The Public Trust Doctrine in Environmental and Natural Resources Law

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p. 39, n. 1: Add at the end of the note.

Updating the Frank article with some post-2012 developments is Michael C. Blumm & Zachery A. Schwartz, *The Public Trust Doctrine Fifty Years After Sax and Some Thoughts on its Future,* 44 Pub. Land & Res. L. Rev. 1, 26-48 ((2021). An early, overlooked critical review of the Sax's book was A. Dan Tarlock, *Defending the Environment: A Strategy for Citizen Action, by Joseph L. Sax (Book Review),* 47 Ind. L. Rev. 406, 409 (1972) (noting, *inter alia,* that one effect of Sax's vision of the public trust was to shift the burden of proof to the proponents of development rather than the objectors); *see also* Gerald Torres, *Joe Sax and the Public Trust,* 45 Envtl. L. 379, 386-91 (2015) (emphasizing Sax's contributions to the understanding of the social function of property and to increasing the democratic legitimacy of the non-judicial branches of government); Holly Doremus. *In Honor of Joe Sax: A Grateful Appreciation,* 39 Vt. L. Rev. 399 (2015) (collecting numerous tributes to Sax's scholarship, both before and after his death in 2014, and emphasizing his roles as an architect of early environmental law, his guidance as a teacher and mentor, and his enduring contributions to the takings puzzle). For a recent assessment of Sax's contributions, see Blumm & Schwartz, *supra*.

p. 78, n. 8: Add a new paragraph to the note.

In *Lakefront: Public Trust and Private Rights in Chicago* (Cornell U. Press, 2021), Joseph Kearney and Thomas Merrill examine the *Illinois Central RR* case in the context of the public preservation of the Lake Michigan shoreline in Chicago. They find that the public trust doctrine played little role between the 1892 decision and the publication of Professor Sax's pioneering article in 1970, asserting that the public dedication doctrine was of greater significance. They observe that the railroad was allowed to maintain ownership of all land it filled and document the extensive public and private filling that took place along the shoreline before the last half-century. They complain that the public trust doctrine casts a shadow of uncertainty concerning future shoreline developments, overlooking the fact many property law concepts, such as nuisance and riparian rights, have similar uncertainties. Unlike decisions of a number of recent courts, the authors do not recognize the doctrine as imposing sovereign limitations on trustees, as they assume that the public trust doctrine, at least in Illinois, is subject to override by the state legislature. That certainly is not true in states like Arizona, and Nevada. For a critical review of *Lakefront*, see Michael C. Blumm, *The Public Trust Doctrine and the Chicago Lakefront,* 11 Mich. J. Envtl. & Admin. L. 315 (2022).

p. 98: Add a new note 1a.

The Pennsylvania Supreme Court has issued two more decisions on the issues raised in the 2017 *PEDF* decision (which the Court now designates as *PEDF II*). In 2021, it reaffirmed that decision and extended it to rental payments and other revenue streams received from oil and gas leasing on state lands. *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 255 A.3d 289 (Pa. 2021) (*PEDF V*). Although the Supreme Court employed essentially the same analysis as it did in the earlier case, its analysis of the cross-generational aspect of the Environmental Rights Amendment (ERA) is particularly striking. This analysis grows out of the fact that the ERA expressly requires the Commonwealth to "conserve and maintain" public natural resources for the benefit of present and future generations.

The Supreme Court reversed a 2019 Commonwealth Court decision holding that the state could spend one third of the rental payments and other nonroyalty shale gas income for purposes other than conserving and maintaining public natural resources—that is, it could spend this money any way it saw fit. *PEDF v. Commonwealth*, 214 A.3d 748 (Pa. Commw. 2019) (*PEDF III*). As a practical matter, under this decision, that money would be spent for the present generation of beneficiaries. The court used a 1947 trust statute to arrive at this conclusion, reasoning that the ERA is like other trusts, which allow one third of the income from the trust to be distributed to life beneficiaries while the rest of the income remains in the trust corpus, to be distributed later to remaindermen. The Supreme Court decided that the text of the Environmental Rights Amendment does not allow the diversion of the public trust money in this way; it contains no express language allowing this result. The Supreme Court also held that the "cross generational" nature of the beneficiaries of the trust, both present and future generations—forbade the expenditure of trust money for the present generation only. "Far from setting up any kind of conflict between these beneficiaries regarding profiting from trust assets, the express inclusion of generations yet to come in 'all of the people' establishes that current and future Pennsylvanians stand on equal footing and have identical interests in the environmental values broadly protected by the ERA." 255 A.3d at 310. "The language unmistakably conveys to the Commonwealth that when it acts as a trustee it must consider an incredibly long timeline and cannot prioritize the needs of the living over those yet to be born." *Id.*

These two Supreme Court decisions left unanswered the question of what expenditures of trust fund money are legally permissible. The General Assembly (state legislature) responded to these decisions by allocating much of the state's oil and gas lease receipts to pay for the day-to-day expenses at the Department of Conservation and Natural Resources (DCNR). PEDF sued the state again, arguing that these new funding statutes violated the ERA on their face. That is, PEDF argued that there were "no circumstances" under which these statutes would be valid. PEDF did not challenge DCNR's actual expenditures as violative of the ERA. The Commonwealth Court, in a 2020 decision, rejected PEDF's arguments. *PEDF v. Commonwealth*, 241 A.3d 119 (Table) (Pa. Commw. 2020) (*PEDF IV*).

In 2022, the Supreme Court issued an opinion affirming the Commonwealth Court's determination that these laws are facially constitutional. At the same time, it held that the state has a constitutional duty to account separately for the use of ERA trust fund money. This latter

holding opens the door for future lawsuits claiming that these statutes are unconstitutional as applied—that is, that DCNR's actual use of ERA trust fund money violates the ERA. *PEDF v. Commonwealth*, 279 A.3d 1194 (Pa. 2022) (*PEDF VI*). (This latter point is further developed in note 5 on p. 168).

PEDF argued that the ERA does not authorize the state "to sell State Forest assets to generate revenue for the general operating expenses of DCNR." Such sales deplete the state's public natural resources, PEDF said, which violates the duty to "conserve and maintain" such resources.

The Court rejected this argument, 4 to 2. It noted that DCNR's primary statutory mission —which includes protection and maintenance of state parks and forests—is "indisputably in furtherance of the purposes of the Section 27 trust." It explained that "basic trust law clearly empowers the Commonwealth, as trustee, to incur reasonable costs in administering the trust to conserve and maintain Pennsylvania's public natural resources."

The Court held:

> [W]e conclude that the use of trust assets to fund DCNR's operations is within the authority of the Commonwealth as trustee to incur costs in administering the Section 27 trust, absent demonstration that these administrative costs are unreasonable or that the DCNR has failed to act with prudence, loyalty, or impartiality in carrying out its fiduciary duties.

In a footnote, the Court added that it was not deciding "whether all of DCNR's statutory responsibilities qualify as trust purposes because PEDF, in the current litigation, presents a facial challenge to the use of trust assets for DCNR's general operations, rather than challenging DCNR's use of trust funds for specific administrative costs." In its facial attack on the statutes that authorized DCNR's expenditure of ERA trust fund moneys, PEDF had argued that there were "no circumstances" under which the statutes were consistent with the ERA. But the Court explained that it is possible that DCNR is spending all of the ERA trust funds for trust fund purposes.

Justice Wecht wrote one of the two dissenting opinions. "With these budgetary appropriations," he explained, "the Commonwealth is deploying public natural resources to raise revenue and offset its obligation to fund government operations. On this basis alone, I would hold that PEDF has lodged a successful facial challenge." He continued: "A trustee's ability to use trust corpus to cover reasonable trustee expenses alleviates the expenses associated with being trustee. It does not relieve the Commonwealth of its independent obligation to fund government operations."

It now appears that PEDF will file a lawsuit claiming that at least some of DCNR's actual expenditures of trust fund proceeds are inconsistent with the state's constitutional responsibility

to "conserve and maintain" public natural resources. At least four of the Supreme Court's seven justices expressed skepticism that all of DCNR's operating expenses are used for that purpose. For example, in his dissenting opinion, Justice Dougherty wrote that "DCNR's mission goals of economic use of state forests, recreation, and heritage conservation are not explicitly related to the trustees' Article I, Section 27 duties to conserve and maintain public natural resources."

A difficult problem at the core of this case is that oil and gas leasing on state lands converts a nonrenewable public natural resource, which is essentially permanent, into money, which may or may not be used for conservation purposes of lasting value. As the Supreme Court emphasized in its 2021 decision, the Commonwealth as trustee "cannot prioritize the needs of the living over those yet to be born." It is true, as the Commonwealth argued, that "[c]onservation and maintenance activities are not accomplished in a vacuum: they require people and equipment." But it is also true, as PEDF argued, that the ultimate result of the conversion is loss of nonrenewable public natural resources for which DCNR's operating expenses may not fully compensate. That issue remains undecided. In other states, like Michigan, revenues from oil and gas leasing on public lands are used to buy additional public lands. *See, e.g.,* MICH. CONST. art. 9, § 35 (creating Michigan Natural Resources Trust Fund). That, at least, replaces lost natural resources with additional natural resources.

p. 98: Add a new note 1b.

Article I, Section 27 also plays several supporting roles, In 2023, for example, the Pennsylvania Supreme Court used Article I, Section 27 to support an agency's exercise of statutory authority. In *Marcellus Shale Coalition v. Department of Environmental Protection*, 292 A.3d 921 (Pa. 2023), the shale gas industry challenged certain DEP regulations as exceeding the agency's statutory authority. The statute in question, Act 13 of 2012, requires state agencies to consider certain "public resources" when deciding whether to issue a well permit. The challenged regulations define "public resources" to include "common areas of a school's property or a playground," whether the school is public or private, even though these areas were not mentioned in the statute. The Commonwealth Court held this part of the regulations to exceed the DEP's statutory authority. The Supreme Court reversed. Among other things, it explained that the legislature's use of "public resources' was intended to implement Article I, Section 27's protection of "public natural resources." Public natural resources protected by the Section 27 public trust, the court reasoned, do not need to be publicly owned. Similarly, the court reasoned, public resources under the statute do not need to be publicly owned. It was thus lawful and reasonable for the regulation to define "public resources" to include "common areas" of a public or private school's property or a playground.

