SECURING ECOLOGY "CAPABLE OF SUSTAINING HUMAN LIFE": INVOKING THE INHERENT AND INALIENABLE PUBLIC TRUST RIGHTS OF THE PEOPLE

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I.

We have crossed a defining threshold, both in environmental law and in ecology. In law, we see a new era of environmental constitutionalism,[1] and not at all unrelatedly, we find ourselves in a new ecological era that is marked by colossal human destruction of the very systems sustaining all life on Earth. Bill McKibben says it is as if we have destroyed our planet that sustained us and are now on a different planet altogether.[2] And as the years pass, it will feel more and more that way. Our climate system is so disrupted by the greenhouse gases that have accumulated in the atmosphere that we now face a clear existential threat to humanity and society.[3] As a Ninth Circuit Court of Appeals panel put it, we are nearing the "eve of destruction."[4]

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1 The University of Pennsylvania's Journal of Constitutional Law explored the theme of environmental constitutionalism in a conference held on January 20, 2024. Symposium. *The Constitutional Right to a Clean Environment*, U. PA. J. CONST. L. (2024).

2 BILL MCKIBBEN, EARTH: MAKING A LIFE ON A TOUGH NEW PLANET 2 (1st ed. 2010).

3 Mary Christina Wood & Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 ENV'T L. 259 (2015); Jordan Fabian & Akayla Gardner, *Biden Says Climate Change Poses Greater Threat Than Nuclear War*, BLOOMBERG (Sept. 10, 2023), https://www.bloomberg.com/news/articles/2023-09-10/biden-says-climate-change-poses-greater-threat-than-nuclear-war [https://perma.cc/3GZY-EH27].

4 Juliana v. United States, 947 F.3d 1159, 1164 (9th Cir. 2020).

At such epic junctures, we should perhaps pause to assess how we got here and consider how to navigate what is bound to be our perilous future. This essay reflects briefly on the legal regime that brought us this living nightmare, and then characterizes the new era of environmental constitutionalism. It then turns to the principle that underlies all environmental obligation – the ancient public trust, which defines the people's inherent rights to survival resources – and suggests why it is ever so important to continue to assert this public trust in court, in the halls of Congress, and to the agencies. The essay ends by describing a global campaign of Atmospheric Trust Litigation that draws deeply on this public trust to summon judges across the world to protect our shared climate system before it is altogether too late.

To begin with, we have no choice but to connect the law with our reality. If we fail at that, the law will be irrelevant. That overriding reality is defined by Nature, not us, and we must view Nature's requirements as laws that define our legal strategies and goals. As Oren Lyons has stated, "The thing that you have to understand about nature and natural law is, there's no mercy. . . . There's only law. And if you don't understand that law and you don't abide by that law, you will suffer the consequence."[5] Nature's law right now compels us to slash fossil fuel emissions, and if we don't abide by that law, there's no mercy in sight.

II.

For the last 50 years, our environmental law has been dominated by statutory law – not only in this country, but abroad as well – and for too long, this body of environmental law has been totally detached from Nature's laws. If the condition of Planet Earth is any evidence, environmental law turned out to be a dangerously failed experiment.[6] As most of us know, statutes confer enormous power and discretion to agencies to legalize – through permit systems – exactly the damage these

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5 Tim Knauss, *Onondaga Faithkeeper Oren Lyons Speaks Out on the Environment: 'Business as Usual is Over'*, SYRACUSE (Feb. 8, 2008, 11:24 PM), https://www.syracuse.com/progress/2008/02/onondaga_faithkeeper_oren_lyon.html [https://perma.cc/9X9H-TJLS].

6 For discussion, *see* MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW AGE, 3–122 (2014) [hereinafter NATURE'S TRUST].

statutes were designed to prevent.[7] This discretion proved devastating in a political system warped by industry influence and campaign contributions. Long ago, nearly all environmental agencies and the legislatures fell captive to industry and started governing to benefit private interests rather than to secure the needs of future generations.[8]

The forest law regime openly permitted clearcuts that razed the ancient forestlands – all the outcome of agency discretion.[9] As Professor Oliver Houck once wrote: "The code words fool no one involved: more 'discretion' means that industry gets to cut more timber."[10] Pursuant to statutes, agencies allowed ecological mutilation through mining that left the former landscapes unrecognizable. They allowed pervasive air pollution and water pollution. And agencies permitted a fossil fuel energy system that has so disrupted our climate system that we face the prospect of 11 degrees Fahrenheit heating over pre-Industrial temperatures, a temperature rise that is not broadly survivable.[11] That is what a child born today has to face – an uninhabitable planet at the end of their projected lifespan.

Shockingly, government has known for decades that the fossil fuel energy system would cause exactly the devastation and all-out emergency that we face today – the fires, the floods, the droughts, the collapsing ice sheets, the monster storms, the sea level rise – it was all predicted, and government proceeded anyway.[12]

So, the very system of environmental law that was supposed to improve things back in the 1970s has failed, with the result that we now find ourselves in an almost unthinkable position. As Elizabeth Kolbert

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7 *Id.*

8 *Id.*

9 Mary Christina Wood, *The Oregon Forest Trust: An Ecological Endowment for Posterity*, 101 OR. L. REV. 515 (2023) [hereinafter *The Oregon Forest Trust*].

10 Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 928 n.366 (1997).

11 *Temperature*, GREAT LAKES INTEGRATED SCI. AND ASSESSMENTS, https://glisa.umich.edu/resources-tools/climate-impacts/temperature/#:~:text=By%202050%2C%20average%20air%20temperatures,than%20temperatures%20during%20other%20seasons [https://perma.cc/MY75-T6JS] (last visited Jan. 22, 2024); DAVID WALLACE-WELLS, THE UNINHABITABLE EARTH: LIFE AFTER WARMING (2019).

12 JAMES GUSTAVE SPETH, THEY KNEW: THE US FEDERAL GOVERNMENT'S FIFTY-YEAR ROLE IN CAUSING THE CLIMATE CRISIS (2021).

wrote: "It may seem impossible to believe that a technologically advanced society could choose, in essence, to destroy itself, but that is what we are now in the process of doing."[13]

Courts became increasingly passive during this era.[14] The claims they saw were always statutory – typically narrow and often procedural. The courts gave enormous deference to agencies on the presumption that agencies acted objectively and in good faith, and always in the interest of the public; they never penetrated the systemic dysfunction that afflicted much agency decision-making. Even when courts offered relief, it was usually just a remand to the agency, which put the matter back into the same corrupted agency dynamics that caused the lawsuit in the first place – in effect, running the "spin cycle" of environmental law.[15] Courts never delved into the heart of the matter. As Ninth Circuit Judge Alfred Goodwin wrote, "the modern judiciary has enfeebled itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court."[16]

Our American system of constitutional democracy rests on the principle that there is a balance of power between the three branches of government. The Founders created this as one of the primary bulwarks against tyranny. When the judicial branch receded and operated in a narrow statutory zone and became overly deferential to the agencies, the executive branch quietly gained unprecedented control over vital ecology. When you juxtapose this rise of executive power against the climate emergency and what Nature's laws require of us to save our children and future generations – recognizing that we have an alarmingly short window of time left in which to slash carbon emissions – you realize that the President of the United States wields almost

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13 Elizabeth Kolbert, *The Climate of Man-III*, THE NEW YORKER (May 1, 2005), https://www.newyorker.com/magazine/2005/05/09/the-climate-of-man-iii [https://perma.cc/S25G-7GW2].

