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Essay

***1209 OUR BETTER NATURES: A REVISIONIST VIEW OF JOSEPH SAX'S PUBLIC TRUST THEORY OF ENVIRONMENTAL PROTECTION, AND SOME DARK THOUGHTS ON THE POSSIBILITY OF LAW REFORM**

Richard Delgado [\[FNa\]](#)

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***1210 I. INTRODUCTION**

When Professor Joseph Sax wrote his famous *Public Trust* article [\[FN1\]](#) in 1970, the environmental movement was in a state of agitation and flux. [\[FN2\]](#) Commentators were writing about plastic trees, [\[FN3\]](#) *Ways Not to Think About Plastic Trees*, [\[FN4\]](#) and whether we should bestow legal rights on natural objects. [\[FN5\]](#) The Green Movement took hold in Europe, and in the United States scholars, activists, and ordinary citizens were calling for greater attention to the problems of decreasing quality of life, increasing pollution, and overdevelopment of the nation's farm and wilderness lands. [\[FN6\]](#)

The time was exactly right for Sax's article. Sax proposed a simple, easily understood, and intuitively appealing approach to environmental protection. [\[FN7\]](#) Because the nation's natural resources and parklands are limited commodities which, if too rapidly consumed, will not be available to ourselves and later generations, Sax argued, we should regard ourselves as trustees who hold these precious goods for the benefit of ***1211** all. [\[FN8\]](#) The nation's rivers,

beaches, and other natural resources are not ours alone to spend; we must deplete them judiciously, setting aside as much as prudence dictates for our own use and that of future generations. [\[FN9\]](#)

Sax's idea caught on quickly, influencing the National Environmental Policy Act, [\[FN10\]](#) whose history reflects trust considerations at numerous points. [\[FN11\]](#) His article is discussed in virtually every environmental law casebook, [\[FN12\]](#) hornbook, [\[FN13\]](#) and law review article. [\[FN14\]](#) Courts have cited it heavily. [\[FN15\]](#)

This Essay argues that Sax's public trust doctrine is a wrong-or, at least, a seriously flawed-solution to our environmental crisis. Its oversimplified answer-to regard the nation's environmental resources as goods held in trust-forestalled more searching reconsideration of our environmental predicament and postponed, perhaps indefinitely, the moment when society would come to terms with environmental problems in a serious and far-reaching way. [\[FN16\]](#) Part I of this Essay out-lines Sax's proposal and its adoption into law. Part II shows that the trust approach is a poor way to deal with our environmental problems. The trust approach places responsibility for protection of natural resources in the hands of individuals (trustees) who share our society's presuppositions and understandings and thus are unlikely to provide far-reaching protection for the environment. Part III discusses how Sax's theory has impaired the development of more promising approaches to environmental protection. A concluding section recapitulates ***1212** some of the themes developed in the Essay and draws some lessons for the cause of law reform generally.

I believe the lesson of Sax's trust approach can be generalized as follows: Most serious reform movements fail because society prefers incremental rather than wide-ranging change. In a version of the maxim that "bad money drives out good," we are almost invariably drawn to doomed, moderate approaches, like Sax's, when society needs more sweeping, ambitious ones. We resist precisely the medicine that could save us. We turn to strong solutions only when it is either too late, or when our thinking has advanced so far that the solutions seem commonplace and tame.

II. SAX'S ARTICLE: THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL LAW

In his 1970 article [\[FN17\]](#) and later work, [\[FN18\]](#) Sax sets out his theory of environmental protection. The 1970 article proposes the basic theory that natural resources ought to be regarded as goods held in common. [\[FN19\]](#) Because these goods are to be enjoyed by all, the government must assume a trust-like duty not to waste or expend them for the benefit of just a few. [\[FN20\]](#) Further, the state must take into account future users-later generations who will be harmed if society depletes or damages the environment in irreversible ways. [\[FN21\]](#)

Sax derives his doctrine from Roman law [\[FN22\]](#) and traces it to early Supreme Court decisions in which the Court used trust language to protect shores, rivers, and other water-related resources. [\[FN23\]](#) Although Sax initially applied the trust doctrine to water conservation, later commentators have urged the doctrine's extension to protect dry beaches, wildlife, parks, and the scientific study of all of these, [\[FN24\]](#) a suggestion that ***1213** some states have adopted. [\[FN25\]](#) The status of the public trust theory today seems secure; it has been incorporated into legislation, case law, and, indeed, our basic thinking about the environment. The National Environmental Policy Act (NEPA) reflects trust notions, [\[FN26\]](#) as do the federal Clean Water Act, [\[FN27\]](#) Endangered Species Act, [\[FN28\]](#) and environmental statutes in many states. [\[FN29\]](#) The public trust theory has been criticized by a few conservative scholars as an impediment to economic development [\[FN30\]](#) and by a few on the environmental fringe as unduly homocentric. [\[FN31\]](#) Yet it seems to have withstood all such criticism and is today the leading approach to protection of the environment and natural resources. Even in areas where direct influence is difficult to trace, the doctrine marked out a realm of the "ideal," so that commentators often favored or encouraged judicial and legislative actions that comported with it.

III. DEFECTS OF THE TRUST SYSTEM OF ENVIRONMENTAL PROTECTION

Sax's public trust theory won widespread approval and was adopted into law. In the process, it inhibited the development of other approaches that would have enabled us-and might still-to cope better with our environmental problems. [FN32] Before turning to these other approaches, I shall briefly explain what is wrong with the public trust doctrine as a means of environmental protection. My problems with it fall into two groups. First is a group of reservations concerning the doctrine's incremental, contained nature. The second has to do with its unsuitability for problems requiring hard choices and global measures. [FN33]

***1214** My first reservation with the public trust approach is that the model is inherently antagonistic to the promotion of innovative environmental thought. A trust is, by its nature, conservative-its purpose is to protect a corpus and put it to some use. [FN34] The idea is to protect what one has, to reduce the risk of improvidence or improper expenditure. [FN35] Trusts are established to serve an already defined purpose, not to prompt consideration of what that purpose should be. One establishes a trust for a child's college education, for example, once one has decided the child should attend college, not to prompt the child to reflect about his or her future, or about whether he or she should attend college, much less about whether college education, as currently constituted, is good or ideal. [FN36]

In this view, the trust theory arrived on the scene too early in our debate about the environment. [FN37] It was adopted before we had explored adequately humanity's relationship with the environment. In short, the fit between it and the stage of social dialogue was poor. Yet something about it attracted us and made us adopt it-made us seize it before we knew precisely what we were protecting and to what extent. [FN38] The trust theory froze thinking on our relationship to nature in the form in which it was articulated in the early 1970s. Serious reflection on environmental questions continued, of course, [FN39] but it was marginalized and confined to the pages of fringe journals and the books of the radical environmental movement. [FN40] It was no longer center stage as it was during the period just prior to the advent of Sax's theory.

