

# ESSAY

## NATURE'S TRUST:

### PROTECTING AN ECOLOGICAL ENDOWMENT FOR POSTERITY

REMARKS BY  
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#### I. INTRODUCTION

It is a tremendous honor to be the Distinguished Visitor this year at Lewis & Clark Law School. My talk this hour applies the public trust to our ecological crisis. I will speak in broad terms, not technical narrow legal terms, because at this crucial moment we truly need to focus on the big picture.<sup>1</sup>

#### II.

When I began preparing this presentation several weeks ago, the world was in a different place. Now, there is war—a war that, if not WWII, certainly has every country engaged in some way. I imagine most of you, like me, read about Putin's brutal atrocities in Ukraine, which was a free and peaceful country just three weeks ago, and find it hard to keep our focus on anything else. Putin's rampage is devastating

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<sup>1</sup> For more extensive discussion and support for assertions made in this Essay, see MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2014).

to the world, and it adds an escalating concern of nuclear war, which of course would pose an existential threat to humanity.

Ukraine requires our resolute attention, *and* we must also keep an undaunted focus on the environment, because, collectively, humanity has launched an assault that might at some point equal the nuclear threat in loss of life. This is the silent war, the unintended war, the war we wage against ourselves, our own children, against all other species on Earth—waged in vast ecological theatres and already causing millions of refugees. This war is the climate crisis that brings us eye-to-eye with tipping points capable of triggering runaway planetary heating that is not broadly survivable; this is the war that has already started the Sixth Mass Extinction; this is the war that leaves dying oceans in its wake and marine waters that show a chemical regression to “a half-billion years ago when the oceans were ruled by jellyfish and bacteria.”<sup>2</sup> This war, through the instrumentalities of sea level rise, wildfire infernos, Category 5 hurricanes, parching droughts, and devastating floods, will level entire towns and swallow entire coastlines if we do not stop. And if this is all too much to bear, well, we must save our despair for better times.

As Bill McKibben said recently, we must defeat Putin *and* climate change.<sup>3</sup> The fact is, there can be no world peace without ecological peace. And there can be no prosperity without ecological prosperity. Law has an integral role in both peace and prosperity. Environmental law will either organize society’s final assaults on Nature or it can catalyze a broad planetary defense of Nature. It will be part of the problem, or part of the solution. Either way, we need to acknowledge that environmental law is not like any other area of law. Family law, criminal law, tax law, and all other types of law, deal with human relations that can be adjusted, whereas environmental law must answer to a set of higher laws. Indigenous culture reflects a nearly universal principle called “natural law,” which you might think of as the laws of Nature. As Oren Lyons explains it: “The thing that you have to understand about nature and natural law is, there’s no mercy . . . There’s only law. And if you don’t understand that law and you don’t abide by that law, you will suffer the consequence.”<sup>4</sup> The main purpose of environmental law is to keep us in compliance with these laws of Nature, because there is no negotiating our way out of those. If environmental law becomes unmoored from Nature’s laws, society will eventually collapse—and environmental law, no matter how complex or sophisticated, will have been irrelevant.

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<sup>2</sup> Kenneth R. Weiss, *Altered Oceans: Part One: A Primeval Tide of Toxins*, L.A. TIMES (July 30, 2006, 12:00 AM), <https://perma.cc/7LLX-MRVY>.

<sup>3</sup> Bill McKibben, *This Is How We Defeat Putin and Other Petrostate Autocrats*, THE GUARDIAN, (Feb. 25, 2022), <https://perma.cc/6QVP-N9PD>.

<sup>4</sup> Tim Knauss, *Onondaga Faithkeeper Oren Lyons Speaks Out on the Environment: ‘Business as Usual is Over’*, SYRACUSE (Feb. 8, 2008), <https://perma.cc/9X9H-TJLS>.

## III.

This evening I want to contrast two dueling social frames in environmental law and suggest that our collective survival and prosperity is only possible through one. We lawyers tend to burrow down into specific doctrines, court rulings, and regulations and miss the social frames through which these legal outcomes emerge. A social frame is something well beyond a legal doctrine. Social frames are powerful because they influence people's account of reality. As George Lakoff writes: "Frames . . . shape the goals we seek, the plans we make, the way we act, and what counts as a good or bad outcome."<sup>5</sup> Frames can oppress and subdue, or they can empower and mobilize. Frames can legitimize massive ruin, or they can demand survival, protection, and recovery. We see the battle of social frames in Russia's war on Ukraine. In Putin's portrayal of liberating Ukraine from Nazis, we see that a frame can be based on cold lies and propped up only by strangling the truth outlets of free press and social media. But we see in President Zelensky's messages that social frames can announce such morally compelling truths and display such personal courage as to draw worldwide support for Ukraine overnight, not only among international leaders but among ordinary citizens all over, including some thousands from other countries who went to fight side by side with Ukrainian soldiers to defend their freedom. Frames can move an entire world, and the frame controlling environmental law has everything to do with whether we will succeed in securing worldwide *ecological* peace.

