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A "DIRECTED TRUST" APPROACH TO INTERGENERATIONAL SOLIDARITY IN AMERICAN ENVIRONMENTAL LAW AND POLICY: A MODEST PROPOSAL

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> *[I]t is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations and national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations. . . .*[1]

INTRODUCTION

In recent years, much has been written about trust principles as a useful lens through which to view environmental obligations—particularly with respect to the obligations of the present generation to those who will live in the generations to come.[2]

Legislatively, for the last half century, the National Environmental Policy Act—the oft-touted "Magna Carta" of modern American environmental law—has urged policymakers to view environmental responsibility through the lens of serving as trustees for future generations.[3] State constitutions, some foreign constitutions, international environmental conventions, and the ethical frameworks of many religious and philosophical traditions also speak eloquently about holding environmental goods in trust for the future.[4] In a concrete way, litigation in highly publicized

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[1] National Environmental Policy Act of 1969 § 101(b), 42 U.S.C. § 4331(b) (1970).

[2] *See infra* note 9.

[3] 42 U.S.C. § 4331(b) (1970).

[4] *See, e.g.*, Pope Francis, *Laudato Si': On Care for Our Common Home* (May 24, 2015), http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-fran

cases such as *Juliana v. United States*[5] asks whether future generations have a legal claim for violation of their rights as future beneficiaries of common resources.[6]

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cesco_20150524_enciclica-laudato-si_en.pdf [https://perma.cc/T2UX-KMRB]. This papal encyclical included a section on intergenerational responsibility in the context of environmental responsibility. Pope Francis explained:

> The notion of the common good also extends to future generations. The global economic crises have made painfully obvious the detrimental effects of disregarding our common destiny, which cannot exclude those who come after us. We can no longer speak of sustainable development apart from intergenerational solidarity. Once we start to think about the kind of world we are leaving to future generations, we look at things differently; we realize that the world is a gift which we have freely received and must share with others . . . . Intergenerational solidarity is not optional, but rather a basic question of justice, since the world we have received also belongs to those who will follow us. . . .

Id. ¶ 159. However, he also pointed out that the concern for future generations is not one to be narrowly construed as concern merely for the physical environment. Pope Francis asks:

> What kind of world do we want to leave to those who come after us, to children who are now growing up? This question not only concerns the environment in isolation; the issue cannot be approached piecemeal. . . . It is no longer enough, then, simply to state that we should be concerned for future generations. We need to see that what is at stake is our own dignity.

Id. ¶ 160.

At times, Pope Francis is pessimistic about the way in which we are responding to the demands of intergenerational responsibility, concerned that "We may well be leaving to coming generations debris, desolation and filth." *Id.* ¶ 161. In addition, he also notes the tension in balancing the demands of intergenerational responsibility with that of intragenerational responsibility. *See id.* ¶ 162 ("[O]ur inability to think seriously about future generations is linked to our inability to broaden the scope of our present interests and to give consideration to those who remain excluded from development. Let us not only keep the poor of the future in mind, but also today's poor, whose life on this earth is brief and who cannot keep on waiting.").

[5] Juliana v. United States, 947 F.3d 1159, 1164–65 (9th Cir. 2020). A full and frequently updated record of the case can be found at http://climatecasechart.com/case/juliana-v-united-states/ [https://perma.cc/5YSK-6ZX4]. Other areas of the climatecasechart.com website provide similar coverage of other climate litigation cases currently pending in the United States and globally.

[6] *See Juliana*, 947 F.3d at 1164. Much has been written about this case and the potential changes it may bring to our thinking about the trust concept as a part of intergenerational responsibility. *See generally* Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1 (2017) [hereinafter *No Ordinary Lawsuit*]; Andrew Johnson, Comment, *Life, Liberty, and a Stable Climate: The Potential of the State-Created Danger Doctrine in Climate Change Litigation*, 27 AM. U. J. GENDER SOC. POL'Y & L. 585 (2019); Thomas Sprankling et al., *Climate Ruling May Help Future Plaintiffs Establish Causation*, LAW 360 (Feb. 21, 2020); Kim Bouwer, *The Unsexy Future of Climate Change Litigation*, 30 J. ENV'T L. 483 (2018);

Underlying much of this discussion is the ancient public trust doctrine as a vehicle for meeting that intergenerational responsibility.[7]

Bronson J. Pace, *The Children's Climate Lawsuit: A Critique of the Substance and Science of the Preeminent Atmospheric Trust Litigation Case,* Juliana v. United States, 55 IDAHO L. REV. 85 (2019); Zachary L. Berliner, *What About Uncle Sam? Carving a New Place for the Public Trust Doctrine in Federal Climate Litigation*, 21 U. PA. J.L. & SOC. CHANGE 339 (2018); Sharon Buccino, *Our Children's Future: Applying Intergenerational Equity to Public Land Management*, 31 COLO. NAT. RES., ENERGY & ENV'T L. REV. 509, 516–17; Robin Kundis Craig, *Juliana, Climate Change, and the Constitution*, 35 NAT RES. & ENV'T 53 (2020); Maxine Burkett, *Litigating Separate and Equal: Climate Justice and the Fourth Branch*, 72 STANFORD L. REV. ONLINE 145 (2020); Jeff Todd, *A Fighting Stance in Environmental Justice Litigation*; 50 ENV'T L. 557, 559–609 (2020); Harrison Beck, Locating Liability for Climate Change: A Comparative Analysis of Recent Trends in Climate Jurisprudence, 50 ENV'T L. 855, 895–903 (2020); Jonathan P. Scoll, *Atmospheric Trust Litigation: "The Kids Can't Wait,"* 31 NAT. RES. & ENV'T 64 (2017). For an excellent debate highlighting various perspectives on Juliana, *see generally* Erin Ryan et al., *Juliana v. United States: Debating the Fundamentals of the Fundamental Right to a Sustainable Climate* (April 13, 2018) (FSU Law Review Rehearing 2018 Transcript) (Online with FLA. ST. UNIV. L. REV.)

[7] For a fuller discussion of the traditional public trust doctrine in the environmental context, *see, e.g.*, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter *Effective Judicial Intervention*]; Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281 (2014); Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past and Charting Its Future*, 45 U.C. DAVIS L. REV. 665 (2012); Mary Christina Wood & Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 ENV'T L. 259 (2015); David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENV'T L.J. 711 (2008); Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980) [hereinafter *Liberating the Public Trust Doctrine*]; Mary Turnipseed et al., *Reinvigorating the Public Trust Doctrine: Expert Opinion on the Potential of a Public Trust Mandate in U.S. and International Environmental Law*, 52 ENV'T 6 (2010); Joel Reschly, *Pesticides, Water Quality, and the Public Trust Doctrine*, 45 ENV'T L. REP. 10938 (Oct. 2015); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENV'T L. 43 (2009) [hereinafter *Ecological Realism*]; Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 ENV'T L. 91 (2009) [hereinafter *Fiduciary Obligation*]; William D. Araiza, *The Public Trust Doctrine as Interpretive Canon*, 45 U.C. DAVIS L. REV. 693 (2012); George P. Smith II & Michael Sweeney, *The Public Trust Doctrine and Natural Law: Emanations Within a Penumbra*, 33 B.C. ENV'T AFF. L. REV. 307 (2006); James L. Huffman, *The Public Trust Doctrine: A Brief (and True) History*, 10 GEO. WASH. J. ENERGY & ENV'T L. 15 (2019) [hereinafter *True History*]; Allan Kanner, *The Public Trust Doctrine,* Parens Patriae*, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENV'T L. & POL'Y F. 57 (2005); Brian E. Gray, *Ensuring the Public Trust*, 45 U.C. DAVIS L. REV. 973 (2012); Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in a Pod*, 45 U.C. DAVIS L.

For centuries, this doctrine has asserted that some essential goods of the earth are held in trust for the benefit of those yet to come.[8] The theory of the trust is inextricably intertwined with the obligation of intergenerational responsibility.[9] It provides a legal expression of and framework for this moral obligation. It recognizes that there is something unique about the earth and all that is in it. This creates obligations not only to our predecessors and contemporaries, but also to our successors, both biological and temporal.

However, while trust theory enjoys an impressive legal pedigree, it has not gained as much traction in American environmental law as might be expected or effective for addressing contemporary environmental issues.[10] There are many complex reasons for this that are practical, historical, political, economic, and legal.

One reason that the trust model is not as effective as it could be in the environmental context is because there are parts of the trust

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REV. 1075 (2012); Dave Owen, *The Mono Lake Case, The Public Trust Doctrine, and the Administrative State*, 45 U.C. DAVIS L. REV. 1099 (2012); Ronald B. Robie, *Effective Implementation of the Public Trust Doctrine in California Water Resource Decision-Making: A View from the Bench*, 45 U.C. DAVIS L. REV. 1155 (2012); James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENV'T L. 527 (1989) [hereinafter *Fish Out of Water*]; J. Peter Byrne, *The Public Trust Doctrine, Legislation, and Green Property: A Future Convergence?*, 45 U.C. DAVIS L. REV. 915 (2012); Gerald Torres, *Who Owns the Sky?*, 18 PACE ENV'T L. REV. 515 (2001); Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351 (1998); Jack Tuholske, *Trusting the Public Trust: Application of the Public Trust Doctrine to Groundwater Resources*, 9 VT. J. ENV'T L. 189 (2008); Alexandra B. Klass, *Renewable Energy and the Public Trust Doctrine*, 45 U.C. DAVIS L. REV. 1021 (2012).

[8] *See supra* note 7 and accompanying text.

[9] Intergenerational responsibility, as a legal principle in the environmental context, is explored in the writings of many, including, e.g., EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989); K.I. Vibhute, *Environment, Present and Future Generations: Intergenerational Equity*, Justice and Responsibility, 39 J. INDIAN L. INST. 281 (1997); Edith Brown Weiss, *A Reply to Barresi's "Beyond Fairness to Future Generations,"* 11 TUL. ENV'T L.J. 89 (1997) [hereinafter *Reply*]; Lydia Slobodian, *Defending the Future: Intergeneration Equity in Climate Litigation*, 32 GEO. ENV'T L. REV. 569 (2020); Buccino, *supra* note 6; RICHARD P. HISKES, THE HUMAN RIGHT TO A GREEN FUTURE (2009); Burns Weston, *Climate Change and Intergenerational Justice: Foundational Reflections*, 9 VT. J. ENV'T L. 375 (2008). Important aspects of intergenerational equity models are critiqued in Paul A. Barresi, *Beyond Fairness to Future Generations: An Intergenerational Alternative to Intergenerational Equity in the International Environmental Arena*, 11 TUL. ENV'T L.J. 59 (1997); Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198 (1990) [hereinafter *Rights and Obligations*].

[10] *See* James L. Huffman, *Why Liberating the Public Trust Doctrine Is Bad for the Public*, 45 ENV'T L. 337, 337 (2015).

analogy that simply do not exist in a clear, obvious way. Traditional trust doctrine requires a *settlor*, who entrusts the defined *res* of the trust to a *trustee* (or to multiple *trustees*) in a *trust instrument* that clearly sets forth obligations to defined classes of *beneficiaries*, present and future.[11] The actions of the trustee are governed by the demands of the trust instrument as well as by well-established *fiduciary obligations* such as care and loyalty.[12] To be effective, a well-established trust has, at a minimum, a known settlor, a clearly written trust agreement, and a well-defined *res*.[13] The trust analogy in the environmental law context lacks all of these.

Certainly, the traditional public trust doctrine holds some expectations about what would constitute the *res,* and some generally accepted limitations that could constitute terms of a "trust agreement."[14] However, as environmental regulation grows increasingly complex, as the migratory nature of environmental problems becomes more apparent, and as each year brings increased understanding of the interconnectedness of all creation,[15] the utility of the traditional trust paradigm may be diminished—unless it is expanded into something significantly different.

Paradoxically, at the very same time, today's dissatisfaction with the highly politicized environmental statutory and administrative regime gives the trust doctrine a renewed appeal because of its straightforward conceptual approach and its deeply moral, rather than merely pragmatic, underpinnings. Yet, this appeal does not easily translate into a clear-cut path for using trust doctrine in a reasoned way, in spite of recent efforts to do just that.[16]

This Article will consider whether there is any value in creatively borrowing from modern developments in trust law to devise a more narrowly focused way to keep future needs in our present debates.

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[11] RESTATEMENT (SECOND) OF TRUSTS § 3 (1957).

[12] The trust is described succinctly in *Ecological Realism*, *supra* note 7, at 67 ("The beneficiaries hold the beneficial title to all assets in the trust. The trustee holds legal title, encumbered with the responsibility to manage the trust strictly for the beneficiaries. This construct imposes a responsibility on government, as the trustee, to protect the assets . . . in the intent of the beneficiary class. In the case of the public trust, the beneficiaries are the citizens, both present and future generations.").

[13] *Id.* at 67–69.

[14] *See Effective Judicial Intervention*, *supra* note 7, at 475–91.

[15] *See* Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 PERSP. ON POL. 7, 7–8 (Mar. 2011); Abrahm Lustgarten, *The Great Climate Migration*, N.Y. TIMES MAG. (July 23, 2020), https://www.nytimes.com/interactive/2020/07/23/magazine/climate-migration.html [https://perma.cc/J84R-XPMN].

[16] *See* Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past and Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 671–86 (2012).

This Article will begin by acknowledging the importance of intergenerational solidarity and the solemn responsibility of preserving environmental assets for future generations. It will then, very briefly, review the ways in which trust doctrine has been a vehicle for expressing and implementing principles of intergenerational responsibility in the environmental context.

It will then discuss the practical difficulties with the trust paradigm in the environmental context, with a particular focus on the way in which it pays insufficient attention to how we identify the settlor, define the *res*, and determine the terms of the trust agreement. This is particularly problematic when the nature of those terms may have to change dramatically as conditions and knowledge change over time. The *Juliana* litigation will be offered as an illustration of these difficulties.[17]

The Article will then propose that one approach to making ancient trust theory more useful as a way to protect environmental resources is to incorporate, in some manner, the modern concept of a "trust director" or "directed trust" function into the environmental regulatory regime. It will first discuss what a "directed trust" means in the private trust context. Then, it will explore some of the reasons such a model may be of use in the complex realm of environmental protection. Finally, it will acknowledge that while the precise *mechanism* by which this might be done is not entirely clear, the *concept* of conferring on some entity specific powers over alleged trust resources and the actions, *vel non*, of the trustees, is worth bringing to the complex field of environmental protection.

I. INTERGENERATIONAL SOLIDARITY IN ENVIRONMENTAL LAW AND POLICY

There are few areas in which an obligation to those in other generations is more obvious than in the context of environmental law and policy. It is well established that various activities—whether man-made or naturally occurring, whether beneficial or harmful—can all have an impact on the natural world for years to come.[18] At times, it is also difficult or even impossible to reverse these impacts.[19]

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[17] Brief of Amici Curiae, Env't Hist. Professors in Support of Plaintiffs-Appellees' Answering Brief at 8–10, Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

[18] *See generally* NATUREWORKS, https://nhpbs.org/natureworks/ [https://perma.cc/S2RU-63GD] (last visited Nov. 24, 2020).

