PUBLIC TRUST PRINCIPLES AND ENVIRONMENTAL RIGHTS: THE HIDDEN DUALITY OF CLIMATE ADVOCACY AND THE ATMOSPHERIC TRUST

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This article explores the confluence of two seemingly contrasting models of climate advocacy that are, in fact, one—claims for climate regulation based on (1) governmental public trust obligations to protect the atmosphere, and (2) environmental rights held directly by members of the public. The analysis explores how climate litigants are increasingly asserting a mix of public trust principles, which assert sovereign responsibility to protect atmospheric resources for the benefit of the public, and public environmental rights to atmospheric stability that require sovereign vindication—often in the absence of more robust legal footing for climate governance. Seldom acknowledged is the fact that either formulation implies the same basic partnership between environmental rights and sovereign obligations.

Legal rights and duties are always different sides of the same coin: if a citizen has a right, then the state has an implicit duty to respect it. By the same token, if the state has an obligation to its citizens, those citizens have a right to the benefit of that obligation, and potentially to hold the state accountable. In this regard, the modern public trust doctrine, which obligates protection for the environmental values of trust resources, can itself be understood as a doctrine of environmental rights—perhaps even the original common law statement of environmental rights. Moreover, both trust and rights approaches showcase common themes, opportunities, and hurdles. Each offers new levers of public participation, tools for speech amplification, and opportunities to reverse regulatory capture, but each is vulnerable to problems associated with vagueness, redressability, and the constitutional separation of powers.

An emerging cohort of public trust and environmental rights litigation bears these observations out, both domestically and internationally. The article catalogs the recent wave of climate litigation relying on "trust-rights" theories domestically and internationally, including Urgenda Foundation v. Netherlands *and* Juliana v. United States. *It reports on the state of the youth climate litigation movement while also showing how the two lines of reasoning function as reciprocal mirror-images of one another, blending the same advantages of heightened political participation with the same challenges for judicial review. The success of trust-rights causes of action in some contexts, especially in American states with explicit constitutional public trust or environmental rights provisions, has prompted American climate activists to seek to instantiate these principles more firmly into state constitutional law.*

Part I frames the turn to trust-rights advocacy as an attempt to buttress the weak federal foundations of environmental law. Part II reviews the scholarly foundations of these theories. Part III traces key climate litigation embracing these strategies internationally and domestically, focusing on Dutch, Nepali, German, Indian, and Canadian claims before turning to the checkered track record of these claims in the United States. It describes how the early U.S. atmospheric trust movement has given way to a newer generation of climate advocacy premising claims on state constitutions and considers the possibility of a state plaintiff raising related federal

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claims. Part IV considers the serious challenges these approaches imply, including constitutional concerns about the separation of powers and strategic concerns about impact litigation. Despite these serious critiques, it concludes that these strategies cannot be casually dismissed because they represent a safety valve to address failures of the political process. These strategies also signal a potential generational divide with which the environmental movement must contend.

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Introduction

This Article explores the confluence of two seemingly contrasting models of climate advocacy: claims for climate regulation based on (1) governmental public trust obligations to protect the atmosphere, and (2) environmental rights held directly by members of the public. The analysis explores how climate litigants are increasingly asserting a mix of public trust principles, which assert sovereign responsibility to protect atmospheric resources for the benefit of the public, and public environmental rights to atmospheric stability that require sovereign vindication—often in the absence of more robust legal footing for climate governance, and especially in the United States.[1] Seldom acknowledged is the fact that either formulation implies the same basic partnership between environmental rights and sovereign obligations. Yet legal rights and duties are always different sides of the same coin: if a citizen has a right, then the state has an implicit duty to respect it.[2] By that same token, if the state has an obligation, the beneficiary of that obligation—the citizens—have rights.[3]

As a result, both approaches showcase common themes, including similar opportunities and related hurdles. Each offers new levers of public participation, tools for speech amplification, and opportunities to reverse regulatory capture, but each is vulnerable to problems associated with vagueness, redressability, and the constitutional separation of powers. An emerging cohort of public trust and environmental rights litigation bears these observations out, both domestically and internationally.

This Article catalogs the recent wave of climate litigation relying on both theories, relating the broad range of lawsuits while detailing the most important international and domestic examples, *Urgenda Foundation v. Netherlands*[4] and *Juliana v. United States*.[5] It provides a thorough report on the state of the youth climate litigation movement while also showing how the two lines of reasoning are reciprocal mirror-images of one another, blending the same advantages of heightened political participation with the same challenges for judicial review. Yet the success of these "trust-rights" causes of action in some contexts have also prompted American climate activists to seek to instantiate these principles directly into state constitutional law.

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1. *See infra* Part I.A.
2. *Cf.* Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays 36–50 (1919) (making parallel arguments in the private law context).
3. *Id.* Following the Hohfeldian model, "rights" are legal privileges to which the holder is entitled under the governing rules of law. In the private law context about which Hohfeld wrote, these rules of law are set forth as principles of tort, property, and contract law. In the public law context, they can be established by constitution, statute, or, as in the case of the public trust doctrine, common law.
4. Urgenda v. Netherlands, [2015] HAZA C/09/00456689 (Neth.) at 41, https://perma.cc/V7C5-VRAV (unofficial English translation).
5. Juliana v. United States, Civ. No. 15-CV-01517-AA, 2023 WL 3750334, at *9 (D. Or. June 1, 2023).

The climate litigation movement, notably led by young people, is a modern phenomenon that draws on deep historical roots. In the United States, it began under the banner of the common law public trust doctrine—the ancient but common-sense idea that some natural resources are so important to everyone that they cannot belong to just anyone, and so the government must protect them for the benefit of all the people (who, in turn, hold the government to account).[6] The original Roman doctrine centered on both air and water resources, asserting that: "[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea."[7] The American common law doctrine focuses on waterways,[8] although many state constitutions, statutes, and regulations apply related protections for other natural resources,[9] including atmospheric resources.[10] The fundamental "public trust principle" that they share—partnering sovereign obligations with the reciprocal public rights to benefit from them—has come to fill an important gap in U.S. environmental law, and as suggested by this analysis, perhaps even constitutional law.

Beginning in the 2010s, American climate advocates brought "atmospheric trust" lawsuits and administrative petitions in every state and in federal court—each seeking to establish the atmosphere as a public trust resource on which we all depend, and which the government is therefore obligated to protect from destruction on behalf of the public.[11] These lawsuits centered on the idea that the state should not permit, encourage, or enable greenhouse gas polluters to expropriate the public

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6. *See* Erin Ryan, *A Short History of the Public Trust Doctrine and its Intersection with Private Water Law,* 38 Va. Env't L. J. 135, 137–38 (2020) [hereinafter *A Short History*] (defining the doctrine); *id.* at 140–57 (tracing its historical development).
7. *See* J. Inst. Prooemium, 2.1.1. (T. Sandars trans., 4th ed. 1869) (translating the *jus publicum* from the Institutes of Justinian, published in 533 C.E. by the Byzantine Emperor, Justinian I).
8. *See, e.g.,* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) (applying the common law public trust doctrine to protect public ownership of Chicago Harbor from outright privatization); Nat'l Audubon Soc'y v. Superior Ct. of Alpine County (Mono Lake), 658 P.2d 709, 712 (Cal. 1983) (applying the common law doctrine to protect the environmental values of a remote watershed from damage by private water appropriations). For a fuller discussion of the history and development of the common law public trust doctrine, *see generally* Ryan, *A Short History, supra* note 6. For a fuller treatment of the development of public trust principles across the United States and the world, *see* Erin Ryan et al., *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 Cardozo L. Rev. 2447, 2476 (2021) [hereinafter *Comprehensive Analysis*].
9. *See* Ryan et al., *Comprehensive Analysis*, *supra* note 8, at 2461–82 (describing the development of public trust principles across multiple axes of U.S. law, including the resources and values protected, the forms of law by which public trust principles are vindicated, and the different underlying theories of the public trust in different states).
10. *See, e.g.,* Va. Const. art. XI ("Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.").
11. *See* Anna Christiansen, *Up in the Air: A Fifty-State Survey of Atmospheric Trust Litigation Brought by Our Children's Trust*, 2020 Utah L. Rev. 867, 868 (2020); *Legal Proceedings in All 50 States*, Our Child's. Tr., https://perma.cc/35XE-MXH8. *See also* James Conca,

atmospheric commons for use as a private carbon sink. International advocates brought similar trust lawsuits[12] and also those premised on environmental rights, drawn from national laws and treaties guaranteeing individual rights to life, dignity, and other values undermined by climate instability.[13] Beginning with the Dutch Supreme Court's conclusion in *Urgenda Foundation* that the Netherlands had failed its duty under the European Convention on Human Rights to limit contributions to climate change,[14] these efforts inspired American advocates to experiment with partnering or even replacing atmospheric trust claims with constitutional assertions of public rights to a stable climate. In the most famous example, *Juliana v. United States*, the plaintiffs partnered an atmospheric trust claim with environmental rights asserted under the substantive component of the U.S. Constitution's Due Process Clause.[15]

Other American claims for climate governance have proceeded directly from state laws and constitutional provisions guaranteeing rights to a healthy environment. Effective in 2022, the New York Constitution was amended to guarantee "a right to clean air and water, and a healthful environment."[16] In 2023, youth plaintiffs convinced a state court to recognize rights to climate stability under the Montana Constitution's promise of a healthy environment—the first recognition of climate rights in the United States—and the Montana Supreme Court resoundingly affirmed.[17] In 2024, Hawaiian youth plaintiffs succeeded in

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Atmospheric Trust Litigation—Can We Sue Ourselves over Climate Change?, Forbes (Nov. 23, 2014), https://perma.cc/V7UT-TK4C.

12. *See, e.g.,* Shrestha v. Off. of the Prime Minister, 074-WO-0283 (2018) (Nepal), https://perma.cc/X9SE-KZSH. *See infra* notes 263–272 (discussing the claim in more detail); Complaint at 14, La Rose v. Her Majesty the Queen, [2020] 2020 FC 1008 (Can.). *See also infra* notes 298–302.
13. *See infra* Part III.A.
14. Urgenda v. Netherlands, [2015] HAZA C/09/00456689 (Neth.) at 41, https://perma.cc/V7C5-VRAV (unofficial English translation) (interpreting European Convention on Human Rights arts. 2, 8, EU, Sept. 3, 1953, C.E.T.S. No. 213) ("Urgenda argues that under Articles 2 and 8 of the ECHR, the State has the positive obligation to take protective measures. Urgenda also claims that the State is acting unlawfully because, as a consequence of insufficient mitigation, it (more than proportionately) endangers the living climate (and thereby also the health) of man and the environment, thereby breaching its duty of care. Urgenda asserts that in doing so the State is acting unlawfully towards Urgenda.").
15. Juliana v. United States, Civ. No. 15-CV-01517-AA, 2023 WL 3750334, at *9 (D. Or. June 1, 2023) ("[P]laintiffs seek declaratory relief that 'the United States' national energy system that creates the harmful conditions described herein has violated and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law.'").
16. N.Y. Const. art. I, § 19.
17. Held v. Montana, 2024 MT 312, para. 30 (Dec. 18, 2024), *affirming* Held v. State of Montana, No. CDV-2020-307, slip op. at 17 (Mont. 1st Jud. Dist. May 23, 2023) ("Based on the plain language of the implicated constitutional provisions, the intent of the Framers, and Montana Supreme Court precedent, it would not be absurd to find that a stable climate system is included in the 'clean and healthful environment' and 'environmental life-support system' contemplated by the Framers.").

their claim that state practices favoring fossil-fuel based transportation infringed their rights under the Hawai'i Constitution to a life-sustaining climate.[18] In the resulting consent decree, Hawai'i acknowledged these climate rights and enacted new climate governance infrastructure charged with achieving net zero emissions by 2045.[19] Inspired by these successes, climate advocates around the country are now advancing a series of state constitutional amendments to explicitly recognize both sovereign obligations and environmental rights. At least nine other states are entertaining similar proposals,[20] most of which expressly partner sovereign obligations with environmental rights, rather than referring explicitly to only one side or the other of the recursively reciprocal coin.

Even so, these claims have so far failed in court more often than they have succeeded.[21] While proponents herald their potential for movement building, they have also generated substantial controversy among observers who assail them as premised on vague arguments that, at best, will be ineffective, and at worst, threaten the very constitutional order.[22] Some opponents critique these claims for their departure from established legal norms, the practical impacts of the litigation strategy, and the workability of some requested remedies, which could require courts to order ambitious legislative and executive activity.[23] For others, the judicial role raises serious concerns about the horizontal separation of powers, on both sides of the political spectrum—among both conservatives who reject judicial encroachment on legislative policymaking and liberals who reject the Supreme Court's retreat from administrative deference.[24] Still others worry more about the implications of *not* pushing these boundaries in the face of the looming harms associated with climate change.[25]

This Article explores the intertwined evolution of "trust-rights" climate litigation strategies, the obstacles and opportunities for their future development, the critiques leveled against them, and the pragmatic hurdles for litigators attempting to deploy them. Part I frames the turn toward public trust advocacy as a response to the weak foundations of environmental law—at least in the United States, where use of the public trust doctrine in environmental advocacy was pioneered—due to the attenuated constitutional support for federal environmental law and the limited reach of state environmental law. It frames

18. Joint Stip. and Order Re: Settlement at 6, Navahine v. Hawai'i Dep't of Transportation et al, No. 1CCV-22-000063 (Haw. Cir. Ct. Jun. 20, 2024).

19. *Id.* at 3. *See also Office of the Governor of Hawai'i - News Release - Historic Agreement Settles Navahine Climate Litigation*, Governor Josh Green (June 20, 2024), https://perma.cc/4TAP-7SJA.

20. *See infra* note 532 and accompanying text (discussing these efforts).

21. *See infra* Part III.B (discussing these claims).

22. *See infra* Part II, Part IV (discussing arguments by proponents and opponents).

23. *Id.*

24. *Id.*

25. *See, e.g.*, Mary Christina Wood, Nature's Trust: Environmental Law For a New Ecological Age 133–36 (2014) [hereinafter Nature's Trust] (arguing that the atmospheric trust project is important because there is no more time to waste).

the core public trust principle as a pairing of sovereign obligations to protect trust resources with implied environmental rights, held by the public, both to the benefit of the trust and to hold the sovereign accountable to its obligation. As such, it recognizes the public trust doctrine itself as an assertion of environmental rights—perhaps even the first assertion of environmental rights. As a necessary corollary, it also recognizes pure statements of environmental rights as variations of the core public trust principle, because they necessarily imply sovereign obligations to protect those rights.

Part II situates this analysis in the U.S. academic discourse, reviewing the scholarly search for sources of environmental rights, previous consideration of public trust principles in application to climate advocacy, the scholarly origins of the atmospheric trust project, and its scholarly critics, even among environmental advocates. It also considers the Hohfeldian private law analogy for understanding the reciprocal nature of partnered claims for public law environmental rights and duties. In recognition of this hidden duality, the piece refers to climate advocacy premised on these twinned, reciprocal models as "trust-rights" advocacy.

Part III reviews the climate trust-rights advocacy that has followed, tracing the trajectory of atmospheric trust and environmental rights claims around the nation and the world. In addition to reporting on international examples from Nepal, Germany, France, India, Canada, and Mexico, it highlights the successful Dutch claim in *Urgenda Foundation*. Then it turns to less successful record of atmospheric trust advocacy in the United States, with special focus on the most famous *Juliana* example, still unfolding after more than ten years, as the plaintiffs have now appealed their loss on standing grounds to the Supreme Court. While the *Juliana* line of argument may be foreclosed to private litigants going forward, this Part explores the potential for state plaintiffs to raise similar claims. It describes how the early atmospheric trust movement gave way to a newer generation premising claims on both sovereign trust obligations and constitutional rights, and more recently still, on environmental rights and obligations in state constitutions—discussing the adoption of trust-rights amendments in Pennsylvania, Hawai'i, Montana, New York, and the nine other states presently considering proposed amendments.

Part IV concludes with consideration of the jurisprudential and pragmatic arguments against—and in favor of—public trust and environmental rights-based advocacy, including both constitutional concerns about the separation of powers issues these lawsuits raise and practical concerns about bringing impact litigation in uncertain judicial venues. While these strategies offer heightened public participation opportunities for climate advocates who feel shut out of the political process, critics assail the vagueness and futility of the legal constraint these claims assert. If the sovereign has an obligation to protect "the environment," what exactly does that require? If citizens have a right to "a healthful environment," what specific action or inaction must the government undertake to vindicate that right? And even if these rights and obligations can

be demonstrated, can the judiciary meaningfully redress alleged violations? Even if it can, is this the right time to further empower judicial oversight of environmental governance?

After considering these questions, the Article nevertheless concludes that trust-rights strategies cannot be casually dismissed. Notwithstanding the legitimate critiques with which they must contend, strategic climate litigation plays an important role in the overall democratic process, even when it loses. These lawsuits perform the same role as the citizen suits enabled by so many federal environmental statutes, which anticipate that private attorneys general will be needed to ensure that public environmental interests are protected. They afford citizens—especially young citizens—critical ports of entry to a political process endemically vulnerable to public choice dynamics, and one that excludes youth voices at the ballot box by design. Trust-rights strategies amplify the voices of comparatively powerless advocates in a policymaking context dominated by more powerful and politically savvy stakeholders, and they offer opportunities to build public constituencies for more effective participation in the political arena beyond the courts. While climate advocacy of this sort should not replace conventional legal advocacy through the ordinary channels of political participation in policymaking, it represents a safety valve to vent public frustration and address potential failures of the political process.

Of note, the generationally distinct reactions that trust-rights strategies seem to provoke may reveal a greater generational divide, by which the older generation maintains more faith in conventional legal advocacy than those that have followed them, and potentially for good reason. The elders came of age witnessing the creation and successes of some of the very same environmental regulations that the younger generations now perceive as under assault.[26] If younger advocates no longer trust that the Clean Air Act can be successfully deployed against climate change, or that the scientific recommendations of environmental agencies will receive judicial deference when challenged in court, they may turn to other strategies.[27] Trust-rights advocacy has provided an additional strategy for members of a disillusioned generation to constructively

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26. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 732 (2022) (overturning Clean Power Plan regulations designed to reduce greenhouse gas emissions under the Clean Air Act without clearer authorization from a congress unlikely to provide it); Sackett v. EPA, 598 U.S. 651, 684 (2023) (overturning Clean Water Act regulations to protect wetlands without a continuous surface connection to conventionally navigable waterways for similar reasons); Loper Bright Enterprises v. Raimondo, 144 S.Ct. 2244, 2273 (2024) (overturning the *Chevron* doctrine of judicial deference to administrative interpretation by, among others, environmental agencies).

27. *Cf. West Virginia*, 597 U.S. 697; *Loper Bright Enterprises*,144 S. Ct. 2244. *See generally* Erin Ryan, Sackett v. EPA *and the Regulatory, Property, and Human Rights-Based Strategies for Protecting American Waterways*, 74 Case W. Rsrv. L. Rev. 281 (2024) (discussing the shift to public trust and environmental rights approaches in tandem with the weakening of conventional tools of environmental law).

engage the legal process. In these respects, even if the suits never achieve the remedies they seek in court, they make a legitimate contribution to our constitutional democracy—always an ongoing conversation among citizens and the three branches of government that represent them—over critical societal policies, when time is of the essence.

I. Public Trust Principles and the Missing Foundations of U.S. Environmental Law

An increasing protagonist of environmental advocacy in the United States, the public trust doctrine creates a set of public rights and responsibilities regarding certain natural resource commons, obligating the state to manage them in trust for the public. It is thought to be among the oldest doctrines of the common law, with roots extending as far back as ancient Rome and early Britain, where it primarily protected public fishing and transportation values associated with navigable waterways.[28] Early on, the common law came to recognize a fundamental "public trust principle": that some natural resources—especially waterways—are so foundational to civilization that they cannot be owned by anyone in particular; instead, they must belong to everyone together. To prevent private expropriation or monopolization of these critical public commons, the sovereign—be it the Emperor, the King, or later, the elected legislative and executive branches of government—is entrusted to manage them on behalf of the public.[29] The public is the intended beneficary of the trust, which, at least in the last few centuries, has empowered its members to hold the government accountable to its obligations in court.[30]

Over these hundreds and even thousands of years, this fundamental principle has gradually transformed from a doctrinal affirmation of sovereign authority over trust resources to a legal recognition of sovereign responsibility to protect them for present and future generations—historically to ensure public access, but increasingly for environmental reasons as well.[31] Especially

28. *See* J. Inst. Prooemium, 2.1.1 at 167–68 (T. Sandars trans., 4th ed. 1869) (translation from the Institutes of Justinian, by the Byzantine Emperor, Justinian I).

29. *See, e.g.*, Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475 (1970) (setting forth the seminal academic statement of the public trust doctrine as a modern legal tool to aid in the protection of natural resources); Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 Env't L. 573, 580 (1989) (discussing the public trust doctrine as "a democratizing force by (1) preventing monopolization of trust resources and (2) promoting natural resource decision making that involves and is accountable to the public").

30. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892); Nat'l Audubon Soc'y v. Superior Ct. of Alpine County (*Mono Lake*), 658 P.2d 709, 727 (Cal. 1983).

31. *See* Ryan, *A Short History*, *supra* note 6, at 140–57 (discussing the evolution of the doctrine from ancient to modern times); *see generally* Erin Ryan, The Public Trust Doctrine,

in recent decades, public trust principles have evolved substantially through U.S. common, constitutional, and statutory law to address a broader variety of natural resources, from waterways to wildlife, and a broader scope of public values associated with them, including ecological, recreational, scientific, and scenic values.[32] For example, in 1983 in *National Audubon Society v. Superior Court,* the California Supreme Court took the first steps toward resolving a conflict over remote water resources sought by the City of Los Angeles by casting the public trust doctrine as an inalterable source of state obligation to protect the environmental values at stake in Mono Lake, in addition to such traditional trust values as public navigation.[33] A number of U.S. states have adopted versions of the doctrine directly into their constitutions, affirming the importance of environmental protection at the highest levels of state law.[34]

Although public trust principles appear in legal systems across the world, they remain especially important in the United States, in part because public trust doctrine principles help fill a gap in the underlying support for American environmental law. The United States was an early mover toward the modern norm of constitutional governance but a relative latecomer to the importance of environmental governance. And while the United States has helped lead the development of environmental law through groundbreaking statutes like the National Environmental Policy Act,[35] the Clean Air and Water Acts,[36] and the Endangered Species Act,[37] even these pioneering pieces of legislation have been frequently challenged, both directly and through implementing regulations,[38] in ways that reflect their more attenuated constitutional grounding (at least in comparison to alternative constitutional frameworks).[39] This attenuated support for U.S. environmental law reflects the contrasting

Mono Lake, and A Quiet Revolution in Environmental Law (forthcoming 2025) [hereinafter Quiet Revolution] (detailing this evolution).

32. *See* Ryan et al., *Comprehensive Analysis*, *supra* note 8, at 2461–97 (discussing the development of the doctrine domestically and internationally).

33. Nat'l Audubon Soc'y v. Superior Ct. of Alpine County, 658 P.2d 709 (Cal. 1983).

34. *See infra* Part III.E.

35. National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).

36. Clean Air Act, 42 U.S.C. §§ 7401–7671 (1963); Clean Water Act, 33 U.S.C. §§ 1251–1389 (1972).

37. Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1973).

38. *See infra* text accompanying notes 52–54 (discussing such environmental legal challenges).

39. *E.g.,* Constituição Federal [C.F.] [Constitution] art. 225 (Braz.) (Brazil's constitution) ("All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations."). *See also* Constitución De La Republica Del Ecuador 2008 [C.P.] [Constitution], art. 71 (Ecuador) (Ecuador's constitution). The constitution refers to "[t]he unique and priceless natural assets of Ecuador includ[ing], among others, the physical, biological and geological formations whose value from the environmental, scientific, cultural, or landscape standpoint requires protection, conservation, recovery and promotion." *Id.* at art. 404.

governance concerns that prevailed at the time the Constitution was drafted. Its framers, mired in political contest over the nature of the unfolding American experiment, evidently perceived the undue exercise of sovereign authority as the greatest potential threat, rather than the loss of environmental values in nature that perhaps only sovereign authority can protect.[40] Arguably, public trust principles have developed rapidly in the United States, at least in part, to help fill a gap of missing foundation for U.S. environmental law.

This Part introduces the public trust doctrine and the role environmental advocates have sought for public trust principles in response to the weak foundations of U.S. environmental law. After considering the attenuated constitutional foundations of federal environmental law and the limits of state law to fill that gap, it reviews the partnered rights and obligations at the heart of the doctrine, as well as the turn advocates have taken toward use of public trust and environmental rights-based strategies to help buttress these missing foundations.

A. The Missing Constitutional Foundations

The American experiment of constitutional governance began with trial and error, but it set the global standard. In 1789, after a failed first try with the Articles of Confederation,[41] the framers of the American Constitution outlined a tripartite structure of government that diffused sovereign power among the separately acting branches and guaranteed citizens a set of inalienable rights.[42] Enshrined in the Constitution's Bill of Rights, these famously included legal guarantees for freedom of speech and assembly,[43] and rights against cruel and unusual punishment.[44] But in the late eighteenth century, when open space was still plentiful, natural resources were bountiful, and the industrial revolution had not yet fully taken hold, environmental conflicts were not among the governance problems that worried the framers.[45] They were much more worried

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40. *See infra* text accompanying note 45.

41. *See, e.g.*, Erin Ryan, Federalism and the Tug of War Within 70 (2012) [hereinafter Ryan, Tug of War] (discussing the failure of the Articles of Confederation because it failed to confer sufficient national power or structures of national government to overcome collective action problems among the new federation of states).

42. U.S. Const. art. I–III; U.S. Const. amend. I-X. *See also* Ryan, Tug of War, *supra* note 41, at 602–06.

43. U.S. Const. amend. I.

44. U.S. Const. amend. VIII.

45. Jack Lewis, *Looking Backward: A Historical Perspective on Environmental Regulations*, EPA Journal (Mar. 1988), https://perma.cc/349H-RU2Y (discussing the paucity of environmental regulation at the time of the nation's founding in light of widespread fear of tyrannical governance and desire for economic development). In a 1789 letter to James Madison during the founding era, Thomas Jefferson signaled his personal lack of concern over environmental conflicts or intergenerational sustainability when he opined: "The earth belongs always to the living generation. They may manage it then, & what proceeds from

about the resurrection of a monarchy, and the potential for unchecked power to corrupt future leaders.[46]

The oldest written constitution still in force, the U.S. Constitution remains a landmark legal accomplishment, a bedrock for the American civilization that has followed, and an inspiration for many of the most important developments in democratic governance worldwide.[47] Though it remains a work in progress,[48] it is an enduring source of American identity, culture, and aspiration that forever changed the world. Even so, it stands apart today for failing to definitively address the need for environmental regulation that many of the modern constitutions it helped inspire do now as a matter of course.[49]

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it, as they please, during their usufruct." *To James Madison from Thomas Jefferson, 6 September 1789*, Founders Online, https://perma.cc/T2V7-3ZAZ.

46. Lewis*, supra* note 45.

47. Christopher A. Suarez, *Democratic School Desegregation: Lessons from Election Law*, 119 Pa. State. L. Rev. 747, 757–58 (2015) (celebrating the court's embrace of the one person, one vote principle in electoral law.); David A.J. Richards, *Rights, Resistance, and the Demands of Self-Respect*, 32 Emory L.J. 405, 406 ("[T]he idea of human rights lay behind the American innovation of judicial review: since human rights are not the just subject of political bargaining and compromise, counter majoritarian courts with the American power of judicial review are a natural institutional way to secure such rights from the incursions of the institutions based on majority rule."); Myers v. United States, 272 U.S. 52, 85 (1926) ("[T]he separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.").

48. The U.S. Constitution is not without its critics, or its flaws, for example, regarding the electoral college, the difficulty of amending it, and its original embrace of slavery. U.S. Const. art. I § 2 (embracing slavery as a national institution) (*repealed by* U.S. Const. amend. XIII). *See, e.g.*, David Shultz, *Voting Rights and the Unconstitutionality of the Electoral College Winner-Take-All Allocation*, 66 S.D. L. Rev. 457, 458 (2021) (arguing that "the winner-take-all allocation for awarding electoral votes" used in 48 states "disenfranchises voters"); Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 Calif. 2005, 2007 (2021) (arguing that the U.S. Constitution "may be the world's most difficult to amend."); Robert M, Cover, Justice Accused: Antislavery and the Judicial Process 159–174 (1975) (critiquing the legal system's acquiescence to punishing the anti-slavery movement).

49. *See* Lael K. Weis, *Environmental Constitutionalism: Aspiration or Transformation?*, 16 Int'l J. Con. L. 863, 842 n. 32 (2018) ("Approximately two-thirds of national constitutions contain rights provision."); David R. Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment 47-50 (2012) (outlining environmental rights provisions in constitutions worldwide). *See, e.g.*, Bundesverfassung [BV] [Constitution] Apr. 18, 1999, SR 101, art. 74 (Switz.) ("The Confederation shall legislate on the protection of the population and its natural environment against damage or nuisance."); Constitución De La Republica Del Ecuador 2008 [C.P.] [Constitution] Oct. 20, 2008, art. 71 (Ecuador); Consolidated Version of the Treaty on the Functioning of the European Union arts. 11, 191, 193, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TEFU] (establishing that the EU "shall contribute to pursuit of… preserving, protecting and improving the quality of the environment,"); James R. May & Erin Daley, *Vindicating Fundamental Rights Worldwide*, 11 Or. Rev. Int'l L. 365, 407–433 (2009) (discussing the obstacles faced by American courts in vindicating environmental

The American Constitution pioneered individual rights and enumerated sovereign responsibilities, but no part speaks directly to the responsibility of environmental stewardship, or the various rights and duties that stewardship implies.[50] While the Constitution sets forth the basic structure and functions of government, it elides the critical role government must play in protecting not only the human rights and relationships catalogued in its articles and amendments, but also the human relationship with the shared natural resources on which we all depend for life and livelihood. It is surely not the only oversight of the Framers—civil rights for women and insular minorities also stand out, for example—but the lack of attention to environmental concerns is a glaring oversight that we have never resolved at the constitutional level.

Indeed, Americans are often surprised to learn that the most solid legal basis for our primary federal environmental laws—the Clean Air and Water Acts, the Endangered Species Act, and others curtailing pollution and harms to natural resources—are based not on any kind of constitutional environmental principle but instead on the Constitution's Commerce Clause, which empowers Congress to regulate market transactions across state, tribal, and international lines.[51] Since the modern environmental movement took form in the 1970s, opponents have challenged a number of these laws in court, sometimes successfully, for allegedly exceeding constitutional bounds.[52] Some of these challenges have

rights); *id.* at 366–372 (discussing the history of the evolution of international fundamental environmental rights).

50. Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make it Right?*, 45. Env't L. 1139, 1155–56 (2015) (noting that "environmental protection requirements are not constitutional in character. They are exclusively the product of the common law and statutory law").

51. U.S. Const. art. I, § 8, cl. 3; Friends of the Earth v. Carey, 552 F.2d 25, 37 (2d Cir. 1977) (noting that Congress enacted the Clean Air Act under the Commerce Clause). *Accord* Sierra Club v. EPA, 540 F.2d 1114, 1139 (D.C. Cir. 1976) ("Regulation of air pollution clearly is within the power of the federal government under the commerce clause"). The Commerce Clause has been used as the constitutional basis for environmental laws protecting air and water quality because, inter alia, these are channels of interstate commerce that Congress is authorized to regulate under the clause. Pollution and hazardous waste are also very often the product of activities in interstate commerce or were transported in interstate commerce. Even wildlife laws have been justified under the Commerce Clause because wildlife viewing and hunting are activities within the scope of interstate commerce. Nat'l Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1057 (D.C. Cir. 1997) ("We hold that the section 9(a)(1) of the Endangered Species Act is within Congress' Commerce Clause power and that the Fish and Wildlife Service's application of the provision to the Delhi Sands Flower–Loving Fly was therefore constitutional.")

52. *See, e.g.,* New York v. United States, 505 U.S. 144 (1992) (challenging the Low Level Radioactive Waste Policy Act as violating the Tenth Amendment); Gibbs v. Babbitt, 214 F.2d 483, 497 (4th Cir. 2000) (upholding Endangered Species Act protection for red wolves against a challenge that it exceeded Commerce Clause authority on grounds of the regulations' substantial effect on interstate commerce via "tourism, trade, scientific research, and other potential economic activities.").

attacked legislation directly and some have focused on their implementing regulations, often suggesting that environmental regulations exceed both statutory and constitutional authority.[53] In other cases, the Supreme Court has overturned environmental regulations it has concluded stray so close to the boundaries of constitutionally permissible authority that clearer congressional authorization is required.[54] Indeed, the most successful federal environmental laws are arguably those that create procedural rights and obligations,[55] such as the National Environmental Policy Act, requiring government actors to "look before they leap" on taking actions that could cause environmental harm,[56] and which follow from such clearer constitutional procedural traditions as due process.[57] Laws that promise substantive environmental protection require more work to ground, at least federally.[58]

Other nations have taken a different approach. The Swiss Constitution, for example, explicitly authorizes legislation for "the protection of the population and its natural environment against damage or nuisance,"[59] removing some of the pragmatic hurdles that environmental governance has faced in the United States. The constitution of Nepal declares that "[t]he State shall pursue…policies" that "protect, promote, and make environmentally friendly and sustainable use of natural resources."[60] In a less utilitarian commitment to environmental protection, Ecuador's constitution recognizes environmental rights directly in nature, declaring that "Pacha Mama" (Mother Earth) "has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes," and that "[a]ll persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature."[61] Many nations in the developing world, generally with

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53. *See, e.g.*, Solid Waste Agency of Northern Cook County v. U.S. Army Corp of Engineers, 531 U.S. 159 (2001) (arguing that regulations implementing the Clean Water Act exceeded statutory authority and that reading the statute otherwise could put it in jeopardy of exceeding congressional authority under the Commerce Clause).
54. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697 (2022) (overturning Clean Power Plan regulations designed to reduce greenhouse gas emissions under the Clean Air Act for this reason); Sackett v. EPA, 598 U.S. 651 (2023) (overturning Clean Water Act regulations to protect wetlands without a continuous surface connection to conventionally navigable waterways for similar reasons).
55. Dinah Shelton, *Developing Substantive Environmental Rights*, 1 J. Hum. Rts. & Env't 89, 90–92 (2010).
56. 42 U.S.C. § 4321.
57. U.S. Const. amends. V, XIV.
58. Shelton, *supra* note 55, at 90–99.
59. Bundesverfassung [BV] [Constitution] Apr. 18, 1999, SR 101, art. 74 (Switz.) ("The Confederation shall legislate on the protection of the population and its natural environment against damage or nuisance."), https://perma.cc/UVN5-MK6Z.
60. Constitution of Nepal, Sept. 20, 2015, art. 51(g), https://perma.cc/M6GU-VAQY.
61. Constitución De La Republica Del Ecuador 2008 [C.P.] [Constitution] Oct. 20, 2008, art. 71 (Ecuador). For further discussion of the constitutional adoption of

newer constitutions, provide explicit constitutional protection for environmental values.[62] Nations in the European Union and other developed nations with older constitutions have often interpreted their own constitutional promises of fundamental rights or due process to include protection for environmental values.[63]

B. Environmental Federalism in the United States

Environmental federalism enables critical additional pathways for environmental governance in the United States, but acting alone, states cannot close this gap.[64] Most American state constitutions are modeled after the federal constitution, although some have departed from that model in adding environmental promises, often based on public trust principles emphasizing sovereign responsibility to protect environmental values for the benefit of the public. As discussed in Part III, some include constitutional language explicitly recognizing the rights of citizens to enjoy a healthy environment and establishing state responsibility to protect them.[65] For example, the Pennsylvania Constitution asserts that citizens "have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment," and that "Pennsylvania's public natural resources are the common property of all the

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environmental rights in Ecuador, *see* Ryan et al., *Comprehensive Analysis*, *supra* note 8, at 2514–15.

62. *See* Ryan et al., *Comprehensive Analysis*, *supra* note 8, at 2514–21 (discussing noteworthy examples from Brazil, Ecuador, Kenya, Nepal, Nigeria, and Pakistan, among others).

63. David R. Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment 214 (2012) ("Western European nations without constitutional recognition of the right [to a healthy environment] have ratified the Aarhus Convention…and are bound by the jurisprudence of the European Court of Human Rights, which recognizes the right to a healthy environment."); *id*. at 225–26 ("In Italy, there is no explicit constitutional right to a healthy environment. However, courts have interpreted the constitutional right to health as incorporating the right to live in a healthy environment."); Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, art. 1, E.U., 2161 U.N.T.S 447 ("In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.").

64. *See generally* Ryan, Tug of War, *supra* note 41 (discussing the dilemmas posed by American federalism for interjurisdictional governance, especially environmental governance). *See also* Erin Ryan, *Environmental Federalism's Tug of War Within*, *in* The Law and Policy of Environmental Federalism (Kalyani Roberts, ed. 2015); Erin Ryan, *Negotiating Environmental Federalism: Dynamic Federalism as a Strategy for Good Governance*, 2017 Wisc. L. Rev. 17 (2017).

65. *See infra* Part III.E.

people, including generations yet to come."[66] Partnering an explicit sovereign obligation with this statement of environmental rights, it goes on to guarantee that "[a]s trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."[67] Emphasizing environmental rights and duties, Montanans added constitutional language in 1972 affirming that "the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."[68] New York's constitution was amended in 2022 to promise "a right to clean air and water, and a healthful environment."[69]

Even without these constitutional provisions, American states have plenary authority to protect environmental values within them. Many have used it to enact meaningful environmental laws, including environmental procedural requirements, anti-pollution laws, land use planning mandates, and resource conservation laws.[70] Yet the natural resource commons most in need of protection—such as air, water, and biodiversity—very often defy jurisdictional boundaries, in that the benefits they confer and the harms we may cause them cross state lines.[71] Climate change is the ultimate example of a boundary-crossing environmental harm, as the greenhouse gases behind global warming mix evenly in the atmosphere, far above the individual states and nations where they are generated—but the same problem applies even intranational environmental problems. Regulating water or air pollution in one state is ineffective when the waterway runs through multiple states and air pollutants travel on the wind, and wildlife roams freely.[72] Hazardous radioactive waste may require transport across multiple states or otherwise threaten shared resources.[73]

The special challenge for multijurisdictional environmental management is that state laws often require federal coordination to be effective, while federal laws often rely on state implementation to be effective.[74] Similar dynamics

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66. Pa. Const. art. I, § 27.
67. Pa. Const. art. I, § 27.
68. Mont. Const. art. IX, § 1.
69. N.Y. Const. art. I, § 19.
70. For example, the California Environmental Quality Act obligates the state "to provide a high-quality environment that at all times is healthful and pleasing to the senses and intellect," Cal. Pub. Res. Code § 2100. and the Minnesota Environmental Rights Act authorizes citizen to sue "for the protection of the air, water, land, or other natural resources located within the state, whether publicly or privately owned, from pollution, impairment, or destruction." Minn. Stat. § 116B.03 .
71. *See, e.g.,* Ryan, Tug of War , *supra* note 41, at 145–80 (exploring the interjurisdictional nature of boundary-crossing environmental problems such as air and water pollution, hazardous waste management, and climate change).
72. *Id.*
73. *Id.*
74. Erin Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 64, at 400–12 (describing the different mechanisms of cooperative environmental federalism that demonstrate this observation).

unfold at every scale of governance—from the municipal[75] to the international—although as regulatory scale increases, regulatory tools become even weaker, leaving international environmental law more aspirational than operational in many instances.[76] Moreover, even where they find solid legal foundation, both state and federal environmental laws struggle for efficacy in protecting public trust resources, especially when they are threatened for reasons other than pollution.[77]

For example, in the context of protecting waterways, the closest thing to a unifying national strategy is the Clean Water Act. While it deserves enormous credit for reducing pollution into navigable waterways from many industrial and municipal sources,[78] it has no means to protect vulnerable waterways from other kinds of harm, such as agricultural or nonpoint-source pollution—or even human actions that threaten their continued existence by siphoning them down to dangerously low levels.[79] While the Clean Water Act regulates water quality, waterways across the nation are endangered by practices that threaten not just the quality but the quantity of water within them, often due to excessive water withdrawals under state laws.[80] The assertions of the Act that come closest to

75. *Id.* at 377–79, 414 (discussing interjurisdictional environmental management challenges at the subnational level).