14 *See* NATURE'S TRUST, *supra* note 6, at 108–13 (describing four overriding factors contributing to a diminished judicial role: the standing doctrine, narrow (often procedural) statutory claims, the judicial deference syndrome, and ineffectual remedies).

15 For a critical analysis of the judicial branch in the era of statutory law, *see* NATURE'S TRUST, *supra* note 6, at 108–13.

16 Juliana v. United States, 217 F. Supp. 3d 1224, 1262 (D. Or. 2016) (quoting Alfred T. Goodwin, *A Wake-Up Call For Judges*, 2015 WIS. L. REV. 785, 785–86 (2015) (book review)).

unfathomable power as one person to determine the course of human history.[17]

Consider the timing. We face looming climate tipping points and irrevocable thresholds, because Nature has its own feedback loops that can lock in uncontrollable heating. One is particularly easy to explain. The vast areas across the northern latitudes have carbon and methane stored in the permafrost. As the Earth heats, those areas start melting and releasing their stored greenhouse gasses. Because humanity has already warmed the planet, these areas have started melting. If that melt really gets going, it will drive us into runaway heating.[18] The Ninth Circuit knows this. As one panel has stated, "The problem is approaching 'the point of no return.' Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies."[19]

To prevent this planetary cataclysm, we have to understand Nature's requirements. It is all a matter of carbon math. Scientists stress an overriding climate imperative to slash carbon emissions globally 45% by 2030.[20] That is a mere six years from now. To look at it another way, the global carbon budget (for having a 50% chance of staying below 1.5 C heating) will be consumed within just six years.[21] Placing this reality in a political time frame, the U.S. President who takes office in January

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17 The U.S. produces a quarter of global emissions. *See* Hannah Ritchie, *Who Has Contributed Most to Global CO2 Emissions?*, OUR WORLD IN DATA (Oct. 1, 2019), https://ourworldindata.org/contributed-most-global-co2 [https://perma.cc/T2XA-KMDP] (describing that, in terms of global cumulative emissions, the United States has emitted more CO2 than any other country to date and is responsible for 25% of historical emissions).

18 Chelsea Harvey, *If Past Is a Guide, Arctic Could Be Verging on Permafrost Collapse*, SCI. AM. (Oct. 19, 2020), https://www.scientificamerican.com/article/if-past-is-a-guide-arctic-could-be-verging-on-permafrost-collapse/#:~:text=In%20fact%2C%20research%20suggests%2C%20the,have%20been%20waving%20for%20years [https://perma.cc/JFF5-2A7W]; Gayathri Vaidyanathan, *Permafrost Meltdown Raises Risk of Runaway Global Warming*, SCI. AM. (Nov. 19, 2015), https://www.scientificamerican.com/article/permafrost-meltdown-raises-risk-of-runaway-global-warming/ [https://perma.cc/B4QN-9CTX].

19 Juliana v. United States, 947 F.3d 1159, 1166 (9th Cir. 2020).

20 *See Climate Solutions*, UNITED NATIONS, https://www.un.org/en/climatechange/net-zero-coalition (2024) [https://perma.cc/Z9HG-4KX5] (" . . . as called for in the Paris Agreement – emissions need to be reduced by 45% by 2030 and reach net zero by 2050").

21 Robin D. Lamboll et al., *Assessing the Size and Uncertainty of Remaining Carbon Budgets*, NATURE CLIMATE CHANGE 13, 1360–67 (2023), https://www.nature.com/articles/s41558-023-01848-5 [https://perma.cc/9MX2-XBZD].

2025 will govern until 2029 – nearly the entire span of time we have left to accomplish 45% carbon emissions reduction. This is an all-out global emergency. If we are to have any hope of not crossing climate thresholds, the full commitment and accelerated action of the executive branch must be aimed towards rapid decarbonization, and agencies must sustain the effort to achieve full decarbonization by 2050.[22]

When Trump came into office, the world was already fully into this climate emergency, and yet he pledged $50 trillion to U.S. fossil fuel development as part of his energy plan.[23] We needed a president to slam the brakes on fossil fuels to prevent the world from plunging over the climate cliff, but instead Trump floored the pedal on fossil fuels to drive us to that cliff as soon as possible. This sheer madness unfurled with no judicial oversight of Trump's energy policy. And statutory law continued to supply all of the permissions and discretion for this perilous course. So, looking back on the half century of statutory environmental law, with its breathtaking conveyance of power and discretion to the executive branch, and a full retreat of the judicial branch in holding the executive accountable, one might conclude that the statutory chapter of environmental law delivered a type of ecological tyranny that now threatens the future of life on Earth.

III.

At stake is nothing less than individual and collective survival. This dreadful awakening gave the impetus for citizens and attorneys to launch a new era of environmental constitutionalism both in this country and worldwide. Some have called it the "Rights Turn" in environmental law,[24] and there is no turning back. Government

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22 *See Climate Solutions*, *supra* note 20; Felicia Jackson, *COP28: Phasedown Or Phaseout, Fossil Fuels Must Be Addressed to Meet 1.5C Goal*, FORBES (Dec. 5, 2023, 7:00 AM), https://www.forbes.com/sites/feliciajackson/2023/12/05/cop28-phase-down-or-phase-out-fossil-fuels-must-be-addressed/?sh=16c184f31717 [https://perma.cc/SHD2-FFLQ]; *Guterres Calls for Phasing Out Fossil Fuels to Avoid Climate 'Catastrophe'*, UNITED NATIONS (June 15, 2023), https://news.un.org/en/story/2023/06/1137747 [https://perma.cc/236C-B877].

23 *See* Bobby Magill, *Decoding Trump's White House Energy Plan*, CLIMATE CENT. (Jan. 20, 2017), https://www.climatecentral.org/news/decoding-trumps-white-house-energy-plan-21097 [https://perma.cc/M92M-XXGT] (discussing and quoting from Trump's America First Energy Plan).

