

A WAKE-UP CALL FOR JUDGES

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Proliferating international demand for American petro-chemical exports and soaring prices for compressed natural gas will soon produce a critical mass of litigation over the rights of the people of the United States versus the corporate capital now being invested in fracturing shale. If the horizontal drilling to execute fracking is indeed poisoning the water needed to sustain human life on the land above the fracking, plaintiffs who have standing will find lawyers and sue in their state and federal courts.

Professor Mary Christina Wood of the University of Oregon School of Law has recently authored an important and well-researched book explaining how common-law lawyers can bring about needed change by activating the third branch of a government whose other two branches have shown no interest in taking on new work: *Nature's Trust: Environmental Law for a New Ecological Age*.¹

Modern American law has evolved away from its roots in natural law, Roman law, and the common law toward the continental pattern of civil law. In part, reliance on statutory and administrative law by state and federal courts has been encouraged by the law schools. Academic focus is placed on positive law in preference to transitory judge-made law, which in the first half of the twentieth century had produced the *Lochner* invention of substantive due process.² In part, also, this drift toward a preference for statutory law eases the work of busy judges. A prudent respect for separation of the powers of government gives constitutional comfort to judges hearing arguments for and against the enforcement of statutes and administrative orders intended by their authors to protect the environment.

The current state of affairs, however, 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. Professor Wood documents how the modern judiciary has enfeebled

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

2. See *Lochner v. New York*, 198 U.S. 45, 53 (1905), *overruled in part by Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963).

itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court.³ To restore our government's primary function of protecting the sustenance of its people, the book proposes a serious and efficacious study of the way state and federal judges can be brought back to meaningful participation in their constitutional role as the third branch.⁴

Nature's Trust is a comprehensive presentation of a new legal paradigm building upon *Illinois Central Railroad Co. v. Illinois*.⁵ In that case, the Supreme Court addressed the problem created by the Illinois legislature's conveyance to a railroad corporation of the entire Chicago shoreline of Lake Michigan.⁶ The people of Chicago needed, and used, that shoreline for fishing, navigation, and commerce.⁷ The Court held that the challenged grant was beyond the power of the legislature.⁸ It said:

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city . . . [has] been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public.⁹

The Court cited the decisions, and Professor Wood's eloquent and closely, but clearly, reasoned book explains the new paradigm.¹⁰

Some federal and state courts, however, are closing their doors to such claims. For example, a federal court recently dismissed a suit by youth attempting to force federal agencies to protect the atmosphere, rejecting the existence of a federal claim under the public trust doctrine and leaving the task of carbon regulation to federal agencies.¹¹ Similar state litigation, while facing early barriers, has more recently met with

3. WOOD, *supra* note 1.

4. *Id.*

5. 146 U.S. 387 (1892).

6. *Id.* at 398-99.

7. *Id.* at 452.

8. *Id.* at 393.

9. *Id.* at 455.

10. WOOD, *supra* note 1.

11. *Alec L. v. Jackson*, 863 F. Supp. 2d 11, 15-17 (D.D.C. 2012), *aff'd*, *Alec L. ex rel. Looz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014).

judicial recognition of the courts' role in enforcing the public trust in the constitutional framework.¹²

In a recent landmark decision, *Robinson Township v. Commonwealth*,¹³ however, the Supreme Court of Pennsylvania overturned, on state constitutional grounds, a statute that promoted fracking.¹⁴ This carefully reasoned and well-documented decision was published too recently to be included in the first edition of *Nature's Trust*, but appears prominently in Professor Wood's current writings.¹⁵

Pennsylvania was one of the three original states that placed the word "commonwealth" in its name. (Virginia and Kentucky also employed the English concept of commonwealth in forming their original constitutions.) As Professor Wood explains, the commonwealth framework reflects the public trust doctrine's core populist concerns by framing individual land ownership within the broader context of the community.¹⁶ Pennsylvania's Chief Justice, in the *Robinson Township* plurality opinion, quoted the state Constitution:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.¹⁷

12. See, e.g., *Kanuk ex rel. Kanuk v. State Dep't of Natural Res.*, 335 P.3d 1088, 1097–99 (Alaska 2014) (affirming dismissal of a climate trust suit, but finding that three of the plaintiffs' claims for a declaratory judgment on the nature of the public trust duty presented justiciable questions that were not barred by the political question doctrine although it was not prudent to resolve those claims at the time); *Chernaik v. Kitzhaber*, 328 P.3d 799, 804–08 (Or. Ct. App. 2014) (reversing the trial court's dismissal of plaintiffs' atmospheric public trust claim, finding it cognizable under the state's Declaratory Judgments Act and rejecting the state's position that a judicial declaration as to the scope of the public trust doctrine would violate the separation of powers principle).

13. 83 A.3d 901 (Pa. 2013).

14. *Id.* at 985.

15. See, e.g., Mary Christina Wood & Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 ENVTL. L. 259, 276 & nn.116–19, 279–80 & nn.143–44, 286 & n.194 (2015); Mary Christina Wood, *The Planet on the Docket: Atmospheric Trust Litigation to Protect Earth's Climate System and Habitability*, 9 FLA. A&M U. L. REV. 259, 262–63 (2013); Mary Christina Wood, *Tribal Trustees in Climate Crisis*, 2 AM. INDIAN L.J. 518, 533 & n.53 (2014).

16. WOOD, *supra* note 1, at 313.

17. 83 A.3d at 913 (quoting PA. CONST. art. 1, §27 (the "Environmental Rights Amendment")).

In holding that the statute violated the Environmental Rights Amendment, the *Robinson Township* plurality rejected concerns about separation of powers and the political question doctrine because the Constitution grants the court, as a coequal branch of government, the power to decide challenges to the state's exercise of its legislative and police power.¹⁸ Resolving such challenges, it noted, is the court's constitutional duty.¹⁹

Whether grounded in Article III or state constitutional provisions, the third branch must now recognize its obligation to provide a check on government exercise of power over the public trust. 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. As a coequal branch of government, the third branch must enforce the legislature's obligation to preserve the public trust. As Professor Wood notes, "The cornerstone of any trust lies in judicial enforcement."²⁰

Recent events in coal-producing states provide strong evidence that state legislatures and regulating commissions have become captives of the industries they were formed to regulate. The Pennsylvania court has demonstrated clearly that only the judges are equal to the task of protecting the people's rights to clean air and safe drinking water. Professor Wood's book points the way.

18. *Id.* at 927–28.

19. *Id.* at 928.

20. WOOD, *supra* note 1, at 230.