The frame influencing the past five decades of environmental statutory law is a frame of political discretion.<sup>6</sup> It basically gives agencies nearly unrestrained power to make environmental decisions, which are often a product of a raw political calculation. This frame would befit a monarchy or oligarchy. The other, more ancient, frame is one of sovereign obligation, and it rises from the reserved rights held by the people.<sup>7</sup> This frame operates through the public trust principle and requires government to sustain ecology as the people's commonwealth. This is a frame required by a democracy. Let's first explore statutory law and its discretion frame and then turn to the public trust.

## IV.

Statutes have dominated environmental law for fifty years. In the 1970s, Congress passed the Clean Air Act,<sup>8</sup> the Clean Water Act,<sup>9</sup> the National Environmental Policy Act,<sup>10</sup> the Endangered Species Act,<sup>11</sup> the

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<sup>5</sup> GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT! KNOW YOUR VALUES AND FRAME THE DEBATE: THE ESSENTIAL GUIDE FOR PROGRESSIVES xv (2004).

<sup>6</sup> See WOOD, *supra* note 1, at 69, 81, 127 (discussing how rulemaking and political discretion affects environmental laws and advocacy).

<sup>7</sup> *Id.* at 14, 126–28.

<sup>8</sup> 42 U.S.C. §§ 7401–7671q (2018).

<sup>9</sup> Federal Water Pollution Control Act (CWA), 33 U.S.C. §§ 1251–1388 (2018).

<sup>10</sup> 42 U.S.C. §§ 4321–4370h (2018).

public lands management statutes, and many others. Every one of these statutes spawned a pile of regulations—amounting to many hundreds of thousands of pages in all. States and local governments passed their own laws in the same model. Nearly all these statutes have one thing in common: they rely on agencies to carry out their mandates. So, you can think of Nature, in its entirety, as partitioned among many thousands of bureaucracies spanning the federal, state, and local levels. Acting under these statutes, agencies exert nearly full dominion over Nature. This system not only took hold in the United States, but in many countries around the world which followed our example.

If you were to picture this field of law, you might imagine each statute as a very deep gopher hole that leads down into subterranean quicksand. There are thousands of these gopher holes across the field of environmental law. Government officials and environmental advocates step into these statutory holes, and many of them never emerge, because the sheer regulatory complexity draws them deeper and deeper into a maze of inquiry that veers further and further away from fundamental principles, and from ecological reality.

Enormous faith has been placed in this system for decades, but let's consider what these statutes have brought us: toxic pollution, nuclear waste, clear-cutting, mountaintop removal, strip mining, wetlands destruction, fracking, deep sea drilling, species extinction, dried-up rivers, drinking water pollution, ocean acidification, ocean dead zones, climate crisis, and almost indescribable mutilation of landscapes across this nation. Of course, there were some successes. The rivers stopped catching fire for the most part. Lead was taken out of gasoline. But despite some gains, Earth's natural ecosystems declined 33 percent in just the first thirty years of this statutory law.<sup>12</sup>

We simply cannot package our losses anymore in traditional metrics like water pollution levels, or numbers of listed species, or acres of wetlands gone. The environmental syndromes of our time and threats to the web of life itself have completely eclipsed these measures. Even the Ninth Circuit Court of Appeals has pronounced that we are nearing the "Eve of Destruction."<sup>13</sup> As James Speth writes, if we "keep doing exactly what we are doing today . . . the world in the latter part of this century won't be fit to live in."<sup>14</sup> If you are not waking up in the middle of the night over this, you probably haven't put all these pieces together.

We just can't teach environmental law anymore as if it's a functional system with a few failures. Instead, we have to understand how the system itself brought these emergencies to our doorstep.

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<sup>11</sup> 16 U.S.C. §§ 1531–1544 (2018).

<sup>12</sup> WORLD WILDLIFE FUND, LIVING PLANET REPORT 2020: BENDING THE CURVE OF BIODIVERSITY LOSS 18 (2020), <https://perma.cc/PCU4-J9EB>.

<sup>13</sup> *Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020) (quoting BARRY MCGUIRE, *EVE OF DESTRUCTION* (Dunhill Records, 1965)).

<sup>14</sup> JAMES GUSTAVE SPETH, *THE BRIDGE AT THE EDGE OF THE WORLD: CAPITALISM, THE ENVIRONMENT, AND CROSSING FROM CRISIS TO SUSTAINABILITY*, at x (2008).

Let's start with the basics. Nearly every statute has this structure: it declares a purpose of protecting the environment, but then it delegates vast authority to an agency to issue permits or leases authorizing the very damage that the statute was designed to prevent.<sup>15</sup> These permit provisions were never supposed to swallow the statutes' purposes, but that is in fact what happened. Agencies regularly use their delegated authority to legalize harm to air, water, soils, forests, species, and whatever resources they control. In surveys of agencies, you see that only about 1 percent of the permits are actually denied.<sup>16</sup> The overarching bureaucratic mindset is that permits are there to be granted. At every level, the agencies have turned environmental law inside out.

