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"BUT MOST OF IT BELONGS TO THOSE YET TO BE BORN:" THE PUBLIC TRUST DOCTRINE, NEPA, AND THE STEWARDSHIP ETHIC

Timothy Patrick Brady*

One Frenchman told of a prudent African solution. He had suggested the digging of a well in his village in a time of drought. Many of the villagers agreed. But then, others argued, it would bring people from other villages and they would bring their cattle and that would increase the pressure on the already precious grass... "Well then [the Frenchman said to the villagers], why not explain that the well is only for your own village. Tell them to dig their own"... "But water is not ours, but from God and must be shared." All in all, they concluded, it was wiser not to dig the well at all.1

I. INTRODUCTION

The decision of the villagers to refrain from digging a well undoubtedly would seem to many to be not only a wrong decision, but the worst decision.2 When faced with a drought, the most sensible solution would seem to be to find and exploit any possible water source. Yet the villagers decided to the contrary.

* Articles Editor, 1989–90, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.
1 Layton, Conserving the planet or rushing to disaster?, 20 J. WORLD TRADE L. 701, 701 (1986).
2 A similar decision under similar circumstances has been made here in the United States. Arizona has banned the extension of irrigation systems under certain circumstances. ARIZ. REV. STAT. ANN. §§ 45-411 to -637 (1987 & Supp. 1988) (declaration of and management in groundwater areas). In addition, the Arizona Supreme Court has held that this statute did not constitute an unconstitutional taking. Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 80–88, 638 P.2d 1324, 1326–27 (1981), appeal dismissed, 457 U.S. 1101 (1982).
The villagers' decision not to dig the well is interesting for two reasons. First, the villagers in some way realized that the needs of the present generation were not determinative of a solution. All too often the needs of a present generation are determinative of solutions to present problems, with little thought given to the consequences of those solutions. The various environmental crises that beset our nation and our world, for example, may be traced in part to the problem-solving of a series of present generations who did not consider the environmental impacts of their actions.3

The second reason why the villagers' decision is interesting is related to the first. The villagers believed that a present generation's problem-solving actions had to be limited by the very nature of the necessary resources. Thus, the villagers could not exert exclusive dominion over a well, because the very nature of the water prohibited them from doing so. Water was from God, they reasoned, and its divine origin rendered the water insusceptible of private ownership.

The two reasons which make the villagers' decision not to build the well interesting also apply to the public trust doctrine. This doctrine looks beyond the needs of the present generation, and also suggests that certain resources are invested with a special nature. But the public trust doctrine4 is intriguing for more reasons than just these two.

Since the publication of Joseph Sax's landmark article on the public trust doctrine in 1970,5 the doctrine has become a widely discussed

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3 The crises of acid rain, ozone depletion, the greenhouse effect, and the threatened extinction of so many animal species have all been brought about by a series of present generations who have acted without thought of, or in flagrant disregard for, the needs of future generations. See generally The World Commission on Environment and Development, Our Common Future (1987); Grosvenor, Will We Mend Our Earth?, 174 Nat'l Geographic 766 (1988); National Geographic Society, Earth '88: Changing Geographic Perspectives (1988).


5 Sax, supra note 4.
topic. Yet it is still unclear what the doctrine is, where the doctrine came from, or what the doctrine's future will be.

This Comment proposes that the future of the public trust doctrine lies in its ability to change the way society considers the needs and rights of future generations. This challenge can be seen as lying dormant in the roots of the doctrine itself. Therefore, it is necessary to examine the history of the public trust doctrine. Next, in analyzing the current calls for the demise of the public trust doctrine in Section III, this Comment argues that the doctrine does have a legitimate purpose in society, and that this purpose is to act as a catalyst for social change. Section IV of this Comment examines the National Environmental Policy Act of 1969 as the possible situs for the application of the public trust doctrine in modern American law. The conclusion of this Comment calls for a renewed appreciation of the public trust doctrine as a legal device that challenges legal perceptions and assumptions about land ownership.


7 Note, The Public Trust Doctrine: A New Approach to Environmental Preservation, 81 W. VA. L. REV. 455, 455 (1979) ("The doctrine has remained for the most part a vague legal concept filled with misconceptions and subject to a traditionally narrow application.").

8 Comment, Federal Administrative Agencies, supra note 6, at 388 (from Justinian). Although the theory of the public trust doctrine is most often traced back to Justinian, at least one commentator insists that the doctrine rests entirely on legal fictions. Lazarus, supra note 4, at 656.

9 Compare Comment, Federal Administrative Agencies, supra note 6, at 435–36 (public trust doctrine can serve to "enhance the protection of valuable and irreplaceable natural resources") with Lazarus, supra note 4, at 715–16 (public trust doctrine inhibits the development of natural resources law and should be abandoned).
II. THE EMERGENCE OF THE PUBLIC TRUST DOCTRINE

A. Pre-Roman Sources of the Public Trust Doctrine

The source of the modern public trust doctrine has been traced most often to Roman civil law and, more specifically, to the *Institutes of Justinian* (Institutes). The *Institutes'* categorization of certain types of property as “common to all,” however, is not original, but rather employs a concept much older than Justinian. Indeed, the doctrine may be thousands of years old.

The myth of a “lost Eden” has been popular in Western civilization for most of the Christian era. The Garden of Eden symbolized a state of perfection that was lost through original sin. But an important lesson to be drawn from the story of Eden was that God created the earth for the common possession of Adam and Eve and their children. Thus, while private property rights are certainly recognized in the Bible, the perfect state is not the private possession of property, but common ownership.

Roman culture had its myth of a communal beginning as well. Ovid wrote of a Golden Age in which people lived in peace without the need of law, the earth produced all necessary food without the need of farming, and the land was “common to all.” In both the Christian myth of Eden and Ovid’s myth of a Golden Age, then, there is a striking preference for the common possession of land.

While these myths are not the legal source of the public trust doctrine, it is important to note the power inherent in the belief of a lost time of perfection in which land was a communal possession. It is a tribute to the power of these myths, of the perceived rightness of common possession of the land, that this perception has insinuated itself into law in the guise of the public trust doctrine.

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12 See infra notes 15–23 and accompanying text.

13 Consider the 7th Commandment: “Thou shalt not steal.” *Exodus* 20:15, *Deut.* 5:19 (King James). A prohibition against stealing necessarily implies some sense of private property.

