NO ORDINARY LAWSUIT: THE PUBLIC TRUST AND THE DUTY TO CONFRONT CLIMATE DISRUPTION— COMMENTARY ON BLUMM AND WOOD

GERALD TORRES*

The following Response addresses the difficult issues that the case of Julianna v. United States *raises. The issues are not just difficult legal questions, but at a deep level, the case implicates core issues of legitimacy. While phrased in the language of separation of powers or justiciability, the heart of the political question doctrine, as this case has revealed, is what the proper obligation of the state to the people in whose name it purports to govern is. While this inquiry presents a complex legal question about institutional competencies, it also an important political philosophical question. One of the characteristics of constitutional adjudication is its capacity to redefine the boundaries of our constitutional commitments.* Julianna *is one such case. Blumm and Wood recognize this and lay out the case for finding a federal public trust duty. This Response is phrased as a comment on Blumm and Wood and extends and highlights how they have identified just what is at stake.*

TABLE OF CONTENTS

* Jane M.G. Foster Professor and Faculty Fellow, Atkinson Center for a Sustainable Future, *Cornell University.*

INTRODUCTION

In 2016, a group of children and the famous climate scientist James Hanson filed suit against the United States, seeking to break the deadlock that has prevented the United States from aggressively confronting the challenge of climate change.[1] The genesis of this lawsuit is rooted in the recognition that humanity is facing a major environmental crisis that is only made worse by a failure to act.[2] The inaction has many justifications but likely only one result: *The World Without Us*.[3] The various impacts of this reality, as Dipesh Chakrabarty says, "saturate our sense of the now."[4] His meditations on how climate change impacts historians' work follow suggestions from Alan Weisman's book.[5] Would we merely be traces in Earth's skin for which there would be no stratigraphers to reveal?[6] What is the historian's task if there is no future within which to imagine human history to unfold?[7] The bleakness of that question is compounded by the realization that it is not beyond our capacity to make decisions that make a human future possible.

The children in the case of *Juliana v. United States*[8] ask a relatively simple, but at the root, an optimistic question: must the government act to safeguard their future by addressing risks that are well-known, but simply beyond the capacity of any individual actor to address?[9]

---

1. Juliana v. United States, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).
2. *Id.* at 1246
3. ALAN WEISMAN, THE WORLD WITHOUT US (2007) (envisioning Earth after humans disappear).
4. Dipesh Chakrabarty, *The Climate of History: Four Theses*, 35 CRITICAL INQUIRY 197, 197 (2009).
5. *See id.*; *see also* WEISMAN, *supra* note 3 (imagining how once humans disappear from the world, nature would erode cities and infrastructure, and animals and fauna would flourish).
6. *See* Chakrabarty, *supra* note 4 at 206.
7. *Id.* at 197.
8. 217 F. Supp. 3d 1224 (D. Or. 2016).
9. *Id.* at 1247, 1251–52, 1261.

Such challenges are historically the province of government, especially where they concern the management of fundamentally public resources which are incapable of private ownership.[10] Because of that characteristic, the government has a duty to act when the capacity to act is apparent and available. *Juliana* asks where that duty originates. The children and the court root it in the due process clause protections that capture the basic fiduciary obligations of government.[11]

While most non-scientists must rely on scientists to evaluate the risk, the scientific consensus on climate change is firm. As Professor Naomi Oreskes said of a review of close to one thousand papers on the topic, some commentators "suggest that there might be substantive disagreement in the scientific community about the reality of anthropogenic climate change. This is not the case . . . . Remarkably, none of the papers disagreed with the consensus position."[12] Professor Oreskes goes on to say that the history of science teaches humility, and we should not act on what we cannot know, but while there may be questions about what to do, there is no longer any question that we must do something.[13] Our responsibility is to our children and grandchildren, and they will be right to blame us if we fail to act.[14]

Chakrabarty posits four theses about historical knowledge that also inform how we ought to think about the *Juliana* litigation. While *Juliana* is an important case, it is one piece in a larger effort not only to produce action but also to transform the way in which we respond to the knowledge of anthropogenic climate change.[15] To paraphrase

---

10. *See id.* at 1252–54 (tracing the history of the Public Trust Doctrine).

11. *Id.* at 1233; *see also, e.g.*, Evan Fox-Decent, *From Fiduciary States to Joint Trusteeship of the Atmosphere: The Right to a Healthy Environment through a Fiduciary Prism* 7 (Dec. 15, 2010), http://ssrn.com/abstract=1698755, *in* FIDUCIARY DUTY AND THE ATMOSPHERIC TRUST 253 (Ken Coghill et al. eds., 2012) (noting basic fiduciary duties of government include "adopt[ing] and enforc[ing] laws protecting persons from private domination and instrumentalization, such as may arise when non-state actors unjustifiably degrade the environment"). Fox-Decent's definitive statement is found in SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY (2011). Of course, this idea has generated strong opposition and a leading statement to the contrary can be found in Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145, 1150 (2014) (discussing the flaws in the fiduciary model of government, including the aggrandizement of the judiciary at the expense of the smooth functioning of government).

12. Naomi Oreskes, *The Scientific Consensus on Climate Change*, 306 SCIENCE 1686, 1686 (2004).

13. *Id.*

14. *Id.*

15. *See* Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 67 (2017) (noting

Chakrabarty's first thesis: "anthropogenic explanations of climate change spell the collapse of the . . . distinction between natural history and human history."[16] While different time scales have often measured human history and natural history, the emergence of humans as geological agents has erased that difference.[17] We must recognize that our actions have a current impact on the planet itself. While he identifies the distinctive schools of historical thought, including environmental history, Chakrabarty suggests that climate change has transformed the way we need to conceive the role people play: we are now a natural force.[18] Our study and understanding of the world must reflect that knowledge.

That conceptual transformation carries with it new meanings for the subjects of traditional histories. Since Hume marked the beginning of modern history by Columbus' successful return voyage to Europe, Chakrabarty suggests that its dominant theme has been freedom in all of its multifarious incarnations.[19] This theme, of course, is intimately tied to the evolution of the social and political institutions that populate the historical literature. However, as humans have become a geological force, the politics and legal institutions that shape social life must necessarily reflect that reality.[20] The impact of human history understood as geologic history compromises the very ideas of legitimacy and sovereignty. Globalization itself is not just as an economic phenomenon or a function of the changing nature of colonialism.[21] Globalization is an expression of the geological history of human activity.[22]

This reality complicates the issues that have occupied historians of whatever stripe. Climate change complicates questions of inequality, poverty, political presence, and social vulnerability. This natural history

---

Juliana is part of a series of atmospheric trust litigation cases); Mary Christina Wood & Dan Galpern, *Atmospheric Recovery Litigation: Making the Fossil Fuel Industry Pay to Restore a Viable Climate System*, 45 ENVTL. L. 259, 260 (2015) (suggesting the use of litigation against fossil-fuel companies to raise funds for climate restoration).