I will never forget a conversation with a friend from West Virginia whose community was under siege from coal mining.<sup>17</sup> The coal companies had literally blown the tops off 500 mountains in the Appalachia range to access deep seams of coal. And they dumped these mountaintops into the valleys below, obliterating over 2,000 miles of streams and contaminating communities with highly toxic heavy metals from exposed sediment. My friend described this scene as a ravaged moonscape. She said to me, "I flew over it a couple of times. I couldn't even talk. How could this possibly be legal?"<sup>18</sup>

But that, in fact, is the problem. The agencies use environmental law to legalize unthinkable damage. Permits for mountaintop removal lined up like a row of dominoes under the Clean Water Act and the Surface Mining Control and Reclamation Act.<sup>19</sup>

What social frame were these agencies operating within to justify such colossal harm? It is the political discretion frame, and it warps decisions across all of environmental law. Congress and state legislatures gave agencies breathtaking discretion to implement these permit or lease systems on the rationale that agencies are expert bodies *assumed* to exercise their judgment for the good of the public. But that is not how it often works.

Outside political influence too often drives this agency discretion.<sup>20</sup> Industry puts relentless pressure on agencies to relax regulation and grant permits. And industry sends large campaign contributions to the president and governors who appoint agency heads and to the

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<sup>15</sup> See, e.g., CWA, 33 U.S.C. §§ 1251, 1344 (2018) (declaring the purpose of the Clean Water Act is to protect waters, but permitting discharges of dredge and fill materials into navigable waters under § 404).

<sup>16</sup> See WOOD, *supra* note 1, at 37, 68–72 (discussing how many environmental permits, both at the state and federal levels, are rarely investigated, in part due to the sometimes-close relationships between polluters and regulating agencies or the lack of strong enforcement language in the statutory provisions).

<sup>17</sup> *Id.* at 49–51.

<sup>18</sup> For elaboration of mountaintop removal see *id.* at 49–50.

<sup>19</sup> 30 U.S.C. §§ 1201–1328 (2018).

<sup>20</sup> See WOOD, *supra* note 1, at 68–69, 99 (explaining agency discretion generally and the ways industrial actors influence that discretion to their advantage through favorable political appointments, distorted science, and political pressure campaigns).

legislators who fund agency budgets. These campaign contributions have a clear purpose: industry captains expect favorable treatment in the agencies. They literally purchase influence, and everyone knows this. After years of such pressure, an agency falls captive to the very industry it regulates. At that point, government officials look at the industry in a different light: as a client they must serve. Discretion then becomes the legal conduit through which the agency delivers public resources into corporate hands through permits. And of course, the worst damage often hits the communities with the least political power; environmental racism proliferates in this political discretion frame, which goes to explain why agencies overwhelmingly site toxic waste facilities near communities of color.<sup>21</sup>

This frame has subsumed nearly all environmental law. The same forces causing land use officials to allow suburban sprawl moved state water agencies to over-appropriate rivers until many ran dry; these same pressures caused the National Marine Fisheries Service to write biological opinions that keep the iconic Pacific salmon at the threshold of extinction; and they kept Oregon's Department of Forestry looking the other way as private timber companies scathed our ancient forests.<sup>22</sup>

Part of the reason this decision-making frame was able to take hold across all of environmental law is because our basic checks and balances of government have failed.<sup>23</sup> We are a nation of three branches, but the executive has gained almost unlimited power in the environmental realm. Congress, itself under the influence of campaign contributions, has been dysfunctional and anti-democratic, either sitting out these ecological crises or making them worse. And the courts long ago decided to give deference to agency decisions, again on the misguided assumption that these agencies are just neutral. Politically charged agency discretion gets a deference pass in court.<sup>24</sup>

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<sup>21</sup> See Linda Villarosa, *Pollution Is Killing Black Americans. This Community Fought Back*, N.Y. TIMES (July 28, 2020), <https://perma.cc/HG6Y-JBND> (pointing out that “African-Americans are 75 percent more likely than other Americans to live . . . near facilities producing hazardous waste.”).

<sup>22</sup> See NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES ACT SECTION 7(A)(2) BIOLOGICAL OPINION AND MAGNUSON-STEVENS FISHERY CONSERVATION AND MANAGEMENT ACT ESSENTIAL FISH HABITAT RESPONSE FOR THE CONTINUED OPERATION AND MAINTENANCE OF THE COLUMBIA RIVER SYSTEM 289 (2020), <https://repository.library.noaa.gov/view/noaa/26460> (finding proposed federal action did not jeopardize salmon populations because the action was merely less harmful than other possible actions and would in fact “positively contribute to the survival and recovery” despite modeling predicting decreased abundance and increased extinction risk over the next twenty-four years); see also Ted Sickinger, *Failing Forestry: Oregon Forest Management Plans Forever in the Making*, THE OREGONIAN (Oct. 25, 2019), <https://perma.cc/4LG7-Q33U> (describing Oregon Department of Forestry's failure to pass an action plan that would have prioritized habitat protection because it would have “cut too heavily into timber harvests.”).

<sup>23</sup> For discussion, see WOOD, *supra* note 1, at ch. 5 (describing how legislative and judicial acquiescence to executive authority has allowed industrial actors to grasp control of environmental regulation).

<sup>24</sup> These concepts are discussed further in NATURE'S TRUST. *Id.* at chs. 3–5.