14 See *Acts* 2:42–47.

15 Deveney, supra note 11, at 26–27 (quoting OVID, *THE METAMORPHOSES*).

16 Some cultures never appeared to have had the need for a “fall” from common possession of the land, because these cultures never developed a concept of private possession of land. The most notable example of such a culture is the early American Indian, to whom the white man’s talk of buying and selling land was simply incomprehensible.
B. Roman Origins of the Public Trust Doctrine

All references to “things common to all” in Roman law, including the references in the Institutes, are traceable to the works of the Roman jurist Marcian. Marcian in turn had been influenced by the poets and philosophers of ancient Rome, who believed in the myth of a Golden Age. Thus, the origins of the category of “things common to all” was undoubtedly heavily influenced by philosophical concepts.

The inclusion of the category of “things common to all” in the Institutes did not mean that private ownership of things within this category was forbidden. On the contrary, it was quite common to grant monopolies to individuals or corporations to exploit the natural resources in areas supposedly common to all. Nor should the inclusion of the category “things common to all” imply that Roman law recognized the concept of a trust, because Roman law had no analogue to today’s concept of trusts. The inclusion of this category appears to have been more a normative statement of what ought to be rather than a legal recognition of what already was.

C. English Roots of the Public Trust Doctrine

The public trust doctrine was introduced into English law through the writings of Bracton, who incorporated parts of the Institutes, including the passage on “things common to all,” into English law. Once again, it appears that the “law” that Bracton stated may not have accurately reflected the customs of society, but was rather a statement of what the law ought to be.

17 Deveney, supra note 11, at 26.
18 Id.
19 Id. at 26–27, 34. Marcian included air, flowing water, the sea, and the seashore in the category of “things common to all.” Id. at 27.
20 The Institutes apparently appropriated Marcian’s list: “And indeed, all of these things are by natural law common to all: air, flowing water, the sea and, consequently, the shores of the sea.” Deveney, supra note 11, at 23 (quoting the Institutes).
21 Deveney, supra note 11, at 33 (citing the grant of exclusive rights in the Tiber River to a group of sponge gatherers and fishermen). This sort of grant was apparently common. Id.
22 W. Buckland, EQUITY IN ROMAN LAW 15 (2d printing 1983).
23 Lazarus, supra note 4, at 634. One commentator suggests that the category of “things common to all” was based more on a need to protect the economic well-being of an empire that depended heavily upon the sea for virtually all its needs. Comment, Massachusetts Land Law, supra note 10, at 841–43. Although economic concerns often shape the framing of laws, it is at least equally likely that earlier myths of the Golden Age influenced the category of “things common to all.” Deveney, supra note 11, at 34.
24 Deveney, supra note 11, at 36.
25 Id.; Lazarus, supra note 4, at 635.
In England, the public trust doctrine developed into the *jus publicum*, which held that the Crown possessed the sea, the rivers, and the land underlying the waters seaward of the high water mark for the benefit of the public. At first, however, this possession did not mean that the Crown could not pass title to areas such as the foreshore. Matthew Hale, the highly influential Lord Chief Justice of England at the time of Charles II, recognized that the foreshore could be, and in fact was, validly held by private individuals.

The power of the Crown to convey title to the foreshore, however, was not absolute. According to Hale, even though title might pass to an individual, the public still retained an interest in navigation. More importantly, Hale recognized that this retained right of navigation was effectively a legal brake upon the power of the Crown, and was a form of trust duty to preserve free navigation imposed upon the Crown for the benefit of the public.

D. The American Roots of the Public Trust Doctrine

It is customary to trace the beginnings of the public trust doctrine in American law back to the landmark case of *Illinois Central Railroad Co. v. Illinois*. Two other important cases preceded *Illinois Central*, however, and these must be considered first. *Arnold v. Mundy*, a New Jersey Supreme Court decision, appears to have been the first American case to consider the public trust doctrine's applicability in the United States. The plaintiff

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26 Comment, Federal Administrative Agencies, supra note 6, at 388-89. One commentator argues that the Crown adopted this doctrine because the Crown could thereby reap some economic gain. Lazarus, supra note 4, at 635.

27 For purposes of this Comment, the foreshore is defined as the land lying between the high and low tide lines. See Webster's Third New International Dictionary of the English Language 890 (1981).

28 Deveney, supra note 11, at 45.

29 Id. at 46.

30 Id. Thus, any grant of a portion of the foreshore to an individual by the Crown was limited by a negative covenant not to interfere with the public's right of navigation. Any such interference could be enjoined as a nuisance. Id.


32 146 U.S. 387 (1892). This custom is undoubtedly due to Sax's reference to this case as the "lodestar in American trust law" in his landmark 1970 article. See Sax, supra note 4, at 489.

33 6 N.J.L. 1 (1821).

34 Deveney, supra note 11, at 55.
Arnold sued to prevent the defendant Mundy from trespassing into an oyster bed in Raritan Bay. Arnold claimed title to the bed, traceable to Charles II of England. Mundy argued that, because the Crown held the land beneath Raritan Bay as trustee for the public, any grant made of this land had to have been made subject to the right of the people to navigate and fish. Chief Justice Kirkpatrick found for Mundy, and held that the original grant of the land was void.

Chief Justice Kirkpatrick’s reasoning in Arnold was, in effect, a recapitulation of the discussion of the origins of the public trust doctrine in the previous sections. The Chief Justice held that, when Charles II took possession of Raritan Bay, the law of nature, Roman civil law, and the common law of England all required that this land be held in trust for the people. The Crown’s title in Raritan Bay was transferred to the State of New Jersey as sovereign, and therefore the State was limited, in its ability to grant away the waters of the State.