Article I, Section 27 has played similar supporting roles in other cases. These include confirmation and extension of police power, guidance in statutory interpretation, and constitutional authority for laws whose constitutionality is challenged on other grounds (e.g., as an unconstitutional taking). See John C. Dernbach, *Taking the Pennsylvania Constitution*

Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust, 104 Dick. L. Rev. 97, 150-61 (1999).

p. 98: Add a new note 1c.

From September 2016 through September 2020, Pennsylvania's Commonwealth Court issued 13 opinions that produced a holding on the ERA. These holdings involve a wide range of issues, and illustrate the many ways that the ERA is being invoked. John C. Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions*, 30 Widener Commonwealth L. Rev. 147 (2021). These cases are a fraction of the recent cases in which a plaintiff or petitioner has alleged a violation of the ERA.

p. 98: Add a new note 1d.

For an argument that the duty of impartiality under trust law embeds environmental justice in Pennsylvania's constitutional public trust, *see* Jacob Elkin, *Note, Environmental Justice and Pennsylvania's Environmental Rights Amendment: Applying the Duty of Impartiality to Discriminatory Siting*, 11 Colum. J. Race & Law 195 (2021). *See also* Maya K. van Rossum, Maya K. van Rossum & Kacy C. Manahan, *Constitutional Green Amendments: Making Environmental Justice a Reality*, 36 Nat. Res. & Env't 27 (Fall 2021).

p. 138: Add a new note 3a.

A Great Lakes controversy of considerable import concerns Enbridge Line 5 pipeline that conveys petroleum from western to eastern Canada, traversing the Straits of Mackinac (which divide the upper and lower peninsulas of Michigan and Lake Michigan from Lake Huron). The pipeline's easement dates to 1953. The Michigan governor wants the pipeline removed, since a recent study showed that a spill under the straits could jeopardize over 700 miles of shorelands. In 2019, the state filed suit to compel the decommissioning of the segment of Line 5 that runs under the straits, claiming that the pipeline is a public nuisance and violates the Michigan Environmental Protection Act since it may become a source of pollution. It is unclear if Line 5 could operate without the straits segment. The company sought to remove the case from state to federal court, but the state filed another suit in 2020 on public trust and easement violation grounds, seeking revocation of the pipeline's easement.

Meanwhile, Canada submitted an amicus brief supporting Enbridge and asserting treaty rights against pipeline shutdowns between the two countries. These issues were unresolved as of this writing, but the state's use of the public trust doctrine affirmatively bears watching. *See* Robert Tuttle, *Michigan eyes Enbridge profits as Line 5 clash intensifies*, Bloomberg News (May 11, 2021), https://www.bnnbloomberg.ca/michigan-eyes-enbridge-profits-as-line-5-clash-intensifies-1.1602164. A 2022 report commissioned by Environmental Defense Canada concluded that shutting down Line 5 would not cause any significant increases in energy prices if the shutdown is managed properly. *See* Zahra Ahmad, *New report finds Enbridge Line 5 closure*

will cause little pain to Michigan, Great Lakes Now (Feb. 16, 2022), https://www.greatlakesnow.org/2022/02/new-report-enbridge-line-5-closure-michigan/#:~:text=Gretchen%20Whitmer%20announced%20the%20state,treaty%20between%20the%20two%20countries.

p. 146, add to n. 5:

In *State v. Hill,* a case that generated hundreds of pages of briefs from numerous amici parties but only a four-page opinion, the Colorado Supreme Court ruled that a fisher on the Arkansas River lacked standing to challenge his exclusion from a favorite fishing hole by an adjacent landowner.[1] The plaintiff, Roger Hill, alleged that the river was navigable, and therefore owned by the state, not the landowner; consequently, he maintained that he had a right to fish, and that the landowner possessed no right to exclude him from the fishing hole.

After some procedural complexity,[2] the court refused to find that the river was navigable, deciding that Hill lacked standing to make that claim, concluding that he "had no legally independent right of the State's alleged ownership of the riverbed." Refusing to recognize that a public trust claim is an alleged public property right, the court refused to allow Hill to raise that state's alleged ownership of the riverbed over the objections of the state.[3] The upshot is that the state, the apparent owner of the riverbed, can by its inaction refuse to defend public property and can prevent the public from raising the ownership issue. The *Hill* decision means that the public will neither know whether the state owns the Arkansas riverbed nor the nature of any attendant public rights until the state decides to take some action.

p. 168, n. 5: Add 77 in place of the blank in the last sentence and strike "forthcoming," and add the following at the end of the note:

The Pennsylvania Supreme Court continues to make considerable use of trust law principles in its Article I, Section 27 jurisprudence. In *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 255 A.3d 289 (Pa. 2021) (*PEDF V*), it reaffirmed the trust principles it had recognized in its previous decision in *Pennsylvania Environmental Defense Foundation v. Commonwealth*—prudence, loyalty, and impartiality, 161 A.3d 911 (Pa. 2017) (*PEDF II*). The 2021 Supreme Court decision also relied on two other principles of traditional trust law while rejecting another.

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[1] State v. Hill, 2023 WL 380755 (Colo. June 5. 2023).

[2] Originally filed in state court, the case was removed to federal court, then the state intervened and got the case remanded to state court, a district court agreed with the state that Hill lacked standing, which the state court of appeals affirmed. 2023 WL at *1-2. Although Hill originally sued the adjacent landowners, the case before the state supreme court concerned only the state's claim of lack of standing.

[3] *Id.* at *3.

The Supreme Court overturned an earlier Commonwealth Court decision that allowed the state to spend one-third of the rental payments and other nonroyalty money received from oil and gas leases on state land in any way it wanted. In reaching this conclusion, as already explained in Note 1a on p. 98, the Commonwealth court relied on a 1947 trust statute that allows one third of the income from the trust to be distributed to life beneficiaries while the rest of the income remains in the trust corpus, to be distributed later to remaindermen. The 1947 statute should be applied, the Commonwealth Court reasoned, because the constitutional trust under Article I, Section 27 is like such a trust.

The Supreme Court expressly rejected the use of the 1947 statute in this context, and relied on two other principles of trust law to do so. First, the Court said, citing traditional trust law, it must interpret the trust according to its specific terms. Here, under the constitution, the state is obliged to conserve and maintain public natural resources; "[t]here is no language that indicates an intent to create an income entitlement" to the state. 255 A.3d at 311. Under the constitution, the Court said, present and future generations are not successive beneficiaries like life beneficiaries and remaindermen are. Rather, they are simultaneous beneficiaries. Thus, the court followed the trust principle that the text of the trust must guide its interpretation. Second, the court relied on the trust principle that a trustee is not allowed to make a profit from trust funds. "Pursuant to fundamental principles of private trust law, we cannot conclude that the Commonwealth, as trustee of the constitutional trust created for the conservation and maintenance of the public natural resources that are owned by 'all of the people,' can divert for its own use revenue generated from the trust and its administration." *Id.* at 313.

When the state legislature subsequently allocated much of the trust fund money from oil and gas leasing to fund the day-to-day operations of the Department of Conservation and Natural Resources, PEDF challenged this decision as violating Article I, Section 27. As explained earlier in Note 1a on page 98, both the Commonwealth Court and the Supreme Court rejected this challenge. But the Commonwealth Court granted PEDF's request for declaratory relief for an accounting under traditional trust law. The Commonwealth Court declared the state "is required to keep detailed accounts of the trust monies derived from the oil and gas leases and track how they are spent as part of its administration of the trust." 241 A.3d 119 (Table) (Pa. Commw. Ct. 2020). The Commonwealth did not appeal that decision. The Supreme Court agreed that this trust principle applies. "A trustee has a duty to maintain 'adequate records of the administration of the trust' and to 'keep trust property separate from the trustee's own property.'" 279 A.3d 1194, 1213, n.25 (Pa. 2022).

While the Supreme Court rejected PEDF's claim that the challenged legislation is facially unconstitutional, it left open the possibility of an as-applied challenge to the legislation—that is, that some of DCNR's expenditures might fall outside its constitutional duty to use the trust fund money to conserve and maintain public natural resources. In a concurring opinion, Justice Donohue stated "that the Commonwealth Court's order requiring the Commonwealth to account for asset expenditures, as specifically requested by the PEDF, will bring any as-applied constitutional defects to light." 279 A.3d at 1214.

Skeptics of the application of traditional trust law to a public trust for natural resources argue that the trustee's traditional duty to maximize financial return to beneficiaries could undermine the public trust. A federal court of appeals has explicitly rejected that argument under Article I, Section 27. *Yaw v. Delaware River Basin Comm'n*, 49 F.4th 302, 320-22 (3d Cir. 2022). In that case, several Pennsylvania state legislators and local governments claimed that the Commission's ban on hydraulic fracturing for natural gas in the Pennsylvania part of the Delaware River watershed violated several provisions of the U.S. constitution. The federal district court dismissed the case for lack of standing, and the court of appeals affirmed. As part of their argument on standing, they claimed to be trustees of Pennsylvania's natural resources under Section 27. The ban's reduction in revenues from hydraulic fracturing, they said, has "'directly and substantially injured the Trust's corpus.'" The court of appeals disagreed, saying this argument turns Section 27 "upside down." The court explained: "The problem with this argument is that it ignores the explicit purpose of [Section 27] and mistakes the unique public trust it created for a run-of-the-mill financial trust in which the trustees have a duty to maximize profits." The court added:

> [T]he fact that the [Environmental Rights Amendment] requires certain fracking proceeds to remain in the trust does not mean that trustees somehow have a duty to keep fracking. To the contrary, the duty of loyalty requires trustees to "manage the corpus of the trust so as to accomplish the trust's purposes," which here is the conservation and maintenance of Pennsylvania's public natural resources.

For a suggestion that the best way to fulfill the intergenerational equity at the center of the public trust doctrine is through a "directed trust," a doctrine increasingly accepted in the private trust world, see Lucia A. Silecchia, *A "Directed Trust" Approach to Intergeneration Solidarity in Amercian Environmental Law and Policy,* 45 Wm. & Mary Envtl. L. Rev. 377 (2021) (calling for "an entity" (not clear which) to review the actions and inactions of governmental trustees in the political branches of government; also raising the question of the obligations the present generation might have to preceding generations "for the sacrifices they made for the sake of posterity" (at 384).

p. 215: Add at the end of the note on the Nevada public trust doctrine.