Ultimately, of course, the voting public represents a last bastion to check government. Environmental law houses a den of thieves, but the public often perceives no theft. Actions that might well be described as assaults against a community or as a theft against future generations are defined by an antiseptic regulatory system as fully legalized exploits. Explained through dense techo-jargon and baffling acronyms, the frame justifies even the most horrific outcomes as “political reality.”<sup>25</sup> “Political reality” becomes a potent tranquilizer for the public.

## V.

We no longer have the ability to fix environmental law through incremental reform. Citizen groups are doing the best they can to challenge government case by case, but they’re losing the battle by not getting at the systemic forces that drive our agencies to make devastating decisions nearly across the board. As environmental journalist Dianne Dumanoski said: “These groups are running around trying to put out all these fires, . . . but nobody’s going after the pyromaniac.”<sup>26</sup> We can pass any new statutes that we want, but if we don’t address the dysfunction of our government, we won’t have solved anything. We need a new frame that transforms political discretion into sovereign obligation, and we need to give content to that obligation and make it enforceable within the system of checks and balances that our Constitution offers. A frame change offers a new account of what is legitimate and what is not. As George Lakoff says, reframing means “changing what counts as common sense.”<sup>27</sup> Let’s turn to the public trust and its frame of obligation.

## VI.

The public trust was recognized by courts in the earliest days of our nation, but it has been all but lost in the administrative jungle that has choked environmental law over the last five decades. This principle is ancient in origin, with roots dating back to Roman law.<sup>28</sup> It basically

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<sup>25</sup> See *id.* at 100–01 (“Clean Air Act regulations . . . display the acronyms BACT, BART, MACT, RACT, SIP, NSPS, NSR, CEMS, HAPS, LAER, NESHAPS, PPM, NAAQS, PSD, TAMS, VOC, and dozens of others.”).

<sup>26</sup> ROSS GELBSPAN, *BOILING POINT: HOW POLITICIANS, BIG OIL AND COAL, JOURNALISTS, AND ACTIVISTS HAVE FUELED THE CLIMATE CRISIS—AND WHAT WE CAN DO TO AVERT DISASTER* 132 (2005).

<sup>27</sup> LAKOFF, *supra* note 5, at xv.

<sup>28</sup> See *Juliana*, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev’d and remanded on other grounds*, 947 F.3d 1159 (9th Cir. 2020) (“Application of the public trust doctrine to natural resources predates the United States of America. Its roots are in the Institutes of Justinian, part of the Corpus Juris Civilis, the body of Roman law that is the ‘foundation for modern civil law systems.’”) (citation omitted); see also WOOD, *supra* note 1, at 126 (discussing how public trust concepts can be found in the Institutes of Justinian and the Magna Carta).

says that government holds our priceless natural resources in trust for both present and future generations of citizens.<sup>29</sup>

This principle arises from sovereign property law, not statutes.<sup>30</sup> It reflects an early understanding that some natural resources are so vital to public welfare that they cannot be given over to private property ownership and control. You might imagine all the resources essential to our human welfare and survival—including the waters, wildlife, and air—as being bound together in one legal package that I call Nature's Trust.<sup>31</sup> Courts have said that government, as the enduring institution of society, holds this natural wealth in trust for its citizens. The beneficiaries, the owners of this great natural trust, are all generations of citizens—past, present, and future. The purpose of the trust is to prevent private parties from monopolizing access to crucial resources and to ensure that future generations inherit the resources they need to support their welfare and survival.

These trust principles are manifest in many other nations as well, and you can understand why: any government that fails to protect its natural resources sentences its people to misery. A strong republic needs strong people sustained by clean water, ample food sources, and secure shelter, all of which are as fundamental to democracy as are voting rights. At its most practical level, the public trust aims to prevent our government leaders from abusing their absolute power over our ecology to serve their own political interests at our expense. When you understand that Nature's Trust supports our very survival, and no less so for our children and future generations than for us, you can see that this principle aims for our nation's endurance, rather than its expiration.

This public trust makes clear that our government does not have unilateral power as a monarchy or dictator would. As Joseph Sax said, the public trust distinguishes a society of citizens from that of serfs.<sup>32</sup> The logic is this: all power accruing to government—every bit of it—derives from “We the People,”<sup>33</sup> and we, the people, never gave our government the power to destroy what remains essential for our survival and prosperity. So, as beneficiaries of this trust, we hold back enduring public property rights in crucial ecology. In its deepest sense, then, the trust is a restraint on government power.

A seminal case announcing this principle was *Illinois Central Railroad v. Illinois*, decided in 1892.<sup>34</sup> There, the Illinois legislature had conveyed the entire Chicago shoreline of Lake Michigan to a private railroad company.<sup>35</sup> Can you imagine? This was shoreline that the

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<sup>29</sup> WOOD, *supra* note 1, at 126–27.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 14–17.

<sup>32</sup> Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1970) (internal citation omitted).

<sup>33</sup> U.S. CONST. pmbl.