In Martin v. Waddell, the United States Supreme Court resolved a similar dispute. In Martin, however, the plaintiff claimed title to the oyster fishery in Raritan Bay on the basis of a grant from the New Jersey legislature. Chief Justice Taney had the opportunity to rule directly on the merits of the legal theory of the public trust

35 Arnold, 6 N.J.L. at 2-3.
36 Id. at 3.
37 Id.
38 Id. at 78 (opinion after reargument).
39 See supra notes 10-31 and accompanying text.
40 Charles II took possession in his sovereign capacity by right of discovery. Arnold, 6 N.J.L. at 77.
41 The law of nature here is probably best understood as the law of what was intended to be, either by the Christian/Deistic god or by nature itself. This appeal to the “law of nature” is not unlike the appeal to the Edenic/Golden Age myth discussed in the text accompanying supra notes 10-16.
42 See supra notes 17-23 and accompanying text.
43 See supra notes 24-31 and accompanying text.
44 Arnold, 6 N.J.L. at 76-77.
45 Id. at 78.
46 Id. The Arnold court did not prevent New Jersey from passing legislation inconsistent with its holding. See Gough v. Bell, 22 N.J.L. 441, 459 (1850). The inconsistency was effectively nullified later. See Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 308-10, 294 A.2d 47, 54 (1972). Neptune City extended the public rights in tidal lands from the traditional rights of navigation and fishing to include bathing, swimming, and other recreational shore activities. Id. at 309, 294 A.2d at 54.
48 Id. at 408.
doctrine as expressed in Arnold, but declined to do so, and upheld the grant on other grounds.49

Justice Thompson’s dissent in Martin pointed out that the Supreme Court allowed the New Jersey legislature to grant away land in a manner that was forbidden by the New Jersey Supreme Court.50 Justice Thompson found it even stranger that Taney’s opinion, which Thompson read as generally supportive of Arnold’s precedent, would allow the legislative grant to stand in a manner inconsistent with the law of Arnold.51

The apparent contradiction52 between Arnold and Martin was effectively resolved in Illinois Central.53 In 1869, the Illinois legislature granted away virtually the entire waterfront area of the city of Chicago to the Illinois Central Railroad.54 In 1873, apparently having thought better about the deal, the Illinois legislature rescinded the grant,55 and a lawsuit challenging the rescission ensued.

The Supreme Court held that Illinois did hold title to the land underlying the navigable waters of Lake Michigan that was within the state’s boundaries.56 Illinois held this title in trust for its citizens so that they might navigate and fish freely in the waters of Lake Michigan.57 Thus, Illinois could not convey the land underlying the waters of Lake Michigan in such a manner that the public’s rights of navigation and fishing were destroyed.58 Illinois could, however, convey parcels of trust land to private individuals if the overall effect of the conveyance was to improve the ability of the public to exercise its trust rights.59 Because the grant to the Illinois Central Railroad did not improve the public’s ability to exercise its trust rights but rather extinguished those rights, the Court held that the initial grant was void.60

The holding in Illinois Central relied upon the earlier cases of Arnold and Martin,61 and through these three cases the public trust

49 Id. at 417-18.
50 Id. at 419-20 (Thompson, J., dissenting).
51 Id.
52 Deveney, supra note 11, at 59.
53 146 U.S. 387 (1892).
54 Sax, supra note 4, at 489.
55 Illinois Central, 146 U.S. at 410-11.
56 Id. at 452.
57 Id.
58 Id. at 452-53.
59 Id.
60 Id. at 454-55.
61 Id. at 456.
doctrine emerged in American law. Just as in Roman law and English law, there was no real legal precedent for the adoption of the doctrine into American law.\textsuperscript{62} \textit{Illinois Central} accepted the reasoning of Martin and Arnold, Martin relied upon Arnold, and Arnold cited only English common law for the public trust doctrine. As discussed earlier,\textsuperscript{63} from a strictly legal standpoint English common law is a dubious source for the public trust doctrine.\textsuperscript{64}

Given the shaky legal justification upon which the public trust doctrine rests, one might wonder why the doctrine should not be done away with as a sort of bastard legal doctrine. To answer this question, as well as lay the groundwork for a review of current criticisms of the public trust doctrine,\textsuperscript{65} it is necessary to discuss briefly two functions of law in society.

III. A POSSIBLE FUTURE FOR THE PUBLIC TRUST DOCTRINE

A. Law as a Reflection of, or Challenge to, Society's Values

Ideally, law in a democratic society would be a true reflection of society's values.\textsuperscript{66} Because law's general function is to regulate behavior in society, the perfect match of law and society is one in which behavior that is acceptable to society is permitted by law, and behavior that is unacceptable to society is rejected by law.\textsuperscript{67} As everyday life makes clear, this perfect match is not achieved easily. But even in a less-than-perfect society, law often expresses society's sense of what is and is not acceptable, and what is or is not right or
wrong. Thus, the criminal law reflects society's condemnation of theft, rape, and murder. When law reflects society's values in this manner, law is performing its traditional function.

When law performs its traditional function, the law essentially follows society. As society's attitudes and values change, these changes are eventually mirrored in the laws governing society. The development of the law as a result of changes in widely held values in society is unlikely to be controversial, because society would want the changes to occur.

Law, however, is not limited to its traditional function of mirroring accepted values. Law sometimes may actually leap ahead of society, anticipating and setting new values and new standards of conduct. For example, because of the civil rights movement, the law effectively set a new value and standard of conduct for American society: the equality of the races. By setting a new value and standard of conduct, the law was substituting its own artificially created "sense of the community" for the pre-existing "sense of the community."

When the law anticipates society and sets a new standard of conduct, there is almost certainly some type of struggle in response. Because society, or some part thereof, sees the new standard as

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69 Caldwell, supra note 68, at 332.
70 "Law" here can be either legislative or common. Legislation, once enacted by the representatives of the citizens in a society, presumably reflects citizens' values. The common law, while not representational of the citizenry in the same sense as legislation, is also susceptible to changes in public opinion. See O.W. HOLMES, THE COMMON LAW 1, 1 (1881). But see infra note 74 and accompanying text.
71 Caldwell, supra note 68, at 320.
72 See id.
73 Id. at 332. Supreme Court Justice Thurgood Marshall would also agree: "To be sure, law is often a response to social change, but... it also can change social patterns. Provided it is adequately enforced, law can change things for the better; moreover, it can change the hearts of men, for law has an educational function also." Marshall, Law and the Quest for Equality, 1967 WASH. U.L.Q. 1, 8.
74 Although it is easiest to think of the common law acting in such an anticipatory fashion, as seen in the landmark case of Brown v. Board of Education, 347 U.S. 483 (1954), legislation can also act in the same fashion, as in the Civil Rights Act of 1964.
75 It may be argued that the law is not so much a source of reform as it is a conduit for reformers. Thus, law does not pull society forward, but reformers do. Nevertheless, for a reform to become truly effective, law must reflect the goals of the reform. If reformers are able to convince the lawmakers, be they legislators or judges, that their position is "right," then the law will serve as a vehicle for social change. See, e.g., H. HOROWITZ & K. KARST, LAW, LAWYERS AND SOCIAL CHANGE: CASES AND MATERIALS ON THE ABOLITION OF SLAVERY, RACIAL SEGREGATION AND INEQUALITY OF EDUCATIONAL OPPORTUNITY 1 (1969) ("Law and lawyers have not created the black revolution. But they have played a critical part in institutionalizing the gains of the movement—and thereby making the movement acceptable to the Nation's white majority.").
alien to its own, society, or some part thereof, attempts to reject the new standard and keep its own, previous standard. Once again, the civil rights movement is an example. The widespread resistance in the South to Brown v. Board of Education is illustrative.\textsuperscript{76}

The public trust doctrine can be viewed as law acting in an anticipatory fashion. As discussed in Section II, the public trust doctrine has never really been a true reflection of society's values about the special character of certain types of land or water. Because the public trust doctrine is a result of the law acting in an anticipatory fashion, one would expect some sort of controversy.