16. Chakrabarty, *supra* note 4, at 201.

17. *Id.* at 206 (quoting Naomi Oreskes, *The Scientific Consensus on Climate Change: How Do We Know We're Not Wrong?*, *in* CLIMATE CHANGE: WHAT IT MEANS FOR US, OUR CHILDREN, AND OUR GRANDCHILDREN 65, 93 (Joseph F. DiMento & Pamela Doughman eds., 2007)).

18. *Id.* at 210–11.

19. *Id.* at 207–08.

20. *Id.* at 210–11.

21. *Id.* at 214.

22. *Id.* at 206–09 (explaining that humans have "reached numbers and invented technologies that are on a scale large enough to have an impact on the planet itself").

of the planet is not separate from the natural history of people. We are that history, now. In his third thesis, Chakrabarty suggests that existing global histories are really species history.[23] He makes this claim without being required to sacrifice the specificities of those histories. Species thinking is not the substitution of the general for the specific. Skepticism of the idea of "the universal" should not dissuade us from asking what thinking about human history as species history in the context of geologic time can tell us. Geologic time is different when we see humans as geological agents. The collapse of natural history and social history is the result of our new role.

By conceiving of human history as geologic history, we are able to see that there is an "us" that has to conceive of and execute concerted action to prevent the calamity that climate disruption presages. The children who initiated the action in *Juliana*, like the others in Our Children's Trust, understand this almost intuitively.[24] Much like the children in Florida who today are instructing their elders on the necessity for action on guns, the children in this case are instructing sophisticated historians and smart lawyers about the meaning of legitimacy.[25] They are asking questions about what government is for, and we should listen. The following Response will address the questions raised by *Juliana*. It will explore why it is one of the most serious cases in front of us today and how, as Chakrabarty suggests, we need to stretch disciplines and our imagination to see what is right in front of us.

---

23. *Id.* at 212, 219.

24. *See* OUR CHILDREN'S TRUST: OUR MISSION (describing the children's mission to "participate in advocacy, public education and civic engagement to ensure the viability of all natural systems in accordance with science") https://www.ourchildrenstrust.org/mission-statement (last visited Aug. 17, 2018).

25. Julie Turkewitz & Alexander Burns, *Florida Republicans Face Mounting Pressure to Act on Gun Control*, N.Y. TIMES (Feb. 21, 2018), https://www.nytimes.com/2018/02/21/us/florida-gun-control-republicans.html.

> Seven days after the killing of 17 students and school staff members in Florida, Republican state leaders are facing pressure unlike any they have experienced before to pass legislation addressing gun violence. On Wednesday, swarms of student protesters carrying signs and boxes of petitions stormed the Florida Capitol, pleading with lawmakers to pass tougher gun control in the wake of the deadly shooting at a Broward County school last week. On one floor, they crowded the doorway of the office of Gov. Rick Scott, a Republican and an ardent supporter of gun rights, shouting, "Shame on you! Shame on you! Shame on you!" On an upper floor, they gathered outside the office of the powerful speaker of the Florida House, Richard Corcoran. "Face us down! Face us down! Face us down!"

This Response will provide commentary on Blumm and Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*.[26] Although this Response will not respond directly, it is built on the scaffolding that they provide. After surveying the case, it will address what seem to be the most troubling aspects of the case, justiciability and redressability, but will suggest that these are not so troublesome as they first appear.

I. *JULIANA V. UNITED STATES*

The claim made by the plaintiffs in this case is at once audacious and very simple. They challenged both the actions and inactions of those entrusted to protect and defend the health, safety, welfare, and property of the people.[27] The children claimed that the federal "defendants [knew] for more than fifty years that the carbon dioxide ('CO_2') produced by burning fossil fuels was destabilizing the climate system in a way that would []significantly endanger [the] plaintiffs."[28] They further claimed that the "defendants' actions violate[d] [plaintiffs'] substantive due process rights to life, liberty, and property, and that defendants [] violated their obligation to hold certain natural resources in trust for the people and for future generations."[29] Importantly, and echoing the research done by Professor Oreskes,[30] the lawsuit was not about the truth or falsity of anthropogenic climate change. For the court, the facts on the veracity of climate change were undisputed.[31] There are two questions: first, what are the responsibilities of the defendants, and second, does the court have the constitutional authority to order defendants to act.[32]

These are hard questions, implicating, as they do not only the constitutional separation of powers doctrine, but also, critically, the question of the proper function of government. On a deeper level, this is a question about legitimacy. If the government, which is the representative of the people and the trustee of the assets that are incapable of ownership by either private persons or the state but must be managed for the good of all, fails in that obligation, are the people

26. Blumm & Wood, *supra* note 15.
27. Juliana v. United States, 217 F. Supp. 3d 1224, 1261 (D. Or. 2016).
28. *Id.* at 1233 (internal quotations omitted).
29. *Id.*
30. Oreskes, *supra* note 12.
31. *Juliana*, 217 F. Supp. 3d at 1234.
32. *Id.*

powerless to make the government do what it is fundamentally obligated to do? If it acts in our name, it must act in our interest. The government may certainly exercise discretion in how it acts, but it may not knowingly cause harm or irreparable damage to the assets that rightfully belong to the people as a whole.[33] There are some things that it must do, and a court can require the political branches to act. The law has long recognized that power; otherwise the writ of mandamus would not just be extraordinary, it would be extinct.[34]

However, that power is not without boundaries, and courts are loath to trench on the prerogatives of the coordinate branches of government.[35] When courts do act, they do so with caution. The political question doctrine and other limitations on justiciability hedge in the power of courts to act.[36] In this case, the court worked very carefully through the pickets established by those doctrines as well as carefully considering questions like displacement and other vehicles that would preclude judicial action.[37]

Some might have thought that invoking the public trust doctrine made the case somewhat more difficult. There is confusion concerning whether there is a federal trust obligation. There should be no confusion. The obligation stems from the sovereign's role as a trustee of trust property for the people.[38]

In keeping with the enumerated powers structure of the Constitution, some courts have held that the federal government is not a plenary

---

33. *See id.* at 1252–53 (explaining the public trust doctrine and noting government must protect the power of future legislatures to promote the general welfare and thus must guard current publicly-held resources).

34. *See generally* Cheney v. U.S. Dist. Court, 542 U.S. 367, 380 (2004) (highlighting the rare use of the writ of mandamus because of its extreme judicial power).

