson Act excise tax on hunting equipment has raised over \$2 billion for America's wildlife).

311. See *supra* notes 261-81 and accompanying text (discussing how hunting helps reduce game populations to a number that the existing habitat can sustain).

312. See *supra* note 301 and accompanying text (noting a recent poll showing a substantial amount of public disapproval of sport hunting in the United States).



theory of wildlife management.<sup>313</sup> Furthermore, the hunting of animals can interfere with the public's scenic and intrinsic enjoyment of living wildlife.<sup>314</sup> The settlement of the debate between hunters and anti-hunters will take place in state legislatures and courts, where the state will decide how to carry out its duty as trustee over wildlife.

Decisions regarding hunting will be more and more difficult to make, as the state is left to decide between competing public trust uses or public rights. When two public trust uses are contrary to one another, the courts and legislature will most likely carry out a balancing of the equities to find which use should prevail in a specific circumstance.<sup>315</sup> Two cases exemplifying such a public trust balancing are *National Audubon Society v. Superior Court*<sup>316</sup> and *Wade v. Kramer*.<sup>317</sup> In *National Audubon Society*, the California Supreme Court mandated that the California State Water Resources Control Board balance the water needs of the residents of the Los Angeles Basin against the ecological and recreational uses of Mono Lake in making water appropriation decisions relating to the lake and its tributaries.<sup>318</sup>

Similarly, in *Wade v. Kramer*, an Illinois appellate court upheld a decision by the state legislature and the state department of transportation allowing the construction of a bridge over the Illinois River that posed potential damage to wildlife.<sup>319</sup> The State had carried out a balancing of interests, by which it found that the benefits flowing to the citizens of the state from the construction of the new highway bridge outweighed the potential damage to wildlife due to the construction project.<sup>320</sup> The court held that there was no violation of the public trust doctrine, since the State had carried out a proper balancing of public uses in

313. See *infra* note 334 (relating the success of anti-hunting groups in stopping bow hunting seasons based on claims that such hunting practices are inhumane and contrary to public values); *id.* (listing some of the alternative management practices anti-hunters suggest wildlife management agencies implement rather than hunting).

314. See *supra* notes 293-95 and accompanying text (noting anti-hunters' enjoyment of wildlife); TOBER, *supra* note 238, at 2 (stating the view of wildlife protection groups who assert that nonconsumptive uses of wildlife derive benefits equally legitimate to those derived by consumptive uses).

315. See *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 451, 658 P.2d 709, 732, 189 Cal. Rptr. 346, 368 (1983) (holding that the California State Water Resources Control Board must consider the water needs of the residents of the Los Angeles basin as well as the human and environmental public trust uses of Mono Lake in making water appropriation decisions relating to streams feeding into Mono Lake); see also STEVEN LEWIS YAFFEE, PROHIBITIVE POLICY: IMPLEMENTING THE FEDERAL ENDANGERED SPECIES ACT 138-39 (1982) (reviewing external pressures that shape implementation of listings and designations under the Environmental Protection Act, in particular the conflict in many cases between hunters and environmental groups and its effect upon agency decisions). See generally APPELEGATE, *supra* note 217 (discussing generally the judicial procedure for settling public trust disputes).

316. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

317. 459 N.E.2d 1025 (Ill. App. Ct. 1984).

318. *National Audubon Soc'y*, 33 Cal. 3d at 451, 658 P.2d at 732, 189 Cal. Rptr. at 368.

319. *Wade*, 459 N.E.2d at 1028.