24 Kelly Matheson, *Overturning 1.5°C: Give Science a Chance*, OPEN GLOB. RTS. (Sept. 20, 2023), https://www.openglobalrights.org/give-science-a-chance/ [https://perma.cc/J46Q-CXPE].

litigators, however, reject any rights turn in the law. They still characterize the statutory law as if it is fully functional and, indeed, the only permissible system for adjudicating environmental conflicts. Accordingly, they persistently argue that any claims outside of statutory law should be dismissed. Why do all government attorneys take the position? Because they know that statutes give their agency clients *discretion*, and discretion means power. While government attorneys have an obligation to represent their public clients, there has been no scrutiny into how they form their litigation positions, and such an inquiry is long overdue.

Statutory law is likely here to stay, but this Rights Turn represents citizens using fundamental rights to hold their government accountable in a way that the statutes utterly failed to do. It portends a more meaningful role for the courts, because the judiciary has the timeless role of enforcing fundamental rights when such rights are infringed by the other two branches of government.[25] The remedy in institutional litigation can be much more effective, far-reaching, and urgent – not limited to statutory remands.[26] This is a shift in environmental law that brings more balance to the separation of powers between the three branches of government and makes the courts more of a participant in the ecological destiny of the nation.

But recognizing that we are at the threshold of a new chapter of environmental law, it is important to reflect on a basic strategy of rights advocates. Presently, there appears to be a strong gravitational pull towards express constitutional rights. This is evident in two respects. First, litigants are choosing to rest their constitutional claims on express constitutional provisions, and these are winning. Two major youth climate cases have been brought in states with express constitutional environmental provisions. In Montana, the *Held v. Montana* case resulted in a victory for youth this summer, when the court overturned a state statute that basically precluded consideration of climate effects in agency

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25 *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("[It is] emphatically the province and duty of the judicial department to say what the law is.").

26 For discussion see NATURE'S TRUST, *supra* note 6, at 230–57; Juliana v. United States, No. 6:15-cv-01517-AA, 2023 U.S. Dist. LEXIS 231191, at *45–46 (D. Or. Dec. 29, 2023)*; see also* MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW 543–46 (3d ed. 2021) (discussing innovative enforcement models on the international level).

decisions.[27] In Hawaii, a case premised on express constitutional language is set for trial in the coming year.[28] It follows in the wake of a 2023 Hawaii Supreme Court opinion in *In Re Hawai'i Electric Light Company*, which found that the Hawaii Constitution's Environmental Rights Clause encompasses the right to a life-sustaining climate system.[29] In Pennsylvania, the constitutional environmental rights amendment, Section 27, has led to major public trust decisions.[30] And in other countries, victories have been pinned on express constitutional language securing the right to a clean environment and the right to dignity.[31] It is naturally strategic for litigants to build environmental constitutionalism from these express provisions of constitutional law, as they form obvious hooks for judges to use as the basis of their rulings.

We now also see this gravitational force in a growing Green Amendment movement seeking to spread the Pennsylvania Section 27 language to other states' constitutions.[32] This strategic momentum may be exactly what our democracy needs at this crucial point in time. But we also need to know and express to government officials and leaders

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27 Held v. Montana, No. CDV-2020-307, Findings of Fact, Conclusions of Law, and Order, 94–100 (D. Mont. Jan. 10, 2023); *see id.* at 100 ("By prohibiting consideration of climate change, GHG emissions . . . the [state's "baby-NEPA] MEPA Limitation violates Plaintiffs' right to a clean and healthful environment and is facially unconstitutional.").

28 Navahine F. v. Hawai'i Dept. of Transp., 1CCV-22-0000631 (Haw. Cir. Ct. Apr. 6, 2023) (explaining trial court's denial of agency's motion to dismiss and rejection of agency's claims for lack of standing, political question, and procedural claims); *see also* Navahine F. v. Hawai'i Department of Transportation, OUR CHILDS. TR., https://www.ourchildrenstrust.org/hawaii [https://perma.cc/75Q2-T5XC] (last visited Jan. 24, 2024).

29 In re Hawai'i Elec. Light Co., 526 P.3d 329, 336 (Haw. 2023) ("We have said that an agency 'must perform its statutory function in a manner that fulfills the State's affirmative constitutional obligations' . . . and that '[a]rticle XI, section 9 [of Hawaii's constitution] . . . subsumes a right to a life-sustaining climate system.'") (citation omitted).

30 *See, e.g.*, Robinson Twp. v. Commonwealth, 83 A.3d 901, 947–48 (Pa. 2013) (discussing the rights of the people of Pennsylvania, including the right to a clean environment); *see also* Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 930–31 (Pa. 2017) (discussing the constitutional right to a clean environment).

31 *See* JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (Cambridge University Press 2015).

32 *See generally Green Amendments in 2023: States Continue Efforts to Make a Healthy Environment a Legal Right*, NAT'L CAUCUS OF ENV. LEGISLATORS (Mar. 27, 2023), https://www.ncelenviro.org/articles/green-amendments-in-2023-states-continue-efforts-to-make-a-healthy-environment-a-legal-right/#:~:text=Green%20Amendments%20also%20help%20to,air%2C%20and%20a%20healthy%20environment [https://perma.cc/X85S-6M2A].

that our inalienable rights as citizens exist even without these provisions in state law. The vast majority of states in America do not have these constitutional provisions. Of the very few that do, Pennsylvania, Montana, Michigan, and Hawaii are the most prominent. A citizen or government official or judge might casually assume that the absence of those provisions in a state constitution – much less in the federal constitution – means that citizens in those states lack any fundamental rights to force protection of their vital ecology.

Here in Oregon, for example, we don't have any such Green Amendment. Yet do we not have the same rights as citizens in Pennsylvania? Could it be seriously asserted that Pennsylvania residents are entitled to assert rights to clean water to drink and pristine air to breathe, but Oregonians have to put up with environmental devastation until a Green Amendment passes? To enact these provisions in some states might take years – time frames that do not match Nature's urgency. And what if the efforts fail in some states? Is that going to feed the argument that the people have no rights there at all? Or what if, in the legislative process, the provisions get watered down and are more limited than hoped for? Does that narrow the right?

Amidst the strong gravitational pull towards express environmental constitutionalism, one key point must be made: *at the same time* we are invoking or pressing for those express rights, we must underscore and assert our *existing* fundamental and inalienable rights to ecology that emanate from our very social contract with government.

We locate those inherent rights in the public trust principle, which underlies all sovereign environmental obligations in this country and in many nations across the world. Professor Gerald Torres calls the public trust "the Law's DNA" because it is so foundational and universal.[33] The point is, we all have pre-existing rights to assert against government even if we live in a state that does not yet – or many never – have express provisions. Those of us in Oregon *are endowed* with environmental rights – in very fact, *equal to* those rights held by citizens in Pennsylvania, Montana, Michigan, and Hawaii – and Oregonians must make that clear to the Attorney General, and to the Governor, and to the head of

33 Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281 (2014).

every agency in Oregon – even if a Green Amendment never passes here. The same is true across the other states with no Green Amendment. To be perfectly clear, all of the express environmental constitutional protections simply iterate what is a pre-existing right. They do not create it.