[19] Many have commented on this attribute of the natural world. *See* Torres & Bellinger, *supra* note 7, at 292 ("Natural resources . . . are complicated and delicate. Without proper care these resources can deteriorate to a point where restoration is no longer possible.").

Certainly, the notion of intergenerational solidarity extends to any area in which obligations to past and future generations must be protected and honored.[20] However, it is particularly compelling in the environmental context.[21] It often requires study of benefits and burdens that may still be speculative—at least in part. It may involve the interests of those who have no one in the legal or political arena to represent them.[22] This task may fall prey to unrealistic optimism that tomorrow's problems will take care of themselves. Alternatively, it may fall prey to unrealistic pessimism that the problems of tomorrow are too overwhelming to tackle in any meaningful way today.[23] Yet, we are all, indeed, "heirs of a legacy that is the work of many generations and [we] will in turn provide an inheritance for [our] successors."[24]

This mandate to honor our ancestors and our descendants should be reflected in environmental law and policy. How to do so raises profound public policy questions. For example, how can we accurately predict what

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[20] Others from various disciplines have studied this question from various perspectives. *See, e.g.*, JANNA THOMPSON, INTERGENERATIONAL JUSTICE: RIGHTS AND RESPONSIBILITIES IN AN INTERGENERATIONAL POLITY (2009) [hereinafter INTERGENERATIONAL JUSTICE].

[21] *See* sources cited *supra* note 9.

[22] *See, e.g.*, David Coursen, *Environmental Injustice is Even Worse than We Thought*, RESILIENCE (June 18, 2020), https://www.resilience.org/stories/2020-06-18/environmental-injustice-is-even-worse-than-we-thought/ [https://perma.cc/TJN9-Q22P].

[23] *See, e.g.*, William E. Rees, *Don't Call Me a Pessimist on Climate Change. I am a Realist*, TYEE (Nov. 11, 2019), https://thetyee.ca/Analysis/2019/11/11/Climate-Change-Realist-Face-Facts/ [https://perma.cc/H3CU-H84M]. This conflict is discussed more fully in Slobodian, *supra* note 9, at 587, in which the author observed:

> A central tension in realizing intergenerational equity is how to weigh the needs of the present against the needs of the future . . . . Past generations have often lacked the technology and economic conditions to extract or use many of the mineral resources we rely on today . . . . While future generations are likely to face significant climate-related challenges, they are also likely to continue to develop both economically and technologically. This reasoning has been used to justify the practice of discounting both the benefits and costs of future natural resource management in relation to current costs and benefits.

Id.

[24] INTERGENERATIONAL JUSTICE, *supra* note 20, at 1. *See also id.* at 7 ("[C]itizens, as well as outsiders, have interests that can only be satisfied in a society in which each generation takes responsibility for the affairs of its predecessors and accepts obligations to its political successors."); *Reply*, *supra* note 9, at 89 (calling the notion of intergenerational responsibility one that "already strikes a deep chord within the major cultural and legal traditions of the world"); *Reply*, *supra* note 9, at 97 ("[A]n intergenerational principle of fairness has already struck a deep chord within many different cultural traditions. It builds upon a history of implicit and explicit concern for future generations.").

future generations will need or want? How can we be sure that they will be unable to meet those needs through creative technical solutions of their own that we cannot even contemplate? How can we be certain that it is morally justifiable to place the needs of future generations ahead of the needs of the poorest of our own contemporaries when there appear to be intractable conflicts between them? How can we fairly determine whether and which decisions we make will take particular options away from those who come after us?[25] What are the economic ramifications for considering the burdens on future generations that will result from inaction or imprudent action today?[26] How can we avoid being overwhelmed when the scope of tomorrow's problems seems to be vast beyond our comprehension?

Likewise, a critical aspect of intergenerational responsibility in the environmental context that does not receive much attention is the question of our responsibilities to those generations who came before us. Is there an obligation to remember and be bound by the good done by those in prior generations and to honor the heritage—including the natural world—which we inherited from them? Is part of our obligation to those who follow us built on what we have received from those who came before us? Should—and how does—gratitude for what we received from our ancestors motivate our concern for what we leave to our descendants? To what extent should the preferences and values of our ancestors with respect to the natural world play a part in our modern understanding of our own obligations? How might we reconcile differences between their values and our own? Some argue that:

> The citizens of each generation are entitled to demand that their successors remember the sacrifices they made for the sake of posterity. They are entitled to demand that their successors make an effort to understand and appreciate the intergenerational goods that they inherit, and appreciate why their predecessors wanted to provide these things as an inheritance for future generations.[27]

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[25] *See Rights and Obligations*, *supra* note 9, at 202 (warning against decisions that will "unduly restrict the options available to future generations").

[26] *See generally* Stephen Marks, *Valuing the Future: Intergenerational Discounting, Its Problems, and a Modest Proposal*, 41 B.U. SCH. L. 10615 (July 11, 2011) (discussing intergenerational investment decisions and their ramifications).

[27] INTERGENERATIONAL JUSTICE, *supra* note 20, at 97. *See also id.* at 98 ("We should maintain records, memorials, and other forms of commemoration. We should preserve the heritage of past generations and the things that they regarded as valuable—at least to the extent that this does not impose unacceptable burdens on us.").

Regardless of how the concept of intergenerational responsibility is framed, our obligations to future generations are more clearly understood in the context of the ways in which our own predecessors bequeathed—or failed to bequeath—to us the goods of the created world.[28] It can also be a sobering recollection in our own environmental planning if we recall that we will one day be the "ancestors" of future generations who will judge us for the inheritance we left to them.[29] This should inspire law and policy makers to avoid falling prey to short-term temptations and ecological gambles.[30]

Because environmental obligations have long been understood to span the generations, various legal frameworks developed to express and honor this.[31] From ancient days, one of the most compelling of these frameworks has been moored in trust theory.[32]

II. OBLIGATIONS TO FUTURE GENERATIONS: THE APPEAL OF THE TRUST CONCEPT

The ancient public trust doctrine, or "PTD," is a traditional structure invoked when seeking a source for and model of a legal responsibility to the public at large, with particular concern for future generations.[33]

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[28] *Cf.* Weston, *supra* note 9, at 380 ("If future generations cannot be said to have a legal basis for asserting ecological rights vis-à-vis present generations, then neither can it be said that present generations can have corresponding legal duties relative to future generations.").
[29] *See* INTERGENERATIONAL JUSTICE, *supra* note 20, at 98. *See also* Buccino *supra* note 6, at 512–13 (noting that "[t]he current generation can spend dividends generated by the principal but cannot spend down the principal itself.").
[30] *See, e.g.*, Wood & Galpern, *supra* note 7, at 275 (arguing that "[a] constitutional trust over crucial resources remains essential for the endurance of the nation because it prevents any one set of legislators from destroying ecology that is crucial to perpetuating and sustaining the nation as a whole through the generations of citizens. Legislators stand under constant temptation to commit public resources to industry supporters in return for campaign contributions.").
[31] *See* Weston. *supra* note 9, at 378–79.
[32] Alternate perspectives and legal models other than the trust paradigm exist to express intergenerational obligations. *See, e.g.*, Weston, *supra* note 9, at 378–79 (using a lease analogy).
[33] For historical background to the public trust doctrine, *see generally* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 DUKE ENV'T L.& POL. F. 1 (2007) [hereinafter *Speaking of Inconvenient Truths*]; Charles F. Wilkinson, *The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine*, 19 ENV'T L. 425, *passim* (1989); *see also* Takacs, *supra* note 7, at 713–15; this history was also referenced in Brief of Amicus Curiae Law Professors in Support of Plaintiffs-Appellees' Answering Brief at 5–6, Juliana v. United States, 947 F.3d 1159

Indeed, "[f]or centuries, people have utilized some version of this doctrine by preserving portions of the environment for the greater public good."[34]

The doctrine, according to some, may be "undergoing a modern resurgence"[35] in our times as a means to address the obligations we bear to those who will come after us. Because the trust is a well-established concept and not a novel theory,[36] "[p]ackaging problems of planetary ecology in . . . trust-based property terms enables domestic courts of various nations to summon clear and enforceable fiduciary standards to hold political leaders accountable for ecological duties."[37] In the context of environmental protection, the consensus is that "concern for future citizens is the *raison d'etre* for the trust."[38] Thus, the public trust has particular appeal for those seeking a model for protecting the interests of future generations. It uses a well-established legal doctrine to preserve public goods whose value and fragility are more greatly appreciated than ever before.[39]

Much has been written about the use of public trust principles in the context of environmental protection.[40] As many have already written on this, this Article will not discuss it in any depth. Instead, it will merely describe it in the briefest of ways to illustrate its inherent limitations as the vehicle through which the interests of future generations can be properly considered.[41]

A. Traditional Public Trust Doctrine in the United States

The traditional public trust doctrine is the basis for much of the use of trust principles (and rhetoric) for long term environmental protection.[42] In American domestic law, "there are 50 state PTDs, intimations of a

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(2019) (No. 18-36082); Brief of Amici Curiae Environmental History Professors in Support of Plaintiffs-Appellees' Answering Brief passim United States v. Juliana, 947 F.3d 1159 (2019) (No. 18-36082) [hereinafter Environmental History Brief]; Kanner, *supra* note 7, at 62–70; *True History*, *supra* note 7, *passim*.

[34] Smith & Sweeney, *supra* note 7, at 308.

[35] Reschly, *supra* note 7, at 10938.

[36] Turnipseed et al., *supra* note 7, at 6. *See also* Wilkinson, *supra* note 33, at 425 (acknowledging that "[t]he public trust doctrine is complicated—there are fifty-one public trust doctrines in this country alone.").

[37] Wood & Galpern, *supra* note 7, at 300.

[38] *Ecological Realism, supra* note 7, at 68.

[39] *See id.* at 68.

[40] *See, e.g.*, discussion *supra* note 7.

[41] For a forceful critique of the public trust doctrine and its limitations, *see generally* Huffman, *supra* note 10, at 349–69.

[42] *See Ecological Realism*, *supra* note 7, at 68.

federal PTD, and the doctrine has also increasingly appeared in legal systems outside of the United States."[43]

As was true in ancient times, it was in the context of navigable waters that the doctrine received its earliest attention in American domestic jurisprudence[44] and where much of the theory involving the public trust doctrine has developed.

In *Illinois Central*,[45] one of the earliest, comprehensive statements of the public trust doctrine in the United States, the Supreme Court engaged in a lengthy discussion of the doctrine. In doing so, it set forth some basic principles that are still highly relevant in understanding this doctrine today.[46] Scholarly commentary on *Illinois Central* emphasizes the important role of federal law in creating the trust,[47] while also recognizing that "[l]ater Supreme Court cases have recognized that states are accorded broad discretion in administering the trust."[48] With respect, at least, to water, various sources for the doctrine have been identified.[49]

In 1970, Joseph Sax ushered in a new era of scholarship on the public trust doctrine in his seminal work, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*.[50] He boldly declared that "[o]f all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems."[51] This was an optimistic assessment of the doctrine's potential to protect both present and future generations.

Perhaps it was not mere coincidence that Sax's landmark article appeared in the same year in which the "modern" era of domestic

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[43] Turnipseed et al., *supra* note 7, at 6.

[44] This water-oriented focus is explored more fully by many commentators, including Smith & Sweeney, *supra* note 7, at 310–14; Huffman, *supra* note 10, at 338; *id.* at 345–49; *Fish Out of Water*, *supra* note 7, at 530–32; and *Effective Judicial Intervention*, *supra* note 7, at 475–78.

[45] Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387 (1892).

[46] *See* Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in* Illinois Central, 71 U. CHI. L. REV. 799, 800–05 (2004).

[47] *Illinois Central* is still widely discussed. *See* discussion *supra* note 7; *see also* Kearney & Merrill, *supra* note 46, at 800–05.

[48] Wilkinson, *supra* note 33, at 455.

[49] *Id.* at 455–56 (suggesting that these sources could include such diverse theories as "federal common law," or "the guarantee clause of the Constitution," or "constitutional preemption," or "the commerce clause").

[50] *Effective Judicial Intervention*, *supra* note 7.

[51] *Id.* at 474.

environmental law began with the creation of the Environmental Protection Agency, the launching of the first Earth Day, and the passage of the National Environmental Policy Act ("NEPA").[52] This renewed interest in the public trust doctrine at the same time that the modern environmental statutory scheme was developing is but one indication as to how intertwined these themes are in the quest to preserve the goods of the earth for those who will come after us.[53] The trust theory and the statutory regime, however, are fundamentally different tools to advance environmental protection.

B. Trust Doctrine in the Statutory Law of the United States

In the view of one commentator, the trust concept is "[a]n ancient yet enduring legal principle [that] underlies modern environmental statutory law."[54] Thus, in a limited way, some environmental statutes have tried to build on the notion of the public trust doctrine and incorporate trust doctrine into their terms.[55]

Nowhere is this more explicit than in NEPA.[56] NEPA states as a matter of broad national policy that there is an obligation of the Federal Government to "improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may . . . fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."[57] NEPA speaks eloquently of the need to "fulfill the social, economic, and other requirements of present and future generations of Americans,"[58] and phrases such as "restore" and "preserve" indicate an interest in remedying the harms of the past and safeguarding goods for the future.[59] Yet, even NEPA itself is silent as to what, in fact, it means

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[52] *Id.*; 5 U.S.C.A. § App. 1 Reorg. Plan 3 1970; *About Us: The History of Earth Day*, https://www.earthday.org/history/ [https://perma.cc/2X9Q-QGUD] (last visited Nov. 24, 2020); National Environmental Policy Act of 1969, as amended, 42 U.S.C. §§ 4321–4347 (1970).
[53] *See* discussion, *supra* note 7.
[54] *Ecological Realism*, *supra* note 7, at 45. *See also Fiduciary Obligation*, *supra* note 7, at 103 ("Trust principles underlie statutory law. . . . [S]tatutory law provides bureaucratic structure and process, while the trust doctrine supplies a firm obligation that can steer agency discretion to carry out the protective goals of the statutes.").
[55] *See* Turnipseed et al., *supra* note 7, at 10 (reviewing the trust principles found in various federal environmental statutes).
[56] *See* National Environmental Policy Act of 1969, § 101, 42 U.S.C. §§ 4321–4347 (1970).
[57] *Id.* § 4331 (b).
[58] *Id.* § 4331 (a).
[59] *Id.*

to hold resources "in trust" for those who will follow.[60] It offers no blueprint or structure for how to do this.

Beyond NEPA, trust principles are even less prevalent in American federal law.[61] Indeed, in spite of the trust language in NEPA, some have correctly observed that "the body of modern environmental law developed largely without meaningful trust scrutiny."[62] Certainly, several other instances can also be found in which federal environmental statutes incorporate explicit trust terms. For example, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[63] allows for a trust mechanism for natural resources damages.[64] Other federal statutes speak to the importance of protecting common resources[65] and avoiding harm to future generations.[66]

In addition, state statutory law also references trust law.[67] State constitutions can often echo or reflect trust principles. By way of example, the State Constitution of Pennsylvania includes expansive trust language when it states:

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[60] *See id.*

[61] For example, in President Clinton's Federal Action to Address Environmental Justice in Minority and Low Income Populations, Executive Order 12898, 59 Fed. Reg. 7629 1994), as amended by Executive Order 12948, 60 Fed. Reg. 6381 (1995), it was explicitly stated that the order "is not intended to, nor does it create any right, benefit, or trust responsibility. . . ." *Id.* § 6-609 (emphasis added).

