

# Climate Justice and the Public Trust

## The Plaintiffs' Perspective

Andrea Rodgers, Julia Olson, and Eric Laschever

**T**he public trust doctrine may be the most misunderstood, historically significant, and urgently necessary legal principle available. It dates to ancient Roman law, which declared that “[by] the law of nature, these things are common to mankind: the air, running water, the sea, and consequently, the shores of the sea.” J. Inst. 2.1.1 (T. Sanders trans., 4th ed. 1867). U.S. jurisprudence traces the public trust doctrine from these ancient sources, through the English common law, to inheritance by the Colonies and the United States. See, e.g., *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603–04 (2012).

Our Children’s Trust, a nonprofit public interest law firm that provides strategic, campaign-based legal services to youth from diverse backgrounds to secure their legal rights to a safe climate, has argued the public trust doctrine has relevance today in suits against the U.S. government and all fifty states alleging that these governments have abrogated their fiduciary responsibility to our youth and future generations by their actions that cause climate change. There has been significant coverage of this litigation, particularly *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), in scholarly journals and the popular media. See, e.g., Michael C. Blumm & Mary Christina Wood, *No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine*, 67 Am. U. L. Rev. 1 (2017); *No Ordinary Lawsuit* podcast; and *60 Minutes* (Mar. 3, 2019). There also is a major documentary film about the case: *YOUTH v GOV*.

This article provides the youth advocates’ perspective. After a brief overview of current global Public Trust climate litigation, we examine the relationship of the public trust doctrine to the U.S. Constitution, discuss the underlying science’s important role in defining the intergenerational trust responsibility, and explore litigation’s role as one tool in the quest for intergenerational climate justice.

### Overview of Public Trust Climate Litigation

Given its historical roots in ancient Roman civil law and English common law, it is understandable that application of the public trust doctrine is not confined to the United States and that litigants around the world use the public trust doctrine as a tool to achieve intergenerational justice. The Columbia University Sabin Center for Climate Change Law, which compiles details of climate change cases, in July 2021 identified twenty-seven cases alleging Public Trust violations in the United States and five cases in other countries, including Canada, Pakistan, Uganda, and India.

Latter sections of this article focus on the United States; therefore, we use the non-U.S. cases to illustrate the doctrine’s central tenets. For example, Rabab Ali’s petition against the Federation of Pakistan claims, “[O]ur legal system—based on English common law—includes the Doctrine of Public Trust as part of its jurisprudence.” Original Const. Petition in the Sup. Ct. of Pakistan, *Rabab Ali v. Fed’n of Pakistan* (2016). The Plaintiff’s Original Application in *Pandey v. India* (2017), pending before the Indian Supreme Court, similarly explains: “[t]he heart of the Public Trust Doctrine is that it imposes limits and obligations upon government agencies and their administrators on behalf of all the people and especially future generations” (citing *Fomento Resorts & Hotels Ltd. v. Minguel Martins* (2009) 3 SCC 571 (Sup. Ct. of India)).

Fifteen Canadian youth plaintiffs similarly allege that by contributing to climate change, the Canadian government has breached “their obligation to protect and preserve the integrity of public trust resources and has violated the right of the plaintiffs and puts at risk the rights of all children and youth now and in the future to access, use and enjoy public trust resources including navigable waters, the foreshores and the territorial sea, the air including the atmosphere, and the permafrost (“Public Trust Resources”).” Statement of Claims to the Court,

*La Rose v. Her Majesty the Queen*, Court File No. T-1750-19 (Oct. 25, 2019). While Canadian courts have heretofore been agnostic as to whether the public trust doctrine exists under Canadian law, the youth plaintiffs argue “that public rights and Crown duties in relation to public trust resources are deeply embedded in our legal DNA.” Memo. of Fact & Law of the Appellants at 20, *La Rose v. Her Majesty the Queen*, No. A-289-20 (Fed. Ct. of App. May 3, 2021).

