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Radical Legal Change: Moving Toward Earth Law

Tara Pierce

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ABSTRACT

This paper will examine the required paradigm shift in socio-legal philosophical thinking and the shared values between the Public Trust Doctrine and Earth Law. These legal frameworks were born from different social narratives, which greatly impacted their ability to serve the public and the Earth Community. Exploring each legal framework's origins and current practice will illuminate how the Public Trust Doctrine can bridge the gap between Western legal systems toward Earth Law—a holistic approach to justice in the context of history, society, ecology, and humanity's relationship with our planet. Earth Law focuses on the roles of beings within their ecosystem, and the requirements for ecosystems to flourish. At its core, Earth Law is a practice that acknowledges that everything is connected. Results of Earth Law includes rights for rivers, granting personhood to mountains, and acknowledging colonial wrongdoings. Given today's environmental devastation, Earth Law challenges practitioners to have incorporate healing practices. This paradigm shift will provide the necessary philosophy and legal tools to address climate change in a timely, adequate, and equitable manner. For this paradigm shift to occur, we must take control of our narrative—currently, Western binary thinking separates humanity from its habitat, Nature. Environmentalists are consistently faced with owls-versus-jobs style arguments. This false dichotomy has created modern environmental laws that permit inequitable environmental destruction, none more dramatic than climate change. By pushing a core Western legal doctrine, the Public Trust Doctrine, deeper into its own logic and values, we find Earth Law.

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INTRODUCTION

Climate Change calls into question the very foundation of Western legal philosophy. Our framework has failed us and the world. Modern environmental law, based on a reasonableness standard, only regulates the pace at which we march to our inevitable death and the destruction of all life as we know it. What legally passes as "reasonable," such as the continued burning of fossil fuels in the face of the known dangers, is repugnant to common sense. Courts hide behind labored reasoning anytime they do not want to touch the merits of a case, regularly denying justice to widespread, systemic harm.[1] Meanwhile, countries in the global south charge ahead, creating a healing jurisprudence: Earth Law. This framework recognizes how everything is connected, promoting equity and stewardship of the environment upon which humanity and all life depends. Fortunately, there is something embedded within Western law that can serve as a bridge toward such holistic legal thinking: the Public Trust Doctrine ("PTD").[2]

The thesis of this paper is that we must take control of our socio-legal narratives to allow the PTD to grow into itself, blossoming into Earth Law so that we can make meaningful climate change law. This requires radical change. Therefore, this paper will follow "the classic structure of a persuasive argument for radical change," which traditionally includes four elements: "(1) what needs to change, (2) why it needs to change, (3) what we will put in its place, and (4) what we will gain from the change."[3] Additionally, this paper includes a fifth element: how to change.[4]

Part I will discuss what needs to change and why it needs to change. The societal narratives in which legal frameworks are born dramatically impact these frameworks' ability to serve the public and what Thomas Berry, an eminent social historian and Earth Law advocate, calls the Earth Community.[5] Berry proposed that: "Every component of the Earth community, both living and non-living, has three rights: the right to be, the right to habitat, and the right to fulfil its role in the ever-renewing processes of the Earth Community."[6] Essentially, every entity on Earth is part of an

1. Lujan v. Defs. of Wildlife, 504 U.S. 555, 604 (1992) (Blackmun, J., dissenting). For example, in this case Justice Blackmun, with whom Justice O'Connor joins in the dissent, describes the plaintiffs as perfect for Article III standing and concludes, "I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing." *Id.* at 607.

2. Judith E. Koons, *What Is Earth Jurisprudence?: Key Principles To Transform Law for the Health of the Planet*, 18 PENN ST. ENV'T L. REV. 47, 63 (2009) (explaining that the public trust doctrine has "roots in the Magna Carta and Roman law").

3. DEBORAH ROWAN WRIGHT, FUTURE SEA: HOW TO RESCUE AND PROTECT THE WORLD'S OCEANS 59 (2020) (enumeration added).

4. *Id.*

5. CORMAC CULLINAN, WILD LAW: A MANIFESTO FOR EARTH JUSTICE 11 (2011).

6. David Takacs, *We Are the River*, 2021 U. ILL. L. REV. 545, 551 (2021).

interdependent community of life, and every entity has a role to fill for the benefit of that community. Western society has derailed humanity's role, and Earth Law will lead us back.

Our society's narratives have resulted in legal frameworks with environmental laws so inadequate that they threaten our very existence. Western environmental laws seek to regulate Nature without understanding it and without understanding our role within it. The dominant paradigm has painted "environmentalists" as impractical extremists and has created false dichotomies, like choosing between the environment and the economy. Grassroots, democratic efforts are easily squashed by the false narrative that humans and Nature are separate. These narratives impede progress, as seen in the Lake Erie Bill of Rights case.[7]

Part II will offer a holistic, equitable legal framework to put in place of our current system and illustrate its benefits. Earth Law is based on a different narrative, one that respects the role of ecosystems and unites humanity with our place in Nature. Successful examples abound in the Global South. The Philippine Supreme Court, in a landmark case, ruled in favor of the rights of future generations, citing the Public Trust Doctrine.[8] This case illuminates an overlap in the PTD and Earth Law: the rights of future generations. Recent New Zealand legislation sets the bar for holistic legal thinking, pushing the practice of law toward a healing practice that incorporates historical contexts and cultural equity, both of which are connected to the pursuit of a flourishing environment. The New Zealand legislation shows the world a glimpse of what we can gain from making this radical paradigm shift.

Part III will discuss how to push change in the Northern Hemisphere and will provide reasons for optimism in the face of what can appear to be impossible. Luckily for us, the change is already beginning. By starting with something deeply embedded in Western law, we can build a bridge toward Earth Law. The PTD is based in the same logic and values as Earth Law, but it was halted from its own logical progression by false narratives. *Illinois Central Railroad Co. v. Illinois,* exemplifies how the PTD is like a precursor to Earth Law by providing an overview of a utilitarian ideology, yet also shows concern for future generations, which leans toward Earth Law.[9] Abandoning false narratives leads to improved environmental laws, as seen in the success of Santa Monica's Sustainability Rights Ordinance.[10] The ordinance declared that the health of the city depends upon the environment.[11] Additionally, society's demand for a new narrative is

7. Drewes Farms P'ship v. City of Toledo, 441 F. Supp. 3d 551 (N.D. Ohio 2020).
8. Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.).
9. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).
10. CITY OF SANTA MONICA, SUSTAINABILITY RIGHTS REPORT: A BIENNIAL REPORT OF ECOSYSTEM HEALTH METRICS 5 (2019), https://perma.cc/3XMH-FYRN.
11. Santa Monica Municipal Code § 12.02.020(b), https://perma.cc/FC6C-THBT.

reflected in recent litigation for an Atmospheric Trust.[12] Adding an Atmospheric Trust is a critical step to widespread understanding of how connected we are to each other and to the Nature's global systems.

This paper urges all legal minds to consider their role in society's dominant paradigm, the quality of life it creates for the Earth Community, and the future survival of life as we know it. We choose our narrative, we create law. We, humanity, are fully capable of living in harmony with each other and other living things in mutually beneficial ways; we need only choose it. What if we choose to view our legal practice as a healing practice? Simple perspective shifts like this one have dramatic impacts on our work. This paper includes a heavy focus on societal narratives, because of their impact on our laws and our legal practice. Western societies shaped their PTD within the context of a false narrative: that humans and Nature are separate. This falsity halted the logical progression of thought. On the other hand, Earth Law views humans as part of Nature, and seeks to place our legal system in the broader context of society, philosophy, and history,[13] which is required to create meaningful climate change law. The PTD is not necessarily inherently flawed—rather, it is simply the beginning of a logical, empathetic thought progression that must be fully realized for humanity to flourish. Radical change is not easy, which is why building off of something familiar is so important. At its core, this paper does not seek to protect the environment—the goal is to create a world where the environment does not need protecting. Building off of the values of the PTD can lead us toward a narrative that pushes legal philosophical thinking toward holistic legal practices that have the ability to heal the world.