\textbf{B. Criticism of the Modern Public Trust Doctrine}

Since the arrival of the public trust doctrine in American law,\textsuperscript{77} courts have not limited its applicability to the traditional areas of navigable waters and the foreshore. Rather, the public trust doctrine has been expanded to cover city streets,\textsuperscript{78} municipal water supplies,\textsuperscript{79} a prehistoric fossil bed,\textsuperscript{80} an inland state park,\textsuperscript{81} an inland national park,\textsuperscript{82} and inland wetlands.\textsuperscript{83} This expansion has not been welcomed


\textsuperscript{77} See supra notes 32-65 and accompanying text.


\textsuperscript{79} See, e.g., City of Los Angeles v. Pomeroy, 124 Cal. 597, 640, 57 P. 585, 600-01 (1899); Watuppa Reservoir Co. v. City of Fall River, 147 Mass. 548, 557-58, 18 N.E. 465, 472 (1888). See generally Selvin, supra note 78.


\textsuperscript{82} Sierra Club v. Department of the Interior, 398 F. Supp. 284, 287 (N.D. Cal. 1975); see also Jawetz, supra note 4, at 482-84.

\textsuperscript{83} Just v. Marinette County, 56 Wis. 2d 7, 14-17, 201 N.W.2d 761, 767-68 (1972).
by all, and has prompted some commentators to question the public trust doctrine itself.

One commentator argues that the public trust doctrine has effectively become a *deus ex machina* used by the courts to allow them to escape from difficult decisions. He points out that the public trust doctrine's ultimate source is mere myth, and its use today by the doctrine's proponents is disingenuous. As a result, he argues, the modern public trust doctrine consists largely of dicta and philosophizing by judges.

Another commentator sees the public trust doctrine as nothing more than the illegitimate substitution of judicial opinion for the proper exercise of administrative discretion, insofar as the doctrine is applied to federal inland areas. Arguably, then, judges should not interfere with an agency's decision regarding an inland area purportedly subject to the public trust doctrine.

A third commentator suggests that the modern public trust doctrine has simply outlived its purpose. Changes in the law governing standing, nuisance, the police power of a state, and administrative law effectively address the concerns that the public trust doctrine was meant to address. Any appeal to the public trust doctrine in light of these changes is simply a backward step at a time when pressing and complex environmental issues must be faced directly, and not through the myth-encrusted public trust doctrine.

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84 Deveney, supra note 11, at 81.
85 *Id.* at 79; *see also* supra notes 10-23 and accompanying text.
86 Deveney, supra note 11, at 80.
87 *Id.* at 81.
88 Jawetz, supra note 4, at 457. Even Joseph Sax, the "father" of the modern public trust doctrine, has come quite close to agreeing with this sentiment. *See supra* note 4.
89 Jawetz, supra note 4, at 469-73. Of course, as Jawetz notes, the judge does have power to overturn an agency's decision under section 706(2) of the Administrative Procedure Act, 5 U.S.C. § 706(2) (1982), if the decision is found to be:

(A) arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence [in certain cases]; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

*Id.* at 472. If no such violation is found, the judge may not overturn the decision absent "substantial procedural or substantive reasons." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 558 (1978).
90 Lazarus, supra note 4, at 657-58.
91 *Id.* at 658-60.
92 *Id.* at 660-64.
93 *Id.* at 665-79.
94 *Id.* at 679-88.
95 *Id.* at 715-16.
These criticisms of the public trust doctrine either point out the weaknesses in the legal lineage of the public trust doctrine or argue that no present need for the public trust doctrine exists. As a result, some commentators conclude that the public trust doctrine is either fatally flawed and should be done away with simply as a matter of legal honesty, or is simply a relic of the common law that should now be retired to the museum of interesting but antiquated law.96

The public trust doctrine still has meaningful work to perform. While the criticisms discussed above have some validity, these criticisms focus on the place of the public trust doctrine in the past and in the present.97 It may be that the public trust doctrine actually belongs to the future.

C. A Future Role for the Public Trust Doctrine

Because law sometimes may act as a catalyst for societal change,98 a possible role for the public trust doctrine in the future may be to serve as a catalyst for change in society’s attitudes towards property. The public trust doctrine can serve as an effective tool to bring the stewardship ethic into law.

The right to own land is deeply engrained in American culture, so much so that it has become synonymous with personal freedom.99 Intrinsic in the right to own land is the right to use land as the owner sees fit, which traditionally has been viewed as the right to use the land in the manner best suited to maximize short-term economic gain.100 As experience has repeatedly shown, a myopic focus on short-term economic gain can often lead to disastrous results.

Current history has demonstrated the incredible fragility of the various ecosystems that make up the planet.101 The time has come, therefore, to adopt a stewardship ethic into property law. The stewardship ethic calls for socially and ecologically responsible custody of land.102 The stewardship ethic necessarily looks toward the future, because it realizes that future generations have a claim in the present.103

96 See supra notes 84–95 and accompanying text.
97 See supra notes 77–95 and accompanying text.
98 See supra notes 66–67 and accompanying text.
99 Caldwell, supra note 68, at 320.
100 Id.
101 See supra note 3.
102 Caldwell, supra note 68, at 323.
103 An expression of the ethic is seen in the letterhead of the Jackson County, Wisconsin, Zoning and Sanitation Department: “The land belongs to the people . . . a little of it to those
The public trust doctrine can be the fiction through which the present generation is forced to take account of the generations yet to come, and of those future generations' right to the land.\textsuperscript{104} The public trust doctrine may be a way to institutionalize within the legal system the ancient belief that at least certain land should be beyond the absolute control of the present generation.\textsuperscript{105} The next section, through an examination of the National Environmental Policy Act, considers whether a legal doctrine that requires the present generation to give formal legal consideration to future generations is possible within our present system.