## Trying the U.S. Climate Change Case: The Public Trust Doctrine and the Constitution

The public trust doctrine’s concept of a trust relationship between the government and future generations, being tested in U.S. and international courts, harmonizes the doctrine uniquely well with climate change litigation on behalf of youth who will inherit the planet encumbered by our greenhouse gas legacy. As discussed below, the doctrine is particularly promising given the current Supreme Court’s use of the common law as foundational to analyzing the meaning of the Constitution and the Public Trust’s prominent place in the Framers’ common law library.

### Common Law and the Constitution

Some legal scholars trace the Supreme Court’s current use of common law to inform its constitutional jurisprudence to 2008 when Justice Scalia convinced seven of his colleagues to reframe the Court’s Fourth Amendment analysis to rely on the Framers’ understanding of the common law in interpreting the Constitution in the case of *Virginia v. Moore*. Sophie J. Hart & Dennis M. Martin, *Judge Gorsuch and the Fourth Amendment*, 69 Stan. L. Rev. Online 132 (2017). Writing for the majority, Scalia opined, “[i]n determining whether a search or seizure is unreasonable . . . [w]e look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve.” *Virginia v. Moore*, 553 U.S. 164, 168 (2008).

Within this concept of the government as fiduciary, the Framers explicitly recognized the fiduciary’s intergenerational obligation regarding the natural world.

In its 2020–21 session, Supreme Court opinions that together included all nine justices used this formulation of common law and constitutional analysis to determine what “sorts of searches the Framers of the Fourth Amendment regarded as reasonable,” what “forms of physical force” constitute “seizure,” and whether article III allowed nominal damages

of one dollar as justiciable redress for standing purposes. *Lange v. California*, 141 S. Ct. 2011 (2021); *Torres v. Madrid*, 141 S. Ct. 989 (2021); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021).

That all justices start with the common law as a present-day guide to constitutional rights and remedies does not mean they necessarily end up with the same conclusion. As Justice Gorsuch in his *Torres* dissent cautioned, “[t]he common law offers a vast legal library. Like any other, it must be used thoughtfully.” He continued, “We have no business wandering about and randomly grabbing volumes off the shelf, plucking out passages we like, scratching out bits we don’t, all before pasting our own new pastiche into the U. S. Reports. That does not respect legal history; it rewrites it.” *Torres*, 141 S. Ct. at 1014 (Gorsuch, J., dissent).

As discussed below, Justice Gorsuch’s “vast legal [common law] library” uniformly and directly ties the public trust doctrine to the U.S. Constitution generally and the Fifth Amendment specifically. Just as the Court has turned to the long tradition at common law of finding a remedy to right a legal wrong, for hundreds of years, the common law public trust doctrine rooted the protection of natural resources as a matter of intergenerational justice, a history inherited and respected by the Framers and the early Supreme Court in *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

### The Public Trust Doctrine and the U.S. Constitution

Given the Supreme Court’s use of the common law in analyzing the Constitution, we turn to the Framers’ conception of government’s fiduciary role, the relationship of this role to the public trust doctrine, and the tie between this doctrine and the Constitution’s Fifth Amendment.

With regard to the government’s role as fiduciary—which undergirds the public trust doctrine—Robert Natelson, Senior Fellow in Constitutional Jurisprudence at the Independence Institute, a libertarian thinktank, notes, “[t]he fiduciary metaphor seems to rank just below ‘liberty’ and ‘republicanism’ as an element of the ideology of the day.” Robert G. Natelson, *The Constitution and the Public Trust*, 52 Buffalo L. Rev. 1077 (2004). Natelson—known for his in-depth review of contemporaneous writings during the period leading up to the Constitution’s ratification—further observed that, while the Framers frequently used “the metaphors of guardianship, master-servant, and agency to describe the relationship between elector and elected, the phrase they used most often was ‘public trust.’” *Id.* Finally, he concludes that the “Founders’ public trust doctrine was far more comprehensive than modern tenets that share the name.” *Id.* The extent to which the public trust doctrine embodies the Framers’ concept of the government led legal scholar Gerald Torres and Our Children’s Trust attorney Nathan Bellinger to refer to it as the “chalkboard on which the Constitution is written.” Gerald Torres & Nathan Bellinger, *The Public Trust: The Law’s DNA*, 4 Wake Forest J.L. & Pol’y 281, 288–94 (2014).