For a brief comment on the *Mineral County* case, see Daniel Rothberg, *Nevada Supreme Court Says State Cannot Change Water Rights for "Public Trust," A Loss for Environmentalists, County Seeking to Bring More Water to Walker Lake,* The Nevada Independent (Sept. 18, 2020), https://thenevadaindependent.com/article/nevada-supreme-court-says-state-cannot-change-water-rights-for-public-trust-a-loss-for-environmentalists-county-seeking-to-bring-more-water-to-walker-lake. The case is back in the federal Decree Court, where the county is alleging that there are a variety of measures that the court can order short of reallocating vested rights to restore the trust resource of Walker Lake. *See* Michael C. Blumm & Michael Benjamin Smith, *Walker Lake*

and the Public Trust in Nevada's Waters, 40 Va. Envtl. L. Rev. 1 (2022) (a more thorough review of the Walker Lake litigation).

p. 221, n. 5: Add to the end of the note.

For an overdue analysis of the role of the PTD in local government law, see Sean Lyness, *The Local Public Trust Doctrine,* 33 Geo. Envtl. L. Rev. 1 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3812653.

p. 275, n. 5: Add 77 in place of the blank in the last sentence and strike "forthcoming,"

p. 293: Add a new note 3:

Professor Karen Bradshaw has proposed that the law should allow animals to own land, just as humans do. Under her proposal, animal ownership of land would be in trust, and managed by a human trustee for their benefit at an ecosystem level. Judges would help oversee the system, just as they do for other trusts, deciding whether the trustee is acting in the best interest of the animal beneficiaries. *Wildlife as Property Owners: A New Conception of Animal Rights* 3 (2020).

p. 295: Add a new note 1:

An empirical study of the application of the public trust doctrine by state fish and wildlife agencies in 13 states over two decades revealed significant gaps between the legal statements these agencies make about the public trust doctrine and their actual practice. Martin Nie, Nyssa Landres, & Michelle Bryan, *The Public Trust in Wildlife: Closing the Implementation Gap in 13 Western States*, 50 Envtl. L. Rep. 10909 (2020). The authors also make several recommendations for improving implementation of the public trust.

Page 359, n. 4. Add to end of the note:

In April 2022, the trial court held a five-day trial on whether Oswego Lake was title navigable and concluded that it was. *Kramer v. City of Lake Oswego,* No. CV 12100913 (slip. op., Apr. 19, 2022). Even though the lake had been expanded by small dams and was now about 30% larger than it had been at statehood in 1859, the court decided that the public had used the lake for commerce both before and after statehood, beginning with Indigenous people's gathering of food and fishing on the lake for thousands of years, using it as part of a multi-faceted transportation route. Post-statehood, settlers used the lake for log and passenger transport and built the dams, and the federal government meandered the lake in 1852, presumptive of navigability. The lake, according to the trial court, was usable in its ordinary and natural condition both before and after statehood, was usable for commerce, and therefore navigable. As a navigable-for-title waterway, the state's public trust doctrine applied,

"obligat[ing] the state to protect the public's ability to use [it] for identifiable purposes," including navigation, recreation, commerce, and fishing. *Id.* at *10.

The court found that, over the years, the lake had become "functionally privatized" by the surrounding landowners for their recreational use, excluding the public, lately through a city ordinance that prohibited the public from using the lake (except visually). There was "no meaningful way to segregate the waters within the original contour of the lake from that in the expanded lake." The court cited (among other cases) the Washington Supreme Court's decision in *Wilbour v. Gallagher* (casebook, p. 124) and an Oregon attorney general's opinion, both of which recognized that public rights "go where the water is" (36 Or. Op. Atty. Gen. 638, 641-46 (1973)), and quoted from *Guilliams v. Beaver Lake Club* (casebook, p. 112), 90 Or. 13, 29 175 P. 437 (1918) to the effect that "to lightly hand over this precious public asset to private control at a time when fresh water is increasingly scarce and valuable 'would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated.'" Id. at *11.

The court also rejected the state's contention that the public trust doctrine imposed no duties on it, determining that "[t]he State must also prevent 'private interruption and encroachment' on the public's use of its trust resources," citing *Illinois Central Railroad* (casebook, p. 70). Citing the Oregon Supreme Court's earlier decision in *Kramer*, the court did allow that the state may interfere with the public's access rights only where its restrictions are "objectively reasonable." Whether the public's exclusion from Oswego Lake is an objectively reasonable one will be decided by a second trial, now not scheduled until mid-2024 (because the city and the landowners requested a 10-day trial).

p. 378: Add at the end of the first paragraph.

New evidence showed that in 2020, the global average temperature was 1.2 C above the pre-industrial baseline, and there was a 40% chance of exceeding the 1.5 C goal of lower target of the Paris Agreement on Climate Change in at least one of the next five years. World Meteorological Organization, *New climate prediction increase likelihood of temporarily reach 1.5 C in next 5 years* (May 27, 2021), https://public.wmo.int/en/media/press-release/new-climate-predictions-increase-likelihood-of-temporarily-reaching-15-°c-next-5 (annual update by the WMO).

p. 407, n. 3: Add to the end of the note.

Following the Ninth Circuit opinion and denial of their petition for *en banc* review of the panel's decision, in March 2021, the youth plaintiffs in *Juliana* made a motion in the district court to amend their complaint to adjust remedy they sought, asking only declaratory relief that the U.S. fossil fuel-based energy system is unconstitutional, emulating the strategy invoked in the *Brown v. Board of Education* school desegregation case. *See* Our Children's Trust, Press Release (March 9, 2021), https://static1.squarespace.com/static/571d109b04426270152febe0/t/

6047b082456 ca3052391eb61/1615310978432/Motion+to+Amend+030921.pdf. In May, Judge Aiken ordered the attorneys in the case to convene for a settlement conference in June. Our Children's Trust, Press Release (May 13, 2021), https://static1.squarespace.com/static/571d109b04426270152febe0/ t/609d98700002ab3ea339fc91/1620940912551/PressRelease051321.pdf. (settlement conference scheduled for June 25). Seventeen states sought to intervene to block the settlement discussions. *See* Maxine Joselow, *17 states seek to block Juliana settlement,* E & E News (June 9, 2021), https://www.eenews.net/greenwire/2021/06/09/stories/1063734545. The Biden Administration, which had sought dismissal of the suit, opposed the states' motion to intervene. *See* Maxine Joselow, *Biden Administration Fires Back at Red States,* E & E News (June 23, 2021), https://www.eenews.net/climatewire /2021/06/23/ stories/1063735537. No settlement transpired.

On June 1, 2023, the district court issued an opinion allowing the plaintiffs' motion to amend their complaint order to pursue declaratory relief alone. The court agreed with the plaintiffs that a Supreme Court opinion, *Uzuegbunam v. Preczewski,* 141 S.Ct. 792 (2021), rendered just after the Ninth Circuit's denial of *en banc*, supported a finding that declaratory relief alone satisfied the redressability requirement of standing. The court found that the plaintiff's amendments to their complaint cured the redressability defects identified by the Ninth Circuit panel by eliminating requests for a remedial plan and a list of U.S. carbon dioxide emissions. Addressing the Ninth Circuit's opinion, the district court stated:

Here, this Court notes that, in its determination of standing, the Ninth Circuit was "skeptical" that declaratory relief alone would remediate plaintiffs' injuries. *Juliana*, 947 F.3d at 1171. The court noted that even if all plaintiffs' requests for relief were granted against federal defendants, such would not solve the problem of climate change entirely. But for redressability under Article III standing, plaintiffs need not allege that a declaration alone would solve their every ill. To plead a justiciable case, a court need only evaluate "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." . . . . This Court finds that plaintiffs' proposed amendments are not futile: a declaration that federal defendants' energy policies violate plaintiffs' constitutional rights would itself be significant relief.

It is a foundational doctrine that when government conduct catastrophically harms American citizens, the judiciary is constitutionally required to perform its independent role and determine whether the challenged conduct, not exclusively committed to any branch by the Constitution, is unconstitutional. Marbury v.Madison, 5 U.S. (1 Cranch) 137, 176–78 (1803). The judicial role in cases like this is to apply constitutional law, declare rights, and declare the government's responsibilities. No other branch of government can perform this function because the "judicial Power" is exclusively in the hands of Article III courts. U.S. Const. Art. III, § 1. The issue before this Court now is not to determine what relief, specifically, is in its power to provide. This Court need only decide whether plaintiffs'

> amendments—alleging that declaratory relief is within an Article III court's power to award— "would be subject to dismissal." Carrico, 656 F.3d 1002. Here, 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." (Doc. 514-1 ¶ 1). This relief is squarely within the constitutional and statutory power of Article III courts to grant. Such relief would at least partially, and perhaps wholly, redress plaintiffs' ongoing injuries caused by federal defendants' ongoing policies and practices. Last, but not least, the declaration that plaintiffs seek would by itself guide the independent actions of the other branches of our government and cures the standing deficiencies identified by the Ninth Circuit.

For analysis of the *Juliana* appeal, see Mary Christina Wood, *On the Eve of Destruction": Courts Confronting the Climate Emergency,* 97 Indiana L. J. 239 (2022). For an impassioned argument on behalf of the plaintiffs by the lead attorney in the *Juliana* case, see Julia A. Olson, *Children's Rights to a Life-Sustaining Climate: The Foundational Rule of Law to Achieve Sustainable Abundance for Humanity*, 15 Northeastern L. Rev. (forthcoming 2023).