My second reservation with the public trust theory is that it is poorly suited to advance natural values. The approach places protection of the environment in the hands of a trustee, generally some agent of the sovereign, who is issued a set of instructions and told to protect the environment accordingly. [FN41] Unfortunately, the trustee in whose hands the environment is placed is not in the classical position of trustee. ***1215** Typically a government agency, it will be in no better position to understand how the environment is to be protected than we are.

Frequently, the impulse for setting up a trust is lack of confidence; we fear that we may act irresponsibly with respect to the valued good (say, a sum of money), so we place it in the hands of another whom we instruct to act in accord with our better natures-in the way we would act if we were trustworthy. [FN42] Consider educational trusts, for example. [FN43] In our society, men often are conditioned to measure their success by material gains, while women are conditioned to value responsibility to others, particularly their children. Men often set up trusts for their children's college education because they fear that otherwise they might spend the money on a sports car or European vacation. Women-and men who have developed a more immediate connection with their children [FN44] -are less likely to resort to a trust; spending the children's college money on a consumer item simply is not a serious temptation. To the extent that this generalization remains true, one might say that Sax's reliance on a trust model is a particularly male approach to guarding against overconsumption of limited resources. [FN45]

One of the reasons why we establish trusts, then, is that we sense in ourselves a dark impulse to act in ways that go against our better natures. [FN46] This is particularly true with respect to environmental values. All of us, especially men, know that we have impulses to hunt, mine, dam, or cut things down-to treat nature, in short, in ways that contravene our stated collective ideals, which are not to hunt, mine, dam, and so on, to excess. [FN47] Both men and women, in addition, often desire an easier, more resource- and energy-intensive life. Sax and other serious environmentalists know this-that if we are left to balance environmental values against short-term pleasure or economic gain, we are likely to favor the latter. But this goes against our ideal natures, hence we relinquish control over the valued object, like Ulysses who lashed himself to ***1216** the mast to avoid succumbing to the sirens' song. [FN48]

There is nothing inherently wrong with the trust model. It can be a useful device in many situations. But in wilderness preservation, the trust approach is unlikely to succeed, because the trustee will share the same values we hold. [FN49] Thus, the trustee will construe our trust instructions against a background of the same cultural assumptions, values, and meanings that we hold, [FN50] and that render us poor defenders of the thing in question. [FN51]

This is much more troublesome in connection with the environment than with areas where bright-line treatment is possible ("Issue Junior four hundred dollars a month as long as he remains a full-time student with a GPA above 2.5"). Environmental protection entails trade-offs and judgment calls. [FN52] If the trustees-for example, government agencies-are prone to make the same mistakes we would, there is likely to be little gain from transferring defense of the environment to them. [FN53]

This is, of course, what has happened. Government trustees at both the federal and state level have done little to stop deterioration of air and water quality, to protect endangered environments from the growing***1217** problem of toxic wastes, and to protect endangered species. [FN54] Certainly, government trustees have generated little in the way of creative, wide-ranging thought about environmental questions; their role has been bureaucratic, routinized, and contained. [FN55] Yet the public and scholarly community have reacted as though environmental issues are solved, or at least in capable hands. [FN56] Self-scrutiny virtually has ceased, with the result that several promising approaches to humanity's relationship with the natural world have not been developed. [FN57] Part IV outlines***1218** some of those approaches. Part V shows that our seizure of a halfway measure like Sax's instead of a more far-reaching approach was eminently predictable and exemplifies the fate of most revolutions in social thought.

IV. WHAT SAX'S THEORY DISPLACED-THREE APPROACHES TO ENVIRONMENTALISM THAT WERE NOT SERIOUSLY EXPLORED

Sax's public trust theory won rapid and widespread acceptance during a time of considerable agitation when new theories and approaches to environmental protection were being explored. [FN58] The trust approach stilled much of that fervor. [FN59] This Part briefly describes three promising approaches that were pushed off center stage. The approaches are (1) Aldo Leopold's system of earth-centered ethics; (2) Native American thought; and (3) ecofeminism. The final section attempts to explain why this happened.

A. Aldo Leopold's Sand County Almanac-Earth-Centered Environmental Ethics

In 1949 Aldo Leopold wrote a slender volume, *A Sand County Almanac*. [FN60] Its core message is contained in the passage: "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise." [FN61] For Leopold, the traditional approach to environmental ethics was wrong. It placed man at the center and asked what use we might properly make of nature. [FN62] Instead, Leopold urged, we are just one of many members of the land community. [FN63] Earth does not exist for our use-we have no special, privileged status. [FN64] Our interests, desires, and wishes should count for no more than those of other creatures; our stability and comfort matter no more than those of a rock, bird, or mountain valley. [FN65] Leopold's book quickly became an underground classic. Then, in the late 1960s and early 1970s, it began to receive serious attention.

***1219** Kenneth Boulding, in his essay *Economics of the Coming Spaceship Earth*, [FN66] echoed many of Leopold's ideas when he wrote that we must soon abandon a "cowboy" mentality and economy, based on ceaseless development, and move toward a concept of "spaceship earth." [FN67] Although Leopold's ideas and spaceship earth considerations remain popular among hard-core environmentalists, they no longer command the popular attention they once did. Their disappearance-among legal scholars, at any rate-coincided with, and is almost certainly one of the effects of, the ascendancy of Sax's trust approach. The broader perspectives afforded by this neglected approach could have precipitated better solutions to some of the serious environmental problems we are facing today. [FN68] Discussion of them faded, however, with the adoption of Sax's scheme. [FN69]

***1220** *B. Native American Thought*

The late 1960s and early 1970s saw a general revival of interest in Native American thought, [FN70] particularly concerning our relationship to land. [FN71] Early in our history, Native American spokespersons decried the white man's seizure and use of their Native American lands. For example, Chief Seathe (Seattle), when signing the treaty of Port Elliot, proclaimed:

Every part of this country is sacred to my people. Every hillside, every valley, every plain and grove has been hallowed by some fond memory or some sad experience of my tribe. Even the rocks which seem to lie dumb as they swelter in the sun . . . thrill with memories of past events connected with the fate of my people . . .

The braves, fond mothers, glad-hearted maidens, and even little children, who lived here . . . still love these solitudes. Their deep fastnesses at eventide grow shadowy with the presence of dusty spirits. When the last red man shall have perished from the earth and his memory among the white men shall have become a myth, these shores shall swarm with the invisible dead of my tribe. . . . [FN72]

In other passages, tribal leaders and wise men spoke of the Native Americans' reverence and respect for the land, animals, forests, and nature. [FN73] Anthropologists, environmentalists, and anthologists were beginning to collect these and other passages into a coherent, spiritually based ***1221** view of the environment. [FN74] This approach, too, was largely stilled by Sax's theory. [FN75]

C. Ecofeminism

A third movement, in its infancy during the period when Sax was writing on the public trust theory, is ecofeminism. Unlike the other two approaches, ecofeminism remains relatively vital today. [FN76] Yet it may ***1222** well have commanded even more serious attention-and might have affected legal thought-had not the public trust doctrine sprung up when it did.