Within this concept of the government as fiduciary, the Framers explicitly recognized the fiduciary’s intergenerational obligation regarding the natural world. For example, Thomas Jefferson, writing to James Madison two years after the Constitutional Convention, exclaimed, “I set out on this ground,

which I suppose to be self-evident, ‘that the earth belongs in usufruct to the living[.]’” Letter from Thomas Jefferson to James Madison, 6 Sept. 1789, in 15 *The Papers of Thomas Jefferson* 392 (Julian P. Boyd ed., 1958) (emphasis in original). “Usufruct” meant “the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing.” John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States* (1856).

That Jefferson meant to encompass future generations in the term “usufruct” is clear, as the letter continued, “the earth belongs to each of these generations, during its course, fully, and in their own right. The 2d. generation receives it clear of the debts and incumbrances [sic] of the 1st. the 3d of the 2d. and so on.” Letter from Jefferson to Madison, 6 Sept. 1789, *supra*. The earth to which Jefferson referred included those natural resources that English common law recognized as necessarily of common ownership: “[s]uch (among others) are the elements of light, air, and water . . . also animals *ferae naturae*, or of untamable nature. . . .” See William Blackstone, *Commentaries on the Laws of England* 14 (1766). To Jefferson, it was self-evident that the Earth is as much the property of succeeding generations as those currently living and that the current generation’s use should not incumber, change, or substantially impair the Earth’s character.

The Constitution’s introductory sentence reflects the Framers’ core purpose to “secure the Blessings of Liberty to ourselves and our Posterity. . . .” U.S. Const., pmb. A 1976 bicentennial review of the Preamble examined “this ever-present consciousness of posterity and of the fiduciary obligation that was owed it.” *Commitment to Posterity, Where Did It Go?*, 27 *Am. Heritage* 5 (Aug. 1976). Noting its origins in the Enlightenment, the authors reviewed the writings of the Framers, including George Washington, Thomas Paine, John Adams, John Dickinson, Thomas Jefferson, George Mason, and Benjamin Rush, and concluded, “nowhere else did [posterity and government’s fiduciary responsibility to it] flourish as it did in the new American republic.” *Id.*

Thus, the Constitution begins by invoking the intergenerational principles that undergird the public trust doctrine. The Fifth Amendment amplifies and implements this core intergenerational vision. The Fifth Amendment prohibits the government from depriving its people of “life, liberty, or property, without due process of law.” U.S. Const. amend. V. The Framers’ concept of “property” was expansive. Madison, for example, noted the term’s narrow “particular” meaning—“that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.” James Madison, *Property*, Mar. 27, 1792, in 14 *The Papers of James Madison* 266–68 (William T. Hutchinson et al. eds., 1983). He then contrasted this individualistic definition with the term’s “larger and juster meaning.” According to this meaning, property “embraces every thing [sic] to which a man may attach a value and have a right; and which leaves to every one else the like advantage.” *Id.* Given the Constitution’s recognition of posterity’s rights, Madison’s concept of “just property”—akin

to Jefferson’s explanation discussed above—embraced leaving future generations “the like advantage” regarding everything to which we attach value.

## This notion would shock the Framers, who above all else worried about the “tyrant’s will” embodied in the law.

The idea of “like advantage” similarly infuses the Framers’ notion of liberty. Thomas Jefferson described the term “liberty” as “unobstructed action according to our will, within the limits drawn around us by the equal rights of others.” Thomas Jefferson to Isaac H. Tiffany, 4 April 1819, *Founders Online*, Nat’l Archives. Jefferson added, “I do not add ‘within the limits of the law’ because law is often but the tyrant’s will, and always so when it violates the rights of the individual.” *Id.*

This last quote is particularly telling considering conclusions by the Ninth Circuit and other tribunals that courts are not competent to redress claims of climate change–related constitutional violations tied to the public trust doctrine, directing youth plaintiffs to the other two governmental branches. This notion would shock the Framers, who above all else worried about the “tyrant’s will” embodied in the law. Their Declaration of Independence, after all, proclaims the peoples’ right to “alter or to abolish” a tyrannical government. In arguing for the Constitution’s ratification, Madison and Jefferson each re-sounded their warning about the “tyrant’s will” and how to safeguard against it, including through judicial review.