<sup>34</sup> Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

<sup>35</sup> *Id.* at 440–41.



citizens needed for fishing, navigation, and commerce. The Court held that the legislature simply did not have the power to convey away the shoreline because it was held in trust for the public.<sup>36</sup> The shore, it said, was “a subject of concern to the whole people of the state,” and a grant of it to a railroad company would be “a grievance which never could be long borne by a free people.”<sup>37</sup> The Court held that government does not have the power to rid itself of the trust.<sup>38</sup>

In a landmark decision by the Pennsylvania Supreme Court in 2013, Chief Justice Castille tied the public trust to the “inherent and inalienable” public property rights that citizens reserved and still hold—rights that are “of such ‘general, great and essential’ quality as to be enconced as ‘inviolable.’”<sup>39</sup> Why should we now focus on these reserved inalienable rights held by “We the People?” Because never before in the history of this nation has our fundamental ecology been so ferociously and ignorantly destroyed, and with such dire consequences to young people. Looking back, we see these primordial rights surfacing at epic times throughout human history. These principles stand no less revolutionary for our time and our crises than the forcing of the Magna Carta on the English Monarchy or Gandhi’s great Salt March to the sea. We, too, live in epic times.

Gerald Torres describes the public trust as “the law’s DNA,” a description I like because it invites application of this principle across a plethora of agencies at any level of government.<sup>40</sup> As Joseph Sax said: “Of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which

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<sup>36</sup> See *id.* at 452–53 (holding, as to navigable waters and their streambeds: “it is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . [A]bdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public).

<sup>37</sup> *Id.* at 455–56 (internal citation and quotation omitted).

<sup>38</sup> See *id.* at 453 (“The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.”); see also *United States v. 1.58 Acres of Land*, 523 F. Supp. 120, 124 (D. Mass. 1981) (“The trust is of such a nature that it can be held only by the sovereign, and can only be destroyed by the destruction of the sovereign”).

<sup>39</sup> *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 947–48 (Pa. 2013) (Castille, C.J., concurring) (internal citation omitted); 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, 47–48 (2017) (further discussing the court’s recognition of public trust rights in *Robinson Twp.* and other cases); see also Mary Christina Wood, “On the Eve of Destruction”: *Courts Confronting the Climate Emergency*, 97 IND. L.J. 239, 244 (2022) (“At its core, the principle remains essentialist and democratic, securing ‘inherent and inalienable’ public property rights”) (quoting *Robinson Twp.*).

<sup>40</sup> Gerald Torres & Nathan Bellinger, *The Public Trust: The Law’s DNA*, 4 WAKE FOREST J.L. & POL’Y 281, 283–85 (2014).

might make it useful as a tool of general application.”<sup>41</sup> With the trust principle, we question the very legitimacy of government-sponsored environmental damage. We start dismantling the political discretion frame that justifies outcomes to serve industry over the public, and we start reframing what counts as common sense.

So, what resources are, or should be, protected by the trust principle? The classic trust manifests in public access rights to use and enjoy streambeds along navigable waters and the waters themselves.<sup>42</sup> That much is indisputable in any state you are in. But in Oregon, this access and use right also covers the full dry sand beach along the ocean. Every time you walk along those glimmering stretches of Oregon beach, think about this right that you hold. Much of that beachfront is privately owned, and your walk would be trespass, but Judge Alfred Goodwin, when he sat on the Oregon Supreme Court, wrote a landmark opinion in *Thornton v. Hay*<sup>43</sup> finding a public right to use and enjoy the beaches.<sup>44</sup>

Modern courts have greatly expanded trust protection to include air, groundwater, biodiversity, wildlife, fisheries, and open space. And that makes sense because all resources together comprise the ecological endowment that we rely on. Nature does not package them separately. As a Washington court said in a climate trust case: “The navigable waters and the atmosphere are intertwined and to argue a separation of the two . . . is nonsensical.”<sup>45</sup>

Here in Oregon, however, our state supreme court recently regressed our public trust doctrine to one of the most restrictive in the country. In *Chernaik v. Brown*,<sup>46</sup> a climate case, the court said that the state’s public trust currently only applies to the beds of navigable waters and the waters themselves, refusing to recognize its application to air, fish, wildlife, and other waters.<sup>47</sup> But oddly, and I guess mercifully, the opinion did not close the door on expanding the trust in the future. Instead, it introduced what I am calling the “Not Just Yet” principle of Oregon public trust jurisprudence, saying, “[w]e do not

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<sup>41</sup> Sax, *supra* note 32, at 474 (internal citation omitted).

<sup>42</sup> See DAVID C. SLADE, *PUTTING THE PUBLIC TRUST DOCTRINE TO WORK* (2d ed. 1997), reprinted in MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* 11 (2d ed. 2015) (estimating that all navigable waters and land beneath such waters within the United States and subject to the public trust doctrine equal roughly 191,000 square miles).

<sup>43</sup> State *ex rel.* Thornton v. Hay, 462 P.2d 671 (Or. 1969).

<sup>44</sup> *Id.* at 673, 678. The court based its finding of a right to public access on the doctrine of custom, but that doctrine is best thought of as a specific application of the public trust. *Id.* at 678. For a discussion of custom and the public trust doctrine, see WOOD, *supra* note 1, at 158–59.