P 408, n. 5. Add to the end of the footnote:

In 2022, a film, Youth v. Gov, was released on Netflix, chronicling the dramatic twists and turns of the *Juliana* litigation over seven years as the 21 youth plaintiffs seek government accountability for the growing climate disaster. *See* https://www.netflix.com/title/81586492.

p. 408, n. 6. Add to the end of the footnote:

For a spirited defense of the constitutionality of the claim in *Juliana,* see James R. May & Erin Daly, *Can the U.S. Constitution Accommodate a Right to a Stable Climate? (Yes, it Can)*, 39 U.C.L.A. J. Envtl. L. & Poly. 39 (2021), https://privpapers.ssrn.com/ sol3/papers.cfm?abstract_id=3716620 (maintaining that constitutional protections are not abrogated simply because threats to life and liberty are from decades of past governmental actions and inactions contributing to climate change).

p. 415, n. 1. Add to the end of the footnote:

The Washington Supreme Court ultimately refused to review the Court of Appeal's decision to dismiss the case, with two justices in vigorous dissent. *Aji P. v. State of Washington* (No. 99564-8), slip op. at 1 (Wash. S. Ct. Oct. 6, 2021). Chief Justice Gonzalez (joined by Justice Whitener) wrote in dissent:

> This case is an opportunity to decide whether Washington's youth have a right to a stable climate system that sustains human life and liberty. We recite that we believe the children are our future, but we continue actions that could leave them a world with an

> environment on the brink of ruin and no mechanism to assert their rights or the rights of the natural world. This is our legacy to them described in the self-congratulatory words of judicial restraint. Today, the court declined the important responsibility to seriously examine their claims.

Id. at 1. Both Justices found that declaratory relief would have provided a meaningful remedy, and that the Court shirked its obligations to review the youths' constitutional claims: Even though an 'issue is complex and no option may prove wholly satisfactory,' the judiciary should not 'throw up its hands and offer no remedy at all.' *McCleary v. State*, 173 Wn.2d 477, 546, 269 P.3d 227 (2012)," *Aji P.*, slip op at 3. Prior to the Court's ruling, former King County Superior Court Judge Hollis Hill urged the Washington Supreme Court to take review of the case, writing in an opinion editorial, "When the government denies the rights of the public, courts must step in, declare the law and order the political branches to comply with the constitution." Hollis Hill, *Let Youth Have Day in Court Over Climate Change*, Seattle Times (Oct. 1, 2021), https://www.seattletimes.com/opinion/let-youth-have-day-in-court-overclimate- change/ [https://perma.cc/PHB2-?RKM].

p. 416-17, n. 2.

Delete: "An appeal is pending before the Alaska Supreme Court. See Appellants' Statement of Points on Appeal, Sinnok v. State of Alaska, 3AN-17-09910CI, (Nov. 29, 2018), available at https://static1.squarespace.com/static/571d109b04426270152febe0/t/5c006c624d7a9c2d5799618e/1543531618994/Sinnok.Statement+of+Points+on+Appeal.Final.pdf; 2019 WL 4395368 (Alaska 2019)."

Replace deleted material with: The plaintiffs lost an appeal to the Alaska Supreme Court in a split 3-2 decision, gaining a strong dissent from Justices Peter Maassen and Susan M. Carney, who stated, "a balanced consideration of prudential doctrines requires that we explicitly recognize a constitutional right to a livable climate – arguably the bare minimum when it comes to the inherent human rights to which the Alaska Constitution is dedicated." *Sagoonick v. Alaska*, No. 7853 (S. Ct. Alaska, Jan. 28, 2022), slip op at 56, available at https://static1.squarespace.com/static/571d109b04426270152febe0/t/61f446dd70bea34900da27f4/1643398878199/2022.01.28+Sagoonick+v+State+of+Alaska.pdf. Justice Massen wrote that the public trust doctrine, as embedded in the state's constitution, "provides a right to a livable climate." Slip op. at 61.

Add to end of note: In 2022, lawyers for Our Children's Trust filed three new state climate trust cases on behalf of youth: *Layla H. v. Commonwealth of Virginia* (filed Feb. 9, 2022, see https://www.ourchildrenstrust.org/virginia); *Natalie R. v. State of Utah* (filed March 15, 2022, see https://www.ourchildrenstrust.org/utah); and *Navahine F. v. Hawaii Department of Transportation* (filed June 1, 2022, see https://static1.squarespace.com/static/571d109b04426270152febe0/t/62979ffa19b8082c7ecdf1ca/1654104084529/1+2022-6-1+Complaint-Summons.pdf). In the Utah case, On Nov. 9, 2022, the

trial court granted a motion to dismiss the case filed by the state, based in part on concerns involving political question and redressability. The youth plaintiffs appealed, and on March 10, 2023, the Utah Supreme Court decided to retain the appeal rather than allowing the Utah Court of Appeals to decide it. This procedural step is reserved for cases of constitutional importance. Oral arguments are anticipated in late 2023. For updates, see https://www.ourchildrenstrust.org/utah.

In the Virginia case, the 13 youth plaintiffs had asserted violations of both their constitutional substantive due process rights as well as their public trust (jus publicum) rights requiring the state to protect public trust assets, including the atmosphere. They alleged that the state violated both by relying primarily on fossil fuels as the state's main energy source. In a response to the plaintiffs' complaint, the state pled sovereign immunity, and on September 16, 2022, the trial judge ruled in its favor from the bench in a cursory opinion. *See* Complaint at 67, //efaidnbmnnnibpcajpcglclefindmkaj/https://static1.squarespace.com/static/571d109b04426270152febe0/t/62042156 6d141446e7316cdb/1644437851120/2022.02.09_VA+Complaint_Final.pdf (recounting Virginia officials' "ongoing policy and practice of exercising their statutory discretion in such a manner as to favor the permitting of fossil fuel infrastructure."). The case is on appeal with the Court of Appeals on the issue of whether the state agencies can be immune from being sued for violation of plaintiffs' constitutional rights, including public trust rights. Nineteen public trust law professors (including the textbook authors) filed an amicus brief in the Court of Appeals supporting the youths' claims and asserting that the public trust obligation cannot be circumvented through an assertion of sovereign immunity. See Brief of Amicus Curiae Public Trust Law Professors Mary Christina Wood, Michael Blumm, John Dernbach, et al., in Support of the Plaintiff-Appellants chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://static1.squarespace.com/static/571d109b04426270152febe0/t/64245b599e98112cfbae9b3f/1680104281822/Layla+H.+v.+Commonwealth+-+Law+Professors+Motion+and+Brief+Amicus+Curiae.pdf. They asserted:

> Judicial enforcement is of paramount importance to the public trust, serving separation of powers principles and evidenced by the fact that numerous courts have enforced the public trust. Public trust claims cannot be barred by sovereign immunity because the public trust fundamentally limits what the government can do with its authority. Public Trust Law Professors' Amicus brief, at 27.

Constitutional law professors filed a separate amicus brief supporting the youth's claim. Briefing before the Court of Appeals has continued into the summer of 2023. For a chronology of *Layla H. v. Commonwealth of Virginia*, *see* https://www.ourchildrenstrust.org/virginia.

In Florida, following a judicial setback when their state based constitutional ATL case (filed in 2018) was dismissed in a ruling upheld by the Florida Court of Appeals on May 18, 2021, four of the youth plaintiffs took their case to the executive branch, filing a petition for rulemaking on Jan. 5, 2022 before the Florida Department of Agriculture and Consumer Services (FDACS). They sought to establish a state goal of generating 100% of Florida's electricity from

renewable energy by 2050. The youth's petition gained rapid traction in the form of a proposed rule issued April 21, 2022 which tracked the youth's petition language to require renewable energy comprising at least 40% by 2030, 63% by 2035, 82% by 2040, and 100% by 2050. On August 9, 2022, the proposed renewable energy rule became final in Chapter 50-5, see Chapter 5O-5: Renewable Energy; it amounts to Florida's most ambitious climate policy in over a decade. For a chronology of the youth's advocacy in the courts and then executive branch, consult https://www.ourchildrenstrust.org/florida. Is the Florida outcome an example of how litigation – even if unsuccessful – might build political momentum towards climate action that then catalyzes administrative action?

Finally, the Hawaii case is addressed in note 5 below.

pp. 416-17, n. 3. Add to end of note:

It is worth considering Justice Walters' dissent in light of the strong dissents by Chief Justice Gonzalez and Justice Whitener in *Aji P.* (Washington ATL case, p. 415 n. 1), Justice Maassen and Carney in *Sagoonich* (Alaska ATL case, p. 416 n. 2), and the dissent by Judge Staton in the Ninth Circuit appeal of *Juliana* (p. 401). Do you think these judges are offering a roadmap for future decisions in each of their states that could turn in favor of the youth plaintiffs, particularly as the effects of climate crisis become more difficult to ignore? For commentary suggesting so, see Wood, 97 Indiana L. J. at 258-69.

p. 417, add a new note 4:

Our Children's Trust has cleared a path forward for state atmospheric trust litigation in Montana, with a case, *Held v. State,* scheduled for an 11-day trial beginning June 12, 2023. This will be the first climate constitutional trial in the United States. The case was brought on March 13, 2020 by 16 youth challenging the constitutionality of Montana's fossil-fuel based state energy policy, codified in Mont. Code Ann. § 90-4-1001(c)-(g) as well as the Climate Change Exception in the Montana Environmental Policy Act ("MEPA"), Mont. Code Ann. § 75-1-201(2)(a) (making a climate exception to environmental review obligations). *See* Complaint at 2, 35-36.

Montana's Environmental Policy Act (MEPA), modeled on the National Environmental Policy Act (NEPA), requires a detailed environmental review of a wide range of proposals before they can be carried out. In the Climate Change Exception, the Montana legislature directed that environmental review under MEPA may not include "actual or potential impacts that are regional, national, or global in nature." The state also adopted an Energy Policy that strongly favors fossil fuels. After the legislature created an exception to MEPA review for certain arsenic discharges, the Montana Supreme Court in a landmark 1999 opinion held that exception to violate the right to a "clean and healthful environment." *Montana Environmental Information Center v. Dep't of Envtl. Quality*, 988 P.2d 1236 (Mont. 1999). Standing partly on this precedent, the 16 youth plaintiffs in *Held* assert that this fossil fuel policy violates several state

constitutional provisions, including an express right to "a clean and healthful environment in Montana for present and future generations," Article IX, Section 1(1), and constitutional public trust rights that predated the state's constitution and are also ensconced in its express language protecting future generations. Complaint at 98. As to these public trust rights, the plaintiffs averred in their complaint: The rights of the public and future generations as beneficiaries under the Public Trust Doctrine are an attribute of sovereignty that predate Montana's Constitution, they are secured by the Constitution, and they cannot be abrogated. *Montana Coalition for Stream Access v. Curran*, 210 Mont. 38, 682 P.2d 163 (1984); *Montana Coalition for Stream Access v. Hildreth*, 211 Mont. 29, 684 P. 2d 1088 (1984). Complaint at 98.