Ecofeminism, as its name suggests, is an effort to link feminism, the study of women and women's values, [FN77] with the exploration of environmental issues. Ecofeminists believe that patriarchy-men's mistreatment and subordination of women-and environmental despoliation are linked. [FN78] Both stem from a view of the world that countenances harsh, unloving treatment of defenseless things and persons. [FN79] For many ecofeminists a developer's cutting down a forest in order to build a shopping center is akin to spousal abuse and other atrocities men inflict on women. [FN80] Ecofeminists urge that women's values and priorities should infuse and shape environmental thinking. Only when our current approach is supplanted by a more loving, feminist one will we be able to enjoy and protect nature fully. [FN81]

***1223** Each of these approaches to environmental protection was put on the back burner when Sax's public trust theory was adopted. In the meantime, our environmental problems have worsened. Halfway measures have been ineffectual, and within the near future we surely again will have to reconsider our relationship to the natural world. We missed an opportunity in the 1970s, one whose loss we have only recently begun to appreciate. Was this inevitable-and what does this missed opportunity mean for our prospects for achieving social and legal reform in general?

V. THE CAREER OF SAX'S PUBLIC TRUST THEORY: WHAT IT ILLUSTRATES FOR LEGAL REFORM

I believe it is possible to generalize from society's experience with Sax's public trust theory of environmental protection. One way to view the debate over environmental values is through the role of normativity. [FN82] It is almost a commonplace that normativity (such as religion) usually increases during times of social unrest. [FN83] The scholarly analog is that academic writing increases in normativity just before and during times of paradigm change. [FN84] Just before such a shift, defenders of the old regime marshal normative arguments to defend the old and condemn the new as dangerous, extreme, and immoral. [FN85] As Thomas Kuhn and others have pointed out, this has been true of virtually every scientific advance. [FN86] It is

true in law and the social sciences as well. Mainstream scholars resisted critical race studies, [FN87] males resisted feminism, [FN88] law deans invited members of critical legal studies (cls) to leave the academy, [FN89] and so on.

***1224** If the new paradigm nevertheless catches hold, normative analysis plays a second, more subtle role. Everyone now condemns the old paradigm (slavery, quantum physics, legal formalism) as antiquated. [FN90] We rejoice in our modernism and liberality. Yet this rejoicing enables us to avoid even more far-reaching changes and to confine reform to comfortable dimensions. [FN91] Normative analysis, then, serves as a kind of social homeostat, ensuring that change occurs at just the right pace-not too early, not too fast, and not too far. [FN92] Like other homeostats, prescriptive thinking prevents us from slipping back to the now-condemned position or paradigm. It thus has both a forward- and a backward-looking momentum; it is conservative and progressive at the same time. It is at this second stage-the stage of consolidating gains-that Sax's article played an important role in our history, one with lessons for every other legal reform movement-feminism, cls, legal realism, law and economics, and postmodernism-all of which evoke the same response at key times. [FN93]

To explain my thesis more fully, it is essential briefly to recapitulate the recent history of environmental activism. During the middle years of the century, American society began to realize that unlimited exploitation of our natural resources could not continue much longer. [FN94] We began to doubt the old ethic that prevailed during our period of rapid expansion, permitting practically any form of development or use of public lands that did not positively injure another person and that a majority of the citizenry would tolerate. [FN95] After several decades of increasing ferment-which included a proliferation of creative essays and books addressing such basic environmental questions as: Why protect the natural environment? [FN96] What status shall we afford natural objects and our wilderness heritage? [FN97]-matters were ripe for a revolution in consciousness. Americans reached a collective decision that something had to be done. Business and a few others resisted change; members of "deep ecology," admirers of Aldo Leopold, and ecofeminists advocated far-reaching changes. [FN98]

***1225** Hoping to capitalize on the manifest failures of the old mine-it-dam-it-cut-it-down approach, members of the latter groups wrote books, spoke at rallies, and organized political campaigns around the issue of environmental protection. [FN99] Their programs were not particularly normative; they did not need to be. Rather, they rested on shrewd observation and imaginative (and for some, unflattering) reconceptions of how our relationship to nature could be.

Normativity was turned against them, however. As is generally the case when a paradigm change is in the wind, society welcomed normative analysis to (1) praise and embrace the just-begun reforms; and (2) condemn the more ambitious reform programs as extreme and dangerous. There almost always arises, at exactly this point in historic transformations, a savior-an individual who captures the legitimate need for reform, as well as society's need to assure that matters do not change too far or too fast, an individual who sincerely condemns the old order, thereby assuring that the revolution has a ratchet effect-won't slip back-yet offers the assurance that the new paradigm is not too different from the old. [FN100] We condemn and abandon the old order only when we are certain that the new one is not more discomforting than necessary. [FN101]

In the environmental revolution, that savior was Joseph Sax, whose trust theory, *Mountains Without Handrails*, [FN102] and other landmark works [FN103] established his credentials as a serious reformer and condemner of the old order. At the same time, his public trust article dealt the coup de grace to legal scholars and environmentalists who were pushing for a radical transformation in consciousness. His theory, then, was in some ways forward-looking, an imaginative, pragmatic-even gallant-effort to save the environment from further deterioration. [FN104] Yet the theory won wide support largely because it did not promise far-reaching environmental protection. It offered exactly what society needs during the middle and late stages of a revolution-a way of confining change to a manageable level. [FN105]

***1226** Sax's public trust doctrine was attractive because it offered protection from our base instincts. [FN106] It enabled us to tell ourselves that we no longer needed to worry about the dark sides of our natures. [FN107] It enabled us to tell ourselves and each other that we had finally done something about the environmental problem. Yet by placing control over natural

resources and wilderness areas in government agencies run by people like us, we could feel confident that familiar, comfortable values would shape and restrain environmental decisionmaking. The ecofeminists and others advocating sweeping change were shut out. The problem was taken care of in a way that would not change anything too fundamentally-which was all to the good.

VI. CONCLUSION

This Essay describes and analyzes the role of Joseph Sax's landmark article on the public trust model of natural resource law in both advancing and retarding the movement for environmental reform. Part I outlined his proposal and showed how it influenced the course of environmental law over the last twenty years. Part II showed the defects of the trust approach, as well as why it proved attractive to national consciousness in the early and mid-1970s (and, indeed, remains so today). The public trust theory, although deeply compromised, solidified the partial revolution in social thought on the issue of environmental protection. It prevented that thinking from slipping back and, thus, provided some protection against retrenchment during the Reagan years, yet it also forestalled more serious consideration of humanity's relationship with the natural world.