<sup>45</sup> Foster v. Wash. Dep’t of Ecology, No. 14-2-25295-1, 2015 WL 7721362, at \*8 (Wash. Super. Ct. Nov. 19, 2015). For a discussion of *Foster* and the atmosphere as a public trust asset, see Mary Christina Wood & Charles W. Woodward IV, *Atmospheric Trust Litigation and the Constitutional Right to A Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENV’T. L. & POL’Y 634, 674 (2016).

<sup>46</sup> 475 P.3d 68 (Or. 2020).

<sup>47</sup> *Id.* at 76–77.

foreclose the idea that the public trust doctrine may evolve to include more resources in the future.”<sup>48</sup> The logic of a Not Just Yet doctrine collapses under the weight of our converging ecological crises, but the court did not address that point.

I am currently leading a project that applies a trust lens to the magnificent forests of our state.<sup>49</sup> This may be a new horizon for U.S. public trust law, but certainly not for Nature’s law and not for several other nations that recognize forests as part of their public trust because of the crucial role they have in providing clean water, wildlife habitat, and climate regulation.<sup>50</sup> Forests are no less crucial to us in Oregon, but since statehood, our forests have been utterly razed for private profit.<sup>51</sup> As my Great Grandfather, CES Wood, protested in an essay back in 1908, “[t]here is no spot where the primeval forest is assured from the attack of that worst of all microbes, the dollar.”<sup>52</sup> Not much has changed in the 114 years since he wrote that essay, except now the destruction is fully legalized by federal land management rules and state forestry laws.

The power of the public trust principle is that it obligates our government trustees to manage ecology for us, according to time-tested fiduciary obligations. This is the opposite of political discretion. Statutory law still operates, but agency discretion must meet a level of fiduciary care: compliance with the statutes does not equate to compliance with the trust principle. In my book, I draw the primary fiduciary duties from leading public trust cases to create a full and operational legal paradigm.<sup>53</sup> But before I summarize a few, let us all pause to think of the many thousands of officials who make decisions about our ecology every day. You can think of these officials controlling a huge account for us—but it is not a financial account, it is our survival account—the only one we have. Most do not know these fiduciary instructions; they know only the regulations that they found on their desk the first day they showed up at work. You can take any environmental issue and see it through this trust lens, and it will shape your expectations of what you require from your government.

But do not rely on our state supreme court to hold our officials accountable. In the *Chernaik* opinion, the majority refused to find that

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<sup>48</sup> *Id.* at 82.

<sup>49</sup> For an address presenting the public trust as a guiding concept for forest protection and recovery, see Mary Christina Wood, *The Oregon Forest Trust: An Ecological Endowment for Posterity*, North Coast Communities for Watershed Protection, Eugene, Oregon, VIMEO (Oct. 17, 2022), <https://perma.cc/N5FF-E7KT>.

<sup>50</sup> For discussion, see WOOD, *supra* note 1, at Part II: THE PEOPLE’S NATURAL TRUST (containing a general description of the public trust doctrine including the implications and understandings in other countries).

<sup>51</sup> See *Tracing Oregon’s Timber Culture*, WORLD FORESTRY CTR. (Sept. 9, 2021), <https://perma.cc/GSQ8-BMJR> (telling the story of how Oregon became and remains a state deeply associated with the timber industry).

<sup>52</sup> EDWIN R. BINGHAM, CHARLES ERSKINE SCOTT WOOD 21 (Wayne Chatterton & James H. Maguire eds., 1990) (quoting C.E.S. Wood).

<sup>53</sup> WOOD, *supra* note 1, at 165.

the state has even a basic public trust duty to protect our crucial resources.<sup>54</sup> But, once again, it invoked that Not Just Yet doctrine, stating that it would “not foreclose the possibility” of finding duties in the future.<sup>55</sup> In a rigorous dissent, Chief Justice Walters declared “the time is now” and proceeded to chart a clear path to enforce the public trust.<sup>56</sup> So the map is there for a future panel to follow.

In the time that I have, I will touch on just four main fiduciary duties and relate them to the Oregon forest trust.<sup>57</sup>

First, the public trust requires government to protect and restore our trust and does not allow it to “substantially impair” the public’s interest in trust resources.<sup>58</sup> This is so basic. You would not put your valuable savings in the hands of a trustee only to allow that trustee to give it away to other parties and bankrupt your trust.<sup>59</sup> But our agencies ran that substantial impairment stop-sign long ago.

Relating this to the Oregon forest trust, how can massive clearcuts—which destroy the forest altogether along with water supplies and fish and wildlife habitat—be considered protective of the trust? They just can’t. In a probing exposé by the *Oregonian*, reporter Rob Davis tells the story of Rockaway Beach, an area that, thirty years ago, was surrounded by lush ancient forest.<sup>60</sup> But it was forest on private land. The entire 1,300-acre Jetty Creek watershed was owned by private timber companies, and over the span of just fifteen years, they cut nearly all of it and sprayed it with chemicals.<sup>61</sup> The town of Rockaway Beach drew its water supply from Jetty Creek, which collects rainfall from those hills.<sup>62</sup> After the clearcuts, the stream flowed with so much mud it “looked like chocolate milk.”<sup>63</sup> And the mud reacted with the

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<sup>54</sup> *Chernaik*, 475 P.3d 68, 77 (Or. 2020).