76. *See, e.g.,* Lydia Scambler, *Despite Efforts, International Environmental Law is Aspirational Rather than Successful in its Contribution to the Protection of the Global Environment and in the Fight Against Climate Change*, 9 Plymouth Law and Crim. Just. Rev. 66 (2017) (discussing the challenges of international environmental law); Albert C. Lin, *In Defense of 2.0 C: The Value of Aspirational Environmental Goals*, 11 Tex. A&M L. Rev. 405, 406 (2024) ("In the context of the Paris Agreement, aspirational goals – though perhaps unrealistic – serve as an asymptotic directive to nations, establish a yardstick for measuring progress, express international concern regarding the climate crisis, and expand the range of possible futures.").

77. *See* Erin Ryan, *How the Successes and Failures of the Clean Water Act Fueled the Rise of the Public Trust Doctrine and Rights of Nature Movement*, 73 Case W. Rsrv. L. Rev. 475, 481–83 (2022) [hereinafter *Successes and Failures*] (noting the Clean Water Act's focus on protecting water quality provides few statutory tools to ensure sufficient water quantity in vulnerable waterways).

78. *See* Ryan, Tug of War, *supra* note 41, at 152 (noting that the Clean Water Act was designed to limit this kind of "point-source" pollution, traceable to a discrete point of conveyance, but it has almost no tools to limit nonpoint source pollution, or the kind of overland pollution that arises when rain passes over pollutants accumulating on roads, yards, or agricultural fields).

79. *See* Ryan, *Successes and Failures, supra* note 77, at 483–84 (discussing the limits of the Clean Water Act).

80. *Id.* at 481–83 Some states do regulate withdrawals, using authority under Section 401 of the Clean Water Act or state water quality standards, for example, California's expansive regulation of Central Valley Project diversions. *See, e.g., 401 Water Quality Certification and Wetlands Program*, California State Water Resources Control Board, https://perma.cc/4SWW-ULQ7 (describing authority by the Regional Water Boards, including the Central Valley board, to regulate discharges under section 401 of the Clean Water Act and the Porter-Cologne Water Quality Control Act (Porter-Cologne Act), which

protecting waterways as *waterways*[81]—regulations that prevent the destruction of wetlands—have repeatedly been challenged in court, sometimes successfully, for straying too close to the boundaries of authority conferred by the Commerce Clause.[82] Advocates defending waterways and other natural resources threatened by overuse have lamented the limits of the U.S. Constitution in failing to provide more straightforward authority for the kinds of regulations needed to protect them.[83] They have increasingly turned to public trust advocacy and other means of asserting environmental rights to fortify their protection.[84]

Federal legal tools for protecting the atmospheric commons have fared even worse.[85] The Clean Air Act is the recognized national strategy for regulating boundary-crossing air pollution, but the text of the statute does not specifically address climate change, and efforts to deploy the Act in service of climate governance have met with stiff legal resistance. The Supreme Court did recognize a federal obligation to regulate greenhouse gas pollution under the Act in *Massachusetts v. EPA*,[86] and the Environmental Protection Agency (EPA) has interpreted parts of the statute authorizing the regulation of any air pollutant to support regulation of greenhouse gas pollution by cars and trucks.[87]

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regulates groundwater withdrawals. *See also* Dan Charles, *New Protections for California's Aquifers Are Reshaping the State's Central Valley*, NPR (Oct. 7, 2021), https://perma.cc/4N9Q-79AT (describing the use of authority under the new California Sustainable Groundwater Management Act to regulate water withdrawals in the Central Valley).

81. That is to say, not just as vessels for water that the law requires to meet minimum standards of quality, but as the geologic formations that waterways represent—rivers, lakes, coastal marshlands, prairie potholes, etc.
82. *See, e.g.*, Erin Ryan, *Federalism, Regulatory Architecture, and the Clean Water Rule: Seeking Consensus on the Waters of the United States*, 46 Env't. L. 277, 289–97 (2016) (discussing the history of Supreme Court litigation challenging the reach of federal authority over wetlands under the Clean Water Act, including both statutory interpretation claims about congressional intent and underlying constitutional concerns about the extent of federal authority).
83. *Cf.* James R. May, *The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes*, 42 Cardozo L. Rev. 983, 987–97 (2021) (detailing the history of failed attempts to constitutionally recognize a fundamental environmental right). *See generally* Robin Kundis Craig, *Should There Be a Constitutional Right to a Clean/Healthy Environment?*, 34 Env't. Rep. 11013, 11020–21 (2004) (arguing that the Constitution requires structural amendment to facilitate better environmental governance).
84. *See generally* Ryan, *Successes and Failures, supra* note 77.
85. *See, e.g.*, Juliana v. United States, 217 F. Supp. 3d 1224, 1237–38 (D. Or. 2016), *rev'd on other grounds*, 947 F.3d 1159 (9th Cir. 2020) ("The Constitution does not mention environmental policy, atmospheric emissions, or global warming. And … climate change policy is not a fundamental power on which any other power allocated exclusively to other branches of government rests.").
86. Massachusetts v. EPA, 549 U.S. 497, 533–35 (2007).
87. *See* Richard K. Lattanzio, Cong. Rsch. Serv., RL30853, Clean Air Act: A Summary of the Act and Its Major Requirements, Congressional Research Service 10 (2022) (noting that Section 202 of the Act "requires the EPA administrator to prescribe 'standards applicable to the emission of any air pollutant from any class or classes of new

However, the Court's subsequent decision in *West Virginia v. EPA* clarified that more is needed from Congress before EPA may rely on some of its most powerful statutory tools to regulate large-scale greenhouse gas emissions from fossil-fuel burning power plants,[88] in a decision fraught with anxiety about constitutional boundaries. The majority's skepticism hinged, in part, on apparent concern that the agency's plan strayed too close to the limits of federal authority, barring it from interpreting its own statutory mandate as freely as it might have in more secure constitutional territory, at least without clearer legislative affirmation.[89] Of course, even robust climate governance at the national level cannot, on its own, solve the global problem of greenhouse gas pollution—but it would be significant, given that the United States is one of the world's largest greenhouse gas polluters.[90]

One potential solution is to amend the national constitution to provide the missing authority for environmental law and climate governance. However, further revealing the price paid by early constitutional movers who couldn't foresee this problem—and the lessons drawn by later constitutional drafters, who avoided it after the fact—the American Constitution is uniquely difficult to change.[91] This cumbersome process has been successfully invoked only twenty-seven times since the nation's founding, and only eight times in the last century.[92] Even aggressive campaigns to correct provisions arguably in conflict with core

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motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,'" and that "[b]eginning in 2010, this language has been used to authorize standards for greenhouse gas (GHG) emissions from cars and trucks").

88. West Virginia v. EPA, 597 U.S. 697, 706, 722–24, 735 (2020).

89. This concern was most directly recognized in Justice Gorsuch's concurring opinion, joined by Justice Alito, in which he explained that the major questions doctrine under which the rule was invalidated "seeks to protect against 'unintentional, oblique, or otherwise unlikely' intrusions" on the areas of "self-government, equality, fair notice, federalism, and the separation of powers." *Id.* at 742 (Gorsuch, J., concurring).

90. *GHG Emissions for all World Countries*, Eur. Comm'n, (2024) https://perma.cc/J5VS-G4VV ("Per Capita Greenhouse Gas Emissions, 2023"); *Global Emissions*, Ctr. for Climate & Energy Solutions, https://perma.cc/PG5Z-N6EU ("Per Capita Greenhouse Gas Emissions, 2018").

91. Richard Albert, *The World's Most Difficult Constitution to Amend?*,110 Calif. 2005, 2007 (2021) (arguing that the U.S. Constitution "may be the world's most difficult to amend."). It can be amended by either a two-thirds majority vote in both the House of Representatives and the Senate (and then ratified by three quarters of the state legislatures), or else by a constitutional convention called for by two-thirds, and then ratified by three quarters, of the State legislatures. U.S. Const. art. V. In practice, a constitutional amendment has never been proposed by constitutional convention. *Constitutional Amendment Process*, Nat'l Archives (Aug. 15, 2016), https://perma.cc/J7F6-GP8G.

92. U.S. Const., amend. 1–27. *See also The Bill of Rights: A Transcription*, Nat'l Archives (Jul. 10, 2024), https://perma.cc/3JC6-BXRM; *The Constitution: Amendments 11-27*, Nat'l Archives (Jan. 12, 2024), https://perma.cc/C7ZM-VDDX. The first ten amendments, comprising the Bill of Rights, were ratified at the same time in 1791. *Id.*

democratic principles in other parts of the Constitution, including amendments that would secure equal rights for women, have failed in recent decades.[93] Especially given the legislative paralysis of recent years, it seems unlikely that the Constitution will be amended any time soon to provide a stronger basis for environmental regulation.

Today, then, there are few uncontroversial choices for constitutionally grounding environmental rights or obligations on the scale needed to support meaningful climate governance. However, older jurisprudence suggests that there may have once been a potential home for such rights in the Privileges and Immunities clause of Article IV,[94] which protects fundamental rights associated with citizenship,[95] including interstate comity and nondiscrimination,[96] the right to travel, [97] and potentially even the federal navigational servitude[98]—a federal mandate to preserve the navigability of public waterways against private encroachment[99] that is conceptually related to the public trust doctrine itself. The Clause was once thought to protect a set of interests ranging from life, liberty, and property to the pursuit of commercial advantage and even access

93. *See* Equal Rights Amendment, H.R. 208, 92d Cong. (1971); S.J. Res. 8, 92d Cong. (1971). *See also* H.R. 681, 91st Cong. (1969) (calling for a direct popular vote in place of the electoral college, to align presidential elections with the one-person-one-vote premise on which American voting rights are founded).

94. U.S. Const. art. IV, § 2 ("The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.").

95. *See generally* Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship under Article IV*, 45 Loy. U. Chi. L.J. 1 (2013).

96. *Id.* at 1, 8, 70.

97. *See* Paul v. Virginia, 75 U.S. 168, 180 (1869) (defining the right to travel as "right of free ingress into other States, and egress from them."); Zobel v. Williams, 457 U.S. 55, 79–81 (1982) (O'Connor, J., concurring) (arguing that the right to interstate travel comes from the Privileges and Immunities Clause). *Cf.* Ilya Shapiro & Josh Blackman, *The Once and Future Privileges or Immunities Clause*, 26 Geo. Mason L. Rev. 1207, 1222-26 (2019) (discussing recognition of the right to travel under the Privileges or Immunities Clause of the Fourteenth Amendment).

98. Today, we generally understand the federal navigational servitude as being rooted in Commerce Clause protection for the channels of interstate commerce, but it may once have been viewed as rooted in the right of travel protected by the Privileges and Immunities Clause. Early Supreme Court jurisprudence identifies "the right of a citizen of one state to pass through or to reside in any other state for purposes of trade agriculture professional pursuits or otherwise" as one of the key protections of the Privileges and Immunities clause, which could be construed to create a right of navigation. *See* Richard W. Bartke, *The Navigation Servitude and Just Compensation—Struggle for a Doctrine,* 48 Or. L. Rev. 1, 3 (1968).

99. *Id.* at 3. At least one scholar argues that the Federal Navigational Servitude should even be understood as an outgrowth of the Property Clause of the Constitution, art. IV, § 3, cl. 2. *See* Stewart Jay, *Origins of the Privileges and Immunities of State Citizenship under Article IV*, 45 Loy. U. Chi. L.J. 1, 6 (2013) (arguing that the Federal Navigation Servitude be understood as drawing support from the Property Clause to recognize federal proprietary interest in navigable waterways as "aggregates of rights, powers, privileges, and immunities").

to public resources.[100] If the Privileges and Immunities Clause was intended to protect citizens' rights to life, liberty, and property, could it offer protection for citizen's rights to a healthy environment and livable climate?

Dashing that hope as a matter of history, *The Slaughterhouse Cases* of 1873 reduced the potential importance of the Privileges and Immunities Clause to rights associated with interstate travel.[101] Yet even that right is conceptually related to the federal navigational servitude that is an expression of the core public trust principle associated with the primary public commons that the Supreme Court has repeatedly affirmed receives protection under the common law public trust doctrine.[102] Modern scholarship suggests that there may even be interest among sitting members of the Supreme Court in reinvigorating the Privileges and Immunities Clause as a source of substantive rights.[103] It is thus possible that the Privileges and Immunities Clause could one day provide constitutional foundation for protecting additional rights, and perhaps even environmental rights—but there are no indications to expect that any time soon.

C. The Emerging Role of Public Trust Principles

In the face of this gap, scholars and advocates have increasingly sought to frame the public trust principles that underlie the public trust doctrine—which partner sovereign obligations for natural resource protection with environmental rights held by the citizen beneficiaries of the trust—as a source of underlying authority to help ground good environmental governance. While the public trust doctrine cannot single-handedly resolve this problem, the potential gap-filling importance of the doctrine—and the public trust principles that are an

100. See Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (explaining that the Clause protects such fundamental rights as "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole").
101. 83 U.S. 36, 80 (1873) (holding that the Privileges and Immunities Clause protects citizen's rights by virtue of their U.S. citizenship, and not state citizenship, and defining those rights narrowly to exclude civil rights). *See also* Martin H. Redish & Brandon Johnson, *The Underused and Overused Privileges and Immunities Clause*, 99 B.U. L. Rev. 1535, 1542, 1554 (2003) (discussing the jurisprudential evolution of the Clause).
102. *See supra* notes 98-99 and accompanying text (discussing the federal navigational servitude) and *infra* notes 104-109 and accompanying text (discussing the common law public trust doctrine). *Cf.* William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine and the Search for a Substantive Environmental Value*, 45 UCLA L. Rev. 385, 409–10 (1997) (suggesting that the Privileges and Immunities Clause, inter alia, protects out-of-state citizens from discrimination by ensuring that their interests are "virtually represented" in the political process, and considering how the public trust doctrine can help hold the government accountable in resource management).
103. Ilya Shapiro & Josh Blackman, *The Once and Future Privileges or Immunities Clause*, 26 Geo. Mason. L. Rev. 1207, 1228–31 (2019) (discussing Justice Thomas and Justice Kavanaugh's position that the Privileges or Immunities Clause is a potential path to substantive rights).

outgrowth of the original common law doctrine—is becoming increasingly evident.

As noted, the public trust doctrine creates a set of public rights and responsibilities with regard to certain natural resource commons, obligating the government to manage them in trust for the general public. Dating back to ancient Roman and early English common law, the doctrine protected public values associated with navigable waterways, such as fishing and transportation.[104] As noted above, even the ancient common law recognized that some natural resources—especially waterways—are so foundational to civilization that they cannot be owned by anyone in particular and instead must belong to everyone together. To protect these critical public commons from private expropriation or monopolization, the doctrine entrusts the government to manage them for the benefit of the public, whose members can hold the state to account in court.[105] As the U.S. Supreme Court explained in its seminal 1892 treatment of the doctrine,

> [T]he State holds the title to the lands under the navigable waters . . . in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. [106]

The doctrine has gradually transformed over time from an affirmation of sovereign authority over trust resources to a recognition of sovereign responsibility to protect them for present and future generations[107]—not only to ensure traditional values of public access, but also to protect the public environmental values associated with trust resources.[108] In recent decades, especially in the United States, the doctrine has evolved through common

104. *See* J. Inst. Prooemium, 2.1.1. (T. Sandars trans., 4th ed. 1869) (translation from the Institutes of Justinian, by the Byzantine Emperor, Justinian I); The Royal Fishery of Banne, 80 Eng. Rep. 540, 543 (K.B. 1611) (applying the doctrine in early English common law).

105. *See generally* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970) (setting forth the seminal academic statement of the public trust doctrine as a modern legal tool to aid in the protection of natural resources); Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 Env't L. 573, 580 (1989) (discussing the public trust doctrine as "a democratizing force by (1) preventing monopolization of trust resources and (2) promoting natural resource decision making that involves and is accountable to the public.").

106. *See, e.g.*, Ill. C. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) (applying the common law public trust doctrine to protect public ownership of Chicago Harbor from outright privatization).

107. *See generally* Ryan, *A Short History, supra* note 6 (reviewing the historical development of the doctrine); Ryan, Quiet Revolution, *supra* note 31.

108. Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419 (1983) (holding that the common law doctrine required protection of environmental values associated with California's Mono Lake). *See also* resources cited *supra* in note 107.

law processes, state constititional amendments, and statutory developments to address a wider variety of natural resources beyond waterways and a broader scope of public values associated with them, including ecological, recreational, scientific, and scenic values.[109]

The development of public trust principles and the corresponding environmental rights they imply represent a potential source of authority to confer additional structural support for environmental governance at the state and even federal level. It is a role of the doctrine that has long been overlooked, but one that could prove increasingly important in supporting environmental values beyond the focus of the federal Commerce Clause and the many state constitutions modeled after the federal constitution. Charging the government with responsibility to care for designated public natural resources, the original common law doctrine provides an enduring source of sovereign obligation with quasi-constitutional elements, arguably mandating sovereign action in the same way the written elements of a constitution do.[110]

In the United States, where the common law trust is considered a doctrine of state law, it can function to supplement other environmental regulation, but as noted, for natural resources that traverse state boundaries—such as navigable waterways, migratory wildlife, and atmospheric resources—state law may prove insufficient. For that reason, environmental advocates have sought to expand recognition for public trust principles in federal common and constitutional law.[111] Some scholars have already considered how to ground public trust principles in existing federal constitutional authority, including the Property Clause, the Tenth Amendment, and even the Privileges and Immunities Clause.[112] Emerging movements for environmental rights, framed both as

109. *See* Ryan, *A Short History, supra* note 6, at 140–49 (reviewing the early history of the doctrine); *see generally* Ryan et al., *Comprehensive Analysis*, *supra* note 8 (discussing the development of the doctrine domestically and internationally); Ryan et al., *Comprehensive Analysis, supra* note 8, at 2470–72 (reviewing the different values protected by the doctrine in different U.S. states, including environmental values).

110. *See* Erin Ryan, *From Mono Lake to the Atmospheric Trust: Navigating the Public and Private Interests in Public Trust Resource Commons*, 10 Geo. Wash. J. Energy & Env't. L. 39, 57 (2019).

111. *See* Erin Ryan, *A Short History, supra* note 6, at 170–80 (discussing the intersections between the public trust doctrine and federal law).

112. *See generally* Samuel H. Ruddy, *Finding a Constitutional Home for the Public Trust Doctrine*, 43 Environs Env't. L. & Pol'y J. 139 (2020) (arguing that grounding the public trust doctrine in federal constitutional authority could provide more consistent, enforceable environmental protection); Araiza, *supra* note 102 (exploring how process-based constitutional theories, like John Hart Ely's *Democracy and Distrust*, can help ground environmental protection under the public trust doctrine). Araiza argues that process-based theories focusing on democratic accountability rather than specific substantive outcomes can foster environmental protection, when additional statements of policy favor it, by ensuring that government decisions about public resources reflect the public interest. *Id.* Araiza further suggests that the Equal Protection and Privileges and Immunities Clauses protect out-of-state citizens from discrimination by ensuring that out of-state interests are represented in each state's

human rights and rights for nature directly, seek formal codification of trust-rights principles directly in constitutional and statutory texts.[113]

Others have sought recognition of the public trust doctrine and the implied principles of sovereign obligations to protect citizens' environmental rights as a feature of constitutional law without formal codification. Some argue that the public trust should be understood as a quasi-constitutional limit on sovereign authority in general, including both state and federal authority.[114] Such a "constitutive" limit is one that is "built into the fabric of sovereign authority, such that it cannot be extinguished through normal judicial or legislative process, as are ordinary exercises of sovereign power."[115] State supreme courts in California, Hawai'i, and elsewhere have already made this determination about the force of these principles within their states,[116] and advocates have argued that federal sovereign authority should be subject to the same fundamental pairing of sovereign obligation and corresponding public rights.[117] If public trust principles are an implied feature of federal constitutional law, then they may apply to protect vulnerable natural resources that can be protected only by federal authority, such as the atmospheric commons under assault by greenhouse gas pollution. As I have discussed in previous work, the argument for a federally applicable public trust proceeds along both logical and historical lines:

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political process, and considers ways that the public trust doctrine can function as a device for holding the government accountable in resource management by considering states the political representative of their citizens' interests in trust resources. *Id.* at 409-10.

113. *See generally* Ryan et al., *Comprehensive Analysis*, *supra* note 8 (comparing the public trust and rights of nature movements). *See also* David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. Env't L.J. 711, 760 (2008) ("The Public Trust Doctrine stands for the proposition that some of nature's gifts inherently belong to all people, and the government must steward these to prevent both private arrogation of public resources and the 'tragedy of the commons' from unfettered public access to these shared resources. Environmental Human Rights represent a growing movement to codify this belief, to make positive law that firms up the philosophy promulgated for 1,500 or so years in the name of the Public Trust Doctrine.").

114. *See* Ryan, *A Short History, supra* note 6, at 177–78; Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J. L. & Pol'y 281, 288 (2014) (arguing that the public trust doctrine is an implied limit on federal authority because it "is the chalkboard on which the Constitution is written"). As Torres and Bellinger explain, "When one writes something on a chalkboard, we see the meaning of the writing, but we commonly forget that there is still a chalkboard that created the space for the writing. We recognize that meaning comes from what is actually written, but there could be no such conveyance of meaning without the chalkboard as a foundation. After all, the Constitution was not written on a blank slate but was written with certain principles and rights in mind. As the chalkboard on which the Constitution was written, the public trust doctrine provides the background and context for the Constitution." *Id.*

115. *See* Ryan, *A Short History, supra* note 6, at 177–78.

116. *See* Ryan et al., *Comprehensive Analysis*, *supra* note 8, at 2472–75 and n.134 (discussing decisions by courts in California, Nevada, Hawai'i, New Jersey, and Washington).

117. *See* Ryan, *A Short History, supra* note 6, at 177–79.

> The logical argument is that there is no principled reason to differentiate between the state or federal nature of the sovereign power rightfully constrained by the doctrine when the sovereign acts in a manner contrary to the public interest in trust resources. Received as part of the English common law that forms the bedrock of all American legal institutions, the doctrine is neither a creature of state nor federal law, but a constraint on the sovereign authority delegated to each level of government within our federal system. Whatever sovereign possesses legal authority over critical natural resource commons must match it with responsibility for protecting the public interests in them that have been recognized since ancient Rome.
>
> The historical argument asserts that the public trust doctrine must constrain federal as well as state authority, because there are neither logical nor historical grounds to differentiate their implicit origins. Except for the very first states, the trust obligations of most American states arose by delegation of federal authority over lands previously held in federal ownership. Today, the doctrine most often constrains state authority, because under the equal footing doctrine of the U.S. Constitution, states own the submerged lands beneath navigable waterways; and under the Submerged Lands Act, they are the primary regulators of tidelands within three miles of shore. But other than the original thirteen colonies, all states inherited their trust obligations through the medium of federal sovereignty that applied before their lands were carved out of federal holdings. The states must have inherited a pre-existing trust obligation, goes this reasoning, because there is no clear legal moment when new trust obligations were expressly conferred. Therefore, the doctrine must have implicitly inhered at the federal level before it was delegated to the states, and by this theory, it remains there in application to all trust resources that were not delegated to the states.[118]

Even so, the public trust has not been recognized as applying to the federal government, and the U.S. Supreme Court made that argument even more difficult in a 2012 decision suggesting (in dicta) that the doctrine is a creature of state law alone.[119] The D.C. Circuit rejected one of the atmospheric trust cases on these grounds, and the Supreme Court declined review.[120]

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118. *Id.*

119. PL Montana, LLC v. Montana, 565 U.S. 576, 603-04 (2012) ("Unlike the equal-footing doctrine, however, which is the constitutional foundation for the navigability rule of riverbed title, the public trust doctrine remains a matter of state law . . .").

120. Alec L. *ex rel.* Loorz v. McCarthy, 561 F. App'x 7, 7–8 (D.C. Cir. 2014), *cert. denied*, 574 U.S. 1047 (2014).

While the ancient Roman common law statement of the public trust doctrine applied to both air and water resources,[121] in American law, the doctrine stands most firmly in application to navigable waterways.[122] Environmentalist appeals to the doctrine surged after it was used to protect environmental values in a famous dispute over water resources between Los Angeles and the Mono Basin, the eastern watershed of Yosemite National Park.[123] However, successes since then have mostly been limited to contexts involving waterways.[124] There have been important new applications in the context of water resources, including California's extension of the Mono Lake doctrine to groundwater tributaries in the *Scott River* case,[125] the protection of public beach access in New Jersey,[126] public walking rights along Great Lakes shores,[127] and the protection of public drinking water from hydraulic fracturing under Pennsylvania's constitutionalized version of the doctrine.[128] The public trust doctrine has been recognized by many courts as a background principle of state law that can function as a defense to takings litigation.[129]

Yet all along courts, scholars, and litigants have wrestled with the full scope of the doctrine. If it applies to waterways, then which waterways? All of them, or only some subset?[130] And if it protects public water commons

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121. *See* J. Inst. Prooemium, 2.1.1 at 167 (T. Sandars trans., 4th ed. 1869) ("By the law of nature these things are common to mankind–the air, running water, the sea, and consequently the shores of the sea.").
122. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892) (in a seminal public trust case, applying the doctrine to protect public interests in Chicago Harbor and affirming its long application to navigable waterways).
123. Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (*Mono Lake*), 658 P.2d 709, 712 (Cal. 1983); *see also* Erin Ryan, *The Public Trust Doctrine, Private Water Allocation, and Mono Lake: The Historic Saga of* National Audubon Society v. Superior Court, 45 Env't L. 561, 617–22 (2015) [hereinafter *Historic Saga*].
124. *See* Ryan, *Historic Saga, supra* note 123, at 625–26; Cathy J. Lewis, *The Timid Approach of the Federal Courts to the Public Trust Doctrine: Justified Reluctance or Dereliction of Duty?*, 19 Pub. Land & Res. L. Rev. 51, 76 (1998) (advocating that federal courts should make vigorous use of the public trust doctrine in natural resource cases).
125. *See* Env't Law Found. v. State Water Res. Control Bd., 26 Cal. App. 5th 844, 857–858 (2018), *rev. denied* (Nov. 28, 2018).
126. *See* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363 (N.J. 1984).
127. *See* Glass v. Goeckel, 703 N.W.2d 58, 61 (Mich. 2005).
128. *See* John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 Env't L. 463, 464 (2015); Robinson Twp. v. Commonwealth, 83 A.3d 901, 913 (Pa. 2013) (recognizing that Pennsylvania's public trust doctrine applies more broadly to natural resources affected by oil and gas).
129. *See supra* text accompanying notes 114–118; *see also* Erin Ryan, *A Short History*, *supra* note 6, at 171–74 (discussing use of the doctrine as a defense to takings claims against environmental regulations).
130. *See*, *e.g.*, Kramer v. City of Lake Oswego, 395 P.3d 592, 612 (Or. Ct. App. 2017), *aff'd in part, rev'd in part*, 446 P.3d 1 (Or. 2019), *opinion adhered to as modified on reconsideration*, 455 P.3d 922 (Or. 2019) (declining plaintiff's request to clarify that the public trust doctrine applies to all submerged lands and overlying waters, not just those owned by the state). On appeal,

against private claims, then what about other public natural resource commons that are also susceptible to private appropriation? The public trust principles underlying the protection of waterways beg legitimate questions about why the same premise should not also apply to other critical commons resources that are also susceptible to harmful expropriation or monopoly. By the same rationale that requires sovereign oversight of the territorial seas, why not other natural resource commons, like coral reefs, forests, or biodiversity, which also confer critical ecosystem services and represent intrinsic environmental value? Litigation applying the common law public trust doctrine to these resources in the United States have generally fared poorly, perhaps because these resources don't share the same diffuse common pool features as water, or perhaps they draw less support from common law precedent.[131] But if those are the relevant metrics, then what about the ocean of air that is the atmosphere, and the fragile climatic system it supports?

Given the premise of the fundamental public trust principle—that some natural resources are so critical that the sovereign must protect them for the benefit of all—climate advocates have asserted that it should apply to the great air commons on which we all depend as dearly as we do the water commons,[132] noting that even the original Roman common law statement of the public trust asserted that not only the sea and the shores of the sea were the common property of all the people, but also the air.[133] When Americans first received the doctrine from British common law centuries ago, it was expanded from protecting not only the sea but also the nation's great navigable lakes and rivers. The climate advocates reported on in Part III have asserted that the atmosphere should be the next formal extension of the doctrine, which should be appropriately dispatched to address the natural resource crisis that threatens to eclipse all others—climate change. Following invitations in the scholarly literature,[134] advocates

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the Oregon Supreme Court held that neither the city nor the state could restrict the public's right to enter public waters from abutting waterfront parks. Kramer v. City of Lake Oswego, 446 P.3d at 6.

131. *See, e.g.,* San Diego Cnty. Archaeological Soc'y, Inc. v. Compadres, 81 Cal. App. 3d 923, 925–26, (Ct. App. 1978), *disapproved of on other grounds by* City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 644 P.2d 792 (1982) ("The [public trust] doctrine has been restricted to tidelands, navigable waters and situations where the government or public in general own the property.").

132. See *infra* Part III.B (discussing these claims).

133. *See* J. Inst. Prooemium, 2.1.1 at 167–68 (T. Sandars trans., 4th ed. 1869) (translation from the Institutes of Justinian, by the Byzantine Emperor, Justinian I).

134. *See* David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. Env't L. J. 711, 760–61 (2008) (framing the public trust doctrine as a codification of basic environmental human rights); Alexandra B. Klass, *Modern Trust Principles: Recognizing Rights and Integrating Standards*, 82 Notre Dame L. Rev. 699, 720 (2006) ("The purpose of this Article is to create a new theoretical framework for a modern public trust doctrine grounded in state common law that can be used broadly for environmental protection purposes and is responsive to the various criticisms of the

like the youth plaintiffs in *Juliana* have drawn on the doctrine in partnership with environmental rights-based climate advocacy premised on other features of constitutional law—although with limited success.[135]

D. Public Trust Principles as Environmental Rights

Yet the public trust doctrine itself provides a basis for asserting environmental rights that could help buttress the inherent weaknesses of U.S. environmental law, especially when the trust is conceived as a constitutive element of sovereign authority.[136] After all, the core public trust principle is really a pairing of two reciprocal, coequal elements—(1) a sovereign obligation to protect the environmental values of trust resources for the benefit of the public, and (2) the right of the public to benefit from the trust and hold the government to account for performance of its trust obligations.[137] Yet one does not exist without the other. They are mirror images, lacking genuine legal meaning without the partnership implied between them. And while different examples of public trust advocacy may emphasize one side of the coin over the other, both are always in operation.[138] Even when the environmental advocacy focuses on the sovereign obligation element of the trust, it relies on the unspoken public right to invoke the sovereign obligation. Even when advocacy is premised on the environmental right, it implies the sovereign obligation to protect it.

In this regard, the public trust doctrine is, itself, a doctrine of environmental rights—perhaps even the original statement of environmental rights, at least within the western legal tradition. It stands for an ancient but evolving conception of partnered environmental rights and duties—a sovereign obligation that delimits governance, removing the government's option to destroy or allow these public natural resources to be destroyed, and reciprocally, an entitlement of the citizenry to the benefits of this stewardship obligation. The big question, perhaps, is what these environmental rights entail.

Framing the rights conferred by the doctrine as legal entitlements to specific environmental goods—to a clean and healthful environment, for

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doctrine."); John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 Env't L. Rev. 463, 466 (2015) ("The potential for a more robust use of environmental rights and public trust is so near at hand as to be within reach, tangible, and capable of being pictured and understood in specific cases."); Wood, Nature's Trust, *supra* note 25, at 133–36 (calling on the deployment of public trust principles for broader environmental protection, including climate governance). For further discussion of climate trust scholarship, *see infra* Part II.B.

135. *See infra* Part III.D (discussing in detail the atmospheric trust and substantive due process claims for a livable climate brought in *Juliana v. U.S.*).

136. *See* Ryan, *A Short History*, *supra* note 6, at 176–81 (discussing the constitutive interpretation of the doctrine).

137. *See infra* Part I.D.

138. *See infra* Part III.

example—poses a conceptual hurdle in the United States, where positive rights are few and far between. In contrast to the more familiar framing of individual rights as negative rights, which constrain how the government engages with citizens, positive rights empower citizens to demand something affirmative from the government. While positive rights find reference in important sources of international human rights law,[139] American law generally regards them with suspicion. The U.S. Constitution does recognize a few positive rights, for example, the right to jury trial and legal representation in a criminal case,[140] and many U.S. states recognize a fundamental right to free public education,[141] but most constitutional rights are framed as negative rights that constrains how the government can behave—such as rights against unreasonable search and seizure,[142] cruel and unusual punishment,[143] or undue interference with the practice of religion.[144] Some invocation of public trust principles in support of environmental rights—for example, to climate stability—are framed as necessary for human survival,[145] yet the U.S. Constitution does not provide a positive right to food or medicine, even though they, too, are arguably necessary for survival.

Even so, several state constitutions arguably premised on trust-rights principles have done exactly that—for example, Montana's promise of "a clean and healthful environment,"[146] and New York's guarantee of "a right to clean air and water, and a healthful environment."[147] Moreover, environmental rights protected by the public trust doctrine, which poses a constraint on sovereign

139. *See, e.g.,* G.A. Res. 217 (III) A, art. 25 at 71 (Dec. 8, 1948) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."); European Convention on Human Rights arts. 2, 8, Sept. 3, 1953, C.E.T.S. No. 213 (protecting, among others, broad conceptions of rights to life and human dignity).

140. U.S. Const. amend. VI. These positive rights are notably connected to circumstances in which the government has compelled an individual into legal process, somewhat bridging the divide between positive and negative rights. Then again, many negative rights arguably imply positive correlates for implementation. *See* Jean-François Akandji-Kombe, *Positive Obligations Under the European Convention on Human Rights*, Directorate General of Hum. Rts. Council of Eur., 1, 12–15 (2007). (discussing the necessary overlap between positive and negative obligations under the European Convention on Human Rights).

141. *See* Trish Brennan-Gac, *Education Rights in the States*, 40 Amer. Bar Assoc. No. 2 (April 1, 2014), https://perma.cc/A29Y-LTRU (noting that many state constitutions recognize a fundamental right to education and that all states provide for compulsory free public education for children). *See also* G.A. Res. 217 (III) A, art. 26 at 71 (Dec. 8, 1948) (recognizing rights to free elementary education).

142. U.S. Const. amend. IV.

143. U.S. Const. amend. VIII.

144. U.S. Const. amend. I.

145. *See infra* Part III.B.

146. Mont. Const. art. IX. *See also infra* Part III.E.

147. N.Y. Const. art. I, § 19.

action, are just as naturally framed in terms of the negative rights that are commonplace in constitutional law. They constrain the government from authorizing or permitting the private expropriation of a public trust commons it holds in trust for the public. Pennsylvania's constitution overtly expresses both sides of this reciprocal coin, partnering its guarantee that "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment" with its affirmation that "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come" and a sovereign commitment "as trustee of these resources [to] conserve and maintain them for the benefit of all the people."[148] Yet arguably, the two models would yield similar results, even if Pennsylvania had left out the overt statement of positive rights—as do other state constitutions, which include only the statement of sovereign obligation.[149]

Environmental rights skeptics[150] may argue that the environmental dimensions of the trust are better framed as a mandate for environmental stewardship by the government, especially given the balancing act the Mono Lake case expressly required.[151] Yet that argument raises interesting questions about the meaningful distinction between environmental rights and stewardship obligations, if rights and duties are properly understood as reciprocal functions of one another.[152] Does a legal duty obligating one always imply a right held by another? At least one scholar has argued that human environmental rights necessarily imply a codification of public trust-themed sovereign management, arguing that "some of nature's gifts inherently belong to all people, and the government must steward these to prevent both private arrogation of public

148. PA. Const. § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.").

149. *See, e.g.,* Fla. Const. art II, § 7 ("it shall be the policy of the state to conserve and protect its natural resources and scenic beauty."). *See also infra* Part III.E (discussing other examples).

150. *See, e.g.,* Cynthia Giagnocavo & Howard Goldstein, *Law Reform or World Reform: The Problem of Environmental Rights*, 35 McGill L.J. 315, 315 (1990); Mauricio Guim & Michael A. Livermore, *Where Nature's Rights Go Wrong*, 107 Va. L. Rev. 1347, 1347–48 (2021); B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 Notre Dame L. Rev. 245, 252 (1999) ("Any [amendment] attempting to capture a normative statement about the environment and plug it into the United States Constitution is simply a bad idea."); Noah M. Sachs, *A Wrong Turn with the Rights of Nature Movement*, 36 Geo. Env't L. Rev. 39, 39 (2023) (critiquing the rights of nature movement).

151. *See* Ryan, *Historic Saga*, *supra* note 123, at 605–09 (describing the compromise the California Supreme Court required between the protection of public trust values and the need to also respect the state statutory system of water management); *id.* at 614–15 (describing the Water Board's implementation of a compromise that protected the lake without prohibiting all water diversions).

152. *See infra* Part I.D; *cf.* Hohfeld, *supra* note 2, at 36–50.

resources and the 'tragedy of the commons' [that could arise] from unfettered public access to these shared resources."[153]

If so, then what is the meaningful difference between environmental stewardship and environmental rights? Is a right wielded by individuals inadequate to protect future generations, as stewardship implies? But why cannot a public right encompass the interests of members both present and yet to come? Perhaps it has to do with the intersection between the environmental content of a stewardship obligation and the countervailing public interests with which it may collide. If that environmental content is framed as a right, does that imply that it will trump all other factors, including property rights, or even competing human rights? If framed instead as a stewardship obligation, does it automatically require a balancing among competing considerations in the overall calculus of the public benefit? Or would each of these conflicts arise under either frame of reference, requiring resolution on the basis of each individual case or controversy? Does it help to frame the trust as a right that belongs to the public at large, but which individuals vindicate as "private attorneys general" on behalf of the broader community?[154] What, if anything, distinguishes environmental rights from other kinds of rights?

These important questions about the nature of public and private rights and their relationships to broader environmental values exceed the scope of this article, which provides more of a starting point for discussion than a finishing point. Yet whether framed as a doctrine of environmental rights or environmental stewardship, the public trust principles increasingly found in domestic and international jurisprudence provide compelling legal tools to secure legal protections for environmental values left vulnerable under conventional anti-pollution laws. Especially in the United States, where constitutional support for environmental law is complicated by features of omission and attenuation, advocates—and especially young advocates—have sought these additional tools in their efforts to oppose environmental degradation and climate change, and as they frame it, in fighting for their own futures.