Part III outlined three approaches to natural resources and wilderness preservation law that would have gone further than Sax's theory and showed that his theory forestalled their serious consideration. Part IV showed that this experience mirrors a general pattern in all law reform movements, putting forward the hypothesis that at certain points in a paradigm shift a savior, like Sax, always arises. This savior offers an approach that enables us to condemn the old order and solidify gains so that we are in no danger of slipping back. Yet the savior's theory*¹²²⁷ also causes the public to lose interest in more far-reaching strategies that would push our thinking too far forward and threaten stability. We turn to strong solutions only when they no longer seem-or are-strong. Meanwhile, the problems that called forth the new thinking proceed largely unabated, until they become so serious that we again engage in introspection and examination. Once again, a savior arises, and the process continues in an unending cycle with few heroes, few villains-and little basic change-until, fundamentally, it is too late. [\[FN108\]](#) [\[FNa\]](#) Charles Inglis Thomson Professor of Law, University of Colorado. J.D., University of California at Berkeley School of Law (Boalt Hall), 1974. I am grateful to Harriet Cummings, David Getches, Kelly Robinson, Eric Schwiesow, Jean Stefancic, and Charles Wilkinson for comments, criticism, and encouragement during the writing of this Essay.

[\[FN1\]](#). Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

[\[FN2\]](#). For a general history of the period, see S. HAYS, *BEAUTY, HEALTH AND PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955-85* (1987). The early 1970s culminated in a famous debate about plastic trees and the theoretical bases for environmental protection. See *infra* notes 3-8.

[\[FN3\]](#). Krieger, *What's Wrong with Plastic Trees?*, 179 SCIENCE 446 (1973).

[\[FN4\]](#). Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974).

[\[FN5\]](#). Stone, *Should Trees Have Standing?-Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

[\[FN6\]](#). Sax, *supra* note 1, at 473; Stone, *supra* note 5 (calling for greater attention to environmental problems); see T. O'RIORDAN, *ENVIRONMENTALISM* (1976); J. PASSMORE, *MAN'S RESPONSIBILITY FOR NATURE* (1974); Meyers, *An Introduction to Environmental Thought: Some Sources and Some Criticisms*, 50 IND. L.J. 426 (1975) (and sources cited therein); White, *The Historical Roots of Our Ecologic Crisis*, 155 SCI. 1203 (1967); see also R.

CARSON, SILENT SPRING (1960) (presaging 1970s activism); S. UDALL, THE QUIET CRISIS (1963) (same).

[FN7]. Sax, *supra* note 1, at 474. The doctrine satisfies three simple criteria for a theory of environmental protection. It provides a legal right in the public; it is enforceable against the government; and it is likely to protect current standards of environmental quality. See Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENVTL. L. REV. 311, 367-82 (1988); *infra* notes 10-15 and accompanying text. The trust approach was widely celebrated and adopted.

[FN8]. Sax, *supra* note 1, at 474, 484-90.

[FN9]. *Id.* at 484, 490, 560.

[FN10]. [42 U.S.C.A. §§ 4321-4370a \(West 1977 & Supp. 1991\)](#). The Act first passed Congress in 1970 and has been amended a number of times.

[FN11]. On the Act's history and interpretation, see F. ANDERSON, D. MANDELKER & D. TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 781-840 (2d ed. 1990); G. COGGINS & C. WILKINSON, FEDERAL PUBLIC LAND AND RESOURCES LAW 321-56 (2d ed. 1986).

[FN12]. See, e.g., F. ANDERSON, D. MANDELKER & D. TARLOCK, *supra* note 11, at 452; G. COGGINS & C. WILKINSON, *supra* note 11, at 303-21.

[FN13]. See, e.g., W. RODGERS, ENVIRONMENTAL LAW 155-68 (3d ed. 1968).

[FN14]. See, e.g., Tarlock, *Earth and Other Ethics: The Institutional Issues*, 56 TENN. L. REV. 43, 56 n.53 (1988); see also Shapiro, [The Most-Cited Law Review Articles](#), 73 CAL. L. REV. 1540, 1551, 1553 (1985) (including the Sax article in a list of the forty law review articles most frequently cited in law reviews).

[FN15]. See, e.g., [West Indian Co. v. Government of Virgin Islands](#), 844 F.2d 1007, 1019 (3d Cir.), cert. denied *sub nom.* [Gressing v. West Indian Co.](#), 488 U.S. 802 (1988); [District of Columbia v. Air Florida, Inc.](#), 750 F.2d 1077, 1083 (D.C. Cir. 1984); [Sierra Club v. Block](#), 622 F. Supp. 842, 866 n.15 (D. Colo. 1985); [Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni](#), 456 F. Supp. 1327, 1337 (D.P.R. 1978), *aff'd in part & vacated in part*, 628 F.2d 652 (1st Cir. 1980), and cert. denied, [450 U.S. 912 \(1981\)](#).

[FN16]. See discussion *infra* Parts II & III; see also Tarlock, *supra* note 14, at 45 (stating that “[a]fter an initial flurry of interest . . . most lawyers and legislatures have considered the problem solved by the spate of environmental legislation put in place in the 1970s”).

[FN17]. Sax, *supra* note 1.

[FN18]. See, e.g., Sax, [The Limits of Private Rights in Public Waters](#), 19 ENVTL. L. 473 (1989); Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980).

[FN19]. Sax, *supra* note 1, at 478-89.

[FN20]. *Id.* at 478-89, 553-57.

[FN21]. On the protection of “diffuse” interests, *cf. id.* at 485, 556, 560-61. See also J. SAX, MOUNTAINS WITHOUT HANDRAILS (1980).

[FN22]. Sax, *supra* note 1, at 475-76.

[FN23]. *Id.* at 485-91. Early Supreme Court cases that cite trust language include [Illinois Central R.R. v. Illinois](#), 146 U.S. 387, 451-63 (1892), and [Martin v. Waddell](#), 41 U.S. 367 (1842).

[FN24]. Wilkinson, [The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine](#), 19 ENVTL. L. 425, 465-66 (1989) (citing sources); see also Blumm, [Public Property and the Democratization of Water Law: A Modern View of the Public Trust Doctrine](#), 19 ENVTL. L. 573, 574-75 (1989); Reed, [The Public Trust Doctrine: Is It Amphibious?](#), 1 J. ENVTL. L. & LITIG. 107 (1986).