To assume otherwise concedes power at the most crucial time in human history. In his important book on resisting tyranny, Yale Professor Timothy Snyder emphasizes Lesson #1 – "Do not Obey in Advance"[34] – which we essentially do if we don't assert rights that we already have. He explains: "Most of the power of authoritarianism is freely given [by citizens]. In times like these, individuals think ahead about what a more repressive government will want, and then offer themselves without being asked. A citizen who adapts in this way is teaching power what it can do."[35] Professor Snyder urges citizens to put down "markers" to limit the gain of tyrannical power.[36]

IV.

The public trust remains the bedrock of any fundamental rights approach, because it embodies the antecedent rights we already have, and when we assert those rights, we put down our markers even as we may simultaneously advance express constitutional provisions.

The public trust principle holds that government has an obligation to protect Nature and its components as a life-sustaining ecological endowment that future generations have every right to inherit.[37] It portends a key role for the courts in protecting crucial ecology. As Charles Wilkinson wrote long ago, "The public trust doctrine is rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles."[38]

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34 TIMOTHY SNYDER, ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY 17 (2017); *see also* Timothy Snyder, *LESSON 1: Do Not Obey in Advance*, YOUTUBE (Sept. 27, 2021), https://www.youtube.com/watch?v=9tocssf3w80 [https://perma.cc/S2LS-XYQS] (focusing around 2:40).

35 Snyder, *supra* note 34, YOUTUBE at 2:48.

36 *Id*. at 5:14-5:51.

37 NATURE'S TRUST, *supra* note 6, at 125-33; Wood & Galpern, *supra* note 3, at 262–63.

38 Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 315 (1980).

The origins of the public trust trace back to Roman law and the Institutes of Justinian – law that underlies legal systems around the globe.[39] The Institutes declared that some resources were so essential to society – the air, the running water, and the sea – that they could not be privatized but must be left common to humankind as a whole. That logic permeated legal systems world-wide, and the Justinian language is still quoted in modern public trust opinions.[40] The public trust is widely characterized as a principle that predates the United States and other countries – Professor Gerald Torres describes it as the slate upon which all constitutions are written.[41] The principle is found in the jurisprudence of every state in this country and has been recognized by the U.S. Supreme Court since the early days of this nation.[42]

It is important to situate this principle correctly in the taxonomy of law. It does not derive from express enactments, but instead is part of the architecture of government itself. Courts – including the U.S. Supreme Court – have characterized this principle as an attribute of sovereignty that predates the constitution. As one federal court said, it "can only be destroyed [through] destruction of the sovereign."[43] This is a doctrine with constitutional force. The federal court in *Juliana v. United States* found that this doctrine, as an attribute of sovereignty, is applicable not only to all of the states but also to the federal government as a sovereign.[44]

The public trust sets up a simple but forceful paradigm of government accountability. It designates government as the trustee of the vital ecology that supports human survival and prosperity: the air,

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39 *See* J. INST. 2.1.1.

40 *See, e.g.*, Juliana v. United States, 217 F. Supp. 3d 1224, 1253 (D. Or. 2016).

41 *See* NATURE'S TRUST, *supra* note 6, at 129 (citing Gerald Torres for the proposition that the public trust is the slate upon which "all constitutions and laws are written" forming the "sovereign architecture").

42 *See* Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 435 (1892) ("This [public trust] doctrine has been often announced by this court, and is not questioned by counsel of any of the parties."); Martin v. Lessee of Waddell, 41 U.S. 367, 367 (1842):

> When the Revolution took place, the people of each state became themselves sovereign; and in that character held the absolute right to all their navigable waters, and the soils under them; for their own common use, subject only to the rights since surrendered by the constitution to the general government.

43 United States v. 1.58 Acres of Land, 523 F. Supp. 120, 124 (D. Mass. 1981).

44 Juliana v. United States, 217 F. Supp. 3d 1224, 1256–59 (D. Or. 2016); *see also* BLUMM & WOOD, *supra* note 26, at 57–100.

waters, wildlife, tidelands, and more. This ecology comprises the *res* of the trust[45] – legally protected natural commonwealth belonging to the people as their public inter-generational property.[46] The present and future citizens are beneficiary owners in common of these crucial components of Nature and therefore hold rights against their government to force protection of their perpetual endowment.[47] As trustee, government must act as a fiduciary towards this ecology and carry out a full set of firm fiduciary duties that are completely separate from, and go beyond, statutory law.[48] Foremost among these is the duty of protection. Court opinions state that government must prevent "substantial impairment" of the *res*.[49] This is an active duty and subject to judicial enforcement by the citizen beneficiaries.[50]

In American law, the public trust principle imposes a restraint on government privatization of crucial resources.[51] In the 1892 lodestar case, *Illinois Central Railroad v. Illinois*, the U.S. Supreme Court overturned the Illinois legislature's conveyance of Lake Michigan's shoreline to a private railroad company, finding that the shoreline was held in public trust for the people. The Court said, "It would *not be listened to* that the control and management of the harbor of that great city – a subject of concern to the whole people of the state – should thus be placed elsewhere than in the state itself."[52] The Court invalidated the conveyance, and the shoreline went back to the people.

This fundamental principle carries tremendous importance not only to citizens in the United States but to those in countries worldwide. As an attribute of sovereignty itself, the public trust applies irrespective of whether there are any express iterations of environmental rights in a constitution. The best explanation of this came from a famous

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45 *Id.*at 3–55.

46 *Id.*

47 *Id.*

48 *Id.*; *see also* NATURE'S TRUST, *supra* note 6, at 165–207.

49 BLUMM & WOOD, *supra* note 26, at 8; Esplanade Props. v. City of Seattle, 307 F.3d 978, 985 (9th Cir. 2002); *see also* McQueen v. S.C. Coastal Council, 580 S.E.2d 116, 120 (2003) (holding that the state may not permit activity that "substantially impairs" the public interest in public trust assets).

50 *See* BLUMM & WOOD, *supra* note 26, at 4; *see also* Just v. Marinette Cnty., 201 N.W.2d 761, 768–70 (Wis. 1972) (emphasizing "active public trust duty").

51 Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 453 (1892).

52 *Id.* at 454–55 (rejecting conveyance of public trust lands into the "hands of a private corporation") (emphasis added).

Philippines case, *Oposa v. Factoran*, decided 30 years ago, in which the Supreme Court of the Philippines said, "[T]hese basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind."[53] And in a haunting passage, the Court said that, without these basic inherent rights, " . . . the day would not be too far when all else would be lost not only for the present generation, but also for those to come—generations which stand to inherit nothing but parched earth incapable of sustaining life."[54]

That prospect now looms large.