[62] Wood & Galpern, *supra* note 7, at 280.

[63] Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601.

[64] Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9607 (f) (CERCLA § 107 (f)) states:

> The President, or the authorized representative of any State, shall act on behalf of the public as trustee of such natural resources to recover for such damages. Sums recovered by the United States Government as trustee under this subsection shall be retained by the trustee without further appropriation, for use only to restore, replace, or acquire the equivalence of such natural resources. Sums recovered by a State as trustee under this subsection shall be available for use only to restore, replace, or acquire the equivalent of such natural resources by the State.

[65] *See, e.g.*, Solid Waste Disposal Act, 42 U.S.C. § 6901(b)(1) [SWDA § 1002(b)(1)] ("Land is too valuable a natural resource to be needlessly polluted").

[66] *Id.* § 6902(a)(5) [SWDA § 1003(a)(5)] (identifying as a goal "requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date") and *id.* § 6902(b) [SWDA § 1003(b)] (declaring it to be national policy that waste "should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment").

[67] *See Fiduciary Obligation*, *supra* note 7, at 103–26.

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's natural resources are the common property of all the people, including generations yet to come. *As trustee of these resources*, the Commonwealth shall conserve and maintain them for the benefit of all the people.[68]

However, meaningful incorporation of trust principles in environmental statutory law is still surprisingly limited in scope. Mere "compliance with a statutory scheme does not automatically ensure compliance with trust standards."[69] A trust requires the most exacting concern for beneficiaries.[70] A statute merely mandates strict compliance with its terms—along with the ability to argue for an interpretation of the statute and its exceptions that is the most favorable to a particular party's interest.[71] In a regime in which the statutory and regulatory scope has greatly increased, "the use of the PTD as a legal tool to fight broad-scale environmental degradation has generally been overshadowed by reliance on statutory and regulatory solutions."[72]

It is natural to look first to the requirements of environmental statutes to assess environmental compliance and to determine whether a particular actor's undertakings have met the standards set in the voluminous trove of statutory law and the regulations that implement them.[73] Yet, as a conceptual matter, the public trust doctrine may be more ambitious as a protective framework for the environment because, in contrast to the statutory regime, trust doctrine "contains no permit shields, no agricultural and silvicultural exemption, and no defense of compliance with a federal label. It is an ancient body of law."[74] The public trust doctrine is less concerned with the minutiae of a regulatory system that may be excruciatingly complex, expensive, and less directly focused on long

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[68] PA. CONST. art. I, § 27 (emphasis added). For further discussion of the interplay between the public trust doctrine and state statutes and constitutions, including that of Pennsylvania, *see, e.g.*, Kanner, *supra* note 7, at 86–93; *True History*, *supra* note 7, at 26–31.
[69] Wood & Galpern, *supra* note 7, at 296.
[70] *See id.* at 302–04.
[71] *See id.*
[72] Turnipseed et al., *supra* note 7, at 7. *See also id.* ("Unfortunately, the copious environmental statutes and regulations enacted in the last 40 years have not proved to be uniformly adept at preventing the degradation of ecosystems and ecosystem services.").
[73] *See* EPA, PROTOCOL FOR CONDUCTING ENVIRONMENTAL COMPLIANCE AUDITS UNDER THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (1998).
[74] Reschly, *supra* note 7, at 10951.

term preservation in the same straightforward way as the public trust doctrine can be.[75]

In addition, the public trust doctrine offers an overarching theory of environmental responsibility that can have important appeal in circumstances when statutes may be interpreted or enforced in different ways. Often statutes and regulations require discretion in implementation or enforcement. These individual decisions on particular matters may have a cumulative impact that may go undetected.[76] In her extensive writings on public trust theory, Mary C. Wood argues that public trust law has a particularly vital role to play in the situations in which statutes provide discretion.[77] In these particular circumstances, trust theory offers a coherent rationale for the ways in which discretion should be exercised if it is to advance environmental obligations to other generations.[78]

It is also true that the modern development of environmental law—both in the United States and internationally—is still very much driven by media.[79] That is, the siloing of water, land, air, species, and ecosystem protection still characterizes much of the regulatory scheme.[80] Thus, when future generations raise concerns about large scale problems, the regulatory scheme may provide a disjointed and fragmented way to address large scale, future concerns because it does not adequately weigh the ramifications of the interplay between various parts of the natural and man-made environments.[81]

Although beyond the scope of this Article, it is worth observing that the public trust doctrine has also made its way into foreign statutes and constitutions[82] as a way of protecting environmental resources for

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[75] *See id.* at 10950.
[76] *See Fiduciary Obligation*, *supra* note 7, at 103, 119.
[77] *See id.* at 102–10.
[78] *See id.* at 103–05.
[79] *See* Tseming Yang & Robert V. Percival, *The Emergence of Global Environmental Law*, 36 L.Q. 615, 645 (2009); Liz Bourguet, *David Roberts: Climate Change, the Media, and Shifting Political Power*, YALE CTR. FOR ENV'T L. & POL'Y (Apr. 10, 2019), https://enviro center.yale.edu/news/david-roberts-climate-change-media-and-shifting-political-power [https://perma.cc/JT2C-JQ4G].
[80] *See Ecological Realism*, *supra* note 7, at 56–57.
[81] *See id.* at 55, 57.
[82] *See* Wood & Galpern, *supra* note 7, at 304–06 (reviewing concept of public trust protection of natural resources in foreign law); *No Ordinary Lawsuit*, *supra* note 6, at 78–84 (discussing international law and foreign law with respect to protecting future generations through a public trust theory). *See generally* 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).

future generations. Indeed, some have argued that the public trust doctrine has become customary international law because it articulates a principle that is prevalent in many different legal systems.[83] With respect to international relations more broadly, there is increasing attention to both intragenerational equity and intergenerational responsibility as "the emerging concept of intragenerational equity [is] a significant element in the debate on the international attainment of sustainable development."[84] Trust theory is a tangible expression of the way in which intergenerational equity can be fostered.[85] Others have argued more broadly for a "planetary trust", which is a far more expansive view with respect to using trust doctrine for environmental protection.[86] While many international agreements concerning sustainability and intergenerational obligations are still in the realm of so-called "soft" law,[87] these international agreements make it clear that, in theory at least, such intergenerational obligations exist.[88]

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[83] Wood & Galpern, *supra* note 7, at 277.

[84] Duncan A. French, *International Environmental Law and the Achievement of Intragenerational Equity*, 31 ENV'T L. REP. 10469 (2011). *See also id.* at 10477 ("Intergenerational equity is the notion that the international community is under a moral, even possibly a legal, obligation to protect and preserve the environment and its natural resources for present and future generations. Whilst it is an overtly anthropocentric notion, intergenerational equity can, however, be interpreted within a broader ecological context.").

[85] *See* French, *supra* note 84, at 10479.

[86] For further discussion of the planetary trust concept, *see* Slobodian, *supra* note 9, at 582:

> Under the planetary trust model, each generation as a whole and all of its members act as both custodian and beneficiary of the trust. Under the public trust doctrine, a specific government has an obligation to manage trust resources for the benefit of its citizens. . . . [T]he public trust doctrine applies only to public resources within the relevant government's jurisdiction. However, the idea of a fiduciary duty to protect the resources of the earth for its future inhabitants is shared by both models and is a strong mechanism for championing the rights of future generations.

Id.

[87] *See id.* at 10480 ("[T]he international legal community has not yet been convinced of the advantages of adopting such a radical new approach. . . . [T]here are still too many issues left unresolved as to what intergenerational equity actually means for it to have any real substantive impact on international law. Intergenerational equity will therefore remain a useful philosophical and political argument for advancing the case of environmental protection. . . ."); Slobodian, *supra* note 9, at 573 (noting that, with respect to intergenerational obligation "[i]t is not clear whether this body of law and practice adds up to an internationally accepted, legally binding obligation.").

[88] For further discussion of the role of intergenerational obligations in international instruments, *see generally* French, *supra* note 84, at 10478–79.

C. Efforts to Expand the Public Trust Doctrine

In the private property context, the trust is the legal vehicle through which trustees ensure that the often-finite assets of the trust are wisely managed to protect both present and future beneficiaries.[89] This accounts for much of the appeal of this doctrine as a traditional way to meet obligations to both future generations and contemporary beneficiaries.[90] The obligation of intergenerational solidarity is baked into the heart of trust theory.

Hence, as concern for future generations becomes increasingly urgent, there is a corresponding urge to explore the ways in which an expanded view of the trust concept may foster our obligations to future generations.[91] This effort is understandable given the intersection of several emerging realities:

- The obligation to future generations—and our own link to past generations—is becoming ever clearer as our knowledge of ecology grows.[92]
- Environmental statutes mention trust obligations in passing but have never developed the concept in any meaningful way.[93]
- Even if complete compliance with the dizzying array of environmental statutes was possible, there could still be environmental harms that would impact future generations because of cumulative impacts, inconsistencies between regulatory obligations, failure to recognize the cross-media impacts of various forms of pollution, etc.[94]
- Trust theory seems to hold the promise of using a traditional doctrine to safeguard the interests of future generations in a more holistic, fiduciary way.

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[89] *See, e.g.*, *Trust*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[90] *Id.*
[91] Mary Christina Wood has been one of the most prolific writers on this theory. Her work on developing the expansive notion of "Nature's Trust" can be found in MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2014). For a critical view of such efforts to expand the public trust doctrine in this way, *see generally Speaking of Inconvenient Truths*, *supra* note 33, *passim*.
[92] *See Ecological Realism*, *supra* note 7, at 76, 89.
[93] *See* Pace, *supra* note 6, at 98.
[94] *See Ecological Realism*, *supra* note 7, at 43–44.

Juliana v. United States offers an unfolding example of an effort to expand the scope of the trust theory to protect the ecological interests of future generations.[95] As part of the Atmospheric Trust Litigation movement,[96] this case is but one example of a growing initiative seeking to "invoke [] the judiciary to act as the vehicle to mitigate common pool resource deterioration in the face of climate change."[97]

There were a number of theories asserted by the young *Juliana* plaintiffs, but the trust argument is of particular interest for this Article.[98] To adopt this line of reasoning would significantly expand the concept of the public trust doctrine beyond its traditional use to safeguard specific assets.[99] It would, if successful, create a far more expansive and complex fiduciary obligation to protect the atmosphere from degradation.[100]

In an order denying the defendant's motion for summary judgment in the *Juliana* case,[101] Judge Ann Aiken of the U.S. District Court for the District of Oregon allowed the case to move forward. Her discussion of the merits of the case was favorable to an expanded view of the public trust doctrine.[102] Her opinion determined that a prior finding that "the public trust doctrine is deeply rooted in our nation's history"[103] was not clearly erroneous. Thus, Judge Aiken let stand the prior ruling that

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[95] In making their argument, "the children are demanding that the government be held liable, as fiduciaries, to maintain an atmosphere free of substantial impairment." Pace, *supra* note 6, at 86. *See, e.g.*, OUR CHILDREN'S TRUST, OUR CHILDREN'S TRUST SUBMISSION TO THE UNITED NATION'S SPECIAL RAPPORTEUR ON CULTURAL RIGHTS AND CLIMATE CHANGE (May 2020).

[96] *See No Ordinary Lawsuit*, *supra* note 6, at 21–24 (outlining basic principles of the Atmospheric Trust Litigation cases).

[97] Pace, *supra* note 6, at 87.

[98] *See id.* at 95.

[99] *See id.* at 95–96.

[100] *See, e.g.*, *id.* at 89:

> [T]he children demanded that . . . the atmosphere must be recognized as an essential component of the public trust assets. . . . That is, the children claimed that the federal government owes, as fiduciaries, active maintenance of the atmospheric system to sustain it for present and future generation beneficiaries. . . . [T]he children sought a judicial order declaring a fundamental right to children and future generations to a stable and healthy climate system, which the United States must actively address and protect via public trust obligations.

Id.

[101] Juliana v. United States, 339 F. Supp. 3d 1062 (D. Or. 2018).

[102] For commentary on Judge Aiken's opinion in *Juliana*, *see, e.g.*, Pace, *supra* note 6, at 95–100; Berliner, *supra* note 6, *passim*; *No Ordinary Lawsuit*, *supra* note 6, *passim*.

[103] *Juliana*, 339 F. Supp. 3d at 1102.

the plaintiffs should have the opportunity to argue for the public trust doctrine's applicability on the merits.[104]

When the case was appealed, Judge Aiken's decision was reversed by a Ninth Circuit decision that seemed deeply sympathetic to the arguments of the plaintiffs but unwilling to use the courts to remedy their grievances.[105] In his opinion, Judge Andrew Hurwitz acknowledged such things as "[t]he record leaves little basis for denying that climate change is occurring at an increasingly rapid pace,"[106] "the federal government has long understood the risks of fossil fuel use,"[107] "the government's contribution to climate change is not simply a result of inaction,"[108] "the causal chain is sufficiently established,"[109] and "[p]laintiffs have made a compelling case that action is needed."[110] These statements, viewed individually and, more compellingly, as a whole, suggest on the merits a sympathetic perspective on the young plaintiffs' substantive complaint.[111]

However, the court identified the nature of the remedy sought by the plaintiffs as one that did not belong to the judiciary but to the political branches. The remedy sought would require "an injunction requiring the government not only to cease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions."[112] The court was concerned about separation of powers, as well, believing that "plaintiffs thus seek not only to enjoin the Executive from exercising discretionary authority expressly granted by Congress . . . but also to enjoin Congress from exercising power expressly granted by the Constitution over public lands."[113]

Thus, the court—with apparent reluctance on the merits of the claim—sent the plaintiffs back to the political branches for any potential remedy.[114] The court believed that the relief sought would require decisions that fall within the province of the political branches.[115] It concluded that

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[104] *Id.* at 1063.
[105] Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).
[106] *Id.* at 1166.
[107] *Id.*
[108] *Id.* at 1167.
[109] *Id.* at 1169.
[110] *Id.* at 1175.
[111] *Juliana*, 947 F.3d at 1175.
[112] *Id.* at 1170.
[113] *Id.*
[114] *Id.* at 1175.
[115] *Id.* at 1171 ("[A]ny effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."); *id.* at 1172 ("[P]laintiff's request for a remedial plan would

"some questions—even those existential in nature—are the province of the political branches."[116]

The dissenting opinion, by Judge Josephine Stanton took a broader view of the court's ability to grant relief.[117] She likened this to other complex cases in which courts were called on to resolve complicated questions requiring judicial supervision and oversight.[118]

The *Juliana* plaintiffs have since petitioned the Ninth Circuit for a rehearing *en banc* in a continued effort to advance the claims of future generations to the preservation of ecological resources.[119] Regardless of how this litigation, and other cases like it, are ultimately resolved, it illustrates the tension between the desire to protect future generations and the inherent limitations of both the trust doctrine and the political process as the vehicles to do so. It seems to be a mere matter of time before other circuits, and perhaps the Supreme Court itself, weigh in on the appropriate scope of the public trust doctrine to safeguard future generations from broadly defined environmental harms.