[FN25]. See Meyers, [Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife](#), 19 ENVTL. L. 723, 724-31 (1989) (arguing that all ecosystems are related, so trust theory, although it originated in the area of water rights, now is being extended logically to land and forests); Wilkinson, *supra* note 24, at 466; Wilkinson, [The Public Trust Doctrine in Public Land Law](#), 14 U.C. DAVIS L. REV. 269, 298 (1980).

[FN26]. 42 U.S.C.A. §§ 4321-4370(a). See sources cited *supra* notes 10-11 on the influence of NEPA on other federal statutes, such as those cited immediately *infra*. See also [Kleppe v. Sierra Club](#), 427 U.S. 390, 409-11 (1976) (requiring that an executive agency take a "hard look" at adverse environmental impacts); G. COGGINS & C. WILKINSON, *supra* note 11, at 355-56.

[FN27]. 33 U.S.C. §§ 1251(5), 1344 (1988).

[FN28]. 16 U.S.C. §§ 1531-1542 (1988). Of course, some serious environmentalists regard these statutes as corrupt and ineffectual, almost by design. For them, Sax's role in setting them up is not an honor, but the opposite.

[FN29]. Stevens, [The Public Trust and In-Stream Uses](#), 19 ENVTL. L. 605, 638 (1989); Wilkinson, *supra* note 24, at 465-66 (listing statutes); Wilkinson, *supra* note 25, at 269-78.

[FN30]. Huffman, [A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy](#), 19 ENVTL. L. 527 (1989); Lazarus, [Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine](#), 71 IOWA L. REV. 631 (1986).

[FN31]. Karp, [Aldo Leopold's Land Ethic: Is an Ecological Conscience Evolving in Land Development Law?](#), 19 ENVTL. L. 737, 738-49 (1989); Scherer, [Anthropocentrism, Atomism, and Environmental Ethics](#), in ETHICS AND THE ENVIRONMENT 73 (D. Scherer & T. Attig eds., 1983).

[FN32]. See *infra* Part IV (describing three such approaches); Tarlock, *supra* note 14, at 44-46.

[FN33]. For discussion of the scope of these problems, see W. RODGERS, *supra* note 13; Karp, *supra* note 31; Tarlock, *supra* note 14.

[FN34]. G. BOGERT, TRUSTS § 1, at 2-3 (6th ed. 1987).

[FN35]. *Id.* §§ 2-3, at 7-10.

[FN36]. *Id.* §§ 8-11, at 19-25 (observing that express trusts require a statement of preexisting intent by settlor).

[FN37]. Cf. Tribe, [Structural Due Process](#), 10 HARV. C.R.-C.L. L. REV. 269 (1975) (asserting that legal and social decisionmaking structures and rules should be chosen with the stage of controversy in mind).

[FN38]. See *supra* notes 1-2 and accompanying text (discussing how flux and agitation over environmental issues permeated the 1960s and early 1970s).

[FN39]. See, e.g., C. STONE, *EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM* (1987); P. TAYLOR, *RESPECT FOR NATURE* (1986); Goodpaster, *On Being Morally Considerable*, in *ETHICS AND THE ENVIRONMENT* 30 (D. Scherer & T. Attig eds., 1983).

[FN40]. See *infra* Part IV.

[FN41]. See G. BOGERT, *supra* note 34, §§ 8-11, at 19-25.

[FN42]. *Id.* § 2, at 7-8. That is, sometimes the designation is a misnomer: Distrust underlies the mechanism of a trust. Sometimes we also set up trusts (e.g., "spendthrift" trusts) because we lack confidence in the beneficiary.

[FN43]. See *id.* § 60 (outlining the uses of educational trusts).

[FN44]. C. GILLIGAN, *IN A DIFFERENT VOICE* (1982), is the prime exponent of the care-and-connection view.

[FN45]. It may also be that fewer women establish trusts than men because they lack the resources to do so, or because men control estate planning. The very idea of a trust was developed by men, rather than women, centuries ago when men's values and ideas predominated. Would it be so surprising if it served as a vehicle for advancing values and plans men hold dear?

[FN46]. See *supra* notes 41-43 and accompanying text. In this setting, acting "against our better natures" means depleting and destroying the environment in ways we would later regret.

[FN47]. These stated ideals are found in many sources including case law and legislation, see *supra* notes 22-23, 26-29 and accompanying text, and the writings of scholars, citizens, and activists, see sources cited *supra* notes 1-5.

[FN48]. See HOMER, *THE ODYSSEY* (F. Fitzgerald trans., 1978). The sirens' song was so seductive it lured sailors from their course and shipwrecked them against the rocks. The mariners' standard solution was to stop their ears. Ulysses, however, wanted to hear the song, so he ordered his crew to stop their ears and sail through while he kept his ears open, his body strapped down to combat temptation. In this way he enjoyed the fruits of the song without paying the penalty-his crew, with their stopped ears, suffered the deprivation of the song for him. The parallels go further. In uncanny similarity, the resource-intensive industrialized world has strapped itself to the mast of the developing world, causing the developing world to suffer much of the environmental predation and degradation necessary to keep the ears of the industrial nations open to hear the song of their own rich lifestyle. A tale for our time.

[FN49]. That is, if you or I would be a poor trustee of a valued good, X, someone who shares our weaknesses and propensities is unlikely to be much better. Consider, for example, the Department of the Interior, or the Forest Service within the Department of Agriculture, with their ethic of resource use and "management."

[FN50]. Such values include consumerism and comfort over conservation; development over wilderness preservation; earth-belongs-to-man; what-is-best-for-us-is-best-for-the-world; and so on.

[FN51]. In this case, most "trustees" will be government bureaucrats-generally male, white, middle class, and with little passion or zeal for environmental innovation. On the bureaucratic

mentality generally, see sources cited *infra* notes 53-55.

[FN52]. Clear versus selective timbering, grazing on public lands, and building roads and parking lots in national parks are well-known examples. See, e.g., J. SAX, *supra* note 21. On the cost-benefit approach, see A. FREEMAN, R. HAVEMAN & A. KNEESE, *THE ECONOMICS OF ENVIRONMENTAL POLICY* 80-95 (1973); Ackerman & Stewart, [Reforming Environmental Law](#), 37 STAN. L. REV. 1333 (1985); Latin, [Ideal Versus Real Regulatory Efficiency](#), 37 STAN. L. REV. 1267 (1985).

[FN53]. Some small gains, of course, may come about because, unlike us, the governmental agent (1) feels responsible; (2) knows he or she is accountable; and (3) learns from past errors-*i.e.*, is a repeat player. For a general discussion of the advantages of the repeat player in the legal system, see Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

[FN54]. Most experts believe air and water quality has improved little if at all, while the problem of toxic wastes has worsened markedly over the last decade or so.