The most discerning discussion locating the public trust in our constitutional structure came from Justice Castille's plurality opinion in the Pennsylvania Supreme Court case, *Robinson Township v. Commonwealth*, analysis that was subsequently adopted by the full Pennsylvania Supreme Court in *Pennsylvania Environmental Defense Foundation v. Commonwealth*.[55] The *Robinson Township* court gave effect to Section 27, the Environmental Rights Amendment, after 40 years of it sitting unenforced. That provision iterates the public trust in express terms; thus, it is different than a constitutional amendment expressing only the right to a clean environment. In his opinion, Justice Castille was very careful to make clear that Section 27 did not create new rights but rather iterated pre-existing rights that the people had reserved to themselves in creating their state government. He emphasized that government gains its power from the people and referred to the social contract in which the people confer such power to their government.[56] Justice Castille made clear that legislative power is not absolute, as people reserve to themselves in Article 1 "inherent and indefeasible rights" that are inviolate.[57] Among those inherent reserved rights are the rights later iterated in Section 27, the Environmental Rights Amendment. In *Environmental Defense Foundation*, the full Supreme Court adopted this analysis, emphasizing that Amendment 27 secured pre-existing rights rather than bestowing new rights to the people.[58]

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53 Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792, 805 (July 30, 1993) (Phil.).

54 *Id.*

55 Robinson Twp. v. Commonwealth, 83 A.3d 901, 955–59 (Pa. 2013); Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 934–35 (Pa. 2017).

56 Robinson Twp., 83 A.3d at 947; for discussion, *see* Torres & Bellinger, *supra* note 33, at 281.

57 Robinson Twp., 83 A.3d at 947–48.

58 Pa. Env't Def. Found., 161 A.3d at 918–19.

As Professor Torres and Nate Bellinger explain in a leading article, "[w]hile some rights are created by government, others–often the most important pre-existing rights–are inherent to humankind and merely secured by government. The public trust doctrine is one of these inherent rights that pre-dates the United States Constitution."[59] So, at its core, the public trust is an expression of popular sovereignty. It holds a compelling logic. The people give government its power, not the reverse. And when the people give government power, they reserve inherent rights that government may not violate. These inalienable, inherent, and indefeasible rights form a perpetual restraint against government. The people would never give government the right to destroy resources crucial to their survival. Thus, the people reserve property rights to those resources, as beneficiaries of an enduring public trust.

How then does this public trust apply to states outside of Pennsylvania? All states are founded on the very same logic, and the people reserved inalienable rights in Article 1 of every state constitution. There is a reservation of rights in Article 1 of the Oregon Constitution.[60] And in the California Constitution.[61] In 2015, a Washington court presiding over a youth climate case relied on the *Robinson Township* analysis to pronounce a "fundamental and inalienable" public trust right secured by Article 1 of that state's constitution.[62] And the federal district court in *Juliana v. United States* adopted similar reasoning on the federal level.[63]

In his landmark article on the public trust, Joseph Sax famously said that the public trust distinguishes a society of citizens from serfs.[64] We are not a nation comprised of 50 states—some with full citizens and

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59 Torres & Bellinger, *supra* note 33, at 288.

60 *See* OR. CONST. art. 1, § 1 (Natural rights inherent in people: "[A]ll power is inherent in the people, and all free governments are founded on their authority . . . .").

61 *See* CAL. CONST. art. 1, § 1 ("All people are by nature free and independent and have inalienable rights.").

62 For discussion and citations *see* Mary Christina Wood & Charles W. Woodward, IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENV'T L. & POL'Y 634, 676–79 (2016).

63 Juliana v. United States, 217 F. Supp. 3d 1224, 1261 (D. Or. 2016), *rev'd on other grounds* 947 F.3d 1159.

64 Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970).

others with serfs. The fact is, the public trust principle has been judicially recognized in every state and imposes environmental duty whether or not there are explicit constitutional provisions that have been enacted by state legislatures. Notably, the constitutional Equal Footing Doctrine holds that every state has sovereign ownership of streambeds along navigable waters to protect essential public uses.[65] To the extent that courts in some states have not fully recognized the principle's scope, citizens should demand a correction rather than allow the breach of public trust to define the duty forever more.

Amidst this climate emergency, it is vital to recognize and assert these inherent pre-existing public trust rights whether or not there is an express Green Amendment on the books now—or one coming to your state soon. Recall Professor Snyder's Lesson One in blocking tyranny: Do not Obey in Advance.

V.

This public trust principle has continued to frame youth litigation in response to the climate emergency. Even back in 2005 after Hurricane Katrina struck, it was clear to many that the U.S. Environmental Protection Agency was never going to regulate carbon emissions in time.[66] A strategy that became known as Atmospheric Trust Litigation (ATL) originated from scholarship applying the public trust to the climate crisis.[67] There was an urgent need for a fundamental rights approach that could be recognized in states across this country, and in other nations as well, to hold governments accountable for emissions reduction before the world crossed looming tipping points. The public trust seemed purposed for this moment in human history.

Within this framework, the air and atmosphere are characterized as the *res* of the public trust—as recognized as far back as Justinian and

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65 Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

66 *See* NATURE'S TRUST, *supra* note 6, at chapter 1 (describing history of EPA's failure to regulate carbon dioxide under the Clean Air Act).

67 The ATL strategy was originated by this author. *See* Mary Christina Wood, *Atmospheric Trust Litigation Around the World*, *in* FIDUCIARY DUTY AND THE ATMOSPHERIC TR. (Ken Coghill et al. eds., 2012); Mary Christina Wood, *Atmospheric Trust Litigation*, *in* CLIMATE CHANGE READER (William H. Rodgers, Jr. et al eds., 2011); Mary Christina Wood, *Atmospheric Trust Litigation*, *in* ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES (William C. G. Burns ed., 2009).

elaborated in an influential 2001 article by Professor Gerald Torres.[68] Governments worldwide are co-trustees of the planet's atmosphere and share the duty to protect it from "substantial impairment." As a broadly recognized principle across the United States and in other nations, the public trust can be domestically enforced by youth beneficiaries in a campaign of global litigation. Because the trust duty of protection must calibrate to Nature's laws, scientists were asked to quantify the emissions reduction necessary to regain atmospheric balance—in essence, to provide a prescription for the planet. Dr. James Hansen, then the top NASA climate scientist for the United States, assembled a team to do so, publishing a leading paper that provided the scientific basis for defining what "substantial impairment" meant in terms of government's legal fiduciary obligation.[69]

In 2010, the remarkable attorney Julia Olsen formed a nonprofit group, Our Children's Trust, to carry this climate litigation strategy forward, and in 2011, Our Children's Trust launched the first wave of ATL cases.[70] This represented the first broad rights-based environmental litigation in the United States. In nearly each case, the youth plaintiffs sought a judicial declaration and a decree that would order a science-based remedial plan that government would create and the court would supervise. The duty in all of those cases was tied to the Hansen prescription as best available science.[71]

The first wave of cases met with many dismissals, but there were also some initial victories recognizing that the atmosphere is held in public trust. In Washington, a trial court declared a right to climate stability based on the "fundamental and inalienable" public trust rights secured by Article 1 of that state's constitution.[72] Judge Hollis Hill was the first to recognize that climate change risked the children's survival later in

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68 Gerald Torres, *Who Owns the Sky*, 19 PACE L. REV. 227 (2001).