Plaintiffs' complaint sought both declaratory relief and injunctive relief based on the Montana Constitution. Plaintiffs requested declaratory relief on the constitutionality of the climate change exception to MEPA and the Energy Policy. In their request for injunctive relief, plaintiffs sought judicial orders directing the defendants to prepare an accounting of Montana's greenhouse emissions and to develop and implement a remedial plan to reduce emissions "consistent with the best available science and reductions necessary to protect Youth Plaintiffs' constitutional rights from further infringement…."

The Montana District Court found that the plaintiffs sufficiently alleged that their claimed harms were caused by carbon emissions for which the state defendants were responsible, that they had "sufficiently raised a factual dispute as to whether the State Energy Policy was a substantial factor in causing Youth Plaintiffs' injuries," and that the state's actions under the exception implicated the plaintiffs' constitutional right to a clean and healthful environment. *Held v. Montana,* CDV-2020-307 (Mont. Dist. Ct. Aug. 4, 2021). The court, however, denied the plaintiffs' request for injunctive relief, holding that ordering and overseeing the development of such a plan would violate the political question doctrine by forcing it to make policy judgments for which courts are not suited. By contrast, the court allowed the request for declaratory relief to move ahead, finding that it had authority to issue declaratory relief without injunctive relief.. On the issue of standing, the District Court held that the plaintiffs alleged sufficient facts to satisfy the state's prudential standing requirements for declaratory relief on these issues. If the plaintiffs succeed, the court said it was prepared to issue a declaratory judgment that the climate change exception and/or Energy Policy are unconstitutional Order on Motion to Dismiss, Held v. State, slip. op. at 21-22 (Aug. 4, 2021), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://static1.squarespace.com/static/571d109b04426270152febe0/t/6112b9d83cde100cb673f36e/1628617176778/CDV-2020-307++-++Order+on+Motion+to+Dismiss+%281%29.pdf. The Order cleared the way for a trial.

The State's lawyers, however, sought to avoid discovery and delay trial by seeking a Writ of Supervisory Control from the state's supreme court. In a victory for plaintiffs, on June 14, 2022, the Montana Supreme Court denied the State's request, *State of Montana v. Montana First Judicial District Court*, OP 22-0315, June 14, 2022; https://casetext.com/case/state-v-mont-first-

judicial-dist-court. This first-ever climate constitutional trial in the country may set a model for further trials if youth plaintiffs continue to turn the judicial tide in their favor. Meanwhile, in March 2023, the state repealed the state's energy policy and the climate change exception in apparent anticipation of the trial. See Dana Durgmandon, *Montana Repeals State Energy Policy as Climate Trial Nears,* DeSmog (Apr. 3, 2023), https://www.desmog.com/2023/04/03/montana-repeals-state-energy-policy-as-climate-trial-nears/. Might this case too (as suggested with respect to the Florida ATL case above) demonstrate the rippling effects of legal action in the political branches? For legal updates of the *Held* case after the time of this writing, see https://www.youthvgov.org/held-v-montana. For a VICE News video covering the plaintiffs and the role of this case in youth climate litigation, see https://www.youtube.com/watch?v=K_fxt9SHH9E.

p. 417, add a new note 5:

As noted above, Our Children's Trust filed a state ATL case in Hawaii on June 1, 2022, *Navahine F. v. Hawai'i Department of Transportation*, No. 1CCV-22-0000631 (Haw. 1st Cir. Apr. 6, 2023)., alleging that the state's transportation system, by perpetuating fossil fuel emissions, violates both the state constitution's public trust principle, Haw. Const. art. XI, § 1, and the constitutional right to a clean and healthful environment, Haw. Const. art. XI, § 9. The youth plaintiffs seek both declaratory relief ("declarations of law establishing that Defendants' state transportation system—and its resulting greenhouse gas pollution and climate harms—violates Defendants' constitutional duties and Youth Plaintiffs' constitutional rights," and generally-stated injunctive relief ("as necessary to rectify Defendants' violations and bring the state transportation system into constitutional compliance based on the best available science."). Complaint at 3, available at https://static1.squarespace.com/static/571d109b04426270152febe0/t/62979ffa19b8082c7ecdf1ca/1654104084529/1+2022-6-1+Complaint-Summons.pdf. The plaintiffs survived a motion to dismiss filed by the state. In its order on April 6, 2023, the trial court (Environmental Court of the First Circuit in Honolulu) rendered important principles of public trust law, stating:

> As a threshold issue, Defendants argue the public trust doctrine does not apply to the climate, because climate is not air, water, land, minerals, energy resource or some other "localized" natural resource. The court need not decide whether "the climate" is a trust resource or "property," because Plaintiffs argue that deteriorating climate change impacts our natural resources. Defendants concede this, saying "to be sure, climate change impacts Hawaii's public trust resources." Mot. at 13. But then Defendants argue that Plaintiffs' claim "strains the public trust doctrine too far" because HDOT/the State only controls a "small portion" of the globe's GHG emissions and "cannot control climate change's local impacts." Id. The court understands this argument, but first, it is factual, which is generally fatal on a 12(b)(6) motion. Second, and more importantly, reduced to its essence, Defendants' argument is that it is not required to do anything because the problem is just too big and the State's efforts will have no impact. Putting aside that

> negative thinking will not solve the problem, the law requires that as trustee, the State/ HDOT must take steps to maintain their assets to keep them from falling into disrepair. It is "elementary trust law" that trust property not be permitted to "fall into ruin on [the trustee's] watch." *Ching v. Case*, 145 Hawai'i 148, 170 (2019). "To hold that the State does not have an independent trust obligation to reasonably monitor the trust property would be counter to our precedents and would allow the State to turn a blind eye to imminent damage, leaving beneficiaries powerless to prevent damage before it occurs." Id. (citing *Kelly v. 1250 Oceanside Partners,* 111 Hawai'i 205, 231 (2006)). To hold that the State has no trust obligation to reasonably monitor and maintain our natural resources by reducing our GHG emissions and establishing and planning alternatives to a fossil-fuel heavy transportation system—all because GHG emissions are just "too big a problem" -- "would allow the State to turn a blind eye to imminent damage, leaving beneficiaries powerless to prevent damage before it occurs." Id. Order Denying Defendants' Motion to Dismiss at 3-4, https://static1.squarespace.com/static/571d109b04426270152febe0/t/6446f0782b28777ddc1ecc73/1682370680268/2023.4.19.Signed+Order+Denying+Motion+to+Dismiss.pdf.

The state further argued that the public trust was cabined by statutory duties, an assertion the court denied based on Hawaii caselaw (particularly *Chin*g *supra*), stating: "the court disagrees that statutory limits or requirements limit the public trust doctrine in a way that requires dismissal of this case. Again, *Ching* is clear: "Moreover, this court has made clear that while overlap may occur, the State's constitutional public trust obligations exist independent of any statutory mandate and must be fulfilled regardless of whether they coincide with any other legal duty." Order at 4 (citation omitted).

Finally, the court rejected the political question argument that the State raised (and that nearly every state raises in ATL cases), stating:

> Defendants started off their oral argument saying climate change is important, Hawai'i is addressing it, it is a high priority, new bills are being introduced and passed, and the political process is working well. Therefore, Defendants argue, the issues raised by the two claims in this case amount to a political question, and the courts cannot or should not get involved. First, again, this is partly a factual argument on a Rule 12(b)(6) motion where the court is required to accept the factual allegations of the Complaint. More importantly, this argument fails to recognize the two claims in this case are both based on the Hawai'i Constitution. The courts unequivocally have 11 an important and long-recognized role in interpreting and defending constitutional guarantees. *In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 143 (2000); Ching, 145 Hawai'i at 176 (the political question doctrine does not bar a claim based on public trust duties). The State argues that three of the Baker factors are met. See *Baker v. Carr*, 369 U.S. 186 (1962), and *Nelson v. Hawaiian Homes Comm'n*, 127 Hawai'i 185, 194 (2012). To the court, the issue of a political question is not yet and likely will not be formed unless and

> until a specific motion for injunctive relief is filed. Then we will see if the requested relief improperly trespasses into political questions. In the meantime, the court concludes the Baker factors are not automatically triggered by the declaratory relief requested. Depending on where the constitutional arguments and claimed relief end up, Defendants are free to bring up the political question argument again. Currently, where the Defendants argue they have no duty to act now, invoking the political question doctrine is premature.

A trial date was set for September 26, 2023, but the State subsequently moved to extend the trial date, and the court granted the request. As of this writing, a new trial date had not yet been set. For the chronology and updates to the case, consult https://www.ourchildrenstrust.org/hawaii. When the case does proceed to trial, it will become of the second constitutional climate trial in the United States.

Meanwhile, the law regarding public trust climate obligations in Hawaii has developed through two important cases involving the state's Public Utilities Commission (PUC), an administrative body having tremendous control over the state's energy policy. While neither of these PUC cases were ATL cases (climate cases brought by youth asserting constitutional rights), the Court took the opportunity in both to pave the way for public trust climate obligations that will undoubtedly reinforce the plaintiffs' positions in the Hawaii ATL case (*Navahine*) as it progresses to trial (tellingly, the *Navahine* court relied on the first PUC case to deny the State's motion to dismiss).

In *Matter of Maui Electric Co., Ltd*., the Hawai'i Supreme Court in March 2022 articulated the state Public Utilities Commission's responsibilities under the state's constitutional public trust doctrine. Article XI, section 1 of the Hawai'i Constitution provides in part: "For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State." "In essence," the court had stated in an earlier opinion, the constitution directs the state and its agencies to "assess and balance 'protection' and 'utilization' of public trust resources."

After the Hawai'i legislature set a goal of achieving 100% renewable electricity by 2045, Hawai'ian electric companies began to implement a plan for competitively bidding for grid-scale renewable electricity supplies. Under this competitive bidding process, the state Public Utilities Commission (PUC) approved an agreement by Maui Electric Co., Ltd. to purchase solar/battery electricity from a project operated by another company. A community group challenged this power purchase agreement, claiming as one of its reasons that the PUC had failed to fulfill its constitutional public trust duties. The court rejected this challenge.