Any specific analysis of changes in air and water quality due to the Clean Air Act, [42 U.S.C. §§ 7401-7642 \(1988\)](#), is hampered by the lack of monitoring being done-emissions data reported by the Environmental Protection Agency (EPA) are almost all based on estimates rather than actual monitoring-and by the manner in which changes in air and water quality present a "real world" experiment where control of all variables is impossible. While it is true that air and water quality have shown some improvement in certain regions, that improvement has not been marked, and studies which have tried to control for many of the real world variables (e.g., industry moving to rural, unmonitored areas, economic recession slowing industrial activity, changes in fuel prices, fluctuations in weather patterns) have concluded that the role of regulations such as those embodied in the Clean Air Act has been small. Portney, *Air Pollution Policy*, in *PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION* 27, 49-52 (P. Portney ed., 1990) [hereinafter *PUBLIC POLICIES*].

Toxic waste problems present a somewhat gloomier picture. The Resource Conservation and Recovery Act of 1976 (RCRA), [42 U.S.C. §§ 6901-6987 \(1988\)](#), is designed to control the production and disposal of hazardous wastes. Under the Act, the EPA was directed to evaluate disposal techniques and draft regulations regarding those techniques. *Id.* § 6907. Part of the 1984 amendment was an attempt by Congress to set deadlines and mandatory regulations, an attempt necessitated by the EPA's lack of progress toward these goals. While the flurry of activity in 1984 may have had some effect, Dower, *Hazardous Wastes*, in *PUBLIC POLICIES*, *supra*, at 151, 167 (stating that better financed firms are beginning to shift production processes and inputs to reduce waste produced), the goals of RCRA seem, in most significant respects, to be unreachable. *Id.* at 168 (citing conclusion of bipartisan legislative organization that regulatory uncertainty, lack of data, and inadequate disposal capacity will hinder RCRA).

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), [42 U.S.C. §§ 9601-9657 \(1988\)](#), was an attempt to clean up already existing toxic sites. It, too, has moved neither far nor fast. Of more than 1100 sites on the National Priority List (those of the more than 30,000 potential clean-up sites that are determined to be in greatest need of response), only 41 had been cleaned as of 1989. Dower, *supra*, at 174 tbl. 5-8 (citation omitted).

This lack of progress on air and water quality and on hazardous waste problems is due in part to the sheer magnitude of any attempted cleanup. It, however, is also due in part to the inertia of preconceived, set ways of dealing with the problems. See text immediately *infra*.

[FN55]. Environmental policy since the 1970s has recorded some successes. D. CHIRAS, *BEYOND THE FRAY* (1990) cites the preservation of 90 million acres of wilderness as one of them, and *PUBLIC POLICIES*, *supra* note 54, notes that the ambient concentration for almost all common air pollutants has declined in most major metropolitan areas. Portney, *supra* note 54, at 51. But Dower also points out that neither the RCRA nor CERCLA has done much to stop the growing problem of hazardous waste disposal. Dower, *supra* note 54. Furthermore, global

problems such as third world deforestation, growing production of "greenhouse" gasses, acid rain, and ozone depletion show no sign of slowing. On the contrary, their treatment would involve major changes in our levels and patterns of energy use, and in the harvesting of tropical rainforests-changes not contemplated by the trust doctrine. [Stone, *The Environment in Moral Thought*, 56 TENN. L. REV. 1, 1-2 \(1988\)](#).

[FN56]. See, e.g., Tarlock, *supra* note 14.

[FN57]. The next Part details three such approaches. Others not treated extensively here are: deep ecology, Christian and other religion-based environmental ethics, and Kenneth Boulding's (and others') "spaceship earth" approach. See *infra* notes 66-67 and accompanying text; see also W. GRANBERG-MICHAELSON, *A WORLDLY SPIRITUALITY: THE CALL TO REDEEM LIFE ON EARTH* (1984).

[FN58]. See *supra* notes 1-6 and accompanying text.

[FN59]. See *supra* notes 10-15 and accompanying text; see also *infra* notes 68-69, 73-75, 81-82 and accompanying text.

[FN60]. A. LEOPOLD, *A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE* (1949), reprinted in *A SAND COUNTY ALMANAC WITH OTHER ESSAYS ON CONSERVATION FROM ROUND RIVER* (1966).

[FN61]. *Id.* at 240.

[FN62]. *Id.* at 219-20.

[FN63]. *Id.*

[FN64]. *Id.* at 219-30.

[FN65]. *Id.* at 219-20.

[FN66]. Boulding, *Economics of the Coming Spaceship Earth*, in *ENVIRONMENTAL QUALITY IN A GROWING ECONOMY 3* (H. Jarrett ed., 1966).

[FN67]. By this metaphor Boulding means we should be self-sustaining and conscious of our own limits. *Id.*

[FN68]. For the view that current approaches are inadequate to control our current environmental predicament, see, e.g., C. STONE, *supra* note 39; Boulding, *supra* note 66; Stone, *supra* note 5.

[FN69]. Because Leopoldian concepts tend to emphasize shifts in what we view as important-value shifts-rather than specific and articulated notions of rights and privileges, it is impossible to say how closer consideration of them might have changed the legislative landscape had the country not seized the trust approach. Many attempts, however, have recently been made to graft these earth-centered notions on to existing trust-based legislation. One such attempt is through a constitutional amendment. Lynton Caldwell, one of the original drafters of NEPA, has noted that NEPA is ineffective in large part because Congress and the courts can easily avoid its provisions. There is no basic interpretive law mandating protection of the environment. Caldwell notes that this is in contrast to civil rights legislation, which must be interpreted in light of the First, Fifth, and Fourteenth Amendments. To provide similar basic law, he has proposed an amendment that resonates Leopold's core message. The amendment prohibits the government from compromising the environment, and raises environmental concerns to the level of guiding

principles of policy. L. Caldwell, *An Environmental Amendment to the Constitution*, ENVIRONMENTAL AMENDMENT CIRCULAR #4 13 (June 1991).

William Ruckelshaus, past director of the EPA, starts from Leopoldian assumptions when he advocates adoption of pricing policies that account for the true cost of environmental goods and services as a method for improving environmental quality. His assumptions are embodied in a set of beliefs he has called a "sustainability consciousness":

1. *The human species is part of nature. Its existence depends on its ability to draw sustenance from a finite natural world; its continuance depends on its ability to abstain from destroying the natural systems that regenerate this world.* This seems to be the major lesson of the current environmental situation as well as being a direct corollary of the second law of thermodynamics.

2. *Economic activity must account for the environmental costs of production.* Environmental regulation has made a start here, albeit a small one. The market has not even begun to be mobilized to preserve the environment; as a consequence an increasing amount of the "wealth" we create is in a sense stolen from our descendants.