IV. ACCOMMODATING THE NEEDS OF THE FUTURE IN A SYSTEM GEARED TO THE PRESENT: NEPA AND THE STEWARDSHIP ETHIC

The public trust doctrine should be used now to protect the rights of future generations. Some might protest that even a public trust doctrine geared toward protecting the interests of future generations is unnecessary. These protesters could point to any number of both federal\textsuperscript{106} and state\textsuperscript{107} statutes that refer to future generations. These dead ... some to those living ... but most of it belongs to those yet to be born . . . .” Just v. Marinette County, 56 Wis. 2d 7, 24 n.6, 201 N.W.2d 761, 771 n.6 (1972).

\textsuperscript{104} The public trust doctrine has always stressed that, ideally, certain categories of land are common to all. Although the public trust doctrine has generally seemed to focus on the present generation as being the “all” to whom the land is “common,” arguably it is not illegitimate to stretch the “all” to include future generations. On the subject of the duty of the present generation to a future generation, see Norton, \textit{Environmental Ethics and the Rights of Future Generations}, 4 Envtl. Ethics 319 (1982); Weiss, \textit{The Planetary Trust: Conservation and Intergenerational Equity}, 11 Ecology L.Q. 495 (1984). For a philosophical discussion of whether an unborn generation can be said to have any rights, see Kavka, \textit{The Paradox of Future Individuals}, 11 Phil. & Pub. Aff. 93 (1982); Parfit, \textit{Future Generations: Future Problems}, 11 Phil. & Pub. Aff. 113 (1982).

\textsuperscript{105} The legal roots of the public trust doctrine do not refer explicitly to a concern for future generations. Instead, the focus would appear to be on the rights of the present generation not to be excluded from certain lands. The public trust doctrine's legal roots seem to depend upon earlier conceptions of a Golden Age, however. One function of a Golden Age myth is to be a source of inspiration for the present so that society, through the efforts of the present generations, will, in the future, be more like the past Golden Age.

\textsuperscript{106} For example, the statute that created the National Park Service stated that national parks were “to conserve the scenery and the natural and historic objects and the wildlife therein,” so that these parks would be left “unimpaired for the enjoyment of future generations.” 16 U.S.C. § 1 (1982). Legislation creating specific natural sites also repeats this concern for future generations. \textit{See}, e.g., 16 U.S.C. § 45(a)(1) (addition of Mineral King Valley to Sequoia National Game Refuge); id. § 90 (North Cascades National Park); id. § 160 (Voyageurs National Park); id. § 458(a) (Fire Island National Seashore); id. § 460m-8 (Buffalo National River); id. § 460z (Oregon Dunes National Recreation Area); id. § 460cc (South Fork National River and Recreation Area); id. § 460gg (Hell's Canyon National Recreation Area); 16 U.S.C.A. § 460m-15 (West Supp. 1989) (New River Gorge National River).

\textsuperscript{107} \textit{See}, e.g., CONN. GEN. STAT. ANN. § 22a-1 (West 1985) (declaration of state environmental policy includes responsibility to future generations); IND. CODE ANN. § 14-4-5-8 (Burns 1987).
protesters could also point out that courts have taken notice of future generations in cases that refer to these statutes.¹⁰⁸

The preeminent statute concerning the present generation’s duty to future generations is the National Environmental Policy Act of 1969 (NEPA).¹⁰⁹ One commentator has argued that the concerns that the public trust doctrine was supposed to address are addressed by NEPA, including any concern for future generations.¹¹⁰ Even if NEPA was meant to work as the modern federal counterpart of the public trust doctrine, it is not altogether clear that it carries out that role successfully.

A. Background

Congress did not necessarily intend NEPA to assume the importance that it currently has in the nation’s environmental affairs.¹¹¹ Nevertheless, from its tangled roots, NEPA has become “the Sherman Act of environmental law,”¹¹² “the most sweeping environmental law ever enacted by a United States Congress,”¹¹³ “an environmental Magna Carta,”¹¹⁴ and “the cornerstone of our federal resource pro-

¹¹⁰ See Lazarus, supra note 4, at 684–87.
¹¹¹ “Whether Congress understood what it legislated, and expected that the environmental impact statement would become a major instrument of environmental review, is far from clear. Neither is it clear that Congress anticipated the extensive role the federal courts have assumed in NEPA’s administration.” D. MANDELKER, NEPA LAW AND LITIGATION: THE NATIONAL ENVIRONMENTAL POLICY ACT § 2:04 (1984). For discussions of NEPA’s legislative history, see id. at §§ 2:02–2:04; ANDREWS, ENVIRONMENTAL POLICY AND ADMINISTRATIVE CHANGE: IMPLEMENTATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT (1976); and R. LIROFF, A NATIONAL POLICY FOR THE ENVIRONMENT: NEPA AND ITS AFTERMATH 10–35 (1976).
¹¹³ R. Liroff, supra note 111, at 3.
¹¹⁴ D. MANDELKER, supra note 111, § 1:01.
tection legislation."\textsuperscript{115} These are extraordinary praises for an environmental statute that is neither technology-forcing nor standard-setting.\textsuperscript{116}

NEPA proclaims, as national policy, that it is the continuing responsibility of the federal government to use all practical means to ensure that the nation may "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations."\textsuperscript{117} Yet the sole implementing tool for this truly inspirational policy\textsuperscript{118} is the environmental impact statement (EIS) that must be drawn up to accompany any major federal action that significantly affects the human environment.\textsuperscript{119} Not surprisingly, then, most disputes involving NEPA center on the need to prepare, or the adequacy of, an EIS.\textsuperscript{120}

Because of the strange combination of sweeping policy statements, or substantive goals, with the narrow procedural requirement of the

\textsuperscript{115} Comment, Sealing Pandora's Box: Judicial Doctrines Restricting Public Trust Citizen Environmental Suits, 13 B.C. ENVTL. AFF. L. REV. 439, 439 (1986).


\textsuperscript{117} 42 U.S.C. § 4331(b)(1) (1982).

\textsuperscript{118} The full text of Congress's declaration of the national environmental policy is worth reading in full:

\begin{quote}
The Congress, recognizing the profound impact of man's activity on the interrelationships of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.
\end{quote}

\textit{Id.}

\textsuperscript{119} 42 U.S.C. § 4332(C) (1982).