69 James Hansen et al., *Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, 8 PLOS ONE 1, (2013); *see also* discussion at NATURE'S TRUST, *supra* note 6, at 221–22. The scientific prescription was developed at this author's request.

70 *See* Wood & Galpern, *supra* note 3, at 263–64 (describing the framework, history, and current structure of the atmospheric trust litigation campaign); *see also* NATURE'S TRUST, *supra* note 6, at 227–29; *see also Law Library*, OUR CHILDS. TR., https://www.ourchildrenstrust.org/law-library [https://perma.cc/F49H-KER4] (last visited Jan. 24, 2024).

71 Wood & Galpern, *supra* note 3, at 268.

72 Foster v. Wash. Dep't of Ecology, No. 14-2-25295-1 SEA, 2015 WL 7721362, slip op. at 8 (Wash. Super. Ct. Nov. 19, 2015).

their lifetimes. Finding that the state was not doing nearly enough to control emissions, she emphasized, "This is an extraordinary circumstance that we are facing here. . . . [T]his is an urgent situation. This is not a situation [in which] these children can wait . . . ."[73]

But most judges dismissed on basically one ground—that the governments were complying with the statutes, and that was all they needed to do. In their limited view, the courts should not interfere with the executive branch's statutory implementation. Thus, the statutory law that brought about this whole crisis also proved the biggest enemy to the youth climate litigation. Even today, state and federal attorneys persist in in framing these cases in a way that future generations may look back on with considerable disdain. These government attorneys continue to battle the children in court to deny their fundamental rights when they could instead choose to deploy the legal resources of the state to force carbon emissions reduction during a rapidly closing, *final and consequential* window of opportunity. Nevertheless, some hard-hitting judicial dissents forged important and principled doctrinal ground for future courts to build on.[74]

Even as youth in some of these cases were flooded out of their homes, while others saw their communities burn to the ground – and all experienced climate chaos in one form or another – the young plaintiffs inspired a global movement around their litigation campaign. They drew press from around the world and spread the ancient public trust logic far and wide in their appeal to inherit a planet capable of supporting their survival.[75]

In 2015, *Juliana v. United States* was filed in the federal district court of Oregon on behalf of 21 youth against a dozen federal agencies. It challenged the entire fossil fuel energy system of the United States and

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73 Wood & Woodward, IV, *supra* note 62, at 672 (quoting Judge Hollis R. Hill).

74 *See* Chernaik v. Brown, 367 Or. 143, 186–87 (2020) (dissent by Justice Walters stating, "The complexity of an issue may make a judicial decision more difficult, but it does not permit this court to abdicate its role."); *see also* Aji P. v. State, No. 99564-8, slip op. at *1 (Wash. S. Ct. Oct. 6, 2021) (Chief Justice Steven C. Gonzalez and Justice G. Helen Whitener dissent to the Washington Supreme Court's refusal to review a court of appeals' decision dismissing the youths' case).

75 Randall S. Abate, *Atmospheric Trust Litigation: Foundation for a Constitutional Right to a Stable Climate System?*, 10 GEO. WASH. J. ENERGY & ENV'T L 33, 33–35 (2019); Bina Venkataraman & Amanda Shendruk, *A New Tool in the Fight to Save the Planet? A 6th Century Roman Doctrine*, WASH. POST (Sept. 1, 2023), https://www.washingtonpost.com/opinions/2023/09/01/climate-legal-action-rights-young-people/ [https://perma.cc/899B-JM8P].

was seen by many as the "Biggest Case on the Planet."[76] Characterized by both the plaintiffs and the judge as a "civil rights action," the lawsuit asserted constitutional rights under the public trust principle as well as the due process clause of the U.S. Constitution.[77] In 2016, the youth plaintiffs won a sweeping victory that was reported around the world and inspired cases in other countries.

Judge Ann Aiken rejected the government's motion to dismiss and found that the youth held constitutional rights under both the public trust principle and the due process clause.[78] As to the public trust, Judge Aiken (like the Pennsylvania Supreme Court) characterized it as an inherent, inalienable right predating the U.S. government and engrained in the social contract.[79] She also found the trust applied to the federal government as an attribute of sovereignty and that it was enforceable through the due process clause of the Constitution. She wrote that the youth have the right to "a climate system capable of sustaining human life"[80]—words that circled the globe within hours. Subsequently, however, the U.S. Department of Justice gained a premature appeal to the Ninth Circuit, and the reviewing panel focused on the judicial remedy.[81] Judge Hurwitz (joined by Judge Murguia) recognized that government policy is contributing to an "environmental apocalypse," but he nevertheless "reluctantly" concluded that the courts have no role in granting the requested relief.[82] Such a result belies the venerable principle in law that, where there is a wrong, the law will provide a remedy.

The third judge on the panel, Judge Staton, wrote a blistering dissent in which she said "the government bluntly insists that it has the *absolute and unreviewable power* to destroy the Nation" and "[m]y colleagues throw up their hands."[83] In a careful analysis of precedent, Judge Staton said the relief requested is well within the court's authority to order and falls

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76 Juliana v. United States, No. 6:15-cv-01517-AA, 2023 U.S. Dist. LEXIS 231191, at *12–13 (D. Or. Dec. 29, 2023).

77 Juliana v. United States, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

78 *Id.*

79 *Id.* at 1257, 1260–61; *see also supra* n.55–58 (describing *Robinson Township*).

80 Juliana, 217 F. Supp. 3d at 1250.

81 For discussion, *see* Mary Christina Wood, *"On the Eve of Destruction": Courts Confronting the Climate Emergency*, 97 IND. L. J. 239 (2022).