III. PRACTICAL DIFFICULTIES WITH THE TRUST PARADIGM

There is great appeal in embracing the concept of a trust as a vehicle not merely to express our obligations to future generations but to

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subsequently require the judiciary to pass judgment on the sufficiency of the government's response . . . which necessarily would entail a broad range of policymaking."); and *id.* ("[G]iven the complexity and long-lasting nature of global climate change, the court would be required to supervise the government's compliance with any suggested plan for many decades."). For a more modest view of what this responsibility would entail, *see Effective Judicial Intervention*, *supra* note 7, at 509 ("[P]ublic trust law is not so much a substantive set of standards for dealing with the public domain as it is a technique by which courts may mend perceived imperfections in the legislative and administrative process."); *id.* at 521 ("The '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."); and *id.* at 558 ("It is virtually unheard of for a court to rule that a policy is illegal because it is unwise. . . . Rather, they may effectively overrule a questionable policy decision by requiring that the appropriate agency provide further justification; alternatively, the courts may, in effect, remand the matter for additional consideration in the political sphere.").

[116] *Juliana*, 947 F.3d at 1173.

[117] *See id.* at 1175–76 (Stanton, dissenting).

[118] *See id.* at 1176 (Stanton, dissenting).

[119] *See* Petition for Rehearing *En Banc* of Plaintiffs-Appellees, *Juliana v. United States*, United States Court of Appeals for the Ninth Circuit, Case No. 18-36082 (March 2, 2020) [hereinafter Petition for Rehearing *En Banc*] and Appellant's Opposition to Petition for Rehearing *En Banc*, *Juliana v. United States*, United States Court of Appeals for the Ninth Circuit, Case No. 18-36082 (March 24, 2020).

implement them in the realm of law and policy.[120] This doctrine also has a deep moral attraction as a way to bind generations to each other as they negotiate the fragile care of the natural world entrusted to all.[121] There is something inherent in the notion of fiduciary obligations that is an eloquent reminder of how important faithful stewardship can be. Indeed, beyond the legal ramifications of the public trust doctrine, the trust theme also has a theological and philosophical mandate as well.[122]

Yet, in spite of its conceptual and ethical attraction, an overly broad reading of the public trust doctrine would, by definition, expand the scope of this theory beyond traditional roots without clear limitations or guidance.[123] There are limitations inherent in the concept of the trust as an

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[120] Other models have also been proposed. *See* SCI. & ENV'T HEALTH NETWORK, MODELS FOR PROTECTING THE ENVIRONMENT FOR FUTURE GENERATIONS (The International Human Rights Clinic at Harvard Law School) (October 2008) (proposing ombudsman and guardianships).

[121] This was expressed eloquently in Araiza, *supra* note 7, at 695 (observing that the public trust doctrine "strikes a deeply resonant chord with Americans, given our national narrative about the common heritage of our nation's natural beauty and abundance.").

[122] *See* Environmental History Brief, *supra* note 33, at 13 ("Grounded in Christian theology, expressed in republican virtue, and later underscored by the findings of modern ecological science, the idea of organic unity and intergenerational responsibility—in particular responsibility to future generations—became one of the great organizing principles of the American Republic."). *See also* Brief of Amici Curiae Eco-Justice Ministries et al., in Support of Plaintiffs-Appellees' Brief in *Juliana v. United States* on appeal from the United States District Court for the District of Oregon, No. 18-36082 (arguing, from a variety of religious perspectives, on behalf of protecting future generations); Anthony L. I. Moffa, *Wasting the Planet: What a Storied Doctrine of Property Brings to Bear on Environmental Law and Climate Change*, 27 J. ENV'T L. & LITIG. 459, 465 (2012) ("[S]ome semblance of regard for future generations exists at the core of the moral teachings of a preponderance of the world's major religions."). I have also written extensively about the role of environmental stewardship in the Judeo-Christian context, particularly in the Catholic tradition. *See generally* LUCIA A. SILECCHIA, *The Call to Stewardship: A Catholic Perspective on Environmental Responsibility*, *in* AMERICAN LAW FROM A CATHOLIC PERSPECTIVE: THROUGH A CLEARER LENS (Ronald J. Rychlak ed., 2015); Lucia A. Silecchia, *Environmental Ethics from the Perspective of NEPA and Catholic Social Teaching: Ecological Guidance for the 21st Century*, 28 WM. & MARY ENV'T L. & POL'Y REV. 659 (2004); Lucia A. Silecchia, *Discerning the Environmental Perspective of Pope Benedict XVI*, 4 J. CATHOLIC SOC. THOUGHT 227 (2007); Lucia A. Silecchia, *The "Preferential Option for the Poor": An Opportunity and a Challenge for Environmental Decision Making*, 5 U. ST. THOMAS L.J. 87 (2008); Lucia A. Silecchia, *"Social Love" as a Vision for Environmental Law: Laudato Si' and the Rule of Law*, 10 LIBERTY U. L. REV. 371 (2016); Lucia A. Silecchia, *Conflicts and Laudato Si': Ten Principles for Environmental Dispute Resolution*, 33 J. LAND USE & ENV'T L. 61 (2017).

[123] The appeal of this argument for expansion lay at the core of the landmark *Liberating the Public Trust Doctrine*, *supra* note 7. However, many also sound a cautious note about such an expansion. *See, e.g.*, Huffman, *supra* note 10, at 340 (noting that an expansion

effective doctrine for bringing meaningful ethical principles to bear on the ways in which the world is held for those to come.[124] While certainly not the only example, cases like *Juliana* bring brought these limitations to the forefront.[125] Although not entirely insurmountable, these difficulties become more obvious when contrasting the public trust with the more traditional private trust.

First, the traditional public trust doctrine evolved when the primary focus was on protecting particular discrete assets for future uses.[126] In its ancient origins, the public trust doctrine was limited to specific assets with a clearly understood necessity for the common good.[127] Traditionally, this was seen in the prominence paid to waterways and preserving bodies of water.[128] This was particularly true for those with utility as navigable waterways.[129]

More recently, the establishment of national parks, the protection of specific endangered species, and initiatives to clean up and restore

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of the doctrine "would require the courts to exceed both their traditional and their constitutional powers and to make up a lot of law while treading on the vested rights of a lot of people"); Kanner, *supra* note 7, at 82 (observing that "courts continue to expand the number of resources held under the public trust. The trust rights in a particular resource tend to increase over time."); Araiza, *supra* note 7, at 696 (noting that "when scholars argue in favor of broadening the doctrine's limitation beyond its traditional focus on aquatic resources, critics can readily criticize them for embracing a judicial role for which courts have neither the legal authority not the expertise, and for seeking a doctrinal expansion that neither legal precedent nor sound policy supports").

[124] For a stronger statement of his point, *see* Huffman, *supra* note 10, at 341 ("Good intentions, even asserted moral imperatives, do not outweigh the risks to liberty and the public good inherent in judicial lawmaking."). For a careful assessment of the basic questions to be answered in advancing the public trust doctrine as a useful paradigm, *see* Frank, *supra* note 7, at 671 (identifying four fundamental questions such as determining the *res*, resolving federalism questions, reconciling the trust concept with other doctrines, and identification of the doctrine's source as necessary for advancing trust theory).

[125] *See generally* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

[126] Because of this, in the view of some commentators, the public "trust" functioned more like a public "easement." *See, e.g.*, *Fish Out of Water*, *supra* note 7, at 533 ("[T]he public trust doctrine should be analyzed as a simple easement rather than as part of trusts, administrative, constitutional, or police power law. . . . By misconceiving the doctrine, our modern courts have confused the concepts of public rights, police power, and constitutional rights.").

[127] *See* Wood & Galpern, *supra* note 7, at 273 (stating that the public trust doctrine "defines vital natural resources as quantifiable assets that the government must manage for the long term interests of the public"). For additional background on the history of the public trust doctrine from various perspectives, *see, e.g.*, Huffman, *supra* note 10, at 343–49.

[128] *See generally* Wilkinson, *supra* note 33, at 426–31.

[129] *See generally id.* (exploring the importance of the public trust doctrine for preserving access to navigable and other water bodies in American legal history).

parcels of environmentally damaged land offer examples of ways in which using trust principles to protect specific environmental assets may come into play in effective ways.[130] This mirrors the way in which a traditional private trust is designed to manage, protect or invest specific assets or a well-defined *res*.[131]

However, the trust doctrine is harder to apply when the specific assets—the *res*—of the trust are not easy to identify. As our understanding of the interconnectedness of the natural world has grown, the ability to limit or define the assets to be protected in a coherent way is unrealistic.[132] Indeed, any "trust approach that cherry-picks specific assets for protection and ignores the reality of interrelationships is likely to perpetuate the failings of natural resources law."[133] As knowledge about ecology grows, it is becoming increasingly clear that all parts of the natural and built worlds are closely intertwined in such a way that makes identifying specific trust assets far harder than the well-intentioned protectors of rivers and waterways would have thought centuries ago.[134] Protecting such broad interests as sustainability, or a healthy atmosphere, or a specific carbon footprint require a far broader understanding of which assets may be held in trust.[135]

Yet, increasing the flexibility or broadening the way in which a trust *res* is identified is also unrealistic and, in many ways, highly undesirable even if the intended goal is admirable. Frequently changing and reassessing the holdings or *res* of the trust adds an element of unpredictability to

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[130] *See* Torres & Bellinger, *supra* note 7, at 287–88 (discussing the expansion in understanding what might legitimately constitute the *res* of the public trust doctrine). *See also* Ralph W. Johnson & William C. Galloway, *Protection of Biodiversity Under the Public Trust Doctrine*, 8 TUL. ENV'T L.J. 21 (1994) (arguing in favor of expanding public trust theory to advance species protection and biodiversity).

[131] *See Ecological Realism*, *supra* note 7, at 67.

[132] *See* Wood & Galpern, *supra* note 7 ("[C]leaving any category of resource from the trust endowment leaves it open to destruction."). *See also id.* at 283–86 (arguing for an expansive definition of the *res* of a public trust); Takacs, *supra* note 7, at 718–20 (noting the gradual expansion in the theory as to what might constitute the terms of a public trust); *No Ordinary Lawsuit*, *supra* note 6, at 23 (arguing that "the air and atmosphere, along with other vital natural resources, are within the *res* of the public trust.").

[133] *Ecological Realism*, *supra* note 7, at 83.

[134] *See, e.g.*, Craig Anthony Arnold & Lance H. Gunderson, *Adaptive Law and Resilience*, 43 ENV'T L. REV. 10426 (2013) (noting the dichotomy that while "[a]ccording to resilience science, interconnected ecological and social systems are dynamic, complex, and subject to abrupt and unpredictable change, . . . environmental law's foundations assume that nature is relatively stable, changing primarily in linear patterns within a range of predictable conditions.").

[135] Johnson & Galloway, *supra* note 130, at 31–32.

the enterprise. This is unpalatable for different reasons including lack of certainty, blurred boundaries between private and public interests, and the constant need to debate the contours of public assets and private property rights in an inefficient way.[136]

Relatedly, a traditional private trust is created with a (hopefully!) clear statement by a settlor as to what the settlor demanded with respect to the management of the *res* by the trustees.[137] At the same time, a well-written trust agreement will include some rational way to allow appropriate flexibility in the management of the trust if new information becomes available or assumptions change.[138] While recognizing the value of stability, a well drafted trust agreement builds in principled standards for controlled flexibility.[139] The public trust doctrine in its current form does not seem well-suited to this delicate balance. The terms of the trust are not entirely clear.[140] Because of this initial ambiguity, it can be difficult to introduce flexibility in a way that is not subject to political whims or expensive, inefficient lobbying or litigation.[141]

Third, in most trusts—public and private—there is often some irreconcilable and inherent conflict between the needs or desires of different classes of beneficiaries, particularly if they are of different generations or ages.[142] Weighing the interests of past, present and future generations is an art, not a precise science. Trustees are bound to a duty of impartiality such that they do not unduly favor some classes of beneficiaries over

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[136] *See* Huffman, *supra* note 10, at 364–65 (critiquing expansive view of *res* in the public trust).

[137] *See* Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 300–01 (1988).

[138] *See id.* at 296.

[139] *See, e g.*, Arnold & Gunderson, *supra* note 134, at 10427 ("[L]aw is brittle and maladaptive if it assumes and reinforces a static state that does not match ecological or social change."). This raises a particular difficulty because the ever changing nature of our ecological knowledge challenges the importance of predictability in law. *See Liberating the Public Trust Doctrine*, *supra* note 7, at 186–87 (noting that "[t]he essence of property law is respect for reasonable expectations. The idea of justice at the root of private property protection calls for identification of those expectations which the legal system ought to recognize.").

[140] Some have argued that, at least in the broadest of strokes, the terms of the trust can be identified. *See* Torres & Bellinger, *supra* note 7, at 284 (stating simply that "[t]he public trust doctrine instructs our government to protect and preserve for both present and future generations the right of all citizens to enjoy natural resources free from substantial impairment or depletion.").

[141] *See* Torres & Bellinger, *supra* note 7, at 311–12.

[142] *See generally* Wood & Galpern, *supra* note 7, at 283 (referencing "irreconcilably conflicting beneficiary interests").

others.[143] Fortunately, a well-planned trust agreement will offer guidance as to the settlor's wishes with respect to how these interests should be reconciled or mediated when they arise.[144] In contrast, in the environmental context of a public trust, there is no clear guidance as to how respect for the past, the needs of the present, and the demands of the future should be balanced when there is inevitable conflict—perceived or real—between them.

Fourth, and closely related, a typical trust includes standards by which the fidelity of the trustees can be measured.[145] However, in a project as complex as environmental regulation—with long- and short-term impacts that are often unknown—this may be difficult to assess.[146] This is a problem in trusts of all kinds,[147] but the specific nature of an environmentally oriented trust concept raises unique difficulties. In the context of developing an adaptive model for environmental regulation it was noted:

> "Dead" approaches can be "resurrected" when the conditions are right, and alternate approaches can stimulate a seemingly failed approach to respond adaptively and become successful. One of the most challenging aspects of developing a legal system that both requires adaptation to changed conditions and allows for systems to evolve over time is that a primary function of the legal system is accountability. . . . Defining the standards and boundaries to which people and entities will be held accountable can

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[143] J.C. Phillips, *Some Instances of the Trustee's Duty to Act Fairly Between Different Classes of Beneficiaries*, 10 U. QUEENSLAND L.J., 83 (1977).

[144] *See* Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 223 (2011).

[145] *See* Phillips, *supra* note 143, at 89–90.