As discussed further in Part IV, however, expansive public trust advocacy has also prompted concern among other advocates that it could undermine support for conventional environmental laws that have been more effective in achieving meaningful climate governance, displacing precision regulatory oversight with aspirational goals and vague legal demands.[155] Even if these reciprocal sovereign obligations and environmental rights are recognized, what exactly could their relatively vague directives deliver? Meanwhile, doctrinal opponents contend that trust-rights advocacy is essentially antidemocratic—dangerously empowering litigants over electorates and courts over legislatures, at a time when judicial

153. *See* Takacs, *supra* note 113, at 760.
154. *See infra* Part IV.
155. *See infra* Part IV.B.

power is already waxing.[156] Indeed, the scholarly discourse over the use of public trust and environmental rights-based legal strategies has been long, vigorous, and at times, fractious.

II. Scholarly Advocacy for Public Trust Principles and Environmental Rights

Situating this analysis in the broader scholarly literature, this Part discusses the array of legal scholarship that has explored various legal bases for asserting public trust and rights-based claims to protect the natural environment, many arising long before public concerns over climate change began to eclipse most others. It reviews the potential legal foundations on which to premise claims for environmental rights and obligations that would protect climate stability, beginning with constitutional and statutory law, briefly addressing rights of nature scholarship, and then turning to scholarly advocacy for the application of public trust principles to the atmospheric commons. It also addresses scholarly criticism of public trust advocacy, its use in climate advocacy specifically, and climate litigation premised on environmental rights or obligations in general. Review of the literature addressing the atmospheric trust project and other environmental rights-based advocacy exposes longing among advocates for stronger legal foundations, but also dissensus among both proponents and opponents of stronger climate governance over the role trust-rights advocacy should play.

A. Searching for Environmental Rights in U.S. Law

In a 2003 book, Professors David Markell and Clifford Rechtschaffen confronted the problem of lacking constitutional foundations for U.S. environmental law in an exploration of what constitutional sources are available to ground environmental regulation.[157] Their account identified several constitutional provisions that offer at least indirect support for American environmental law, and on which federal environmental regulations are premised: (1) the Commerce Clause, (2) the dormant Commerce Clause, (3) Tenth Amendment limits on the power of the federal government to require state action, and (4) the Supremacy Clause and implied preemption.[158] While these constitutional provisions have grounded nearly a half century of critical environmental statutory law at the federal level, to date, none has produced an iron-clad platform for holistic climate regulation that has survived judicial

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156. *See infra* Part IV.A.

157. *See* Clifford Rechtschaffen & David L. Markell, Reinventing Environmental Enforcement & The State/Federal Relationship 38–43 (2003).

158. *Id.*

scrutiny.[159] Nor have they grounded regulatory efforts to protect the nation's waterways beyond the point of navigability.[160]

In response to these limitations, the rights of nature discourse began gathering force in the United States after the Supreme Court rejected the idea that natural objects could assert legal rights in 1972.[161] In *Sierra Club v. Morton*, the Court held that harm to the natural environment itself was insufficient to confer standing in a suit to halt development plans for a Disney ski resort in the Sequoia National Forest.[162] While the plaintiff's effort to assert standing on behalf of the environment was unsuccessful, it launched a wave of scholarship contending that the Court had wrongly decided the underlying rights of nature issue.[163] This included Christopher Stone's seminal treatment in *Should Trees Have Standing?*, which argued for direct recognition of legal rights in natural objects and in nature as a whole.[164] Stone's work would eventually inspire a fully developed model of environmental rights that de-privileges human interests, embraced by the unfolding rights of nature movement.[165] Other environmentalists have objected to this line of reasoning, however, criticizing rights-of-nature approaches as unrealistic at best, and actively harmful at worst.[166]

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159. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 734–35 (2022) (concluding that the Clean Air Act did not clearly authorize EPA's plan to regulate certain large-scale greenhouse gas emissions, in a realm of environmental law that approaches the edge of constitutional comfort for the majority of the sitting Supreme Court).
160. *See generally* Erin Ryan, *Sackett v. EPA and the Regulatory, Property, and Human Rights-Based Strategies for Protecting American Waterways*, 74 Case W. Rsrv. L. Rev. 281 (2024); Ryan, *Successes and Failures, supra* note 77.
161. Sierra Club v. Morton, 405 U.S. 727 (1972).
162. *Id.* at 729–30, 734–39.
163. *See id.* at 735–36; *id.* at 739–42, 749–50 (Douglas, J., dissenting from the holding and inspiring the Western literature from which the contemporary Rights of Nature movement developed).
164. Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450, 455–56 (1972); *see also* Cormac Cullinan, *Do Humans Have Standing to Deny Trees Rights?*, 11 Barry L. Rev. 11, 11–12, 19–21 (2008) (referring to Stone's "seminal" article that "motivated the famous dissenting judgment by Justice Douglas in the case of *Sierra Club v. Morton*"). Stone urged that institutionalizing rights to nonhuman entities would jump start a long-term legal and cultural shift toward an understanding of humans as part of a greater whole, rather than at the center of the universe. *Id.* at 489–501.
165. *See generally* Ryan et al., *Comprehensive Analysis*, *supra* note 8.
166. For example, Professor Noah Sachs argues that its vague standards such as a right to "exist" or "flourish" are unenforceable and lack a limiting principle; that judges will lack the technical expertise required to adjudicate rights of nature claims; and that it is likely to create arbitrary and oppressive outcomes for humans while weakening protections for nature. *See* Noah M. Sachs, *A Wrong Turn with the Rights of Nature Movement*, 36 Geo. Env't L. Rev. 39, 42, 51 (2023) (adding that as "[a]lmost every human activity… involves some harm to living organisms," a rights of nature based system has the potential to force a "remake" of the entire legal system). Cynthia Giagnocavo and Howard Goldstein worry that the rights of nature approach is overly optimistic; that it is a mistake to confuse "legal reform for the social change that we desire;" and that to define nature in terms of legal rights would

Meanwhile, other scholars continued to explore legal principles on which to ground human rights in nature. In the early 1990s, Professor Joseph Sax, the intellectual progenitor of the public trust doctrine as a tool of environmental law, considered whether environmental rights should be grounded in the anthropocentric tradition of human rights or an ecocentric theory centered on the rights of nature itself.[167] He concluded that environmental rights could be pursued ecocentrically but that they are also deeply intertwined with human rights, given human interdependence with a healthy environment.[168] Pragmatically speaking, he recommended that advocating for them within the conventional framework of human rights would likely lead to greater legal recognition and more successful environmental enforcement.

At around the same time, Professor Dinah Shelton concluded that the human rights-based approach of guaranteeing citizens' rights to environmental quality would be most successful at earning recognition from the courts.[169] In later work exploring the problem of developing substantive U.S. environmental rights in the absence of clearer constitutional guidance,[170] she observed that procedural environmental rights, which ensure participation and/or access to information, have been much easier to create and more successfully enforced than substantive environmental rights to a specified quality of

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give the legal community too much power in possessing the final word in defining the value of nature. *See* Cynthia Giagnocavo & Howard Goldstein, *Law Reform or World Reform: The Problem of Environmental Rights*, 35 McGill L.J. 315, at 361, 362–64 (1990). Mauricio Guim and Michael Livermore worry that rights of nature initiatives have the potential to undermine the success of environmental protection and may require impossible balancing when nonhuman interests are compared. *See* Mauricio Guim & Michael A. Livermore, *Where Nature's Rights Go Wrong*, 107 Va. L. Rev. 1347, 1366 (2021) (stating that if Rights of Nature efforts are ineffective it could "dissipate energy and create skepticism about future environmental advocacy efforts.").

167. *See generally* Joseph L. Sax, *The Search for Environmental Rights*, 6 J. Land Use & Env't L. 93 (1990); *see also* Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 Stan J. Int'l 103 (1991). In Sax's seminal work advocating for use of the public trust to protect environmental interests, he suggested that the public trust doctrine should be used in place of environmental rights claims because environmental rights claims were overly ambitious and received inconsistent legal responses. Sax, *The Public Trust Doctrine in Natural Resource Law, supra* note 29, at 474. However, in his later 1990 article, *The Search for Environmental Rights,* Sax reflects on the evolution of the discourse since his original publication in 1970. *Supra* at 105. He notes that, during this time, significant efforts were made to formulate an "environmental right." *Id*. By 1990, Sax recognized the necessity for identifying the basis for an environmental right, prompting him to write this article delineating the basis for such a right. *See id*.

168. Joseph L. Sax, *The Search for Environmental Rights*, 6 J. Land Use & Env't L. 93, 101–02 (1990).

169. Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 Stan J. Int'l 103, 106 (1991).

170. Dinah Shelton, *Developing Substantive Environmental Rights*, 1 J. Hum. rts. & Env't 89 (2010).

environment.[171] Demonstrating the ongoing search for stronger foundations, her work suggests that in the absence of a substantive constitutional guarantee, a jurisdiction's statutory environmental laws may themselves establish substantive environmental rights.[172]

Professor James May reviewed domestic and international sources of law in search of potential sources of a substantive U.S. environmental right beyond the statutes considered by Shelton and the explicit constitutional provisions identified by Markell and Rechtschaffen.[173] He identified potential sources in express and implied constitutional recognition, recognition in domestic legislation, and recognition in international or regional law, expanding the potential range of legal foundations.[174] Yet he also identified major barriers to implementation of environmental rights on the basis of current law, including insufficient text, non-justiciable remedies, and pragmatic hurdles for effective enforcement.[175] Thus far, these barriers have continued to preclude the recognition of environmental rights at the federal level, though as reported in the final part of this article, they are increasingly being recognized the state level.[176]

Still other scholars declined to choose between a theory of environmental rights cleanly centered around humans or nature. In exploring the relationship between the public trust doctrine and environmental human rights in 2008, Professor David Takacs argued that the public trust doctrine asserts a normative principle in favor of preserving the environment, and that environmental human rights stand for the codification of this norm into positive law.[177] His recognition of the two sides of this coin sets the stage for this Article's recognition of the partnership between the reciprocal principles at the heart of the public trust doctrine—the sovereign obligation it creates for environmental protection and the human rights it recognizes to demand performance of that obligation.

B. Public Trust Principles in Climate Advocacy

Pursuing the insight, first articulated by Joseph Sax, that the public trust doctrine obligates environmental protection of trust resources by the state,[178]

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171. *Id.* at 90–92.
172. *Id.* at 104.
173. James R. May, *The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes*, 42 Cardozo L. Rev. 983, 986–87 (2021).
174. *Id.* at 990–1012 (2021).
175. *Id.* at 1013–15.
176. *See infra* Part IV.
177. David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. Env't. L.J. 711, 760 (2008). In later work favoring rights of nature principles, Takacs argued that both human and nonhuman needs must be balanced against one another to foster healthfully synergistic relationships within nature. David Takacs, *We Are the River*, 2021 U. Ill. L. Rev. 545, 552 (2021).
178. Sax, supra note 29, at 556–57.

many advocates have focused attention on the role that public trust principles should play in protecting the atmospheric commons from the greenhouse gas pollution most scientists believe is causing climate change. A number of scholars have argued that public trust principles could provide legal support for meaningful regulatory responses to climate change.[179] Professor Robin Craig has argued that it could support adaptive management-based regimes.[180] Professor David Caron has argued that it could support climate governance to forestall sea level rise.[181] Professor Jeff Thaler and Patrick Lyons suggest it could be used to promote offshore renewable energy as a means of combating climate change.[182] Professor Randall Abate frames the issue in terms of climate justice.[183] Most ambitiously, however, Professor Mary Wood has sought to apply the trust directly to atmospheric resources, reviving the Justinian concept of the public trust as encompassing not just the running waters and the sea, but also the air.[184]

179. *See generally* Wood, Nature's Trust, *supra* note 25, at 133–36; Rachel M. Pemberton & Michael C. Blumm, *Emerging Best Practices in International Atmospheric Trust Case Law*, 2022 Utah L. Rev. 941, 950–51 (2022) (addressing the shift to supporting atmospheric trust claims with state constitutional language); Patrick Parenteau, *The Atmosphere as a Global Public Good*, 16 U. St. Thomas J.L. & Pub. Pol'y 217, 220–21 (2023) (providing an overview of atmospheric trust litigation in the United States and abroad, arguing that an atmospheric trust could be a public good); 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, 34–36 (2019) (explaining the development of atmospheric trust litigation); Bradford C. Mank, *Does the Evolving Concept of Due Process in Obergefell Justify Judicial Regulation of Greenhouse Gases and Climate Change?:* Juliana v. United States, 52 U.C. Davis L. Rev. 855, 874-76 (2018) (providing an analysis of the Due Process claims in Juliana and Obergefell).

180. *See* Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 Vt. L. Rev. 781, 781–82 (2010).

181. *See* David D. Caron, *Time and the Public Trust Doctrine: Law's Knowledge of Climate Change*, 35 U. Haw. L. Rev 441, 442–43 (2013).

182. *See* Jeffrey Thaler & Patrick Lyons, *The Seas Are Changing: It's Time to Use Ocean-Based Renewable Energy, the Public Trust Doctrine and a Green Thumb to Protect Seas from Our Changing Climate*, 19 Ocean & Coastal L. J. 241, 276 (2014).

183. Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?*, *in* Climate Justice: Case Studies in Global and Regional Governance Challenges 543, 543–569 (Randall S. Abate, ed., 2016).

184. *See generally* Wood, Nature's Trust, *supra* note 25; Mary Christina Wood, *Atmospheric Trust Litigation*, *in* Climate Change: A Reader 1018, 1021 (W.H. Rodgers, Jr. et al., eds.) (2011); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 Env't. L. 43, 80–81 (2009) [hereinafter Wood, *Part I*] (criticizing the failure of modern environmental law to protect natural resources and proposing broader state responsibilities as trustee, especially to combat greenhouse gas pollution); Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 Env't. L. 91, 93, 98, 139 (2009) [hereinafter Wood, *Part II*] (discussing the pragmatic duties of governmental trustees, the interaction between the public trust and statutory law, and the ramifications of the trust for property rights in an effort to "reframe what is currently government's *discretion* to destroy our atmosphere and other resources into an *obligation* to

In her research and writings, Wood argues that we seek public trust protection for the atmospheric commons and the related climate system that enables life on earth as we have come to know it.[185] In urging use of the doctrine to protect this endangered commons, she argues that the state must curtail private appropriation of the atmosphere as a dumping ground for carbon pollution and other greenhouse gases.[186] Together with Professor Michael Blumm, she argues that the government's failure to prevent this unprecedented private appropriation is enabling short-sighted destruction of the most important public commons of all, leading to the global threats associated with rapid climate change.[187] Wood and Blumm emphasize that countless lives, communities, cultures, places, and species will be lost if we don't act quickly to better protect the shared atmospheric commons.[188]

This scholarship has helped ignite a worldwide movement to recognize the applicability of public trust principles, including both sovereign obligations and environmental rights, for preventing the destruction or expropriation of the air commons. In their earliest incarnation, these efforts in the United States became known as the atmospheric trust project.[189] Scholars have traced the deployment of atmospheric trust litigation across all fifty U.S. States.[190] The intuition behind the project—and the strong emotions it reflects—attracted significant public support, especially among young people.[191] Nevertheless, this public support has only rarely been matched by sought-after judicial outcomes.[192] This complex track record likely corresponds to the chaotic intersection between the strong public emotion that climate change inspires and the heavy doctrinal

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defend those resources") (emphases in original); Mary Christina Wood, *Tribal Trustees in Climate Crisis*, 2 Am. Indian L. J. 518, 518–19 (2014) (considering the federal trust obligation as the legal cornerstone of Indian law and suggesting how tribes can use their status as co-trustees with the federal government to combat climate change).

185. *See generally* Wood, Nature's Trust, *supra* note 25; Mary Christina Wood, *Atmospheric Trust Litigation*, *in* Climate Change: A Reader 1018, 1021 (W.H. Rodgers, Jr. et al., eds.) (2011), *supra* note 184; Wood, *Part I*, *supra* note 184; Wood, *Part II*, *supra* note 184; Wood, *Tribal Trustees in Climate Crisis*, *supra* note 184.

186. Wood, *Part II*, *supra* note 184, at 93–98; *see also* Michael C. Blumm & Lynn S. Schaffer, *The Federal Public Trust Doctrine: Misinterpreting Justice Kennedy and* Illinois Central Railroad, 45 Env't. L. 399 (2015) (arguing that the Public Trust Doctrine is an inherent limit on both state and federal sovereign authority, and that *Illinois Central* represents an application of the Tenth Amendment's reserved powers doctrine).

187. Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 Am. Univ. L. Rev. 1, 14–16, 43–44 (2017) [hereinafter Blumm & Wood]; Wood, *Part II*, *supra* note 184, at 97–98.

188. Blumm & Wood, *supra* note 187, at 44–46; *see generally* Wood, Nature's Trust, *supra* note 25.

189. *See* Ryan, *Historic Saga*, *supra* note 123, at 625–33.

190. *See generally* Christiansen, *supra* note 11.

191. *See infra* text accompanying notes 477–478 and 626–643 (discussing public support for and the atmospheric trust cases like *Juliana*, especially among young people).

192. *Id.*

lifts that such litigation has required, extending common law precedents beyond the established zone of waterways and toward unconfirmed limits on federal authority. Scholars have observed that ambitious public trust advocacy often proves more successful in the political sphere than the judicial sphere,[193] but both the remedies sought and the losses sustained in court have raised concerns among both proponents and opponents of stronger environmental governance.

C. The Scholarly Critics

As popular as they have been among many young advocates, atmospheric trust claims have generated substantial controversy among legal scholars and observers. Opponents worry about the departure of these claims from established common law norms, given that the American public trust doctrine is mostly applied to state action impacting water resources, rather than state or federal action involving air resources.[194] Some have worried about the practical impacts of the advocacy strategy and the workability of the requested remedy—which would make it the responsibility of the court to order and then oversee ambitious legislative and executive activity.[195] The judicial remedy raises serious concerns for others about the horizontal separation of powers and the limits of sovereign authority.[196] Still others worry about the implications of newer constitutional strategies,[197] such as the fundamental rights claim made in *Juliana v. United States*,[198] which seeks to reinvigorate judicial oversight of substantive due process

193. *See* Ryan et al., *Comprehensive Analysis, supra* note 8, at 2561–62. *See generally* Paul Rink, *Conceptualizing U.S. Strategic Climate Rights Litigation*, 49 Harv. Envtl. L. Rev. (forthcoming 2025) [hereinafter Strategic Climate Rights Litigation] (discussing how climate litigation that fails in court can still be a strategic tool of effective climate advocacy); Sam Bookman, *The Puzzling Persistence of Nature's Right,* Utah. L. Rev. (forthcoming 2025). (discussing how even litigation doomed to loss in court can provide a win for the underlying political movement).

194. *See, e.g.*, Lazarus, *supra* note 50, at 1152–54; *See also* Ryan, *Historic Saga, supra* note 123, at 617–22 (discussing related critiques of the public trust doctrine more generally).

195. Lazarus, *supra* note 50, at 1155–61.

196. *Id. See infra* Part IV (discussing these concerns).

197. *See, e.g.,* Dan Farber, *The Children's Crusade,* Legal Planet (Dec. 14, 2023), https://perma.cc/W8HH-MC3Y (arguing that the litigation has no chance of success because it "asks for major expansions of constitutional doctrines that the Court's majority has been downsizing: implied fundamental rights (slashed in the abortion case) and judicial protection for vulnerable groups (slashed in voting rights and affirmative action cases").

198. Juliana v. United States, No. 15-CV-01517-AA, 2023 WL 3750334, at *9 (D. Or. June 1, 2023) ("plaintiffs seek declaratory relief that 'the United States' national energy system that creates the harmful conditions described herein has violated and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law.").

claims,[199] and in its earliest incarnation, unenumerated fundamental rights.[200] At a time when judicial supremacy appears on the rise, some legitimately worry about further empowering courts at the expense of legislative and executive decision-making.[201]

Several critics have subjected the public trust doctrine itself to scholarly scrutiny. Foremost among them, Professor James L. Huffman is skeptical of how the public trust doctrine has developed in the United States[202] and argues that its roots in Roman law should not be regarded as a basis for modern environmental uses of the doctrine. He contends that Roman law did not guarantee an inalienable public right to the sea and seashore and that Roman law considered these resources "common to all" only because supply was so abundant and demand so low that there was not enough competition to be comparable to the modern day.[203] Moreover, he contends that Roman law made no distinction between the public and the personal status of the ruler of the Empire, further confusing the analogy.[204]

The gap between the enthusiasm of advocates like Blumm and Wood and critics like Huffman prompted another pair of professors, legal scholar J.B. Ruhl and historian Thomas McGinn to carefully review the Roman origins of the doctrine in an attempt to provide better clarity on the history. Acknowledging that

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199. Substantive due process refers to the principle that the Due Process Clause of the Fourteenth Amendment "applies to matters of substantive law as well as to matters of procedure. . . . [A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." Planned Parenthood v. Casey, 505 U.S. 833, 846–47 (1992). Additionally, substantive due process "forbids the government to infringe certain 'fundamental'" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 301–02 (1993). Relatedly, "[f]undamental liberty rights include both rights enumerated elsewhere in the Constitution and rights and liberties which are either (1) 'deeply rooted in this Nation's history and tradition' or (2) 'fundamental to our scheme of ordered liberty.'" Juliana v. United States, No. 6:15-CV-01517-AA, 2023 WL 9023339, at *16 (D. Or. Dec. 29, 2023) (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

200. A Ninth Amendment claim for an unenumerated fundamental right to climate stability was eventually dismissed from the *Juliana* litigation, although other elements of the claim were allowed to go forward. *Juliana*, No. 6:15-CV-01517-AA, at 20.

201. *Cf.* Erin Ryan, Sackett v. EPA *and the Regulatory, Property, and Human Rights-Based Strategies for Protecting American Waterways*, 74 Case W. L. Rev. 281 (2023) (critiquing judicial immodesty in rejecting fifty years of executive expertise and legislative acceptance in the reach of Clean Water Act regulation); Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. Pa. L. Rev. Online 24, 24, 42 (2023) (critiquing judicial aggrandizement by the Roberts Court); Josh Chafetz, *The New Judicial Power Grab*, 67 St. Louis U.L.J. 635 (2023) (providing examples of judicial aggrandizement by the Supreme Court).

202. J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does it Support an Atmospheric Trust?*, 47 Ecology L.Q. 117, 123 (2020).

203. James L. Huffman, *Speaking of Inconvenient Truths-A History of the Public Trust Doctrine*, 18 Duke Env't L. & Pol'y F. 1, 14–18 (2007).

204. *Id.*

Roman law is too complex to distill down to just the small portion that supports the modern Public Trust Doctrine, they conclude that while Huffman and the other critics are correct that the modern doctrine has developed substantially since its roots in ancient Rome, the Roman trust was a well-established legal concept that likely even predated the Roman common law, and has gone on to influence both the civil codes in Europe and the common law of England and its former colonies.[205] Based on their careful historical analysis, they conclude that the Roman doctrine and the legal norms from which it emerged do provide some support for modern environmental invocations of the doctrine.[206]

Professor Richard Lazarus has long critiqued the use of the public trust doctrine in environmental law, beginning with a criticism not long after the environmental use of the doctrine emerged in the Mono Lake case.[207] Decades later, he reiterated similar concerns in his critique of atmospheric trust advocacy, warning that "it is a serious mistake to take the public trust doctrine far beyond its historic moorings… [p]urporting to glean from the doctrine legal obligations enforceable by the judiciary could shortcut the democratic processes for lawmaking that are central to our nation's values and system of government."[208] Considering its specific application in the context of climate advocacy, he critiques the hurdles of justiciability and the problem of providing an appropriate judicial remedy, comparing atmospheric claims to the judicial relief sought in the pioneering civil rights decision in *Brown v. the Board of Education*:[209]

> The courts have struggled for more than sixty years to implement *Brown*'s holding with "all deliberate speed." But imagine what would be required for climate change in light of its extraordinary temporal and spatial scope of cause and effect, and the corresponding complexity of the technological, economic, and social judgments that must be made in determining how to address the climate issue. The courts would be asked to embrace a judicial role that assigns them the primary responsibility of deciding the appropriate levels of greenhouse gas emissions in the United States. They would be asked to set legal rules governing how those emissions should then be allocated and when different levels would need to be achieved. The courts would have to develop the equivalent of the President's proposed Clean Power Plan…. consider the sweep of activities that would be affected over both time and space. Consider, too, the fundamental social and economic policy judgments that courts would have to make. The courts do not

205. *See* J.B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does it Support an Atmospheric Trust?*, 47 Ecology L.Q. 117, 165 (2020).

206. *See id.* at 175–76 (2020).

207. Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 641–44 (1986).

208. Lazarus, *supra* note 50, at 1152.

209. 347 U.S. 483 (1954).

remotely possess the necessary competence or lawmaking legitimacy to answer those kinds of questions.[210]

Similarly, Professor Dan Farber argues that atmospheric trust claims have no chance of success, that they disparage federal regulators working hard to manage climate change from within environmental agencies, and that they might backfire by creating adverse precedent, "for instance, with a ruling that individuals never have standing based on harm from climate change."[211]

The thrust of these critiques is the concern that plaintiffs involving the public trust to respond to such pressing problems as disappearing natural resources and climate change are both unrealistic about their prospects of success and undermining the very environmental laws that stand a better chance at solving these problems. Frustrated attempts to cut through elaborate environmental laws and regulatory process crafted over many decades to get a court-ordered magical solution not only fail to anticipate why the courts will be unable to deliver on the vague directives they are being asked to consider, say the critics, they redirect scarce public resources and attention away from what environmental law can deliver, if we just let the process work.[212] Professor Dave Owen worries that advocates placing their faith in these broad and aspirational legal doctrines are acting under an almost delusional "shared hope that heroic judges will cut through all the complexity of bureaucratic decision-making and just do what . . . is right."[213] Assessing these attempts to wrest environmental decision-making away from the political process and into the courts, Professor Lazarus warns, "[t]he bottom line is that this is just not how we make laws of this nature under our constitutional framework."[214]

These critics herald instead the diligent work of devoted scientists and civil servants toiling away in state and federal agencies under the established authorities who make a meaningful differences every day—formulating total national ambient air quality standards and state renewable portfolio standards, while lawsuits brought under theories like the atmospheric trust "have yet to remove a single metric ton of carbon from the air."[215] Critics worry that atmospheric trust and environmental rights claims discredit the importance of these less mediagenic forms of environmental protection and may even misinform the public by suggesting that they are the only remaining hope for preventing

210. Lazarus, *supra* note 50, at 1156.

211. Farber, *The Children's Crusade*, *supra* note 197.

212. Lazarus, *supra* note 50, at 1152–57; Email from Dave Owen, Professor of Law, University of California--San Francisco Law School (Mar. 6, 2024) (on file with author).

213. Owen, *supra* note 212.

214. Lazarus, *supra* note 50, at 1157.

215. Oral communication from Professor Dave Owen to author (May 14, 2024). *Accord* Owen, *supra* note 212 (noting that "that there is no evidence that any case has led to any direct reduction in carbon emissions" in comparison to more conventional forms of environmental advocacy, which have accomplished a lot in the aggregate).

a climate catastrophe.[216] Professor Lazarus specifically calls out some of the more passionate proponents of atmospheric trust advocacy for denigrating the invaluable contributions of countless state and federal employees who toil without recognition within the less glamorous infrastructure of modern environmental regulation that continues to protect the public and the environment from very real threats of harm.[217] These are serious critiques that cannot be taken lightly, and this Article returns to them in Part IV.

D. The Reciprocal Nature of Public Trust Principles and Environmental Rights

Although scholars such as Joseph Sax and David Takacs considered the confluence of public trust principles and environmental rights, until now, the scholarly discourse has failed to consider the reciprocal relationship between them. For while the public trust doctrine focuses on sovereign obligations and environmental rights focus on legal entitlements, as discussed in Part I.D, each is the mirror image of the other—necessarily implying a duality that connects all of these efforts. Each example of the climate advocacy that follows asserts some kind of sovereign obligation to protect atmospheric resources for the benefit of some kind of rights-bearing public, which recursively, can hold the sovereign accountable for its obligation.

While the scholarly discourse has thus far elided the reciprocal nature of trust-rights claims, the literature has long appreciated the reciprocal nature of rights and duties. As Professor Wesley Newcomb Hohfeld first recognized in the private law context, legal rights and duties are mirror images of one another.[218] When someone holds a legal right, the party against whom they hold that right

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216. Oral communication from Professor Dave Owen to author (May 14, 2024). *Accord* Owen, *supra* note 212.

217. Lazarus, *supra* note 50, at 1157. ("[S]ome of the leading advocacy in favor of a judicially enforceable atmospheric trust doctrine has embraced a polarizing thesis that will make the necessary law reform even harder to accomplish. Such advocacy couples positive promotion of the atmospheric trust doctrine with a condemnation of existing environmental law, extending even to the good faith efforts of public servants in federal, state, and local governments who have sought to administer those laws. The gist of the argument is that courts must embrace and enforce an atmospheric public trust doctrine because of the failings of the legislative and executive branches. The rhetoric is surprisingly harsh. Environmental law becomes merely an "illusion" that purports to protect the environment but instead only perpetuates harm.").

218. Hohfeld, *supra* note 2, at 36–50. This Article focuses exclusively on the rights and duties aspect of Hohfeld's analysis that is most pertinent in the public law setting, setting aside Hohfeld's parallel consideration of privileges and immunities that has more purchase in the private law context he was originally writing for. Considering Hohfeld's theory in its entirety in this context would be an interesting thought experiment, but it would distract from the focus of this analysis, which is to discuss the reciprocal nature of environmental rights and sovereign obligations. I do not attempt to use Hohfeld's framework to construct a full portrait of the parties' legal relationships in every respect, including both the positive correlations

has a legal duty to respect it, and the opposite is equally true. Hohfeld's central insight into the reciprocal nature of rights and applies in the public law context as well. When someone holds a public law right, the state is obligated to respect that right, whether it frames a positive entitlement (to a jury trial)[219] or a negative entitlement (to freedom of religion).[220] And by the same token, if the state has a legal obligation (to guarantee a republican form of government),[221] then the beneficiaries of that obligation, the citizens, have a legally cognizable right (to enjoy that republic).[222]

The claims for environmental rights reviewed here showcase the same reciprocal nature, generally partnering individual rights with state obligations.[223] If there is a sovereign duty (framed, for example, as a public trust obligation), then the public is impliedly empowered with the right to hold the state accountable for performance of that duty. If there is an environmental right held by members of the public, then the state is legally obligated to honor it. In the claims and constitutional provisions reviewed here, sometimes both the rights and obligations are acknowledged, while in other cases, only one side of the duality is specified—but they all represent different faces of the same single coin, stemming from the same fundamental principle of sovereign responsibility to protect public trust commons.

The Hohfeldian rights-duty model was conceived in the private law context of property, tort, and contract, but it is fitting to extend to the public trust context, with doctrinal roots in the property fields of public property and trust obligations. While the Hohfeldian model applies cleanly to contexts in which there is a single party with a right and a single party with a duty, the public law context of environmental rights offers the additional parameter of common rights and reciprocal duties held by members of the public against (and reciprocally, toward) one another. There are thus environmental rights attached to the modern public trust doctrine (in states that have recognized an environmental dimension to the public trust doctrine),[224] and environmental rights that emerge from independent sources (for example, state constitutional environmental rights amendments, as discussed further below). Yet whatever its source, if the environmental right is coupled with an implied sovereign

(rights and duties) and negative correlations (privileges and immunities) that exist between private parties but apply less cleanly between private parties and the government.

219. U.S. Const. amend. VI.

220. U.S. Const. amend. I.

221. U.S. Const. art. IV, § 4 (the "Guarantee Clause").

222. *Id.*

223. *See supra* Part I.D.

224. *See* Ryan et al., *Comprehensive Analysis*, *supra* note 8, at 2461–76 (reviewing the different planes of the evolution of the doctrine in different states, including the consideration of environmental values).

obligation of enforcement, it can be understood as an expression of the core public trust principles of public rights and responsibilities.[225]

The implication for assessing current climate advocacy is that what initially appears to be two independent models have much more in common than observers have thus far recognized. Sharing common principles and features, they each offer the same potential advantages of enabling citizens multiple ports of entry to the policy making process, and amplifying citizen advocacy in contexts where the public choice dynamics of regulatory process may shut them out in comparison to repeat players with stronger influence on policymakers and regulatory agencies. They both provide a focal point for citizens to build constituencies and signal the importance of the issue to then in hope of influencing future policymaking where they may have fewer specifics to offer.

But the strategies also have the same disadvantages, in many respects, for the same reasons. They are both vulnerable to critiques of vagueness and unenforceability. While the strategies may have rhetorical value as mechanisms for enhancing political speech, they can be put to no useful ends, because—even setting aside the possibility Professor Farber imagines of outright failure or negative precedent—the specific content of the rights and obligations at issue remain uncertain. After all, what exactly does it mean to have an individual right to a healthy environment, or a sovereign obligation to protect the atmosphere? What specific entitlements are conferred on the individual by a right to environmental health? What specific actions must the state take to defend it?

Of course, the litigants bringing these lawsuits may not know the specific action they want taken—they just want their leaders to understand how very badly they want different action from that taken to this point (and as Professor Lazarus notes, even if they did request specific relief, as the early atmospheric trust plaintiffs did, the courts will likely decline to deliver it).[226] New environmental scholarship has considered how losing litigation strategies under rights of nature theories and the atmospheric trust project exemplify a strategy of "winning through losing," or procuring sought after political, identity-based, or movement building results even when they are not successful in procuring the sought-after judicial remedy,[227] though critics worry about the demoralization costs of that strategy.[228] Others have specifically discussed the value of strategic

225. An interesting question left for another day is whether there can be sovereign obligations that are not paired with public rights of enforcement. Because the public trust doctrine does not fit that description, I leave the question idle for now, but there are certainly examples of constitutional texts considered non-self-executing.

226. Lazarus, *supra* note 50, at 1156.

227. Douglas NeJaime, *Winning Through Losing*, 96 Iowa L. Rev. 941, 941 (2011); Sam Bookman, *The Puzzling Persistence of Nature's Rights,* Utah L. Rev. (forthcoming 2025) (applying NeJaime's thesis to the rights of nature movement); Ryan et al., *Comprehensive Analysis*, note 8, at 2560–63.

228. Rink, *Climate Rights Strategic Litigation*, *supra* note 193, at text accompanying note 304 ("Another risk is that courtroom losses for climate rights strategic litigation could have

climate litigation that fails in court, when it helps to galvanize social movements that then deliver results through the political process.[229] Which brings us to a review, in the part that follows, of how climate trust-rights claims have actually progressed.

III. Trust-Rights Advocacy in Action: Atmospheric Trust and Climate Rights Litigation

Having revealed the normative duality of atmospheric trust and climate rights advocacy as based on reciprocal trust-rights principles, the Article makes its positive contribution in reporting on the use of these strategies in domestic and international environmental litigation. Rising to the challenge framed by the scholarly discourse, grassroots advocates have attempted to leverage atmospheric trust and climate rights theories beyond the ivory tower in a global campaign of independent and loosely coordinated environmental litigation. This Part reviews the mixed results of these campaigns, which so far have proved more successful internationally than domestically, more successful administratively than judicially, and perhaps more successfully when framed as rights than as duties, notwithstanding their fundamental commonality. Most claims have been expressly framed as grounded either in public trust principles or in fundamental rights, but having established them as flowing from the same core principles in either case, this analysis reviews them together in sequence geographically and over time.

Atmospheric trust claims and their environmental rights analogs have been brought in countries around the world,[230] including not only North and South

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dampening indirect impacts on climate action more generally by disheartening climate activists. Judicial rulings that deride plaintiffs for contributing to their own harm or that sanction fossil fuel companies as providing a service to society could prove to be particularly demoralizing.").

229. *Id.*; Ryan et al., *Comprehensive Analysis*, *supra* note 8, at 2561–62.

230. *See Climate Change Litigation Databases*, Sabin Center for Climate Change Law, https://perma.cc/J37S-6WDU.

America,[231] but also Africa,[232] Asia,[233] Europe,[234] and Australia.[235] As discussed below, claims within the European Union have proceeded along clearer pathways of environmental rights, drawing on the more favorable platforms available to plaintiffs in European law. After the Dutch plaintiffs in *Urgenda v. Netherlands* convinced their highest court that European law compels sovereign climate governance obligations to protect citizens' fundamental rights,[236] plaintiffs around the world were inspired to frame climate-related claims as vindicating fundamental rights to environmental health and/or stability, or even basic human rights to life, privacy, and dignity.[237] The first section of this Part focuses on international climate claims, many of which, like *Urgenda*, have met with marked success in court.

The second section focuses on climate claims in the United States, where success has been more elusive. Inspired by Professor Mary Wood's vision of a trust for nature, and lacking comparable legal support for the environmental rights recognized in other countries, American advocates launched a loosely coordinated campaign of climate litigation premised on the idea of an atmospheric trust.[238] In these lawsuits, plaintiffs have made different versions of the argument that the atmospheric commons is a congestible public resource that is being expropriated for the benefit of a select few, while the government has a duty to protect it for everyone.

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231. Future Generations v. Ministry of Env't, (2018)11001-22-03-000-2018-00319-01, at 45 (Colom.).
232. Mbabazi v. Att'y Gen. and Nat'l Env't Mgmt. Auth., (2015) Civil Suit No. 283, High Court of Uganda Holden at Kampala, Complaint, at 4 (Uganda) (decision pending) (the plaintiffs allege that "the government has failed in its duty to uphold the citizens [sic] right to a clean and healthy environment and neglected its duty as a public trustee"), https://perma.cc/H6W4-9UJE.
233. Shrestha v. Off. of the Prime Minister et al., (2018) 074-WO-0283 at 3 (Nepal) (ordering the government to enact comprehensive climate regulation pursuant to constitutional obligations to protect the environment and citizens' rights to a clean and health environment and human dignity), https://perma.cc/X9SE-KZSH.
234. Urgenda v. Netherlands, [2015] HAZA C/09/00456689 (Neth.) at 32, https://perma.cc/V7C5-VRAV (unofficial English translation) ("This case is essentially about the question whether the State has a legal obligation towards Urgenda to place further limits on greenhouse gas emissions – particularly CO2 emissions – in addition to those arising from the plans of the Dutch government, acting on behalf of the State.").
235. *See generally* Pabai Pabai and Guy Kabai v Australia, VID622, 2021.
236. Urgenda v. Netherlands, [2015] HAZA C/09/00456689 (Neth.) at 41, https://perma.cc/V7C5-VRAV (unofficial English translation) (interpreting European Convention on Human Rights arts. 2, 8, EU, Sept. 3, 1953, C.E.T.S. No. 213).
237. *See infra* Part III.A, discussing Urgenda and its progeny in detail.
238. *See, e.g.,* Erin Ryan, Mary Wood, Jim Huffman, Irma Russel, & Rick Frank, *Juliana v. United States: Debating the Fundamentals of the Fundamental Right to a Sustainable Environment*, 46 Fla. St. U. L. Rev. Online *1 (2018) [hereinafter Ryan et al., *Debating Juliana*] (analyzing the unfolding atmospheric trust litigation in the context of *Juliana v. United States*); Blumm & Wood, *supra* note 187 (discussing *Juliana v. United States* and all other atmospheric trust litigation and administrative actions); Abate, *supra* note 183.