<sup>55</sup> *Id.* at 84.

<sup>56</sup> *Id.* at 84–86. (Walters, C.J., dissenting).

<sup>57</sup> These duties are elaborated in WOOD, *supra* note 1, at chs. 8–9. For a summary of these duties, see Douglas Quirke, *The Public Trust Doctrine: A Primer*, UNIV. OF OR. SCH. OF L. ENV’T. AND NAT. RES. L. CTR. 13–20 (2016), <https://perma.cc/9TRA-2PZ5>.

<sup>58</sup> See *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002) (“[T]he state may only divest itself of interests in the state’s waters in a manner that does not substantially impair the public interest.” (internal citation omitted)); see also *In re Water Use Permit Applications (Waiāhole Ditch)*, 9 P.3d 409, 451 (Haw. 2000) (“The mandate of ‘protection’ coincides with the traditional notion of the public trust developed with respect to navigable and tidal waters. As commonly understood, the trust protects public waters and submerged lands against irrevocable transfer to private parties, see, e.g., *Illinois Central*, *supra*, or ‘substantial impairment,’ whether for private or public purposes.”); *Orion Corp. v. State*, 747 P.2d 1062, 1072–73 (Wash. 1987) (“[A]t the time it purchased its tidelands, Orion could make no use of the tidelands which would substantially impair the trust.”).

<sup>59</sup> As the Supreme Court emphasized in *Geer v. Connecticut*, “[I]t is the duty of the legislature to enact such laws as will best preserve the subject of the trust and secure its beneficial use in the future to the people of the State.” *Geer v. Connecticut*, 161 U.S. 519, 534 (1896).

<sup>60</sup> Rob Davis, *Perfectly Legal: The Clear-cut Rewards of Campaign Cash, Polluted by Money*, THE OREGONIAN (Mar. 15, 2019), <https://perma.cc/F3XF-QHMX>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

city's treatment system, causing high levels of a carcinogen.<sup>64</sup> This is what the political discretion frame delivers the public: a pillaged watershed. Harm flows freely outside property boundaries, but the profits stay entirely within. And the same story repeats up and down the Oregon coast. Corbett, Oregon, located in the Columbia River Gorge, is another case-in-point. That town of 3,000-plus people relies on water from the South Fork of Gordon Creek, a drainage that you can see is likewise wrecked by clearcutting.<sup>65</sup> As my friend in West Virginia asked, "How can this be legal?" It's only legal under the permissive discretion frame. A trust frame would hold the state accountable for preventing substantial impairment to water resources. The frame makes a difference.

A second fiduciary duty is the duty of loyalty. The Pennsylvania *Robinson Township*<sup>66</sup> opinion said that the legislature is a trustee with "a duty of loyalty to administer [the] trust solely in [the] beneficiary's interest and not his own."<sup>67</sup> Courts understand that trustees have immense control over property, so in a private trust, courts would void decisions tainted by a conflict of interest.<sup>68</sup> If we applied this standard to our public trustees, we would directly challenge the practice of accepting campaign contributions. Our modern culture understands all too well that it causes self-interested decision-making by the people we elect to office. The problem is not that this corruption goes unrecognized, but that it has become institutionalized. Citizens seem resigned to it because they don't know of any other paradigm that would yield a higher standard of ethical behavior from their government. Courts could enforce the duty of loyalty by voiding and remanding decisions tainted by significant campaign contributions.

Our Oregon legislature has made quite a mockery out of the duty of loyalty. As Davis reports in his exposé, industry donations "turned Oregon into one of the biggest money states in American politics" and "promoted an easy regulatory climate where industry gets what it wants, while people threatened by pollution struggle to be heard."<sup>69</sup>

Let us relate this back to timber regulation. As Davis found, the timber industry gave more to Oregon lawmakers during one decade than to lawmakers in any other state.<sup>70</sup> As Davis reports, Rockaway Beach Democrat Rep. Deborah Boone took \$26,000 in campaign

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<sup>64</sup> *Id.*

<sup>65</sup> Tony Schick & Rob Davis, *Timber Tax Cuts Cost Oregon Towns Billions. Then Clear-Cuts Polluted Their Water and Drove up Its Price*, OR. PUB. BROAD. (Dec. 31, 2020), <https://perma.cc/7EV3-BJQ4>.

<sup>66</sup> *Robinson Twp.*, 83 A.3d 901, 957 (Pa. 2013).

<sup>67</sup> *Id.* at 957 (citing RESTATEMENT (SECOND) OF TRUSTS § 170); *see also id.* ("As trustee, the [legislature] is a fiduciary obligated to comply with the terms of the trust and with standards governing a fiduciary's conduct.").

<sup>68</sup> For additional discussion on the court's role enforcing the bar against conflicts of interest, see WOOD, *supra* note 1, at 189–90.

<sup>69</sup> Davis, *supra* note 60.