EIS, NEPA suffers from a sort of a statutory split personality. The split arises out of the virtually exclusive focus on the EIS in most disputes involving NEPA. Thus, the goal of NEPA—the creation of a productive harmony between people and nature— is often lost in the emphasis on procedural compliance.

B. NEPA as Procedure

The Supreme Court has not considered NEPA to be much more than a procedural hurdle through which a federal agency may jump upon completion of an EIS. In a line of decisions, the Supreme Court has ruled that NEPA sets forth procedural guidelines, and does not declare substantive law.

In Kleppe v. Sierra Club, several environmental groups brought suit against the Department of the Interior, claiming that the Department could not plan further development of certain coal reserves without first preparing a regional EIS. The Court reversed an injunction that had been issued by the Court of Appeals for the District of Columbia Circuit, holding that the environmental groups had failed to show that there had been any major federal action with respect to the region.

Although Kleppe turned largely upon whether or not the Department of the Interior was considering a regional plan, the Court did note that it could not substantively review an agency’s decision to select a certain alternative from the alternatives specified in the EIS. A court could only make sure that the agency had taken a “hard look” at the environmental consequences of its actions. Any court that second-guessed the agency’s choice would be impermissibly intruding into the protected area of executive discretion. This line of reasoning soon became a recurring theme.

121 42 U.S.C. § 4331(a) (1982). This goal is reminiscent of Ovid’s description of the Golden Age. See supra note 15 and accompanying text.
123 Id. at 394–95. The region to which the environmental groups referred was the “Northern Great Plains region,” which encompassed parts of Wyoming, Montana, North Dakota, and South Dakota. Id. at 396.
124 The District of Columbia Circuit Court issued an injunction preventing the implementation of mining plans in the region, id. at 395, and later held that, if the Department did plan to control the development of coal mining in the region, then an EIS would be required. Id. at 403.
125 Id. at 399. The Court, however, did note that there were “proposals . . . for actions . . . [that are] either local or national [in scope].” Id.
126 Id. at 410 n.21.
127 Id. (quoting Natural Resources Defense Council v. Morton, 458 F.2d 827, 838 (1972)).
128 Id.
In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, the Natural Resources Defense Council (NRDC) challenged the Atomic Energy Commission's (AEC) adoption of rules pertaining to the cost-benefit analysis of the uranium fuel-cycle in certain nuclear reactors, and the decision by the AEC not to apply this rule to the Vermont Yankee licensing proceedings. Although the bulk of the opinion focused on administrative law, the Court, in an apparent afterthought, makes "one further observation of some relevance to this case." After lambasting the District of Columbia Circuit Court for impermissibly interfering with congressional policy decisions, the Court stated that NEPA's mandate to federal agencies is essentially procedural. The Court cited Kleppe as a reminder that a court has limited power to review the sufficiency of environmental factors.

Thus, from *Vermont Yankee* emerges a vision of NEPA that seems to eviscerate the great purposes of the statute. While the Court does suggest, at the very end, that a decision made by an agency pursuant to NEPA could be set aside for substantive reasons, the entire thrust of the opinion is to set limitations on the ability of a court to review a NEPA decision substantively.

The Court followed *Vermont Yankee's* reasoning in *Strycker's Neighborhood Council, Inc. v. Karlen*. In *Karlen*, the Court overturned a Second Circuit decision that had held that the Department of Housing and Urban Development (HUD) had not given enough weight to certain environmental factors in its evaluation of a low-income housing development. Citing *Vermont Yankee's* dicta that NEPA is essentially procedural, the Court stated that this procedural view of NEPA meant that an agency was not bound to

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130 Id. at 557.
131 Id. at 557–58.
132 Id. at 558.
133 *Vermont Yankee*, 435 U.S. at 555.
134 "Administrative decisions should be set aside in [a NEPA] context, as in every other, only for substantial procedural or substantive reasons . . . ." Id. at 558 (citing Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966)). Even here, however, the Court cautioned against overturning an agency decision merely because the court is "unhappy with the result reached." Id.
136 Id. at 227. Specifically, the Second Circuit Court of Appeals was concerned with "crowding low-income housing into a concentrated area." Id. (quoting Karlen v. Harris, 590 F.2d 39, 44 (2d Cir. 1978)).
137 Id. (citing *Vermont Yankee*, 435 U.S. at 558).
“elevate environmental concerns over other appropriate considerations.” Thus, the only role for a court was to make sure that an agency considered the environmental consequences of whatever action the agency was taking.

Finally, the Court held in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council* that a court, when reviewing an agency’s NEPA actions, should simply ensure that the agency has adequately considered the environmental impact of its actions. If an agency has adequately considered its impacts, and has disclosed those impacts, then a reviewing court may only review the agency’s actions under the arbitrary and capricious standard.

Through this line of cases, the Supreme Court has effectively reduced NEPA—whose purpose was to create a productive harmony between people and nature—to a mere full disclosure law, whose application is to be reviewed by the very lax standard of the arbitrary and capricious test. Any attempt to argue that NEPA is a substantive statute starts out with the heavy burden of refuting the Supreme Court’s procedural holdings over the past fourteen years.

### C. NEPA as Substance

Despite these procedural holdings, authority does exist for the argument that NEPA should be, and is, a substantive statute. For example, NEPA did more than declare environmental policy and require the filing of EISs. It also created the Council on Environmental Quality (CEQ), and charged CEQ with making recommendations to the President on how to implement the policy goals of NEPA. The Supreme Court has noted that CEQ’s interpretation of NEPA should be given substantial deference.

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138 Id.

139 Id. Although the Court cites Kleppe as support for its view that an agency must consider the environmental consequences, Kleppe itself spoke of a “hard look.” For a discussion of Kleppe, see supra notes 122–28 and accompanying text.


141 Id. at 97–98.

142 See supra note 121.


144 Id. § 4344(3).

If the Supreme Court did in fact give CEQ's interpretation of NEPA substantial deference, then the Court would not have developed the Kleppe/Vermont Yankee line of cases. As CEQ states: "NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." Thus, NEPA is meant to do more than simply ensure that agencies consider environmental consequences: NEPA is meant to influence the action taken.