35. *See id.* at 380–81 (describing three conditions a plaintiff must meet before a court will issue a writ of mandamus: (1) the party must have no other means of relief; (2) the party must show that the court may clearly and indisputably issue mandamus in this circumstance; and (3) the court must be satisfied the writ is appropriate in this circumstance).

36. *See* 4 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW AND PRACTICE § 13:1–13:41 (3d ed. 2018) (describing four justiciability doctrines courts use to limit their exercise of jurisdiction: standing, ripeness, mootness, and political question).

37. *See Juliana*, 217 F. Supp. 3d at 1235–42 (discussing the political question doctrine implications of the case), 1242–48 (conducting a standing analysis), 1259–60 (examining displacement).

38. *See* 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 8:51 (2d ed. 2018) (outlining the origins of states as trustees of natural resources and providing a lesser federal duty but noting any similar federal obligation may only be limited to the Interior Secretary and Congress).

government and thus has neither the powers nor the obligations of those that are.[39] However, that approach betrays a fundamental misunderstanding of the unenumerated powers of the federal government as well as a disregard for the unenumerated rights of the people. "As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign."[40] Professor Sarah Cleveland, in a magisterial study of the evolution of the plenary power of the federal government, suggests that the structure of sovereignty requires the federal government to exercise those powers that only it can exercise.[41]

Similarly, Charles Lund Black demonstrated conclusively that those rights enumerated in the Constitution are not limits on the rights of the people.[42] Instead, they are vouched safe in the Ninth Amendment.[43] One of the geniuses of the Constitution was that it inverted the calculus of legitimacy that guarded the princes of Europe and beyond. It made the government the guarantor and incubator of freedom even as it restricted the powers of the state to those in service of liberty. Part of that power resides in the obligations created by the trust duty to act on behalf of those who are the beneficiaries of that duty.

The trust property in question is the resources owned in common that are necessary to the protection of the rights to life, liberty, and property of the people themselves. This, according to the plaintiffs, includes the air that sustains us.[44] The atmosphere has a finite capacity to hold carbon without risking a cascade of events that threaten life itself.[45]

---

39. *See* Eric Pearson, *The Public Trust Doctrine in Federal Law*, 24 J. LAND, RESOURCES, & ENVTL. L. 173, 176–77 (2004) (noting some courts have found the public trust doctrine may empower certain branches of government in certain circumstances, but not the government as a whole).

40. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

41. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 278–79 (2002).

42. CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 13–14 (1997).

43. *Id.* at 38.

44. Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016); *see generally*, Gerald Torres, *Who Owns the Sky?*, 18 PACE ENVTL. L. REV. 227 (2001) (asserting that the public has an ownership interest in the atmosphere).

45. *See, e.g.*, Shuang Liang et al., *Potential Decline in Carbon Carrying Capacity Under Projected Climate-Wildfire Interactions in the Sierra Nevada*, SCI. REPORTS, May 2017, at 4–5 (predicting a "steep decline in the capacity . . . to sequester [carbon]").

The scope and nature of the trust obligation has been a source of much current scholarship about how to characterize that obligation, or even if such an obligation exists.[46] To be sure, as Blumm and Wood demonstrate, this is not a question of abstract interest.[47] The issue of state legitimacy lies behind the demand that the state act in the interest of the people when it undertakes to regulate resources in a way that directly affect not just the current well-being of the people, but which implicates their capacity to sustain the material foundations for the institutions through which they constitute themselves.[48] These are not idle questions, much like the invocation of a right to culture in international human rights law, such a right necessarily entails the material conditions for cultural reproduction.[49]

---

46. *See* Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 680–81 (2012) (providing an updated analysis of public trust case law and introducing a symposium issue dedicated to discussion of the public trust doctrine); Pearson, *supra* note 39, at 174 (evaluating the existence of public trust obligations in federal government).

47. Blumm & Wood, *supra* note 15, at 26 (discussing the "magnitude of harm alleged by [the] plaintiffs" in *Juliana*).

48. The literature surrounding the idea of a fiduciary structure to explain the nature of the relationship between the state and the people is now reasonably well developed and controversial. *See, e.g.*, sources cited *supra* note 11 (discussing the basic fiduciary duties of government). Much of the difficultly lies in disagreement over whether the idea of the fiduciary is more metaphor than a description of actual obligations. The debate often confuses public with private versions of the duty as well as trying to construct a general obligation without sufficient concrete specificity. Of course, the trust duty in the context of U.S. and Canadian law dealing with Indians or first nations often arises. But the discussion in those contexts often obscures more than it reveals. The actual application of the trust idea in the colonial context misunderstands the failure of the state to meaningfully apply the trust duty as a brake on the exercise of plenary authority. That all the institutions of the state were allied against a perceived external enemy is not surprising. The surprise is that the judiciary provided any meaningful resistance at all. The full articulation of the trust or fiduciary duty in the context of domestic and international human rights law is still developing, but it can still give us insight into the proper role of the state and its agencies. Moreover, it is not the exercise of public power at the expense of private right, but rather the reverse.

49. *See, e.g.*, G.A. Res. 61/295, annex, United Nations Declaration of the Rights of Indigenous Peoples (Sept. 13, 2007) (restating the right of cultural preservation); G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 76 (Dec. 10, 1948) (including social and cultural rights in list of fundamental rights to be enjoyed by all people).

A. The Political Question Doctrine

The Constitution textually assigns some powers to the political branches of government.[50] The judicial branch must not second-guess the decisions made in execution of those powers. Of course, the courts can review the actions of the political branches,[51] but that is not the boundary that the political question polices. According to the court in *Juliana*, the Supreme Court created a test to determine when a court should proceed with caution.[52] *Baker v. Carr*[53] said that a court should stay its hand when there exists:

> [(1)] a textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] a lack of judicially discoverable and manageable standards for resolving it; [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [(5)] an unusual need for unquestioning adherence to a political decision already made; or [(6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[54]

The grammar of these rules is governed by the practice of judicial review as it has evolved consistent with the text and structure of the Constitution.[55] While the doctrine—reflecting the ways courts have

---

50. *See, e.g.*, U.S. CONST. art. I, § 1 ("All legislative Powers . . . shall be vested in a Congress of the United States . . . ."); *Id.* art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

51. *See, e.g.*, Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S.Ct. 2076, 2081 (2015) (noting the separation of powers and emphasizing political questions "are committed to the Legislature and the Executive, not the Judiciary"); Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012) (holding that the court was competent to interpret a federal statute and decide its constitutionality despite the foreign policy ramifications of the statutory right created by Congress).

52. Juliana v. United States, 217 F. Supp. 3d 1224, 1235–36 (D. Or. 2016) (identifying criteria from Baker v. Carr, 369 U.S. 186 (1962), to determine the presence of a political question).

53. 369 U.S. 186 (1962).

54. *Juliana*, 217 F. Supp. 3d at 1236 (quoting *Baker*, 369 U.S. at 217).