PART I. WHAT NEEDS TO CHANGE AND WHY: OUR NARRATIVES AND THE INADEQUATE, UNEQUITABLE LAWS THEY CREATED

"You know who wins cases? The side with the best story."

~ Professor Shanin Spector
UC Hastings College of Law
Spring Term Torts Lecture 2021

Western environmental laws are desperately inadequate, because of the social narratives that influenced lawmakers at the time the laws were

12. *See, e.g.*, Juliana v. United States, 217 F. Supp. 3d. 1224 (D. Or. 2016) and Urgenda Foundation v. The State of the Netherlands, Case No. C/09/456689/HA_ZA 13-1396 (Netherlands), Rechtbank Den Haag [District Court of The Hague, Chamber for Commercial Affairs] (June 24, 2015).

13. EARTH LAW: EMERGING ECOCENTRIC LAW—A GUIDE FOR PRACTITIONERS xxxix, (Anthony R. Zelle et. al. eds., 2021).

made. The narratives include false dichotomies and false choices, most of which stem from the idea that humans and Nature are separate. This separation sets up other false narratives, including the view that humans can only interact with Nature in destructive ways, and therefore we must always choose between the economy and the environment.

Western modern environmental laws continue to view Nature as siloed resources, constraining statutes to a regulatory framework focused on parts of the ecosystem like air, water, endangered species, pesticides, etc., thus failing to provide tools addressing the whole ecosystem.[14] The titles of our statutes illuminate how we address the environment in disconnected pieces. For example, the Clean Water Act, Clean Air Act, and Endangered Species Act. These Acts gave the illusion of success by creating huge early gains from low-hanging fruit.[15]

However, this narrow focus on only visible, physical human health impacts and environmental degradation overlooks the roles of social and economic relationships and systems.[16] Through these environmental laws, Congress has attempted to regulate something without fully understanding it. Moreover, Congress ignored not only the PTD, but the people's wants and needs by "[r]eadily handing out permits to pollute and destroy is de facto privatization."[17] Only the permitted party benefits, and that which was polluted or destroyed is lost. While we have won many battles, we are losing the planet.

Society and law are two sides of the same coin, each shaping the other. Western dependence on the current system is so endemic that, for many, an alternative way of life sounds like a pipe dream.[18] We must not let our lack of imagination define our future. Cormac Cullinan, current Director of the Wild Law Institute in South Africa, puts it, "While the regulatory function of law is easy to see, we often overlook the fact that law plays an equally important role in constituting and forming society itself."[19] The law matters because it is a principal tool used to regulate human behavior, which is exactly why many societies turned to the creation of environmental laws when it was clear that human behavior was causing environmental destruction.[20] The commodification of Nature is what got us into this mess. The solution to this morally vacant conduct is not to continue it with "new"

14. Alyson C. Flournoy, *Integrative Environmental Law: A Prescription for Law in the Time of Climate Change*, 30 DUKE ENV'T L. & POL'Y F. 225, 247–48 (2020).

15. *Id.* at 248.

16. *Id.*

17. MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 267 (2014).

18. THOMAS BERRY, THE SACRED UNIVERSE: EARTH, SPIRITUALITY AND RELIGION IN THE TWENTY-FIRST CENTURY 163 (2009).

19. CORMAC CULLINAN, WILD LAW: A MANIFESTO FOR EARTH JUSTICE 55 (Mary Evelyn Tucker ed., 2003).

20. *Id.*

regulatory processes within the same "old" narrative. Capitalism is often praised for pushing innovation, yet such praise conveniently forgets that the innovation is only for the sake of profit. If the prosperity of the entire population is not profitable, then people are left to die. This dynamic is why the law matters. The law expresses societal values and shapes our narrative.

A. ENVIRONMENTAL INJUSTICE

Currently, our environmental laws are failing us, but they are not failing us equally. For example, the Clean Air Act is harming the largely Latinx community in Wilmington, Los Angeles.[21] Surrounded by three oil refineries and peppered with active oil wells,[22] the air quality should be an embarrassment to our government. Community members are experiencing high rates of asthma and respiratory illnesses, and the community is at a sixty percent higher risk for developing cancer than other communities.[23] This type of environmental racism is the norm in the United States, an unfortunate by-product of the 1984 case *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc*.[24]

This situation created by the Clean Air Act warrants a reexamination of how we draft legislation and how we allow administrative agencies to interpret legislation. It cries out for a more transparent, more democratic process that does not discriminate. Moreover, it exemplifies the need to add the atmosphere to the PTD.

The PTD is based in values seen across cultures that focus on ecology and future generations. For example, "Clean water or clean air of functioning ecosystems are rights because human life cannot exist without them."[25] Privatizing water gives the "owner" all the power. Therefore, the state must steward certain parts of Nature, like water, for its current and future citizens. The relationship between humans and Nature is thus recognized in PTD logic, but not fully realized. Through a strong case of cognitive dissonance,[26] Western societies have held two opposing beliefs at once: that humans are separate from Nature, but also that humans have a

21. Pearson, *Taking a Stand Against Environmental Injustice*, YOUTUBE (May 7, 2018), https://youtu.be/YMJNqKbtC-Q.

22. *Id*.

23. *Id.*

24. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). In summary, the court now defers to agency "expertise" unless congress has spoken directly to the issue at hand. This case runs afoul of the duty of courts to say what the law is and the purpose of the Clean Air Act, which is to maintain and *improve* air quality.

25. David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENV'T L.J. 711, 733 (2008).

26. *Cognitive Dissonance*, MERRIAM-WEBSTER, https://perma.cc/WRC3-F3XF ("psychological conflict resulting from incongruous beliefs and attitudes held simultaneously").

relationship with Nature that must be mutually beneficial, at least for humanity's survival.

Based on the first of the two opposing beliefs, the PTD's full meaning and force were restrained by the false narrative at the time of its creation: that humans and nature are separate. The idea that everything on Earth was there to serve man resulted in viewing everything as the "other," including women, children, and nature.[27] This othering is why Nature is viewed as a legal object, rather than a legal subject with rights.[28] This dualistic narrative is where the PTD was born and what has controlled the social-legal narrative of our other environmental laws.

However, it only takes a slight breeze to push the PTD into what author and Professor Mary Christina Wood calls "Nature's Trust" which "expresses a fiduciary construct of private property ownership to prevent environmentally injurious uses."[29] Inherent in this fiduciary duty, is the widening of the community to include nonhuman life. This extension is required for the trust to be functional. Western laws have not made the extension, putting us all in peril. Cofounder of the Natural Resources Defense Council, James Gustav Speth, put it simply: "[W]e're headed toward a ruined planet."[30]

Only by assuming that humans are separate from Nature, can we assume that humans only interact with Nature in destructive ways. This assumption supports the false choice of "economy versus environment," exemplified by former President Trump who said, "We can leave a little bit of it, but we can't destroy businesses," in reference to the environment.[31] With this narrative, anyone against changing business-as-usual has the upper hand, because it appears that "environmentalists" are extremists who do not care about people because their goals will destroy the economy. But that is a false narrative, because without Nature, where will our economy come from?

The environmental statutes designed to protect Nature permitted its destruction. For example, the corporate quest for coal has already scalped 500 Appalachian mountains, buried or polluted nearly 2,000 miles of streams, and forced families to leave the homes of their ancestors.[32]

Within the vocabulary of environmental law, actions that might well be described as crimes against humanity, relentless assaults against the community, theft against future generations, or even reckless

27. *See generally* Koons, *supra* note 2. While this is a common theme of ecofeminism, it has also been discussed in a legal journal at least once.