CEQ's vision of what an EIS is supposed to be also differs from that of the Supreme Court. While the Court focuses on disclosure, CEQ makes clear that an EIS is more than a disclosure document. Rather, the EIS is an action-forcing device intended to ensure "that the policies and goals . . . [of NEPA] are infused into the ongoing programs and actions of the Federal Government." Finally, the text of NEPA itself would seem to belie any contention that NEPA is merely a procedural statute. NEPA mandates that all policies, regulations, and public laws of the United States be interpreted and administered to the fullest extent possible according to NEPA's substantive goals.

individual agencies who are to implement NEPA by filing the necessary EISs. Of course, CEQ has promulgated regulations to guide the various agencies in drafting an EIS, 40 C.F.R. pt. 1502 (1987), and these regulations must be followed. 40 C.F.R. § 1507.1. 146 See supra notes 122-42 and accompanying text.


149 See supra note 141 and accompanying text.

150 40 C.F.R. § 1502.1 (1987). Of course, proponents of the "NEPA as procedure" view would argue that the Supreme Court is stating what a court may look for when it reviews an EIS, and is not reducing the EIS to a mere disclosure statement. Although this interpretation technically may be true, its practical effect is to reduce the EIS to a mere disclosure statement and not to force agencies to act in a manner consistent with CEQ's vision of the NEPA process. See supra notes 147-49 and accompanying text. It should be noted that CEQ believes that the courts also have the responsibility of enforcing NEPA "so as to achieve the substantive requirements of section 101 [(NEPA's policy statement)]." 40 C.F.R. § 1500.1(a) (1987).

151 40 C.F.R. § 1502.1 (1987) (emphasis added). CEQ repeatedly refers to the need to ensure that the "policy" or "spirit" of NEPA is enforced. See, e.g., id. §§ 1500.1(a), 1500.3, 1502.1, 1502.2(d), 1505.1.

152 42 U.S.C. § 4332 (1982). These words seem to be about as clear as congressional directives
D. The Importance of the Stewardship Ethic in NEPA

Earlier this Comment discussed the stewardship ethic and how the public trust doctrine might serve as a vehicle to bring this stewardship ethic into law. If, as one commentator has argued, NEPA does statutorily incorporate the public trust doctrine into federal law, then NEPA should also be able to serve as a vehicle to bring the stewardship ethic into law. NEPA’s split personality is important because each of NEPA’s two personalities—procedure and substance—belies a very different attitude toward the environment.

One commentator, Don Frost, recently has written about the philosophic basis of NEPA’s substantive goals. He argues that two philosophical theories provide a possible basis for NEPA’s policy mandate. The first theory, utilitarianism, ultimately favors development over environmental protection. Conversely, the second theory, environmentalism, encourages environmental protection. Because NEPA’s substantive goals are premised on the need to protect the environment, it is clear that the utilitarian philosophy must be rejected. Environmentalism, on the other hand, is based on the belief that people’s relationship with nature must be harmo-
nious.\textsuperscript{163} It is clear that this philosophy is consonant with NEPA's goals.\textsuperscript{164}

Unfortunately, it is also clear that agencies have not applied NEPA in accordance with what Frost calls duty-based environmentalism, or what this Comment refers to as the stewardship ethic.\textsuperscript{165} Because of the Supreme Court's insistence that NEPA is essentially procedural,\textsuperscript{166} Frost argues that NEPA's substantive mandate of duty-based environmentalism has been undermined.\textsuperscript{167} Using Frost's terms, then, it would appear that the Supreme Court sees utilitarianism, rather than duty-based environmentalism, as the basis for NEPA.\textsuperscript{168} Thus, the split personality of NEPA may be caused by differing philosophies about land ownership.

If NEPA is presumed to have taken the place of the public trust doctrine,\textsuperscript{169} it must be applied with a clear view toward, and perhaps even a preference for, the rights of future generations. Yet the bifurcation of NEPA's procedure and substance endangers the rights of future generations by allowing agencies to discount these generations.\textsuperscript{170} It would thus seem reasonable to question whether NEPA has indeed taken the place of the public trust doctrine.

\textsuperscript{163} Id. at 42. Frost discusses two types of environmentalism: biocentrism, \textit{id.} at 42–43, and duty-based, \textit{id.} at 44–46. Biocentrism believes that humans are “indistinguishable in kind from the other inhabitants of the earth.” \textit{Id.} at 42. Because this philosophy fails to take account of people's “dual nature—[their] . . . thinking and nonthinking selves,” Frost rejects it as “impractical and unrealistic.” \textit{Id.} at 43.

Duty-based environmentalism states that humans have a duty “to preserve the environment and its inhabitants.” \textit{Id.} at 42. Part of the duty-based environmentalism belief is that the present generation is obliged to “provide future generations with a clean and healthy environment.” \textit{Id.} at 45.

\textsuperscript{164} “[W]ith NEPA, Congress clearly intended to enact an environmental policy founded on duty-based environmentalism.” \textit{Id.} at 50. \textit{But see supra} note 111 and accompanying text.

\textsuperscript{165} Both the stewardship ethic and duty-based environmentalism are concerned with the present generation's obligation to future generations, and how this obligation affects property law and land use. \textit{See supra} note 163.

\textsuperscript{166} \textit{See supra} notes 122–42 and accompanying text.

\textsuperscript{167} Frost, \textit{supra} note 116, at 56.

\textsuperscript{168} Because the Supreme Court appears to view NEPA cases as questions of the standard of review to be applied to agency actions, \textit{see supra} notes 136–42 and accompanying text, it is probably more precise to say that the Court allows agencies to use utilitarianism as the basis for NEPA.

\textsuperscript{169} Lazarus, \textit{supra} note 4, at 684–87.

\textsuperscript{170} If a court can only make sure that NEPA's procedures have been followed, it cannot easily question the substance of an agency decision that disregards the rights of future generations.
V. THE PUBLIC TRUST DOCTRINE AND NEPA: VANGUARDS FOR THE STEWARDSHIP ETHIC

Both the public trust doctrine and NEPA are possible vehicles to bring the stewardship ethic into law. Both present problems as vehicles, however: the public trust doctrine is criticized as illegitimate and redundant, and NEPA is interpreted so as to render policy goals virtually meaningless.

A. NEPA and the Stewardship Ethic

If NEPA is to serve as a vehicle for bringing the stewardship ethic into law, the debate over NEPA must shift from the substance/procedure dilemma to a consideration of how best to protect the rights of future generations. Some suggestions as how best to protect these rights follow.

1. The Stewardship Ethic in NEPA as Procedure

Even if NEPA were to remain essentially procedural, courts could require agencies to include extended and explicit discussions about the impact of their actions on future generations in an EIS. This suggestion is hardly radical; indeed, the District of Columbia Circuit Court has already considered this issue.