Americans relying explicitly on the public trust principles contend that the government holds atmospheric resources in trust for the people—just as it holds navigable waterways in trust—and that governments at all levels are failing their sovereign obligations to protect the atmosphere from the greenhouse gas pollution that will destroy climatic stability.[239] They claim that by failing to meaningfully regulate greenhouse gas production, governments are effectively allowing private polluters to appropriate the public air commons as a private dumping ground, and at the expense of present and future generations' interests in a livable world.[240] Implicit in this argument is the flip-side of the core public trust principle: corresponding to the government's sovereign obligation to protect the atmospheric commons for the public is the public's fundamental right to this kind of environmental protection by the government.

Yet most of these efforts have not succeeded, at least not as initially conceived. Some have accomplished greater success in administrative spheres, and some have retooled their strategies to shift toward constitutional claims, at both the state and federal levels. The partnering of public trust and environmental rights assertions has evolved over the course of the American atmospheric trust project, from common law into statutory and constitutional premises, shifting explicit focus to both sides of the reciprocal rights-duties coin.

This Part reports on the climate trust-rights litigation movement and considers both the promise and problems of these various legal campaigns. It begins with *Urgenda Foundation v. Netherlands*, the most famous example of successful trust-rights climate litigation, and other examples of international trust-rights claims. Then, after briefly sketching the trajectory of the atmospheric trust movement in the United States, this Part turns to the most famous domestic example, *Juliana v. United States*, recounting the decade-long efforts by its youth plaintiffs to have their claim heard, and imagining how a state plaintiff might succeed where the *Juliana* plaintiffs could not. Finally, it reviews the shift toward state constitutional advocacy and more narrowly tailored claims.

A. Urgenda Foundation and International Climate Claims

The first successful climate litigation resting on environmental rights and implied public trust principles was brought in the Netherlands in 2015—a case eerily simultaneously to *Juliana v. United States*, though it was resolved much sooner.[241] In *Urgenda Foundation v. Netherlands*, the plaintiffs argued that the government's sovereign obligation to protect the environment required it to take immediate steps to reduce greenhouse gas emissions by 25% compared

239. Juliana v. United States, 217 F. Supp. 3d 1224, 1253 (D. Or. 2016).

240. *See id.* at 1233, 1245; *see also* Ryan, *From Mono Lake to the Atmospheric Trust*, *supra* note 110, at 61.

241. Urgenda v. Netherlands, [2015] HAZA C/09/00456689 (Neth.), https://perma.cc/V7C5-VRAV (unofficial English translation).

to 1990 levels.[242] The plaintiffs maintained that, based on the best available scientific models, the state had set insufficient targets to reduce greenhouse gas reductions.[243] They argued that the state, in failing to reduce emissions at a sufficient pace, was violating Articles 2 and 8 of the European Convention on Human Rights (ECHR), which protect the right to life and the right to respect for private and family life.[244] The defendant argued that the government had no legal obligation to achieve more aggressive reduction targets and that its current policy was not in violation of the ECHR or any other applicable law.[245]

In a resounding legal victory for the plaintiffs' argument, the court held that the state had an obligation to do its part to protect the atmospheric commons. It concluded that "given the high risk of hazardous climate change, the State has a serious duty of care to take measures to prevent it,"[246] and that the government had "acted negligently and therefore unlawfully" in implementing its low emissions reduction standards.[247] The court reasoned that "the possibility of damages . . . [impacting] current and future generations of Dutch nationals[] is so great and concrete that given its duty of care, the State must make an adequate contribution, greater than its current contribution, to prevent hazardous climate change,"[248] and ordered a 25% reduction in current Dutch annual greenhouse gas emissions compared to 1990 levels.[249]

While *Urgenda* did not explicitly raise the public trust doctrine, the case was nevertheless premised on core public trust principles in its affirmation of fundamental rights to invoke sovereign responsibility for the protection of a shared natural resource commons for the benefit of the public. The court interpreted the fundamental rights to life and to respect for private and family life under European Law to include climate stability, leaving the state obligated to protect the atmospheric commons for the benefit of the public. Like every assertion of the core public trust principle in environmental advocacy, the case

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242. *Id.* at 31–32 (interpreting European Convention on Human Rights arts. 2, 8, EU, Sept. 3, 1953, C.E.T.S. No. 213) ("This duty of care principally means that a reduction of 25% to 40%, compared to 1990, should be realised [sic] in the Netherlands by 2020.").

243. *Id*. at 41.

244. *Id.* ("Urgenda argues that under Articles 2 and 8 of the ECHR, the State has the positive obligation to take protective measures. Urgenda also claims that the State is acting unlawfully because, as a consequence of insufficient mitigation, it (more than proportionately) endangers the living climate (and thereby also the health) of man and the environment, thereby breaching its duty of care. Urgenda asserts that in doing so the State is acting unlawfully towards Urgenda"). *See also* Spoelman, *infra* note 251, at 754.

245. Urgenda v. Netherlands, [2015] HAZA C/09/00456689 (Neth.) at 32, https://perma.cc/V7C5-VRAV (unofficial English translation).

246. *Id.* at 48.

247. *Id.* at 54.

248. *Id.* at 53.

249. *Id.* at 57 (ordering the government "to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990").

partnered an (implied) sovereign obligation with an (express) environmental right, enforceable by the citizens in court. At every level of litigation, as the case moved from the Hague District Court to the Court of Appeals and then finally on to the Dutch Supreme Court, all three bodies found for the plaintiffs—upholding both the environmental right and the sovereign obligation.[250] It was the first and highest profile example of successful trust-rights climate advocacy, and climate activists worldwide took note.

For the first time anywhere in the world, *Urgenda* established as a legal matter that a government body bears a cognizable duty to prevent climate change, and that failing to take such action represents a violation of human environmental rights.[251] The decision prompted the Dutch government to adopt thirty of the plaintiffs' proposals from their "54 Climate Solutions Plan," drafted by Urgenda and a coalition of 800 Dutch organizations committed to reducing greenhouse gas emissions.[252] Adopted with substantial public support, the plan allocates billions of euros to fund renewable energy development, reduces the maximum speed on highways during daylight hours, reduces livestock numbers, and mandates more sustainable forest management practices.[253] In a press release, the UN High Commissioner for Human Rights noted that, because *Urgenda* relied upon the European Convention on Human Rights, the decision may implicate the activities of other European governments as well.[254]

While the decision does not have direct legal implications for the United States or other countries outside the European Union, *Urgenda* bolstered the international movement toward advancing public trust principles in climate governance more generally. After *Urgenda*, litigants across the globe brought related claims against their governments for failing to protect the

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250. *See Urgenda Foundation v. The State of the Netherlands*, Env't L. All. Worldwide, https://perma.cc/7UGP-2RQK.

251. Naomi Spoelman, *Urgenda: A How-To Guide for Enforcing Greenhouse Gas Emission Targets by Protecting Human Rights*, 47 Ecology L.Q. 751, 751 (2020); *see also* Blumm & Wood, *supra* note 187, at 80–81 ("[T]he case was the first time a court intervened to pronounce the government's remedial efforts inadequate in light of the best available science.").

252. Johnathan Watts, *Dutch Officials Reveal Measures to Cut Emissions After Court Ruling*, The Guardian (Apr. 24, 2020), https://perma.cc/C729-PZFH.

253. *54 Actions for 17 Mtons of CO2 Reduction*, Urgenda, https://perma.cc/S8TY-38Q9.

254. *See Bachelet Welcomes Top Court's Landmark Decision to Protect Human Rights From Climate Change*, U.N. Press Release (Dec. 20, 2019), https://perma.cc/A45D-YD6W; *see also* Spoelman, *supra* note 251, at 756–57 (noting that the *Urgenda* decision is only enforceable in the Netherlands but provides a roadmap for litigators in other European countries).

environment—and climate stability in particular[255]—in other nations including Nepal,[256] Germany,[257] France,[258] India,[259] Switzerland,[260] Canada,[261] and Mexico.[262]

1. Nepal

In Nepal, for example, environmental plaintiffs successfully invoked public trust principles directly in the national constitution in a suit for climate action that ultimately produced comprehensive legal reform.[263] In 2017, the plaintiffs sought judicial relief to compel the government to enact climate mitigation and adaptation laws, claiming that persistent inaction violated constitutional protections for citizens' rights to a clean and healthy environment[264] and to live with dignity.[265] They argued that existing environmental laws were inadequate because they failed to address the specific challenges of climate change, resulting in grave harms to both the people and ecosystems of the nation.[266] In late December of 2018, the Court agreed that existing laws did not address the dire need for climate related regulations.[267] It concluded that action was required to satisfy the nation's constitutional obligations to protect its citizens' rights to a dignified life and a clean and healthy environment, its constitutional obligations to protect the environment more generally,[268] and as well, the

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255. *Cf.* Spoelman, *supra* note 251, at 757. *See also* the discussion that follows in this section.
256. Shrestha v. Off. of the Prime Minister et al., (2018) 074-WO-0283 (Nepal), https://perma.cc/X9SE-KZSH. *See infra* notes 263–272 (discussing the claim in more detail).
257. BVerfG, 1 BvR 2656/18 [Order of 24 March], https://perma.cc/B6F4-HMAC (official English Translation).
258. Tribunaux Administratif [Administrative Court], Oct. 14, 2021, Nos. 1904967, 1904968, 1904972, 1904976/4-1, (Fr.) https://perma.cc/G9K3-SJYQ (unofficial English translation of *Notre Affaire à Tous v. France*).
259. Pandey v. India, [2019] No. 187/2017, National Green Tribunal at Principal Bench, New Delhi, Order, at 2 (India).
260. Verein KlimaSeniorinnen Schweiz v. Switzerland, [2024] 53600/20 Eur. Ct. H.R.; Isabella Kwai, *Heat Waves are Killing Older Women. Are They also Violating Their Rights?,* N.Y. Times (Aug. 7, 2023), https://perma.cc/2VUT-4TYN.
261. Complaint at 14, La Rose v. Her Majesty the Queen, [2019] 2020 FC 1008 (Can.). *See also infra* notes 298–302.
262. *Jovenes v. Gobierno de Mexico*, Our Child's. Tr., https://perma.cc/ZJF6-WPR8 reporting on the case). *See also infra* notes 303–305.
263. Shrestha v. Off. of the Prime Minister et al., [2018] 074-WO-0283 (Nepal), https://perma.cc/X9SE-KZSH.
264. Const. of Nepal, art. 30 ("Each person shall have the right to live in a healthy and clean environment.").
265. *Id.* at art. 16 ("Each person shall have the right to live with dignity.").
266. Shrestha v. Off. of the Prime Minister et al., [2018] 074-WO-0283 (Nepal), https://perma.cc/X9SE-KZSH.
267. *Id.*
268. Const. of Nepal, art. 51(g).

nation's commitments to multilateral climate action under the U.N. Framework Convention on Climate Change and the Paris Agreement.[269]

Using a writ of mandamus, the Court ordered the government to enact and implement a new law to promote climate mitigation and adaptation; reduce fossil fuel consumption and increase low-carbon technology; and develop methods for compensating those harmed by environmental degradation, among other provisions.[270] The court further ordered the government to use available sources of authority to implement existing climate policy in the interim.[271] Within the year, the government complied with the court order by enacting the Environment Protection Act of 2019 and the Forest Act of 2019.[272]

2. Germany

In 2020, in Germany, a group of youth plaintiffs filed a legal challenge to their nation's federal climate law, arguing that its target of reducing GHGs from 1990 levels by 65% through 2030 was insufficient and therefore violated a series of human rights protected by German constitutional law.[273] The youth plaintiffs alleged conflicts with their constitutional right to "a future consistent with human dignity," as protected by Article 1, their fundamental rights to life and physical integrity protected by Article 2, and Article 20(a)'s requirement that the overall political process "protect the natural foundations of life in responsibility for future generations."[274] As in *Urgenda*, this case did not raise the public trust doctrine directly, but the constitutional claims mirror public trust principles in establishing sovereign responsibility for protecting human rights and related environmental "foundations for life"—in other words, a stable climate commons—for present and future generations. Like the Dutch case, the German case partners an implied sovereign obligation with an express environmental right, because the flip side of the citizen's environmental right is the state's duty to respect it.

On April 29, 2021, the Federal Constitutional Court agreed that parts of the Act violated the plaintiffs' fundamental rights by requiring emission cuts

269. Shrestha v. Off. of the Prime Minister et al., [2018] 074-WO-0283 (Nepal), https://perma.cc/X9SE-KZSH.

270. *Id.* at 13–14.

271. *Id.* at 6 (The court directed the government "[t]o actively implement and renounce the sluggish attitude and plans and policies outlined in National Adaptation Program of Action 2010, Climate Change policy, 2011, National Framework for local Adaptation Plan for Action 2011 in all local units, municipalities, wards and districts of all 7 provinces through forming local committees.").

272. Summary, *Shrestha v. Office of the Prime Minister et al.*, CLIMATE CASE CHART, https://perma.cc/X9SE-KZSH. Both statutes are https://perma.cc/X9SE-KZSH.

273. BVerfG, 1 BvR 2656/18 at paras. 38, 193 [Order of 24 March], https://perma.cc/B6F4-HMAC (official English Translation). The federal climate law is the "Bundesklimaschutzgesetz" or "KSG", and the German Constitution is called the Basic Law, or "GG."

274. *Id.*

only through 2030, contrary to constitutional requirements that "environmental burdens [be] spread out between different generations."[275] Recognizing intergenerational equity concerns in this context for the first time, the Court invalidated those parts of the law, explaining that "[a]s intertemporal guarantees of freedom, fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed by Art. 20a GG being unilaterally offloaded on to the future." [276] Holding that the legislature had failed to proportionally distribute the burden between current and future generations, the Court warned that "one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom."[277] As significant as this decision appears, later German adjudicators have been reluctant to extend similar reasoning to statutes that lack similarly specific climate goals,[278] highlighting judicial reluctance to order specific acts of environmental governance without clearer constitutional authorization—a jurisprudential feature shared with atmospheric trust litigation in the United States.[279]

3. France

Meanwhile, in France in 2018, several nonprofits sued the French government for its failure to act appropriately in response to the threats of climate change in a claim that mixed domestic legal obligations and the same European obligations that the *Urgenda* plaintiffs invoked.[280] The French plaintiffs sought an injunction requiring the state to remedy its inadequate climate response on the basis of several specific duties to act.[281] These included climate governance obligations of the state under the French Environmental

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275. *Id.* at 193.
276. *Id.* at 183.
277. *Id.* at 192.
278. *See Emma Johanna Kiehm, et al. v. State of Brandenburg*, CLIMATE CASE CHART, https://perma.cc/5U7S-TKJP (noting that in later climate cases, plaintiffs lacked standing when the court did not find the clearly violated climate goals or proscribed generational burden shifting). *See also* BVerfG, 1 BvR 1565/21 Jan. 18, 2022, https://perma.cc/7XVM-BU94. *See also infra* Part III.B, Part III.D (describing justiciability hurdles in the United States).
279. *See infra* Part III.B, Part III.D.
280. Tribunal Administratif [Administrative Court], Feb. 3, 2021, Nos. 1904967, 1904968, 1904972, 1904976/4–1, (Fr.) https://perma.cc/Z2AW-9539 (unofficial English translation of *Notre Affaire à Tous v. France*).
281. Tribunaux Administratif [Administrative Court], Oct. 14, 2021, Nos. 1904967, 1904968, 1904972, 1904976/4-1, at 27, (Fr.) https://perma.cc/G9K3-SJYQ ("[Plaintiffs seek] to order the Prime Minister and the competent ministers to take the necessary measures to repair the ecological damage[] linked to the surplus greenhouse gas emissions resulting from the State's failure to meet the first carbon budget and to stop the damage worsening and, in particular and as rapidly as possible, to take all useful steps to make it possible to meet the objectives that France set for itself in terms of the reduction of GHG emissions").

Charter,[282] characterized by the court as having constitutional significance,[283] and following in the footsteps of *Urgenda*, the European Convention "right to life" and "right to respect for private and family life."[284] They argued that France must implement a comprehensive policy framework and efficient practical measures to fight climate change.[285] Notably, they also requested compensation, both for ecological harm, and also for the intangible "moral harm" they themselves suffered as a result of state inaction, requesting "the symbolic sum of 1 euro."[286]

In early 2021, the Administrative Court of Paris concluded that state inaction on climate change had indeed caused ecological damage and awarded the plaintiffs the one euro requested in damages.[287] Interpreting Article 5 of the French Environmental Charter, the court reaffirmed that the government has an affirmative obligation to act "when the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment."[288] Notably, the Environmental Charter

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282. *Id.* ("Finally, under the terms of Article 3 of the Environment Charter, which has constitutional value: 'Every person must, under the conditions defined by law, prevent damage to the environment or, failing that, limit the consequences thereof.'").

283. *Id.*

284. *Id.* at 2 ("[Plaintiffs argue that] the State has a legal obligation, in accordance with the principles of the right to life and the right to the protection of one's privacy and family life, as provided in article 2 and 8 of the European Convention on Human Rights, which presupposes the protection of the environment and the fight against climate change, the consequences of which jeopardize nearly 9.75 million people in France.").

285. *Id.* at 3 ("[Plaintiffs argue that] the State is also bound by specific obligations related to its fight against climate change, as enshrined in international conventions, the laws of the European Union, and domestic law, each pertaining to the mitigation of greenhouse gas emissions and energy consumption, the development of renewable energies, the adoption of sector-specific measures, and the implementation of evaluation and monitoring measures").

286. *Id.* at 17 ("[The plaintiff asked the court] 1) to order the State to pay him the symbolic sum of one Euro as compensation for the moral prejudice suffered, 2) to order the State to pay him the symbolic sum of one Euro for the ecological damage suffered, 3) to enjoin the Prime Minister and the competent ministers to put an end to all State failures to fulfill its general and specific obligations in the fight against climate change or to mitigate its effects, to put an end to the ecological damage, and in particular, within the shortest possible time to: [adopt the specific measures requested]."); *Id.* at 32 (holding that the French Environment Code allows plaintiffs to seek damages for "moral harm, caused by the harmful consequences of a wrongful failure by the administrative authority to demonstrate the existence and certain harm resulting, for that [plaintiff], from the fault committed by the State."); *see generally*, Vernon V. Palmer, *Moral Damages: The French Awakening in the Nineteenth Century*, 36 Tulane Eur. & Civ. L. Forum 45, (2021) (discussing the development of "moral damages" as a French legal concept, which is similar to emotional damages in the United States and is used to demonstrate that the defendant has committed wrongful actions).

287. Tribunal Administratif [Administrative Court], Feb. 3, 2021, Nos. 1904967, 1904968, 1904972, 1904976/4–1, (Fr.) https://perma.cc/Z2AW-9539 (unofficial English translation of *Notre Affaire à Tous v. France*).

288. The Charter for the Environment (France), https://perma.cc/Q6T9-ZTWX.

places environmental obligations not only on the state, but also "every person" to "prevent damage to the environment, or failing that, limit the consequences thereof."[289] The French statement of environmental rights expands public trust principles from obligating the state as an entity to obligating the broader community of citizens who, in the aggregate, comprise the state. In so doing, the statement provides a potential stepping-stone to the competing rights of nature frameworks currently emerging, which locate the beneficiary of environmental rights not in the citizens at all but in nature directly.[290]

Nevertheless, the court in Paris deferred its decision on whether an injunction was warranted—instead giving the government two months to disclose what steps it was taking to meet its climate targets.[291] The decision affirmed that the government could be held responsible for failing to meet its own climate and carbon budget goals under both EU and national law,[292] but it rejected the claim that the state could be forced to meet more specific targets or that these measures could be directly linked to clear ecological damage.[293] The court further declined the plaintiff's request for compensatory damages for ecological harm, concluding they had failed to show that the government would be unable to repair the alleged harm.[294]

The French case highlights how litigants continue to experiment with all available legal tools to push for climate governance, including claims for injunctive and damages relief premised on public trust principles and environmental rights. But it also highlights the obstacles these claims face in courts that may affirm the interpretive principle but lack the tools or mandate to command the governance relief sought. As shown in Parts III.B and D, atmospheric trust claims in the United States have failed to overcome related jurisprudential barriers of justiciability and redressability, albeit in suits premised on far less secure legal grounds than the French Environmental Charter.

289. Tribunal Administratif [Administrative Court], Feb. 3, 2021, Nos. 1904967, 1904968, 1904972, 1904976/4-, at 27 (Fr.) https://perma.cc/Z2AW-9539 (unofficial English translation of *Notre Affaire à Tous v. France*).

290. *See* Ryan et al., *Comprehensive Analysis*, *supra* note 8, at 2500–38.

291. Tribunal Administratif [Administrative Court], Feb. 3, 2021, Nos. 1904967, 1904968, 1904972, 1904976/4-, at 27 (Fr.) https://perma.cc/Z2AW-9539 (unofficial English translation of *Notre Affaire à Tous v. France*). After the two-month period, the court upheld the steps the French government put in place following the first case. The court urged the government to "take all useful measures to repair the ecological damage and prevent it worsening for the share of greenhouse gas emissions not made good compared to the first carbon budget," by making changes in several sectors such as agriculture, transportation, and energy. Tribunal Administratif [Administrative Court], Oct. 14, 2021, Nos. 1904967, 1904968, 1904972, 1904976/4-1 at 44–45, (Fr.) https://perma.cc/G9K3-SJYQ_(unofficial English translation of *Notre Affaire à Tous v. France*)

292. *Id*. at 31–33.

293. *Id*.

294. *Id*. at 31.

4. *India and Switzerland*

Similarly, in India in 2019, a court summarily dismissed an atmospheric trust claim premised on international climate obligations on the grounds that "[t]here is no reason to presume that Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances."[295] And after a group of older Swiss women succeeded in a 2024 lawsuit claiming that their government's failure to curb emissions is violating the rights of older women, who are particularly physically vulnerable to the increased heat associated with climate change[296]—the Swiss Parliament later intervened to negate the court's decision.[297] As discussed further in Part IV, separation-of-powers concerns over the judicial capacity to redress violations of public trust principles in the climate context pose an enduring challenge of the legal strategy.

5. *Canada and Mexico*

In the Americas, climate trust-rights claims have faced even more barriers. Immediately following the Dutch and Nepali suits, a group of Canadian youth plaintiffs sued the federal government in 2019, alleging (among other claims) that it had failed to produce plans that would adequately fulfill Canada's "constitutional obligation to protect public trust resources" from the dangers of greenhouse gas emissions.[298] Matching their appeal to express sovereign obligations and implied environmental rights with an overt appeal to environmental rights with implied sovereign obligations, the plaintiffs also invoked rights to life and equal protection set forth in the Canadian Charter of Rights and Freedoms (similar to the American Bill of Rights).[299] They

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295. *Pandey v. India*, [2019] No. 187/2017, National Green Tribunal at Principal Bench, New Delhi, Order, at 2 (India), https://perma.cc/XHD2-Z9LR (order dismissing the complaint on the grounds that "[t]here is no reason to presume that Paris Agreement and other international protocols are not reflected in the policies of the Government of India or are not taken into consideration in granting environment clearances").

296. Verein KlimaSeniorinnen Schweiz v. Switzerland, [2024] 53600/20 Eur. Ct. H.R.; Isabella Kwai, *Heat Waves are Killing Older Women. Are they Also Violating their Rights?,* N.Y. Times (Aug. 7, 2023), https://perma.cc/2VUT-4TYN.

297. Imogen Foulkes, *Swiss Parliament Defied ECHR on Climate Women's Case*, BBC News (June 12, 2024), https://perma.cc/6P4H-2QYD.

298. Complaint at 14, La Rose v. Her Majesty the Queen, [2019] 2020 FC 1008 (Can.).

299. *Id*. at 15–16; Canadian Charter of Rights and Freedoms § 7, 1982 (Can.) ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."); *id.* at § 15(1) ("Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour [sic], religion, sex, age or mental or physical disability.").

also argued that the public trust doctrine is "both a common law obligation and an unwritten constitutional principle" governing federal action, seeking formal recognition of the constitutive understanding of public trust principles in Canada.[300] However, the lower court granted the government's motion to dismiss and an appeals court affirmed with prejudice.[301] A related Canadian claim is pending in one of Canada's provinces, mirroring the strategic turn to environmental federalism seen in the litigation taking place at multiple levels of regulatory scale in the United States.[302]

In the same year, fifteen Mexican youth filed suit against their federal government, alleging that it too had failed to take concrete steps to uphold its constitutional and statutory obligations to ensure a healthy environment.[303] While the trial court initially dismissed the claim for lack of standing, the youth plaintiffs appealed and the Collegiate Court reversed, concluding that the plaintiffs did have standing.[304] As this piece goes to press, the case is still pending a final decision on the merits.[305]

B. The Atmospheric Trust Project in U.S. Law

Atmospheric trust cases in the United States have met with more limited success. Cases and administrative petitions were launched around the country at both the state and federal levels, with mixed judicial results and somewhat better results through the administrative process. As of yet, there has been no litigation yielding results approaching what the Supreme Court of the Netherlands delivered in *Urgenda*, although there have been notable administrative successes, especially in coastal states such as Washington, Massachusetts, and Hawai'i,[306] and as discussed further in Part III.E, trust-rights advocacy appears to be now shifting to the state constitutional realm.[307] In 2024, the *Juliana* case was dismissed before trial (for the umpteenth time), but as this Article goes to press,

300. Complaint at 62, La Rose v. Her Majesty the Queen, [2019] 2020 FC 1008 (Can.).

301. La Rose v. His Majesty the King, [2023] 2023 FCA 241, at 6 (Can.) (reporting on the lower court's finding that the plaintiff's constitutional claims were not justiciable, and the public trust claims, while justiciable, "disclosed no reasonable cause of action."); *id.* at 11, 22–25 (dismissing all claims, including the public trust claims, on the grounds that they had "no reasonable prospect of success").

302. Mathur v. Ontario, [2023] 2023 ONSC 2316 (Can.).

303. *See Jovenes v. Gobierno de Mexico*, Our Children's Tr., https://perma.cc/ZJF6-WPR8 (reporting on the case with case documents available in Spanish).

304. *Id.*

305. *Id.*

306. Blumm & Wood, *supra* note 187, at 73–77 (discussing administrative relief in Massachusetts and Washington). *See also infra* Part III.E (discussing the *Navahine* settlement in Hawai'i).

307. *See infra* Part III.E.

the plaintiffs have appealed to the Supreme Court,[308] leaving the final trajectory of the case unclear. Either way, the case deserves scrutiny as an exemplar of the atmospheric trust/environmental rights litigation strategy, and of what scholars have referred to as the "winning through losing"[309] virtues of "strategic climate litigation."[310]

Early atmospheric trust plaintiffs were inspired by a group of minors and their lawyers who, in 1993, convinced the Supreme Court of the Philippines to recognize their government's legal responsibility for intergenerational environmental equity.[311] Assisted in the United States by a nonprofit organization, Our Children's Trust,[312] youth plaintiffs organized nationwide to bring local lawsuits and administrative action seeking public trust protection for the atmosphere.[313] Beginning in the 2010s, atmospheric trust plaintiffs brought over fifty lawsuits and administrative petitions in every state and also in federal court, each seeking to establish that the atmosphere is subject to the public trust and that the relevant regulators must therefore act to protect it from further destructive appropriation by polluters, especially large scale polluters.[314] When the agencies of government allow unfettered greenhouse gas emissions, these plaintiffs claimed, they are illegally enabling private actors to despoil the great air commons that belongs to all of us, in derogation of the public trust.[315] More recent claims have buttressed or replaced the original common law trust

308. Petition for Writ of Mandamus, Juliana v. United States, No. 24-__ (2024), https://perma.cc/259S-PEHZ.

309. *See, e.g.*, Sam Bookman, *The Puzzling Persistence of Nature's Rights*, UTAH L. REV. (forthcoming 2025) (discussing how even litigation doomed to loss in court can provide a win for the underlying political movement).

310. *See, e.g.*, Paul Rink, *Climate Rights Strategic Litigation*, *supra* note 193 (discussing how climate litigation that fails in court can still be a strategic tool of effective climate advocacy).

311. *See* OLIVER A. HOUCK, TAKING BACK EDEN: EIGHT ENVIRONMENTAL CASES THAT CHANGED THE WORLD 43–61 (2010) (discussing Minors Oposa v. Factoran, G.R. No. 101083, 224 S.C.R.A. 792 (1993), a decision by the Supreme Court of the Philippines recognizing a legal burden of intergenerational responsibility to protect the environment). *See also* Katy Scott, *Can 'Climate Kids' Take On Governments and Win?*, CNN (July 24, 2018), https://perma.cc/4LX6-KY2E (reporting that the *Juliana* youth plaintiffs were inspired by this case).

312. *Our Mission,* OUR CHILD'S. TR., https://perma.cc/52SA-QXZ6("Our Children's Trust elevates the voice of youth to secure the legal right to a stable climate and healthy atmosphere for the benefit of all present and future generations.… We lead a game-changing legal campaign seeking systemic, science-based emissions reductions and climate recovery policy at all levels of government. We give young people, those with most at stake in the climate crisis, a voice to favorably impact their futures.").

313. *See State Judicial Actions Now Pending*, OUR CHILD'S. TR., https://perma.cc/PF3G-DE6V (describing pending actions in Alaska, Hawai'i, Montana, Utah, and Virginia).

314. *See generally,* Christiansen, *supra* note 11. *Other Proceedings in all 50 States*, OUR CHILD'S. TR., https://perma.cc/35XE-MXH8;https://perma.cc/35XE-MXH8; *see also* James Conca, *Atmospheric Trust Litigation—Can We Sue Ourselves over Climate Change?,* FORBES (Nov. 23, 2014), https://perma.cc/S2N6-M8FK.

315. *See generally* Christiansen, *supra* note 11.

argument with claims arising under state constitutional trusts or independent provisions of the U.S. Constitution.[316]

A salient aspect of these lawsuits is that most of the plaintiffs have been children, at least at the time their initial claims were brought.[317] They argue that it is their future, and the well-being of the children that come after them, that is being squandered by sovereign failures to protect atmospheric resources today.[318] The named plaintiff in the case that got the farthest in federal court, *Juliana v. United States*, was a teenager when she and eighteen other youth plaintiffs first filed the case in 2015, and some plaintiffs have been even younger.[319] In addition to *Juliana*, as detailed below, this atmospheric trust advocacy included notably unsuccessful judicial appeals, such as *Alec L. v. Jackson*[320] in federal court and *Chernaik v. Brown*[321] in the Oregon Supreme Court, but also successful administrative actions, such as that leading to the Massachusetts Executive Order on Climate Change[322] and a Florida rule requiring electric utilities to use only renewable fuels by 2050.[323] However, as this article was going to press, the Florida rule was repealed in July of 2024, revealing the inherent fragility of administrative successes.[324]

Most of the early judicial cases did not succeed in court, although there were some incremental successes. Many early claims were dismissed on displacement,

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316. *See, e.g.*, Held v. Montana, 2024 MT 312, para. 30 (Dec. 18, 2024) (successfully challenging state laws preventing environmental assessment of greenhouse gas emissions under the state's constitutional protection for environmental rights to climate stability); Juliana v. United States, No. 15-CV-01517-AA, 2023 WL 3750334, at *19 (D. Or. June 1, 2023) ("[P] laintiffs seek declaratory relief that 'the United States' national energy system that creates the harmful conditions described herein has violated and continues to violate the Fifth Amendment of the U.S. Constitution and Plaintiffs' constitutional rights to substantive due process and equal protection of the law.'").

317. Sam Bliss, *These Teens Are Taking Their Climate Lawsuit All the Way to the Supreme Court*, Grist (Oct. 22, 2014), https://perma.cc/43CH-YXMG.

318. *Id.*

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

320. 863 F. Supp. 2d 11, 15 (D.D.C. 2012).

321. 475 P.3d 68, 83-84 (Or. 2020).

322. Mass. Exec. Order No. 569 (Sept. 16, 2016), https://perma.cc/RF7C-BYLN. On Sep. 16, 2016, the Governor of Massachusetts responded to a win in court by atmospheric trust youth plaintiffs by issuing Executive Order No. 569, establishing an Integrated Climate Change Strategy for the Commonwealth. *See Legal Updates*, Our Child's Tr. (Sep. 16, 2016), https://perma.cc/77TT-GDUA; *see also* Blumm & Wood, *supra* note 187, at 72–74 (discussing Kain v. Mass. Dep't of Env't Protection, 49 N.E.3d 1124, 1128 (Mass. 2016), the litigation leading to this executive order).

323. Fla. Admin. Code Ann. r. 50-5.002 (2023) ("Each Electric Utility that produces or purchases energy should seek to achieve an increase in the amount of renewable energy produced or purchased to at least…100% renewable energy by 2050") (repealed Jul. 28, 2024).

324. *Id.*

preemption, or political question grounds.[325] In one of the very first atmospheric trust cases, *Blades v. California*, the plaintiffs sought a judicial declaration that the atmosphere is a public trust resource under California law and that the state has a public trust duty to limit greenhouse gas emissions, but the claim was dismissed.[326] The plaintiffs in *Alec L. v. Jackson* brought the first atmospheric trust in federal court in Washington D.C., but the suit was dismissed on grounds that their common law claim was displaced by the Clean Air Act.[327] When the D.C. Circuit and then the Supreme Court affirmed the dismissal,[328] it was a great disappointment to atmospheric trust advocates—especially when subsequent Supreme Court precedent called into question the strength of federal authority even under the Clean Air Act to regulating greenhouse gas pollution.[329] Similar claims later failed in Pennsylvania,[330] Washington,[331] and Florida.[332]

Some later atmospheric trust cases seemed to erode some of the initially negative precedent that prevented claims from reaching court, but even so, few produced the results the plaintiffs were seeking. For example, in *Chernaik v. Kitzhaber*, an Oregon appellate court reversed a lower court's decision to dismiss an atmospheric trust claim based on the defendant's arguments that hearing the case would have violated the political question doctrine and separation of powers doctrine, which are jurisprudential rules that generally direct courts to refrain from deciding hot-button political issues that raise questions of legislative policy rather than judicially interpretable legal rights.[333] The appellate court also rejected the lower court's decision to dismiss on grounds that the court lacked

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325. *See, e.g.*, Alec L. v. Jackson, 863 F. Supp. 2d 11, 15 (D.D.C. 2012); Blades v. California, No. CGC11-510725 (Cal. Super. Ct. 2012); Reynolds v. Florida, No. 37 2018 CA 000819, at 1 (Fla. Cir. Ct. June 10, 2020), *aff'd*, 316 So.3d 813, 814 (Fla. Dist. Ct. App. 2021).
326. No. CGC11-510725 (Cal. Super. Ct. 2012) (dismissing the claim without prejudice).
327. Alec L. v. Jackson, 863 F. Supp. 2d 11, 15 (D.D.C. 2012) (holding that the plaintiffs lacked standing in the first federal atmospheric trust case).
328. Alec L. *ex rel.* Loorz v. McCarthy, 561 Fed. App'x 7, 8 (D.C. Cir. 2014) (affirming the dismissal on appeal), *cert. denied*, 574 U.S. 1047 (2014).
329. West Virginia v. EPA, 142 U.S. 2587, 2616 (2022) (holding that EPA lacked authority under the Clean Air Act to regulate greenhouse gas pollution from power plants).
330. *Pennsylvania*, Our Child's Tr., https://perma.cc/E4WW-7JFE (Mar. 21, 2023).
331. Aji P. *ex rel.* Piper v. State, 480 P.3d 438, 458 (Wash. Ct. App. 2021), *rev. denied*, 497 P.3d 350 (Wash. 2021). While the *Aji P.* case was on appeal, a separate group of youth activists attempted to sue the Washington State Department of Ecology for denying their petition for rulemaking, which would have required the agency to address greenhouse gas emission reduction. Foster v. Wash. Dep't. of Ecology, 2016 WL 11359472, at *1 (Wash. Super. Ct. 2016). While the trial court ordered the agency to initiate rulemaking to "adopt a rule to limit greenhouse gas emissions in Washington State," the appellate court reversed in an unpublished opinion. Foster v. Wash. Dep't. of Ecology, 2017 WL 3868481, at *7 (Wash. Ct. App. 2017).
332. Reynolds v. Florida, No. 37 2018 CA 000819, at 1 (Fla. Cir. Ct. June 10, 2020) (order granting defendant's motion to dismiss with prejudice), *aff'd*, 316 So.3d 813, 814 (Fla. Dist. Ct. App. 2021).
333. Chernaik v. Kitzhaber, 328 P.3d 799, 808 (Or. Ct. App. 2014).

the authority to grant the kind of relief the plaintiffs had requested.[334] It was a victory for the atmospheric trust plaintiffs to clear these initial hurdles, but the state supreme court would later vitiate all such claims by deciding against the atmospheric trust in Oregon—holding that the atmosphere is not a public commons resource within the state's public trust doctrine.[335]

Other decisions upholding atmospheric trust claims in the early stages of litigation also left plaintiffs empty-handed at the end. An Alaska court held that the political question doctrine did not foreclose the atmospheric trust claim, but nevertheless declined to provide the relief the plaintiffs asked for.[336] A Texas state court rejected the agency's determination that the public trust doctrine applies only to water and affirmed that the federal Clean Air Act provides "a floor, not a ceiling, for the protection of air quality," but that case was later vacated on unrelated grounds.[337] A Washington state court expressly held that the state public trust does includes air and atmosphere, but that case was also later reversed on other grounds.[338]

There have also been successes in court, though usually only partial successes. Several cases have provided potentially useful foundation for future success in atmospheric trust cases by recognizing the application of the public trust doctrine to the atmospheric commons. Some interpret constitutional provisions that are unique to each state, and some interpret the common law trust. For example, in 2015, an appellate court in New Mexico expressly affirmed that the state constitution recognizes public trust protection of the atmosphere: "We agree that Article XX, Section 21 of our state constitution recognizes that a public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of this state."[339] Nevertheless, it declined the requested injunctive relief on grounds that the state's air quality regulatory process provided a sufficient remedy.[340]

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334. *Id.* at 805 ("In ruling otherwise, the trial court focused on the fact that plaintiffs had not alleged that defendants had violated 'a specific constitutional provision or statute.' To the extent that the court believed that a request for a declaration must be based on those kinds of written sources of law, as opposed to other doctrines, it misunderstood the scope of its statutory authority.").
335. Chernaik v. Brown, 475 P.3d 68, 84 (Or. 2020) (holding that, while there may be room for the public trust holdings in Oregon to expand, the plaintiffs have not proposed a workable theory for expansion).
336. *See, e.g.*, Kanuk *ex rel.* Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1091 (Alaska 2014).
337. Bonser-Lain v. Texas Comm'n on Env't Quality, No. D-1-GN-11-002194, 2012 WL 2946041 (Tex. Dist. Ct. July 9, 2012), *vacated*, 438 S.W.3d 887, 895 (Tex. App. 2014).
338. Foster v. Washington Dep't of Ecology, No. 14-2-25295-1 SEA, 2015 WL 7721362 at *4 (Wash. Super. Ct. Nov. 19, 2015), *rev'd on other grounds*, 200 Wash. App. 1035, 2017 WL 3868481 at *7 (2017).
339. Sanders-Reed v. Martinez, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015).
340. *Id.* at 1227. Youth plaintiffs have since submitted a rulemaking proposal to New Mexico's Environmental Improvement Board. The Board opposed the proposal and denied the youth

A few years before New Mexico judicially recognized the atmospheric trust under its state constitution, an appeals court in neighboring Arizona assumed (without deciding) that the atmosphere might be subject to protection under the state's common law public trust doctrine.[341] In *Butler v. Brewer,* the court affirmed (in an unpublished decision) that plaintiffs may seek a judicial determination of what resources are included in the public trust doctrine and whether the state has violated the doctrine, but ultimately dismissed the claim before it for lack of standing.[342] The court rejected legislative efforts like Idaho's to abrogate judicial authority to determine public trust protections,[343] but it was unpersuaded by the specific atmospheric trust claim before it, at least in this instance.[344]

Since then, even though *Butler* did not establish an atmospheric trust and cannot be cited as precedential even within the state of Arizona, the case has been cited by other courts for both parts of its complex conclusion (rejecting legislative abrogation of the public trust doctrine but also rejecting the atmospheric trust claim that came before it). At least one Alaskan court cited the case in support of the proposition that atmospheric trust claims are indeed justiciable, which means that they are suitable for judicial review (overcoming the general counterarguments that such claims should be dismissed on political question, separation of powers, or other like grounds).[345] At the same time, other courts have taken *Butler*'s cautious approach to mean that atmospheric trust claims are, in fact, nonjusticiable.[346]

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plaintiffs' request for a full hearing on the matter. *New Mexico*, Our Child's Tr., https://perma.cc/BTX6-BY5Z (Mar. 21, 2023).