28. Koons, *supra* note 2, at 47, 56.

29. WOOD, *supra* note 17, at 271.

30. *See generally* JAMES GUSTAV SPETH, ANGELS BY THE RIVER: A MEMOIR (2014).

31. Fox News Sunday, *Trump on the Environment*, YOUTUBE (Mar. 23, 2017), https://youtu.be/sChapaeZO5Y (expert interview with former President Trump).

32. WOOD, *supra* note 17, at 262.

endangerment of innocent children all succumb to the terminology of an antiseptic regulatory system . . . So dehumanizing is the regulatory techno-jargon and so capable of castings a mind-numbing pall over the hazards of environmental damage, that society's most destructive inclinations now gain acceptance as if they were normal.[33]

B. RIGHTS FOR THE ECOSYSTEM OF LAKE ERIE

In practice, this narrative upholds the dominant paradigm of oppression and causes good faith efforts to fail in the United States. Judge Zouhary's comments in his ruling on the validity of Lake Erie's Bill of Rights ("LEBOR") provide a prime example of how treating ecosystems as separate resources places a heavy burden on advocates.[34] Prompted by three days of contaminated drinking water, the residents of Toledo, Ohio banded together in a true democratic effort to create positive change.[35] They drafted LEBOR, which acknowledged their dependence on the Lake Erie ecosystem and sought to protect it in its entirety. LEBOR had good intentions. It mimicked Earth Law legislation around the world, declaring that "Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally evolve," and granted Toledo residents "the right to a clean and healthy environment."[36] It was off to an excellent start—however, LEBOR did not include any definitions or provisions to clarify these rights, nor how to protect them or provide guidance for appropriate conduct. Sadly, LEBOR failed, due in large part to vague language.

Judge Zouhary, in what seems an encouraging moment, writes that with careful drafting, Toledo could pass successful legislation that reduces water pollution, and Zouhary pointed to *CropLife America Inc. v. City of Madison* as an example.[37] In that case, the City of Madison and Dane County enacted ordinances to ban the sale and use of fertilizers that contain more than trace amounts of phosphorous, because the phosphorous run off was damaging the water quality.[38] While phosphorous is an excellent fertilizer, it is also a pollutant that contributes to excess amounts of algae and other undesirable aquatic vegetation.[39] On appeal, the court upheld the bans, finding that the ordinances were not preempted by state or federal law, including the arguments from plaintiffs regarding the Commerce Clause and federal pesticide regulation.[40]

33. WOOD, *supra* note 17, at 262.
34. Drewes Farms P'ship v. City of Toledo, 441 F. Supp. 3d 551, 553 (N.D. Ohio 2020).
35. *Id.*
36. Toledo Municipal Code ch. XVII, § 254(a), § 254(b).
37. *Drewes Farms P'ship*, 441 F. Supp. 3d at 557.
38. CropLife Am., Inc. v. City of Madison, 432 F.3d 732, 733 (7th Cir. 2005).
39. *Id*.
40. *Id*. at 734.

It was easy to uphold the phosphorous bans, because the language was clear and the scope was narrow. The Wisconsin statutes defined "fertilizer" to include "fertilizer and any other substance" and "pesticides" to include "a fertilizer pesticide combination," and specifically stated that "weed and feed" products (which the plaintiffs sold) were "fertilizer-pesticide combinations."[41] The court found that while the state regulates pesticides and local governments regulate fertilizers, each has a hand in regulating combination products.[42] Furthermore, the court found that it makes practical sense to allow local governments to regulate phosphorous, because effects will differ from county to county depending on a variety of factors, including geese migration.[43]

While this strategy works, it appears from the language of LEBOR that the residents of Toledo were looking for something more. Their goal was not water quality alone, but the recognition of a deeper understanding of Lake Erie's ecosystem and their dependence on it. Ben Price, the national director of the Community Environmental Legal Defense Fund, stated before LEBOR was struck down that, "We're seeing the results of our narrow-mindedness, of our belief that nature is property and property ownership is the highest right. The hope is that by beginning somewhere, like Toledo, the conversation enlarges."[44] In that regard, by citing *CropLife* as a success story, Judge Zouhary misses the point of LEBOR.

Falling into the old trap of pitting the economy against the environment, Judge Zouhary writes that "LEBOR's authors failed to make hard choices regarding the appropriate balance between environmental protection and economic activity."[45] This choice implies that the only way humans interact with their environment is destructive. Judge Zouhary notes that countless activities could run afoul of LEBOR, such as "catching fish, dredging a riverbed, removing invasive species, driving a gas-fueled vehicle, pulling up weeds, planting corn, irrigating a field . . ."[46] While driving gas-fueled vehicles is inherently harmful to life, the other activities can be conducted in ways that honor the lake and create mutually beneficial relationships between the residents and the habitat. Laying out the foundations of agroecology and sustainable fishing practices was not included in LEBOR but would have been beneficial to their case. To properly address climate change, this is exactly where such ecological practices should be promoted, if not required.

41. *CropLife*, 432 F.3d at 734 (internal quotations omitted).
42. *Id.*
43. *Id.*
44. Sig Samuel, *Lake Erie Now Has Rights, Just Like You*, VOX (Feb. 26, 2019), https://www.vox.com/future-perfect/2019/2/26/18241904/lake-erie-legal-rights-personhood-nature-environment-toledo-ohio.
45. Drewes Farms P'ship v. City of Toledo, 441 F. Supp. 3d 551, 556 (N.D. Ohio 2020).
46. *Id.*

PART II. WHAT WE SHOULD REPLACE AND WHAT WE CAN GAIN: CREATING ECO-CENTRIC NARRATIVES & REPLACING MODERN ENVIRONMENTAL LAW WITH HOLISTIC LEGAL FRAMEWORKS

"If citizens yearn for a deeper, principled truth, then environmental statutes must regain their moral grounding or they will continue to serve the very marauders that their makers designed them to protect against."[47]

~ Mary Christina Wood

Any socio-legal paradigm shift sounds like a lot to ask of the United States, especially in our current polarized political climate. But our society is already moving ahead full steam. As Greta Thunberg puts it, "[w]e already have all the facts and solutions. All we have to do is wake up and change."[48] In the United States, and in other highly developed countries, the outcry is strong, and people want the solutions put into action. This outcry is evidenced by the huge market for "green" products. The internet is consistently being flooded with headlines like "Scientist in Mexico Creates Biodegradable Plastic from Prickly Pear Cactus,"[49] and people across the country continue to "March for Science."[50] The Sunrise Movement took over House Speaker Nancy Pelosi's office with the support of Congresswoman Alexandra Ocasio-Cortez,[51] books like *All We Can Save* are hitting the shelves,[52] podcasts like How to Save a Planet and A Matter of Degrees continue to educate and inspire,[53] and the Earth Law Center launched an Earth-centric pilot course for law schools in the United States.[54] The world is in upheaval. Everywhere, people are demanding change in the face of our shared existential crisis. The slight breeze needed

47. WOOD, *supra* note 17, at 262–63.

48. GRETA THUNBERG, NO ONE IS TOO SMALL TO MAKE A DIFFERENCE 10 (2019).

49. Scott Snowden, *Scientist in Mexico Creates Biodegradable Plastic from Prickly Pear Cactus*, FORBES (July 14, 2019, 1:01 PM), https://perma.cc/55VU-L3QU.

50. MARCH FOR SCIENCE, https://perma.cc/FH4U-AVLS.

51. Miranda Green, *Ocasio-Cortez Joins Climate Change Sit-In in Pelosi's Office*, HILL (Nov. 13, 2018, 11:31 AM), https://perma.cc/VBQ5-TV2P.