Specifically, in Federalist Paper 48, Madison quotes Jefferson’s *Notes on the State of Virginia*, in which Jefferson observed that concentrating the powers of the legislative, executive, and judiciary in the legislature’s hands “is precisely the definition of despotic government.” *The Federalist* No. 48 (James Madison), from the *New York Packet*, Feb. 1, 1788, *Federalist Papers: Primary Documents in American History Library of Congress Research Guides*. Jefferson continued, “[i]t will be no alleviation, that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one.” *Id.* Jefferson concluded, “An elective despotism was not the government we fought for.” *Id.* His proposed remedy was the Convention’s constitution “in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.” *Id.*

## The Science as Evidence in Defining the Public Trust Duty and Breach

Just as the public trust doctrine provides a compelling legal frame for youth advocates seeking intergenerational justice, developing the scientific record that correctly identifies the

remedy needed by our youth and future generations is as, if not more, important. In this regard, Dr. James Hansen, Director of the Climate Science, Awareness and Solutions program at Columbia's Earth Institute and immediate past director of the NASA Goddard Institute for Space Studies, has been an important expert in advancing public trust doctrine claims in court. Dr. Hansen is credited with changing the trajectory of the popular understanding of climate science in 1988 when he testified before a U.S. Senate committee that he was 99% certain that the year's record temperatures were connected to the growing concentration of atmospheric pollutants and a warming climate. Ben Block, *A Look Back at James Hansen's Seminal Testimony on Climate, Part One*, Grist, June 16, 2008.

Dr. Hansen's declaration is Exhibit A in support of the *Juliana* plaintiffs' complaint. Complaint for Declaratory & Injunctive Relief, *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. Aug. 12, 2015). Many other renowned scientists also authored important scientific declarations and expert reports to support the youth during the various stages of the litigation. See Our Children's Trust online compendium of *Juliana* pleadings for other examples of expert testimony supporting the youth's claims.

Thus, while Humphrey Bogart and Ingrid Bergman may "always have Paris," for climate trustees and the trust beneficiaries, Paris is wholly inadequate.

According to Dr. Hansen, his study, coauthored with seventeen colleagues, *Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, 8 PLoS ONE e81648 (2013), established that "continued fossil fuel burning up to even 2°C above the preindustrial level likely would cause large climate change with disastrous and irreversible consequences." Declaration of Dr. James Hansen at 3, *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. Aug. 12, 2015). Dr. Hansen's testimony concluded that "actions to rapidly phase out CO<sub>2</sub> emissions are urgently needed to reduce the atmospheric CO<sub>2</sub> concentration to no more than 350ppm and restore Earth's energy balance." *Id.* Dr. Hansen's declaration also references the 2016 study by him and his colleagues, *Ice Melt, Sea Level Rise and Superstorms: Evidence from Paleoclimate Data, Climate Modeling, and Modern Observations That 2°C Global Warming Is Highly Dangerous*, 16 Atmos. Chem. Phys. 3761–812 (2016), which concludes "that, if CO<sub>2</sub> emissions are allowed such that energy is continuously pumped at a high rate into the ocean, then multi-meter sea level rise will become practically unavoidable,

with consequences that may threaten the very fabric of civilization." Declaration of Dr. James Hansen, *supra*, at 4. Ocean warming and sea level rise impacts form an essential basis for Public Trust arguments based on quintessential Public Trust assets such as the seas and their shores.

Dr. Hansen's *Juliana* declaration summarizes the underlying science defining the level of CO<sub>2</sub> pollution and emissions reductions required and serves as the litmus test to ascertain a breach of governments' trust obligations. Importantly, the science establishes that the Paris Accord target of heating up to 2°C will allow the rapid destruction of public trust resources and will not protect future generations. *Id.* Our Children's Trust Submission to the United Nations Special Rapporteur on Cultural Rights and Climate Change (May 2020) documents that "state compliance with political targets such as those outlined in the Paris Agreement should not be deemed to constitute compliance with human rights obligations in the area of climate change." More specifically, the submission established, "the best available science indicates that even 1.5°C of warming above pre-industrial temperatures for any significant amount of time jeopardizes the right to a safe climate for future generations. Consequently, more ambitious mitigation efforts are needed than those encompassed by the Paris Agreement to protect the human rights of children and youth." *Id.* at 4, 6 (citing, e.g., J. Roy et al., in *Global Warming of 1.5°C. An IPCC Special Report* at 447 (2018)). Thus, while Humphrey Bogart and Ingrid Bergman may "always have Paris," for climate trustees and the trust beneficiaries, Paris is wholly inadequate.