In Concerned About Trident v. Rumsfeld, the appellants alleged several flaws in an EIS drawn up by the Navy in connection with the planning of a Trident submarine base at Bangor, Washington. Noting that the Navy had a duty to fulfill the policy goals of NEPA,

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171 See supra notes 98–105 and accompanying text.
172 See supra notes 154–70 and accompanying text.
173 See supra notes 77–97 and accompanying text.
174 See supra notes 122–42 and accompanying text.
176 555 F.2d 817 (D.C. Cir. 1977).
177 Appellants alleged that the EIS “does not adequately analyze and describe alternatives to the Bangor dedicated site; fails to adequately assess the environmental impacts outside of Kitsap County; fails to discuss the impacts of the possible deployment of more than ten submarines and the early termination of the Trident Program; does not adequately analyze the fiscal impacts of the Program; and finally, is short-sighted in assessing the environmental impacts only up to 1981.” Id. at 826–27 (emphasis added).
178 Id. at 829.
the court remanded the EIS back to the Navy for correction of certain deficiencies. The court ordered the Navy to forecast the environmental impacts of the proposed base beyond the 1981 date that had been chosen as the EIS cutoff date, stating that it was imperative that the Navy make a reasonable effort to determine what impacts the proposed base would cause beyond 1981.

Similarly, in Potomac Alliance v. United States Nuclear Regulatory Commission, the District of Columbia Circuit Court upheld the appellant's charges that the NRC violated NEPA by failing to consider the long-range effects of granting an amendment to a reactor's license. In his concurring opinion, Judge Bazelon noted that the NRC had to extend its consideration of the environmental impacts beyond the year 2011 because the NRC could not state that there was no reasonably foreseeable possibility that the environmental impacts would not continue past that year.

By requiring agencies to consider the impact of their actions on future generations extensively and explicitly, it may also be possible to develop the basis for a later arbitrary and capricious challenge. If, as a result of completing an EIS in the manner described, an agency determines that it risks possible severe harm to the interests of future generations, and the agency nevertheless decides to go ahead with the action, a group who challenges this decision may have a slightly better chance to argue that the decision was arbitrary and capricious.

2. The Stewardship Ethic in NEPA as Substance

The rights of future generations could also be protected in more substantive ways. Of course, the best substantive protection would be for the Supreme Court to reverse itself and state that NEPA is

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179 Id. at 830.
180 Id.
181 Id. The court noted that the Navy did have some basis for choosing 1981 as the cutoff date, but that it simply could not agree with the Navy that 1981 was the proper cutoff date. Id. at 829–30.
182 682 F.2d 1030 (D.C. Cir. 1982) (per curiam).
183 Id. at 1031. The Virginia Electric Power Company had sought, and was granted, an amendment to its NRC license for its North Anna Nuclear Power Station to increase the capacity of its spent-fuel pool. Id. In issuing the amendment, the NRC considered environmental impacts through the year 2011, because the plant's license expired in that year. Id. at 1033 (Bazelon, J., concurring).
184 Id. at 1036–37 (Bazelon, J., concurring).
185 Id. at 1036 (Bazelon, J., concurring).
a substantive statute. Such a reversal, however, is not likely to happen soon.

Perhaps another way to protect the interests of future generations is to change who writes an EIS. Presently, the agency seeking to perform some action writes an EIS. Often, however, the mandate of NEPA to write an EIS conflicts with the main statutory mission of the authoring agency.\textsuperscript{186} If such a conflict exists, the temptation is great for the agency to write an EIS so as to allow itself the possibility of achieving its statutory mission.\textsuperscript{187}

This temptation could be avoided by centralizing the writing of EISs into one agency, by charging either the Environmental Protection Agency, the CEQ, or some newly created agency with drafting all EISs for the government. Although any agency charged with writing EISs may suffer from lax enforcement due to political vicissitudes, the creation of a new agency whose sole purpose is to write EISs may help to create more objective EISs, free from conflicting mandates.

\textbf{B. The Need for the Public Trust Doctrine as a Vehicle for the Stewardship Ethic}

If NEPA was meant to incorporate the public trust doctrine, it has failed. This reason alone should silence the critics who call for the abandonment of the public trust doctrine. But even if NEPA had been (or will be) more successful in incorporating the public trust doctrine, the public trust doctrine itself should still not be relegated to history.

As a doctrine that has its roots in Roman antiquity, and perhaps earlier,\textsuperscript{188} the public trust doctrine bespeaks an ancient realization—one so badly needed today—that humanity’s relationship to the land is much more than what is contained in any property law or land-use system. It has been a slowly developing doctrine over much of its history, with periods of dormancy and rapid expansion. But what is most important is that, while the public trust doctrine has become a legal doctrine, its purpose is to attack a legal system of land ownership that is environmentally unsound. If the stewardship ethic is ever to become part of the law, it must come from a source that attacks the very premises of the reigning legal system of land ownership—from a source like the public trust doctrine.

\textsuperscript{186} Z. PLATER & R. ABRAMS, supra note 120, at 367.  
\textsuperscript{187} Id. at 368.  
\textsuperscript{188} See supra notes 10–23 and accompanying text.
VI. Conclusion

The public trust doctrine can be a tool through which the stewardship ethic can be introduced effectively into American law and society. A review of the history of the public trust doctrine shows that the doctrine has been more of a statement of what ought to be the law than an accurate reflection of how the law actually operates. Current criticisms of the public trust doctrine, by focusing on the past and present uses of the doctrine, lose sight of its potential for future use. Criticisms of the public trust doctrine that argue that the doctrine has been preempted by NEPA fall upon the rocks of the Supreme Court's interpretation of NEPA as procedural. Although NEPA could be treated as a statute of real substance, such an interpretation would require reversal of Supreme Court precedent, which is unlikely to occur.

The bifurcation of NEPA into procedure and substance is symptomatic of a deep-seated attitude toward ownership of land. It is this attitude—an attitude that the present generation is free to exploit the land it owns in whatever manner the present generation feels economically justifiable—that a renewed public trust doctrine would attack. It is this attitude that must be attacked if our planet is to survive.

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189 See supra notes 10–65 and accompanying text.
190 See supra notes 77–105 and accompanying text.
191 See supra notes 106–42 and accompanying text.
192 See supra notes 143–53 and accompanying text.
193 See supra notes 154–70 and accompanying text.