52. *See generally* ALL WE CAN SAVE: TRUTH, COURAGE, AND SOLUTIONS FOR THE CLIMATE CRISIS (Ayana E. Johnson & Katharine K. Wilkinson eds., 2020) (an anthology of essays by diverse women working on the frontlines of climate change as activists, scientists, farmers, journalists, teachers, lawyers, etc., promoting a solution-oriented public conversation on the climate crisis).

53. *How To Save a Planet*, GIMLET MEDIA, https://perma.cc/5NQM-KMWU; *A Matter of Degrees*, https://perma.cc/UAF8-3FSH.

54. Author took this pilot course, Summer 2021. Contact author for questions and more information, or visit https://www.earthlawcenter.org for general information.

to push the PTD into the realm of Earth Law is coming and picking up speed like a climate-induced extreme weather event. United States' legal thinkers need only raise their sails to join the movement and create meaningful climate change law.

Earth Law is the fastest growing legal movement in the world,[55] which embraces a legal theory based on the premise that rethinking law and governance is necessary for the well-being of all Earth's inhabitants.[56] "Earth jurisprudence posits that the welfare of humans, as members of the Earth Community, is dependent on the welfare of Earth as a whole."[57] Anthony Zelle, President of the Earth Law Center, described it to law students as "a new context, and a departure from, our modern environmental laws."[58] Earth Law is based on relationships and duties, underscoring that "where there is a right to human life, there is a responsibility to act in a way that will support it."[59] Ironically, for humanity to survive, it must cease its anthropocentric thinking.[60] Earth Law does that by extending fundamental rights to animals, rivers, mountains, and ecosystems; by listening to all voices equitably; and by going beyond the concept of rights, giving legal consideration to the relationships of parties within their ecosystem.

Relationships and duties within our ecological roles are not homogenous. Even our current legal system reflects that not all laws apply equally to all people, because that is sometimes inappropriate based on things like age or mental capacity. Applying this principle to Nature is not a big leap.

Many countries are already using the PTD in expansive ways that create a path to Earth Law. India's Supreme Court has continually extended the PTD since at least 1997, when they used it to justify the court's reasoning that the public has a right to expect some natural resources to maintain their natural characteristics.[61] The Philippine courts are acknowledging the rights of future generations and accepting the responsibility of remedies that require consistent monitoring.[62] New

55. Takacs, *supra* note 6.

56. Koons, *supra* note 2, at 47.

57. EARTH LAW, *supra* note 13, at 5.

58. Tony Zelle, Chair & President, Earth Law Center, Panelist at the Hastings Env't Law Ass'n Earth Law Panel (Nov. 1, 2021).

59. EARTH LAW, *supra* note 13, at 5.

60. Perhaps there is even more irony in the realization that "anthropocentric" thinking does not actually benefit humanity, because such thinking only benefits a select few and in the long run will kill us all. Ecocentric is anthropocentric, and anthropocentric is ecocentric, because there is no separation between humanity and nature. But for the sake of clarity, we will continue using these words in their pop culture contexts.

61. Takacs, *supra* note 25, at 736.

62. *See, e.g.*, Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.).

Zealand made a legislative leap directly into Earth Law, setting a new bar of socio-legal narratives and action for nations with origins in colonialism. These examples are part of the Earth Law movement, showing the path toward holistic legal frameworks and their benefits. These are examples of the law recognizing that society wants to change the narrative and is validating those voices by incorporating the new chosen narrative into the law itself.

A. INDIA

India's paradigm shift is ongoing but provides a good guide for beginning. Perhaps surprisingly, some of the law review articles India cited encouraging a "new natural law" were from the United States.[63] For example, in *M.C. Mehta v. Kamal Nath*, the Court cites a Harvard Law Review article stating that, "[H]uman activity finds in the natural world its external limits. In short, the environment imposes constraints on our freedom; these constraints are not the product of value choices, but of the scientific imperative of the environment's limitations."[64] Shortly before discussing the PTD, the court wrote:

> The classic struggle between these members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change.[65]

Another Indian case that illuminates the power of language and the interlocked fate of humanity and our habitat, is *M.I. Builders Pvt. Ltd. v. Rahhey Shyam Sahu*.[66] The Court held that the destruction of a park would mean that citizens "would be deprived of the quality of life to which they are entitled under the law."[67] This sentence implicitly states that a person's quality of life depends on our environment. It is the cornerstone of logic behind the PTD.

These examples showcase the ability of the PTD to protect Nature. However, to move all the way to Earth Law, the narrative must go beyond the discussion of these courts. Both still fall into the "economy versus environment" trap. But if we abandon that notion, then we can move pass the idea that our habitat "constrains our freedom." The environment

63. Takacs, *supra* note 25, at 736.

64. M.C. Mehta v. Kamal Nath, 1 S.C.C. 388, 388 (1997) (India) (citing David B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 HARV. ENV'T. L. REV. 311 (1988)); *see also*, *id*.

65. *M.C. Mehta*, at ¶ 35; Takacs, *supra* note 25, at 737.

66. M.I. Builders Private Ltd. v. Radhey Shyam Sahu, (1999) 6 S.C.C. 464, 466 (India).

67. *Id.*; Takacs, *supra* note 25, at 737.

provides us potentially endless opportunities, but precisely because of our value choices we have failed to see them. We have chosen to try to separate ourselves from Nature, we have chosen to burn fossil fuels with full knowledge of the consequences, and we have chosen a linear economy of disposable goods and overconsumption. We can choose differently. We can design differently, farm differently, live differently. Doing something in a new way does not mean we are limited—it means we are changing our relationship to how we do that thing. It may seem like a minor, perhaps even unnecessary, way to discuss living in harmony with Nature, but the narrative must be inviting, must be exciting, and must align so closely with common sense to overcome the status quo.

B. PHILIPPINES

Looking to the Philippines, we find the PTD taking hold in their statutes and case law. The PTD is first found in their 1976 Water Code, and a year later their environmental policy gave a nod to the U.S. National Environmental Policy Act, where the Philippines wrote that the nation would "recognize, discharge and fulfill the responsibilities of each generation as trustee and guardian of the environment for succeeding generations."[68] Ten years later, the Philippine Constitution entrenched the right to a healthy environment, declaring that "[t]he State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature."[69]

This constitutional language became important in 1993, when a group of schoolchildren filed a class action suit challenging a timber license issued by the Department of Environment and Natural Resources (*Oposa*), which essentially granted the right to cut down every last tree.[70] The Philippine Supreme Court found they had standing under their Constitution to raise concerns over a healthy environment and intergenerational equity.[71] While the Court did interpret the language in their Constitution to codify PTD principles, they also reasoned that the language was unnecessary.[72] The Court stated that the right to a healthy environment was more basic than other rights, because "it concerns nothing less than self-preservation and self-perpetuation," which "need not even be written in the Constitution for they are assumed to exist from the inception of humankind."[73]

68. 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, 770 (2012).

69. *Id.* at 771.

70. Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.).

71. Blumm & Guthrie, *supra* note 68, at 771.

72. *Id.*

73. *Id.* at 772.