82 Juliana v. United States, 947 F.3d 1159, 1164–65 (9th Cir. 2020).

83 *Id.* at 1175 (Staton, J., dissenting) (emphasis added).

in line with the civil rights litigation remedies that punctuate our judicial history.[84] She ended with a call to judges worldwide: "[H]istory will not judge us kindly. 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?"[85]

On December 29, 2023, Judge Aiken issued a pathbreaking opinion in the *Juliana* case allowing the plaintiffs' second amended complaint, which pared down the relief requested.[86] This decision clears the way for the case to finally go to trial. Calling the climate crisis "sui generis," or in a "class of its own," due to imminent harm it threatens, Judge Aiken wrote: "This catastrophe is *the* great emergency of our time and compels urgent action . . . [and] as part of a coequal branch of government, the Court cannot shrink from its role."[87] Judge Aiken affirmed the plaintiffs' right to proceed under both the due process and public trust claims.[88]

On February 2, 2024, the Biden Justice Department filed a petition for a writ of mandamus to the Ninth Circuit challenging Judge Aiken's decision.[89] The Biden administration lawyers are following exactly the same playbook they created under the Trump administration to shield executive discretion from judicial review. Oil production now soars

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84 *Id.* at 1178.

85 *Id.* at 1191.

86 Juliana v. United States, No. 6:15-cv-01517-AA, 2023 U.S. Dist. LEXIS 231191, at *7 (D. Or. Dec. 29, 2023). For discussion, *see* Richard Reibstein, *Juliana Lives*, THE ENV'T CITIZEN (Jan. 23, 2024), https://www.trunity.com/ec-blog/juliana-lives [https://perma.cc/3ZNW-52TQ].

87 Juliana, 2023 U.S. Dist. LEXIS 231191, at *7 (emphasis in original).

88 *Id.* at *62–63.

89 Petition for Writ of Mandamus, United States v. U.S. District Court of Oregon and Juliana, Case 6:15-cv-01517-AA (filed Feb. 2, 2024), available at https://climatecasechart.com/wp-content/uploads/case-documents/2024/20240202_docket-24-684_petition.pdf [https://perma.cc/2KDV-RUCH]. For updates, see Juliana v. United States*: Current Status*, OUR CHILDS. TR., https://www.ourchildrenstrust.org/juliana-v-us#:~:text=However%2C%20on%20January%2018%2C%202024,from%20proceeding%20to%20trial%2C%20again [https://perma.cc/EY74-NV2V] (last visited Jan. 24, 2024). As this essay was going to press, the Ninth Circuit issued an opinion granting the defendants' petition for mandamus and ordering the trial court to dismiss the case. United States v. U.S. District Court for the District of Oregon, Case 24-684 (9th Cir. May 1, 2024), available at https://climatecasechart.com/wp-content/uploads/case-documents/2024/20240501_docket-24-684_order.pdf. The plaintiffs' attorneys announced that they would seek *en banc* review of the decision in the Ninth Circuit. *See* Kale Williams, *Despite Legal Setback, Lawyers in Oregon Youth Climate Case Continue to Fight*, KGW8 (May 8, 2024), https://www.kgw.com/article/tech/science/environment/lawyers-oregon-youth-climate-case-legal-setback/283-e544ab00-cf92-4b73-a601-443a5f851052.

beyond even Trump-era levels,[90] and in fact beyond levels ever produced by any country.[91] Government lawyers tend to hide behind their legal filings, but they are real people making real decisions at the most consequential time in human history. The *Juliana* plaintiffs have launched a petition and national campaign directed to the Biden administration to allow the lawsuit to go forward.

Despite the Biden administration's effort to thwart a *Juliana* climate trial, there is suddenly considerable momentum in U.S. atmospheric trust litigation. The state atmospheric case in Montana, *Held v. Montana*, resulted in a decisive victory for the youth plaintiffs in June, 2023, when Judge Kathy Seeley found, after a trial, that the state of Montana violated the youths' constitutional right to a "clean and healthful environment" and overturned a statute that precluded the consideration of climate effects in state decisions.[92] A youth climate case is scheduled for trial in Hawaii,[93] where that state's Supreme Court has already declared a constitutional climate right.[94] Several other atmospheric trust cases are pending at the state level.[95] There is also considerable momentum on the international level, marked by several victories for youth in climate cases in other countries.[96] To put this in perspective, the public trust – an inherent right predating constitutions – has inspired a campaign of global litigation and remains a core claim in the biggest climate case on the planet challenging the entire U.S. fossil fuel policy. In the race to force governments to slash emissions before society skids

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90 Evan Harper & Toluse Olorunnipa, *U.S. Oil Production Hit a Record Under Biden. He Seldom Mentions It*, THE WASHINGTON POST, (Dec. 31, 2024), https://www.washingtonpost.com/politics/2023/12/31/us-oil-production-has-hit-record-under-biden-he-hardly-mentions-it/ [https://perma.cc/9KAB-NSPB].

91 *Id.*

92 Held v. Montana, No. CDV-2020-307, at *100 (Mont. Dis. Ct. Nov. 22, 2023) (The Montana Attorney General has since filed an appeal to the state Supreme Court).

93 *See* Navahine F. v. Haw. Dept. of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. Apr. 6, 2023) (scheduling the case to take place June 24, 2024, to July 12, 2024, at the Environmental Court, First Circuit in Honolulu, HI).

94 In re Haw. Elec. Light Co., 526 P.3d 329 (Haw. 2023).

95 *See State Legal Actions*, OUR CHILDREN'S TRUST, https://www.ourchildrenstrust.org/state-legal-actions [https://perma.cc/T7DK-YN77] (listing the youth-led climate lawsuits and legal actions that Our Children's Trust has launched over the past decade across all 50 states).

96 *See* Wood, *supra* note 81, at Part XV (compiling cases internationally); *see also* Tessa Khan, *Norway Has Made a Vital Climate Leap. This is How Britain Can Do the Same*, THE GUARDIAN (Jan. 31, 2024), https://www.theguardian.com/commentisfree/2024/jan/31/norway-climate-britain-oslo-rosebank-british [https://perma.cc/9EAZ-5LQF].

beyond the point of no return, every victory in these cases helps fortify judicial resolve elsewhere.

VI.

It is worth considering how the public trust principle brings a paradigm to the climate emergency that is distinct from other rights-based approaches such as a constitutional right to a clean environment or a right of human dignity. First, the public trust focuses on a discernable ecological resource—the *res*. It can scale up or down, from something as local as a wetland to something as global as the planet's atmosphere. And in so doing, it can span jurisdictions. Multiple states sharing a fishery for example, or nations of the world sharing an atmosphere, are co-trustees of that shared *res*, each with duties not only to their citizens but to each other as co-trustees. This paradigm can transcend individual sovereign borders to create shared duties.