341. *See* Butler v. Brewer, No. 1 CA-CV 12-0347, at 1, 3, 5–7 (Ariz. Ct. App. March 14, 2013) (notably, the court stated that "the [public trust doctrine] is '[a]n ancient doctrine of common law [that] restricts the sovereign's ability to dispose of resources held in public trust.' Quoting Ariz. Ctr. For L. in the Pub. Interest v. Hassell, 172 P.2d 356, 364 (Ariz. Ct. App. 1991)).

342. 2013 WL 1091209, at *1, *5–*7.

343. *Id. See also* San Carlos Apache Tribe v. Super. Ct., 972 P.2d 179, 199 (Ariz. Sup. Ct. 1999) ("The public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people.").

344. *Butler*, No. 1 CA-CV 12-0347, at 7 ("we would be weaving 'a jurisprudence out of air' to hold that the atmosphere is protected by the [public trust] Doctrine and that state inaction is a breach of trust merely because it violates the [public trust] Doctrine without pointing to a specific constitutional provision or other law that has been violated") *Id.* at 5 ("Not only is it within the power of the judiciary to determine the threshold question of whether a particular resource is a part of the public trust subject to the Doctrine, but the courts must also determine whether based on the facts there has been a breach of the trust").

345. *See* Kanuk *ex rel.* Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, n.62 (Alaska 2014) (holding that the claims are justiciable, based on the fact that other courts had recently reached the same conclusion).

346. *See* Iowa Citizens for Cmty. Improvement v. State, 962 N.W.2d 780, 798 (Iowa 2021) ("other cases support the conclusion that environmental public trust litigation is a nonjusticiable political question") (*citing Butler*, No. 1 CA-CV 12-0347, 2013 WL 1091209); Sanders-Reed v. Martinez, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015) ("A separate common law

C. An Administrative Atmospheric Trust

In contrast to lackluster results in court, atmospheric trust advocates have achieved some noteworthy successes through administrative process.[347] Instead of asking a court to order regulatory agencies to take action to protect the atmospheric commons, which has raised potential issues of justiciability, these petitioners go directly to the regulators and ask for action directly. In some instances, these efforts have been met with great success.

For example, one group of atmospheric trust petitioners succeeded in persuading the Governor of Massachusetts to create an executive climate action plan by Executive Order.[348] Enacted in 2016, the resulting plan acknowledges that "climate change presents a serious threat to the environment and [state] residents, communities, and economy" and concludes that "only through an integrated strategy bringing together all parts of state and local government will we be able to address these threats effectively."[349] The Order creates affirmative obligations for the Secretary of Energy and Environmental Affairs, the Department of Environmental Protection, and the Secretary of Public Safety, and orders the Secretary of each Executive Office to designate an existing employee to serve as the Climate Change Coordinator for that office.[350] Massachusetts further extended its commitment to fighting climate change in 2023 by creating a new Office of Climate Innovation and Resilience within the Office of the Governor, headed by a Climate Chief who will serve in the governor's cabinet.[351] Even though it was not a judicial determination of the

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cause of action under the public trust doctrine would circumvent and render a nullity the process under the Air Quality Control Act that has established how competing interests are addressed and decisions are made regarding regulation of the atmosphere.").

347. *See* Foster v. Washington Dep't of Ecology, No. 14-2-25295-1 SEA, 2015 WL 7721362 at *7–*9 (Wash. Super. Ct. Nov. 19, 2015) (holding that while the atmosphere may be protected by the public trust doctrine as enshrined in the state's constitution, administrative rulemaking is the proper venue for that action), *rev'd* on other grounds, Foster v. Washington Dep't of Ecology, 200 Wash. App. 1035 (2017), *abrogated by* Aji P. *ex rel.* Piper v. State, 480 P.3d 438, 458 (Wash. Ct. App. 2021), *rev. denied*, 497 P.3d 350 (Wash. 2021) ("we are not bound by [*Foster*] . . . our analysis does not lead us to the conclusion that the public trust doctrine applies to the atmosphere.") *see also* Blumm & Wood, *supra* note 187, at 73–77 (discussing administrative relief in Massachusetts and Washington).

348. On Sep. 16, 2016, the Governor of Massachusetts responded to a win in court by atmospheric trust youth plaintiffs by issuing Executive Order No. 569, establishing an Integrated Climate Change Strategy for the Commonwealth. The executive order was a response to the state supreme court's decision siding with OCT plaintiffs that the state environmental agency had failed its statutory obligation to limit sources of greenhouse gas emissions. Kain v. Dep't of Envt. Prot., 49 N.E.3d 1124, 1127, 1142 (Mass. 2016). *See also* Christiansen, *supra* note 11, at 886–87. (discussing both the case and the executive order); Blumm & Wood, *supra* note 187, at 72–74 (discussing the litigation leading to this executive order).

349. Mass. Exec. Order No. 569 (Sept. 16, 2016), https://perma.cc/4XWA-THFV.

350. *Id.*

351. Mass. Exec. Order No. 604 (Jan. 6, 2023), https://perma.cc/8LZU-CUCP.

state's public trust obligations, the Governor's acceptance of that burden likely buttresses future environmental advocacy premised on similar principles.

In Florida, a group of youth climate activists temporarily succeeded in convincing the Florida Department of Agriculture and Consumer Services (FDACS) to adopt a rule in 2022 that requires Florida's electric utilities to become 100% renewable by 2050, with the first accountability benchmark of 40% listed at 2030.[352] The state enacted the rule in settlement of an atmospheric trust lawsuit in which dozens of youth plaintiffs had claimed that the state's promotion of fossil fuels violated their constitutional rights.[353] The renewable energy plan was designed to be implemented in graded steps, with increasing shares of utilities becoming renewable.[354] FDACS Secretary Nikki Fried, then a candidate for Governor, acknowledged enforcement hurdles for the plan but nevertheless defended the settlement as "a monumental first step" in curbing greenhouse gas pollution from instate power generation.[355] "This is one of the most urgent issues of our time," she explained at a news conference; "[w]e can't afford to deny this reality and the urgency of what is happening to our state."[356] A few years later, after Fried lost her primary and retired from public office,[357] the plan was ultimately repealed.[358]

In a celebrated Hawai'i case discussed further in Part III.E,[359] youth plaintiffs settled a trust-rights lawsuit when the state publicly recognized the constitutional climate rights the plaintiffs had asserted and the Department of Transportation agreed to establish a Climate Change Mitigation & Culture Manager, as well as a volunteer Youth Council, to help oversee state efforts to achieve "zero emissions in all ground transportation, and inter-island sea and air transportation, by 2045."[360]

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352. Fla. Admin. Code Ann. R. 5O-5.002 (2023) ("Each Electric Utility that produces or purchases energy should seek to achieve an increase in the amount of renewable energy produced or purchased to at least…100% renewable energy by 2050."); *see* Press Release, Our Child's. Strongest Climate Policy Enacted in Florida in Over a Decade, Our Child's. Tr. (August 9, 2022), https://perma.cc/XW48-HQAH. As this article went to press, the rule was repealed. Fla. Admin. Code Ann. R. 5O-5.002 (2023) (repealed Jul. 28, 2024).

353. *See* Curt Anderson, *Florida Seeks 100% Renewable Electricity by 2050*, AP (Apr. 21, 2022), https://perma.cc/2FJS-7U3G (describing the proposed settlement and noting that it was the result of a youth climate suit following the same model unfolding in other states).

354. *Id.*

355. *Id.*

356. *Id.*

357. Tal Axelrod, *Charlie Crist Defeats Nikki Fried in Fla. Dem Governor's Primary; Will face DeSantis in November*, ABC News (Aug. 23, 2022), https://perma.cc/78K3-4XXY.

358. Fla. Admin. Code Ann. R. 5O-5.002 (2023) (repealed Jul. 28, 2024), https://perma.cc/2G4Q-HPMW.

359. See text accompanying notes 507–513 (discussing *Navahine* as an example of state constitutional trust-rights advocacy).

360. Christopher Bonasia, *UK Activists Win Landmark Ruling on Oil Well's 'Inevitable' Emissions*, Energy Mix (June 26, 2024), https://perma.cc/8ZHG-86FZ. *See* Navahine v. Hawai'i Department of Transportation, No. 1CCV-22-0000631, (June 24, 2024); *see also Office of*

Other times, administrative petitioners have encountered hurdles distinct to the dynamic political process. For example, in Washington state, youth plaintiffs went to court to challenge the Department of Ecology's administrative decision to deny their petition for a rulemaking that would have required the agency to mandate limits on greenhouse gas emissions consistent with the best available science.[361] The court ruled for the plaintiffs, requiring the agency to reconsider their petition, but the agency once again denied it.[362] However, when the youth brought their now well-publicized petition directly to the Governor, he directed the Department to initiate a rulemaking to cap emissions.[363]

While the Washington example highlights the strength of public trust claims—and especially atmospheric trust claims—as a mobilizing force in the political process, politics are subject to shifting alliances and priorities. A few years later, the Governor's priorities changed again, and the Department dropped its rulemaking process, effectively lowering the standards the plaintiffs had sought to achieve.[364] The trial court then ordered the agency to promulgate the rulemaking that it had started under the Governor's earlier order, but that decision was then overturned on appeal.[365] In the end, the Washington example epitomizes the confusingly vacillating trajectory that many atmospheric trust claims have faced while moving simultaneously through political and judicial processes.

Atmospheric trust advocates learned valuable lessons from this "first hatch" of cases. They experienced the advantages and disadvantages of proceeding through administrative channels, where they could bypass the separation of powers problems raised by asking courts to order specific legislative or executive acts, but the results they might achieve would be more vulnerable to shifting political winds. They also learned the distinct hurdles they could expect proceeding through judicial channels, especially those they could expect in bringing a pure common law claim without the buttressing support of commanding statutory or constitutional text—such as the text the New Mexico plaintiffs pointed to in their state constitution,[366] or that in the European

the Governor of Hawai'i - News Release - Historic Agreement Settles Navahine Climate Litigation, Governor Josh Green (June 20, 2024), https://perma.cc/M8TV-YKFD.

361. Foster v. Washington Dep't of Ecology, No. 14-2-25295-1, 2015 WL 7721362, at *1 (Wash. Super. Ct. Nov. 19, 2015).

362. *Id.* at 2.

363. *Id.* at 3.

364. Blumm & Wood, *supra* note 187, at 76–77.

365. Foster v. Wash. Dep't of Ecology, No. 14-2-25295-1, 2016 WL 11359472 at *1 (Wash. Super. Ct. 2016) (ordering DOE to "proceed with the rulemaking procedure to adopt a rule to limit greenhouse gas emissions in Washington state as directed by Governor Inslee in July 2015"), *rev'd* by Foster v. Wash. Dep't of Ecology, 200 Wash. App. 1035, 2017 WL 3868481, at *8 ("[T]he trial court abused its discretion when it granted CR 60(b) relief…we reverse.").

366. N.M. Const. art. XX, § 21 ("The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of

Convention on Human Rights on which the *Urgenda* plaintiffs relied.[367] Later advocates attempted to apply these lessons in the next wave of atmospheric trust litigation, most famously in *Juliana v. United States*.

D. Juliana v. United States

In 2015, just as *Urgenda* was getting underway, domestic atmospheric trust advocates launched a new claim in federal court with a novel approach, explicitly combining public trust sovereign obligation arguments with environmental rights claims premised on rights in the United States Constitution. The eighteen youth plaintiffs filed their suit in Oregon,[368] where University of Oregon Professor Mary Wood teaches and where the assisting NGO, Our Children's Trust, is based.[369] Alleging that the federal government had violated atmospheric trust obligations and the plaintiffs' constitutionally protected fundamental right to climate stability, the original complaint sought both declaratory relief—asking the court to affirm the environmental rights and sovereign obligations the plaintiffs alleged—and injunctive relief, ordering the government to take action in compliance with these rights and obligations.[370]

Kelsey Juliana, one of eighteen youth plaintiffs filing the lawsuit, explained her personal motivation behind bringing the case:

> Our nation's top climate scientists . . . have found that the present [carbon dioxide] level is already in the danger zone and leading to devastating disruptions of planetary systems. The current practices and policies of our federal government include sustained exploitation and consumption of fossil fuels. We brought this case because the government needs to immediately and aggressively reduce carbon emissions and stop promoting fossil fuels, which force our nation's climate system toward irreversible impacts. If the government

despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people."); *see also* *Sanders-Reed v. Martinez*, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015).

367. European Convention on Human Rights arts. 2, 8, Sept. 3, 1953, C.E.T.S. No. 213 (Articles 2 and 8 of the European Convention on Human Rights contain the right to life and the right to privacy, respectively); *see also* Urgenda v. Netherlands, [2015] HAZA C/09/00456689 (Neth.) at 41, https://perma.cc/V7C5-VRAV (unofficial English translation).

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

369. *See* Sarah Adams-Schoen, *Juliana v. United States*, Or. Hist. Soc'y - Oregon Encyclopedia (Sep. 23, 2023), https://perma.cc/2VZW-82TM (discussing both Wood and Our Children's Trust as based in Oregon).

370. Complaint at 94-95, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC) (Plaintiffs asked the court to "[d]eclare that Defendants have violated and are violating Plaintiffs' fundamental constitutional rights," and asked the court to "[e]njoin Defendants from further violations of the Constitution").

continues to delay urgent annual emissions reductions, my generation's well-being will be inexcusably put at risk.[371]

Bill McKibben, an internationally renowned environmentalist, famously called it "the most important lawsuit on the planet,"[372] as the plaintiffs fought off successive motions to dismiss the claim before the trial could even begin. In her order denying the government's first motion to dismiss, Federal District Court Judge Ann Aiken memorably began by observing: "This is no ordinary lawsuit."[373]

The case was novel not only because it took on climate change, and not only because of the coordinated political advocacy that accompanied it, and not even because the primary advocates were all children at the time of its filing. It was novel because it raised new legal claims involving issues of both common and constitutional law. The initial complaint relied on familiar public trust claims, alleging sovereign obligations to protect common pool natural resources, but like its sibling cases, it applied the doctrine in a wholly new way—alleging federal trust obligations to protect the atmospheric commons.[374] However, the *Juliana* plaintiffs attached a wholly new theory of constitutional rights and obligations to the public trust claim.[375] The plaintiffs argued that they held a fundamental right to a stable climate, and that the federal government's failure to protect it represented a violation of substantive due process (and at least in the original complaint, violations as well of equal protection and unenumerated rights claimed under the Ninth Amendment).[376] As the litigation unfolded and they confronted the same difficulties previous claimants had encountered on

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371. *Landmark U.S. Federal Climate Lawsuit: Details of Proceedings*, Our Child.'s Tr., https://perma.cc/N354-9JBR.

372. *Id.*

373. *Juliana*, 217 F. Supp. 3d at 1234.

374. Complaint at 83, *Juliana*, No. 6:15-cv-01517-TC (D. Or. Aug. 12, 2015) ("[O]ne principle of the public trust doctrine is: 'the public has fundamental rights and interests in natural resources such as the sea, shore, and the air.'").

375. *Id.* at 92 ("Among the implicit liberties protected from government intrusion by the Ninth Amendment is the right to be sustained by our country's vital natural systems, including our climate system."); *Id* at 86. ("Defendants continue to knowingly enhance that danger by allowing fossil fuel production, consumption, and combustion at dangerous levels, thereby violating Plaintiff's substantive Fifth Amendment due process rights."): *see infra* note 396 (discussing that this element of the original complaint would eventually be dismissed).

376. *Id.* at 92 ("Among the implicit liberties protected from government intrusion by the Ninth Amendment is the right to be sustained by our country's vital natural systems, including our climate system."); *id* at 86. ("Defendants continue to knowingly enhance that danger by allowing fossil fuel production, consumption, and combustion at dangerous levels, thereby violating Plaintiff's substantive Fifth Amendment due process rights."): *see infra* note 396 (discussing how this element of the original complaint would eventually be dismissed).

their common law atmospheric trust claim, their constitutional claims came to the forefront.[377]

Juliana inspired enormous international interest, especially among climate-conscious children,[378] but the merits of the claim would have to overcome serious problems of precedent.[379] The first challenge was the plaintiffs' contention that public trust sovereign obligations attach to the federal government as well as the states, which, the plaintiffs argued, is the only level adequately positioned to regulate greenhouse gas pollution in the United States.[380] It was a difficult argument, given Supreme Court dicta characterizing the doctrine as a matter of state law just a decade earlier.[381] Nevertheless, the plaintiffs invoked scholars who distinguish that dicta based on its limiting context,[382] emphasizing that the public trust as an attribute of sovereign authority must apply to all sovereign authority, not just at the state level.[383] They also defended the existence of federal trust obligations on the historical grounds that every post-colonial American state that inherited the doctrine as an attribute of sovereignty upon statehood must have received it through sovereignty conferred by the federal government.[384] Federal sovereignty over pre-state lands must have been bound by the same trust obligations that would ultimately pass to the new states. At a minimum, it established that federal sovereignty is not a complete stranger to public trust obligations.

377. Juliana v. United States, No. 6:15-CV-01517 AA, 2023 WL 3750334, at *8 (D. Or. June 1, 2023) ("[P]laintiffs' proposed amendments are not futile: a declaration that federal defendants' energy policies violate plaintiffs' constitutional rights would itself be significant relief.").

378. *See infra* text accompanying notes 451–455 and 477–479 (discussing public interest in *Juliana* and its sibling trust-rights cases, including the 36,000 children who signed an amicus brief in support of the *Juliana* claim while awaiting trial in 2018, and the 350,000 "intergenerational individuals" who signed petitions demanding that the Biden Administration stop opposing the case after the plaintiffs' 2024 appeal to the Supreme Court).

379. The following description of the case expands on previous analysis in Ryan, *From Mono Lake to the Atmospheric Trust*, *supra* note 110, at 60–64.

380. *See* Juliana v. United States, 217 F.Supp.3d 1224, 1263–64 (D. Or. 2016).

381. *See* PPL Montana, LLC v. Montana, 556 U.S. 576, 603 (2012).

382. *See Juliana*, 217 F.Supp.3d at 1274. *See also* Ryan et al., *Debating Juliana*, *supra* note 238, at 17 (presenting Rick Frank's argument that the Court's passing statement in the *PPL Montana* dicta cannot resolve the larger issue in a fully different factual context).

383. *See Juliana*, 217 F.Supp.3d at 1263–64; *see also* Ryan, *A Short History, supra* note 6, at 176–81 (discussing ongoing scholarly debate over whether the trust extends to federal authority).

384. *See Juliana*, 217 F.Supp.3d at 1274 ("Upon the acquisition of a territory by the United States… the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out of the territory." quoting Shively v. Bowlby, 152 U.S. 1, 14 (1894)); *see also* Ryan, *A Short History, supra* note 6, at 178–79 (discussing the historic argument for a federal public trust doctrine); Blumm & Schaffer, *supra* note 186, at 399–405 (discussing Justice Kennedy's reference to the equal footing doctrine in Idaho v. Coeur d'Alene Tribe and what it means for the public trust doctrine's origins).

The more challenging doctrinal extension sought by the plaintiffs was their contention that public trust obligations apply to atmospheric resources.[385] The plaintiffs invoked Justinian references to the air commons, but they could point to no previous American common law precedent for this claim. Judge Aiken initially sustained this part of the claim against an early motion to dismiss, evading the novelty of the atmospheric trust claim by holding that the plaintiffs had also alleged cognizable claims of climate-change related harm to coastal resources that are clearly the subject of public trust rights and obligations.[386] Over the course of the litigation, she repeatedly affirmed those aspects of the complaint alleging that ocean acidification caused by greenhouse gas pollution was harming the territorial seas, which are indisputably protected by the traditional public trust doctrine.[387]

However, in a dramatic departure from the "first hatch" pure atmospheric trust cases, the *Juliana* plaintiffs bolstered the public trust element of their lawsuit by adding a series of ambitious constitutional claims under the Equal Protection and Due Process Clauses of the Fourteenth Amendment and the unenumerated rights preserved by the Ninth Amendment.[388] In some respects, their most provocative claim rested on their invocation of the Constitution's promise of equal protection of the laws,[389] which they alleged was being violated because the burden of the government's failure to address climate change would fall disproportionately on the young and the future generations they represented.[390] Their contention was that the climate governance failures they alleged discriminated against their generation,[391] who would be most impacted by climate change but lacked the voting rights to influence climate policy

385. Complaint at 83, Juliana v. United States, No. 6:15-cv-01517-TC (D. Or. Aug. 12, 2015) ("[O]ne principle of the public trust doctrine is: 'the public has fundamental rights and interests in natural resources such as the sea, the shore, and the air.'"); *see also* Juliana v. United States, No. 6:15-CV-01517 AA, , 2023 WL 3750334, at *6 (D. Or. June 1, 2023) ("Plaintiffs' Second Amended Complaint thus requests this Court to… enter a judgment declaring that the United States' national energy system has violated and continues to violate the public trust doctrine.").

386. Order Denying Petition for Mandamus, *In re* United States, 895 F.3d 1101, 1104 (9th Cir. 2018); *Juliana*, 217 F.Supp.3d at 1276.

387. Opinion and Order at 46–48, Juliana v. United States, No. 15-CV-01517-AA (D. Or. Dec. 29, 2023) ("[P]laintiffs have alleged violations of the public trust doctrine in connection with the territorial sea. Because the Ninth Circuit did not reach the merits of plaintiffs' claims, the Court incorporates its analysis and legal conclusions, as stated *Juliana* (finding that plaintiffs' alleged injuries relate to the effects of ocean acidification and rising ocean temperatures, thus pleadings adequately alleged harm to public trust assets. . .)") (internal citations omitted).

388. Juliana v. United States, 217 F.Supp.3d 1224, 1263-64 (D. Or. 2016).

389. U.S. Const. amend. XIV, §1, cl. 4 ("nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.").

390. Complaint at 89–90, Juliana v. United States, 217 F.Supp.3d 1224 (D. Or. Sep. 10, 2015) (No. 6:15-cv-01517-TC 217).

391. *Id.*

through conventional political processes.[392] Nevertheless, lacking precedent for generational equal protection claims and facing problems of speculative evidence, they soon abandoned the Equal Protection claim to focus on the others.

The constitutional argument they took farthest was their claim that the federal government's failure to address climate change represented a violation of their fundamental right to a livable climate—an equally novel claim drawing on the rights to life, liberty, and property protected by the Fourteenth Amendment's Due Process Clause[393] and the Ninth Amendment's doctrine of unenumerated fundamental rights.[394] The Ninth Amendment adds to the Bill of Rights the clarification that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"[395]—at least theoretically leaving open the possibility that other fundamental rights, such as a right to climate stability, may also be worthy of legal protection. The *Juliana* claim had initially suggested that the right to a healthy climate may be one of these unenumerated rights that are also entitled to constitutional protection,[396] although in time, the plaintiffs would limit their focus to the Fourteenth Amendment argument that the government's failure to adequately regulate greenhouse gas pollution was implicitly violating their substantive Due Process rights to life, by denying them a livable climate.[397] Although it relied on a different source for this claimed right to life, the *Juliana* plaintiffs' substantive due process claim was thus conceptually identical to the *Urgenda* plaintiff's claimed rights to life under the European Convention on Human Rights.

In her memorable initial ruling in the case, rejecting the defendant's original motion to dismiss, Judge Aiken held that the plaintiffs could move forward with a suit claiming this kind of fundamental right—at a minimum, as a substantive component of due process—to a climate system capable of sustaining human

392. *See* Katy Scott, *Can 'Climate Kids' Take On Governments and Win?,* CNN (July 24, 2018), https://perma.cc/U5N9-3XF5.

393. U.S. Const. amend. XIV, §1, cl. 3 ("…nor shall any State deprive any person of life, liberty, or property, without due process of law.").

394. U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

395. *Id.*

396. Complaint at 92, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. Jun. 8, 2017) (No. 6:15-cv-01517-TC). This part of the claim would eventually be dismissed in late 2023, even as the public trust and substantive due process claim continued forward. Opinion and Order, Juliana v. United States, Civ. No. 15-CV-01517-AA, at 45-46 (D. Or. Dec. 29, 2023) ("[T]he Ninth Amendment has never been recognized as independently securing any constitutional right…this claim must be dismissed.").

397. Second Amended Complaint at 133–40, Juliana v. United States, No. 6:15-CV-01517-AA, 2023 WL 3750334 (D. Or. June 1, 2023).

life.[398] Analogizing to the fundamental right to marry that the Supreme Court had recognized earlier the same year,[399] Judge Aiken opined:

> "[As to t]he idea that certain rights may be necessary to enable the exercise of other rights, whether enumerated or unenumerated. . . . Exercising my 'reasoned judgment,' I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress."[400]

Judge Aiken did not conclude here that the alleged rights had actually been violated—only that the plaintiffs should have the opportunity to prove it in her court. For all the reasons noted above, that would have proven an exceptionally heavy lift legally, for both the novel atmospheric trust claim and the unprecedented constitutional claim. Yet recognition for a fundamental right to climate security would have been such a landmark ruling from a federal court at any level—whether under a substantive due process analysis or the conventional public trust argument that Judge Aiken allowed in relation to the territorial seas. For that reason, even this initially sympathetic ruling, together with several other that would follow from Judge Aiken, were celebrated as important incremental successes by the youth climate litigation movement.[401]

Yet even beyond these substantive legal hurdles, the *Juliana* claim raised sobering procedural hurdles relating to remedy the plaintiffs had requested, and how it should bear on their standing to even make these arguments in court. Even if the plaintiffs could prevail on the atmospheric trust or substantive due process claim, what exactly did they expect the court to do about it? What could they, both constitutionally and realistically, expect a court to do about it? The *Juliana* youth plaintiffs had high hopes. In their initial complaint, the plaintiffs specifically requested two things: "(1) a declaration [that] their constitutional and public trust rights have been violated and (2) an order enjoining defendants from violating those rights and directing defendants to develop a plan to reduce CO_2 emissions."[402] The first request for declaratory relief, interpreting alleged rights and obligations, falls within the traditional wheelhouse of a court. But the

398. Juliana v. United States, 217 F.Supp.3d 1224, 1249–50 (D. Or. 2016) ("Exercising my reasoned judgment, I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.") (internal citations omitted).

399. Obergefell v. Hodges, 576 U.S. 644 (2015) (holding that the fundamental right to marry under the Due Process Clause of the Fourteenth Amendment applies equally, across all fifty states, to same-sex couples as it does to opposite-sex couples).

400. *Juliana*, 217 F. Supp. 3d at 1249–1250.

401. *See* Ryan, *supra* note 110, at 62 (making this point).

402. *Juliana*, 217 F. Supp. 3d at 1233 (quoted text); *see also id*. at 1246–48 (discussing redressability of plaintiff's claim).

second request, for injunctive request on the basis of the requested interpretation of rights and duties, raised both eyebrows and concerns about redressability. Could the court order defendant agencies to regulate greenhouse gases this way?

Respecting the judicial lane within the constitutional separation of powers, courts are reluctant to engage in adjudication that veers toward untethered policymaking. Courts will order legislative or executive action when it is clearly required by the sources of law they are asked to interpret, but such jurisprudential constraints as the political questions doctrine and the standing doctrine of redressability counsel courts to err on the side of judicial restraint.[403] The defendants and critics of the lawsuit argued that these barriers exist to prevent exactly a claim like this one from moving forward, while the plaintiffs argued that they were simply asking the court to appropriately vindicate their alleged rights, as courts routinely do. They further contended that climate change, and the government's alleged complicity in creating it, constituted a unique exigency that weighed in favor of justiciability.[404] If the court would not order some kind of change, reasoned the plaintiffs, their rights would continue to be violated with no means of relief.

Their initial claim persuaded at least Judge Aiken that the defendant agencies possessed the power to redress their claim through existing regulatory resources, by developing a remedial plan to reduce greenhouse gas emissions.[405] However, the same argument did not persuade the higher courts, requiring sequential retooling of the case as it progressed through an epic legal obstacle course of motions to dismiss, interlocutory appeals, petitions for mandamus, and even Supreme Court intervention. Eventually, as described further below, the plaintiffs would have to address this problem by amending their complaint to seek only judicial recognition of the rights they claim violated.[406]

Still ongoing nearly a decade after the initial filing, the *Juliana* claim has endured an extraordinary volley of attempts to quash it, engaging every level of the multi-tiered federal judiciary. Judge Aiken had originally slated the case for trial in October of 2018, after denying several early motions to dismiss.[407] However, the Trump Administration then filed multiple petitions for the writ of mandamus, by which the Administration sought to convince the Ninth Circuit Court of Appeals to force Judge Aiken to dismiss the case after her decision

403. *See* Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. Rev. 405, 414–15 (1984) (showing examples of courts exercising judicial restraint when confronted with jurisprudential constraints).

404. *See* Ryan et al., *supra* note 238 (Jim Huffman and Mary Wood debating the requested remedy); Brief for Petitioner at 23-28, Juliana v. United States, No. 18-36082 (9th Cir. Feb. 26, 2019).

405. Juliana, 217 F. Supp. 3d at 1247-48; *see also* Blumm & Wood, *supra* note 187, at 71–72.

406. Juliana v. United States, No. 6:15-CV-01517 AA, 2023 WL 3750334, at *9 (D. Or. June 1, 2023).

407. *See Juliana v. United States – Major Court Orders and Filings*, Our Child.'s. Tr., https://perma.cc/EZ2A-7CZP (listing all motions).

otherwise.[408] Two of these petitions were appealed to the United States Supreme Court, which denied both of them. However, in the latter denial, the Court offered the defendant (and the lower courts, who were paying close attention) a hint about how better to procure the dismissal it sought.[409]

Though the Supreme Court again declined the government's petition,[410] the second order suggested that this was because the defendants could seek the dismissal it wanted from a more appropriate judicial forum, understood by observers as the intermediate court of appeal.[411] The implication was that even though the justices did not wish to become involved at that point, the defendants could still seek to overturn Judge Aiken's refusal to dismiss by filing an interlocutory appeal with the Ninth Circuit. An interlocutory appeal is a tool of civil procedure that enables a higher court to rule on a motion while the litigation still technically rests with a lower court (because there has not yet been a final result to appeal). Judge Aiken apparently understood the implications of the Court's second order as well, and she acknowledged it by certifying the question of whether the trial should proceed to the Ninth Circuit on interlocutory appeal.[412]

The case's unusually complicated procedural voyage continued from there. After an extended period of consideration and intense public interest,[413] and over a vigorous dissent by one of the three judges on the Ninth Circuit panel, the appeals court remanded the case back to the trial court with instructions to

408. *Id.*; Adam Wernick, *Circuit Court Declines to Halt Climate Case Brought by Youth Plaintiffs*, World (April 14, 2018), https://perma.cc/4654-45T3; *see also In re* United States, 884 F.3d 830, 838 (9th Cir. 2018).

409. Order Denying Petition for Stay of Proceedings, *In re* U.S., 586 U.S. 983 (2018) (No. 18A410), https://perma.cc/4GM6-W8BV.

410. *Id.*

411. The Court's order implied that the Ninth Circuit had previously dismissed the government's efforts to dismiss the case for reasons that may no longer be valid: "At this time… the Government's petition for a writ of mandamus does not have a 'fair prospect' of success in this Court because adequate relief may be available in the United States Court of Appeals for the Ninth Circuit. …Although the Ninth Circuit has twice denied the Government's request for mandamus relief, it did so without prejudice. And the court's basis for denying relief rested, in large part, on the early stage of the litigation, the likelihood that plaintiffs' claims would narrow as the case progressed, and the possibility of attaining relief through ordinary dispositive motions. Those reasons are, to a large extent, no longer pertinent. The 50-day trial was scheduled to begin on October 29, 2018, and is being held in abeyance only because of the current administrative stay."

412. Certification of Interlocutory Appeal at *3–6, Juliana v. United States, No. 6:15-cv-01517-AA, 2018 WL 6303774 (2018).

413. *See* Brandi Buchman, *Inaugural Hearing of House Climate Group Gathers Young Voices*, Courthouse News Serv. (April 4, 2019), https://perma.cc/DZE2-RTCZ (reporting on the public debate ahead of an anticipated trial).

dismiss for lack of "redressability,"[414] a requirement of standing.[415] To qualify for judicial review, a case must be one for which the judiciary can provide meaningful "redress," and the majority concluded that some of what the plaintiffs had asked the courts to do in the initial case, such as ordering specific action by the political branches, was relief it should not provide.[416]

In response, in 2021, the youth plaintiffs filed a new motion to amend their complaint, removing their initial requests for the comprehensive court-ordered injunctive relief to which the Ninth Circuit had objected.[417] While retaining their substantive public trust and constitutional claims, they shifted legal strategy to seek primarily declaratory relief—an official interpretation of the law—which they hoped would fall more squarely within available judicial authority.[418] Highlighting national interest in the litigation, seventeen states attempted to intervene in opposition to the claims, indicating that they would object to any settlement between the plaintiffs and the sitting Biden Administration.[419] Their motion was denied in March of 2023,[420] although the court order indicated that they could refile later if the case moved forward.[421]

Eventually, Judge Aiken did allow the plaintiffs to amend their complaint in light of the redressability issue the Ninth Circuit had identified in its earlier

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414. Juliana v. United States, 947 F.3d 1159, 1173–75 (9th Cir. 2020).

415. *See* Lujan v. Def. of Wildlife, 504 U.S. 555, 560-61 (1992) (explaining that a plaintiff must satisfy each of three constitutional standing requirements to be heard in court: (1) injury in fact, (2) causation between the defendant's actions and the plaintiff's injury, and (3) redressability).

416. *Juliana*, 947 F.3d at 1169–74.

417. Motion to Amend Complaint at 10–19, Juliana v. United States, No. 6:15-cv-01517-AA (D. Or. Mar. 9, 2021), https://perma.cc/K9BN-9HJ8.

418. *See generally* [Proposed] Second Amended Complaint for Declaratory and Injunctive Relief, Juliana v. United States, No. 6:15-cv-01517-AA (D. Or. Mar. 9, 2021). The youth plaintiffs sought a judgment declaring the violation of the public trust doctrine and plaintiffs' constitutional rights to substantive due process and equal protection of the law, an injunction "restraining Defendants from carrying out policies, practices, and affirmative actions that render the national energy system unconstitutional in a manner that harms Plaintiffs", award of attorneys' fees, and "such other and further relief as the Court deems just and proper." *Id.* at 144–45.

419. *See Legal Actions*, Our Child's. Tr., https://perma.cc/E648-S87W; Motion for Limited Intervention, Juliana v. United States, No. 6:15-cv-01517-AA (June 8, 2021). The Motion to Intervene was headed by Alabama and joined by Alaska, Arkansas, Georgia, Indiana, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Utah, and West Virginia. *Id.* Settlement negotiations between the youth plaintiffs, their attorneys, and the Department of the Justice began in May 2021 but ended just five months later with no resolution. Press Release, *Settlement Talks End Without Resolution in Juliana v. U.S. Climate Case*, Our Child.'s Tr (Nov. 1, 2021), https://perma.cc/QEF8-A6G4.

420. *See Legal Actions*, *supra* note 419.

421. *Id*.

grounds for dismissal, and she allowed some of those claims to move forward.[422] Her order granting permission discussed three factors in her decision. First, she observed that the Ninth Circuit had not foreclosed the possibility of an amended complaint when it mandated the dismissal of their original complaint for lack of standing.[423] Second, the plaintiffs cited a recent Supreme Court case offering an expansive interpretation of declaratory judgments that would support their standing to raise these claims.[424] And finally, Judge Aiken noted that the modified complaint significantly narrowed the scope of relief that the plaintiffs were requesting.[425] Instead of asking for court-ordered substantive policy changes, the new complaint sought declaratory relief and a more modest injunction to restrain only further harm by the government[426]—preventing it "from carrying out policies, practices, and affirmative actions that render the national energy system unconstitutional in a manner that harms [the p]laintiffs"—and even then, only if the court deemed such injunctive relief "necessary, just, and proper."[427] Even so, she allowed only the claims for declaratory relief to move forward.

In her ruling late in December of 2023, Judge Aiken dismissed all claims for injunctive relief, finding that even the narrowed prayer for injunctive relief would require the court to order a sweeping result that it could not grant.[428] Although the requested order would satisfy the first prong of the redressability analysis by redressing the plaintiffs' alleged injuries,[429] it would fail the second prong by requiring the court to make complex policy decisions better left to the political branches.[430] She acknowledged that federal courts routinely issue injunctions against federal agencies,[431] including celebrated cases requiring the

422. Juliana v. United States, No. 15-CV-01517-AA, 2023 WL 3750334, at *8 (D. Or. June 1, 2023).

423. *Id*. at *4–6.

424. *Id*. at *7–8. The plaintiffs pointed to *Uzuegbunam v. Preczewski*, in which the Supreme Court held that "a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right." Uzuegbunam v. Preczewski, 592 U.S. 279, 292 (2021).

425. Juliana v. Unites States, No. 15-CV-01517-AA, 2023 WL 3750334, at *6–8 (D. Or. June 1, 2023) (citing *Uzuegbunam v. Preczewski*). Judge Aiken noted that nominal damages are a form of declaratory relief, and that "*Uzuegbunam* illustrates that when a plaintiff shows a completed violation of a legal right, as plaintiffs have shown here, standing survives, even when relief is nominal, trivial, or partial." *Id*. at *8.

426. [Proposed] Second Amended Complaint at 144, Juliana v. United States, No. 6:15-CV-01517-AA (D. Or. Mar. 9, 2021).

427. *Id*.

428. Juliana v. United States, No. 15-CV-01517-AA, 2023 WL 9023339, at *12 (D. Or. Dec. 29, 2023).

429. *Id*. at *10. ("Based on plaintiffs' alleged facts, an order to defendants to refrain from certain fossil fuel activities which are causing plaintiffs' injuries would redress those injuries.").

430. *Id*. at *10–12. (noting that the scaled-down injunction would still be "beyond a district court's power to award").