Although the court had held in earlier opinions that the PUC was subject to the public trust, "we have not explored the dimensions of its trustee duties." The PUC's unique regulatory

mission, the court said, is to ensure reliability of the state's electric system and ensure that electricity rates are "just and reasonable." The PUC must also consider the state's dependence on fossil fuels and "the fast-approaching 100% renewable energy goal." The court explained that these "considerations are intended to mitigate the unhealthy effects of climate change," which the constitutional right to a healthy environment guards against. In this way, the court said, the PUC must assess and balance protection and utilization of public trust resources. In addition, "when the proposed project poses a *reasonable* threat to public trust resources," the "PUC as trustee must further assess the threat." To approve a power purchase agreement like the one challenged here, the PUC "must affirmatively find that there is no harm to the trust resource or that potential harm is justified." For a threat to be reasonable, "there must be tangible evidence that reasonably connects the threatened harm to the proposed project."

The Court stated that the right to a "clean and healthful environment" under a separate part of the state's constitution—Article XI, Section 9—includes "a right to a life-sustaining climate system." 506 P.3d 192, 203 n.11 (Haw. 2022). This interpretation parallels Judge Aiken's declaration in the *Juliana* case of a constitutional right under the federal constitution's due process clause and public trust principle to a climate system capable of supporting human life. (p. 383). Here, the Court held that there was abundant record evidence that the PUC had engaged in the detailed analysis and factfinding required under state law and the constitution. In addition, the Court reasoned, by helping to phase out fossil fuels, the agreement is consistent with the "right to a life-sustaining climate system." The Court also held that the community group's claims that the solar/battery project threatened public trust resources were not backed by any credible evidence.

The more recent case involving the PUC built on the Court's previous declaration of the constitutional "right to a life-sustaining climate system." It involved a challenge to a decision by the PUC denying a regulated utility's purchase of biomass-produced energy from a tree burning facility. *In the Matter of Hawai'i Electric Light Company,* SCOT-22-0000418 (Haw. slip op., March 13, 2023). An important backdrop to the case had been established by the Hawaiian legislature's declaration of a climate emergency in 2021, S. Con. Res. 44, 31st Leg., Reg. Sess. In *Hawai'i Electric Light*, the Hawaiian Supreme Court unanimously upheld the PUC's decision on the ground that commission could, and must, evaluate the project in light of emerging evidence of the climate emergency. Recent studies of the project's emissions cast considerable doubt on the company's claim that it would produce negative greenhouse gas emissions over its life. In the Court's view, accepting the company's argument that the PUC should base its decision on what was known about the project when it filed its application a decade earlier would amount to an abdication of the agency's constitutional duty to affirmatively protect "a clean and healthful environment" under article XI, §9 of the Hawai'i constitution, which includes the right to "a life-sustaining climate system." *Id.* at *18-*19. The Court observed that "the right to a life-sustaining climate system is not just [an] affirmative [obligation]; it is constantly evolving." *Id.* at *18.

In a perceptive and farsighted view of why the state commission was justified in denying the biomass agreement, Justice Michael Wilson wrote a concurrence asserting that the denial was required not only by the state constitution's right to a clean and healthy environment, but also the constitution's guarantee of due process and its recognition of the public trust doctrine. Justice Wilson observed that "[c]limate change is a human rights issue at its core; not only does it inordinately impact young people, but it also is a profound environmental injustice disproportionately impacting native peoples." *Id.* at *15 (Wilson, J., concurring). After noting that the U.S. was responsible for approximately 20% of the world's historic and cumulative greenhouse gas emissions (*id.* at *16), the concurrence proceeded to explain in some detail how the federal courts of the U.S. have "thus far abdicated responsibility to apply the rule of law to claims that allege knowing contamination of the atmosphere with deleterious levels of greenhouse gas emissions." *Id.* at *16-*17. The concurrence continued:

> One of the most prominent examples of a federal court abdicating its responsibility to leave future generations a habitable planet is the Ninth Circuit's reversal of the District Court of Oregon's decision recognizing that youth plaintiffs adequately alleged a violation of their substantive due process right to a stable climate capable of supporting human life in *Juliana v. United States*, 217 F. Supp 3d 1224 (D. Or. 2016), rev'd and remanded, 947 F.3d 1159 (9th Cir. 2020). In a decision consistent with the application of the environmental rule of law to climate claims in other countries, the United States District Court for the District of Oregon aptly explained how "[f]ederal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it." Id. At 1262. The concern of the district court proved prescient when it was reversed by the Ninth Circuit Court of Appeals. Another recent example of federal courts refusing application of the environmental rule of law to climate claims is the majority opinion of the United States Supreme Court in *West Virginia vs. EPA*, —— U.S. ——, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022). The majority deprived the federal Environmental Protection Agency of "the power needed – and the power granted – to curb greenhouse gases" from power plants; as the dissent explained: "the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions...I cannot think of many things more frightening." Id., 142 S. Ct. at 2828, 2644, 213 L. Ed. 2d at 938, 955 (Kagan, J., dissenting). Similarly, the United States District Court for the Northern District of California dismissed a public nuisance-based lawsuit brought by the cities of Oakland and San Francisco against fossil fuel companies, seeking money damages to help pay for projects necessary to adapt to the consequences of a changing climate. *City of Oakland v. BP*, 325 F. Supp 3d 1017 (N.D. Cal. 2018). While "accept[ing] the science behind global warming" and the "very real" dangers that climate change poses, the United States District Court for the Northern District of California dismissed the suit based upon the proposition that the remedies for the emergency are so political as to render the Plaintiff's claims nonjusticiable. Id. At 1028-29. Under this novel analysis, the judicial branch of

government is precluded from consideration of climate claims: "the problem deserves a solution on a more vast scale than can be supplied by a district judge or jury in a public nuisance case." Id. At 1029. Likewise, two of the three members of the Ninth Circuit Court of Appeals panel in *Juliana v. United States,* 947 F.3d 1159 (9th Cir. 2019) dismissed youth-plaintiffs due process and public trust claims against the federal government based on the proposition that Plaintiffs have no standing because the application of remedies to the climate crisis would be too complex for judicial decision-making. Juliana, 947 F.3d at 1171 ("it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan" which would require a "comprehensive scheme to decrease fossil fuel emissions and combat climate change."). In a formidable dissent, Judge Josephine Staton took to task the Majority's supposition that youth plaintiffs are barred from bringing claims against the United States for knowingly threatening their substantive due process right to a stable climate capable of supporting human life.16 As Judge Staton explained, claims vindicating the right to a life-sustaining climate system are redressable by courts; a remedial plan requiring the federal or a state government to reduce greenhouse gas emissions in an amount necessary to ensure a stable climate system is not a remedy that defies judicial decision making so as to render it nonjusticiable:

> Our history is no stranger to widespread, programmatic changes in government functions ushered in by the judiciary's commitment to requiring adherence to the Constitution. Upholding the Constitution's prohibition on cruel and unusual punishment, for example, the Court ordered the overhaul of prisons in the Nation's most populous state. See *Brown v. Plata*, 563 U.S. 493, 511, 131 S. Ct. 1910, 179 L. Ed. 2d 969 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration.") And in its finest hour, the Court mandated the racial integration of every public school—state and federal—in the Nation, vindicating the Constitution's guarantee of equal protection under the law. See *Brown v. Bd. Of Educ. (Brown I*), 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954); *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954). In the school desegregation cases, the Supreme Court was explicitly unconcerned with the fact that crafting relief would require individualized review of thousands of state and local policies that facilitated segregation. Rather, a unanimous Court held that the judiciary could work to dissemble segregation over time while remaining cognizant of the many public interests at stake. . . .

> Plaintiffs' request for a "plan" [in the instant case] is neither novel nor judicially incognizable. Rather, consistent with our historical practices, their request is a recognition that remedying decades of institutionalized violations may take some time. Here, too, decelerating from our path toward cataclysm will undoubtedly require "elimination of a variety of obstacles." Those obstacles may be great in number, novelty, and magnitude, but there is no indication that they are devoid of discernable standards.

Juliana, 947 F.3d at 1188-89 (Staton, J., dissenting). The remedy for violation of the right to a stable climate capable of supporting human life is discreet: to reduce greenhouse gas emissions. In comparison, desegregating the schools of the United States is a significantly more complex remedial undertaking.

A request by the *Juliana* youth plaintiffs for a full en banc review of the two-judge majority provided a further example of the hostile reception of the federal courts to climate claims. The plaintiffs' request to the largest federal circuit in the United States for an en banc hearing was denied. *Juliana v. United States*, 986 F.3d 1295 (9th Cir. 2021) (order denying petition for rehearing en banc). Notwithstanding its status as the signature climate case in the United States, and the compelling dissent of Judge Staton, the Ninth Circuit Court of Appeals provided no opinion as to why an issue recognized by all three members of the Juliana panel as an existential "problem approaching 'the point of no return' " *Juliana*, 947 F.3d at 1166, lacked the importance necessary to gain the consideration of an en banc panel of Ninth Circuit appellate judges. Juliana, 986 F.3d at 1296. The Ninth Circuit sent a clear message to young people and future generations who seek protection from knowing environmental damage to a life-sustaining environment: they have no standing to seek redress in the federal courts of the United States.