3. *The maintenance of a livable global environment depends on the sustainable development of the entire human family.* If 80 percent of the members of our species are poor, we cannot hope to live in a world at peace; if the poor nations attempt to improve their lot by the methods we rich have pioneered, the result will eventually be world ecological damage. Ruckelshaus, *Toward a Sustainable World*, SCI. AM., Sept. 1989, 166, 168. Ruckelshaus then argues that to reflect these values in an institutional manner, government must modify the market to reflect true environmental costs. This begins to involve some of the marketable "pollution permit" and water rights ideas currently under discussion. See Hahn & Stavins, [Incentive-Based Environmental Regulation: A New Era from an Old Idea?](#), 18 *ECOLOGY L.Q.* 1 (1991). These ideas, the germ of which was present long ago, might have been developed earlier had not the trust doctrine provided such a seemingly effective but stolidly incremental solution.

[FN70]. For a collection of essays on Native American thought on nature and the environment, see AMERICAN INDIAN ENVIRONMENTS: ECOLOGICAL ISSUES IN NATIVE AMERICAN HISTORY (C. Vecsey & R. Venables eds., 1980) [hereinafter AMERICAN INDIAN ENVIRONMENTS]. Other writings include: Strickland, *The Idea of Environment and the Ideal of the Indian*, 10 J. AM. INDIAN EDUC. 8 (1970), and Momaday, *An American Land Ethic*, in ECOTACTICS: THE SIERRA CLUB HANDBOOK FOR ENVIRONMENTAL ACTIVISTS 97 (J. Michell ed., 1970). For books on the general subject of Indians and the land, see, e.g., V. DELORIA, WE TALK, YOU LISTEN: NEW TRIBES, NEW TRUTH 86, 194, 197 (1970); W. JACOBS, DISPOSSESSING THE AMERICAN INDIAN 19-30 (1972); S. UDALL, *supra* note 6.

For the view that the Native American cultures did not attain a high level of environmental consciousness, see C. MARTIN, KEEPERS OF THE GAME 184-88 (1978); sources cited *infra* note 71.

[FN71]. See, e.g., Erikson & Vecsey, *A Report to the People of Grassy Narrows*, in AMERICAN INDIAN ENVIRONMENTS, *supra* note 70, at 152; Lyons, *An Iroquois Perspective*, in AMERICAN INDIAN ENVIRONMENTS, *supra* note 70, at 175. For a discussion of some of these themes, see Getches, *A Philosophy of Permanence: The Indians' Legacy for the West*, J. OF THE WEST, July 1990, at 54, 54-55, 64, 67.

[FN72]. Seathe, *"Dead, Did I Say? There Is No Death. . ."* in THE WAY: AN ANTHOLOGY OF AMERICAN INDIAN LITERATURE 28, 29 (S. Witt & S. Steiner eds., 1973) [hereinafter THE WAY].

[FN73]. See, e.g., I. KELSAY, JOSEPH BRANT 1743-1807: MAN OF TWO WORLDS (1984); Tecumtha, *"The Way . . . Is for All the Redmen to Unite,"* in THE WAY, *supra* note 72, at 7 (statement of Shawnee military leader Tecumtha, or Tecumseh); see generally AMERICAN INDIAN ENVIRONMENTS, *supra* note 70.

[FN74]. See, e.g., the collection of writings in AMERICAN INDIAN ENVIRONMENTS, *supra* note 70; see also [Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 \(1960\)](#):

It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional way of life. The record does not leave the impression that the lands . . . are the most fertile, the landscape the most beautiful But this is their home-ancestral home. There they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money

Id. at 142 (Black, J., dissenting).

Other writers have declined to jump on the Native Americans bandwagon, and have been generally less enthusiastic about their behavior toward the land. For example, J. SWANTON, THE INDIANS OF THE SOUTHEASTERN UNITED STATES 317-20 (1969), describes the process of firing woods and cane brakes to drive game into mass hunting areas. Swanton also details the mass slaughter of carrier pigeons, presaging the white man's final act of species extinction. *Id.* D. WORSTER, RIVERS OF EMPIRE 34 (1985), suggests that the Hohokum (the gone ones) of the area near Phoenix, Arizona, may have irrigated themselves out of existence in a salinification process that, again, eerily presages the white man's own environmental destruction.

Others note that buffalo drives failed to exterminate all buffalo because the Native Americans lacked the technology (e.g., machine guns) to do so. The main way of harvesting buffalo was to drive them off cliffs. But once the herd was in motion, there was no way to stop them, with the result that many more bodies than could be eaten piled up at the bottom of the cliffs. Interview with Alan Delocourt, Ph.D., Davis, California (June 22, 1991).

Nonetheless, the Native Americans' spiritual view of humanity's relationship to nature has an important message especially in light of today's increasingly damaged environment. That the Native Americans themselves may have had some difficulty following their own spirituality only makes the message all the more poignant.

[FN75]. It is interesting to speculate what the world of environmental regulation would have looked like had these views indeed gone forward. Extrapolation is made difficult (1) by one's own fear of cultural imperialism-pretending to speak on behalf of another culture, see generally Delgado, [The Imperial Scholar: Reflections on a Review of Civil Rights Literature, 132 U. PA. L. REV. 561 \(1984\)](#); and (2) because those anthologists and writers who were articulating the Indian-based approach in the 1960s and 1970s were not advocating particular programs, but rather general changes in values and consciousness. Still, it seems possible to speculate that a spiritually based approach to land and natural-resource management, like that which these writers were urging, would have emphasized the following: Leaving the nation's parklands, deserts, and forests exactly as they are-*i.e.*, with as little development as possible; preserving all living species, no matter the cost; requiring that producers of toxic waste internalize the cost of its disposal; and reducing rapidly water and air pollution to the lowest possible levels, with the cost placed on those doing the polluting. Violation of environmental rules would be punished by intense community disapproval, fines, and ultimately, perhaps, banishment from the community, thus forcing the polluter to cease doing business entirely.

But see C. MARTIN, *supra* note 70, at 184-88 (stating that historically Native Americans did not attain a high level of environmental consciousness).

[FN76]. For a collection of essays, see REWEAVING THE WORLD: THE EMERGENCE OF ECOFEMINISM (E. Diamond & G. Orenstein eds., 1990) [hereinafter EMERGENCE OF ECOFEMINISM].

[FN77]. For more general discussions of feminism and feminist legal theory, see Bartlett, [Feminist Legal Methods, 103 HARV. L. REV. 829 \(1990\)](#); Scales, [The Emergence of Feminist Jurisprudence: An Essay, 95 YALE L.J. 1373 \(1986\)](#); West, [Jurisprudence and Gender, 55 CHI. L. REV. 1 \(1988\)](#); see also C. GILLIGAN, *supra* note 44.