However unnecessary the Court originally found the need to codify PTD principles or the right to a healthy environment, they clarified their stance fifteen years later in *Metropolitan Manila Development Authority v. Concerned Residents of Manila Bay*.[74] Fourteen residents brought a class action suit alleging that ten government agencies violated numerous statutory duties, including the PTD, by not preventing the pollution of Manila Bay.[75] The Court took a forceful stance, stating that "Even assuming the absence of a categorical legal provision specifically prodding petitioners to clean up the bay, they and the men and women representing them cannot escape their obligation to future generations of Filipinos to keep the waters of the Manila Bay as clean and clear as humanly possible. Anything less would be a betrayal of the trust reposed in them."[76] Additionally, the Court found the pollution was so severe it required the trial court's continuing jurisdiction to monitor the cleanup.[77]

The Philippine Constitution and the Court's interpretation show there is overlap in promoting the PTD and declaring the right to a healthy environment. Essentially, their legal framework expanded their public trust to include the current and future right to a healthy environment. The Court's reasoning goes beyond seeing it as a logical outgrowth of the PTD, but rather that the two are inseparable. The Court ruled that the constitutional right is a reflection of the PTD.[78] This makes sense, given the PTD came into existence with the acknowledgement that humanity's self-preservation depends on at least a few parts of Nature. Thus, the Court found that same idea applies to a healthy environment in general.

India and the Philippines show how easy it is to expand the PTD to include more of Nature. This inclusion signifies steps toward a deeper understanding that the original natural "resources" protected by the PTD are actually connected to a complex ecological web, one in which we often cannot anticipate the impacts of our actions. Expanding the PTD gets us closer to the realization that each entity has a role to play in that ecosystem and we have a duty to promote the continued existence of that role for the benefit of all life. From here, it is even possible to move beyond rights-based frameworks into relationship-based frameworks. While many cultures practice these types of legal systems, it is a new concept to those outside of Earth Law. But even slowly weaving in aspects of Earth Law has its benefits, as exemplified by India and the Philippines here.

74. Metro. Manila Dev. Auth. v. Concerned Residents of Manila Bay G.R. No. 171947-48, 574 S.C.R.A. 661 (S.C., Dec. 18, 2008) (Phil.).

75. Blumm & Guthrie, *supra* note 68, at 771.

76. *Id.* at 773 (citing *Metro. Manila*, at 574.)

77. *Id.*

78. Blumm & Guthrie, *supra* note 68, at 774.

C. NEW ZEALAND

New Zealand shows the world a glimpse into what we can gain from Earth Law. New Zealand has enacted the most progressive statutes granting nonhuman entities legal personhood, also providing roadmaps for how these grants should be implemented and how they return power to local indigenous communities to govern.[79] Legal personhood was granted to a mountain ecosystem and the river that flows from it: the Te Urewera forest and the Whanganui River.[80] The government acknowledged treaty violations and seeks to make amends; and they acknowledged the longstanding Māori cultural traditions rendering their claims authentic and the ecological sciences supporting their understanding of connectedness with the natural world.[81]

While New Zealand does not recognize a human right to a healthy environment or safe, clean water,[82] it appears they jumped into creating holistic legal frameworks without such a bridge. The PTD in its infantile state, can be seen as anthropocentric: humans have rights to certain resources, and any inherent value in the existence of those resources beyond human use is irrelevant.

Professor David Takacs wrote what is likely the most well-researched paper on the Earth Law Movement and spent time in New Zealand learning about the Te Urewera Act. He points out that this statute moves into the realm of "anthro-ecocentric" notions:

> the law is still first and foremost a reflection of human beliefs and human needs, but the law situates those needs in a web of interrelatedness where the nonhuman world looks after us as we look after it, with those connections so entwined that there is no "us" and "it"—we are the River, and the River is us.[83]

Perhaps this is the most Ecocentric the human mind is capable of thinking. It is also a philosophy in line with the Māori concept of self, which is much more expansive than the average westerner's concept of self.[84] For the Māori, like many other Indigenous cultures, there is little separation between one's "self" and the habitat that sustains oneself: "To pollute the River, is to pollute the people."[85] This statute helps create a legal form that more accurately represents the Māori worldview, replacing "hierarchy with

79. Takacs, *supra* note 6, at 553.
80. Te Urewera Act 2014 (N.Z.); *see also*, Takacs, *supra* note 6, at 545.
81. Takacs, *supra* note 6, at 561.
82. *Id.* at 560
83. *Id.* at 561.
84. *Id.* at 562.
85. *Id.* at 563.

relationship, dominance with interdependence, and property rights with interconnected management responsibilities."[86] Interconnected responsibilities in regards to ecosystems better resemble the idea that taking care of one's environment is the equivalent of taking care of oneself.

The Māori did not want fee simple ownership of the mountain or river, or to be "guardians" of them, because that would "turn reality on its head . . . if anything, the reverse would be true."[87] A fee simple, also termed a fee simple absolute, is the "broadest property interest allowed by law" and continues until the owner of the property dies.[88] The Māori do not believe they can "own" something to which they fundamentally "belong."[89] Such property rights silo Nature into parts, into resources, failing to give life or encourage the connections of all living things.[90] Instead of ownership or guardianship, Te Urewera bestowed legal personhood on the Whanganui River, which is also represented by political appointees from both the government and the Māori.[91] The Te Urewera also was granted legal personhood, and maintains public access and is governed by a set of principles that reflect Tuhoe cosmology.[92] For example, businesses that want to operate in the Te Urewera area must "negotiate friendship agreements that detail how they will 'demonstrate loyal affection to the Te Urewera values and her need to continue her complex balancing act among living systems.'"[93] This statute, achieved without the bridge of the PTD, has ventured right into Earth Law.

However, it is extremely unlikely that western societies will be able to make such a dramatic legal leap without a bridge. This is particularly true for the United States, where it appears increasingly challenging to bring environmental suits to court.[94] Yet, New Zealand shows United States what we stand to gain from this radical change. With similar histories of violent settler colonialism, New Zealand has shown that meaningful steps can be taken toward healing, and that such healing requires a holistic approach. It's a challenging process, and no one expects it will be done perfectly. To create a better world, we must all rise to this challenge. The U.S. can own up to its history, which is a necessary part of radical environmental change. Living in harmony with the environment requires understanding ecosystems and respecting humanity's place within the ecosystem. This paradigm shift away from the commodification of Nature

86. *Id.* at 568.
87. Takacs, *supra* note 6, at 570.
88. *Fee Simple*, BLACK'S LAW DICTIONARY (11th ed. 2019).
89. Takacs, *supra* note 6, at 569.
90. *Id.* at 573.
91. *Id.* at 570.
92. *Id.* at 572.
93. *Id.* at 547.
94. Blumm & Guthrie, *supra* note 68, at 807–08.

will require looking to those that have been silenced for guidance. Additionally, any environmental reform must have all communities seated at the table in order for it to be equitable. Laws are not effective unless they are equitable.

"[L]egal reform cannot tinker around the edges of the failed regime of statutory environmental law and practice."[95] We must push ourselves to change, to be better.

PART III. HOW TO MAKE THE CHANGE: TAKING CONTROL OF OUR NARRATIVE & USING THE PUBLIC TRUST DOCTRINE AS A BRIDGE TO EARTH LAW

"The current state of affairs . . . reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits. . .. [T]he modern judiciary has enfeebled itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court. []The third branch can, and should, take another long and careful look at the barriers to litigation created by modern doctrines of subject-matter jurisdiction and deference to the legislative and administrative branches of government."[96]

~ Alfred T. Goodwin

Fortunately for the fate of humanity, the change is already happening. The law often lags behind societal shifts, but given the urgency of climate change, we do not have time to wait for the law to catch up. By changing the narrative, we can use the full force of the PTD to create meaningful climate law. Society is demanding the law to do better, and we must take control of our narrative to allow the PTD to reach its full potential.

The first step to taking control of our narrative is to properly disillusion ourselves of the false narratives under which we have been laboring in vain. "Without a change in human consciousness to embrace our responsibilities as members of the Earth community, no set of legal doctrines will resolve the environmental crises of the 21st century."[97]

Humans are part of Nature. Despite our ability to alter our habitat, we still came from Nature, and we still live in it. Climate change is evidence that humans massively impact Nature, and it is common sense to recognize that everything we have comes from Nature in one form or another. This

95. EARTH LAW, *supra* note 13, at xxxvi.

96. Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 WIS. L. REV. 785, 785–86, 788 (2015).