[146] For a further discussion of some of these practical difficulties, *see* Wood & Galpern, *supra* note 7, at 282–84. *But see* Ryan et al., *supra* note 6, at 38 (arguing that in the public trust context, "what we're dealing with is just basic asset management, and that management is covered by fiduciary obligations of protection. So when we look at the atmosphere, we do have definable scientific standards . . . [T]he public trust claim is discernible because it has these standards.") (quoting Mary Wood).

[147] *See* Macey, *supra* note 137, at 298 ("Perhaps the most obvious question is whether the initial premise, that conditions often change in ways unforeseeable by the settlor, is necessarily correct. Put another way, the question becomes whether the transaction costs of writing a trust instrument that specifies all conceivable future contingencies are truly infinite. Even if the answer to the question is yes, it is interesting to wonder: At what point does it become inefficient to plan for the unexpected?").

> have significant impact on the resilience of ecosystems, social systems, and legal systems.[148]

Compounding this difficulty is the fact that the application of traditional fiduciary duties is not as clear in the environmental context as in a traditional trust.[149] Even if the nature of the *res,* the terms of the trust, and the needs of all beneficiaries were entirely clear, it is not clear how the "trustee" of the trust should understand and then comply with such duties as loyalty and care.

Fifth, in the environmental law arena there is a lack of clarity as to who the "settlor" of the trust originally was.[150] Perhaps it is not necessary to answer this question. If preserving natural resources "in trust" is, as commentators have suggested, an "ancient and enduring"[151] principle, then this may not be a critically important question to answer. From a philosophical or theological perspective, the answer for many would be that the settlor of the trust is divine.[152] More narrowly, if the public trust doctrine is considered to be "rooted in the original social compact that citizens make with their governments,"[153] then the settlor would be the original citizenry. Indeed, there is a steadily growing body of scholarly literature arguing that the public trust doctrine is an important part of constitutional law.[154] Peter H. Sand asked this critically important question in context when he inquired:

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[148] Arnold & Gunderson, *supra* note 134, at 10441.

[149] *See generally* Wood & Galpern, *supra* note 7, at 289–97 (detailing the application of traditional trust fiduciary principles in the context of the public trust doctrine for natural resources).

[150] Indeed, one commentator called the assets protected by the public trust doctrine to be "gifts of nature." Takacs, *supra* note 7, at 718. If this is the case, then a reference in some manner to a divine author would seem to be necessary—and, yet, that would be difficult or impossible to translate into a legal theory. *See* Huffman, *supra* note 10, at 368 ("[W]e will search in vain for a creator who, under trusts law, cannot be either the trustee or the beneficiary. Without a creator we cannot know the terms of the trust."); *Fish Out of Water*, *supra* note 7, at 535 (noting the lack of the creator or settlor of a public trust and noting, correctly, that "the trust as a relationship between parties holding legal and equitable title can only be understood with references to the purposes of the creator").

[151] Wood & Galpern, *supra* note 7, at 272.

[152] *Fish Out of Water*, *supra* note 7, at 542 ("[A]dvocates of the modern public trust doctrine might be pleased if the courts would look to God, or Mother Nature, or the natural law as the creator of the trust.").

[153] Wood & Galpern, *supra* note 7, at 274.

[154] *See generally* Wood & Galpern, *supra* note 7, at 273–77; Torres & Bellinger, *supra* note 7, at 288–29 (describing the public trust as something that preexisted the Constitution).

> To the extent that fiduciary metaphors . . . are used in a legal sense (rather than as sheer rhetoric, which is often the case!), they all express the common "altruistic" concept of agency, or, acting on behalf and for the benefit of another. What seems to distinguish public trusteeship from the rest of the existence of a "settlor" who creates the trust? The question in the case of public trusteeship is who is the settlor? Presumably it is the community . . . that designates governmental authorities as public trustees to manage the corpus (the body) of the trust for the benefit of "the people" (including the yet-unborn beneficiaries of an intergenerational trust), and which then empowers the beneficiaries to enforce the terms of the trust against the trustees.[155]

In the American legal system, the identity of the "settlor" has the added complexity created by a federal system: is the settlor—the original "owner"—of the resources placed in trust, the federal government or the government of the state or states in which the resource is located? Is it the federal government who created the trust when lands were conveyed for the creation of new states? This, too, has been the subject of legal debate and academic commentary.[156] Is a system of multiple state level trustees efficient or effective when the public trust doctrine is evoked to protect not only specific assets but broader environmental goods that cannot be contained within the geographic boundaries of a single state?[157] With a lack of clarity as to the settlor, there are thorny questions that can arise when the presumed desires of the unidentified settlors seem to conflict with the demands of at least some of the beneficiaries.[158]

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[155] Turnipseed et al., *supra* note 7, at 8.

[156] *See* Wilkinson, *supra* note 33, at 439 (observing that "In the United States . . . there were two potential owners, the United States and the state within which the navigable watercourse was located. The matter of ownership was not so pressing in the original thirteen states, where lands within state boundaries never passed o the United States; the colonies, now states, held title to lands within their borders before the union was formed and they retained ownership to those lands afterwards. The situation was different, however, with respect to the western lands that the United States obtained through treaties."). *See also Fish Out of Water*, *supra* note 7, at 539–44 (addressing complexities of identifying the settlor of the public trust).

[157] *See* Berliner, *supra* note 6, at 354 ("The effects of climate change do not stop at state borders, so why should the obligations under the PTD?").

[158] This problem is discussed more fully in Thomas Gallanis, *The New Directions of American Trust Law*, 97 IOWA L. REV. 215 (2011). He asks, "whose wishes about the administration of the trust are paramount: the settlor who established the trust and specified

Sixth, there is still another difficulty with the "cast of characters" question.[159] There is uncertainty as to who the trustees of the trust are in the context of environmental protection. In the broadest sense, it can be said that all of the living are to act as trustees for those who will come. It states the obvious to note that all the living can, for good or for evil, impact the environment. From a moral perspective, this broad responsibility seems to be the optimal approach—and the one that is most accurate. The language of NEPA discussed above broadly references the "responsibility of each generation to be a trustee[160] supporting a view that, as a moral matter, this obligation is broadly shared." However, in a legal sense it is harder to determine who is to serve in the role of trustee.[161]

It seems most logical that the trustee at any given time is the legislature. This branch is most closely responsive to the citizenry, and "[t]he legislature stands accountable to the people as trustee. . . . Agencies within the executive branch act as authorized agents of the trustee and must meet fiduciary standards as well."[162] On the federal level, "the trust approach would hold Congress accountable, at least in the court of public opinion, as the ultimate trustee with a duty to act."[163] In addition, there may be circumstances in which the jurisdictional nature of government authority over and impact on resources—particularly those that cross boundaries—is in the nature of a co-trusteeship between federal and state authorities, and between national and international authorities.[164] This would involve multiple legislatures as co-trustees. There is also an argument—in my view, less convincing—that the judicial branch serves in the role of trustee because it can review the deeds of other

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the terms of its governance in the trust instrument, or the beneficiaries, who are the equitable owners of the trust assets." *Id.* at 218.

[159] *See id.* at 230.

[160] The National Environmental Policy Act of 1969, § 101(b), 42 U.S.C. § 4331(b) (1970).

[161] *See* Weston, *supra* note 9, at 376 ("At a minimum, each of us has a moral responsibility to ensure that today's children and future generations inherit a global environment at least no worse than the one we received from our predecessors. . . . When this responsibility-towards-future-generations axiom is considered from a legal perspective, however, it emerges less obvious.").

[162] Wood & Galpern, *supra* note 7, at 278. *See also Ecological Realism*, *supra* note 7, at 75 ("The legislature is the trustee of the assets in its role as primary governing branch of the sovereign. The executive branch is by nature an 'agent' of the legislature. . . . [A]gencies are agents of the trustee, encumbered with the duty to carry out sovereign trust obligations."); and *No Ordinary Lawsuit*, *supra* note 6, at 23 (positing that "the legislature and its implementing legislature are public trustees").

[163] *Fiduciary Obligation*, *supra* note 7, at 135.

[164] *See* Wood & Galpern, *supra* note 7, at 287–89 (discussing "sovereign co-trusteeship" relationships on both the domestic and international level).

actors to determine if they are compatible with protecting the needs of the beneficiaries.[165]

It is also important, in any trust, to avoid too much overlap in identity between the settlor, beneficiaries, and trustees. This is prohibited in the law of private trusts, which requires that these parties be distinct.[166] Although a single actor may wear more than one hat, he or she may not be the sole person in all of these roles.[167] By analogy, in the environmental context, "the state" or "the people" should not be the sole settlor, trustee and beneficiary.[168]

It is also unclear what the "terms" of the trust agreement are.[169] This may be part of natural law which predates government.[170] If that is the case, there would be no need for any express statement of the terms. Indeed, "the existence of a constitutional trust does not depend on the formulation of express constitutional public trust provisions. . . . [T]hese expressions do not create a new constitutional right but rather articulate the pre-existing, inherent property rights held by the government and reserved by the people when forming their government."[171] Certainly, at a minimum, the terms of any environmental trust should include a duty to prevent waste.[172] However, there is much else about the particular terms of the trust that are unclear. This can be problematic. The expansion of the trust doctrine, without clear guidelines or standards of care introduces uncertainty at best and impermissible overreach at worst, no matter how noble the motives. If the terms of the trust were merely to protect known, specific assets for the benefit of the present and future

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[165] *See id.* at 279–80.

[166] *See* Macey, *supra* note 137, at 295–96 n.2 (citing G. KEETON & L. SHERIDAN, THE LAW OF TRUSTS 18–32 (10th ed. 1974)).

[167] *Fish Out of Water*, *supra* note 7, at 543.

[168] This problem is also addressed in *Fish Out of Water*, *supra* note 7, at 543–45.

[169] *See* Wilkinson, *supra* note 33, at 459 (noting the complexity of determining "whether the substantive standards for administering the trust are defined by state or federal law" or whether it is a complex, interconnected scheme incorporating both). *But see Fiduciary Obligation*, *supra* note 7, at 111–12 (arguing that defining the obligations and terms of the trust "should not be overwhelming to judges. Public trust law, as developed over two centuries, encompasses scores of individual cases").

[170] *See generally* Smith & Sweeney, *supra* note 7, at 327 (noting it is "important that legislatures utilizing the public trust doctrine do so within a set of principled limits").

[171] Wood & Galpern, *supra* note 7, at 276. *See also id.* at 277–78.

[172] This is elaborated on more fully in *Fiduciary Obligation*, *supra* note 7, at 95. *See also No Ordinary Lawsuit*, *supra* note 6, at 23 (stating that in the public trust context, the trustees owe the beneficiaries "protection against 'substantial impairment' of the air, atmosphere, and climate system, which amounts to an affirmative duty to restore its balance").

public it is easier to divine the terms of the trust from past practice and established custom. This becomes far more difficult if and when the goals of the public trust are expanded to include broader goals of environmental and ecosystem protection rather than preservation of specific assets.[173]

Once the terms of the public trust are expanded this way, it could rightly be said that there is a danger of a "voracious appetite of the contemporary public trust doctrine."[174] This appetite is hard to control without clear terms for the public trust that offer guidance as to what assets should and could be protected—and how.[175]

Finally, as demonstrated by *Juliana*, it is still not clear whether the public trust doctrine can be invoked on the federal level in any expansive way or where it remains primarily the province of the states.[176] That debate is beyond the realm of this Article. In part, this is because others have discussed this debate in far more detail.[177] More importantly, even if cases were to begin holding that there is a federal public trust for the environment, and even if that claim could be asserted beyond the traditional confines of specific assets, and even if the trust could be asserted on behalf of future generations, the *practical* benefits of such a victory would be more limited than they may appear.

A finding by a court that the public trust doctrine exists in this context would likely result in a declaratory judgement as to whether and how the political branches had satisfied the terms of the trust.[178] If the court found that they had not done so, then the political branches would be directed to develop a plan to remedy this breach.[179] This would require

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[173] Indeed, one expression of the breadth that this could entail is found in Byrne, *supra* note 7, at 915, where the author argues that the public trust doctrine "should provide a basis to overcome regulatory takings limitations on environmental regulation." Such a broad reading would run into dangerous and direct conflict with the requirements of the takings clause and the requirements of just compensation.

[174] Smith & Sweeney, *supra* note 7, at 333.

[175] This fear was expressed in more urgent terms in *Fish Out of Water*, *supra* note 7, at 567 ("The trust concept contradicts democratic theory by separating the state, as trustee, from the public, as beneficiary, as if they are two distinct entities. The constitutional rights concept invites the creation of new rights at the expense of existing rights—environmental rights at the expense of property rights.").

[176] *See No Ordinary Lawsuit*, *supra* note 6, at 50.

[177] *See generally id.* at 49–51 (arguing in favor of a federal public trust doctrine); Torres & Bellinger, *supra* note 7, at 294–97 (arguing in favor of a federal public trust doctrine).

[178] *See No Ordinary Lawsuit*, *supra* note 6, at 68.

[179] For fuller discussion of the plan that would be required, *see generally id.* at 64–65, 68 ("public trust cases call on the judiciary to evaluate the performance of other branches of government in fulfilling the fiduciary obligations they owe to the people").

extensive court supervision.[180] This is the point at which the limitations of the traditional trust paradigm seem most obvious.

This would require that courts engage in close supervision of the political branches, both "requiring a plan that includes measurable steps"[181] and "continued oversight to ensure proper execution."[182] The judiciary is not the expert in determining what might effectively satisfy the trust obligations in the absence of clarity regarding so many elements of the trust.[183] The political branches may, for complex reasons and political pressures, be unable or unwilling to take the broader view necessary to accomplish this task as trustees.[184] The fact that they were found to have violated a fiduciary obligation to begin with may not necessarily indicate an inability to meet those obligations. But, it may indicate unwillingness, lack of resources, or genuine uncertainty as to the best way forward on complex matters. A judicial declaration that there is a broad public trust would still require someone to determine what the limits of the *res* in the trust are; how the trustee failed to protect the *res*; what must be done to protect the *res*; and how to monitor that all this had been accomplished.[185] The political branches and the courts have inherent limitations on their ability to do this well.[186]

Because of this, a modest proposal to introduce the concept of a "directed trust" approach to environmental law and policy might be a useful way to develop better protection for future generations regardless of whether or not federal courts expand the public trust doctrine in the ways sought by plaintiffs in cases such as *Juliana*.[187]

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[180] This was explained in *id.* at 24 (indicating that the Atmospheric Trust Litigation "anticipates long-term implementation of climate recovery plans under continuing court supervision"). However, it is also argued that this is a role that courts have already played in other legal contexts. *See id.* at 71–72; and Petition for Rehearing *En Banc*, *supra* note 119, at 3–4 (speaking of the similarity of the remedy sought here to "decades of remedial plans like those ordered and overseen by various circuits to enforce the declaratory judgment of *Brown v. Board of Education*" and noting that "systems of segregation were no less complex to remedy than the government system of promoting fossil fuels").

[181] *No Ordinary Lawsuit*, *supra* note 6, at 72.

[182] *Id.*

[183] Indeed, this can generate "anxiety about judicial policy-making on technically complex and socially important issues." Araiza, *supra* note 7, at 697.