431. *Id*. at *10. ("While crafting and implementing injunctions in cases involving longstanding agency shortcomings may require rigorous, adversarial fact-finding to penetrate questions of

desegregation of schools, enforcing tribal treaty rights, and requiring prison reforms.[432] Yet she identified a critical difference between those "structural reform" cases and this one, which is that those cases required court-ordered conformity by a single agency, while the relief requested here would require the coordination of multiple decision-makers across multiple executive agencies,[433] positioning the court to "tread[] on ground over which [the] Ninth Circuit cautioned the Court not to step."[434]

Nevertheless, Judge Aiken allowed the plaintiffs to proceed on their key claims for declaratory relief, by which they seek judicial acknowledgement of the public trust violation and violations of their substantive due process rights to a stable climate. Judge Aiken reasoned that the Supreme Court "has long recognized that declaratory judgment actions can provide redressability, even where relief obtained is a declaratory judgement alone."[435] Moreover, she explained that courts have a "unique and singular duty to both declare constitutional rights and prevent political acts that would curb or violate those rights," and that "[d]eclaratory judgments are thus firmly sited within the core competences of the courts in ways that structural injunctions are not."[436] Finally, she laid out a vision for the process that could follow if the plaintiffs prevail in their claim, which could involve splitting the case into separate liability and remedy stages.[437]

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science, there is nothing exceptional about a federal court issuing injunctions against federal agencies.").

432. *Id*. at *10–11. (noting that similar "structural injunctions" had been ordered in cases that "ordered busing to desegregate schools; the treaty rights cases that assured a fair share of fish for American Indian treaty fishers; cases instituting prison condition reform; and cases relating to land use and low-income housing"). Judge Aiken further noted that "the Ninth Circuit did not offer any explicit guidance on how to distinguish other structural injunction cases, where the district court has power to order specific, injunctive relief, from this case, where the relief necessary to redress plaintiffs' injuries is held to be too broad [by defendants]." *Id.*

433. *Id*. at *11. This form of relief, Judge Aiken concluded, "would be more expansive than any case of which the Court is aware," and that while ordering plaintiffs to sue every agency individually may not "bring about the all-out course correction necessary to avoid the impending crisis," ordering "agencies to work together, outside their silos to oversee resolution of a complex, multiagency problem" is not "necessary-and is perhaps premature-at this point in the case." *Id*. at *12.

434. *Id*.

435. *Id*. at *12–13. (concluding that a "declaration that defendants are violating plaintiffs' constitutional rights may be enough to bring about relief by changed conduct," satisfying the first prong of redressability).

436. *Id*. *13–14. ("Declaratory judgments ask courts to declare actions lawful or unlawful, applying legal standards to a set of facts. Unlike structural injunctions, which envision an on-going dialogue between the court and the parties, the declaratory relief model facilitates a dialogue between the parties.").

437. *Id*. at *14. In the liability stage, the court would lay out what obligations the government owes the plaintiffs, while the remedy stage would involve judicial oversight of the government as

In the surviving complaint, then, the plaintiffs traded the possibility of a more immediately actionable remedy for the opportunity to make their novel constitutional and public trust claims in court. The complaint that then moved forward sought judicial affirmation of the plaintiffs' claim that the "United States national energy system that creates the harmful conditions described… has violated and continues to violate the Fifth Amendment of the U.S. Constitution and plaintiffs' constitutional rights to substantive due process"[438] as well as judicial recognition of the ways that "the historical public trust doctrine" is implicated.[439] Judge Aiken dismissed the Ninth Amendment[440] and Equal Protection[441] claims, finding them insufficiently grounded in precedent.

Nevertheless, she concluded that the complaint frames a violation of constitutional and common law rights that were the proper subject of judicial review.[442] She allowed the public trust claim to continue because it addresses the serious harm of ocean acidification from excessive greenhouse gas pollution, connecting climate change to traditional public trust resources and bypassing at least one legal quandary.[443] As she concluded, the public trust claim could move forward independently of the controversy over extending trust protections to the atmosphere, because atmospheric climate change itself threatens the territorial seas that have been recognized as a public trust resource from the earliest days of the nation.[444]

In May of 2024, *Juliana* was once again dismissed by the Ninth Circuit, again for lack of standing, this time with prejudice (prohibiting the plaintiffs from revising their pleadings to revive their claim, as they had done after the

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it adopts plans to comply with those obligations—potentially through a special master or a consent decree. *Id.*

438. *Id.* at *6.

439. *See id*. at *1.

440. *Id.* at *20 ("[T]he Ninth Amendment has never been recognized as independently securing any constitutional right . . . this claim must be dismissed.").

441. *Id.* at *19–20. (noting that both the Supreme Court and the Ninth Circuit had rejected the contention that age could qualify as a "suspect class" that would subject a law challenged on equal protection grounds to strict scrutiny). This heightened form of judicial scrutiny of equal protection claims, normally required for the plaintiffs to prevail, is only available when the allegedly targeted group is one that the Supreme Court has identified as especially subject to unjustifiably different treatment.

442. *See id*. at *21.

443. *Id.* ("The Court has expended innumerable hours in research and analysis of plaintiffs' public trust claim and, in prior orders, determined that plaintiffs have alleged violations of the public trust doctrine in connection with the territorial sea."); *id*. ("Because the Ninth Circuit did not reach the merits of plaintiffs' claims, the Court incorporates its prior analysis and legal conclusions. . . . Accordingly, the Court finds that plaintiffs have stated a claim under a purported public trust doctrine.").

444. *Id. See also* Ryan, *A Short History, supra* note 6, at 142–45 (reviewing the early Roman and English roots of the doctrine).

Ninth Circuit dismissed their claim the last time).[445] The panel concluded that the plaintiffs had failed to raise a redressable claim, or one for which the judiciary could grant any meaningful relief.[446] It also took issue with the district court's earlier ruling that the plaintiffs had leave to amend their complaint after the Ninth Circuit had granted the government's last petition for mandamus, dismissing the case the last time.[447] The new panel concluded that the plaintiffs should not have been able to reframe their claim, and that an intervening Supreme Court ruling that the plaintiffs had cited in support of their amended complaint did not provide a relevant change of law that would have enabled their amendment.[448] The plaintiffs then unsuccessfully appealed the dismissal to the Ninth Circuit en banc,[449] and have now appealed to the U.S. Supreme Court in a move that is unlikely to change the fate of the case.[450]

Regardless of the final result, the *Juliana* case warrants consideration as the standard-bearer of American trust-rights claims—especially at the federal level, where advocates see climate governance as most necessary. Although it is likely that the plaintiffs' decade-long, internationally watched campaign will come to an end without ever reaching a formal trial, it has measurably impacted the global conversation about climate governance at every stage. In 2015, when the case was in its infancy, respected journalist Bill Moyers produced a documentary about the atmospheric trust project, which he christened the Children's Crusade.[451] At various stages during the *Juliana* litigation, tens of thousands and even hundreds of thousands of supporters weighed in to show support for the claim, many (if not most) of them young people. In 2019, a "children's brief" signed by over 36,000 children was delivered to the Ninth Circuit Court of Appeals in support of the plaintiffs' claims,[452] beginning:

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445. *In re* United States, No. 6:15-cv-1517, 2024 WL 5102489, at *2 (9th Cir. May 1, 2024) ("We held that the Juliana plaintiffs lack standing to bring their claims . . . . The district court is instructed to dismiss the case forthwith for lack of Article III standing, without leave to amend."), https://perma.cc/2GHH-YYKZ.
446. *Id.* at *1.
447. *Id.* at *1–2.
448. *Id.* ("We held that the Juliana plaintiffs lack standing to bring their claims and told the district court to dismiss. *Uzuegbunam* did not change that.").
449. Order Denying Rehearing en banc, *In re* United States, No. 6:15-cv-1517, slip op. at 2 (9th Cir. July 12, 2024).
450. Karen Zraick, *Youth Group Asks Supreme Court to Revive a Landmark Climate Lawsuit*, N.Y. Times (Sep. 12, 2024), https://perma.cc/3449-T6LW (discussing the Supreme Court appeal).
451. Bill Moyers, *The Children's Climate Crusade*, Moyers (Jan. 1, 2015), https://perma.cc/6VT7-3PSX.
452. Brief of Zero Hour on Behalf of Approximately 32,340 Children and Young People as Amici Curiae Supporting Plaintiffs-Appellees, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016), at *12 [hereinafter Brief of Zero Hour]; *see also Join the Youth Legal Action for a Safe Climate*, Join Juliana, https://perma.cc/CUW3-5XDC (noting that the brief was filed with over 36,000 names in support, and inviting continued signatories while the case works its anticipated way toward the U.S. Supreme Court) (the Zero Hour Movement has since

> Children are people and citizens. The Constitution protects the fundamental rights of children as fully as it does the rights of adults. The Constitution states clearly it intends to "secure the Blessings of Liberty to ourselves and our Posterity." We *are* the Posterity the Constitution protects. Scientific studies show that government actions today, including its actions of authorizing greenhouse gas discharges and subsidizing fossil fuel extraction, development, consumption, and exportation, imperil plaintiffs' constitutional rights to life, liberty, and property. The government's fossil fuel policies and actions threaten to push our climate system over tipping points into catastrophe. We ask the Court to grant plaintiffs the opportunity to try their case and prove the harms caused and intensified by governmental action.[453]

The brief went on to address the importance of applying public trust principles to protect the atmosphere, on behalf of vulnerable youth today and voiceless generations yet to come:

> As the Constitution protects our fundamental rights, the Public Trust Principle protects our inheritance of resources. It articulates the legal duty of the government, as the trustee of property held in common, to conserve our vital natural resources. The government holds and manages the public trust for us, the trust beneficiaries. The government is obligated to protect our inheritance of, and refrain from substantially impairing and alienating, the natural resources upon which all life and liberty depend. "The beneficiaries of the public trust are not just present generations but those to come."[454]

Five years later, after the *Juliana* plaintiffs appealed their 2024 dismissal by the Ninth Circuit to the Supreme Court, an even wider show of support from nearly 350,000 petitioners implored President Biden and Attorney General Merrick Garland to withdraw opposition by the Department of Justice to the lawsuit.[455]

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moved their online operations to https://perma.cc/46UH-5YBD). The organization "This is Zero Hour" was instrumental in this petition campaign, and it now supports environmental issue awareness and letter writing campaigns to elected officials. *Current Actions*, This is Zero Hour, https://perma.cc/83CQ-9X3D.

453. Brief of Zero Hour at 5–6, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016).

454. *Id.* at 8–9 (quoting Ariz. Ctr. for L. in Pub. Int. v. Hassell, 837 P.2d 158, 169 (Ariz. Ct. App. 1991)).

455. *Nearly 350,000 People Demand the Biden Administration and U.S. Department of Justice End the Opposition to Youth Climate Case*, Friends of the Earth (Sep. 12, 2024), https://perma.cc/CU44-XK57 ("Yesterday, two petitions signed by hundreds of thousands of intergenerational individuals were digitally delivered to President Biden and Attorney General Garland urging an end to the Department of Justice's (DOJ) relentless opposition to America's youth-led constitutional climate lawsuit, Juliana v. United States. Nearly 350,000 signatures were co-delivered by world renowned author and co-founder of 350.org and Third Act,

The case also warrants consideration from the legal standpoint. Despite its substantial evolution after the initial filing in 2015, the central premise of the case remained its effort to vindicate a set of fundamentally paired rights and duties—environmental rights held by the public, in public natural resource commons that the state holds a sovereign obligation to protect. The *Juliana* plaintiffs retained the iconoclastic atmospheric trust claim, seeking to expand common law public trust protection to atmospheric resources, but they departed from the first wave of atmospheric trust suits to partner that claim with an independent assertion of fundamental rights to climate stability—an even broader trust-rights claim—through more established constitutional promises of fundamental fairness in governance under the Due Process Clause.

In this respect, the case highlights the potential for future trust-rights advocacy bridging both conventional and unconventional trust resources with more conventionally understood rights. The suit alleged that U.S. energy policy is unlawfully harming the atmosphere, a legal reach, but also the territorical seas, a long established public trust resources—and in violation of both the common law public trust doctrine and federally protected constitutional rights to due process. Even if the assertion of the atmosphere as a public trust resource never gains traction, the assertion of climatic impacts on the ocean revealed a lever for traditional public trust advocacy in pursuit of climate governance. And even if the substantive due process claim never advances federally, it has already inspired related constitutional advocacy at the state level, as described further below. Moreover, the failure of *Juliana* to advance on redressability grounds has already inspired the next wave of climate trust-and-rights litigation to proceed in much narrower forms.[456] These suits, now shifting toward state constitutional claims, predicate more modest claims for relief on theories of the case that, if judicially affirmed, could create important trust-and-rights precedent for future climate advocacy.[457]

While the case may yet contribute to future climate advocacy, the loss stung for trust-rights plaintiffs today. Days after *Juliana* was dismissed, *G.B. v. EPA*, another version of the same suit brought by Our Children's Trust working with youth plaintiffs in California, was dismissed by a federal district court judge, citing the Ninth Circuit's grounds for dismissing *Juliana* (though allowing these plaintiffs leave to amend).[458] The history of these atmospheric trust and fundamental rights claims to date suggest they will continue to face hurdles as they moves through the legal system—and also that the Supreme Court is

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Bill McKibben, and the youngest ever White House Environmental Justice advisor and Co-Founder of Waic Up, Jerome Foster II.") [hereinafter End Opposition to Youth Climate Case].

456. *See infra* Part III.E.

457. *Id.*

458. Order Granting Defendant's Motion to Dismiss, G. B. v. EPA, No. CV 23-10345-MWF (AGRX), 2024 WL 1601807 (C.D. Cal., May 8, 2024).

not eager to entertain the issue.[459] Nevertheless, the extraordinary volley of litigation back and forth among the different levels of federal jurisdiction in *Juliana* testifies both to the gravity of the issue, and also the likelihood that the federal courts may eventually have to consider the substantive issues, one way or the other. For even if private plaintiffs in such cases cannot meet the Court's threshold for standing, it may be possible for state plaintiffs to do so.

1. Juliana*-Style Claims by State Plaintiffs?*

As this Article goes to press, the *Juliana* plaintiffs have appealed their loss to the Supreme Court, but the Court's earlier rulings suggests that it is not favorably disposed to the claim.[460] However, even if the standing analysis in the Ninth Circuit's 2024 dismissal serves to preclude other private plaintiffs from bringing similar suits, the fundamental arguments raised by the *Juliana* plaintiffs are not necessarily a dead-letter. These same issues may yet reappear in a trust-rights climate suit brought by an American state as a plaintiff.[461] A state plaintiff might succeed where private plaintiffs could not, based on the special standing that states hold to challenge erroneous federal actions that threaten unique state sovereign interests—arguably, including that of protecting public trust impressed state territory—from damage associated with global warming.[462]

Following the *Juliana* model, a state might argue that when a federal agency made a specific regulatory decision—say, approving the export of liquified natural gas from a state terminal[463]—it unreasonably performed a statutory duty in a way that violated procedural requirements and injured the state's sovereign

459. As noted above, the Supreme Court of Oregon has separately signaled that it does not consider the atmosphere to be a public trust resource as a matter of Oregon state law, which does not bear on the plaintiffs' federal claim (and even less so after the amended complaint), but it certainly lends no support to the public trust origins of the claim. *See* Chernaik v. Brown, 475 P.3d 68, 81–82 (Or. 2020).

460. *See supra* notes 409–412 and accompanying text (discussing the Supreme Court's previous rulings in the case).

461. This thought experiment is more fully entertained in a separate forthcoming essay, Erin Ryan, *Environmental Rights, State Climate Claims, and Standing: Could a State Bring the* Juliana *Atmospheric Trust Lawsuit?*. I am especially grateful to my research assistant, Molly Adamo, for helping to articulate this line of reasoning.

462. Because states are sovereign entities, federal courts grant states "special solicitude" when assessing state standing to bring suits challenging federal agency actions where Congress has created a procedural right in the authorizing statute. *See* Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007) (quoting Lujan v. Def. of Wildlife, 504 U.S. 555, 572, n. 7 (1992)); *id.* at 520 (recognizing that states may meet the particularized injury, causation, and redressability requirements of standing in contexts where ordinary citizens cannot). The full exposition of this idea further considers and distinguishes these hypothetical facts from the limits on the "special solicitude" doctrine that the Court recently articulated in U.S. v. Texas, 599 U. S. 650, 676, 686 (2023).

463. This hypothetical is drawn from the *Juliana* complaint, alleging that the Department of Energy's approval of liquefied natural gas exports from a terminal in Coos Bay, Oregon would be "the largest projected source of CO2 emissions in Oregon, and will significantly

obligation to protect trust territories for the benefit of the public. Consistent with the amended *Juliana* claim,[464] the state could ask for declaratory relief establishing that its citizens hold fundamental rights to climate stability to protect their interests in their state's trust territory (as discussed in Part II.B, the reciprocal side of the state's public trust obligations). Either way, the state would need to show both that it has a legitimate sovereign interest harmed by the federal agency's error and that it has standing to raise its claim, notwithstanding the Ninth Circuit's redressability analysis in *Juliana*.

A plaintiff state might be able to show that an agency's regulatory approach was arbitrary and capricious in its failure to consider the impact of that approach on both the state's sovereign territory and its public trust obligation to protect its citizens' rights in trust territory likely to be damaged by climate change.[465] States with coastal lands and other submerged trust lands vulnerable to sea-level rise, ocean acidification, and other harms associated with climate change might be able to allege that a federal agency's failure to consider harm to trust territory from unmitigated greenhouse gas pollution represents a violation of statutory duties under such related federal statutes as the Coastal Zone Management Act,[466] or potentially the Clean Air or Water Acts.[467] The Supreme Court has recognized that states may meet the particularized injury, causation, and

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increase the harm that Defendants' actions are causing to Plaintiffs." Complaint at 3, Juliana v. United States, No. 6:15-CV-01517-TC (D. Or. Aug. 12, 2015)

464. Juliana v. United States, No. 6:15-CV-01517 AA, 2023 WL 3750334, at *6 (D. Or. June 1, 2023) ("Plaintiffs' Second Amended Complaint thus requests this Court to… enter a judgment declaring that the United States' national energy system has violated and continues to violate the public trust doctrine.").

465. To demonstrate federal recognition of the underlying state sovereign interest, the plaintiff state would point to the Supreme Court's repeated affirmation that the original thirteen colonies inherited public trust obligations at statehood and that the same obligations were then extended to all later states, as recognized by the constitutional equal footing doctrine, Pollard v. Hagan, 44 U.S. 212, 222–23 (1845), which affirms the public trust an aspect of state sovereignty over territory. Martin v. Waddell, 41 U.S. 367, 410 (1842), Shively v. Bowlby, 152 U.S. 1, 48–49, 57 (1894). As received from English common law, the doctrine obligates the sovereign to manage trust resources "for the benefit of the public." Analogous to the common law of trusts, the state is thus responsible for the management and protection of trust resources while its citizens are the intended beneficiaries, holding rights both to the benefit of the trust and to hold the trustee accountable. See Ryan, *A Short History*, *supra* note 6, at 149–58 (describing the historical origins of the doctrine and its reception by the U.S. Supreme Court).

466. A state plaintiff challenging a federal agency's approval of liquified natural gas exports in a coastal zone that is the subject of a Coastal Zone Management Plan could potentially make such a showing, connecting it to harmed state interests and obligations in trust territory. Coastal Zone Management Act, 16 U.S.C. §§ 1451–1466.

467. Clean Air Act, 42 U.S. Code § 7604; Clean Water Act, 42 U.S.C. § 7604.

redressability requirements of standing in contexts where ordinary citizens cannot[468]—particularly when challenging insufficient climate governance.[469]

States' sovereign interests in their territory and their public trust obligations to preserve it for their citizens are well understood, making this a potentially viable legal strategy.[470] While it would not establish the constitutional right to climate stability that the *Juliana* plaintiffs sought, such a suit could advance their goals by establishing that the public trust doctrine protects atmospheric concerns in association with the traditional trust territorial interests of the states. An even more ambitious strategy would be to attempt a *parens patriae*[471] claim to represent the substantive environmental rights of its citizens—those fundamental rights to enjoy the benefit of trust resources implied as the reciprocal, flip-side of their state's public trust obligations.[472] To prevail, the state

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468. Massachusetts v. EPA, 549 U.S. 497, 520 (2007).

469. *Id.* In 2007, in *Massachusetts v. EPA*, the Supreme Court affirmed the principle that states receive "special solicitude" in the standing analysis due to states' unique "stake in protecting [their] quasi-sovereign interests," and the Court established that this includes state interests in protecting their physical territory from sea-level rise. The Court also concluded that the states' claims were suitably redressable to meet the requirements of standing, because the judicary was positioned to force the defendant agency to perform a statutory duty—in that case, assessing whether greenhouse gas emissions contribute to climate change and thus require regulation under the Clean Air Act. *Id.* at 532. It concluded that state plaintiffs must only show "some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 517–18 (citing Lujan, 504 U.S. at 572, n. 7); *see also* Sugar Cane Growers Cooperative of Fla. v. Veneman, 289 F.3d 89, 94–95 (C.A.D.C.2002) ("A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result.")).

In 2023, the Court somewhat limited the "special solicitude" doctrine in *U.S. v. Texas*, a case in which Texas and Louisiana challenged federal failures to control immigration at the southern U.S. border, holding that these states lacked standing despite their claim of a sovereign interest in the matter, on substantive and precedential grounds that are both distinguishable in an atmospheric trust/fundamental rights claim brought by a state. 599 U. S. 650, 676, 686 (2023). The Court reasoned that the claims in *U.S. v. Texas* were not "legally and judicially cognizable," because there was no legal or historical precedent for state claims against Article II federal enforcement discretion, specifically distinguishing *Mass. v. EPA*, and the Court affirmed its longstanding presumption against hearing claims that challenge executive judgments with regard to prosecution and enforcement. *Id.* at 671–72. For the full analysis of why *U.S. v. Texas* would not control the outcome here, see Ryan, *Thought Experiment*, supra note 461.

470. *See supra* note 465 (discussing the Court's settled public trust jurisprudence).

471. *Parens patriae*, literally meaning 'parent of the country,' is a doctrine of standing that allows states to bring lawsuits as representatives of their citizens to prevent or repair harm to the states' quasi-sovereign interests. Commonwealth v. United States Dep't of Educ., 340 F. Supp. 3d 7, 15 (D.D.C. 2018); N. Arapaho Tribe v. Burwell, 118 F. Supp. 3d 1264, 1277 (D. Wyo. 2015).

472. The state would argue that these fundamental trust rights, the flip-side of the coin of state public trust obligations, deserve federal consideration in the same way that state obligations under the public trust doctrine have been federally recognized since the nineteenth century.

would need to convince a court to accept the environmental obligations asserted under modern interpretations of the doctrine, which have not received Supreme Court review.[473] Potentially more problematic, states are usually limited in their ability to bring *parens patriae* suits against the federal government on behalf of their citizens' rights because it is presumed that the federal government is the superior protector of their rights.[474]

However, a state plaintiff's best counterargument is that the underlying public trust issue presents a unique circumstance allowing the state to serve as the predominant—or potentially the only—*parens patriae* representative of the people's rights and general welfare,[475] according to the scope of the federally recognized relationship between the state and its public under the doctrine.[476] Until a federal public trust is formally recognized, *only* the state can act in the relevant *parens patriae* role of "ultimate protector." To defeat this claim, the federal government would have to assert that there actually is a federal responsibility to protect public trust resources. That would render it the superior *parens patriae* protector, but it would also force federal actors to consider the effects of federal regulation on public trust resources to avoid a judicial finding that their actions had arbitrarily or capriciously violated federal obligations. From the perspective of climate litigants, either result would be considered favorable. While this strategy raises greater uncertainties, the approach would enable a state claim analogous to the *Juliana* substantive due process claim to the fundamental right of a livable climate.

E. Climate Claims on State Constitutional Grounds

The failure of so many of the early atmospheric trust cases satisfied many of the predictions of their critics. At the same time, they managed to engage the public in ways that appear to have exceeded previous strategies, especially across generations. As noted, over 36,000 youth signed an open amicus brief supporting the *Juliana* plaintiffs' claims that was shared with the Ninth Circuit Court of

473. The plaintiff state's best argument is that if the Court continues to treat the public trust doctrine as a federally-recognized feature of state law, then it must defer to the state's own interpretation of its obligations under the doctrine when considering its trust-rights claim.

474. Massachusetts v. Mellon, 262 U.S. 447, 485–486 (1923) (stating this principle in a case dismissing Massachusetts' bid to act as *parens patriae* in a context involving a law protecting maternal health).

475. *See* PPL Montana, LLC v. Montana, 556 U.S. 576 (2012) (stating, in dicta, that the public trust does not apply to the federal government). *But see* Ryan, *A Short History, supra* note 6, at 176–81 (discussing scholarly arguments in favor of a federal trust).

476. The Supreme Court has already recognized that the states have been assigned sovereign obligations to manage and protect territorial trust resources for the public, as the very legal representatives of their citizens that the *parens patriae* doctrine envisions. *See supra* note 465.

Appeals in 2019,[477] and another some 350,000 "intergenerational individuals" signed petitions delivered to the Biden Administration asking it to withdraw its opposition to the suit in 2024.[478] The youth plaintiffs in atmospheric trust cases helped jumpstart a public conversation about the importance of more effective climate governance and the responsibilities governments owe their citizens in response to serious environmental challenges.[479] Given that many of these youth plaintiffs weren't even old enough to vote, speaking as litigants was their best means of participating in the political process—and the hundreds of thousands of petitioners supporting them suggest that their voices have indeed been heard. Yet speaking is not as effective as winning, so American climate advocates have shifted strategy.

The following section reviews how climate advocates have adapted to the challenges of the early atmospheric trust cases, partnering their public trust claims with constitutional claims that may find firmer legal footing, especially in states that have adopted trust-rights principles in their constitutions—or are now attempting to do so. Even scholarly critics of environmental advocacy based on the common law public trust doctrine acknowledge the comparative legal force of these claims when partnered with, or premised on, unambiguous commitments to environmental protection in state statutes and constitutions.[480] Assertion of public trust obligations and the environmental rights they imply—or conversely, assertions of environmental rights and the public trust obligations they imply—continue to motivate advocacy nationwide. The notion that the government must protect the air commons for the benefit of the public has now spawned a series of new climate cases brought on specific state constitutional grounds.[481]

Juliana was among the first cases to make the argument that the environmental right to a stable climate is an unenumerated fundamental right of citizenship (after *Urgenda* held that it was a basic human right under European law),[482] but similar arguments are now unfolding in the handful of states whose

477. Brief of Zero Hour at *12, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016); *supra* text accompanying notes 452–454, discussing and quoting the children's brief.

478. *End Opposition to Youth Climate Case*, Friends of the Earth (Sep. 12, 2024), https://perma.cc/CU44-XK57; *supra* note 455. *See also* Bill Moyers, *The Children's Crusade*, *supra* note 451.

479. Paul Rink, *Climate Rights Strategic Litigation*, *supra* note 193 (discussing the impacts of strategic climate litigation, like Juliana, that loses in court but advances public discourse, among other potential benefits).

480. *See, e.g.*, Araiza, *supra* note 112, at 433 ("If there is to be justification for stringent judicial review under the public trust doctrine, it must therefore be found in some theory that accords a substantive preference for the preservation of public trust resources."); *id.* at 438–45 (proposing state constitutions as a source of these substantive environmental preferences).

481. *Id.*

482. Juliana v. United States, No. 15-CV-01517-AA, 2023 WL 3750334, at *9 (D. Or. June 1, 2023); Urgenda v. Netherlands, [2015] HAZA C/09/00456689 (Neth.) at 41-42, https://perma.cc/V7C5-VRAV (unofficial English translation).

constitutions include positive environmental rights, such as Florida,[483] Hawai'i,[484] Montana,[485] Utah,[486] Virginia,[487] and New York.[488] Expanding the pool to include state constitutions with substantive commitments to environmental protection that could arguably form the basis for related claims creates even broader opportunities for this kind of environmental advocacy. Nearly half the states include some such constitutional provision,[489] but the following discussion is limited to those with constitutional provisions expressly framed in terms of public trust obligations or public environmental rights.

New York is the most recent state to enact constitutional protections for the environment in its Green Amendment of 2022, which now guarantees New Yorkers "a right to clean air and water, and a healthful environment."[490] Similar language appears in the Massachusetts,[491] Illinois,[492] and Montana[493] constitutions. The Florida Constitution provides that the state shall "conserve and protect its natural resources and scenic beauty,"[494] and similar language appears in the Hawai'i Constitution.[495] As described below, these state constitutional provisions have proven a source from which climate advocates are asserting both sovereign obligations and environmental rights, including the Montana youth who prevailed in their claim that the state constitution's promise of "a clean and healthful environment" were violated by state policies protecting

483. Fla. Const. art II, § 7 ("[I]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise and for the conservation and protection of natural resources.").
484. Haw. Const. art IX, § 8 ("The State shall have the power to promote and maintain a healthful environment, including the prevention of any excessive demands upon the environment and the State's resources.").
485. Mont. Const. art. IX, § 1 ("The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.").
486. *Natalie R. V. State of Utah*, Our Child.'s. Tr., https://perma.cc/H5NY-GHQG.
487. *Layla H. V. Commonwealth of Virginia*, Our Child.'s. Tr., https://perma.cc/LW4Y-7XNV.
488. *See* Fresh Air for the East Side, Inc. v. New York, No. E2022-000699 (Sup. Ct. Monroe Cty. Dec. 20, 2022); *see also* Fresh Air for the Eastside, Inc. v. Town of Perinton, No. E2021-008617 (Sup. Ct. Monroe Cty. Dec. 8, 2022).
489. See Araiza, *supra* note 112, at 451.
490. N.Y. Const. art. I, § 19.
491. Mass. Const. art. XCVII ("[T]he people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agricultural, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.").
492. Ill. Const. art. XI, § 2 (Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.").
493. Mont. Const. art. IX, § 1.
494. Fla. Const. art II, § 7.
495. Haw. Const. art IX, § 8.

the fossil fuel industry,[496] and the Hawai'i youth who achieved a groundbreaking settlement for climate governance based on similar constitutional arguments.[497]

Held v. Montana, a case built on state constitution-based public trust principles was the first of its kind to go to trial in June 2023.[498] The case relied on a 1972 amendment to the Montana Constitution that provides that "[t]he state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."[499] Montana's constitution is unusual for imposing obligations for environmental protection not only on the state as the collective representative of the public interest, but on all members of the public directly. Even so, and despite that constitutional provision, the state disputed that fossil fuels have contributed to climate change and that Montana has experienced unusual weather events that have been linked to temperature changes.[500] The plaintiffs focused their lawsuit on a provision of the Montana Environmental Protection Act that requires state agencies to perform environmental review of proposed actions, but was amended to specifically forbid agencies from considering greenhouse gas emissions and climate-related environmental impacts.[501] In allowing the case to go to trial, Judge Seeley of the Montana First Judicial District Court denied the State's motion to dismiss[502] for lack of standing and failure to exhaust the administrative process.[503]

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496. David Gelles, *In Montana, It's Youth vs. the State in a Landmark Climate Case*, N.Y. Times (Mar. 24, 2023), https://perma.cc/3P8H-KXL7; *see also Montana Youth Win*, Our Child's. Tr., https://perma.cc/GV9C-VSAJ.

497. Clark Mindock, *Hawai'i Transportation Department Must Face Kids' Climate Lawsuit, Judge Rules*, Reuters (Apr. 7, 2023), https://perma.cc/M6GB-GX4A (reporting on the lawsuit); *Navahine F. v. Hawai'i Department of Transportation*, Climate Case Chart, https://perma.cc/5QS9-QPQF (reporting on the settlement and linking to the record of settlement).

498. Held v. Montana, No. CDV-2020-307 at 102 (Mont. Dist. Ct. Aug. 14, 2023); Gelles, *supra* note 496; *see also Montana Youth Win*, Our Child's. Tr., https://perma.cc/GV9C-VSAJ.

499. Mont. Const. art. IX, §1; *see also* Gelles, *supra* note 496.

500. Gelles, *supra* note 496.

501. Held v. Montana, 2024 MT 312, para. 30 (Dec. 18, 2024); *see also* Julia Jacobo, *Montana's New Law Banning Climate Impact Review Sparks Backlash from Environmental Experts*, ABC News (May 26, 2023), https://perma.cc/V83Z-ZHAY (describing the new law, which "prevents weighing climate impacts in state environmental reviews").

502. Rachel M. Pemberton & Micheal C. Blumm, *Emerging Best Practices in International Atmospheric Trust Case Law*, 2022 Utah L. Rev. 941, 956 (2022) ("While not explicitly using 'public trust' language, the court recognized that the inclusion of a state duty over natural resources in the Montana Constitution provides 'protections that are both anticipatory and preventative.'") (quoting Held v. State, No. CDV-2020-307, at *14 (Mont. Dist. Ct. Aug. 4, 2021)

503. Order on Motion to Dismiss, Held v. State, No. CDV-2020-307 (Mont. Dist. Ct. Aug. 4, 2021), https://perma.cc/2KRH-3K3B; s*ee also* Order on Defendants' Motion to Dismiss for Mootness and for Summary Judgment slip op. 2-4, Held v. State of Montana, No. CDV-2020-307 slip op. at 2–4 (Mont. Dist. Ct. 23 May 2023) (declining to dismiss the case on prudential grounds, over protests from the state, even after the state amended the Environmental Policy Act).

On August 14, 2023, in a much celebrated win for climate advocacy, the trial court found in favor of the youth plaintiffs, holding that Montana citizens' rights to a clean and healthful environment under the state constitution includes the right to a stable climate, and that the challenged statutory provision harmed these rights.[504] With unequivocal support for the plaintiffs' claim on appeal, the Montana Supreme Court later concurred that "Montana's right to a clean and healthful environment and environmental life support system includes a stable climate system, which is clearly within the object and true principles of the Framers inclusion of the right to a clean and healthful environment," affirming the district court's conclusions that the plaintiffs had standing to challenge the statutes precluding assessment of climate impacts and that these statutes were unconstitutional.[505] Even before the high court's groundbreaking ruling, the case has already had an outsized impact on the discourse, inspiring advocates in nearly a fifth of all American states to file paperwork to advance similar environmental rights amendments to their state constitutions.[506]

In another iteration of this new wave of state constitutional climate litigation, youth climate activists in Hawai'i sued the state Department of Transportation for failing to reduce harmful emissions in violation of the state's constitutionalized public trust doctrine and the environmental rights it implies.[507] In Navahine v. Hawai'i Department of Transportation, the plaintiffs sought a declaration that the state had violated its duty under the public trust principles explicitly incorporated into the Hawai'i Constitution,[508] contending that state practices favoring fossil-fuel based transportation infringed their state constitutional rights to a healthy environment.[509] Given the historic strength of that state's public trust doctrine, the plaintiffs' claim survived a motion to dismiss[510] and resulted in an unprecedented consent decree with the state,

504. Held v. State, No. CDV-2020-307, slip op. at 101–02 (Mont. 1st Dist. Ct. Aug. 14, 2023), https://perma.cc/FWB3-5XA9.

505. Held v. Montana, 2024 MT 312, para. 30, 73 (Dec. 18, 2024) (holding that the Montana Constitution's promise of a healthy environment included protections for climate stability, that the plaintiffs had standing on the basis of their injured state constitutional rights to challenge statutes precluding assessment of greenhouse gas emissions during environmental impact assessment, and that these statutes violated the state constitution).

506. See infra notes 532–548 and accompanying text (describing proposed new state constitutional environmental rights amendments).

507. Navahine v. Hawai'i Department of Transportation, No. 1CCV-22-0000631 (Haw. Cir. Ct. 2024); Clark Mindock, *Hawaii Transportation Department Must Face Kids' Climate Lawsuit, Judge Rules*, Reuters (Apr. 7, 2023), https://perma.cc/M6GB-GX4A.

508. *See* Complaint at 27-28, 67-70, Navahine v. Hawai'i Department of Transportation, No. 1CCV-22-0000631, (Haw. Cir. Ct. 2022) (detailing the constitutional public trust bases for the claim); Mindock, *Hawai'i Transportation Department Must Face Kids' Climate Lawsuit*, supra note 497.

509. *Navahine*, 1CCV-22-0000631 (Haw. Cir. Ct. 2024).

510. *See* Mindock, *Hawai'i Transportation Department Must Face Kids' Climate Lawsuit*, supra note 497.

approved by the overseeing court.[511] Under the terms of the settlement, the state will establish a Climate Change Mitigation & Culture Manager and a volunteer youth council, seating at least two of the youth plaintiffs,[512] all charged with overseeing an effort to achieve net-zero emissions in all ground and inter-island sea and air transportation by 2045.[513]

These state-based climate rights lawsuits have been more successful than their atmospheric trust predecessors, both because the state constitutions at issue provide more robust support for the sovereign obligations and environmental rights claimed by the plaintiffs, but also because the plaintiffs learned from the failures of the early cases. In particular, the newer claims have taken a more purposefully modest approach in their prayers for relief to avoid the redressability and justiciability issues raised in *Juliana* and earlier climate rights cases.[514] These claims seek less controversial judicial remedies that they hope will be more likely to support standing, while maintaining climate rights-based legal theories that they hope will preserve future opportunities for broader environmental advocacy in both the judicial and policymaking arenas.

For example, in contrast to *Juliana*'s initial pleadings, which sought judicial design and implementation of a national plan for reducing greenhouse gas pollution, the Montana plaintiffs in *Held* partnered their request for equally significant declaratory relief (interpreting the scope of their environmental rights under the state constitution to include climate stability) with more tailored injunctive relief, including the invalidation of a particular state law preventing state agencies from considering climate impacts when conducting legally required environmental review.[515] Like the *Juliana* plaintiffs, the Hawaiian plaintiffs in *Navahine* requested an emissions reduction plan, but they focused their complaint on the actions of one specific agency, the state Department of Transportation,[516] rather than the redesign of national climate policy initially sought in *Juliana*.

Other state law claimants are partnering similar requests for declaratory relief with even more modest injunctive remedies tailored to specific projects or decisions alleged to violate their alleged rights. For example, in *Fresh Air for the Eastside v. New York*, the plaintiffs premised their bid to close a specific local landfill emitting methane, a powerful greenhouse gas, on an alleged violation

511. *Office of the Governor of Hawai'i - News Release - Historic Agreement Settles Navahine Climate Litigation*, Governor Josh Green (June 20, 2024), https://perma.cc/M8TV-YKFD.

512. *Navahine*, 1CCV-22-0000631, 8–9 (Haw. Cir. Ct. 2024).

513. *Office of the Governor of Hawai'i - News Release - Historic Agreement Settles Navahine Climate Litigation*, Governor Josh Green (June 20, 2024), https://perma.cc/M8TV-YKFD (describing the terms of the settlement).

514. Rink, Climate Rights Strategic Litigation, *supra* note 193, at Part II.D (providing a comprehensive review of the climate-rights based claims noted here).

515. Held v. Montana, No. CDV-2020-307, at 102 (Mont. Dist. Ct. Aug. 14, 2023).

516. Complaint at 70, Navahine v. Hawai'i Department of Transportation, No. 1CCV-22-0000631 (Haw. Cir. Ct. 2022).

of environmental rights protected by the New York State Constitution.[517] While this claim has failed to move forward,[518] a similar suit was recently filed in Alaska against a specific liquified natural gas terminal alleged to violate the plaintiffs' public trust and substantive due process rights under the state constitution.[519] In *Sagoonick v. Alaska*, plaintiffs are seeking an injunction against further action developing the terminal and a declaratory judgment that its operation violates their rights of equal access to public trust resources and to sustained yield of these resources, together with recognition of their fundamental right to a climate system that sustains human life, liberty, and dignity.[520] If successful, such suits could affirm the legal force of state-based environmental rights in present and future circumstances while surviving the standing hurdle that tripped *Juliana* and so many previous claims for broader injunctive relief.

