

Book Review

Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age*, New York: Cambridge University Press, 2014, pp. 436, \$45

Reviewed by Doug Williams

The mass of statutes, regulations, and judicial decisions that constitute the contemporary field of “environmental law” falls dramatically short of protecting the resources on which present and future generations will depend for a secure and sustainable planet. An aggressive judicial response to this failing, drawing upon the “public trust” doctrine, may well be the last and best hope of avoiding environmental disaster. That is the extended thesis of Professor Mary Christina Wood’s impassioned plea in *Nature’s Trust: Environmental Law for a New Ecological Age* for “a full paradigm shift” in environmental law and land management (207).¹

Professor Wood’s thesis recalls Professor Joseph Sax’s 1970 landmark article detailing the public benefits that might be secured by expanded judicial application of the public trust doctrine.² Against a background of relative quiescence on the part of state and federal legislatures, Professor Sax wrote that only the public trust doctrine was of sufficient “breadth and substantive content” to serve “as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems.”³ Sax acknowledged that “[t]he ‘public trust’ has no life of its own and no intrinsic content. It is no more—and no less—than a name courts give to their concerns about the insufficiencies of the democratic process.”⁴ Nonetheless, he believed that the courts, in invoking the doctrine, would tend “to promote

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1. Aside from Professor Wood’s work, the effort to reinvigorate the public trust doctrine has gained many adherents in recent years. See, e.g., Gerald Torres & Nathan Bellinger, *The Public Trust: The Law’s DNA*, 4 WAKE FOR. J. L. & POL’Y 281 (2014); Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741 (2012); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699 (2006); J.B. Ruhl & James Salzman, *Ecosystem Services and the Public Trust Doctrine: Working Change from Within*, 15 S.E. ENVTL. L. J. 223 (2006).
2. Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).
3. *Id.* at 474.
4. *Id.* at 521.

rational management of our natural resources,” and “show[] more insight and sensitivity to many of the fundamental problems of resource management than . . . any of the other branches of government.”⁵

Despite massive legislative and administrative activity in the forty-plus years since Professor Sax wrote his seminal article, Professor Wood reinvoles Sax’s belief that it will be the courts rather than legislatures and administrative agencies that will address the “fundamental problems” we currently face, including global climate change. Professor Wood contends that our political branches have become so captured by corporate interests that it is almost foolhardy to believe they will take the actions necessary to ward off impending ecological crises. Administrative agencies, in particular, Wood insists, have abused both the discretion legislatures have given them and the deference courts have extended to them, and in the process “have turned environmental law inside out.” (9). Instead of protecting critical resources, U.S. agencies, including the Environmental Protection Agency, have effectively offered permits to destroy natural resources to the highest corporate bidders. In Wood’s words: “Despite its original goals, environmental law now institutionalizes a marriage of power and wealth behind the veil of bureaucratic formality.” (103). The courts, she argues, must force a divorce, decreeing that an unholy alliance give way to a more perfect union between the agencies and the people those agencies are duty-bound to serve. The mechanism for securing this transition is a “prism of long-standing, inherent, and deeply understood public property rights”—a rebranded version of the public trust doctrine known as Nature’s Trust (140).

By Professor Wood’s reckoning, Nature’s Trust is not just a description of the undoubted responsibility of legislatures and agencies to use their authorities in ways to promote the public good. Indeed, the trust is distinguishable from the States’ common law “police powers” and the federal government’s constitutional legislative authority, which are often viewed as the source of authority for governments to regulate private and public activity to protect environmental values and resources.⁶ Instead, Nature’s Trust is a full-blown elaboration of property rights, enforceable by the courts at the behest of those who hold them—namely, all citizens.⁷

As trustees, governments owe a specific set of substantive, fiduciary, and procedural duties to trust beneficiaries. In particular, trustees must protect trust assets, prevent waste or substantial impairment of these assets, maximize

5. *Id.* at 565-66.