320. *Id.*

making its decision.<sup>321</sup> Furthermore, the court held that the State can reallocate property from one public purpose to another without violating the public trust doctrine.<sup>322</sup>

When the public trust use of hunting is pitted against the public trust use of preventing the killing of wildlife by humans, a balancing similar to that in the above mentioned cases would be carried out. Under *Wade*, depending on which public trust use prevails, the state could reallocate the state's wildlife to that public use and away from the competing use without violating the public trust doctrine. But the chance hunters would have of prevailing if a state carried out a balancing test is unclear. Depending on which state such a confrontation of claims arises, the battle could pit the claims of the seven percent of the population that hunts against the ninety-three percent of the population that does not hunt.<sup>323</sup>

In balancing the interests, allowing hunting to prevail would provide several benefits, including: (1) Management of wildlife populations to reduce them to a size compatible with existing habitat in the state; (2) generation of large amounts of revenue from state and federal hunting licenses and stamps, and hunters spending money on their sport within the state; and (3) preservation and protection of potentially thousands of acres of habitat on public and private lands as a means of proliferating wildlife populations.<sup>324</sup> On the other hand, banning hunting would provide several benefits, including: (1) Elimination of alleged decreases in wildlife populations from hunting; (2) assurance that animals are not being killed by hunters; (3) potentially more enjoyment and viewing of wildlife in areas where people usually hunt. Nonetheless, the number of animals lost due to hunting could be small in proportion to the number of animals dying of starvation and disease, as well as those hit by cars.<sup>325</sup>

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321. *Id.*

322. *Id.*

323. See George Reiger, *Who Owns Our Wildlife?*, FIELD & STREAM, Nov. 1994, at 13 (claiming that as the percentage of our population that hunts decreases, state agencies will increasingly give hunting less consideration when they interpret the mandate that wildlife belongs to the public and should be managed for the benefit of all); Satchell, *The American Hunter*, *supra* note 20, at 30 (reporting that 16 million Americans—7% of the population—purchased hunting licenses in 1989); *id.* (stating that the hunting debate mounts 2 million hunters against 135 million nonhunting wildlife enthusiasts).

324. See *supra* note 310 (discussing the amount of revenue hunting licenses, stamps, and excise taxes on hunting equipment generate for the purpose of purchasing and protecting habitat and managing wildlife); *supra* note 281 and accompanying text (examining private land holdings that are protected and managed as wildlife habitat by hunters, which would be lost to other uses should hunting be banned).

325. See SWAN, *supra* note 15, at 77 (reporting that in Pennsylvania alone, 30,000 deer-car collisions are reported each year and that nationwide, in 1992, 460,000 deer were killed by automobiles and 159 people died in these accidents); *id.* (stating that the automobile has taken the place of the bear and the panther as the major predator of deer); *supra* notes 261-81 and accompanying text (discussing the adverse effects bans on hunting can have on game populations).

Most likely, no state with any tradition of hunting would completely eliminate the sport.<sup>326</sup> Rather, accommodations would be considered to serve best all public needs and uses relating to wildlife. For example, in a state in which the majority of the public wants a ban on hunting, the state could quite possibly ban hunting on some or all of the state's land, leaving the sport to be carried out on private lands and limited areas of public land.<sup>327</sup> This sort of a compromise is one that has been suggested and considered not only by state legislatures, but allegedly by the federal government.<sup>328</sup> The banning of hunting on state or federal lands would meet many needs in that: (1) Hunting would still be allowed,

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326. See *supra* note 310 and accompanying text (noting the amount of revenue generated by the federal and state governments from hunting).

327. See *infra* note 328 and accompanying text (examining federal and state legislation that would prohibit or substantially limit hunting on public lands and refuges).