55. In many ways, these arguments, though stated as doctrine, reflect the structure of constitutional argument constructed by Professor Philip Bobbitt in his now classic book, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE]. In that book, Bobbitt suggests that there are modalities of constitutional argument and that we can understand law, and perhaps especially constitutional law, by inquiring how we do it. *Id.* at 7. Those modalities of argument are the historical; textual; structural; doctrinal; ethical; and prudential

resolved this problem in other cases—begins with textual prohibitions, those are not the hard cases. The problems begin when the court takes the structure and relationships created by the Constitution seriously and asks when that structure really acts as a command.

The political branches will always suggest that decisions with a hint of policy are always beyond the purview of a court, except for those of the most "activist" stripe.[56] But, of course, that would have the courts deciding only the most mundane and ordinary of cases. Those cases make up the bulk of most of the decisions that courts make and create the decisional texture out of which doctrine evolves.

However, it is the hard cases that absorb most of our attention. The courts, in addition to resolving ordinary cases, also stand as a guarantor of the rights retained by the people, and the Constitution itself is supposed to constrain action or compel action consistent with those rights. It is, after all, what government is for. This does not make the calculus of decision easier, but it means that it should always look behind claims that the plaintiffs are merely asking the court to take political action on its behalf. This is especially true where, as here, the plaintiffs are claiming that the government's actions are insufficient to discharge an obligation that is of constitutional dimension.[57]

This is also not just a question for American courts. As Professors Roy and Woerdman point out in discussing a case posing similar issues in the Netherlands, "it is difficult to pronounce on *climate law* without indirectly invoking a view on the regulatory aspects of *climate policy*."[58] This impossibility does not automatically render a claim beyond the proper institutional reach of the judicial branch. Merely because there is some policy implicated in resolving a dispute does not automatically convert a case that is capable of decision to one that is out of bounds.

---

forms of argumentation. *Id.* at 7. They closely reflect textual, doctrinal, and prudential modalities of constitutional adjudication. While prudence is a virtue, it cannot be a barrier to obligations that arise from the ethical obligations that arise under the constitution. Ethical is used here in the way that Professor Bobbitt suggests: "deriving rules from those moral commitments of the American ethos that are reflected in the Constitution." PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 13 (1991) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION].

56. *See* Kevin F. Ryan, *Courts and the Culture Wars: An Exchange*, 29 VT. B.J. 6, 8 (2003) (critiquing judicial activism as a "vehicle for potentially unlimited constitutional reform").

57. *Juliana*, 217 F. Supp. 3d at 1246 (citing Wash. Envt'l Servs. v. Bellon, 732 F.3d 1131, 1172 (9th Cir. 2013)).

58. Suryapratin Roy & Edwin Woerdman, *Situating* Urgenda v. the Netherlands *Within Comparative Climate Change Litigation*, 34 J. ENERGY & NAT. RESOURCES L. 165, 167 (2016).

Professors Roy and Woerdman summarize the approach of the Dutch court in the following way:

> [T]he Court's primary finding is that the State needs to take *more robust and immediate mitigation action*. To arrive at this finding, the Court assumes competence as the question is characterised as a legal question with political consequences. Further, it invokes a version of the precautionary principle whereby it shifts the burden on to the State to show that it has adopted sufficient targets, and is pursuing appropriate policy measures to achieve such targets.[59]

The idea of maintaining the distinction between a decision that is clearly political and one that is legal, but with political consequences, is critical to ensuring that the claim of separation of powers as expressed in the political question doctrine is not just a talisman to prevent a court from exercising its institutionally competent role. This is reinforced by the reality that "in the almost forty years since *Baker v. Carr* was decided, a majority of the Court has found only two issues to present political questions, and both involved strong textual anchors for finding that the constitutional decision rested with the political branches."[60]

This was essentially the point made by Blumm and Wood. The need to police the boundaries of institutional competence is critical, but it is the structural division of the institutions and the nature of the claim that forms the perimeter.[61] As discussed earlier, the most difficult cases have potential political implications. The Supreme Court, however, has noted that technical and scientific complexity does not make an issue non-justiciable where there is an otherwise cognizable legal issue.[62] The recognition that the public trust doctrine is appropriately located in the due process clause makes *Juliana* not only justiciable but a case that breaks on the other side of the separation of powers argument. As the Supreme Court said in *Marbury v. Madison*,[63] "[i]t is emphatically the province and duty of the judicial department to say what the law is . . . . This is the very essence of judicial duty."[64]

---

59. *Id.* at 177.

60. Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine & the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267–68 (2002) (footnote omitted).

61. Blumm & Wood, *supra* note 15, at 24.

62. *See* Baker v. Carr, 369 U.S. 186, 198 (1961) (noting inappropriate subject matter alone does not make a case nonjusticiable).

63. 5 U.S. (1 Cranch) 137 (1803).

64. *Id.* at 177–78.

1. Discerning a judicially discoverable and manageable standard for resolving the problem of agency inaction

The defendants in *Juliana* argued that the obligation of the court to rule on the due process violation that was asserted by the plaintiffs would require the court to trench on political prerogatives because the claim could not be resolved according to any manageable standard.[65] The defense proved too much. The plaintiffs were not arguing that any specific standard caused the problem about which they were complaining; instead they were arguing that the control regime taken as a whole was insufficient to protect the plaintiffs from the constitutional harm they were alleging.[66] The aggregate actions of the government were insufficient. The government could not force the plaintiffs to argue that any specific regulation or statute was insufficient; rather, the government had to confront the plaintiffs' claim that current government policies were not enough.[67] Moreover, the government had already conceded that there was a necessity to move national policy in the direction the plaintiffs were asking but had failed to take the necessary steps to achieve that goal.[68]

Far from asking the court to fix a standard for which it was demonstrably incapable, the plaintiffs were asking the court to do something that it was uniquely capable and empowered to do. As the court said, "[e]very day, federal courts apply the legal standards governing due process claims to new sets of facts. The facts in this case, though novel, are amenable to those well-established standards."[69] This is a large and important case, but it in many ways merely asks the

65. Juliana v. United States, 217 F. Supp. 3d 1224, 1239 (D. Or. 2016) (analyzing the defendants' argument that there was no "legal standard by which to judge plaintiffs' claims").

66. *Id.* at 1240.

67. *See id.* at 1239 ("Plaintiffs could have brought a lawsuit predicated on technical regulatory violations, but they chose a different path. As masters of their complaint, they have elected to assert constitutional rather than statutory claims."); *see also id.* at 1245–46 (discussing the causality component of the plaintiffs' claim and their scientific support).