[FN78]. On patriarchy, see Polan, [Toward a Theory of Love and Patriarchy, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 294 \(D. Kairys ed., 1982\)](#) [hereinafter POLITICS OF LAW]. On the connection between patriarchy (and men's values generally) and environmental

despoliation, see G. ORENSTEIN, *THE REFLOWERING OF THE GODDESS* (1990); *EMERGENCE OF ECOFEMINISM*, *supra* note 76.

[FN79]. See sources cited *supra* notes 76-78. For the view that law and legal culture are male in approach and mindset, see McIntyre, *The Maleness of Law* (unpublished manuscript, on file with Author); Menkel-Meadow, [Portia in a Different Voice: Speculations on a Woman's Lawyering Process](#), 1 *BERKELEY WOMEN'S L.J.* 39 (1985); Taub & Schneider, *Women's Subordination and the Role of Law*, in *POLITICS OF LAW*, *supra* note 78.

[FN80]. See *Ecofeminism: Healing Mother Earth*, *Business Wire*, Apr. 17, 1990, available in LEXIS, library, BWIRE file (reporting an interview with author G. Orenstein).

[FN81]. See *supra* notes 76, 78, 80. One of the themes missing from current environmental thought that ecofeminism provides is the notion of interconnectedness. (This notion is essential as well to the two approaches previously discussed.) Environmental problems of a global nature (e.g., overpopulation, the ozone hole, global warming) demand the realization not only that all humankind is interrelated and interdependent across national boundaries, but that all things on this earth, alive and inert, are interrelated. More than this, the ecofeminists expand the feminist theories of domination of women to domination of the entire ecosystem. They thus are acutely aware of the damage that a hierarchical view of nature (with *man*-not merely humans-at the top) has done to our ability to understand and live with and within nature. See King, *The Ecology of Feminism and the Feminism of Ecology*, in *HEALING THE WOUNDS* 18, 23-24 (J. Plant ed., 1989) (developing an ecofeminist position that there is no hierarchy in nature-whether among persons or between persons and nature).

A seriously considered ecofeminism would reject the kind of environmental protection that protects the environment *for* someone (either for oneself or for future generations). The environment is protected because it is a part of us just as we are a part of it. Indeed, "interconnection" is almost too weak a word-what is necessary is a recognition of the essential *unity* between people and nature. Women share with nature the experience of being the other in a world dominated by men whose interests are often foreign, if not inimical, to their own. It is precisely this pattern of hierarchical separation and domination that has led us to the current environmental crisis. Only when our approach is supplanted by a more integrated, empathic, feminist one will we be able to address that crisis effectively. *Id.* at 23-28.

[FN82]. On normativity in law and legal analysis and scholarship, see Symposium, [The Critique of Normativity](#), 139 *U. PA. L. REV.* 801 (1991), and Schlag, [Normative and Nowhere to Go](#), 43 *STAN. L. REV.* 167 (1991).

[FN83]. Delgado, [Norms and Normal Science: Toward a Critique of Normativity in Legal Thought](#), 139 *U. PA. L. REV.* 933, 942 (1991).

[FN84]. *Id.* at 942-44; see also Schlag, [Normativity and the Politics of Form](#), 139 *U. PA. L. REV.* 801 (1991).

[FN85]. See, e.g., Schlag, *supra* note 84, at 906-09.

[FN86]. E.g., T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970).

[FN87]. See, e.g., Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 139 *U. PA. L. REV.* ____ (forthcoming 1992); Kennedy, [Racial Critiques of Legal Academia](#), 102 *HARV. L. REV.* 1745 (1989).

[FN88]. Ely, [The Wages of Crying Wolf: A Comment on Roe v. Wade](#), 82 *YALE L.J.* 920 (1973) (arguing that the landmark Supreme Court decision protecting a woman's right to an abortion was unprincipled because it gave little weight to the fetus's interest); cf. Wechsler, [Toward Neutral Principles of Constitutional Law](#), 73 *HARV. L. REV.* 1 (1959) (arguing that without reason

Brown v. Board of Education placed rights of blacks to associate with whites above rights of whites not to associate with blacks).

[FN89]. See generally Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 224 (1984).

[FN90]. On paradigm change in legal thought, see Schlag, *supra* note 82.

[FN91]. See D. BELL, RACE, RACISM AND AMERICAN LAW 1-51 (2d ed. 1980) (discussing the managerial role of civil rights statutes and Supreme Court decisions in confining reform).

[FN92]. On this reform-dampening function, see Delgado, *supra* note 83.

[FN93]. See *supra* notes 83-91 and accompanying text; see also *infra* note 100 and accompanying text.

[FN94]. See *supra* notes 2-6, 60-68.

[FN95]. See, e.g., Boulding, *supra* note 66.

[FN96]. See, e.g., Tribe, *supra* note 4.

[FN97]. See, e.g., Stone, *supra* note 5.

[FN98]. See, e.g., Devall, *The Deep Ecology Movement*, 20 NAT. RESOURCES J. 299 (1980); Karp, *supra* note 31; see also *supra* notes 60-68, 76-81 and accompanying text. For a contemporary work that draws on these strands, see C. STONE, *supra* note 39.

[FN99]. For a history of this period, see S. HAYS, *supra* note 2.

[FN100]. In feminism the individual who set the revolution on a softer, more acceptable course was Carol Gilligan. See C. GILLIGAN, *supra* note 44. In critical race theory, Randall Kennedy both condemned and praised the old order. Kennedy, *supra* note 87. In critical legal studies Roberto Unger's scholarly writing and utopian vision made the movement acceptable to a wide audience.

[FN101]. For the argument that Sax's public trust approach proved appealing because of its familiar, incremental character, see *supra* Part III. For the argument that it permitted too much preservationist activity in contravention of democratic values, see Huffman, *supra* note 30.

[FN102]. J. SAX, *supra* note 21.

[FN103]. E.g., J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971).

[FN104]. On the notion that legal reform movements are often transformative and conservative at the same time, see Crenshaw, *Race, Reform and Retrenchment*, 101 HARV. L. REV. 1331 (1988).

[FN105]. For criticism of environmentalism as "going too far," see, e.g., Huffman, *supra* note 30. For responses to criticisms levelled at the "deep ecology" movement, see Naess, *A Defense of the Deep Ecology Movement*, 6 ENVTL. ETHICS 265 (1984).

[FN106]. See *supra* notes 41-53 and accompanying text; cf. Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988) (arguing that our broad system of civil rights laws comforts and assures us that blacks are no longer actively repressed, thereby enabling us to maintain an unfair and unjust racial status quo).

[\[FN107\]](#). See *supra* notes 41-53 and accompanying text (arguing that the trust approach appealed to us precisely because we feared what we might do, so we transferred responsibility to a trustee who, it was hoped, would act according to our “better natures”).

[\[FN108\]](#). For the view that breakthroughs in antidiscrimination law follow this same cyclical pattern, see D. BELL, *supra* note 91, at 1-51.

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