6. For a discussion of the relationship between the public trust and police powers, see Christine Cress, *It’s Time to Let Go: Why the Atmospheric Trust Won’t Help the World Breathe Easier*, 92 N.C. L. REV. 236, 265-67 (2014); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 665-79 (1986).

7. For Wood’s distinction between “police powers” and the public trust, see pages 127-28. Professor Wood also internationalizes Nature’s Trust, extending its beneficiaries to include citizens all over the world and its responsibilities and duties to all governments. For simplicity, I will focus in this essay only on the domestic version of Nature’s Trust.

the value of the assets, restore damaged assets, recover damages from those who have caused such damage, and refrain from selling trust resources into private hands, except in limited circumstances (167). In addition, trustees owe undivided loyalty to trust beneficiaries and must adequately supervise their agents, employ good faith and reasonable skill, apply the precautionary principle in managing resources, and operate in a transparent manner complemented by disclosure obligations sufficient to keep the trust beneficiaries informed of the state of the trust's assets (189).

The breadth of the trustees' responsibilities is informed in part by the scope of the trust *res*—the resources in which citizens are deemed to hold common property rights and to which the trustees' fiduciary obligation run. Traditionally, the public trust doctrine has been limited to protecting lands lying beneath navigable waters, and courts have tended not to venture far beyond navigable waters in vindicating claims that the trust has been breached.⁸ Wood, however, like Sax before her,⁹ argues for an expansion of the trust *res*, one sufficient to meet the essential purpose of her ecologically-informed view of Nature's Trust. That purpose is to “sustain all foreseeable future generations of humanity”—to establish and maintain a “survival account” for humanity (143). To serve this purpose, the trust must “protect[] both the natural infrastructure essential to societal welfare and the public's right to use such ecological wealth.” (146). Accordingly, “virtually all categories of natural resources merit protection as assets in the trust—air and atmosphere, surface waters, groundwater, dry sand beaches, wildlife, fisheries, plant life, wetlands, soils, minerals and energy sources, forests, grasslands, and public lands.”(157).¹⁰

Professor Wood's expanded view of the public trust doctrine is grounded in what she describes as “natural law—the law which natural reason appoints for all mankind.” (126)¹¹ With this grounding, the trust “forms the sovereign architecture around which the Constitution and all other laws meld”; it “holds constitutional magnitude and . . . doctrinal supremacy over contrary laws.” (129). Thus, in Wood's view, the Supreme Court erred in *PPL Montana, LLC v. Montana*,¹² when it described the public trust doctrine as “a matter of state law . . . subject . . . to the federal power to regulate vessels and navigation under the commerce clause” of the Constitution (133). Instead, “[t]he trust emerges twin-

8. See, e.g., Klass, *supra* note 1, at 712 (“very few, if any, courts have extended the common law doctrine beyond tidal or navigable waters.”).
9. See Sax, *supra* note 2, at 556 (“it seems that the delicate mixture of procedural and substantive protections which the courts have applied in conventional public trust cases would be equally applicable and equally appropriate in controversies” involving a range of natural resources).
10. The six factors Wood relies on to expand the scope of the trust are as follows: “(1) public need; (2) scarcity; (3) customary use and reasonable expectation; (4) unique and irreplaceable common heritage; (5) suitability for common use; and (6) ancillary function.” (157).
11. Citing CAESAR FLAVIUS JUSTINIAN, *THE INSTITUTES OF JUSTINIAN WITH ENGLISH INTRODUCTION, TRANSLATION AND NOTES* §12.1 (Thomas Collett Sanders, trans., 1984).
12. 132 S. Ct. 1215, 1235 (2012).

born with democracy,” (128), and “[a]ny government deriving its authority from the people never gains delegated authority to manage resources in a way that would jeopardize present or future generations or compromise crucial public needs.” (129).