Thus, it is apparent that "the modern [federal] judiciary has enfeebled itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court." See Alfred T. Goodwin, *A Wake Up Call for Judges*, 2015 Wisc L. Rev. 785, 785-86, 788 (2015) (citing Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (2014)). 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. See *Juliana*, 217 F.Supp.3d at 1262 (D. Or. 2016) ("The current state of affairs...reveals a wholesale failure of the legal system to protect humanity") (citations and quotations omitted), rev'd and remanded, 947 F.3d 1159 (9th Cir. 2020). Unlike the *Juliana* majority, the Hawai'i State Supreme Court does not choose to "throw up [our] hands," 947 F.3d at 1174 (Staton, J., dissenting); see, also, *Aji P v. State of Washington*, 198 Wash.2d 1025, 497 P.3d 350, 353 (2021) (Gonzalez, J., dissenting) ("The court should not avoid its constitutional obligations that protect not only the rights of these youths but all future generations who will suffer from the consequences of climate change.") In

contrast to the federal judiciary, the Hawai‘i Supreme Court has recognized the constitutional right to a life-sustaining climate. *MECO*, 150 Hawai‘i 528, 538, n.15, 506 P.3d 192, 202, n.15 (2022):

> The [Hawai'i] PUC's consideration of the Project's greenhouse gas emissions and denial of the amended PPA in the instant case aligned with the urgent need for state action to reduce emissions; and thus gave due protection to the right of the people of Hawai‘i to a life-sustaining climate. See Daniel Farber, *State Governmental Leadership in U.S. Climate Policy*, Wilson Center (June 23, 2021) (available at https://www.wilsoncenter.org/ article/state-governmental-leadership-us-climate-policy) ("It is likely that many states will remain ahead of the nation as a whole for years to come, meaning that their emission cuts will continue to augment national efforts."). The PUC found the emission of over 8 million tons of CO2 unacceptable, and in so doing, properly considered the fact that low-carbon alternatives could provide Hawai‘i with renewable energy at lower costs and lower emissions.

The concurrence maintained that due process "safeguards fundamental rights which are implicit in the concept of ordered liberty" (*id.* at *24) because "[i]t is beyond cavil that a life-sustained climate system is implicit in the concept of ordered liberty and lies "at the base of all our civil and political institutions. . . . Indeed, a stable climate is the foundation upon which society and civilization exist in Hawaii and throughout the globe." *Id.* at *26 (citations omitted). Justice Wilson continued: "Without an effective response to climate change that prevents catastrophic climate change impacts, the integrity of the rule of law itself is subject to collapse. . . . The effects of failing to reduce atmospheric CO2 concentrations to below 350 ppm will lead to social, political and economic chaos, and in that chaos, the rule of law cannot survive. *Id.* at *27 (citations omitted).

Justice Wilson concluded that due process requires the state to take action "to ensure that there is a life-sustaining climate system capable of supporting the health and survival of Hawai'i's people and the rule of law itself." He maintained that "the right to a life-sustained climate system is deserving of fundamental status as essential to our scheme of ordered liberty because it is preservative of all rights. . . . and fundamental to Hawai'i's constitutional guaranteed, including the right to personal security and the right to bodily integrity." *Id.* at *28-*29 (citations omitted).

As for the public trust doctrine, which in Hawaii is codified in art. XI, §1 of the state constitution, Justice Wilson wrote:

> The right to a life-sustaining climate also arises under the public trust doctrine enumerated in Article XI, section 1 of the Hawai‘i Constitution. Article XI, section 1 bestows upon the State the duty to protect and conserve natural resources, including the climate system, for the benefit of present and future generations. Article XI, section 1

declares that "[f]or the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawai'i's natural beauty and all natural resources, including land, water, air, minerals and energy sources" and that "[a]ll public natural resources are held in trust by the State for the benefit of the people." (emphasis added). This mandate adopts "the public trust doctrine as a fundamental principle of constitutional law in Hawai'i." *In re Waiāhole Ditch Combined Contested Case Hr'g*, 94 Hawai'i 97, 132, 9 P.3d 409, 444 (2000) ("Waiāhole"). The public trust doctrine establishes the State of Hawai'i as a fiduciary over all natural resources and requires the State to hold those resources in trust for the benefit of present and future generations. See, e.g., *Ching v. Case*, 145 Hawai'i 148, 177-78, 449 P.3d 1146, 1175-76 (2019). Thus, Article XI, section 1 prohibits the State of Hawai'i from taking action that "substantially impairs the public interest" in a trust resource. King v. Oahu R. & L. Co., 11 Haw. 717, 725 (1899).

The climate system is a "natural resource" held in trust by the State for the benefit of present and future generations. The climate system "is an interactive system consisting of five major components: [1] the atmosphere, [2] the hydrosphere, [3] the cryosphere, [4] the land surface and [5] the biosphere[.]" A.P.M. Baede et al., *The Climate System: an Overview* 87 (B. Bolin and S. Pollonais eds., 2001) (available at https://www.ipcc.ch/site/assets/uploads/2018/03/TAR-01.pdf). The climate system also encompasses all other natural resources, including "land, water, [and] air." Haw. Const. art XI, § 1. In order for all other natural resources mentioned in Article XI, section 1 to be conserved for future generations, the level of atmospheric CO2 must be reduced to below 350 ppm. That is, Hawai'i's natural beauty, land, water, air, minerals and energy sources all depend upon a stable climate system, and a stable climate system is only possible if atmospheric CO2 concentrations are limited to below 350 ppm.

The urgency of the climate crisis compels protection of the climate system as a fundamental natural resource under Article XI, section 1. The public trust "does not remain fixed for all time, but must conform to changing needs and circumstances." *Waiāhole*, 94 Hawai'i at 135, 9 P.3d at 447; see also *Reppun v. Board of Water Supply*, 65 Haw. 531, 553, 656 P.2d 57, 72 (1982) (acknowledging that "the continued satisfaction of the framers' intent requires that the [riparian] doctrine be permitted to evolve in accordance with changing needs and circumstances"); *Matthews v. Bay Head Improvement Ass'n,* 95 N.J. 306, 471 A.2d 355 (N.J. 1984) (extending the trust to privately owned beaches, in recognition of the "increasing demand for our State's beaches and the dynamic nature of the public trust doctrine[.]"). At current levels of greenhouse gas emissions, average global temperature is expected to reach the 2°C threshold above the 1850-1900 average by 2045. S. Con. Res. 44, 31st Leg., Reg. Sess. (2021). Given the unprecedented life-threatening emergency that will result if atmospheric CO2 concentrations are not reduced to below 350 ppm, and the increasing necessity to urgently reduce emissions in order to reach that goal, the State bears a public

> trust duty to protect and conserve a life-sustaining climate system for present and future generations.
>
> In applying the PUC's public trust duty to its decision whether to approve or deny the amended PPA, Article XI, section 1 of the Hawai'i Constitution requires the PUC to consider the Project's contribution to, or mitigation of, the climate emergency. An agency's constitutional public trust obligations are independent of its statutory mandates, but they operate in tandem.

The concurrence examined several statutory provisions before concluding that climate is a "sui generis emergency," as "[t]he lives of our children and future generations are at stake. With the destruction of our life-sustaining biosphere underway, the State of Hawaii is constitutionally mandated to urgently reduce its greenhouse gases emission in order to reduce atmospheric CO2 concentrations to below 350 ppm." *Id.* at *38.

Was this concurrence likely written with the Hawaii ATL case in mind? Were the two PUC cases, both of which declared a constitutional public trust right to a climate system capable of supporting human life, a strong predicate for the upcoming trial in *Navahine?* Reading the Hawaii decisions in light of the *Juliana* 9th Circuit majority decision issued by Judge Hurwitz, do you have the sense that at least some judges are questioning their colleagues' refusal to offer a legal remedy in face of a calamity that threatens humanity worldwide? As the climate emergency increasingly lands on the docket of courts worldwide, the role of the judicial branch of government in holding the political branches accountable takes on unprecedented importance.

p. 417, current note 4 becomes n. 6.

Apart from the ATL cases as the ones above challenging broad parts of a state's energy or transportation system, the PTD can also be invoked to challenge discrete actions that may otherwise be permitted under state pollution laws. An example of a successful effort occurred in Louisiana, when on Sept. 12, 2022, the 19th Judicial District Court found that the Louisiana Department of Environmental Quality (LDEQ) violated the public trust doctrine when it failed to consider the negative effects of greenhouse gas emissions in its cost benefit analysis. The court reversed the LDEQ's decision to issue air permits to FGLA, a Formosa Plastics Group company, for the construction of a new chemical manufacturing complex. In its ruling, the court found that LDEQ's decision was arbitrary and capricious and against the preponderance of the evidence under the agency's public trust duty. *See Rise St. James et al. v. Louisiana Department of Environmental Quality*, No. 694029 (19th La. Dist. Ct.).

p. 417, current note 4 becomes n. 7.

p. 492, n. 5. Add to end of note.

In Ecuador was the first nation to expressly recognize rights of nature in its 2008 constitution. Article I of the Constitution states, ""Nature or Pachamama, where life is

reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution." A proposed gold mining operation by a Canadian company in the Los Cedros Reserve was challenged in the Constitutional Court. The affected area is one of the most biologically diverse habitats in the world, with nearly 12,000 acres of primary cloud forest safeguarding the headwaters of four important watersheds. Some observers believe that the court's decision will determine the future enforcement of the country's rights of nature. *See* Rebekah Hayden, *Rights of Nature in Ecuador,* Ecologist (Nov. 6, 2020), https://theecologist.org/2020/nov/06/rights-nature-ecuador. In December 2021, the court unanimously ruled (two judges abstaining) that mining operations pursued by the state mining company and its Canadian partner threatened the Los Cedros protected area's right to exist and flourish. The opinion stated, "[T]he risk in this case is not necessarily related to human beings… but to the extinction of species, the destruction of ecosystems or the permanent alteration of natural cycles.…" *See* Katie Surma, *Ecuador's High Court Affirms Constitutional Protections for the Rights of Nature in a Landmark Decision,* Inside Climate News (Dec. 3, 2021), https://insideclimatenews.org/news/03122021/ecuador-rights-of-nature/.

In Australia, a federal court ruled that the environment minister has a legal duty to not cause harm to the young people of the country by exacerbating climate change by approving mining projects, although the court dismissed a requested injunction of an expansion of a New South Wales coal mining operation on technical grounds. *See Australian teenagers' climate change class action opens "a big crack in the wall," expert says,* ABC News (May 26, 2021), https://www.abc.net.au/news/2021-05-27/climate-class-action-teenagers-vickery-coal-mine-legal-precedent/100169398. A appeals court reversed in 2022, unanimously siding with the government, although their lists of reasons differed: one judge saying that said elected officials should decide policy matters, even though there was "no dispute" in the case that climate change itself caused harm; another judge found "incoherence" between the law and the minister's obligations to act under a duty of care; a third expressed thought there was a lack of "sufficient closeness or directness" between the minister's decision to approve developments like coal mines and "any reasonably foreseeable" harm. *Australia climate change: Court overturns teenagers' case against minister,* BBC News (March 15, 2022), https://www.bbc.com/news/world-australia-60745967.