97. Koons, *supra* note 2, at 64.

recognition destroys the idea that humans and nature are separate. Yet even with that done, many environmentalists are filled with shame, also known as "eco-guilt," or "eco-anxiety,"[98] because while humanity certainly is part of Nature, we are currently interacting with it in very destructive ways, making it harder to move past the false choice of "economy versus environment." But it does not have to be that way, nor has it always been that way.

To smash the idea that humans can only interact with Nature in destructive ways, we can look to the PTD in non-Western societies. While the PTD is often criticized for being rooted in property law, this assumes property law implies hegemony.[99] However, many sustainable Indigenous people employed highly advanced, enduring property regimes.[100] The main difference why some Indigenous societies lived in harmony with Nature, while Western societies destroyed it,[101] is the social narrative that led to the legal narrative. Western legal traditions allow resources to "be fully privatized—altered, destroyed, used, and sold at the whim of the owner," while the societies that flourished with Nature often were "Indigenous property law systems [that] treat resources as inherently communal, intergenerational, and spiritually imbued with obligation."[102] There are analogous practices in Western law, such as tenancies in common, shared easements, life estates, future interests, and trusts; it is the fee simple, which promotes dominion over ecology, that has not served us and has caused so much damage to the world.[103] Yet, these analogous property practices indicate that the United States' legal system is capable of being community-minded in another area of law, which will support PTD principles. And most importantly, the point is that humans can live in harmony with Nature. It has been done.

Shedding our old narrative is easier with something new and complete ready to replace it. A narrative that can create meaningful climate change law, "to be at all durable, must hinge on durable values, ones focused

98. *See, e.g.*, Maggie Astor, *No Children Because of Climate Change? Some People Are Considering It*, N.Y. TIMES (Feb. 5, 2018), https://www.nytimes.com/2018/02/05/climate/climate-change-children.html; *see generally* Sarah Jaquette Ray, A FIELD GUIDE TO CLIMATE ANXIETY (2020).

99. WOOD, *supra* note 17, at 271.

100. *Id.*

101. Note the use of the word "some" in this sentence. The author does not mean to imply all Indigenous people lived in harmony with the environment, as some unfortunately did not. It is beyond the scope of this paper to discuss the "noble savage" or "ecological savage" trap, so suffice it to say that the point is some Indigenous people did, and still do, live in harmony, proving it can be done. Thus, the narrative that humans can only interact with nature in destructive ways is false.

102. WOOD, *supra* note 17, at 271.

103. *Id*.

around community protection rather than corporate profit."[104] This durability is the goal of the PTD, a goal that leans into Earth Law. Professor Wood writes that, "[a] trust construct intertwines multiple moral understandings, including: (1) an ethic toward future generations; (2) an affirmation of public rights to natural assets; (3) a condemnation of waste; and (4) a duty to other living creatures.[105]

An ethic toward future generations can be seen in the Reserved Power Doctrine, which prohibits legislatures from taking action that would deprive future legislatures the crucial resources needed to serve the people.[106] The impacts of this doctrine are as tangible as beach access and are embedded in the PTD.[107] The United States upheld this aspect of the doctrine at least since *Illinois Central*. That case is critical to the United States' understanding of the PTD. When a railroad company sought to control a large portion of the Chicago waterfront, the Supreme Court found that "the control of the State for the purposes of the trust can never be lost," because the State has a fiduciary duty to preserve navigable waters for the public interest.[108] Professor Wood points out the continued impacts of *Illinois Central*, which rippled into more case law because "[t]o hand over all these lakes to private ownership . . . would be *a great wrong upon the public for all time*, the extent of which cannot, perhaps, be now even anticipated."[109] This early expansion of the PTD to include lakes as "navigable waters" also increased the scope of public interest from basic survival to rights of recreation and enjoyment.[110] Since the late 1800s, the United States has solidified the government's stewardship duties and has been expanding the PTD. There is no reason to stop now.

A. THE LOGICAL PROGRESSION OF THE PUBLIC TRUST DOCTRINE

An affirmation of public rights is also seen in Earth Law, which taps into long held beliefs of community rights, reflecting a societal value that could be called the "commonwealth ethic."[111] Given the interconnectedness of humans and their habitats, of the role each stream, fungus, animal, and microbe plays in that habitat, it only makes sense that public rights must extend to the full web of Nature in order to support and sustain life. "The

104. *Id.* at 263.
105. WOOD, *supra* note 17, at 263.
106. *Id.* at 266.
107. *Public Access to the Coast*, OR. DEP'T OF LAND CONSERVATION & DEV., https://perma.cc/2DZG-5CZT.
108. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 438–44 (1892).
109. WOOD, *supra* note 17, at 266 (citing Lamprey v. State, 52 Minn. 181, 200 (1893) (italics in original)).
110. *Ill. Cent.*, 146 U.S. at 436.
111. WOOD, *supra* note 17, at 266–67.

ecological web comprises a 'commonwealth' itself—public assets in constant interaction to support life, welfare, and community prosperity."[112] There is no separation between humans and Nature, between humans and our habitat.

The duty to other living creatures essentially means that the PTD embraces the value of Nature's right to exist and flourish, thus widening the "recognized community to which humans owe responsibility to include the land, air, waters, plants, and animals—in short, all of Nature."[113] With these moral understandings, a new narrative can be told; one that values biodiversity alongside cultural diversity, intergenerational synergy, and the critical role of the human species within our habitat. With our new narrative, we can create environmental laws with integrity and moral values, hopefully saving ourselves and the planet from climate change.

For such a societal and economic shift to take hold, we need the legal system's support. The legal system needs to codify a new concept of humans' relationship with our habitat: a symbiotic relationship. Today, our legal system protects individual rights, often above all else and only for a select few.[114] Our laws protect corporations as if they were people and permit environmental destruction.[115] Permitting environmental destruction only occurs because we think the only way humanity interacts with Nature is destructive. But if our laws reflected our role in an ecosystem, if our roles reflected our dependence on the Earth and our stewardship duties, permitting the destruction of our home would be unthinkable. The PTD has,

> the potential to catalyze us into the next phase of our relationship with Earth, a phase in which human law and governance express our responsibility to safeguard the well-being of Earth as a trust. With this catalyst, what is changed is not only the law, but also human hearts and minds.[116]

It will likely take several steps for the PTD to create a complete bridge to Earth Law, but the above description would be a fantastic start. One law review found that twelve countries across four continents have already evolved their PTDs into ecological protections in ways unrealized by the United States.[117] Several critical elements incorporated in those PTDs include the precautionary principle, sustainable development, and

112. *Id.*

113. WOOD, *supra* note 17, at 269.

114. *See, e.g.*, U.S. CONST. amends. I-XXVII. Nearly all amendments to the U.S. Constitution focus on individual rights; none mentions duties to the human community or the environment.

115. *See generally* Citizens United v. FEC, 130 S. Ct. 876 (2010); *see also, e.g.*, ESA § 10 Permits (as an example of one statute that, just like the others, permits environmental destruction. The ESA is meant to protect ecosystems upon which endangered or threatened species depend).