[184] *See id.* at 733–34.

[185] The expansion of the public trust doctrine would "empower[] the courts to mandate actions by the executive and legislative branches of government, even when those branches have chosen not to act." *True History*, *supra* note 7, at 16.

[186] *See* Araiza, *supra* note 7, at 696–97.

[187] *See No Ordinary Lawsuit*, *supra* note 6, at 22–23.

IV. TOWARD A "DIRECTED TRUST" APPROACH TO ENVIRONMENTAL LAW AND POLICY

Certainly, a "public trust" is not, and never has been of the same nature as a private trust established to manage private property.[188] Thus, perhaps one response to the weaknesses outlined above is to acknowledge that the analogy is an imperfect one and that it is unwise to try to "shoehorn" any critique of the public trust doctrine into the framework of a private trust. This would require a simple concession that the term "trust" means radically different things in the public and private contexts and that analogizing the two uses of the term "trust" is, at best, an exercise in futility.

This approach would view the moniker of "trust", as an accident of legal history not intended to drive development of modern environmental policy.[189] Public and private trusts strive toward different and, perhaps, inconsistent ends that cannot be analogized.[190] It may simply be best to view the word "trust" as having a unique meaning in each of these circumstances. This would allow the public trust doctrine more unfettered parameters in which to expand. Accepting this view would also argue against any proposal to graft a new development in private trust law onto public trust theory because this might compound the problem of the flawed analogy.

Conceding this, in light of the movement to reimagine the public trust doctrine and expand its contours to address the complexity of modern environmental needs, perhaps there is one useful strand of private trust law that may be helpful. One overlooked aspect of private trust law might be borrowed for public trust law to make it both more effective and less fraught with uncertainty.

This modest proposal is to look to a specific new development in private trust law to address some of the difficulties of implementing the public trust doctrine: the rise of the directed trust. It is worth exploring whether a "directed trust" approach, rapidly gaining favor in traditional private trusts, might be productively grafted onto environmental law and

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[188] *See* Zachary C. Kleinsasser, *Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine*, 32 B.C. ENV'T AFF. L. REV. 421, 422–24 (2005).
[189] *See* Huffman, *supra* note 10, at 368 (arguing that "the public trust doctrine cannot be explained or understood as a branch of the law of trusts"); *Fish Out of Water*, *supra* note 7, at 538 ("The categorizations of trusts are dependent upon the identification of the three essential parties to a trust relationship. As indicated above, three distinct entities are relevant to a trust's creation and implementation: the creator, the trustee, and the beneficiary. Who are the creator, trustee, and beneficiary of the alleged trust of the public trust doctrine?").
[190] *See* Huffman, *supra* note 10, at 369.

policy. How and where this might best be done is not entirely clear. However, just as the concept of a directed trust arose to fill a gap in traditional private trust law, a similar concept may fill a gap in the way in which the public trust doctrine—or the desire for an expanded public trust doctrine—works in the environmental protection realm.

A. The "Directed Trust" in Modern Trust Law

In a traditional trust, the settlor conveys legal title to property to a trustee who then, in accordance with the terms of the trust agreement, relevant local law, and traditional fiduciary responsibilities, manages it for the benefit of the intended beneficiaries. Not only does the trustee manage the trust assets, but the trustee also has legal title to those assets. The concept of the "directed trust" has evolved as "trust law has developed over recent decades to allow the duties of a trustee to be separated among various fiduciaries."[191] At its core, the concept of a "directed trust" allows a settlor to name someone other than a trustee to have decision making authority over some aspects of the trust and its corpus.[192] That is, a directed trust still has trustees as does any other trust. But, it also has "directors" with a distinct role to play.[193]

Over the years, many states developed individual statutes allowing, under different names, trust "protectors" or trust "advisors" or trust "directors" to participate in the functioning of a trust.[194] Although all of these terms are still in use and have some differences in meaning, for reasons described below, this Article will use the terms "directed trust" and "trust director."[195] While the concept was gaining popularity, there was much uncertainty on such fundamental issues as the correct terminology for this role[196] and the relationship between the trustees and those serving

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[191] James Kronenberg & Dana Fitzsimons, *Is Good Faith Really a Standard of Care?*, SA001 ALI-CLE 121 (July 19–20, 2018) Westlaw.

[192] *See* John D. Morley & Robert H. Sitkoff, *Making Directed Trusts Work: The Uniform Directed Trust Act*, 44 ACTEC L.J. 3, 5–6 (2019).

[193] *See* Jocelyn Borowsky, *Directed Trusts from a Delaware Perspective*, TSWB20-ALI -CLE 67 (Mar. 24, 2015) Westlaw.

[194] A leading example of this was the directed trust law of Delaware which, in many respects, helped to shape the development of this area of law nationwide. For a discussion of Delaware directed trust law pre-UDTA, *see generally id.*

[195] To preserve the original language of the authors, in any quote used in this Article, I have retained the author's preferred term regardless of whether it was advisor, or protector, or trustee. Unfortunately, this may lead to some linguistic confusion. However, I intend that the terms be used synonymously for purposes of this discussion.

[196] For example, in Robert A. Stein & Benjamin Orzeske, *The Revolution Continues: Toward Greater Modernization and Uniformity in Trust and Estate Law*, 76 BENCH &

in director capacity. Perhaps most controversially, there was a lack of clarity with respect to the fiduciary obligations, if any, that such directors would have, either directly or vis-à-vis the trustees.[197] As the role of trust directors expanded, there were critical questions about their responsibilities still left unanswered. Indeed, one commentator referred to them as "an orphan of the law."[198]

However, in 2017, the National Conference of Commissioners on Uniform State Statutes adopted the Uniform Directed Trust Act ("UDTA") to propose a comprehensive, consistent approach to the directed trust.[199] This replaced an earlier, less comprehensive treatment of directed trusts

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BAR MINN. 20, 22 (2019), the authors discuss the ambiguities that exist when inconsistent names are used for parties playing roles that are very similar and the dramatic consequences that this may have for liability and other substantive disputes.

[197] The debate over the fiduciary obligations of trust directors before the enactment of the Uniform Directed Trust Act is explored comprehensively in Alexander A. Bove, Jr., *A Protector by Any Other Name . . . .*, 8 EST. PLAN. & CMTY. PROP. L.J. 389 (2016); Alexander A. Bove, Jr., *The Case Against the Trust Protector*, 37 ACTEC L.J. 77 (2011) (criticizing the confusion with respect to fiduciary obligations that arises from vague rules on directed trusts and trust protectors); Stewart E. Sterk, *Trust Protectors, Agency Costs and Fiduciary Duty*, 27 CARDOZO L. REV. 2761 (2006); Wayne E. Reames, *Beyond UTC Section 808 and the Uniform Directed Trust Act*, 45 ACTEC L.J. 61 (2019) (suggesting that many of these difficulties persist even after the promulgation of the UDTA); *Trust Advisors,* 78 HARV. L. REV. 1230 (1965); Philip J. Ruce, *The Trustee and the Trust Protector: A Question of Fiduciary Power. Should a Trust Protector be Held to a Fiduciary Standard?*, 59 DRAKE L. REV. 67 (2010); Lawrence A. Frolik, *Trust Protectors: Why Have They Become "The Next Best Thing*?", 50 REAL PROP., TR. & EST. L.J. 267 (2015).

[198] Paul B. Miller, *Regularizing the Trust Protector*, 103 IOWA L. REV. 2097 (2018).

[199] NAT'L CONF. OF COMM'RS ON UNIF. STATE L., UNIFORM DIRECTED TRUST ACT (2017) [hereinafter UDTA]. For additional commentary on the UDTA, *see generally* James P. Spica, *From Strength to Strength: A Comment on Morley and Sitkoff's Making Directed Trusts Work*, 44 ACTEC L.J. 215 (2019); Morley & Sitkoff, *supra* note 192, at 3; James P. Spica, *Used Not Only as Directed: Michigan's Adaptation of the Uniform Directed Trust Act*, 64 WAYNE L. REV. 339 (2018) [hereinafter *Michigan*] (describing the specific process of incorporating the UDTA in Michigan trust law); Erica E. Lord et al., *Directed Trust And Other Modifications*, SZ016-ALI-CLE 1 (2018) Westlaw; ROBERT F. SITKOFF ET AL., *Trusts, Beneficiaries, Directors! The Uniform Directed Trust Act Can Conjure a Hollywood Ending from Even the Most Difficult Family Script*, *in* 52ND ANNUAL HECKERLING INSTITUTE ON ESTATE PLANNING (2018); William D. Lucius & Shirley B. Whitenack, *Directed Trusts: A Primer on the Bifurcation of Trust Powers, Duties and Liabilities in Special Needs Planning*, 15 NAELA J. 71 (2019); Alexis Gettier et al., *New Direction: The Connecticut Uniform Directed Trust Act*, 33 QUINNIPIAC PROB. L.J. 274 (2020) (describing the specific attributes of Connecticut's adaptation of the UDTA); David Biscoe Bingham, *Arkansas Enacts Version of the Uniform Directed Trust Act: Relief for "Directed Trustees" Begins in 2020*, 55 WTR ARK. L. 10 (2020) (describing the specific attributes of Arkansas's adaptation of the UDTA); and Miller, *supra* note 198, *passim*.

in the Uniform Trust Code.[200] The UTDA also paved the way for expansion of the use of trust directors since some significant ambiguities have been resolved.[201]

First, with respect to clarifying terminology, the UDTA adopted the term "trust director" rather than "protector" or "advisor."[202] Various state statutes and commentators still use the popular "trust protector."[203] However, this Article will use the term "trust director" in deference to the choice made in the UDTA and in the hope that greater consistency may come to the trust lexicon.

At its core, a directed trust exists when "the terms of the trust grant a person other than a trustee a power over some aspect of the trust's administration."[204] The trustee remains the legal owner of the property and continues to have the rights and responsibilities of traditional trustees. However, a trust director has the authority and responsibility to direct the actions of the trustee in various ways specified by the settlor in the trust instrument. These responsibilities can be quite broad or fairly narrow, depending on the vision of the settlor. Unlike trustees who hold legal title to the trust *res* and the beneficiaries who hold an equitable claim to it, a trust director has no ownership interest in the trust property.[205] However, a trust director is given specific authority to "direct" the trustee on various matters identified by the settlor.[206]

The UDTA recognizes that the settlor lays out the exact nature of the director's powers in the trust agreement.[207] Thus, the exact scope of

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[200] NAT'L CONF. OF COMM'RS ON UNIF. STATE L., UNIFORM TRUST CODE § 808 (2010) (amended in 2018 to note that "[f]ormer UTC Section 808 was largely superseded by the Uniform Directed Trust Act in 2017"). In contrast to earlier attempts to codify directed trusts, the "UDTA deftly addresses the question of the fiduciary character of trust protection, and it also offers clear statements on the content and directionality of protectors' duties, and the impact of the latter on conventional fiduciary liability rules." Miller, *supra* note 198, at 2108. The UTC's § 808 is discussed more fully in Ruce, *supra* note 197, at 82–84.

[201] *See* Morley & Sitkoff, *supra* note 192, at 6–7.

[202] There has been much discussion with respect to the distinctions—subtle and otherwise—between these different terms. *See, e.g.*, Lord et al., *supra* note 199.

[203] Will Sleeth, *The Rise of Litigation Involving Trust Protectors*, EST. CONFLICTS (Apr. 5, 2016), https://www.estateconflicts.com/trust-protectors/ [https://perma.cc/PX8B-KQ6H].

[204] UDTA, *supra* note 199, § 1 cmt.

[205] *Id.* at Comment to § 12 ("[I]n a directed trusteeship, title to trust property belongs only to the trustee and not to the trust director."). *See also* Morley & Sitkoff, *supra* note 192, at 6 (noting that a trust director "[d]oes not hold legal title to the trust property and is not a trustee"); *id.* at 54 ("In the usual case, a trust director would not have custody of the trust property.").

[206] Morley & Sitkoff, *supra* note 192, at 6.

[207] UDTA, *supra* note 199, § 1 cmt.

the director's authority and responsibility will vary depending on the trust document. However, the director's powers could include "a power over the investment, management, or distribution of trust property or other matters of trust administration."[208] Depending on the way the settlor defined the trust director's obligations, there is a range of activities that the director is able to undertake on his or her own,[209] as well as a number of actions that the director may direct the trustee(s) to undertake or for which the trustees need the director's approval.[210]

While the UDTA's list of potential powers for a trust director is broad,[211] some of those powers most relevant in the context of drawing an analogy for environmental protection include the ways in which a trust director may have the power to:

- "[A]cquire, dispose of, exchange, or retain an investment";[212]
- "[A]dopt a particular valuation of trust property or determine the frequency or methodology of valuation";[213]
- "[S]elect a custodian for trust assets";[214]
- "[M]odify, reform, terminate, or decant a trust";[215]
- "[P]rosecute, defend, or join an action, claim, or judicial proceeding relating to the trust";[216]
- "[V]eto or approve the actions of a trustee."[217]

In addition, a trust director also has "any further power appropriate to the exercise or nonexercise of a power of direction"[218] which could include such things as "mak[ing] a report or accounting to a beneficiary

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[208] *Id.* § 2(5).
[209] *Id.* ("A power of direction may . . . be structured as a power to act independently—for example, by amending the terms of a trust or releasing a trustee from liability.").
[210] *Id.* ("A power of direction may be structured as a power to direct the trustee in the exercise of the trustee's powers—for example a power to direct the trustee in the investment or management of the trust property.").
[211] *See* Morley & Sitkoff, *supra* note 192, at 10–11 (describing the broad scope of the power of direction).
[212] UDTA, *supra* note 199, § 6(a).
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.* § 9(a).
[218] UDTA, *supra* note 199, § 6(b)(1).

or other interested party."[219] Thus, these obligations and rights of the trust director will vary to include those specific things that the settlor believed were most critical to protecting the rights of all the beneficiaries and protecting the health and value of the trust *res*.