68. *Id.* at 1240–41; *see also* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.S. No. 54113 (ratified by the United States on Sept. 3, 2016); United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102–38, 1771 U.N.T.S. 107. Although President Trump announced the withdrawal of the United States from the Paris Agreement in 2017, the earliest the United States could actually leave the Agreement is 2020. *See* Valerie Volcovici, *U.S. Submits Formal Notice of Withdrawal from Paris Climate Pact*, REUTERS, Aug. 4, 2017, https://www.reuters.com/article/us-un-climate-usa-paris/u-s-submits-formal-notice-of-withdrawal-from-paris-climate-pact-idUSKBN1AK2FM.

69. *Juliana*, 217 F. Supp. 3d at 1239.

defendants to show that what they are already doing is enough to prevent the violation of both a constitutional right and a constitutional duty.[70] Remember that even in as large a case as *Brown v. Board of Education*[71] the Court was working on the social equivalent of addressing climate disruption.[72] The old way of dealing with the constitutional violation was inadequate, and a new approach would be necessary. It would be one that required transformation of many independent institutions, but merely because analysis and resolution are hard is no reason to turn a blind eye to the on-going violation.

That many policy judgments are implicated is not to suggest that they avoid the issue, each policy judgment is subject to evaluation and if the sum of those judgments still results in a constitutional violation it is insufficient to shrug and say these are decisions that have been made and we cannot review them. Instead, if they add up to a systemic derogation of a duty that is owed to the people on whose behalf the government exists, a fundamental obligation of the judicial branch is to say what that duty is. That is precisely what the plaintiffs are asking the court to do in this case.

In 2015, The Hague District Court decided an issue much like the one in question in *Juliana*. In *Urgenda Foundation v. State of the Netherlands*,[73] the court, faced with the question of whether the Netherlands were doing enough to combat climate change, ordered "the State to limit the joint volume of Dutch annual greenhouse gas emissions, or have them limited, so that this volume will have reduced by at least 25% at the end of 2020 compared to the level of the year 1990."[74] This order was consistent with the obligations the State had already pledged to undertake, and it did not require that the court opine on the validity of the underlying science. The agreement the government had entered resolved that question, and so the only question left to resolve was whether to hold the state to its own understanding of the gravity of the risk posed by climate disruption.

---

70. *Id.* at 1241 (emphasizing that the question of whether the government has violated a constitutional right "falls squarely within the purview of the judiciary").

71. 347 U.S. 483 (1954).

72. *Id.* at 492–93 (explaining that the Court "cannot turn the clock back" and ignore the significance of the question to present day society).

73. Urgenda Found. v. State of the Netherlands, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396, Judgment, §§ 2.6, 5.1 (Neth. June 24, 2015), https://elaw.org/system/files/urgenda_0.pdf.

74. *See id.* § 5.1.

2. Prudential concerns

A court should be modest. Yet, that modesty should not prevent it from acting when it must. The court here found that granting relief in the *Juliana* case would be fully consistent with international obligations the United States has made, and, importantly, there is no need to defer to the political branches because the alleged violation would not be remedied by that deference.[75]

The court concluded that the core responsibilities of the judiciary are triggered by the claims raised by the plaintiff and there is no compelling reason to assume that the relief asked for would require the court to do more than courts are normally required to do.[76] This is especially true in this case where the violation implicates a constitutional liberty. The comparison with *Carr* was instructive.[77] The *Juliana* case necessarily raises political issues, but that fact alone does not bar decision.[78] As in *Carr*, the case here would vindicate constitutionally protected interests that the current system gives the plaintiffs no other way to protect.[79] To decide that prudence dictated abstaining would be to rely on a theoretical model of virtual representation that has been shown to be insufficient.

After surveying the question of standing in light of the political question doctrine, the court determined that the plaintiffs met the standing tests, but it paid particular attention to the question of redressability.[80] While the court conceded that redressability and causation were closely tied, that relief would be scientifically complex does not mean that it is impossible nor that the defendants would not be able to comply.[81] It is precisely here that the lessons from the Dutch case are most instructive. While the decision in the Netherlands carries no normative or precedential weight in the *Juliana* case, its reasoning is persuasive. The reduction order issued by The Hague court merely

---

75. *Juliana*, 217 F. Supp. 3d at 1240–41 (acknowledging that the remedy imposed by the court would be consistent with the international agreements that the United States previously signed but has yet to implement).

76. *Id.* at 1241 (explaining that, regardless of the outcome on the merits, the court would remain within the bounds of the judiciary).

77. *Id.* at 1235.

78. *Id.* at 1241.

79. *Id.* at 1236 (citing Baker v. Carr, 369 U.S. 186, 217 (1962)).

80. *Id.* at 1246–48 ("A plaintiff need not show a favorable decision is certain to redress his injury, but must show a substantial likelihood it will do so.").

81. *Id.* at 1247 (recognizing the scientific complexity required to conclude whether a favorable remedy would be substantially likely to redress the injury).

required the State to take action it already signaled that it was able to achieve.[82] The international agreement provided the benchmark by which to measure the obligation of the government and provided a way for the court to assess the validity of the government action that would have prevented the country from achieving the carbon reduction goals it had already agreed to.[83]

B. Displacement

The defendants in *Juliana* asserted that even if the political question doctrine did not require the court to stay its hand, the existing political judgments of the legislative and executive branches have already addressed the questions posed by the plaintiffs.[84] That, of course, is a mere version of the last two objections stated in the *Carr* test. Is there an "unusual need for unquestioning adherence to a political decision already made"?[85] But that is precisely the question that the plaintiffs have posed. They claim that the decisions already made still add up to a constitutional violation. A court cannot defer judgment because the legislature has acted if the legislature has acted unconstitutionally. What this claim represents is a constitutionalized version of the displacement doctrine.[86] But it is no more persuasive dressed up like a doctrine counseling constitutional prudence than in any other guise. As the court put it, "[t]he public trust imposes on the government an obligation to protect the *res* of the trust. A defining feature of that obligation is that it cannot be legislated away."[87]

That the legislature has addressed legislation that affects public trust assets is not the test. The test is whether the legislation—in this case, taken as a whole—is sufficient to satisfy the requirements of the public

---

82. *See* Urgenda Found. v. State of the Netherlands, Rechtbank Den Haag, C/09/456689/HA ZA 13–1396, Judgment, §§ 2.35, 5.1 (Neth. June 24, 2015), https://elaw.org/system/files/urgenda_0.pdf (noting that the Netherlands was a party to the United Nations Framework Convention on Climate Change).

83. *See id.* §§ 2.36–2.41 (explaining specific provisions of the United Nations Framework Convention on Climate Change).

84. *Juliana*, 217 F. Supp. 3d at 1259 (pointing to the Clean Air Act and the Clean Water Act as examples of legislative action to address the issue of climate change).