The mechanism for the people to assert these natural rights and to hold government trustees to their fiduciary obligations is, of course, litigation in the courts. Indeed, the impending ecological crises “demand judicial intervention to rein in runaway agencies, arrest the siphoning of natural wealth belonging to the public, and re-anchor environmental law to its original moorings of justice, public interest, and community morality.” (232). To Wood’s dismay, however, modern courts have largely abdicated the responsibility to protect the public trust, presiding over—indeed, encouraging—a shift in which administrative agencies have become “the new tribunals of justice” and the judiciary has been reduced “to a mere twig of its original” constitutional stature (p. 231). Nonetheless, while acknowledging that “[a]rriving at judicial public trust remedies for captured agencies and legislatures will not be easy,” (256), Wood holds out great hope that the courts will find the courage to meet their duty to “gather[] the shifting sands of time onto the scales of justice” and “vindicate[] the rights of the people as beneficiaries of Nature’s Trust....” (257).

Wood acknowledges that an expansion of the public trust doctrine may require courts to enter territory in which that have traditionally been reluctant to venture. Unprecedented judicial intervention in administrative processes may be necessary to ensure effective remedies in the face of bureaucratic intransigence and resistance. Courts may be required to develop administrative capacity and issue structural injunctions establishing “a surrogate judicial-administrative process” to oversee the performance of administrative agencies (248). While such an “activist” judicial role “surpasses the traditional role of courts,” (241), Wood is confident that courts are up to the task. They can engage in “measured judicial supervision” of agencies and legislatures by developing plans that include “measurable steps” that must be taken and by “providing oversight to ensure proper execution of the plan.” (250).

As sweeping and elegant as Wood’s Nature’s Trust may be, her trust in the courts to provide the necessary impetus to solve pending environmental crises is, at best, overly optimistic. It is likely true that judges face less pressure from corporate and moneyed interests than legislators and agencies, but that freedom from direct lobbying does not necessarily translate into greater concern for protection of natural resources or greater institutional competence and capacity. There is no compelling reason to believe that courts, which are by nature conservative, will be willing to take action that agencies and legislatures have been unwilling to take. Nor is there any reason to believe that, even if courts do take action, the results will be significantly better management of natural resources.¹³ Most courts that have addressed

13. Wood suggests that courts can effectively manage complex environmental problems through innovative remedies like structural injunctions (240-57). In my view, Wood underestimates the difficulties in fashioning such remedies, particularly given the inter-

public trust objections to the way in which resources have been managed by agencies and legislatures, particularly “super wicked” problems like global climate change,¹⁴ have concluded that the courts are not the appropriate forum in which to air such grievances.¹⁵

In the end, Nature’s Trust’s greatest contribution may not be as a legal strategy to remedy the failings of current environmental law, but as a reminder to the public generally that our future is dependent on much greater, and sustained, moral commitments to respect the limits of natural resources to support the kind of environment in which we desire to live. Professor Wood herself acknowledges that “judicial relief must find grounding in the broader context of society’s moral understandings.” (257). Until these understandings are more fully developed, law will be at best a primitive mechanism for the kind of change Wood contends is necessary. Even more important, if and when a more fully developed sense of the moral impropriety of massive environmental degradation takes hold, it will likely be unnecessary for the courts to play the role of revolutionary heroes. Instead, citizens will demand more responsive political institutions—ones deserving of public trust.

jurisdictional dimensions of such problems. Problems like global climate change would not be amenable to remedies from one jurisdiction. Indeed, a coordinated and consistent set of remedial obligations across state, national, and international jurisdictions would have to be fashioned—a result that seems at best dubious.

14. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1158 (2009).
15. See Cress, *supra* note 6, at 259-64. In June 2014, the D.C. Circuit affirmed in an unpublished decision a district court decision dismissing public trust claims challenging the federal government’s failure adequately to address global climate change. The court concluded that the public trust doctrine is a matter of state law and does not present a federal question to support federal court jurisdiction. See *Alec L. v. McCarthy*, 561 Fed. App’x 7 (D.C. Cir. 2014).