116. Koons, *supra* note 2, at 64.

117. Blumm & Guthrie, *supra* note 68, at 807.

intergenerational equity in the process.[118] Additionally, many of those countries' PTDs increase the democratization of the process by giving the public broad standing to challenge government and private proposals that threaten the PTD.[119] Many countries have made it easier to bring PTD suits, often inviting litigants to pursue public trust claims and providing jurisdiction in the country's Supreme Court.[120] Equally as important, non-United States courts have used the PTD "to fashion complex remedial injunctions," such as the Philippine Supreme Court's "perpetual mandamus" to clean up Manila Bay.[121]

The countries' legal conduct described above points strongly to the PTD being a precursor to Earth Law. As the PTD expands, its logic and values are becoming fully realized. Western societies shaped their public trust within the context of a false narrative, halting the logical progression of thought. On the other hand, Earth Law seeks to place our legal system in the broader context of society, philosophy, and history, which is required for positive reform.[122] While the United States has not yet achieved this, the PTD is imbedded in our dominant paradigm and has a history of expansion (however slow and anthropocentric that may be), and PTD's shared values with Earth Law make it the perfect place to start. It is the bridge western legal philosophy needs to be reunited with Nature. Uniting Western society and legal thought with Nature is required for us to create more holistic legal frameworks that will adequately address climate change. To do this, we must control our narrative.

In order to avoid further stagnation similar to the failure of LEBOR, legal practitioners must push the legal paradigm shift. "[L]egal reform cannot tinker around the edges of the failed regime of statutory environmental law and practice."[123] Otherwise, every judge will be a Judge Zouhary.

B. THE SANTA MONICA SUSTAINABILITY ORDINANCE

Ideally, the next time judges see a similar case to LEBOR, they will provide a different example as guidance, like the Santa Monica Sustainability Ordinance ("SMSO").[124] Santa Monica declared that the

118. *Id*. Unfortunately, these principles are often incorporated as a necessary part of upholding some constitutional or declarative right to a healthy environment or right to life, which the U.S. refuses to acknowledge. But wouldn't it be great to change that, too? Either way, New Zealand moved into Earth Law without such acknowledgements, so it is not a prerequisite.

119. Blumm & Guthrie, *supra* note 68, at 807.

120. *Id.* at 807–808.

121. Blumm & Guthrie, *supra* note 68, at 808 (internal quotations omitted).

122. EARTH LAW, *supra* note 13.

123. *Id.* at xxxvi.

124. Santa Monica Municipal Code § 12.02.020(b), https://perma.cc/FC6C-THBT.

health and well-being of the town depended on a healthy environment.[125] But instead of writing a brief, vague piece of legislation, the town analyzed and united all its environmental policies into one cohesive unit to meet the ideals of their declaration.[126] This ordinance provided enough information for all parties to understand their duties and what was legally binding. While the SMSO is a localized success which could be considered small in comparison to the size of the United States and the amount of work that needs to be done, it should not be discounted. The Climate Action Tracker says that increased local governmental action is an important piece of the puzzle to get the United States into the "sufficient" column.[127] Should the SMSO concept spread to other cities, the impact on local and regional land and water use planning could have dramatic, positive effects.

Another reason to put effort into avoiding the "economy versus environment" trap is that pricing the negative externalities of carbon products is impossible. The impacts are not equitable, and no amount of money will bring back the homes of climate refugees or bring back entire islands being engulfed by the sea. Money will not reverse biodiversity losses or bring back the human deaths from extreme weather. These are the true costs of burning fossil fuels. The only reasonable solution is a complete phasing out of fossil fuels. This goal can be achieved by including the atmosphere in the public trust. It follows the original logic that human life depends upon certain parts of nature that must be stewarded. Traditionally, Western societies have applied the PTD to water, shorelines, and submerged lands.[128] But we have expanded it before, at least once in response to environmental law Professor Joseph Sax's publication of *The Public Trust Doctrine in Natural Resources Law*.[129] This work began a paradigm shift of its own, pushing the PTD toward environmental protection.[130] Since then, it has addressed "conservation, scenic resources, open space, generation of energy, and the preservation of ecosystems and historical sites."[131]

Yet, few people have been brave enough to suggest an Atmospheric Trust in the United States, likely for fear of being labeled "extremists" or accused of having a non-functional plan that would kill the economy. The children of this world are some of the loudest voices, imploring adults to

125. *Id.*

126. *Id.*

127. *USA*, CLIMATE ACTION TRACKER, https://perma.cc/BP8L-JQHG. This website tracks the progress of each country toward doing its "fair share" of climate change mitigation. Currently, the U.S. is in the "insufficient" column and would stay there even if all its climate goals were met.

128. Koons, *supra* note 2, at 64.

129. *Id.*; *see generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

130. Koons, *supra* note 2, at 64.

131. *Id.* (internal quotations omitted).

be the leaders they are supposed to be, among them is the youth of *Juliana v. United States*.

C. ATMOSPHERIC TRUST LITIGATION IN THE UNITED STATES

In a bold move, twenty-one youths banded together to sue the United States for its role in climate change.[132] The plaintiffs allege that the United States has known for over fifty years that the burning of fossil fuels releases carbon dioxide ("CO_2"), which destabilizes the climate system in ways that "significantly endanger plaintiffs, with the damage persisting for millennia," and despite that knowledge, defendants "[b]y their exercise of sovereign authority over our country's atmosphere and fossil fuel resources, . . . permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels, . . . deliberately allow[ing] atmospheric CO_2 concentrations to escalate to levels unprecedented in human history."[133] While other entities and countries do continue to burn fossil fuels, the plaintiffs claim that defendants have a higher degree of responsibility for exposing them to these dangers, and in so doing, defendants violated plaintiffs' rights to due process and defendants' fiduciary duties under the public trust.[134]

The plaintiffs are seeking two things. First, a declaration that their constitutional rights and public trust rights have been violated.[135] Second, plaintiffs seek an order enjoining defendants from continuing to violate these rights and directing defendants to develop a plan to reduce carbon emissions.[136] This complex remedy is not unlike what the Philippine Supreme Court required for the cleanup of Manila Bay.

However, this type of remedy is practically unheard of in the U.S., and so is this type of suit. In her 2016 *Juliana* opinion, Judge Aiken wrote, "This is no ordinary lawsuit."[137] Some American states continue to impose obstacles to public trust suits, often requiring legislative permission to bring challenges.[138] If our legal system is serious about serving the public and promoting the continuation of life on Earth, there is much to learn from countries like the Philippines.

The United States should be guided by Judge Aiken's 2016 opinion in *Juliana*, which provides a critical legal analysis that strongly supports PTD logic and values, and why the addition of an Atmospheric Trust is valid. Judge Aiken clearly guides her readers through the complex questions before the court, succinctly summarized as (a) whether the

132. Juliana v. United States, 947 F.3d 1159, 1159 (9th Cir. 2020).
133. *Juliana*, 947 F.3d at 1159.
134. *Id.*
135. *Id.*
136. *Id.*
137. Juliana v. United States, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016).
138. Blumm & Guthrie, *supra* note 68, at 807.

defendants are responsible for some of the harm caused by climate change, (b) whether plaintiffs can challenge defendants' climate change policy in court, and (c) and whether the court can direct the defendants to change their climate change policy without running afoul of separation of powers.[139] Her analysis addressed Article III standing, Due Process, the Political Question Doctrine, and the PTD issues.[140]

Judge Aiken found for the plaintiffs on all fronts. However, *Juliana* is awaiting appeal after being dismissed in 2020 by the Ninth Circuit for lack of Article III standing.[141] The Ninth Circuit found that the plaintiff's met the first two requirements for standing: (1) they had concrete and particularized injuries, and (2) the chain of causation was easily traced to the defendants, whose role was not one of simply inaction.[142] But the Ninth Circuit lost its nerve on the third requirement, which is redressability. Hiding behind the Political Question Doctrine, the court found that it is "beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan where any effective plan would necessarily require a host of complex policy decisions entrusted to the wisdom and discretion of the executive and legislative branches."[143]