85. Baker v. Carr, 369 U.S. 186, 217 (1962) (laying out the questions that may arise when the court is asked to decide on a political question).

86. *See* Gerald Torres and Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281, 300–01 (2014).

87. *Juliana*, 217 F. Supp. 3d at 1260 (noting that the nature of public trust claims prevent the need for displacement analysis).

trust duty.[88] It is common place to admit that legislation can displace the common law.[89] In many cases, that is precisely the aim of legislation. It seeks a definitive answer built on the lessons of common law doctrine, correcting it where it must and codifying it where it warrants. In the context of federal law, Congress may pass a statute, or an agency may publish regulations pursuant to a statute, that replaces solutions that have been achieved through the application of federal common law.[90] This makes sense from the perspective of constitutional design. To respect the structural separation of powers, when the political branches have spoken directly to the question raised by the courts' use of federal common law, there is no question that when Congress takes up the question the room for the courts to supply their own answer is limited to ordinary interpretation.[91] In short, because federal common law is designed to fill in gaps left by Congress, it is displaced where there is no longer any room for them to act.[92] Nonetheless, displacement requires more than a general statement on the issues implicated by federal common law.[93] The use of federal common law will often supplement a statutory scheme.

More specifically, the Clean Air Act does not displace the public trust doctrine because the constitutional nature of the doctrine means that it is not susceptible to statutory displacement and will even survive displacement where it is treated as a common law doctrine. Despite *Massachusetts v. EPA*,[94] the Clean Air Act does not directly address greenhouse gases. The Clean Power Plan[95] was an attempt to use the applicable provisions of the Clean Air Act to reduce carbon emissions

88. *See, e.g.*, Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 721 (Cal. 1983) (en banc).

89. *See, e.g.* Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 424 (2011) (holding that the Clean Air Act and the Environmental Protection Agency's actions displace any federal common law public nuisance claim).

90. *Id.* (concluding that when the federal statute speaks directly to the issue, Congress intended to displace federal common law).

91. *See, e.g.*, United States Telecom Ass'n v. Fed. Commc'ns Comm'n, 855 F.3d 381, 383 (D.C. Cir. 2017).

92. *See* United States v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979) (explaining that when Congress is silent on a topic, federal judges may fill in the gaps).

93. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 634 (1981) (noting that general expressions of national policy, rather than specific statutes, lack the specificity to preempt federal common law).

94. 549 U.S. 497 (2007).

95. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (Dec. 22, 2015) [hereinafter Clean Power Plan].

from power generation.[96] But the Clean Air Act does not by its terms speak directly to the elimination of greenhouse gases, nor does it provide a remedy that would safeguard public trust assets.[97] That is what is at the core of the public trust cases.[98] The plaintiffs in this case squarely ask whether the legislative and executive branches are fulfilling their fiduciary duty to adequately protect trust resources.[99] The Clean Air Act does not by its terms require the agency to answer whether the protections in the statute adequately protect the atmosphere from substantial carbon loading impairment.[100] What is more, the efforts by the current administration to undo the Clean Power Plan only underlines the deficiencies of the Clean Air Act and why the Act alone does not displace the public trust duty.[101]

Additionally, the structure of the Clean Air Act makes the aggregation of harms associated with CO_2 emissions difficult to calculate. The efforts undertaken by the Environmental Protection Agency, especially under the Clean Power Plan, are admirable but they fall short of providing a framework that would facilitate the creation of an overall target necessary to protect the atmosphere. What the *Juliana* case makes clear is that this target must be informed by the best available science.[102] The science suggests that, to prevent the worst effects of climate change, atmospheric levels of carbon dioxide must be reduced to 350 parts per million, and the sooner the better.[103] The plaintiffs in *Juliana* are asking the government to craft a comprehensive climate recovery plan to restore the concentration of carbon dioxide in the atmosphere to 350 parts per million by the end of the century.[104] As

---

96. Clean Power Plan, 80 Fed. Reg. at 64,663.

97. *See generally* The Clean Air Act of 1970, 42 U.S.C. §§ 7401–7515 (2012).

98. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1260 (D. Or. 2016) (discussing the enforceability of the public trust doctrine in federal cases).

99. *Id.* at 1254 (explaining that the natural resource trustee's fiduciary duty includes the duty to protect the resource against damage and destruction).

100. *See generally* 42 U.S.C. §§ 7401–7515.

101. *See* Lisa Friedman, *Trump Takes a First Step Toward Scrapping Obama's Global Warming Pol'y*, N.Y. TIMES (Oct. 4, 2017), https://www.nytimes.com/2017/10/04/climate/trump-climate-change.html (reporting on the current administration's draft proposal to roll back the Clean Power Plan).

102. See *Juliana*, 217 F. Supp. 3d at 1239 (stating that the "logistical difficulties" that arise from the science involved are "immaterial").

103. *See* U.S. ENVTL. PROT. AGENCY, POL'Y OPTIONS FOR STABILIZING GLOBAL CLIMATE 8 (Dec. 1990) (recognizing the need for drastic cuts in emission levels to prevent further destruction to the atmosphere).

104. *Juliana*, 217 F. Supp. 3d at 1263 (asserting that the current efforts lack the necessary effect needed to prevent drastic damage to vital natural resources).

mentioned earlier, in international negotiations the United States has already recognized this target as both legitimate and necessary.[105]

The Clean Air Act does not ask whether the statute is sufficient for government trustees to meet their obligation to protect the atmosphere from substantial impairment. It cannot displace the public trust inquiry if it does not even ask the same question. The claim in this litigation is for the government to provide an accounting of the overall effectiveness of the actions it has taken to protect an essential trust resource on behalf of current and future generations. Efforts to perform a site by site enforcement of greenhouse gas emissions under the Clean Air Act would not achieve the goals sought by the plaintiffs in this litigation, and such an effort would be vulnerable to the defenses the government raises. Enforcement of the trust obligation, to the contrary, would give the political branches a benchmark to assess whether their actions are consistent with their duty and how they enforced any extant statute would be measured by that obligation. The fiduciary obligation arising under the public trust duty to protect the carbon loading capacity of the atmosphere would provide the context for actions undertaken under existing statutes or would suggest where legislative action is necessary because of the limitations of current law. Far from displacing the public trust duty, the existing statutory scheme would benefit by the finding of a trust obligation because such a finding would fix the boundaries of required and permissible action. The case not only provides the basis for action but also provides the salutary benefit of marking the path of required action.

