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ARTICLES

- Fighting Fire with Finance: How Risk Retention Groups Can
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Andrew P. Morriss

Prescribed burning is an established land management practice crucial to reducing wildfire risk and enhancing ecosystem resilience, yet it remains significantly underutilized due to legal uncertainties, liability risks, and prohibitive insurance costs. Current approaches—combining tort liability standards, regulatory mandates, and commercial insurance requirements—have produced fragmented and inadequate incentives that neither sufficiently encourage safer burning practices nor reliably compensate injured parties. This Article critically evaluates these existing legal frameworks and proposes an innovative, legally grounded solution: the creation of Risk Retention Groups (RRGs) under the federal Liability Risk Retention Act. By offering specialized, member-owned liability coverage that operates outside of restrictive state-by-state regulations, RRGs provide robust incentives for data-driven risk management, clear standards of accountability, and adaptive best practices. Adopting a RRG-centered legal framework thus promises to clarify and stabilize prescribed burn liability, enhance regulatory effectiveness, and significantly reduce barriers to the beneficial use of fire in land management.

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In standard cost-benefit analysis (CBA), regulatory agencies use a figure known as the “value of a statistical life” (VSL) to monetize the life-saving benefit of regulations that are expected to prevent premature deaths. Regulators use this approach in many contexts, including in regulating environmental mortality risks. This Article focuses on an underexplored dimension of such risks—their tendency to fall on people who do not benefit from the underlying risky activity. The person whose life is imperiled by breathing in pollutants emitted by a nearby factory may not benefit in any meaningful way from the factory’s operations or from the general

industrial activity that creates the risk. The Article asks whether, in such cases, it is normatively defensible to use VSL-based CBA in regulating the mortality risk at issue.

The Article argues that, when it comes to regulating environmental mortality risks, VSL-based CBA lacks a normative basis. This is so for two reasons. First, this approach does not do the normative work it purports to do as it fails to accurately capture a regulation’s effect on overall well-being. Second, even if it did accurately reflect a regulation’s impact on overall well-being, VSL-based CBA fails to account adequately for the way risks, costs, and benefits are distributed among differently situated groups of people.

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Federal lands and waters serve valuable conservation and public access purposes. As climate change results in increased wildfires, droughts, and hazardous weather conditions, protecting access to remaining public resources is becoming increasingly important. Despite those concerns, President Donald Trump and his administration seek to open federal lands and waters to oil, gas, and mining corporations. In several states, the public trust doctrine—a sovereign duty to hold key public resources in trust for the benefit of current and future generations—prohibits the state from leasing public lands and waters for oil and mineral extraction when that use would impair rights in public resources. But because the public trust doctrine is traditionally viewed as a state common law doctrine, courts have not recognized that the federal government has trust obligations to federal public lands and waters. Through a long overdue examination of proprietary equal footing’s linkage to the Admissions Clause of the U.S. Constitution, this Note argues that the public trust doctrine is a constitutional mandate under the Admissions Clause. It shows that the public trust doctrine was central to the republican ideology of the founding era by examining the Mississippi Crisis, the Northwest Ordinance, and the Ordinance’s effect after the Constitution’s ratification. Applying that historical context to the development of the public trust and equal footing doctrines in American jurisprudence, this Note argues that the public trust is inherent in the constitutional equal footing doctrine. Since the equal footing doctrine and republicanism are settled constitutional principles, a historical understanding grounds the public trust doctrine in the Admissions Clause. Recognizing the Northwest Ordinance as the source of the American public trust reveals it as a federal constitutional mandate of all republican governments, regardless of whether the government is state or federal.

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