Still other state-based environmental rights plaintiffs have requested only declaratory judgments recognizing harm to alleged constitutional rights, unpartnered with specific requests for injunctive relief. In *Clean Air Council v. Pennsylvania*, the plaintiffs have sought judicial intervention in greenhouse gas regulation, but only in the form of a declaratory judgment holding that abandoned oil and gas wells leaking greenhouse gases within the state violates state constitutional rights.[521] In a Virginia suit alleging public trust claims against state oil and gas infrastructure, the plaintiffs sought declaratory relief only and left the assignment of any appropriate equitable relief to the best judgment of the presiding court—but the claim was still dismissed for lack of standing.[522] In *Natalie R v. Utah*, plaintiffs following a similar strategy are awaiting their hearing before the Utah Supreme Court, arguing that state fossil fuel development infringes their state-based constitutional rights to life.[523]

517. Complaint, Fresh Air for the Eastside, Inc. v. State of New York, No. E2022000699 (Sup. Ct. Monroe Cty. Jan. 28, 2022).
518. Fresh Air for the Eastside, Inc. v. State of New York, No. 20-1234 at 2 (N.Y. App. Div. 4th, July 26, 2024) (dismissing the claim with prejudice). The same plaintiffs brought a related action in federal court premised on statutory claims under the federal Resource Conservation and Recovery Act and state common law claims indirectly related to the earlier state court action, but the action was dismissed on procedural grounds. Fresh Air for the Eastside, Inc. v. Waste Mgmt. of N.Y., No. 18-CV-06588-FPG-MJP (W.D.N.Y. Apr. 18, 2024) (dismissing but with leave to amend).
519. Complaint for Declaratory and Injunctive Relief, Sagoonick v. Alaska II, No. 3AN-24- (Alaska Sup. Ct. May 22, 2024).
520. *Id.* at 40–44, 80–81.
521. Petition for Review, Clean Air Council et al., v. Pennsylvania, No. 379 MD 2023 (Pa. Commw. Ct. 2023).
522. Complaint for Declaratory and Injunctive Relief at 71-72, Layla H. v. Virginia, No. 1639-22-2 (Va. Ct. App. Feb. 9, 2022) (requesting a declaratory judgment of constitutional rights and any injunctive relief the court "deems necessary" to rectify alleged violations). Nevertheless, the claim was still dismissed for lack of standing. Layla H. v. Virginia, No. 1639-22-2, at 16–18 (Va. Ct. App. June 25, 2024).
523. Complaint for Declaratory Relief, Natalie R. v. Utah, No. 20230022-SC (Utah. Dist. Ct. Mar. 15, 2022).

While climate plaintiffs in states with explicit constitutional environmental protections target those specific provisions, as the *Clean Air Council* Pennsylvania suit has done, plaintiffs in other states have attempted to imply environmental rights from more general constitutional provisions. The Utah and Virginia suits both claimed violations of fundamental rights under their respective state constitutions,[524] attempting variations of the novel federal claim in *Juliana* in state law contexts. The youth plaintiffs in Utah allege that the state has implemented environmental policies that violate life, liberty, and property under Utah's Due Process Clause.[525] The youth plaintiffs in Virginia had argued that the state's Gas and Oil Act constitutes an unconstitutional deprivation of life without due process, alleging that the defendants' actions "violate Plaintiffs' substantive due process rights, secured by Virginia's Constitution," and as well that the defendant's claimed rights to "utilize[e] Virginia's coal, oil, and gas resources cannot and do not operate to secure, and are not narrowly tailored to achieve, a more compelling state interest than Plaintiffs' fundamental rights to life, liberty, and property."[526]

Like *Urgenda* and *Juliana*, these claims center on the idea that climate stability is a fundamental human right, whether or not it is specifically enumerated in constitutional text, for which there should be governmental accountability and judicial redress.[527] Similar claims have been recognized by judges, but thus far only in dissenting and concurring opinions. For example, even before *Navahine*, one Hawai'i Supreme Court justice emphasized in a concurrence that "the right to a life-sustaining climate system is also included in the due process right to 'life, liberty, [and] property' enumerated in Article I, section 5 and the public trust doctrine embodied in Article XI, section 1's mandate that the State of

524. *See* Complaint for Declaratory Relief, Natalie R. v. Utah, No. 20230022-SC (Utah. Dist. Ct. Mar. 15, 2022); Plaintiff's Complaint for Declaratory Relief at 78-82, No. 220901658 (Utah Dist. Ct. Mar. 15, 2022); Plaintiff's Brief in Opposition to Defendant's Demurrer and Plea of Sovereign Immunity at 4, Layla H. v. Commonwealth, No. CL22000632-00, (Cir. Ct. Richmond, Aug. 26, 2022).

525. Complaint at 78–82, Natalie R. v. State, No. 220901658 (Utah Dist. Ct. Mar. 15, 2022), https://perma.cc/6QS7-8KBS.

526. Complaint at 65–67, Layla H. v. Commonwealth, No. CL22000632-00 (Va. Cir. Ct. Feb. 9, 2022), https://perma.cc/G3L6-YSA9.

527. *Id.* at 66 (arguing that Virginia's contribution to harmful greenhouse gas emissions is depriving the youth plaintiffs of their "fundamental rights to life, liberty, and property"); *see* Urgenda v. Netherlands, [2015] HAZA C/09/00456689 (Neth.) at 41, https://perma.cc/V7C5-VRAV (unofficial English translation). ("This case is essentially about the question whether the State has a legal obligation towards Urgenda to place further limits on greenhouse gas emissions – particularly CO2 emissions – in addition to those arising from the plans of the Dutch government, acting on behalf of the State."); *see also* Complaint at 94–95, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC) (Plaintiffs asked the court to "[d]eclare that Defendants have violated and are violating Plaintiffs' fundamental constitutional rights," and asked the court to "[e]njoin Defendants from further violations of the Constitution").

Hawai‘i ‘conserve and protect Hawai‘i's. . .natural resources’ ‘[f]or the benefit of present and future generations[.]’”[528] The same justice used his separate opinion to criticize the Ninth Circuit's opinion dismissing *Juliana* as an “abdicati[on of judicial] responsibility to leave future generations a habitable planet,”[529] and to critique the federal courts as a whole as “hostile” to climate claims.[530] Reasoning that the federal judiciary had abdicated its responsibility to respond to climate claims, he maintained the responsibility of state courts to take up the task.[531]

As the next wave of climate litigation shifts to the states, many environmental advocates are acting quickly to facilitate constitutional reinforcement of environmental rights claims, following the success of the *Held* case in Montana and the *Navahine* case in Hawai‘i. At present, at least thirteen states have introduced bills to amend their state constitutions to include provisions that partner, either explicitly or implicitly, sovereign obligations and environmental rights.[532] These proposed amendments follow from two different legal frameworks: one that explicitly emphasizes only the environmental rights held by individuals, such as Montana's constitution, and another that emphasizes both sides of the rights-and-duties legal coin—simultaneously recognizing the state's sovereign obligation to protect trust resources and guaranteeing the related environmental rights—as Pennsylvania's constitution does.[533] Most of the proposed amendments are framed in the latter model, explicitly recognizing both the public trust obligation of the state and the environmental

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528. *In re* Haw. Elec. Light Co., Inc., 152 Haw. 352, 360 (Haw. 2023) (Wilson, J., concurring) (Justice Wilson's concurring opinion was not joined by the other justices of the Hawai‘i Supreme Court, and the majority opinion made no mention of the public trust doctrine, the atmospheric trust, or *Juliana*).

529. *Id.* at 365.

530. *Id.* at 367.

531. *Id.* (“The stark failure of the federal judiciary to grant redress to present and future generations alleging knowing destruction of a life-sustaining climate system relegates implementation of the climate rule of law to state judiciaries.”).

532. Kate Burgess, *Issue Area: Green Amendment*, National Caucus of Env't Legislators, https://perma.cc/3VW2-RDQE (reporting on states considering or moving toward consideration of related constitutional amendments).

533. Pa. Const. art. I, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”); John C. Dernbach, Kenneth T. Kristl & James R. May, *Recognition of Environmental Rights for Pennsylvania Citizens:* Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania, 70 Rutgers L. Rev. 803, 845–52 (2018); *See* John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 Env't L. 436, 487–94 (2015) (noting that two explicit constitutional obligations in Pennsylvania are (1) the “duty to conserve and maintain public natural resources” and (2) the “duty to refrain from impinging upon public environmental rights.”).

rights of their citizens, including Arizona,[534] Kentucky,[535] New Jersey,[536] New Mexico,[537] Vermont,[538] West Virginia,[539] and Washington.[540] States considering

534. S. Con. Res. 1031, 56th Leg., 2d Reg. Sess. (Ariz. 2024) ("A. Each person, including a person in a future generation, has the right to a clean and healthy environment, including pure water, clean air, healthy ecosystems and a stable climate, and to the preservation of the natural, cultural, scenic and healthful qualities of the environment. B. This State's public natural resources, including its waters, air, flora, fauna and climate, are the common property of all the people, including present and future generations. This State and its political subdivisions shall do all of the following: 1. Serve as trustees of these resources. 2. Conserve, protect, and maintain these resources for the benefit of all the people. C. The rights prescribed in this section are inherent, inalienable and indefeasible and are among those rights reserved to all the people. This State may not infringe on these rights. This section and the rights prescribed in this section are self-executing.").
535. B. Res. 1592, 24th Reg. Sess. (Ky. 2024) ("Every person has a right to a healthy environment, including a right to clean air, pure water, and ecologically healthy habitats. The Commonwealth's natural resources, among them its air, water, flora, fauna, climate, and public lands, are the common property of all people, including generations yet to come. As trustee of the environment and its natural resources, the Commonwealth shall conserve and maintain them for the benefit of all people.").
536. S. Con. Res. 43, 221st Leg., 2024 Sess. (N.J. 2024) ("(a) Every person has a right to a clean and healthy environment, including pure water, clean air, and ecologically healthy habitats, and to the preservation of the natural, scenic, historic, and esthetic qualities of the environment. The State shall not infringe upon these rights, by action or inaction. (b) The State's public natural resources, among them its waters, air, flora, fauna, climate, and public lands, are the common property of all the people, including both present and future generations. The State shall serve as trustee of these resources, and shall conserve and maintain them for the benefit of all people. (c) This paragraph and the rights stated herein are (1) self-executing, and (2) shall be in addition to the rights conferred by the public trust and common law.").
537. H.R.J. Res. 4, 56th Leg., 2d Sess. (N.M. 2024) ("A. The people of the state shall be entitled to clean and healthy air, water, soil, and environments; a stable climate; and self-sustaining ecosystems, for the benefit of public health, safety and general welfare. The state shall protect these rights equitably for all people regardless of race, ethnicity, tribal membership status, gender, socioeconomics or geography. B. The state, counties and municipalities shall serve as trustees of the natural resources of New Mexico and shall conserve, protect and maintain these resources for the benefit of all the people, including present and future generations. C. The provisions of this section are self-executing. Monetary damages shall not be awarded for a violation of this section. This section is enforceable against the state, counties, and municipalities.").
538. S. Proposal 5, 2024 Leg. (Vt. 2024) ("That the people have a right to clean air and water and the preservation of the natural, scenic, and cultural values of the environment. The State of Vermont's natural resources are the common property of all the people. The State shall conserve and maintain the natural resources of Vermont for the benefit of all people.").
539. H.R.J. Res. 23, 2024 Reg. Sess. (W. Va. 2024) ("All people have a right to a clean and healthy environment, including clean air, pure water, a stable climate, and the preservation of the natural, scenic, recreational, and healthful qualities of the environment. The state shall protect these rights equitably for all people. West Virginia's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the State shall conserve, protect, and maintain them for the benefit of all the people.").
540. H.R.J. Res. 4210, 68th Leg., 2024 Reg. Sess. (Wash. 2024) ("(1) The people of the state, including future generations, have the right to a clean and healthy environment, including

exclusively environmental-rights framed constitutional amendments include California[541] and Hawai'i,[542] perhaps because these two states arguably already have strongly established public trusts doctrines reflected in different parts of their constitutions.

Although they share common roots, the proposals showcase fascinating variety. While California's proposed amendment is concise (noting that "[t]he people shall have a right to clean air and water and a healthy environment"),[543] proposals in sister states like Washington refer to the responsibilities of different state subdivisions, principles of environmental justice, and interpretive instructions to ensure that the provisions are procedurally self-executing (to ensure that individuals may invoke these guarantees without further legislative process):

> (a) The people of the state, including future generations, have the right to a clean and healthy environment, including pure water, clean air, healthy ecosystems, and a stable climate, and to the preservation of the natural, cultural, scenic, and healthful qualities of the environment. The state, including each political subdivision of the state, shall serve as trustee of the natural resources of the state, among them its waters, air, flora, fauna, soils, and climate. (b) The state, including each political subdivision of the state, shall conserve, protect, and maintain these resources for the benefit of all the people, including generations yet to come. (c) The rights stated in this section are inherent, inalienable, and indefeasible, are among those rights reserved to all the people, and are on par with other protected inalienable rights. The state, including each political subdivision of the state, shall equitably protect these rights for all people regardless of their race, ethnicity,

pure water, clean air, healthy ecosystems, and a stable climate, and to the preservation of the natural, cultural, scenic, and healthful qualities of the environment. (2) The state, including each political subdivision of the state, shall serve as trustee of the natural resources of the state, among them its waters, air, flora, fauna, soils, and climate. The state, including each political subdivision of the state, shall conserve, protect, and maintain these resources for the benefit of all the people, including generations yet to come. (3) The rights stated in this section are inherent, inalienable, and indefeasible, are among those rights reserved to all the people, and are on par with other protected inalienable rights. The state, including each political subdivision of the state, shall equitably protect these rights for all people regardless of their race, ethnicity, tribal membership status, gender, geography, or wealth, and shall act with prudence, loyalty, and impartiality in fulfilling its trustee obligations. The provisions of this section are self-executing.").

541. Assemb. Const. Amend. 16, 2023-24 Reg. Sess. (Cal. 2024) ("The people shall have a right to clean air and water and a healthy environment.").

542. S.B. 2933, 32d Leg. 2024 (Haw. 2024) ("The inherent and inalienable rights of the people, including present and future generations, to clean water and air, a healthful environment and climate, healthy native ecosystems and beaches, shall be protected and shall not be infringed.").

543. Assemb. Const. Amend. 16, 2023-24 Reg. Sess. (Cal. 2024).

> tribal membership status, gender, geography, or wealth, and shall act with prudence, loyalty, and impartiality in fulfilling its trustee obligations. The provisions of this section are self-executing.[544]

Hawaiʻi's proposed amendment would guarantee that the "inherent and inalienable rights of the people" to a healthy environment "shall not be infringed,"[545] invoking the force with which individual rights enshrined in the federal Bill of Rights are legally protected.[546]

The different formats these amendments take is itself a subject for further inquiry, and a fuller treatment would consider the strengths and weaknesses of the two main approaches. Some advocates for these amendments have emphasized the importance of pursuing the Pennsylvania model[547]—expressly affirming both sovereign obligations and environmental rights—presumably because it appears to maximize enforcement opportunities along two seemingly different legal theories. For example, some courts may be more amenable to enforce an individual right than a sovereign obligation, because courts are used to enforcing rights and reluctant to tell executive and legislative actors what to do. Nevertheless, the analysis in this article suggests that the choice between the two is truly irrelevant, because either exclusive formulation—framing the directive as only an environmental right or only a sovereign obligation—legally implies both.[548]

It is also worth considering the strategic advantages to adopting comparatively vague or specific directives in these amendments, perhaps in different political contexts. On the surface, it would seem that the stronger the political consensus about what these rights and obligations should entail, the greater the flexibility in that state to craft more specific directives of the sort proposed in Washington. Specific directives would theoretically be more easily enforced in courts reluctant to interpret vague directives in ways that could trigger the kinds of justiciability and redressability concerns that brought down the *Juliana* litigation.[549]

On the other hand, the Washington proposal is just that—a proposal—and to achieve the political consensus necessary to actually amend the state constitution, it may yet become necessary to capture only the vague premise on which there is political consensus, leaving the details of implementation in a given case or controversy to the professional judgement of the relevant state actors. It is noteworthy that some of the newest such amendments, such as that adopted in Montana and New York, are comparatively concise—and therefore

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544. H.J. Res. 4210, 68th Leg., 2024 Reg. Sess. (Wash. 2024).
545. S.B. 2933, 32d Leg. 2024 (Haw. 2024).
546. *See, e.g.*, U.S. Const. amend. II.
547. Maya K. Van Rossum, The Green Amendment: The People's Fight For A Clean, Safe & Healthy Environment (2d ed. 2022).
548. *See supra* Part I.D.
549. *See supra* Part III.D.

vaguer and more open to interpretation than the Washington proposal. While that may initially seem like a hurdle, in this regard they resemble many the amendments to the U.S. constitution in the Bill of Rights, which have been successfully judicially interpreted for a quarter of a millennia. Framing public trust principles in constitutional terms may elide the vagueness and justiciability problems experienced by climate advocacy based on common law assertions of rights-and-trust principles.

Even as creative climate litigation shifts to state constitutions, however, opponents of these claims remain equally creative, mounting nimble defenses that keep the legal status quo fluid. A common law-based action in *Honolulu et al. v. Sunoco*, for example, could undermine all other state claims if the plaintiff, the oil giant Sunoco, succeeds in persuading the U.S. Supreme Court to hold that the U.S. Constitution and the Clean Air Act preempt all state actions litigating over climate change. Sunoco had previously lost its bid to dismiss a common law climate change claim for lack of jurisdiction and failure to state a claim at the trial, appellate, and state supreme court levels. In February 2024, Sunoco then filed a writ of certiorari asking that the U.S. Supreme Court intervene to dismiss the case, arguing that the U.S. Constitution and the Clean Air Act preempt state actions for climate change. On June 10, 2024, the U.S. Supreme Court invited the Biden Administration to weigh in, and the outcome is still pending. If Sunoco succeeds, the conclusion could potentially invalidate related state-based claims, potentially even those made on state constitutional grounds.

IV. Constitutional and Pragmatic Concerns with Emerging Climate Advocacy

Climate advocates have thus deployed both trust- and rights-themed strategies in pursuit of effective climate governance, heralding the responsibilities of governments to protect public environmental values. On balance, these strategies have been more effective at rallying public support than winning in court—a fact that has drawn withering criticism from both supporters and opponents of the kinds of climate regulation these advocates seek. In this final section, the Article considers these critiques, highlighting problems that have stymied the atmospheric trust cases and may also bedevil climate rights-based lawsuits, given their underlying commonalities. Trust-rights advocates have adapted to these challenges in different ways, partnering public trust claims with more explicitly framed assertions of environmental rights that may yet find firmer legal footing, especially in states that have expressly constitutionalized public trust principles.[550] The most recent wave grounded in these constitutional provisions may prove more robust than the first hatch atmospheric trust claims,

550. See *supra* Part III.E.

but even these require interpretation of relatively vague directives, raising common questions about justiciability, enforcement, and practical strategy.[551]

The opportunities are clear. Trust-rights litigation offers climate advocates additional levers for heightened public participation and amplification of their political speech in a uniquely salient public forum—the courts. The strategy provides meaningful opportunities to push back against what public-choice theorists might call the "capture" of climate regulators by powerful fossil fuel industry players and their lobbyists.[552] Scholars have described lax regulation of fossil fuel emissions as a colossal example of market failure and manipulation of policymakers by the regulated industry, which has arguably facilitated enormous short-term profits for a concentrated minority of shareholders at the expense of the vast majority of stakeholders' long-term interests in a livable climate, including many future generations yet unborn.[553] The judicial forum provides a focused opportunity for citizens who view themselves as shut out by these political process failures to make their claim in a highly visible context, build coalitions in support of their cause, and try to effect legal change—if not through the judicial process itself, then potentially in settlement with the political branches, or through the wider electoral process that follows.[554] As one young supporter once exclaimed in a class of mine, "I have written letters to my representatives and decades later, I am still waiting to hear back from them—but if I get my day in court, at least I know I will be heard!"[555]

Yet the strategy remains vulnerable to criticisms that the implied rights and duties are too vague to offer meaningful redress, especially in a judicial forum.[556] If the sovereign has an obligation to protect the environment, exactly what does that require? If citizens have a right to a healthful environment, what specifically does that right entail? In either case, what specific action or inaction must the government undertake? And is the judiciary the proper branch to entertain these questions? What can courts actually deliver in response? These claims face uphill battles once they reach the courtroom, many foreseen by the scholarly critics reported on in Part II, generating considerable dissensus about the wisdom of

551. *See, e.g.,* Lazarus, *supra* note 50, at 1159; Araiza, *supra* note 102, at 395, 445 ("These provisions have been plagued by courts' hesitation to construe them as imposing limits on governmental action, largely due to concern about both the vagueness of the provisions and judicial competence to evaluate difficult social policy decisions affecting the environment."); Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 Cal. W. L. Rev. 239, 275 (1992) (critiquing the inherent vagueness of the public trust directive to protect trust resources for the public benefit and the implied problems for judicial enforcement).

552. *See, e.g.*, Wood, Nature's Trust, *supra* note 25, at 7, 32, 50, 52 (critiquing the "tight alliance" between environmental agencies and regulated industries).

553. *Id.; see also* Dieter Helm, *Government Failure, Rent-Seeking, and Capture: the Design of Climate Change Policy*, 26 Oxford Rev. Econ. Pol'y 182, 182 (2010) (using public choice theory to trace market failure in climate policy).

554. *See generally* Wood, Nature's Trust, *supra* note 25.

555. Oral communication from Kevin Griffin to author (Feb. 26, 2024).

556. *See* sources cited at *supra* note 551 (voicing these critiques).

the approach. When atmospheric trust claims failed to gain traction for lack of established precedent, American climate advocates began shifting course to pursue environmental rights grounded in explicit constitutional text—but even there, the trust-rights strategy remains marked by constitutional and practical uncertainty.

Debate has arisen within the environmental law community over whether the climate advocacy reviewed here, especially the atmospheric trust project, should be regarded as groundbreaking impact litigation—making use of all available legal tools to confront the climate crisis—or a foolhardy legal strategy that threatens to set back environmental jurisprudence for decades, or even longer.[557] Lawsuits by children on behalf of future generations yield haunting political imagery, but the legal arguments require a long reach. The original Justinian Code does provide support for the application of public trust principles to the air commons, but no common law precedent supports that claim in the United States,[558] and the extension sought by plaintiffs faces stiff opposition from those who disfavored even the application of the traditional public trust doctrine to the environmental values associated with waterways.[559] Even as courts begin to recognize environmental rights and sovereign obligations to protect the atmosphere, the task of responding with appropriate judicial remedies poses an entirely different legal problem. Critics allege that these mediagenic trust-rights lawsuits may be draining limited attention, funding, and energy that could be better focused on more promising forms of environmental advocacy.

The discussion that follows considers the theoretical implications of these strategies, focusing on the ways in which judicially enforceable trust-rights principles might collide with constitutional separation of powers concerns, and separately, the pragmatic implications of the trust-rights litigation strategy for broader environmental law.

A. Separation of Powers Concerns

This section focuses on the constitutional separation of powers concerns raised by trust-rights advocacy. Atmospheric trust litigation has especially prompted these concerns, as they have asked courts to make some of the heaviest interpretive lifts, but similar considerations could arise in climate advocacy seeking the judicial enforcement of broadly framed environmental rights. In both contexts, advocates have asked courts to issue declaratory and injunctive relief in hope of changing the direction of state and national climate policies. Yet as Judge Aiken described in her 2023 decision limiting the *Juliana* claim

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557. See *supra* Part II.C.
558. See *supra* Part I.C.
559. *See* Ryan, *Historic Saga*, *supra* note 123, at 618–20 (discussing critiques from property rights advocates).

only to declaratory relief,[560] climate policy is a complex tapestry of legislative and regulatory decision-making. Judges regularly interpret rights and obligations within legal relationships and enjoin the conduct of actors that violate them, both private and public, but their comfort level declines as the requested relief approaches direct interference in substantive lawmaking.[561] Judges have always made new law through the conventional, incremental common law process, but outright judicial policymaking beyond the incremental interpretation of established sources of law threatens to exceed the constitutionally prescribed judicial role.[562]

When climate advocates ask courts to vindicate environmental rights and/or sovereign obligations by ordering changes to fossil fuel policy, these objectives can collide. Trust-rights suits legitimately ask the courts to interpret fundamental rights and obligations, but the extension to climate policy is an admittedly novel legal context. The ambitious injunctive relief requested by the early atmospheric trust claims attracted much criticism and contributed to their many losses in American courts. Standing challenges premised on issues of justiciability and redressability accounted for the legal gyrations these plaintiffs have made to preserve their claims, such as the transition from early trust-centered complaints seeking forceful injunctive relief to *Juliana*'s more constitutionally-centered complaint seeking mostly declaratory relief.[563] While the newest wave of state constitutional claims appear to have learned from *Juliana*'s difficulties by framing even narrower claims,[564] these suits may eventually request similar forms of relief, for the same essential reasons—climate advocates will want courts to transform judicial interpretations of their state constitutional rights into specific injunctive directions that impact climate policy. In each of these individual contexts, it will ultimately be the judiciary that interprets the demands of the alleged rights or obligations, and if they are violated, it will be the judiciary that decides on an appropriate remedy.

All of which raises two critical questions with which trust-rights advocacy must grapple, operating at two different levels of consideration. At the level of individual claims, it raises the question of what kinds of remedies successful trust-rights advocacy can realistically hope to accomplish. Providing formal interpretation of operative rights and duties is a conventional judicial task that may be within reach for these plaintiffs. Declaratory relief of this sort could significantly impact legislative, administrative, and even private law choices

560. See *supra* Part III.D.

561. *See, e.g.,* Zivotovsky v. Clinton, 556 U.S. 189, 194–95 (2012) (explaining the political questions doctrine).

562. *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881 (1983).

563. See *supra* Parts III.B, Part III.E (describing the evolution of the atmospheric trust claims from origins to *Juliana*).

564. See *supra* notes 498–526 and accompanying text (describing the newer wave of narrower claims).

in the political process going forward,[565] so the value of a formal judicial declaration of rights or obligations should not be underestimated. But is trust-rights litigation limited only to seeking declaratory relief, and is that enough to justify the potential downsides of this kind of litigation?

On a broader level, the separation-of-powers problems raised by trust-rights litigation begs the question whether the strategy is, as its proponents allege, a paragon of democratic governance, enabling citizens to access multiple forums for public participation and deliberation? Or, as critics contend, is the strategy fundamentally antidemocratic, distorting the judicial role at the expense of the wider political process? Is Professor Richard Lazarus correct in his ultimate assessment that "that this is just not how we make laws of this nature under our constitutional framework"?[566]

1. *Judicial Trust Administration in a Time of Judicial Ascendance*

The public trust doctrine has always prompted separation-of-powers concerns about the role of the courts in policing the acts of the other branches on matters that, for some, stray uncomfortably close to matters of pure policy.[567] When a court invalidates state action for violating trust obligations, the court is overriding presumptively deliberated decision-making by the political branches. Is the judicial vindication of public trust principles an appropriate check on legislative or executive action, or does it usurp policymaking authority better exercised by the political branches? In the context of protecting natural resource commons, does empowering judicial review guarantee vulnerable public interests, or does it threaten the constitutional order by coopting the conventional political process?

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565. *Cf.* Evan Bianchi, Sean Di Luccio, Martin Lockman, & Vincent Nolette, *The Private Litigation Impact of New York's Green Amendment*, 49 Colum. J. Env't L. 357, 408–22 (2024) (arguing that the Green Amendment could have a significant impact on even private law transactions going forward, even after a state court held that the amendment did not create a private right of action, by shaping the norms against which community standards and reasonableness expectations in contract and property law contexts will be measured).

566. Lazarus, *supra* note 50, at 1157. *See also supra* notes 207–217 and accompanying text (discussing these critiques).

567. *See. e.g,* Lazarus, *supra* note 50, at 1155–56 (noting that environmental protection requirements "are exclusively the product of the common law and statutory law," and without the constitutional support analogous to equal protection claims, there is "therefore far less force to the premise that courts can legitimately supplant the lawmaking prerogatives of the legislative and executive branches"); *see also* Araiza, *supra* note 112, at 395, 445 (critiquing the judicial role in public trust administration); Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 Cal. W. L. Rev. 239, 275 (1992) (critiquing the problems of the vague public trust directive for judicial enforcement); Ryan, *The Historic Saga*, *supra* note 123, at 621–22 (discussing these concerns with regard to traditional trust advocacy); Ryan, *From Mono Lake to the Atmospheric Trust*, *supra* note 110, at 62–64 (discussing them with regard to the atmospheric trust project).

At bottom, the question is how much power courts should have over the actions taken by other branches of government to vindicate core public trust rights and obligations, and it is a question about which reasonable minds have long disagreed. In his seminal critique of atmospheric trust advocacy, Professor Lazarus argues that the courts should always be seen as, at best, "secondary players" in the broader effort to actualize effective climate governance:

> Courts can, as in *Massachusetts v. U.S. Environmental Protection Agency*, properly cajole and push executive branch agency recalcitrance in the face of statutory commands. But the courts possess neither the competency nor the legitimacy necessary to play a far greater role and should avoid substituting their policy judgment regarding the proper level of environmental protection for that of the legislature or executive branch agencies acting pursuant to legislative charges of such lawmaking responsibility. For this reason, I think it is a strategic mistake to delude oneself—let alone the law students we teach—by suggesting otherwise. Far better to accept the true difficulty of the lawmaking challenge we face, and to undertake the necessary hard work at the national—and no less important at the retail—level, than to pretend that the courts can provide quick fixes to rescue us from ourselves.[568]

Lazarus is right that the importance of fighting for responsible environmental governance through the political process at all levels of jurisdictional scale must never be taken for granted. He is right that the judiciary will never be able to provide a quick fix that obviates that important work, nor should we ask this of judicial actors. Courts cannot, as he memorably warns, "rescue us from ourselves." But can they at least help us move the ball forward, when the matter involves the enforcement of environmental rights and obligations? Is it possible, or even desirable, to call on what the judiciary *can* do in an effort to save ourselves and the future generations put at risk by the threat of unremediated global warming?

It is a genuinely troubling question—especially now. Climate litigation is raising these questions at a time of environmental exigency, but also a controversial moment of ascendancy for judicial power. In recent years, the Supreme Court in general (and the Roberts Court in particular) has been criticized for aggrandizing power to itself at the expense of all other federal actors[569]—the

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568. Lazarus, *supra* note 50, at 1152.

569. *See, e.g.*, Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. Pa. L. Rev. Online 24, 24, 42 (2023) (concluding that "the Roberts Court's exceptional feature is judicial self-aggrandizement, its demeaning rhetoric about other constitutional actors and vague judicial standards that together reify judicial importance and justify centralized power in the judiciary"); Josh Chafetz, *The New Judicial Power Grab*, 67 St. Louis U.L.J. 635 (2023) (providing examples of judicial aggrandizement by the Roberts Court, and other Supreme Courts, in multiple arenas of law); Erin Ryan, Sackett v. EPA *and the Regulatory, Property,*

executive agencies, by weakening judicial deference to agency discretion;[570] the legislature, by promulgating new clear statement rules at a time of legislative paralysis;[571] and even previous Supreme Courts, by breezily disregarding past precedents.[572] Within that context, is it really wise to entrust judges with yet more power to second-guess political actors, especially as the doctrine continues to expand? Is advocacy attempting to engage the courts in climate governance on public trust grounds, especially in the absence of constitutional grounding, dangerously antidemocratic?

These are legitimate, even wrenching, concerns.

And yet, public trust principles remain an integral part of the legal system, at an arguably foundational level. Most states that have considered the issue treat the public trust doctrine as a quasi-constitutional constraint on sovereign authority, operating beyond the reach of normal legislative processes to undo.[573] Constitutional or constitutive constraints, which structure the space within which normal legislation takes place, typically *are* the proper subject of judicial interpretation and intervention.[574] Even the famously libertarian Professor Richard Epstein has noted that the public trust doctrine has a constitutional dimension,[575] undermining casual disregard for the judicial role in its implementation and enforcement. The doctrine creates serious sovereign obligations, and as this paper argues, reciprocally meaningful environmental rights. If the judiciary were not available to interpret and defend these rights and obligations, they would become devoid of all power and all legal meaning.

The judiciary has long been understood as the proper vindicator of rights and enforcer of obligations. The law of trusts has always been interpreted and enforced by courts, for exactly the reason of this unique judicial capacity.[576] Who better than judges to oversee the public beneficiary's interest in trust resources

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and Human Rights-Based Strategies for Protecting American Waterways, 74 Case W. Rsrv. L. Rev. 281, 284 (2023) (critiquing the Court for self-aggrandizement in the environmental law context by "invoking a new 'clear statement' doctrine during an unusually intense period of legislative paralysis (in which Congress appears unlikely to achieve clarity on any major question)," enabling the Court to "unselfconsciously substitute[] its own judgment for that of the political branches on a scientific matter in which judicial capacity approaches its nadir.").

570. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244 (2024).

571. West Virginia v. EPA, 142 S. Ct. 2587 (2022); Sackett v. EPA, 598 U.S. 651 (2023).

572. Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (overturning the precedent set decades earlier in *Roe v.* Wade, recognizing a constitutional right to abortion).

573. *See* Ryan et al., *Comprehensive Analysis*, *supra* note 8, at 2472–76 (discussing the majority approach adopting the public trust as a constraint on sovereign authority, but also Idaho's minority approach rejecting this rationale).

574. *See* Ryan, *A Short History*, *supra* note 6, at 176–81 (discussing academic discourse on the public trust as a constitutive constraint.

575. Richard A. Epstein, *The Public Trust Doctrine,* 7 Cato J. 411, 426–28 (1987).

576. *See generally* Edward A. Zelinsky, *Situating the Modern Public Trust Doctrine in Trust Law: The Duty of Loyalty and the Case for Bifurcated, De Novo Judicial Review*, 42 Va. Env't L. J. 1 (2024).

against the potentially self-serving or neglectful management by a legislative or executive trustee? While the government is always under a police-power duty to protect the public, and decisions made under the police power generally receive judicial deference, sovereign obligations under the public trust are less open to interpretation and thus the proper subject of judicial scrutiny.[577] Given the trust obligation to protect specific trust values even when they are in conflict with other public interests, courts may be the best and only venue for evaluating government decisions that fall short.[578]

The antidemocratic critique may also discount the ways that judicial review of public trust governance legitimately empowers democratic participation in the wider political process, because of the intricately braided dance between citizens and the three branches of government within that process.[579] Most policymaking is appropriately legislative, because the elected legislature is the operative democratic device for achieving consensus among competing considerations and diverse interest groups. Administrative agencies are often involved, usually by legislative invitation in broadly framed requests for implementation given agencies' superior subject matter expertise.[580] Courts adjudicate related disputes by interpreting the operative legal constraints and the past judicial precedents that help make sense of them. But most important of all, the citizens oversee the political process, variously participating as voters, jurors, public commenters, editorial writers, legislative office visitors—and occasionally, as plaintiffs.

As I have previously argued, the best way to understand trust-based advocacy is that it engages all players in the democratic process within their usual role.[581] The legislative and executive branches coordinate in policy making and implementation until a citizen objects, filing a claim against the state for allegedly violating some core public trust constraint. The court assesses whether the government has abdicated a sovereign obligation or contravened

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577. In the Mono Lake case first affirming public trust responsibilities for environmental protection, the California Supreme Court specifically rejected the state's argument that the trust obligation was satisfied so long as the state was acting in the public interest, an interpretation that would have rendered the public trust doctrine coterminous with the police power. Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (Mono Lake), 658 P.2d 709, 712 (Cal. 1983).

578. *See* Ruddy, *supra* note 112, at 160–61 (arguing that separation of powers concerns about the public trust doctrine can be defeated for various reasons, including that its use for environmental protection "comports with accepted understandings of the proper judicial role in our constitutional system" because the doctrine corrects for "structural imbalance in political access by raising judicial scrutiny when government dispositions of trust resources appear to favor particular interests at the expense of the general public").

579. Part of this analysis expands on an argument in Ryan, *Historic Saga*, *supra* note 123, at 637–39.

580. *Cf.* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 864–66 (1984) (discussing the importance of the administrative role), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

581. Ryan, *Historic Saga*, *supra* note 123, at 637.

an environmental right. If it agrees with the plaintiff, most courts will, at a minimum, declare that the challenged government activity exceeded state authority, requiring the sovereign actor to revisit its decision. Importantly, the reviewing court doesn't invalidate these policy choices of its own volition; it simply interprets whether the challenged action was authorized—whether the applicable public trust principles either allowed or prevented the challenged action from having legal force.[582] In this regard, a court issuing a declaratory judgment should easily pass separation-of-powers muster, and in keeping with the judicial role of enforcing rights and obligations, so presumably would appropriately tailored requests for injunctive relief that are necessitated by the rights and obligations the court has recognized. (More ambitious requests for injunctive relief raise additional questions and may warrant additional scrutiny.)

Moreover, it is worth noting that—unless the *Juliana* plaintiffs meet with surprising success in their appeal to the U.S. Supreme Court—the overwhelming majority of these claims are likely to be raised in state courts, rather than federal courts. Most of the contemporary critiques of judicial aggrandizement have been focused on the federal courts, and the Supreme Court in particular[583]—not the state courts that, as courts of general jurisdiction, will hear most of these claims, likely premised on state constitutions, the common law public trust doctrine, statutory trust applications, or a mix of all three. While it is too early to say anything definitive in this regard, one could imagine that state court decisions may even prove a helpful counterbalance to federal judicial aggrandizement, as the very kind of constitutional check-and-balance that the vertical separation of powers has always intended.[584]

2. Environmental Claims as Generalized Harms

Even so, the separation-of-powers critique remains especially potent when the public trust doctrine is invoked to protect environmental values, because the public nature of these claims triggers a separate critique about the anti-democratic abuse of judicial process. Courts serve a constitutionally assigned role in balancing legislative and executive power, and they are arguably the only meaningful enforcer of countermajoritarian rights against a potentially indifferent majority. But when trust-rights claims are made to protect environmental rights, they seem less like countermajoritarian rights in the classical sense.[585] Do climate lawsuits represent claims to vindicate individual rights that must be honored even if the majority would prefer otherwise, like an

582. *Id.*
583. *See supra* notes 569–572 and accompanying text.
584. *See* Ryan, Tug of War, *supra* note 41, at 39–44.
585. *Cf.* Araiza, *supra* note 112, at 415, 427 (distinguishing public trust concerns from the concerns of discrete and insular minorities that warrant heightened equal protection scrutiny).

individual right to free speech or free exercise? Or are they better understood as claims to protect the generalized but diffuse interests of the public?[586]

Setting aside concerns about requests for ambitious injunctive relief, even if courts are constrained to merely undoing wrongful political action, critics of trust-rights climate claims might argue that such litigation violates the separation of powers for essentially the same reason that the jurisprudential standing doctrine limits the judicial role.[587] As explained in Part III,[588] plaintiffs must meet a strict set of standing requirements to access the court system, including the requirements of a particularized and redressable injury. To meet them, plaintiffs must show that the harm at issue is unique to them in a way that deserves individual judicial inquiry (rather than a generalized grievance shared by all members of the public), and also that it is a harm the court can actually redress (rather than a public policy matter that is the proper subject of the political process).[589] These standing requirements are more than mere legal technicalities. The late Justice Antonin Scalia famously maintained that strict application of the standing doctrine—which, he argued, vindicates the constitutional separation of powers by properly distinguishing courts from legislators—is a bedrock protection for liberal democracy.[590]

While the debate over the judicial role with regard to generalized injuries is broader than the debate over judicial administration of trust-rights claims, they raise similar separation-of-powers issues because both involve the potential for judicial intervention in decision-making realms otherwise reserved for policymakers. As Justice Scalia explained in legal scholarship published in 1983, the same year that the *Audubon Society* public trust decision saving Mono Lake launched the modern environmental public trust movement:[591]

> "[T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*."[592]

Scalia's article differentiates between particularized injuries, for which plaintiffs should always have access to judicial review, and the kinds of

586. *Cf.* Sax, *supra* note 29, at 560.
587. This line of reasoning raises similar concerns to arguments for preempting public trust claims on standing grounds, as the Ninth Circuit did in dismissing multiple iterations of the *Juliana* atmospheric trust claim. Order Granting Motion for Writ of Mandamus at 4–5, *Juliana v. United States*, No. 24-684 (9th Cir. May 1, 2024).
588. *See supra* Part III.D.1 (recounting the standing challenges confronted by atmospheric trust litigants).
589. *See generally* Scalia, *supra* note 562.
590. *Id.* at 891.
591. *See generally* Ryan, Quiet Revolution, *supra* note 31.
592. Scalia, *supra* note 562, at 894.

majoritarian injuries—often raised by administrative and environmental law plaintiffs—which he disdains as antidemocratic.[593] For him, harms that concern everyone equally should be resolved strictly through conventional political processes, such as voting and lobbying.[594] Pursuing this reasoning, he points favorably to 1920s era Supreme Court jurisprudence denying taxpayer standing to pursue a generalized policy grievance in court,[595] and he critiques later 1960s-era jurisprudence allowing it for qualifying constitutional claims.[596]

To be clear, trust-rights plaintiffs must meet the same standing requirements as any other plaintiffs to access the courts, just like plaintiffs suing under conventional environmental laws.[597] Indeed, the application of these standing requirements to preclude plaintiffs from vindicating the broader public interest in environmental cases has prevented environmentalists from pursuing claims on behalf of wildlife and ecosystems in a number of seminal cases for the development of standing doctrine and environmental law[598] (and in so doing, indirectly fomenting the Rights of Nature movement as an alternative conception of environmental rights[599]).