C. Constitutionalization of the Public Trust

There is a stronger reason why the existing statutory structure does not displace the public trust duty. The supremacy clause prohibits it.[106] So far, the discussion of displacement and the demonstration that the existing statutory structure does not displace it was predicated on the assumption that the public trust doctrine is a form of common law. In fact, it is much more than that. Ordinary legislation cannot displace the public trust doctrine any more than it can displace any other constitutional command. As illustrated earlier, the trust duty flows

---

105. *See generally* Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.S. No. 54113; United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

106. *See generally* Torres & Bellinger, *supra* note 86, at 304 (analogizing legislative displacement of the public trust doctrine with legislative displacement of the Constitution).

naturally from the sovereign status and obligations of the state.[107] It could no more disclaim those obligations than it could attempt to limit the freedoms we enjoy to those that are enumerated in the text. Charles Black and Philip Bobbitt have convincingly demonstrated the falsity of that view.[108] That there is no specific textual hook is no reason to doubt the centrality of the duty. Because the duty flows from the limited plenary power of the federal government it must be understood as an irreducible component of the legitimate status to the government.

Moreover, the court in this case has located another constitutional home for the public trust doctrine: the Due Process Clause.[109] The failure of the state to protect against the degradation of the atmosphere in a way that threatens the well-being of the people it is charged with protecting is a breach of the trust responsibility. Any statutory scheme that fails this constitutional test is incapable of displacing the constitutional duty. The reality that "separate but equal" was no substitute for efforts to achieve real civic equality meant that formal compliance when measured against actual impact is the real test of whether the legislative power is used in a constitutional way. As I said in a different context, "the public trust doctrine continues to act as a floor, setting a minimum level of protection for the air and our atmosphere; the Clean Air Act does not displace the public trust doctrine but supplements it."[110]

II. REDRESSABILITY: WHAT CAN THE COURT DO?

Despite the difficulties facing the plaintiffs, they nonetheless persuaded a court to permit their case to go forward.[111] They cleared the hurdles of standing and justiciability. The dark shadow that haunts

---

107. *See supra* note 38 and accompanying text.

108. *See* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 131–32 (1997) (asserting that the Constitution imposes a duty on the government to act justly); CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 74–75 (1969) (arguing that courts should not shy away from reviewing the constitutionality of government actions); BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 55, at 7–8 (acknowledging the absence of any argument against the Supreme Court's declaration of judicial review in *Marbury v. Madison*); BOBBITT, CONSTITUTIONAL FATE, *supra* note 55, at 3–5 (discussing the debate over judicial review on issues of constitutionality after controversial Supreme Court cases).

109. *Juliana*, 217 F. Supp. 3d at 1261–62.

110. Torres & Bellinger, *supra* note 86, at 304.

111. *Juliana*, 217 F. Supp. 3d at 1261–63 (recognizing that, even in the face of a politically-charged issue, "the judiciary must not shrink from its role as a coequal branch of government").

the case is the question of remedy. Yet, it need not seem so fearsome. The criticism normally begins with a critique of positive rights. Positive rights imply a duty, and, where the state is the defendant as here, positive rights seem to require action.[112] The idea of a court ordering the political branches to act is what sets in motion the vast machinery of justiciability. Having resolved that, however, does not settle the issue. That courts are often unwilling to find positive rights in circumstances that implicate the activities of coordinate branches of government does not mean that they cannot or that they have not.[113]

Of course, we could turn to private law and find many examples where the enforcement of a duty compels a particular action. Specific performance may be rare, but it is not prohibited.[114] Moreover, there are many examples of injunctive relief in vindication of constitutional rights.[115] Here the plaintiffs are asking the court to order action that will preserve the rights to life, liberty, and property.[116] The courts will have great discretion in what to order, and may order the government to produce a plan—even a plan using existing statutes—that will achieve the carbon budget necessary to prevent calamitous climate disruption.

One need only think about the orders in many of the historic civil rights cases. Courts ordered systemic change in the context of voting, education, housing, and marriage.[117] Many of these changes were

---

112. *Id.* at 1271–72 (noting that, although the Due Process Clause does not impose an affirmative duty on the government, exceptions exist when the government placed an individual in danger).

113. See discussion, *supra* note 62.

114. *See, e.g.*, Urgenda Found. v. State of the Netherlands, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396, Judgment, §§ 5.1–5.5 (Neth. June 24, 2015), https://elaw.org/system/files/urgenda_0.pdf (ordering the State to limit emissions); Blumm & Wood, *supra* note 15, at 64–67 (recognizing the broad authority of the court to fashion remedies); *see, e.g.*, *Medcom Holding Co. v. Baxter Travenol Labs.*, 984 F.2d 223, 227 (7th Cir. 1993) (upholding remedy of specific performance to carry out a contract for the sale of corporate stock).

115. *See generally* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 524–27 (2003) (summarizing the potential remedies for claims against the federal government, including injunctions).

116. *See Juliana*, 217 F. Supp. 3d at 1264 (asking the federal government to implement an enforceable national plan and protect constitutional rights).

117. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015) (finding that the right to marry is a fundamental right that cannot be deprived); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (invalidating a poll tax law to protect the constitutional right to vote); Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that segregation in schools violates students' constitutional rights); Buchanan v.

fraught with politics and resistance, but the nature of the violations compelled the action.[118] The plaintiffs merely ask for a coordinated but measurable response to the problem of carbon loading.[119] They are asking for the reasonable management of a public resource. That the effort will be complex is daunting, but it should inspire creativity, not paralysis. To quote the Supreme Court of Washington in the educational context:

> [T]he remedy question proves elusive . . . [due to] the delicate balancing of powers and responsibilities among the coordinate branches of government. This court is appropriately sensitive to the legislature's role in reforming and funding education, and we must proceed cautiously. At the same time, the constitution requires the judiciary to determine compliance with [its provisions] . . . . What we have learned from experience is that this court cannot stand on the sidelines and hope the State meets its constitutional mandate to amply fund education . . . . While we recognize that the issue is complex and no option may prove wholly satisfactory, this is not a reason for the judiciary to throw up its hands and offer no remedy at all. Ultimately, it is our responsibility to hold the State accountable to meet its constitutional duty . . . .[120]

If education is essential for a child's future, actions that secure a future for that child to grow up are equally vital. These children are claiming that protection of the resources upon which their survival depends is the right upon which all the others rest.

There are other instances where courts have ordered affirmative action.[121] The defense of the trust obligation to tribes has often compelled courts to order wide ranging remedies, whether they be protecting pre-existing rights to resources or apportioning access to

---

Warley, 245 U.S. 60, 82 (1917) (invalidating a property ordinance in order to prevent housing segregation).

118. *See generally* Martha Minow, *Surprising Legacies of* Brown v. Board, 16 WASH. U. J.L. & POL'Y 11, 14–15 (2004) ("Many people viewed the 'all deliberate speed' language of *Brown II* as a signal that encouraged both noncompliance with, and even resistance to, desegregation. Hence, we have the continuing national failure to achieve racial justice.").