The breadth of each of these powers is varied in scope and can have an enormous range. For example, the "power to direct trust investments may be a plenary power to direct the investment of all the trust's assets or a power to veto the sale of a single 'heirloom' investment."[220] A settlor may intend to vest the trust director with expansive control over all or most of a trust's assets—or, can direct the director's authority only to an asset with particular value or complexity.[221] The exact nature of the scope and status of the director's responsibilities is "left to the fertile minds of lawyers."[222]

The role of a trust director can be envisioned as an affirmative power to direct the actions of the trustees or it may be framed in a more limited, potentially passive way that requires that trustees seek the consent of the trust director on matters of particular significance to the settlor.[223] Alternatively, the UDTA also contemplates the possibility of "springing" obligations for a trust director that would mean that the director "would not be under a duty to act unless requested to do so by the beneficiary."[224] In this scenario, the trust director could be called upon to act when a beneficiary had reason to seek the protection of a director's judgement or action on a particular matter of concern, particularly if the beneficiary had doubts about the actions of the trustee.[225]

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[219] *Id.*
[220] *Michigan*, *supra* note 199, at 367. A similar point is made in Lord et al., *supra* note 199.
[221] *Michigan*, *supra* note 199, at 367.
[222] Miller, *supra* note 198, at 2098.
[223] This distinction was drawn long before the formality of the UDTA was created. *See Trust Advisors*, *supra* note 197, at 1230 ("It is convenient to distinguish between trust advisors with powers of direction and those possessing only consent powers.").
[224] UDTA, *supra* note 199, § 8. *See also* Morley & Sitkoff, *supra* note 192, at 36 ("[A] trust director's duties could arise at a particular moment, rather than applying continuously, such that the director would not be under a constant obligation to monitor the administration of a trust."); Gettier et al., *supra* note 199, at 287 ("[C]lients may wish to establish trusts that are directed by trust directors as to investments because a trustee is uncomfortable overseeing a particular trust asset or a trust with highly concentrated holdings and would prefer that the investment responsibility be bifurcated.").
[225] Miller, *supra* note 198, at 2104–05 (as was described in more detail: "The particular functions to a protector performs [sic] may include constitutive functions, advisory functions, supervisory functions, and managerial functions. First, a protector will serve a constitutive function when called upon to make decisions about ways in which the trust is constituted. . . . Second, a protector will perform an advisory function where called upon to give nonbinding advice to trustees and/or beneficiaries in connection with ongoing

Resolving the intricate question of fiduciary obligation, the UDTA establishes that trust directors do have traditional, enforceable fiduciary obligations attached to those areas in which they have the authority to act. With respect to the trustees they direct ("directed trustees") the standard is "willful misconduct."[226] These decisions in the UDTA resolved the thorniest of the debates among jurisdictions that differed in their approaches to these questions.[227] If a trustee is directed to take a particular action by a trust director, the trustee will only be liable for a breach of fiduciary duty if willful misconduct was engaged in by the trustee when the trustee followed the direction of the trust director.[228]

In the realm of the private trust, the use of a trust director is rapidly expanding.[229] With the promulgation of the UDTA and the uniformity it proposes—particularly with respect to issues such as liability and fiduciary responsibility—it should be expected that this trend toward directed trusts will continue in the estate and wealth management arena.

B. The Appeal of a "Directed Trust" Approach in Environmental Protection

The functions that a trust director may play in a traditional trust may, by analogy, be extraordinarily useful in the environmental context.

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administration of the trust. Third, a protector will serve a supervisory function where required to keep abreast of trust administration, to monitor and evaluated trustee performance and/or the condition of trust property, to monitor and evaluated beneficiaries' claims for distributions, and to give or withhold consent to decisions provisionally made by trustees. Finally, a protector will perform a managerial function when granted responsibility for making binding discretionary decisions.").

[226] *See Michigan*, *supra* note 199, at 369 ("The trustee may be liable for any loss that results from her compliance with a trust protector's directions if the direction is contrary to the terms of the trust or constitutes a breach of a fiduciary duty that the trust protector owes to the trust beneficiaries."); and Lucius & Whitenack, *supra* note 199, at 11. The complexity of applying the willful misconduct standard is explored more fully in Jane Ditelberg, *Am I My Brother's Keeper: Willful Misconduct and the Directed Trustee Under the Uniform Directed Trust Act*, 44 ACTEC L.J. 207, 211 (2019) (further exploration of the complexity in applying the "willful misconduct standard").

[227] Morley & Sitkoff, *supra* note 192, at 32 ("[T]he UDTA employs the novel and technically innovative strategy of absorbing the existing fiduciary law of trusteeship. In most instances, the UDTA applies to a trust director the same fiduciary duties that would apply to a trustee in a like position and under similar circumstances . . . . [T]he UDTA prescribes clear rules that negate any duty of cross-monitoring among trust directors and trustees while at the same time requiring trust directors and trustees to share information.").

[228] *Id.* at 40.

[229] *See* Bove, *supra* note 197, at 1 (observing that the concept of using a trust director has "rapidly become one of the most popular and valuable tools for estate planning attorneys today").

Having someone in the role of a "trust director" can help address some of the limitations on the ability of the traditional trust doctrine to effectively protect the interest of multiple generations in ecological resources. It may also enable this to be done with some efficiency.[230] Is it possible to envision a role to be played by an entity other than the traditional legislative "trustee" to offer direction that allows it to better act on behalf of the present and future beneficiaries of the trust? Is it possible to envision a role to be played by an entity other than the judiciary to determine when the acts of a trustee should be questioned or overruled? If even possible, is it wise?

The powers of a trust director, and the way these powers can be customized make this a particularly useful role for responding, efficiently and expertly, to changed circumstances that the settlor may not have been able to predict.[231] A brief look at the permissible powers of a trust director may be useful in the environmental context.

A trust director may be given the power to "acquire, dispose of, exchange, or retain an investment."[232] In the environmental context, this could mean the obligation to retain public resources rather than allocate them for private development.[233] It may mean safely disposing of or remediating for retention those publicly owned assets and resources that

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[230] *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 670 (2004) (noting the "usefulness in minimizing agency costs" that comes with using a trust director).

[231] The importance of this aspect of trust directors is noted repeatedly. *See, e.g.*, Sterk, *supra* note 197, at 2762–63 ("[T]he settlor will typically be dead for much of the trust's duration. Practically, the settlor's demise often makes it impossible to determine whether the trustee is faithfully representing the wishes of the dead settlor. Even if the settlor left explicit instructions on some matters, the settlor could not possibly have anticipated all of the decisions a trustee would face. . . . [T]he settlor's lack of foresight . . . becomes more serious as the duration of the trust increases."); *id.* at 2763 ("As the living embodiment of the dead settlor, the protector has the potential to mitigate the foresight problems associated with dead hand control."); *id.* at 2794 ("[T]he settlor will typically have appointed the protector precisely because the settlor could not anticipate the circumstances that have, in fact, unfolded."); Reames, *supra* note 197, at 64 (noting that "moderns statutes . . . contemplate empowering protectors to take action to account for changes circumstances or unexpected situations"); Lord et al., *supra* note 199 ("[D]irected trust structures and trust modifications are becoming increasingly more common to effectuate the intended purpose of a trust or respond to unanticipated changes affecting the trust's creators or beneficiaries."). *See also* Richard C. Ausness, *The Role of Trust Protectors in American Trust Law*, 45 REAL PROP., TRUST & EST. L.J. 319, 321 (2010) (noting that the trust director function is most useful "if the trust is a large one or is expected to last a long time," a characterization that would clearly fit most public trusts in the environmental realm).

[232] UDTA, *supra* note 199, § 6(a).

[233] *No Ordinary Lawsuit*, *supra* note 6, at 50.

are posing an environmental risk.[234] It may also mean, through the principled and responsible use of market purchase or eminent domain, acquiring investments in assets that must be preserved for the future.[235]

A trust director may also have the authority to "adopt a particular valuation of trust property or determine the frequency or methodology of valuation."[236] One of the difficulties in protecting ecological interests is that it is difficult to quantify or account for the value of those things that are priceless.[237] Thus, a trust director in the environmental context should be one with scientific expertise who can look objectively at the value of environmental resources and determine their tangible and intangible value both now and in the future; the way in which current use may or may not deplete (or increase) future value; and the methodology of determining whether the value will be depleted or can be renewed.

In private trusts, when appropriate, a trust director can also have the authority to "select a custodian for trust assets."[238] This power is particularly valuable when there is an asset in the trust that is complex and requires expertise to care for it and preserve its value and well-being.[239] In the environmental context as well, there can be a need for someone to be a custodian for trust assets and to care for them with expertise and dedication to the needs of both the current and future generations.[240] Certainly, trustees can play this role. However, a custodian with specific expertise about a particular type of assets can contribute more effectively to doing so.

A trust director may also be granted, by the settlor, the ability to "modify, reform, terminate, or decant a trust."[241] This is a fairly broad—and, thus, potentially dangerous—power for a settlor to grant to a trust director.[242] However, it builds in a necessary flexibility to allow someone the authority to respond to changed conditions and information in a nimble way—without being unduly tied to the demands of a settlor whose knowledge of future developments may have been limited or short-sighted.[243]

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[234] *See* Brian E. Gray, *Ensuring the Public Trust*, 45 U.C. DAVIS L. REV. 973, 988 (2012).
[235] *See* Berliner, *supra* note 6, at 350.
[236] UDTA, *supra* note 199, § 6(a).
[237] Kanner, *supra* note 7, at 97.
[238] UDTA, *supra* note 199, § 6(a).
[239] Morley & Sitkoff, *supra* note 192, at 10.
[240] WEISS, *supra* note 9, at 7.
[241] UDTA, *supra* note 199, § 6(a).
[242] Ausness, *supra* note 231, at 3.
[243] This may be a power particularly necessary in the environmental sense. *See Fish Out of Water*, *supra* note 7, at 544 ("The people's intentions with respect to land and water resources have changed over time. They will continue to change in the future. The idea

A trust director has the authority, if the trust instrument so provides, to "veto or approve the actions of a trustee."[244] In the environmental context, this can be a very useful brake on specifically delineated activities (or failures to act) that are deemed by the trust director to be impermissible or harmful in the short or long term.[245]

Finally, and in a very practical way—given the roundabout progress of litigation such as *Juliana*—a trust director has the authority to "prosecute, defend, or join an action, claim, or judicial proceeding relating to the trust."[246] A trust director has the legal authority to defend the interests of the beneficiaries—any or all of them—in court against anyone who would harm the assets of the trust.[247] This is the case even if the person doing the harm is a trustee or another beneficiary and regardless of whether the harm results from an act of commission or omission.[248]

This power allows greater weight to be given to the wishes of the settlor.[249] Indeed, in the private trust context "[d]irected trusts grew out of the settlor's desire to retain or assert more control over trust management while at the same time benefitting from professional management of the

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that the people of one era can be the creator of a binding trust for the people of a later era is simply contrary to democratic theory. It would be a strict violation of democratic principles for the original voters and legislators of a state to limit, through a trust, the choices of the voters and the legislators of today.").

[244] UDTA, *supra* note 199, § 9 (a).

[245] *Trust Advisors*, *supra* note 197, at 1230.

[246] UDTA, *supra* note 199, § 6(a).

[247] *Id.* § 6(a) cmt.

[248] EDWARD E. CHASE, *New Developments: Trust Protectors, Directed Trusts*, 11 LA. CIV. L.J. TREATISE § 5:11 (2d ed. 2019).

[249] *See id.* ("A trust protector . . . is vested by the settlor with specified powers regarding the trustee's management of the trust."); *id.* ("By designating a trust protector, the settlor's interest in managing the assets for the benefit of the beneficiaries is better protected."); Miller, *supra* note 198, at 2099–2100 (calling the development of the directed trust "entirely to the credit of trust lawyers aiming to make trusts more responsive to settlor intent"); *id.* at 2100 ("[G]iven that protectors are usually engaged to enhance protection for settlors' expectations, protectors raise difficult questions about the proper objects of trust fiduciary duties."); *id.* at 2103 (noting "there is one important generalization that can be made of protectors: namely, that the core function of the protector is that of promoting respect for the settlor's intentions in the administration of a trust"); Ruce, *supra* note 197, at 68 (noting the important role of "making decisions related to the trust that the settlor is unable to make, most often because the settlor is deceased"); *id.* at 69 (speaking of "problems . . . often not foreseen by the settlor at the time of the trust's creation, and because the trust is irrevocable—and because the settlor is often dead—the settlor has very little input in how the trust adapts to these problems"); *id.* at 96 ("When acting in conjunction with the trustee, the protector can bring valuable insight regarding the original desires of the settlor.").

trust."[250] The existence of trust directors can be an asset to beneficiaries seeking to ensure that the trustees at any given time take their obligations seriously and that there is an efficient way to address deficiencies in trustee performance.[251]

This inability of the beneficiaries to take effective action may be particularly pronounced in scenarios where the beneficiaries are from future generations, poorly informed, disorganized, or lacking in resources.[252] A trust director, in essence, is one who understands the intent and the values of the settlor and has broad or tailored authority to defend that intent and those values when they are under threat. The reasons that a private party may desire to have a trust director are similar to the reasons one might be desired in the environmental context.[253]

Settlor intent is protected by investing the trust director with sufficient authority to override the actions of the trustees and the subjective preferences of the beneficiaries when necessary.[254] This can also

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[250] Borowsky, *supra* note 193.

[251] *See* Sterk, *supra* note 197, at 2768.

> [H]ow does the settlor ensure that the trustee acts in accordance with the settlor's expectations? Trust law's traditional response is to enlist the trust beneficiaries as monitors, through the mechanism of an action for breach of fiduciary duty. By subjecting the trustee to potential liability, trust law encourages the trustee to comply with settlor's instructions. But monitoring by the beneficiaries is both imperfect and costly. First, the beneficiaries themselves often lack the expertise to detect breach. Second, the beneficiaries may be dependent on the trustee, and hence they may be reluctant to take action to discipline the trustee.

Id.

[252] This is precisely the case in environmental claims brought on behalf of future generations.

[253] For further discussion of this analogy, *see* Miller, *supra* note 198, at 2103–04 ("[T]he settlor may have reason to question (if not necessarily to doubt) the trustworthiness of her trustees. The settlor may . . . also have reason to question her beneficiaries' capacity or motivation to effectively monitor the trustee and to take enforcement action as needed on bases that would resonate with the settlor given her intentions (which may, or may not, be aligned with the particular interests of particular beneficiaries). The settlor may anticipate that changes bearing on the relative desert of her beneficiaries might justify adjustment of beneficial entitlements or the exercise of dispositive discretions, but worry that the trustee may not respond appropriately. Additionally, or alternatively . . . the settlor may worry about the impact of changes in law, policy, or socio-economic context on the realization of her intentions, and doubt the wisdom of leaving it to his or her trustees and/or the courts to respond to same. Finally, the settlor might be generally skeptical about the court's capacity or willingness to effectively and efficiently protect her interest in sound administration of the trust.").

[254] *See id.* at 2089 ("Trust protectors disrupt common assumptions about the fiduciary administration of trusts. Protectors are interpolated between trustees and beneficiaries . . . in

entail a mediating role in which the party in the role of the trust director can assist the beneficiaries and trustees in better understanding each other and resolving their disputes. In a trust that involves a complex *res*, this has an even more vital function.

C. Implementation of a "Directed Trust" Approach to Environmental Protection in American Law

In the context of private trusts, it has been predicted that the increased use of trust directors "will represent the single most profound change in trust design, administration and practice of the first half of the twenty-first century."[255] Whether or not this will come to be is a matter of much spirited speculation among estate planners and asset managers.[256] However, this Article makes a modest proposal: Those concerned with protecting the interests of future generations should consider whether there is a way to incorporate directed trust principles into environmental law and policy.

Hopefully, the potential advantages of having a person, entity or institution take on the role of a "trust director" for environmental affairs have been demonstrated above in the description of the ways in which this role, crafted for private trusts, might be analogized to the environmental protection regime.[257] Is it possible to have an appropriate entity that could function as a "trust director" when it comes to natural resources? Is it possible to add to the imperfect and uncertain trust model a well-disciplined, highly expert group of policymakers who could bring to public debate the skills and attributes that trust directors have in the private context? Is it feasible to have someone charged with representing the members of future generations at all levels of present-day decision making? Is it possible to carve out specific responsibilities that are clear and well suited to a trust director's expertise?