Judge Aiken's opinion on the Political Question Doctrine is much more convincing. First, it is critical to note that the scope of the Political Question Doctrine cannot be overstated,[144] making it easy for judges to use in order to avoid challenging cases. Judge Aiken provided this historic quote from Alexis de Tocqueville, observing that, "[t]here is hardly any political question in the United States that sooner or later does not turn into a judicial question."[145] Citing additional precedent, Judge Aiken points out that just because a case "raises issues of great importance to the political branches" does not mean it automatically raises a political question.[146]

Moreover, the Constitution does not mention environmental policy or atmospheric emissions. Thus, climate change policy is not a fundamental power allocated exclusively to another branch of government.[147] If the Political Question Doctrine is in place to ensure the separation of powers by preventing the judicial branch from second-guessing decisions committed exclusively to other branches of government,[148] then there is no political question here. Of course, should the plaintiff's case prevail on the

139. *Juliana*, 217 F. Supp. 3d at 1234.
140. *See generally Juliana*, 217 F. Supp. 3d 1224.
141. *See generally Juliana*, 217 F. Supp. 3d 1224.
142. *Juliana*, 947 F.3d at 1160.
143. *Id. See also* EARTH LAW, *supra* note 13, at 632.
144. *Juliana*, 947 F.3d at 1163.
145. *Juliana*, 217 F. Supp. 3d at 1235.
146. *Id.* at 1236.
147. *Id.* at 1238.
148. *Id*.

merits, federal courts will have to carefully fashion a remedy respecting the separation of powers. But that does not mean such remedies are outside their jurisdiction. As stated in *Juliana*, "Federal courts retain broad authority 'to fashion practical remedies when confronted with complex and intractable constitutional violations.'"[149]

Judge Aiken also clarifies the fact that the remedy sought is a declaration from the court that the United States policy violates their due process rights and public trust rights and to direct agencies to figure out how to reduce carbon emissions.[150] This is essentially telling the agencies to do their jobs. Also, Judge Aiken writes that the court can issue the requested declaration without directing any agency to do any particular action.[151] She concludes that the heart of the lawsuit is about determining whether the plaintiff's constitutional rights have been violated, and that sits squarely inside the purview of the judiciary.[152]

One of the strongest arguments for the expansion of the PTD is found in Judge Aiken's opinion:

> [T]his Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink.[153]

Plaintiffs allege that a stable climate system, not the absolute and complete freedom from any and all pollution, but the bear minimum of a stable climate system, is necessary to exercise their right to life, liberty and property.[154] Judge Aiken stated, "I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."[155] Surely, there would not be any society without it, which Judge Aiken emphasizes by writing that "a stable climate system is quite

149. *Id*. at 1242.
150. *Juliana*, 217 F. Supp. 3d at 1233.
151. *Id*. at 1239.
152. *Id.* at 1261.
153. *Id.* at 1250.
154. *Id.*
155. *Id*.

literally the foundation of society, without which there would be neither civilization nor progress."[156]

If future courts do not allow the PTD to protect the foundation of society, they go against the very essence, purpose, and goal of the PTD, which is to promote the survival of humanity. Thinking about future generations is the first connection that can be made while still wearing anthropocentric blinders. The survival of humanity is central to the PTD. Judge Aiken echoed precedent and the well-established role of government, dating back to *Illinois Central* when she wrote that "[t]he government, as trustee, has a fiduciary duty to protect the trust assets from damage so that current and future trust beneficiaries will be able to enjoy the benefits of the trust."[157]

D. ATMOSPHERIC TRUST LITIGATION IN THE NETHERLANDS

There is still hope for *Juliana* to prevail on appeal in the Ninth Circuit. If humanity is lucky, the court will follow the same logic of Judge Aiken. Additional reason for hope in the Northern Hemisphere is found in *Urgenda v. Netherlands*,[158] which would also provide the United States' courts excellent guidance in considering the *Juliana* appeal. *Urgenda* was a similar Atmospheric Trust case, where the Dutch Supreme Court ruled that the plaintiff's rights were violated, and the Court did not shy away from imposing a duty on the government to reduce greenhouse gas emissions.[159] This ruling shows that the expansion of the PTD is taking hold in the Northern Hemisphere.

Adding an Atmospheric Trust is critical in the process of recognizing how ecosystems are connected (not just locally but globally), the importance of intergenerational equity, and holding ourselves accountable for the stewardship of Nature. At minimum, an Atmospheric Trust in highly developed countries will promote effective climate change law that reduces greenhouse gases, buying us enough time to push the socio-legal paradigm shift into Earth Law practices that create a better world for the entire Earth Community.

That will keep the consciousness flowing toward a broader understanding of our place within Nature, moving us toward the holistic legal framework of Earth Law. It is easy to imagine that as our self-awareness grows, we will expand our legal system to reflect the requirements of humanity's well-being, which has been scientifically

156. *Id.* (internal quotations omitted).

157. *Juliana*, 217 F. Supp. 3d at 1254.

158. Urgenda Foundation v. The State of the Netherlands, Case No. C/09/456689/HA_ZA 13-1396 (Netherlands) (June 24, 2015).

159. Hofs-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) (Neth.) (referring to the Urgenda v. Netherlands case).

proven to depend on the well-being of our global habitat (not that we needed scientific proof; isn't it painfully obvious by now?). Extending the PTD to the atmosphere will lead to an ocean trust, a forest trust, a river trust, and eventually a realization of the critical roles each entity plays in an ecosystem. This will lead us to statutes that resemble those of New Zealand. In an ideal world, there will be no given right to pollute or destroy—rather, we will engage in activities that promote the flourishing of all life, human and nonhuman.

CONCLUSION

The United States is at a critical moment in history, perhaps the most critical because our decisions now will impact the survival of humanity. The Global South is leading the charge in the paradigm shift. Given its contribution to climate change is generally much less than that of the Northern Hemisphere,[160] it is critical for the United States to join the shift. While individual rights are paramount here, the PTD can simultaneously protect those individual rights while illuminating how those rights are based on shared values and concerns. This can unite Americans and provide them with a sense of community that has been lacking since this country's founding. To reflect the societal value of the commonwealth ethic,

> Public rights must extend across the full tapestry of Nature to support the ecosystems sustaining life on the planet. The ecological web comprises a 'commonwealth' itself—public assets in constant interaction to support life, welfare, and community prosperity.[161]

By expanding the PTD, we can begin to meet society's demand for a new narrative. Slowly, more initiatives like LEBOR will find successful strategies like that in Santa Monica. More businesses will go beyond sustainability, and actually benefit our land, waters, air, and associated biota. More cases like *Juliana* will be found to have standing and will prevail based on intergenerational equity. As the PTD grows, it will eventually include all of Nature because everything is connected. At that point, it will be impossible not to acknowledge the relationships between natural entities (including ourselves) and thus, we will begin to focus our legal system on stewardship and duties that better reflect the actual functioning of life.

This paper may have started with an overtone of despair, and certainly scientific consensus warrants some panic. However, to believe that

160. Andrew Freedman, *In Warming, Northern Hemisphere Is Outpacing the South*, CLIMATE CENT. (Apr. 9, 2013), https://perma.cc/JCV6-5LSA.

161. WOOD, *supra* note 17, at 266.

humanity is truly capable of living in harmony with each other and with Nature is painfully optimistic. Many cultures have this way of life. Those that currently do not live in harmony with each other or Nature need only make the choice to change. And we know how.

We have seen meaningful expansions of the PTD in the Philippines and India, among many others with western legal frameworks. New Zealand is our current leader, providing guidance for the world. Changing the system may be unimaginable, but we should not let our imaginations limit us when others have already shown us the way.

"The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race."[162]

~ Oliver Wendell Holmes, Jr.

162. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897), *reprinted in* 110 HARV. L. REV. 991, 992 (1997).