119. *Juliana*, 217 F. Supp. 3d at 1264.

120. McCleary v. State, 269 P.3d 227, 258, 259, 261 (Wash. 2012).

121. *See, e.g.*, Brown v. Plata, 563 U.S. 493, 526–27 (2011) (requiring the state to take steps to reduce its prison populations as not only the best option but the only option to provide relief for prisoners); Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) (requiring states to desegregate within a reasonable time, after little action was taken in light of the initial case).

shared resources.[122] These were often politically difficult decisions, but political difficulty is no defense for a failure to protect a fundamental interest.

But to point to specific instances where courts have acted affirmatively in the vindication of rights is in some sense to miss the point. Of course courts have that power. If they did not, then the rights that our constitutive documents create would be meaningless. The Ninth Amendment is the warrant of those rights, the mere enumeration of them is more by way of example, especially where, as here, the claim is not abstract but real. There is little doubt that the way we have to think about the right to life and liberty has to be reconceived in light of the threat of inaction on the challenge of climate change. It may be true that any court in ordering a remedy must tread carefully, but tread into that territory it must. The public trust demands it, and deeper implications of legitimacy also command it.

Here again, the Dutch case is instructive. The claims of the plaintiff children and the plaintiffs in the *Urgenda* case in their essence argue for a constitutional duty of care.[123] The court is called on to assess whether the government has met that duty:

> Given the fact that governments can choose their course of action in relation to climate policy, the only recourse available to petitioners was to allege a violation of the duty of care. In this sense the *Urgenda* judgment serves a crucial informational function: the hazardous

---

122. *See Fulfilling the Federal Trust Responsibility: The Foundation of the Government-to-Government Relationship: Hearing Before S. Comm. on Indian Affairs*, 112th Cong. 637 (2012) (statement of Daniel Rey-Bear, Partner, Nordhaus Law Firm LLP) (discussing cases where the federal courts have rejected the government's argument that there is no federal-tribal trust duty based on lack of statutory language); *see also* Daniel I.S.J. Rey-Bear & Matthew L. Fletcher, "*We Need Protection from Our Protectors": The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENVTL. & ADMIN. L. 397, 400–25 (2017) (analyzing the federal-tribal trust relationship and its place in the legal framework); *see also* Menominee Tribe of Indians v. United States, 391 U.S. 404, 411 (1768) (holding that the hunting and fishing rights granted to the Menominee tribe by the United States survived the Termination Act of 1954).

123. *Juliana*, 217 F. Supp. 3d at 1251–52 (acknowledging the plaintiffs' argument that the Due Process Clause imposes "a special duty on defendants to use their statutory and regulatory authority to reduce greenhouse gas emissions"); Urgenda Found. v. State of the Netherlands, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396, Judgment, § 3.2 (Neth. June 24, 2015), https://elaw.org/system/files/urgenda_0.pdf ("Moreover, under national and international law . . . the State has an individual obligation and responsibility to ensure a reduction of the emission level . . . in order to prevent dangerous climate change.").

> risks of climate change should not be left to whims of particular legislative changes or the possibility of "politicized expertise" of regulators.[124]

The role of the court is to assess the validity of the choices made by the other branches of government. The court may not substitute its judgment for those of the political branches, but it can insist that they do their duty, and it can assess those actions consistent with the reasoned articulation of that duty. Sometimes this requires extraordinary action on the part of the courts, like the restructuring of school districts or school financing or the judicial management of a prison system or supervision of voting procedures.[125] Nonetheless, the extraordinary action, even or usually in the face of legislative or executive intransigence, is often warranted and fully within the institutional competence of the judiciary. Indeed, the courts can often employ the necessary technical assistance to effectuate their legal ruling. The courts have the power and authority to make their judgments matter as Blumm and Wood illustrate.[126]

CONCLUSION

The objections to the use of the public trust doctrine are plentiful and easy to find. They typically pivot on issues of institutional competence or deference to the policymaking branches of government. What the *Juliana* plaintiffs illustrate—and the point that Blumm and Wood make—is that policy is not made in a vacuum. Background principles of legitimacy and legality form the boundaries of that policy. Sometimes those principles are marshalled to prevent overreaching by the legislature or to prevent rent seeking by private

---

124. Roy & Woerdman, *supra* note 58, at 189 (citing Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise* 2007 SUP. CT. REV. 51, 52 (2008)).

125. The line of *Edgewood* decision in the Texas Supreme Court vindicated the constitutional right to education by requiring the legislature to fund the public school system to achieve that result. *See* Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 393 (Tex. 1989) (beginning a series of cases following up the groundbreaking decision to clarify the duty the state owed to its children); *see also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (noting the school's affirmative duty to facilitate desegregation). On prisons and jail restructuring, see generally Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006). On voting, *see, e.g.*, South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966) (pointing to the Attorney General's authority to issue an injunction under the Voting Rights Act).

126. *See* Blumm & Wood, *supra* note 15, at 71–73 (discussing the possible remedies the court could choose if the *Juliana* plaintiffs win on the merits).

parties, but in many cases those principles have to be deployed to ensure that appropriate action is taken in defense of those principles.

Blumm and Wood illustrate, and the Dutch case demonstrates, that claims of non-justiciability or lack of redressability are not real impediments to judicial action.[127] Even, as was demonstrated here, when that action is modest, restrained, and in keeping with the fundamental obligations of the judicial role in policing the state or private actors who would use the state for their own advantage. The court has a benchmark to aim for in ordering action and it is the very standard that the government has set for itself. Reference to the Intergovernmental Panel on Climate Change (IPCC) and our assent to the international goals, based as they are on the best science available cannot be discounted as an improvident policy judgment.[128]

At its deepest level, what this case illustrates is the intersecting strands of environmental knowledge, human rights, and what can only be understood as the reaffirmation of the legitimate role for government. By adopting a procedural version of the precautionary principle, this case and the arguments the plaintiffs are making demonstrate the possibility of engaging the most profound constitutional commitments within the context of addressing what is the most profound challenge of our day.

---

127. Juliana v. United States, 217 F. Supp. 3d 1224, 1246–48 (D. Or. 2016); Urgenda Found. v. State of the Netherlands, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396, Judgment, § 2.35 (Neth. June 24, 2015), https://elaw.org/system/files/urgenda_0.pdf.

128. *See* Urgenda Found. v. State of the Netherlands, Rechtbank Den Haag, C/09/456689/HA ZA 13-1396, Judgment, § 2.8 (Neth. June 24, 2015), https://elaw.org/system/files/urgenda_0.pdf (describing the IPCC as both a scientific body and an intergovernmental organization); *supra* note 68 and accompanying text (discussing the United Nations Framework Conventions on Climate Change and the Paris Agreement).