Certainly, this would be a challenge for many significant reasons:

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the administration of trusts. Generally speaking, protectors provide enhanced protection for settlor intent."). Thus, while "centuries of legal development have placed the trustee at the center of a trust and its administration . . . [w]ith the promulgation of the UDTA, the law of trusts is catching up to the rise of flexible, multiparty trust administration by trustees in concert with trust directors." Morley & Sitkoff, *supra* note 192, at 61.

[255] Reames, *supra* note 197, at 61.

[256] *See generally id.* at 61.

[257] *See supra* Section IV.C.

- As in the private trust context, it would complicate the traditional trust paradigm by introducing a new set of complex relationships.[258]
- This problem is compounded by skepticism—including my own—about both whether a trust theory is the best paradigm for protecting the claims of future generations and whether trust theory should be expanded to incorporate a broader swath of resources. It may seem incongruous to advocate for a new trust principle while at the same time expressing deep skepticism about the wisdom and applicability of the trust paradigm *per se*.[259]
- If there is uncertainty as to who should be considered the settlor of the trust, then determining the responsibilities of a trust director with any credibility becomes far more difficult.[260]
- If there is uncertainty as to who should be considered the trustee(s) of the trust, this must be resolved so that there is clarity as to who the trust directors should be asked to direct.[261]
- Given the critical importance of separation of powers much thought must be given to which branch of government any trust directors would belong and what authority, if any, the directors should have to make demands of the political branches of government.[262]

In spite of these very real challenges, envisioning a "trust director" is suited for fostering the type of intergenerational solidarity needed for effective long-term protection of complex environmental assets.[263]

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[258] *See Miller*, *supra* note 198, at 2100 (noting that adding a trust director into the trust model will "call . . . assumptions into question; fixed matrices give way to fluid ones, unsettling common assumptions about elements of the doctrinal core of the trust that are responsive to its usual relational characteristics").

[259] Indeed, because of this concern, there is a strong appeal to the argument made in Araiza, *supra* note 7, to use the public trust doctrine as an interpretive canon to be used in interpreting and applying other legal rules rather than pursue its further expansion as an independent doctrine.

[260] EDWARD E. CHASE, 11 LA. CIV. L. TREATISE, TRUSTS § 5:3 (2d ed.).

[261] *See* discussion *supra* Part III.

[262] Juliana v. United States, 947 F.3d 1159, 1170 (9th Cir. 2020).

[263] Wood & Galpern, *supra* note 7, at 289 ("Fiduciary duties strive to assure intergenerational equity between different generations of citizens.").

This extra layer of protection can enhance the way in which legal obligations are "faithfully executed" but also uphold the higher and less tangible standards of fiduciary obligations.[264]

Having a trust director in the environmental context would mean having someone responsible, explicitly, for protecting the interests of future generations.[265] This "modest proposal" would urge a return to the lofty, but still merely aspirational "trust" language of NEPA and flesh it out in more meaningful detail.[266] NEPA would seem to be the most convenient place in which to graft a far more robust environmental obligation that binds generations to each other.[267] However, as of now, "no court has expressly held that this language provides a federal public trust mandate."[268] Yet, others have already suggested that "Congress should amend the National Environmental Policy Act to incorporate a substantive trust protection standard similar to that found in some state NEPA-equivalent laws, and provide mechanisms for citizen enforcement. Such legislation should provide for natural resource accountings, particularly carbon accountings."[269] Perhaps, as will be discussed below, this is the context in which a role for trust directors may emerge.

Given concerns about separation of powers, it would be difficult at this point to situate a "trust director" of any sort within any specific branch of government.[270] However, there are a number of ways in which a directed trustee principle may still become part of the way in which we view environmental stewardship. These four suggestions are intended to start a discussion of this model.

First, and as the most modest of proposals, the "trust director" model may simply be a way in which those outside government—in the

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[264] *See generally Fiduciary Obligation*, *supra* note 7, *passim*.
[265] *See generally* Wood & Galpurn, *supra* note 7.
[266] *See generally* The National Environmental Policy Act of 1969, § 101, 42 U.S.C. § 4331 *et seq.* (2012).
[267] Turnipseed et al., *supra* note 7, at 13 (When asked what role the public trust doctrine would, ideally, play in protecting the environment, Michael Blumm presented a vision in which "[t]he Supreme Court would interpret NEPA, with its language that establishes the federal government as a trustee and its express concern for future generations, as placing a clear public trust burden on the U.S. federal government. As a result, NEPA would require agencies to focus on the long-term and on intergenerational equity.").
[268] *Id.*
[269] *Fiduciary Obligation*, *supra* note 7, at 135. *See also* Buccino, *supra* note 6, at 522–24 (arguing for a more substantive application of NEPA mandates with respect to future generations).
[270] *See generally* Juliana v. United States, 947 F.3d 1159, 1170 (9th Cir. 2020).

scientific community in particular—can frame their moral responsibility.[271] They would not have any enforceable power to "direct" that anything can be done. But a careful review of the responsibilities of directed trustees—to make an accounting, to warn a trustee against particular actions, to defend specific interests of the settlor, to account for the value of the *res*, and to urge legal action to defend beneficiaries' interests—may be a useful framework for activity that can seem to be overly political, partisan, or merely reactive to particular threats rather than helpfully proactive.[272]

Environmental advocacy groups might consider charting their mission statements like those of trust agreements creating trust protectors—with a carefully defined set of obligations that they will undertake to ensure that the "trustees" are meeting their obligations.[273] Although they may not be legally enforceable, having such a well-crafted model or plan for their activities can lead to greater credibility and a more effective way to bring their work to the attention of the relevant constituencies. To date, environmental advocacy groups can do a great deal of good in the public arena if they are well-respected, fact based, and reliable with respect to both the quality of their data and the fairmindedness of their advocacy. In reimagining their role in the light of trust directors, advocacy groups may have a model for their public presence. They can express well-reasoned views on the nature, value and health of the corpus, the needs of the beneficiaries, and the obligations that they would hope that the trustees would pursue. This can be an effective posture in the public arena, and approaching their role this way can enhance the way in which such groups may play a valuable role in addressing intractable issues.

Second, should courts in cases such as *Juliana*, reach the conclusion that there is, in fact, a public trust for a wider range of environmental interests than previously believed, the trust director model can be particularly useful.[274] As noted above, the result of such a conclusion would be the obligation to refer the matter back to the political branches to address the breaches of the trust, *vel non*, in the development of a workable plan of action. This would require extensive supervision by a court comprised of generalist judges who are not experts in environmental matters.[275]

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[271] *See* discussion *supra* Section IV.B.
[272] *See generally* Wood & Galpurn, *supra* note 7.
[273] *See generally* Miller, *supra* note 198.
[274] Juliana v. United States, 339 F. Supp. 3d 1062 (D. Or. 2018).
[275] *See Fiduciary Obligation*, *supra* note 7, at 111 ("[T]he short-term challenges of redirecting the political branches to meet their fiduciary obligations to the public is bound to require judicial involvement.").

However, it could be helpful if courts employed trust director principles in their orders. As the balance of authority currently stands:

> [A] court could require an agency to prepare a climate recovery plan, but the specific details of the plan would ultimately come from the agency, not the court. The judiciary's role is to ensure that the political branches protect trust assets from substantial impairment, not to dictate specific environmental policies. Substantive decisions about how best to protect and manage trust assets would remain in the hands of the democratically elected branches.[276]

When a trust breach—or potential breach—is sent back to the political branches to resolve, the individual in charge of reviewing the progress made, testifying before the court as to whether trust obligations are being met, and the merit of remedial proposals developed can be charged to view his or her role as that of a trust director.[277] That is, the work that must be done can be structured as the work of a trust director who directs the trustees in government as to what must be done to meet the obligations of the public trust. Ultimately, it will be up to the courts in such cases to determine whether the remedy proposed is correct and

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[276] Torres & Bellinger, *supra* note 7, at 313. For further discussion of the interplay between the judiciary and the political branches, *see generally* Ryan et al., *supra* note 6, at 28 ("The court won't tell agencies what to do; the court will establish parameters that reflect the fundamental rights of citizens and then tell the agencies to do the job they really should have been doing for the last there decades.") (quoting Mary Wood); Torres & Bellinger, *supra* note 7, at 310–11 ("[T]he public trust doctrine, enforced by the courts, is an important check on how the political branches manage trust assets; it ensures that government trustees protect trust assets for present and future generations and do not abdicate their fiduciary duty to protect substantial impairment to the *res*."); *Fiduciary Obligation*, *supra* note 7, at 136 ("The Nature's Trust approach requires a reinvigorated judiciary to serve as an ultimate guardian-enforcer of the public trust . . . Judges should be receptive to trust cases, understand the judiciary's role in the constitutional balance of power over ecological assets, be willing to enforce trust principles against the political branches, and be equipped to implement complex remedies where warranted."); *Ecological Realism*, *supra* note 7, at 75 (noting that the "judicial branch remains the ultimate guardian of the trust"); *id.* ("Although common law generally yields to statutory expression, the public trust arena harbors a judicial 'veto' of extraordinary scope, unparalleled in other areas of the law."); Huffman, *supra* note 10, at 374 ("What do judges know about the public good? How is the judicial process suited to hearing and evaluating the multitude of competing and conflicting claims on the public good? How is a court supposed to decipher the public good from arguments by self-interested public and private litigants about the facts of a particular case and the laws applicable to that case?").

[277] *See generally* UTDA, *supra* note 199.

complete. But, rather than address the political branch directly, with a level of detail and expertise that the courts lack, a "trust director" model may be helpful. The court can select the person with the expertise to oversee the remedial process and offer broad guidance as to what an appropriate solution would entail. Then, this individual, viewing his or her role as a "trust director" can then offer greater direction to the "trustees" in the political branches to develop the comprehensive solution that is necessary.

Third, and more proactively, as NEPA marks its golden anniversary, it may be worth reexamining whether trust director principles can be incorporated into this "Magna Carta" of American environmental law to breathe life into its aspirational trust language.[278]

For example, NEPA's environmental impact process requires environmental impact statements ("EIS") be prepared on a project-by-project basis.[279] It is now almost rote to state that NEPA requires that an environmental impact statement be prepared for:

> every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment . . . on—
>
> (I) the environmental impact of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.[280]

The language of the EIS requirement could be amended to require more explicitly that the EIS review the impact of the activity or non-activity on future generations.[281] This would not be an analysis only of the specific action proposed but also of the way in which that activity would exacerbate or contribute to problems created by other activities. In a sense, this part of the EIS would function like the accounting done

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[278] *See* discussion, *supra* Section IV.B.
[279] National Environmental Policy Act of 1969, § 102(c), 42 U.S.C. § 4332(c) (2012).
[280] *Id.*
[281] *Id.*

by a trust director to examine the value of the *res* that can be impacted by specific actions of a trustee and to propose or direct ways in which harm to that *res* can be mitigated or avoided.[282] An accounting is a way in which we can understand what we have been bequeathed by our predecessors. Were this to be a traditional trust "accounting is the method by which beneficiaries may ensure proper management of their property."[283] Such an accounting in the environmental context may accomplish very similar things. This activity may not be capable of preventing a harmful act from moving forward—just as a traditional EIS alone may not halt a dangerous project.[284] However, it can generate a reliable record of the harms that, once publicly available, may halt projects based on the undeniable power of public opinion.[285] In this, clarity in drafting is critically important.[286] As with private trusts, understanding what the objectives are is critically important.[287] But this need for clarity can be one of the greatest strengths of this approach. Once the EIS framework is in place to provide a more detailed framework with respect to the impact on future beneficiaries, those who review these can look at these statements with an eye to whether or not they are an accurate accounting.

In addition, under the NEPA framework, it may also be an opportune time to reassess the role of the Council on Environmental Quality to assess whether it is capable of functioning independently in its current status in the Executive Office of the President and to consider whether its mandate may be rewritten, using some of the language of trust director statutes to clearly and succinctly articulate its roles to offer direction, even if it cannot enforce that direction.[288]

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[282] *Fiduciary Obligation*, *supra* note 7, at 101.
[283] *Id.*
[284] *See generally* National Environmental Policy Act of 1969, § 102(c), 42 U.S.C. § 4332(c) (2012).
[285] *See generally Fiduciary Obligation*, *supra* note 7.
[286] This is also true in the traditional private trust where "[T]he directed trust language should be as specific and inclusive as possible in identifying the precise powers as to which the trustee is directed." Lord et al., *supra* note 199. The danger in a lack of clarity arises when "it is not uncommon to see drafting ambiguity regarding the director's authority and responsibility, which then creates ambiguity about the trustee's authority and responsibility." *Id.*
[287] One succinct summary of obligations to future generations, which could be a kernel of the trust "agreement," set forth these obligations to be "(1) a duty to pass on the earth and its natural resources to the next generation in the same or equivalent condition as it was when that generation first received it and (2) a duty to repair any damage caused by a failure of any previous generation to do the same." Moffa, *supra* note 122, at 467.
[288] *See generally* Miller, *supra* note 198.

Finally, it may be worth exploring whether the EPA structure can incorporate "trust director" principles in each of its divisions to articulate a discrete set of responsibilities to future generations that can or should be reviewed and to propose "direction" to policy makers as to how this may best be accomplished.[289] It has been said that "[D]escribing the relationship of public officials to the public as one of trust conveys nothing of the fiduciary responsibilities owed by a trustee to a beneficiary under trusts law. The government official's general responsibility to the public is political, not legal."[290] However, by embedding directed trust principles into the mindset of the way public officials organize their work may have tangible benefits.[291] Certainly, there is ample opportunity for this position to become politicized or for it to be undertaken without a fully objective view. However, over time, a cadre of committed, knowledgeable, nonpolitical appointees may find this to be an opportunity to serve future beneficiaries in a discrete way, using defined trust principles to address potential future harms and propose solutions that may be implemented by the more politically accountable actors.

CONCLUSION

If it is true that "[t]here is no greater monument to the tradition of ordered liberty than the nation's responsible commitment to society and environment: past, present, and future,"[292] then it is the task of each generation to meet this commitment in ways that are both well-suited to its time and capable of meeting this sacred responsibility.

At this time, both domestically and internationally, there is increased attention paid to the use of trust theory to do this. However, this approach has its limitations—and dangers. The concept of directed trusts has developed to allow those who create private trusts to better ensure that they achieve the ends for which they are created. Perhaps borrowing principles from this theory can breathe some life into the public trust doctrine that are worth exploring as we meet the challenge to serve and act "as trustee of the environment for succeeding generations."[293]

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[289] *See generally* UTDA, *supra* note 199.
[290] Huffman, *supra* note 10, at 369.
[291] *See* discussion, *supra* Section IV.B.
[292] Environmental History Brief, *supra* note 33, at 10.
[293] *See* National Environmental Policy Act of 1969, § 101(b), 42 U.S.C. § 4331(b)(1) (2012).