In Brazil, a class action filed in October 2020 by the Institute of Amazonian Studies against the federal government of Brazil seeks recognition of a fundamental right to a stable climate for present and future generations under the Brazilian Constitution. The Institute has asked for an order requiring the government—which has failed to prevent deforestation, as required by its own plans, and failed to adapt to climate by missing emissions targets established by federal statutes—to comply with national climate law. The case asks the court for an order requiring the federal government to comply with existing policies, reforest an area equivalent to what was deforested beyond the statutory limit, and allocate sufficient budgetary resources for this purpose. *See* http://climatecasechart.com/climate-change-litigation/non-us-case/institute-of-amazonian-studies-v-brazil/. After some procedural wrangling, a court suspended the environmental license of coal mining and power plan project until the alleged flaws of the environmental impact assessment can be addressed. The court also ruled that climate change

guidelines must, indeed, be required in environmental impact assessments of thermal power plants and coal mining in Rio Grande do Sul. *See* Gedham Gomes & Luiz Gustavo Bezerra, Mayer-Brown Blog, https://www.mayerbrown.com/en/perspectives-events/blogs/2021/09/climate-litigation-in-brazil-new-lawsuit-seeks-to-bring-climate-change-discussions-to-the-core-of-environmental-licensing-of-carbonintensive-activities.

In Chile, whose voters opted for the drafting of a new constitutional in late 2020 by an overwhelming 78%, the constitutional convention that will draft the new constitution has been urged to adopt a public trust doctrine provision by an interdisciplinary group of scholars from both Chile and the U.S. *See* Carl Bauer, et al., *The Protection of Nature and a New Constitution for Chile: Lessons from the Public Trust Doctrine* (May 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847110; Michael C. Blumm & Matthew Hebert, *Constiutionalizing the Public Trust Doctrine in Chile*, 52 Envtl. L. (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4025564.

In Portugal, six youth plaintiffs sued 33 European Union member countries in the European Court of Human Rights in September 2020, alleging that the governments have violated their human rights by permitting activities that release greenhouse gases into the atmosphere, and these releases have harmed their physical and mental wellbeing, as Portugal is facing sea-level rise as well as chronic droughts and heatwaves. The plaintiffs requested that the court issue binding orders on 33 European countries to cut greenhouse gas emissions. The European Court of Human Rights in Strasbourg, France, has fast-tracked the lawsuit. *See Duarte Agostinho and Others v. Portugal and 32 Other States*, no. 39371/20, ECHR (2020), http://climatecasechart.com/climate-change-litigation/non-us-case/youth-for-climate-justice-v-austria-et-al/. *See* Joanna Kakissis, *These Portuguese kids are suing 33 European countries to force them to cut emissions,* NPR (Dec. 2, 2021), https://www.npr.org/2021/12/02/1058350093/climate-change-portuguese-children-lawsuit#:~:text=They%20argue%20that%20climate%20change,judgment%20could%20come%20next%20year.

The Ireland Supreme Court held that a national mitigation plan, adopted for the purpose of transitioning to a low carbon economy by the end of 2050, was neither sufficient to carry out climate goals or comprehensive enough to allow the public to evaluate these policy objectives. Although the plan was challenged as a violation of constitutional rights, the Court dismissed these claims because the plaintiff, Friends of the Irish Environment, is a corporate entity and not entitled to assert the right to life. However, the Court did not foreclose the possibility of a constitutional right to life existing in an environmental case when brought forth by a proper plaintiff. *See Friends of the Irish Environment v. Ireland*, [2020] IR 793 (Ir.), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200731_2017-No.-793-JR_opinion.pdf.; Isabella Kaminski, *Ireland forced to strengthen climate plan, in supreme court win for campaigners*, Climate Home News (July 31, 2020), https://climatechangenews.com/2020/07/31/ireland-forced-strengthen-climate-plan-supreme-court-victory-campaigners/.

In Germany, plaintiffs filed a lawsuit challenging provisions of a climate protection act and the government's failure to take adequate measure to reduce greenhouse gas emissions to limit an increase in global temperatures to well-below 2°C. The federal Constitutional Court held that the act was incompatible with the human rights enshrined in the German constitution, and these fundamental rights required the government to manage CO_2 reductions "in a forward-looking way." The court's reasoning discussed intergeneration justice and explained that the current generation could not consume large portions of the CO_2 budge while future generations experience the consequences of those actions. The court ordered the government to set emissions reduction goals by the end of 2022. *See Neubauer, et al. v. Germany*, BVerfGE, 1 BvR 2656/18, Mar. 24, 2021, http://climatecasechart.com/climate-change-litigation/non-us-case/neubauer-et-al-v-germany/. However, in 2021, the German Federal Constitutional Court, ruled that German states are neither obliged and may lack the competence to implement emission reduction-targets independent from the targets on the federal level. The result means that only the federal Republic of Germany is competent to regulatine GHG emission budgets. Whether the decision means that private parties are similarly immune from lawsuits is not clear. Markus Burianski, et al., *German Federal Constitutional Court Refuses to Hear Climate Activists' Complaints,* White & Case (Feb. 4, 2022), https://www.whitecase.com/publications/alert/german-federal-constitutional-court-refuses-hear-climate-activists-complaints.

In France, the municipality of Grande-Synthe filed a lawsuit against the French government for failing to address climate change and reduce greenhouse gas emissions required by domestic and international law, including the Paris Climate Accords and the European Convention on Human Rights. The Conseil d'Etat issued a decision holding that the French government had caused "ecological damage" by failing to adequately reduce greenhouse gas emissions. The court held the French government liable for the damage caused by its inadequate climate policies and its failure to meet its international commitments. *See Commune de Grande-Synthe v. France*, Conseil d'Etat, Grande-Synthe, Nov.19, 2020, 427301, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190123_Not-Yet-Available_press-release-1.pdf.

In 2021, A Paris administrative court found the French state guilty of failing to meet its commitments to curb greenhouse gas emissions, a ruling that recognized the ecological damage linked to climate change and held the French state responsible for failing to fully meet its goals in reducing greenhouse gases. The court ordered the state to pay the symbolic sum of 1 euro in compensation for "moral prejudice", a common practice in France. *Paris court finds French state guilty in landmark lawsuit over climate inaction,* France 24 (March 2, 2021), https://www.france24.com/en/live-news/20210203-french-government-found-guilty-in-landmark-lawsuit-over-climate-inaction.

p. 527-28, n. 8. Add to the end of the note:

In April 2021, the Supreme Court of Pakistan upheld a local zoning law that prevented the expansion of a cement plant because of the associated harmful environmental effects and the damage to groundwater supplies. In rejecting the cement company's challenges to the zoning

law, the Court discussed the local government's obligation to take a precautionary approach, as codified in the IUCN World Declaration on the Environmental Rule of Law and "act in line with the principle of *in dubio pro natura*" (when in doubt, favor nature). Further, the Court highlighted the importance of the rights of nature and recognized that "the environment needs to be protected in its own right." Finally, the Court discussed the case in the context of climate change and intergenerational justice, recognizing the courts' role in protecting future generations from the harmful effects of climate change by upholding climate justice whenever possible. *D. G. Khan Cement Company v. Government of Punjab*, (2021) C.P.1290-L of 2019 (SC) at 1 (Pak.), http://climatecasechart.com/climate-change-litigation/non-us-case/d-g-khan-cement-company-v-government-of-punjab/.

p. 542, n. 6. Add to end of the note:

Another unsuccessful rights of nature effort occurred in Florida. In November 2020, voters in Orange County, Florida approved a Rights of Nature amendment titled "Right to Clean Water, Standing and Enforcement" to the Orange County Charter, which recognized the rights of rivers, streams, and wetlands within Orange County. In April 2021, a case was filed on behalf of Orange County waterways to enforce their legal rights that would be harmed by defendant Beachline South Residential, LLC proposal to fill roughly 115 acres of wetlands for a residential and commercial development. The plaintiff water bodies sought injunctive and declaratory relief preventing the issuance of a wetland fill permit, maintaining that they have a right to exist and be protected under the law. *See* Complaint for Plaintiff, *Wilde Cypress Branch et al. v. Beachline South Residential, LLC*, Filing # 125602282 (Fla. Cir. Ct. Apr. 26, 2021),https://static1.squarespace.com/static/5e3f36df772e5208fa96513c/t/6088377c15b1c8231ebfa7f28/1619539905869/Rights+of+Waterways+Legal+Complaint+April+26+2021.pdf. On July 6, 2022, the court dismissed the complaint, saying the lawsuit was preempted by a 2020 state statute that that said local governments could not grant legal rights to "a plant, an animal, a body of water, or any other part of the natural environment." The statute also prohibits local governments from granting people or political subdivisions "any specific rights relating to the natural environment." Katie Surma, *Two Lakes, Two Streams and a Marsh Filed a Lawsuit in Florida to Stop a Developer From Filling in Wetlands. A Judge Just Threw it Out of Court*, Inside Climate News, July 7, 2022, https://insideclimatenews.org/news/07072022/two-lakes-two-streams-and-a-marsh-filed-a-lawsuit-in-florida-to-stop-a-developer-from-filling-in-wetlands-a-judge-just-threw-it-out-of-court/.

p. 543, add at end of note 7:

There is other recent scholarship. For an argument that strands of the rights of nature can already be found in U.S. law, see Karen Bradshaw, *Identifying Contemporary Rights of Nature in the United States,* 95 S. Cal. L. Rev. 1439 (2022). The author argues that natural resources damages law, the law of indigenous or tribal governments, and federal wildlife law all recognize rights of nature in key ways. For a recent critique on the rights of nature approach, see Noah M. Sachs, *A Wrong Turn with the Rights of Nature Movement*, Geo. Envtl. L. Rev. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4402290. The author asserts that the

litigation necessary for the rights of nature movement to succeed would, in turn, lead to "arbitrary and oppressive outcomes for humans while under-protecting nature." *Id.* How does the public trust doctrine respond to this critique?