### The Litigators' Perspective in the Quest for Intergenerational Climate Justice

Our experience before the bench seeking intergenerational justice recalls Sisyphus, the poor soul who the Greek gods punished by forcing him to roll an immense boulder up a hill, only for it to roll down every time he neared the top. In the face of this daunting task, what keeps us going, and how do we measure progress?

First, our successful place on the hill is not measured by litigation wins and losses—in this regard Red Sanders, the famed UCLA football coach, is wrong: Winning is not the only thing. Frankly, the recent record using the public trust doctrine is discouraging to us. For every Judge Aiken, the district court judge in *Juliana* who applies Jefferson's "self-evident" concepts of life, liberty, and property to undisputed climate change evidence, there are other jurists who reach contrary conclusions. Sometimes, the rock moves up and falls back in the pages of a single opinion, such as *Kanuk v. State of Alaska*, in which the Alaska Supreme Court recognized the merits of the Public Trust claims before dismissing the case as a political question beyond the court's purview. *Kanuk v. State of Alaska*, 335 P.3d 1088 (Alaska 2014). Judge Staton, in her Ninth Circuit *Juliana* dissent, showed that legal minds can be won. After considering the undisputed evidence of climate harm and governmental causation, she observed: "Plaintiffs' claims are based on science, specifically, an impending point of no return. If plaintiffs' fears, backed by the government's *own studies*, prove true, history will not judge us kindly."



At the end of her stinging dissent, Judge Staton posed a question that poignantly encompasses the ones above, “Where is the hope in today’s decision? . . . When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?” *Juliana*, 947 F.3d at 1191 (Staton, J., dissenting). Judge Staton was responding to the two-judge majority, which was also sympathetic to the plaintiffs’ plight, finding that the youth had suffered particularized injury caused by the government’s actions, but “reluctantly” concluding that the court could not redress this injury because to do was “beyond [its] constitutional power.” *Id.* at 1165 (majority opinion). Most recently, District Court Judge Kathy Seeley in Montana followed the path of Judge Aiken and denied the state government’s motion to dismiss Montana youth’s constitutional and public trust claims, finding that “[w]hile all states contribute to the nation’s overall carbon emissions, Youth Plaintiffs sufficiently allege that Montana is responsible for a significant amount of those carbon emissions.” Order on Motion to Dismiss, *Held v. State of Montana*, No. CDV-2020-307 (MT 1st Jud. Dist. Ct., Lewis & Clark Cnty. Aug. 4, 2021).

We recognize that constitutional impact litigation takes years, even decades—it took fifty-eight years, for example, for the Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), to adopt the dissenting opinion in *Plessy v. Ferguson*, 163 U.S.

537 (1896). Ultimate success means getting the right plaintiffs and the right evidence at the right time in front of the right court. Each decision gets us closer to the end, and each loss helps build a blueprint for the next case. Patience is what we have learned from the work of past rights-based litigants. The uniquely urgent facts of the climate crisis try this patience, but the lesson remains the same.

Finally, the youth plaintiffs in these various cases will forever be part of a lineage of the law’s evolution, reevaluation, reconstruction, and reckoning. Those in the United States are intimately connected to the Framers through law, as litigants, and as their posterity. Significantly, they are also an important part of a global movement calling for action from all branches and levels of government in the U.S. and abroad. As part of this movement, youth litigants, together with millions of others, are in their own constitutional revolution, grounded in the common law of the public trust doctrine, to force governments to protect their fundamental rights, or for those governments, as have other tyrannies, to lose their legitimacy by failing to do so. 🌱

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