328. See *National Wildlife Refuge System, 1994: Hearings Before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marines*, 103rd Cong., 1st Sess. (statement of Bob Graham, United States Senator) (supporting H.R. 833, a bill that would reform the federal refuge system by requiring conservation plans for each refuge, including a compatibility report that would require findings be made in order for secondary uses such as jet-skiing, off-road vehicle use, water-skiing, and livestock grazing, and requiring that hunting and fishing be permitted on each refuge); *National Wildlife Refuge System, 1994: Hearings Before the Subcomm. on Environment and Natural Resources of the House Comm. on Merchant Marines*, 103rd Cong., 1st Sess. (statement of R. Max Peterson, Executive Vice President, International Association of Fish and Wildlife Agencies) (opposing H.R. 833 on the grounds that: (1) The compatibility standard functionally eliminates or could be litigated against to eliminate hunting and fishing activities from national wildlife refuges; (2) it treats hunting and fishing the same as habitat-destroying uses such as jet-skiing, off-road vehicle use, and water-skiing in regards to compatibility with the goals of the refuge system; and (3) the current federal and state programs for developing hunting regulations provide a procedure by which hunting is approved only upon a showing that it is compatible with the federal refuge system); Williamson, *supra* note 26, at 32 (discussing Arizona's Proposition 200, which, if it had been enacted, would have prohibited hunting, fishing, and trapping on all public land within the state, which constitutes 83% of the land in Arizona); see also *HSUS to Congress: Don't Allow Hunting on Wildlife Refuges*, PR NEWswire, June 9, 1993, available in LEXIS, News Library, Arcnews File (copy on file with the *Pacific Law Journal*) [hereinafter *HSUS to Congress*] (urging Congress to amend the proposed version of the Wildlife Refuge System Management and Policy Act of 1993 so that it lists hunting as an incompatible use of wildlife refuges). Similar to the compatibility requirements of the above-mentioned legislation, the U. S. Fish and Wildlife Service must already provide written compatibility statements for all secondary uses, such as hunting, permitted on the 499 federal wildlife refuges according to a legal settlement into which the Service entered with the National Audubon Society and other environmental organizations. Hanback, *supra* note 304, at 48. According to sportsperson's groups, under the terms of the agreement, if the Service fails to provide written documents determining hunting as a compatible use for an individual refuge, the activity can be "expeditiously" terminated. *HSUS to Congress, supra*. By the terms of the agreement, an anti-hunter group could sue the Service for failing to abide by the compatibility provision, and a judge could grant an injunction against hunting on the basis that the requisite paperwork was not properly completed and filed. *Id.* Rick Story, *How the West Was Won; Defeat of Arizona Proposition That Would Have Banned Outdoor Sports*, OUTDOOR LIFE, Feb. 1993, at 56 (discussing the defeat of Arizona's Proposition 200 by a voter margin of 62% to 38%). But see *Hunting will Continue on National Wildlife Refuge: Refuge Funding Compatibility Reviews Continuing*, PR NEWswire, July 29, 1994, available in LEXIS, News Library, Curnws File (copy on file with the *Pacific Law Journal*) (quoting U.S. Fish and Wildlife Service Director Mollie Beattie as stating that all reports that the Service is planning to end hunting on the national wildlife refuges are inaccurate, and that the Service has not changed its longstanding policy of supporting compatible outdoor recreation, such as hunting within the system).

although limited to those hunters with access to private hunting land;<sup>329</sup> (2) the beneficial effect of hunting on the management of wildlife populations would still occur, although the hunting on private property may not be enough to control certain wildlife populations; (3) wildlife could be better enjoyed by the nonhunting public on state lands;<sup>330</sup> (4) some money would still be generated for the state from hunting;<sup>331</sup> and (5) anti-hunters would view our society as more civilized and humane.<sup>332</sup>

Thus this “no hunting” policy could be challenged by hunters in three ways. First, the result of prohibiting hunting on public lands would be a return to the exclusionary statutes of early England, when Americans who owned land were the only ones privileged to hunt.<sup>333</sup> Second, hunters who do not own huntable land could claim that the state is violating the public trust doctrine by interfering with their right to use the wildlife resource. Finally, hunters could argue that this policy would lead to wildlife overpopulation and die-off due to reduced hunting opportunities, which would again violate the public’s interest in preserving wildlife. Depending on these arguments, the above proposal could fail if the balancing carried out by the state imposed a disproportionate burden on hunters’ exercise of their public trust right.

Another possible scenario, which has occurred and is occurring more often each year, would be to restrict the means by which hunters may take game.<sup>334</sup> The

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329. See *supra* notes 59-64 and accompanying text (examining the right of hunters to hunt on private land that they own or have permission upon which to hunt).