Yet the public trust doctrine really *does* invite members of the public to use the judiciary to second-guess legislative policies relating to resources that are, by definition, important to everybody. The U.S. Supreme Court confirmed this when it revoked a nineteenth century legislative conveyance of Chicago Harbor to a private railroad in a seminal statement of the public trust doctrine,[600] and a century later, the California Supreme Court did the same in rejecting

593. *Id.* at 894, 897.

594. *Id.* at 894–97.

595. *See* Massachusetts v. Mellon, 262 U.S. 447 (1923) (denying taxpayer standing to prevent certain federal government expenditures alleged to violate the Tenth Amendment, because the plaintiff did not suffer particularized harm); *accord* United States v. Richardson, 418 U.S. 166 (1974) (denying taxpayer standing to challenge the exemption of CIA spending from public auditing because the interest was too generalized).

596. *See* Flast v. Cohen, 392 U.S. 83 (1968) (holding that federal taxpayers can have standing for claims that federal tax money is being used in contravention of constitutional limits in certain circumstances, here in violation of the Establishment Clause).

597. Lujan v. Defs. of Wildlife, 504 U.S. 555, 555–56 (1992) (setting forth the modern standing requirements of concrete and particularized injury specifically to preempt a public interest environmental claim).

598. *See id.* at 556; Sierra Club v. Morton, 405 U.S. 727, 739–41 (1972) (denying environmental advocates standing in their suit to prevent a ski resort from developing a pristine ecosystem in the Sierra National Forest because they represented only the generalizable public interest and lacked a particularized injury.

599. Justice Douglas's dissent in Sierra Club v. Morton, 405 U.S. at 741–42 (Douglas, J., dissenting), was prompted in part by Christopher Stone's famous article, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972), considered one of the most important progenitors of the modern Rights of Nature movement. *See also* Ryan et al., *Comprehensive Analysis*, *supra* note 8, at 2503–06.

600. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

the executive licensing of water exports destroying Mono Lake.[601] Concerns about judicial empowerment are thus legitimate issues with which trust-rights advocacy must contend. To the extent that these lawsuits protect widespread public interests and empower judicial intrusion in policymaking spheres, they confirm the very anxiety about the runaway judicial role that Justice Scalia famously critiqued in the standing context.

3. Citizen Suit Provisions and the Public Trust

Nevertheless, there is a reason why Justice Scalia's argument especially targeted environmental cases as blurring the lines that the separation of powers should maintain. For the same reason public trust principles threaten to blur these lines, Congress itself has blurred them by the inclusion in environmental statutes of "citizen suit" provisions that specifically authorize individual plaintiffs to enforce public environmental claims in the courts—even in suits against the government. These citizen suits provide insight into why environmental plaintiffs invoking public trust principles are also operating on the right side of the constitutional line, even if it is a blurry one.

Citizen suit provisions are not exclusive to environmental law, but they are endemic there. To take a prominent example, the Endangered Species Act authorizes any person to bring a civil suit to enjoin anyone else—including the state and federal government—alleged to be in violation of the Act or its implementing regulations, or to compel enforcement of the Act by the government.[602] Similar citizen suit provisions exist in the Clean Air Act,[603] the Clean Water Act,[604] and at least sixteen other major federal environmental statutes.[605] Plaintiffs must still show a particularized injury to satisfy standing requirements in these cases,[606] but these claims often vindicate generalizable concerns, aiming for judicial intervention within realms of executive and legislative discretion. The Administrative Procedures Act similarly invites plaintiffs to challenge failures in agency decision-making if they can show they have been affected, even if the alleged harm represents a more generalized kind of concern.[607]

601. Nat'l Audubon Soc'y v. Super. Ct. of Alpine Cnty. (*Mono Lake*), 658 P.2d 709, 727 (Cal. 1983).
602. Endangered Species Act, 16 U.S.C. § 1540(g) (1973).
603. Clean Air Act, 42 U.S.C. § 7604 (1970).
604. Clean Water Act, 33 U.S.C. § 1365 (1972).
605. *See* James R. May, *The Availability of State Environmental Citizen Suits*, 18 SPG Nat. Res. & Env't 53, 53 (2004); *The Role of Citizen Enforcement*, Nat'l Env't L. Ctr., https://perma.cc/JRR6-SWCY.
606. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 555–56 (establishing the modern standing requirement of showing a concrete injury in fact, effectively limiting public interest environmental claims without a showing of unique personal harm).
607. 5 U.S.C. § 706 (1966).

It is no accident that so many environmental statutes are specifically crafted with citizen suit provisions that invite this kind of partnership between individual plaintiffs and judicial enforcement. These provisions are designed to recruit private plaintiffs to serve as "private attorneys general," to ensure vigorous enforcement of environmental laws protecting widespread public interests against the anticipated pushback from economic actors that benefit from continued environmental harm and regulatory failures to contain them.[608] These strong countervailing forces combine due to the political process failure known as "regulatory capture," well documented by both public choice theorists[609] and environmental scholars,[610] in which the political branches fail to vindicate widespread public interests because, through a variety of means, they become "captured" by powerful industries seeking weaker regulation, which gain influence over regulators and policymakers by lobbying, funding, and even staffing them.

In passing these environmental statutes with citizen suit provisions, Congress recognized the importance of protecting public natural resource commons like waterways, the atmosphere, and biodiversity. But after centuries of environmental degradation and the political process failures that enabled it, Congress also understood how easy it is for the intense interests of a few focused appropriators to overcome the diffuse interests of the general public in environmental protection.[611] So legislators made it easier for members of the public to assist environmental enforcement by seeking judicial review. These statutes invite citizens (who must still be able to meet the applicable standing requirements) to seek enforcement of even generalizable public concerns in a purposeful, carefully constructed partnership with the judiciary.

Public trust principles work in the same way, for many of the very same reasons. Indeed, the public trust doctrine is probably the historical progenitor

608. *See* May, *supra* note 605, at 53 (discussing how citizen suit provisions "invite citizens to sue as 'private attorneys general' to force compliance, or to force agencies to perform mandatory duties").

609. *See, e.g.*, James M. Buchanan, *What is Public Choice Theory*?, 32 Imprimis No. 3, at 3–5 (2003) (describing the mechanics of public choice theory and agency capture); Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. Cal. L. Rev. 101, 114 (2000) (also describing the mechanics of public choice theory and agency capture); *see generally* Mancur Olson, The Logic of Collective Action (1965).

610. *See, e.g.*, Sax, *supra* note 29, at 560 (describing the circumstances in which "self-interested and powerful minorities often have an undue influence on the public resource decisions of legislative and administrative bodies and cause those bodies to ignore broadly based public interests"); Lazarus, *supra* note 50, at 1160–61 (discussing Sax's understanding of regulatory capture, and affirming how public choice dynamics, in which the diffuse public interest cannot compete with politically power special interests, "regularly arises with environmental lawmaking").

611. *Cf.* May, *supra* note 605, at 53 (quoting Nat. Res. Def. Council. v. Train, 510 F.2d 692, 700 (D.C. Cir. 1974)).

of the "citizen suit" as a legal device—the original common law citizen suit provision—enabling judicial intervention by private attorneys general to enforce the protection of wider public interests in natural resource commons. Centuries ago, the common law recognized the importance of facilitating judicial review for exactly these kinds of claims,[612] which often stack intense economic interests against diffuse public harms, where the public choice incentives to facilitate private appropriation of a commons resource is much stronger than the incentives to resist it.[613] To protect widespread public interests in these critical natural resources, including those of future generations, the public trust doctrine appropriately draws on the branch of government that can partner with private attorney general enforcers of public environmental values (who, in modern times, can also show enough private harm to meet the jurisprudential requirements of standing).

For these reasons, a defining feature of the common law public trust doctrine is the way it empowers ordinary citizens to seek redress for public trust violations in court.[614] Even statutory and constitutionalized public trust principles invite this kind of partnership between private-attorney general plaintiffs and judicial enforcement. Separation-of-powers critics are right to worry about judicial capacity, the antidemocratic critique, and especially about further empowering the judiciary at a moment when growing judicial power is already worrisome at the federal level—but in this unique legal context, the judicial role seems appropriate to the task (if for no other reason, because there is no ready alternative).

In the absence of firmer foundations for environmental law, outlined in Part I, advocates have similarly turned to trust-rights advocacy for lack of better alternatives. If it is not the ultimate answer, perhaps it is at least an element of the corrective, bringing issues to the public fore through this unique perch within the larger political process, ideally helping to inspire appropriate legislative and executive responses with the appropriate application of litigation-based pressure. Perhaps this justifies taking the long view on empowering judges at a time when judicial power is already rising—a view that looks past the political winds of this single moment in time and instead toward time immemorial. The core public trust principle, after all, is thousands of years old. There must be some reason for that, and we would do well to consider it.

For this reason, the judicial role in administering the trust should not be seen as antidemocratic—instead, it is a democratic corrective. As I have previously argued, the separation of powers does not require that citizens engage

612. *See, e.g.*, Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

613. Sax, *supra* note 29, at 560.

614. *See, e.g.*, Araiza, *supra* note 112, at 437–38 (acknowledging the centrality of judicial review to effectuating the public trust doctrine while struggling to understand what that review should be based upon).

with those powers in isolation.[615] Judicial review is the citizen's last stand in a democracy—the last opportunity to be heard within the complex political process that includes checks, balances, and multiple ports of entry to the broader public conversation in which policies are conceived, deliberated, enacted, and refined. The platforms for public discourse and organizing enabled by public trust litigation are important components of the overall political process, even when that litigation is premised on theories that may lose in court (such as the many losing atmospheric trust cases).[616] When citizens invoke the judicial process this way, the lawsuits themselves become part of the wider political process, enabling them to speak their truth to sources of power, communicate with other citizens about their grievances, and build support for ongoing policymaking through conventional political channels.[617]

B. Legal Strategy and Environmental Rights-Based Climate Advocacy

Counterbalancing this criticism from the opponents of environmental regulation, trust-rights advocacy also inspires criticism from the champions of environmental regulation, many of whom have bitterly opposed these lawsuits as bad legal strategy and as a misappropriation of scarce resources away from more promising avenues. These critics argue that trust-rights climate advocacy is dangerous to the very cause it seeks to advance, both because it threatens to create harmful future precedent, and because it is proverbially sucking up all the air in the room.

The first critique is that the losses these cases produce could undermine climate governance instead of advancing it, creating negative legal precedent that could set back environmental law for decades.[618] This contention has been especially leveled against the atmospheric trust lawsuits, given the mass nationwide filings in the first wave of the strategy. While impact litigants often make careful decisions about when, where, and how to file novel claims in order to maximize their chances of success,[619] the first-hatch atmospheric trust litigation arguably carpet-bombed the nation with claims that made headlines without making a lot of helpful new law,[620] some of which may have created precedent that future litigants with more promising claims may find difficult to

615. Ryan, *Historic Saga, supra* note 123, at 637–39; Ryan, *From Mono Lake to the Atmospheric Trust*, *supra* note 110, at 63–64.

616. *See* Rink, *Climate Rights Strategic Litigation*, *supra* note 193; Ryan, *From Mono Lake to the Atmospheric Trust*, *supra* note 110, at 60–64; Ryan, *Historic Saga*, *supra* note 123, at 629–31.

617. *See* Rink, *Climate Rights Strategic Litigation*, *supra* note 193; Ryan, *Historic Saga*, *supra* note 123, at 629–31.

618. *See supra* Part II.C.

619. James E. Pfander, *Forum Shopping and the Infrastructure of Federalism*, 17 Temp. Pol. & Civ. Rts. L. Rev. 355, 355 (2008) (discussing the use of forum shopping in deciding whether to bring impact litigation claims).

620. *See supra* Part III.B, Part III.D.

overcome. Even Joseph Sax, in the very scholarship that midwifed the modern movement, counseled against overreaching legal arguments that might set back the development of public trust principles in environmental law.[621] Heeding this concern, the later wave of state constitutional claims have been more grounded in identifiable legal texts and appear more narrowly tailored to address individual aspects of wider climate policy.[622] For example, plaintiffs in Alaska are seeking redress for the limited grievance of how the operation of a single liquified natural gas terminal is allegedly violating their constitutional rights,[623] rather than, say, seeking to alter national or even statewide oil and gas policy.

Other environmental critics are concerned not only with the bad precedent these cases might set in court, but also with the bad strategy they portend more generally—by crowding out better strategies that might produce more meaningful climate governance more quickly. These critics assail aspirationally vague trust-rights claims for distracting public attention and resources from the more conventional, incremental, and complex forms of environmental governance that they believe are more likely to produce meaningful greenhouse gas reductions—even if not at the pace that young climate advocates contend is necessary.[624] These critics worry that a small group of climate advocates have hijacked the public conversation, diluting public confidence in the painstaking work of setting and enforcing emissions standards, best available technologies, renewable portfolios, and sustainable land use planning. As one critic has explained,

> I know the advocates will say they are raising awareness and enriching dialogue and serving an important expressive function, but I think it's also important to consider the possibility that they may be lowering awareness (for example, by working to discredit strategies that, while frustratingly political and technical and incomplete, might be our best hopes); reducing the quality of dialogue (again, by offering the siren song of a strategy that will just get the outcomes we want without

621. *See* Sax, *supra* note 29, at 552–53 (cautioning against overly ambitious arguments that could create adverse precedent in his observation that a "litigation theory which begins with a sophisticated analysis of public trust principles . . . is likely to obtain a far more sympathetic response from the bench than is one which takes a rigorous legal principle and squeezes it to death."). *See also* Lazarus, *supra* note 5050, at 1160 (discussing Sax's warning).

622. *See supra* Part III.E.

623. Complaint for Declaratory and Injunctive Relief at 40–44, 80–81, Sagoonick v. Alaska (Alaska Sup. Ct. May 22, 2024) II, No. 3AN-24.

624. *See supra* Part II.C; Lazarus, *supra* note 50, at 1152 ("I think it is a strategic mistake to delude oneself—let alone the law students we teach—by suggesting [that this kind of advocacy can effect meaningful results through litigation]. Far better to accept the true difficulty of the lawmaking challenge we face, and to undertake the necessary hard work at the national—and no less important at the retail—level, than to pretend that the courts can provide quick fixes to rescue us from ourselves.").

dealing with the messiness of administrative governance); and sounding off without providing constructive expression.[625]

By contrast, he notes, the potentially displaced forms of environmental law include activities that have, collectively, made a lot of incremental progress toward the ultimate goal:

> Over the same time period, state and local governments have passed hundreds of climate-related laws. Federal agencies also have enacted lots of climate-related rulemakings. And climate attorneys have participated in many administrative proceedings, like utility ratemaking cases, leading to the adoption of rules promoting renewable energy. Activism focused on corporate energy policies also has produced major successes, helping dramatically advance the spread of renewable energy in otherwise skeptical red states. Climate attorneys and activists have also fought many defensive actions in these same realms. Not all of this work has been successful, and some of the results have been symbolic. But the aggregate result (along with the impact of new technologies and market trends) has been dramatic reductions in GHG emissions compared to a continuation-of-historic-trends scenarios. In other words, while the ATL attorneys have accomplished, at best, hardly anything, other strategies—which some ATL and environmental-rights attorneys openly disparage—have accomplished a lot.[626]

To be sure, these too are important concerns. It is critical that trust-rights advocacy not displace the elaborate mechanisms of environmental law that have accomplished enormous gains toward more breathable air, drinkable and swimmable water, and biodiversity preservation in just the few decades they have been operating at a national level.[627] Trust-rights advocacy could never deliver anything as complex or precise as the statutory programs accomplished through legislative and executive activity, such as the Inflation Reduction Act's advances toward renewable energy goals[628] or the President's Executive Order on environmental justice review.[629]

625. Email from Dave Owen, Professor of Law, University of California--San Francisco Law School (May 14, 2024) (on file with author). This quote and the next from the same exchange are published with Professor Owen's permission, although he notes that he expressed these ideas before the conclusion of the *Navahine* case in Hawai'i.

626. Email from Dave Owen, Professor of Law, University of California--San Francisco Law School (May 6, 2024) (on file with author).

627. *See* Lazarus, *supra* note 50, at 1152–55 (describing the accomplishments of conventional environmental governance at the same time that most atmospheric trust cases were losing in court).

628. Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

629. Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321.

Yet there is no reason to think that environmental advocacy must be all or nothing, one way or the other, in support of either trust-rights or conventional advocacy. Most forms of environmental governance can only be accomplished through conventional political processes—like the Inflation Reduction Act and Environmental Justice review—but there are some forms better served by trust-rights advocacy, like movement-building of the sort to which the *Juliana* Children's Brief contributed;[630] the litigation-driven nudge toward climate planning that the *Navahine* plaintiffs accomplished in Hawai'i,[631] and perhaps even true constitutional change, of the sort effected by the 1970s advocates for Pennsylvania's public trust amendment, and more recently, the 2020s advocates for New York's new environmental rights Green Amendment.[632]

The climate litigants' best response to the critique that they are crowding out conventional legal advocacy is that discrediting such forms of environmental governance is categorically the *opposite* of what they hope to accomplish. The contest for resources may or may not be significant; that is a claim hard to prove one way or the other. But there is no reason why trust-rights advocacy should cause onlookers to lose faith in conventional environmental governance, because in the end, that is what the litigants in every one of these suits have been seeking, in prayers for relief from the modest to the flamboyant. For example, the judicial relief initially sought in *Juliana* was to compel more of exactly these kinds of traditional environmental regulation—just more than was happening to reduce greenhouse gas pollution. Even after retreating to a suit for declaratory relief alone (to overcome justiciability concerns), the plaintiffs' ultimate objectives were still to obtain this kind of conventional environmental lawmaking. Even if spurred by judicial recognition of a fundamental right to a livable climate, the end game would have been lawmaking that would follow substantially the same processes of fact-finding, consensus-building, and fine-tuning that yielded the Clean Air and Water Acts.

The only difference is that this lawmaking would have taken place under a legal mandate alleged to be required by the public trust doctrine and Due Process Clause, a substantive requirement limiting the possibility that the political branches could simply opt out of the enterprise. While the substantive command would limit the range of possible outcomes (in a way most environmental advocates would approve), it would in no way obviate the need for the skill and expertise of the civil servants toiling away in the forgotten corners of environmental law. These lawsuits should always be seen as a supplement, and not a replacement, for conventional environmental law, to help overcome

630. *See supra* text accompanying notes 451–455 (discussing widespread youth participation in the Children's Brief and the other 350,000 individuals who signaled their support of the *Juliana* claim to the Ninth Circuit).

631. *See supra* text accompanying notes 507–513 (discussing *Navahine v. Hawai'i Dept. of Transportation*).

632. *See* Part III.E (discussing both the Pennsylvania and New York constitutional amendments).

whatever political process failure is preventing governments from appropriately responding to a climate crisis that has already thrown countless lives, livelihoods, communities, economies, and vulnerable nations into chaos.

In seeking to refocus legislative and administrative attention on climate governance by asserting environmental rights and public trust responsibilities, litigants are attempting to overcome that barrier—whether a product of pure public choice theory, arbitrary and capricious administration, or outright political patronage—that has unreasonably diminished the speed and responsiveness of elected officials and confused or distracted fellow citizens. The strategy seeks merely to add incentives and reduce roadblocks preventing conventional environmental governance from addressing climate change. Yet without a specific set of legal mechanisms for following through on the relevant rights and obligations claimed by these plaintiffs, their suits would be of no inherent value.

In this regard, trust-rights litigation have used public trust principles in the way that has always been intended, relying on them as a legal device for starting a conversation among all branches of government about sovereign obligations to protect environmental rights. The public trust doctrine has always enabled ordinary citizens to put pressure on the political branches by invoking their rights to judicial review—a tool that is most important when the political branches don't seem to be listening. Used wisely, the doctrine can help "protect[] the public against legislative or executive abdication, strengthening the legitimacy of the democratic process with additional checks and balances.[633] As I have argued in prior work, the cross judicial-political dialogue inspired by trust-rights litigation highlights why "the separation of powers" is not the same thing as those powers working in complete isolation:

> Citizens' appeals to the judicial process are rightly part of the wider political process. The ability to seek judicial review is especially important when citizens have felt silenced within the wider political process for unjust reasons, such as invidious discrimination or government corruption. The public trust doctrine thus facilitates a conversation between the three branches of government about the disposition of critical public natural resource commons in which all citizens have a stake, but which are often managed far beyond the reach of the average voter's influence. Viewed this way, it is not that the judiciary is antidemocratically second-guessing the political branches—any "second-guessing" at issue is by citizens legitimately invoking their rights to the judicial process. And especially for the *Juliana* plaintiffs and supporters, many of whom are too young to vote, it is one of their only means of democratic participation. . . .

633. Ryan, *The Historic Saga*, *supra* note 123, at 630; Gerald Torres, *Joe Sax and the Public Trust*, 45 Env't L. 379, 393–97 (2015).

> In the ongoing and recursive dialectic between law and culture, a compelling case can sometimes change the conversation, even if it doesn't immediately change the law.[634]

For a recent example of the recursive dialectic between culture and law, consider the evolution of the Supreme Court's gay rights jurisprudence over the last thirty years—a stunning progression that tracked the evolution of cultural norms, themselves influenced by compelling examples of civil rights litigation.[635] For a more modern example in the climate context, consider the result of the Massachusetts, Florida, and Hawai'i youth climate suits, leading to a Massachusetts executive climate strategy, an erstwhile Florida pledge to generate 100% renewable electricity by 2050, and a Hawai'i climate mitigation officer and youth council.[636] Even if the resulting climate governance strategies never fully deliver, they nevertheless represent remarkable shifts poised to alter the direction of public policy, in direct response to climate trust-rights advocacy. Even Professor Lazarus, who has strongly criticized the possibility that these strategies displace traditional environmental law, recognizes their value as a device for amplifying marginalized environmental concerns in the wider political process:

> I believe those lawsuits are best understood as part of an overall political strategy rather than as a viable, standalone litigation strategy. The filing of such lawsuits can serve a useful political purpose: they provide an opportunity for potentially effective political organizing and publicity with the ultimate goal of prompting legislatures to enact the laws we need.… Fortunately, many of those who are championing the atmospheric trust litigation are very much focused on the positive political potential of their efforts in terms of influencing law- and policy-makers in both the legislative and administrative arenas, and wisely do not focus exclusively on litigation.[637]

634. *See* Ryan, *From Mono Lake to the Atmospheric Trust*, *supra* note 110, at 63–64.

635. *Compare* Bowers v. Hardwick, 478 U.S. 186, 190–96 (1986) (upholding state laws criminalizing gay sex),) *with* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (overturning *Bowers*), *and* Obergefell v. Hodges, 576 U.S. 644, 681 (2015) (establishing a constitutional right to gay marriage).

636. *See supra* Part III.C, Part III.E. The Florida pledge, repealed as this article was going to press, could nevertheless rise again if the political winds shift. Fla. Admin. Code Ann. r. 50-5.002 (2023). Florida youth immediately filed new litigation to accomplish the same goal premised on state constitutional rights, following in the footsteps of *Held* and *Navahine*. Amy Green, *A Florida Commission Keeps Approving Utility Plans with Lots of Fossil Fuels. Now Young Adults are Suing.*, Inside Climate News (Dec. 18, 2024), https://perma.cc/V59X-424S (describing a suit by six young Floridians that "accuses the state commission overseeing Florida's electric providers of slowing the transition to cleaner energy by sanctioning utility plans that favor fossil fuels…argu[ing that] the commission's actions violate state law and the constitutionally protected rights of the state's youth to a safe and livable future.").

637. Lazarus, *supra* note 50, at 1157.

Still, most trust-rights claims have not delivered the hoped-for environmental governance—yet. And in all fairness, most may never do so. That said, they have rallied countless youth to become more involved in a political process that so far, has not been responsive to their deep concerns about climate change. Together with other focal points of youth activism, including the leadership of Swedish youth climate activist Greta Thunberg, trust-rights claims have helped inspire a worldwide youth movement.[638] In 2019, the same year in which 36,000 children signed on to an amicus brief in support of the *Juliana* claim, young people from every inhabited continent participated in an International Climate Strike, marching out of school to protest governmental failures to respond to the increasing urgency of the climate crisis.[639] As *Juliana* waited on appeal to the Supreme Court, 350,000 supporters asked the Biden Administration to get out of its way.[640] The Climate Strike transitioned into a series of ongoing weekly protests, the Fridays for Future movement, joined by many thousands of additional young climate protestors around the world.[641] Around the same time, it was reported that at least 1,000 climate lawsuits had been filed in 24 nations, 888 of them from within the United States, many led by youth plaintiffs.[642] Not all of these cases were framed as trust-rights claims, but no matter what happens in *Juliana* and its sibling litigation, these cases have helped coalesce a youth movement that cannot be undone.[643] By contrast, most

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638. *See, e.g.*, *supra* notes 451–455 and 477–479 and accompanying text (documenting public support generated among youth and others for the atmospheric trust claims in *Juliana*).

639. Harmeet Kaur & Madison Park, *Young Environmental Activists Across the World Skip School in a Call to Action*, CNN (March 15, 2019), https://perma.cc/9CCF-N4ZP ("The movement, inspired by the actions of 16-year-old Swedish environmental activist Greta Thunberg, spanned more than 100 countries and 1,500 cities, where students gathered in the streets and at their state capitols to call for action."); *see also Pictures From Youth Climate Strikes Around the World*, N.Y. Times (March 15, 2019), https://perma.cc/7HAA-DFCQ ("From Sydney to Seoul, Cape Town to New York, children skipped school en masse Friday to demand action on climate change. It was a stark display of the alarm of a generation. It was also a glimpse of the anger directed at older people who have not, in the protesters' view, taken global warming seriously enough.").

640. *End Opposition to Youth Climate Case*, *supra* note 455.

641. *See* Seth Borenstein & Frank Jordans, *Afraid and Anxious, Young Protestors Demand Climate Action*, AP News (Sept. 23, 2022), https://perma.cc/4ZL6-2MQX.

642. *See* Katy Scott, *Can 'Climate Kids' Take On Governments and Win?* CNN (July 24, 2018), https://perma.cc/ZRR5-TPNA (discussing climate cases filed against governments, corporations, and individuals, and noting the role that youth activists have played at the forefront of many such high-profile cases).

643. Alternatively, critics ask, "Did the Juliana plaintiffs make a positive contribution or just suck all the air out of the room--or some combination of both? I don't think we can assume the former just because they got a lot of media attention." Email from Dave Owen, Professor of Law, University of California--San Francisco Law School (May 6, 2024) (on file with author).

Americans seem not to understand what the Inflation Reduction Act was even about, let alone what it actually accomplished.[644]

For these reasons, advocates should not focus exclusively on the litigation outcome, as Professor Lazarus recommends. Nor should they proceed blindly forward, without giving thought to the impacts of their claims on doctrinal development. Yet neither should they shy away from aspirational claims, if there is sufficient foundation for potential, if incremental, success. They might succeed, as the Massachusetts, Montana, and Hawaiʻi youth plaintiffs did, and as the Florida plaintiffs administratively for a time (although they are now pressing forward with state constitutional claims premised on the Montana and Hawaiʻi models).[645] Such advocacy may yield an administrative settlement that accomplishes the plaintiffs' goals, as the Hawaiian and Massachusetts lawsuits did. Or it might provide political leverage to help jumpstart the needed societal conversation about the importance of more effective climate governance, as the *Juliana* plaintiffs may yet do. It is a delicate line to walk—the line between pushing that conversation forward and triggering a judicial rejection that could entrench the status quo by validating the opposing view—but mindful of that line, careful public trust litigation can provide an additional fulcrum into the political process for claimants otherwise sidelined.

However the claims play out in court, these strategies play an important role in the overall democratic process, enabling citizens multiple ports of entry to the political process, enabling them to build a constituency for more effective participation in the political arena, and amplifying their voices in policymaking contexts dominated by more powerful players with bigger and more expensive megaphones. Longshot legal strategies should by no means replace conventional legal advocacy—such as voting, lobbying for legislation, commenting on proposed rules, and suing to enforce conventional environmental statutes—all of which remain the gold standard of political participation by which citizens should pursue environmental objectives.

Yet on a matter of such existential import as climate change, and as a means of amplifying the voices of the generations most voiceless in political channels—the young and the yet to be born—this kind of advocacy represents a legitimate, if desperate, part of the overall political economy. At best, it could prove a safety valve to address grave failures of the political process, and at worst, a safety valve to vent building public frustration. Either way, it makes a meaningful contribution to the overall conversation among the citizens and the branches of government that represent them. Additionally, if more states adopt these principles directly into their constitutions, then the rights and duties entailed may move beyond providing a mechanism for enhancing aggrieved political speech to providing a platform for genuinely improved climate governance.

644. *See, e.g.*, Mary Small, *Why Does No One Know What a Huge Success the Inflation Reduction Act Was?*, Newsweek (Aug. 16, 2023), https://perma.cc/5Y5U-B93S.

645. *See* Green, *supra* note 636 (describing the Florida lawsuit).

This, of course, is the great hope—and as sea levels rise around us, hope is needed.

Conclusion: A Generational Divide

This Article has reviewed the emerging direction of climate advocacy along two seemingly distinct legal paths that are more unified than they may at first appear—the atmospheric trust movement, which casts the atmosphere as a resource protected by the public trust doctrine, and the pursuit of environmental rights to climate stability, under a set of potential sources that includes common law, statutory, constitutional, and treaty-based law. These paths may seem distinct, but in fact, both strategies appeal to the recursive legal premises of the core public trust principle, which asserts: (1) sovereign obligations to protect environmental resources for the benefit of the public, and (2) public rights to benefit from these resources and to hold the state to its protective obligations. Like reciprocal Hohfeldian rights and duties, the two strategies are the implied flip-sides of the same theoretical coin, expressing the same underlying concepts regardless of which side faces up. Environmental rights presume sovereign vindication, and the sovereign obligation creates public environmental rights. But as two sides of a single coin, these different climate advocacy strategies herald similar advantages and disadvantages.

Reviewing the scholarly literature and key iterations of climate advocacy domestically and internationally provides an exploration of both the obstacles and opportunities for future development of trust-rights advocacy. Constitutional separation of powers concerns, issues of justiciability and redressability, and pragmatic concerns about impact litigation strategy have jointly shepherded American climate advocacy from the early atmospheric trust cases toward a newer generation premised on environmental rights and public trust obligations in state constitutions. While this modern trend may encounter familiar obstacles, the rapid evolution from one legal strategy to the next reveals the depth of frustration with the slow progress of conventional environmental regulation to cope with the looming threat of climate change.

Some critique the evolving trust-rights strategy as rhetorically satisfying but legally misguided, because these lawsuits must overcome serious constitutional and practical obstacles that have felled most of them thus far. Yet even when they do not succeed in court, these suits serve legitimate political purposes. Trust-rights advocacy helps facilitate a multifaceted conversation among the citizens and all three branches of government about the disposition of critical public natural resource commons in which all citizens have a stake, but which are managed far beyond the reach of the average citizen's influence. These plaintiffs, so many of them young people, are seeking their day in court because for them, court appears to be the only forum in which they will be heard on this matter of existential and time-sensitive importance. And indeed, for these

youth plaintiffs and their supporters—many too young to vote—litigation may *truly* be their only means of democratic participation. Judicially asserting an environmental right, or affirming a sovereign obligation to protect it, enables youth plaintiffs to insist that the political branches take their concerns more seriously, even when they can't cast a ballot.

To that end, the youth trust-rights movement suggests a broader generational divide within environmental law, and one that warrants attention from commentators. Younger advocates have turned toward these newer strategies to move the levers of environmental law because the core public trust principles of sovereign environmental responsibility and public environmental rights make intuitive sense to them, at a moment when so much else in environmental governance does not. But as this generation turns toward trust-rights strategies, the architects and practitioners of the older, conventional mechanisms of environmental law worry that the focus on trust-rights advocacy will undermine the success of the comprehensive statutory schemes that have been critical tools of environmental law since the 1970s.

This generational divide is almost certainly facilitated by recent Supreme Court decisions weakening those comprehensive statutory programs, such as the weakening of the Clean Water Act in *Sackett v. United States*[646] and of the Clean Air Act in *West Virginia v. EPA*,[647] making statutes that seem like avatars to the older generation seem much more vulnerable and ineffective to the younger generation. The Court's 2024 decision in *Loper Bright Enterprises* to overturn the 40-year *Chevron* doctrine of judicial deference to agency expertise,[648] a cornerstone of robust environmental rulemaking under the big environmental statutes, further erodes the faith with which younger generations regard the traditional statutory pillars of environmental law and the regulations that implement them. *Corner Post*, a companion decision to *Loper-Bright*, further weakened environmental (and other) regulations by loosening the statute of limitations in a way that facilitates more *Loper Bright* style challenges to seemingly settled regulations.[649] These cases, unfolding one after another in the past three years, have deeply impacted young environmental advocates.[650] As a law professor, I have been surprised and dismayed by the erosion I see in many of my students' faith in conventional environmental law infrastructure and in the very rule of law as a guarantor of wise and fair environmental governance.

646. 598 U.S. 651, 684 (2023).

647. 597 U.S. 697, 706, 735 (2020).

648. Loper Bright Enterprises v. Raimondo, 144 S. Ct. 2244, 2272–73 (2024).

649. Corner Post, Inc. v. Board of Governors of the Federal Reserve System, 144 S. Ct. 2440, 2440 (2024) (holding that the statute begins to toll at the date of the alleged injury, rather than the date of enactment, making it easier to bring new *Loper Bright* style claims against old regulations).

650. My support for this proposition is anecdotal but widespread. It is a constant source of conversation in the environmental law classes that I and my colleagues teach and among students at the law schools I visit to lecture.

I understand why many of them see the trust-rights litigation strategy as a necessary corrective.

Yet as younger advocates lose faith in the efficacy of the statutory avatars of federal environmental law to cope with climate change, many in the older generations, dismayed by the theoretical challenges and losing track records of trust-rights approaches, contend that the proven avatars are still the best bet. Having come of age during the emergence and development of these conventional strategies, they maintain an abiding faith in traditional environmental infrastructure that confers a greater buffer against the disappointment generated by cases like *West Virginia*, *Sackett*, and *Loper-Bright*. The elders may be right to place their bets where they do, but it's understandable that their younger counterparts are skeptical. These different generational perspectives make sense: the older generations reasonably place faith in legal infrastructure that they themselves helped build, participated in, and have seen work over many years, while the younger generation's thinner faith has been tested not only by the Supreme Court's recent decisions but also by political efforts to dismantle so much environmental law infrastructure during the Trump Administration.[651] On these facts, it would be surprising if there weren't a generational disconnect.

In the end, the elders are right to continue investing in conventional environmental law, but it's also important to understand the role that trust-rights advocacy plays within the overall political discourse, especially with these generational dynamics in mind. The movement represents, at best, the not-so-silent scream of the younger generation, calling out for their opportunity to be heard. For some youth advocates, it is their *only* opportunity to be heard. And no matter what the elders may think about whether these strategies will win in court, it's important to stop and listen to what these young people are saying. The same holds true for the older participants in trust-rights litigation, who also play an important role. When there are that many voices raised in unison, and is that much frustration spilling out into the public forum, just telling people to shut up is an equally problematic legal strategy.

For all these reasons, trust-rights strategies are simultaneously exciting and dangerous. For some, they offer a chance to speak truth to power and represent the last, best hope for mobilizing toward urgently needed change, while for others, they upset the constitutional order and threaten to displace our last, best hope for managing climatic crisis. But of course, both of these perspectives are missing the full view. Under the current circumstances of climate urgency,

651. *See supra* text accompanying notes 646–650; 646-650. *See also* Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List.*, N.Y. Times (Jan. 20, 2021), https://perma.cc/2LGM-L859 ("[N]early 100 environmental rules [were] officially reversed, revoked or otherwise rolled back under Mr. Trump. More than a dozen other potential rollbacks remained in progress by the end but were not finalized by the end of the administration's term.").

a diverse portfolio of approaches will be key, as is wisdom in their strategic deployment.

Trust-rights climate claims follow in the tradition of citizen suit provisions that justify a limited judicial forum in which private attorney generals help vindicate broader environmental concerns. For youth proponents, they represent a mechanism for enhancing their weakened political speech, with the expressive force of demanding adherence to baseline legal rights and responsibilities. When the judiciary weighs in on whether sovereign obligations have been failed or environmental rights violated, it is not antidemocratically second-guessing the political branches, but enabling young citizens to penetrate the political process by means that put them, at least for the moment, on equal footing with the institutional actors, lobbyists, and moneyed stakeholders that normally control it. Even unsuccessful claims provide a legitimate forum for movement building, political renegotiation, and agitating for the kinds of cultural change that ultimately leads to legal change. Still, it is critical that trust-rights strategies not eclipse or hamstring traditional mechanisms of environmental law, which remain bedrock tools for effecting meaningful environmental governance in concert with these rights and obligations.

In time, trust-rights claims premised on constitutionalized environmental rights and public trust principles may join the ranks of conventional environmental law. But even now, they form a legitimate part of the overall political economy of environmental advocacy, especially in addressing the climate crisis. Widespread generational support for these efforts among youth around the world provides an indication of the breadth of fear and the depth of frustration they feel with the slow pace of the political process in response thus far—frustration to which leaders at all levels of government should listen carefully. Indeed, when that many children tell us that something is this wrong with the world we all share, everyone should be listening carefully.