Second, the public trust presents a defined fiduciary set of duties that is already well established in the law. The public trust draws from a full body of trust law already on the books that has developed over two centuries. Other constitutional rights to a clean environment or dignity do not have these duties established in their jurisprudence. For example, the duty against substantial impairment of the *res* is a key public trust obligation—and an active duty. Proving a violation of this duty may be a simple matter where there exists an obviously degraded resource or an atmosphere flooded with fossil fuel emissions. While there are several fiduciary obligations – both substantive and procedural[97] – the duty of loyalty, which has emerged in some recent public trust cases, deserves special mention because of its integral role in democracy.[98] Trustees are supposed to remain free from bias to ensure loyalty to the beneficiaries. If we applied this standard to our public trustees, we would frontally challenge the present system of accepting campaign contributions

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97 For a brief inventory of public trustees' fiduciary duties, see Doug Quirke, *The Public Trust Doctrine: A Primer, University of Oregon ENR Center*, Section VI (Feb. 2016), at https://law.uoregon.edu/sites/default/files/mary-wood_0/mary-wood/PTD_primer_7-27-15_EK_revision.pdf [https://perma.cc/HL55-6ZBP]. For a full discussion and analysis see NATURE'S TRUST, *supra* note 6, Chapters 8 and 9.

98 *See* Wood, *The Oregon Forest Trust, supra* note 9, at 672–80. For discussion of the duty of loyalty, see Courtney Lords, *Protection of Public Trust Assets, Trustees' Duty of Loyalty in the Context of Modern American Politics*, 23 J. ENV'T L. & LITIG. 519 (2008).

because it causes obvious self-interested decision-making by our elected officials.[99]

Third, this doctrine establishes public property rights, so it provides a direct check against the privatization and monopolization that has caused so many resources to be treated as commodities for the singular benefit of profiteers. It challenges the property paradigm of exclusive human dominion over Nature's components while still allowing a practical accommodation between public and private property interests.[100]

Fourth, this principle remains a foundation of nations worldwide, whether they express the duty to their citizens in terms of a trust or not. It derives from Roman law which animated nearly all common law and civil law systems. Accordingly, citizens and their lawyers have the opportunity of characterizing a duty that is shared on a global level.

Fifth, this principle incorporates the duty to future generations, not just present citizens. The future generations are a recognized beneficiary class, as explicitly recognized by every court that presides over public trust cases. This is the only principle that carries a legal duty to future generations fully embedded within it.

And finally, when we summon the public trust, we invigorate the very democracy from which it comes[101] and we remind government that the people give it power, not the reverse. In that lodestar 1892 case, *Illinois Central*, when the U.S. Supreme Court overturned the Illinois legislature's conveyance of Lake Michigan's shoreline to a private railroad company, those Justices said that conveyance of the shoreline "would be a grievance which never could be long borne by a free people."[102] Sometimes Americans forget what a truly "free people" should expect – certainly the protection of vital ecology and the climate system that we need for our survival.

We should always remember that these public trust rights are judicially recognized "inherent and indefeasible rights" that citizens

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99 For discussion see *supra* NATURE'S TRUST note 6, at 189–94.

100 *See* Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 PACE ENV'T L. REV. 649 (2010).

101 *See* Sax, *supra* note 64, at 491 (describing the doctrine as an "instrument of democratization" with respect to environmental decision-making).

102 Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 456 (1892).

reserved and still hold – rights that are "of such 'great and essential' quality as to be ensconced as 'inviolate.'"[103] Why should we now focus on these reserved inalienable rights held by "we the people"? Because never before in the history of this nation has our fundamental ecology been so ferociously and ignorantly destroyed, and with such dire consequences to young people. These primordial rights have surfaced at epic times throughout human history. They stand no less revolutionary for our time and our crises than when they forced the Magna Charta on the English Monarchy or inspired Gandhi's Great Salt March to the sea.

VII.

Joseph Sax wrote his famous article invigorating the public trust in 1970.[104] That article has been the premise of international public trust judicial opinions in multiple other nations. But the timing of that article coincided with the dawn of the statutory era in this country, and the statutes took over the legal landscape almost completely. Like invasive ivy smothering the indigenous plants below, the statutes became the *all of it*. Courts, lawyers, law professors, and citizens alike were drawn to the express mandates of statutes and fell deeper and deeper into a complex regulatory morass while decades passed and agencies doled out countless permits to pollute and destroy, and government leaders escaped more and more accountability to the public. The permit system was in failure mode without many even realizing it until it was almost too late.

The youth plaintiffs in the *Juliana* case and other state atmospheric trust cases voiced the public trust duty of government in a way that had never happened before, and the public trust sprang to the forefront of environmental awareness. We would be foolish to squander this progress. This does not mean changing or slowing the pace of the express constitutionalism movement. It means fortifying it with the public trust expectations that underlie our very democracy and that continue to form a firm restraint against government's abuse of power.

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103 Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 930–31 (Pa. 2017) (citations omitted); *see also* Robinson Twp. v. Commonwealth, 83 A.3d 901, 947–48 (Pa. 2013).

104 Sax, *supra* note 64.

All of government's ecological responsibility to citizens is lodged in the public trust that predates this nation.

The public trust comes to life through all of us in our various capacities. If you are a lawyer, you can elaborate the ancient public trust in your briefs, regardless of whether your claim is premised on an express constitutional provision. If you are a judge, your opinion can underscore the inherent public trust rights – even if you also pin your ruling on an express constitutional provision. If you are a legislator, you can draft a constitutional amendment that makes clear it does not create a new right but rather partially iterates original inalienable environmental rights held by the people. If you are a journalist, you can ignite widespread citizen interest in public trust rights through your stories.[105] If you are any government official, you can embrace rather than disclaim your trust responsibility and support the youth's struggle for a stable climate system – rather than use your public office to lock in horrific and deadly conditions on a heating planet. And if you are a citizen campaigning for express constitutional provisions, you can galvanize people by voicing the ancient public trust obligation. When citizens learn of a pre-existing ecological duty going back to the beginning of this nation, they become outraged by government's environmental assaults – and no longer feel that they are begging their government to give them *new* rights.

In all of these scenarios, while the express constitutional provisions may be a tool of choice for the moment, the public trust remains the essential constitutional bedrock from which we advocate, legislate, litigate, and campaign. So if you are a young person in this world, learn the public trust as the young plaintiffs in *Juliana* and other cases did, and assert it everywhere you can. Never forget the inalienable rights of a *free people* to inherit a stable climate system capable of sustaining *your* life on Earth.

VIII.

We should never underestimate the power of people everywhere to rise up against intolerable harm to our shared natural endowment. But we need to make the call. Let us tap that wellspring of human understanding that is instinctive, passion-bound, and deeply shared

105 *See* Venkataraman & Shendruk, *supra* note 75.

among citizens here and across the world. Like those generations before us, the public trust calls us to stake our moral claims in history. This call echoes in the razed forests of Oregon, in the blasted hollows of Appalachia, in the cancer alleys of industrial corridors, on the banks of rivers that carry only ghost-fish anymore, and at the base of immortal mountains that weep their last glaciers into the sea. It summons people everywhere to rise up and defend this glorious sanctuary we call Earth. We did not live 100 years ago when people could not even imagine this climate crisis. And if we wait even 10 years, it will be too late. This moment belongs only to us alive right now. Let us together claim it by asserting not the power of life, but the trust of life.