330. See *supra* notes 261-81 and accompanying text (noting hunting’s role in controlling wildlife populations).

331. See *supra* note 310 and accompanying text (reviewing the state and federal revenue that is generated each year from hunting).

332. See *supra* notes 25-28 and accompanying text (discussing anti-hunter views towards hunting in the United States).

333. See *supra* notes 47-49 and accompanying text (noting the exclusionary statutes of England in effect from the mid-fourteenth through the mid-eighteenth centuries); Zumbo, *supra* note 63, at 34 (recounting the shortage of public lands for hunting and the resulting high prices charged for access to private hunting lands, which leaves hunters with the options of paying high fees, traveling distances to available public land, or giving up the sport altogether).

334. See Brown, *supra* note 299, at 8A (reporting on a debate between anti-hunters and hunters over a proposed goose hunt designed to alleviate an overpopulation of resident geese, in which the central issue is whether hunting is a necessary method of controlling the population as opposed to the use of an experimental immunocontraception for animals); Efsthathiou, *supra* note 159, at A1 (stating that in an effort to block a proposed goose hunt to reduce an overpopulation of resident geese, anti-hunters have proposed the use of sirens, harmless chemicals that make goose food unsavory, and barrier fences, rather than the use of hunting); Roberts, *supra* note 276, at C1 (noting that a judge overturned a California Department of Fish and Game decision to allow a bow hunting season for bears, holding that the use of bow and arrow to hunt bear is an inhumane method of killing); *id.* (quoting Cleveland Armory, founder of the Fund for Animals, as stating that the cancellation of the bow season for bears was a landmark case in that it pinpointed the cruelties involved in game management today); Satchell, *The American Hunter*, *supra* note 20, at 30 (stating that one of the activists’ strategies for eradicating hunting is to rely on the emotional issue of cruelty, which has proven effective for posing public arguments against bow hunting); Thomas, *supra* note 20, at C6 (reporting that the Fund for Animals, one of the most visible animal-rights groups, carried out a successful attack on bow hunting

public interest in the humane treatment of animals could be enforced against the competing public trust use of hunting.<sup>335</sup> The majority of the public would most likely win if a court weighed the equities of certain allegedly inhumane hunting methods because the anti-hunting public could claim that their trust right in wildlife is violated by the state allowing hunters to use certain methods, such as bow and arrow, game-pursuing dogs, muzzleloading guns, and handguns, which allegedly cause game animals excessive physical suffering, trauma, and higher crippling occurrences.<sup>336</sup> This sort of judicial decision would depend on the empirical data available to either side, and would largely depend on the judge's view toward hunting.<sup>337</sup> Nonetheless, the ability to cause a judge to carry out a public trust weighing of the equities is a hunter and anti-hunter right that may be used to shape the future of hunting.<sup>338</sup>

In light of the above discussion, the public trust doctrine should be the key focal point of the hunting debate.<sup>339</sup> Under this doctrine, both hunters and anti-hunters have strong arguments regarding how much importance should be assigned to hunting.<sup>340</sup> As the public trust doctrine requires the protection of the public's interest in common resources, both sides in the hunting debate are left to argue whether hunting is consistent with or contrary to that end.

### CONCLUSION

An examination of most potential sources of an existing right to hunt leads to the conclusion that hunting is merely a privilege, an activity subject to governmental restriction and prohibition. However, if hunting is no more than a privilege, it is a privilege that is passionately held by hunters across the

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of bears, saying the method was cruel and inefficient, and convinced the court that the California Department of Fish and Game's documents supporting the hunting method were not satisfactory).

335. See *supra* note 334 (describing various hunting practices that have been considered inhumane by anti-hunting groups).

336. See Roberts, *supra* note 276, at C1 (summarizing evidence offered by anti-hunting groups that purports that the crippling rate for bow and arrow use exceeds 50%); *id.* (relating that opponents of bow hunting of bears contend that more than half of the bears shot with arrows are merely wounded and escape to die a slow death, or end up carrying arrows around in their body for the rest of their life).

337. See Thomas, *supra* note 20, at C6 (reporting on a judge's decision to block a bow hunting season for bears, approved by the California Department of Fish and Game, on the grounds that the agency's documents supporting the hunting method were not satisfactory in light of concerns that such hunting methods are inhumane).

338. See generally APPELATE, *supra* note 217 (examining the strategic and procedural use of the public trust doctrine by persons seeking to enjoin a use of the trust resources that is contrary to the public good).

339. See *supra* notes 135-36 and accompanying text (exploring the legal view of state ownership of wildlife as trustee for the benefit of its citizens).

340. See *supra* notes 243-303 and accompanying text (proposing possible hunter and anti-hunter arguments under the public trust doctrine).

country.<sup>341</sup> Hunting is a tradition, a remnant of days gone by, when the American lifestyle was one closely tied to the outdoors.<sup>342</sup> But it is the traditionalism of hunting that may ultimately protect it from extinction.

Under the long existing, yet modern, public trust doctrine, hunting is recognized as a traditionally protected public use or right. This right, when combined with the fact that more and more states recognize wildlife as a public trust resource, should give rise to an implied right to hunt, enforceable against the government. The implied right should exist whenever hunting is found to be beneficial to and consistent with the public's interest in conserving and managing wildlife. Thus, the quote by Aldo Leopold at the introduction of this Comment is aptly applied to this idea—hunting should be protected so long as it tends to preserve wildlife, and when it no longer does so, it should be restricted or prohibited. The public trust doctrine is the means by which courts can decide whether hunting benefits wildlife, and to what extent the activity deserves protection.

Furthermore, the public trust doctrine provides an ideal means of resolving conflicts between competing public rights and uses through a balancing of the equities. Not only can the doctrine serve to protect hunters' interests and anti-hunters' interests, it provides a means by which two divergent American traditions can exist side by side. It is a vehicle for hunters and anti-hunters to combine efforts in making legal challenges to issues affecting both groups' interests, issues such as pollution, environmental degradation due to unchecked industry and urban development, and widespread poaching.<sup>343</sup> While the future of hunting seems guarded and somewhat uncertain in light of present public opinion, one thing is certain: the public trust doctrine should become the means by which controversies involving hunting are resolved.

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341. See Roberts, *supra* note 276, at C1 (reporting that one hunting group, the Antelope Valley Sportsmen's Club, has organized a sports hunting defense fund, with a goal of raising \$1000 per day to fight anti-hunting challenges in the courts); *supra* note 310 and accompanying text (discussing the amount of money that hunters as a whole contribute to the perpetuation of game populations and, ultimately, the sport of hunting game); *supra* notes 15-21 and accompanying text (reviewing the tradition of hunting in our nation and the importance hunters attach to hunting).

342. See Satchell, *The American Hunter*, *supra* note 20, at 30 (quoting John Turner, 1990 Head of the U.S. Fish and Wildlife Service, as stating that if society does away with hunting, society does away with a vital cultural and historical aspect of American life); Tompkins, *supra* note 29, at 11 (quoting Mollie Beattie, Director of the U.S. Fish and Wildlife Service, as saying that hunting is a cherished part of our national heritage, and hunters themselves are important contributors to wildlife conservation); *supra* notes 15-24 and accompanying text (summarizing the historical development of hunting in North America); see also Loos, *supra* note 268, at 10 (surveying various renowned American ecologists in the nation's history who have been avid hunters, including John Quincy Adams, Aldo Leopold, and Theodore Roosevelt).

343. See Satchell, *The American Hunter*, *supra* note 20, at 30 (stating that the real tragedy for wildlife is pollution, pesticides, urbanization, deforestation, hazardous waste, lack of water, and wetland destruction); *id.* (articulating the hope that anti-hunters and hunters can find commonality in their mutual revulsion for commercial poaching and unlawful trophy hunting, which has reached record levels in the United States).