<sup>70</sup> *Id.*

contributions from the timber industry.<sup>71</sup> Among Boone's donors was a company that logged in the Jetty Creek watershed. In the political discretion frame, a donor's money buys influence without question. A trust frame examines the same behavior against the duty of loyalty.

Let us turn to a third duty. Courts have said that trustees must achieve the highest and best use of public resources.<sup>72</sup> That only makes sense. The ecological endowment is our most priceless survival account. We should use it wisely to benefit the most people. But consider the matter of pollution: our environmental agencies hand out free permits allowing industry to use our air and waters as their dumping grounds. Can pollution ever be the highest and best use of our resources? Because statutes legalize pollution, many industries have never had to revamp their design, even though many could. This fiduciary duty calls the entire permitting system into question.

Back to forests—how can a clearcut be the highest and best use of an ancient forest in Oregon? Research shows that Western Oregon's old growth forests are rich carbon storehouses.<sup>73</sup> We have the Amazon of North America right in our backyard. Why would we destroy it or cut trees on short rotations when we now face the prospect of runaway planetary heating? We need to use our forests to sequester carbon and, in doing so, maintain them as linchpins for drinking water and biodiversity. Clearcuts convert invaluable commonwealth into a single use commodity—timber. If you look at this practice in terms of natural wealth, this liquidation gets only pennies on the dollar and sends all of it to corporate timber interests while leaving communities like Rockaway Beach and Corbett with terribly damaged water supplies. There are plenty of examples in Oregon of responsible forest stewardship with modest logging. But the state's agencies have never searched for an economic alignment between private and public needs that would reach the “highest and best use” of the Oregon forest estate. As our new climate reality rages across Oregon, that line between private prerogative and public right demands fresh definition.

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<sup>71</sup> *Id.*

<sup>72</sup> See *Waiāhole Ditch*, 9 P.3d 409, 451 (Haw. 2000) (“[T]he . . . resources trust also encompasses a duty to promote the reasonable and beneficial use of . . . resources in order to maximize their social and economic benefits to the people of this state.”).

<sup>73</sup> See Dr. Beverly Law, Professor Emeritus Oregon State University, Testimony before the 117th Cong. H. Subcomm. On Nat'l Parks, Forests, and Pub. Lands: Wildfire in a Warming World: Opportunities to Improve Community Collaboration, Climate Resilience, and Work Force Capacity (Apr. 29, 2021) (“Preserving high carbon density forests like those of the Pacific Northwest, and allow[ing] them to continue to accumulate carbon could increase forest carbon stocks substantially by 2100”) (internal citations omitted); see also R.A. Houghton, *Pacific Northwest Forests and the Global Carbon Cycle*, in ELLIOT A. NORSE, ANCIENT FORESTS OF THE PACIFIC NORTHWEST 138–39 (1990) (“The Westside's ancient forests contain very large amounts of [carbon] per unit area relative to the world's other major forest types.”); Beverly E. Law et al., *Strategic Forest Reserves Can Protect Biodiversity in the Western United States and Mitigate Climate Change*, COMMC'NS EARTH & ENV'T, Dec. 14, 2021, at 3, <https://perma.cc/E7KP-63CY> (“Forests in the Pacific Northwest . . . currently support high carbon and biodiversity”).

Let's move on to a fourth duty. Several courts have said that trustees must administer the trust for the people overall, rather than for the primary purpose of benefitting a private party.<sup>74</sup> This makes sense: our government trustees must act strictly on behalf of us, the beneficiaries of the trust. That's why we refer to them as public servants, not private servants. Now to be clear, the trust does not reject private use of public resources. But government's environmental decisions can't be driven by the interest of a private party over the public. Yet how often has this tenet been violated? How many times have federal agencies leased out our public lands to profit an oil, or coal, or mining company? How many forests in Oregon have been razed to serve a private timber company? How many times have we heard port officials promote fossil fuel export facilities along our coast to create a few dozen longshoreman jobs? The political discretion frame of statutory law utterly legitimizes these decisions made for private parties over the broader public interest. You can see how this trust frame repositions all players in their relationship to ecology. It conceives of government officials as public trustees, rather than as self-interested, disloyal officials. The citizens are beneficiaries with a clear public property interest in natural resources, rather than weakened political constituents with increasingly pathetic appeals to beg of their public officials. And it presents Nature as an endowment holding priceless value for future generations, rather than as a vague "environment" with intangible value.

Of course, the trust can only serve its purpose if enforced by courts. In this way, the public trust falls in step with a recursive theme in our constitutional democracy: courts have a duty to enforce the fundamental rights of citizens against government. Without a real prospect of judicial enforcement, the trust is not a trust at all. Unchecked power is called a tyranny.

## VII.

I have described the two competing frames in environmental law: the political discretion frame that dominates statutory law, and the sovereign obligation frame that rests on public trust logic. Let us apply these to the climate crisis and see how government used the discretion frame to turn what was decades ago a manageable pollution problem into the all-out emergency we now face. Then we will see how young people are pressing the frame of sovereign obligation to rescue their future.

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<sup>74</sup> See *Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs*, 742 F. Supp. 441, 445 (N.D. Ill. 1990) ("[T]he public trust is violated when the primary purpose of a legislative grant is to benefit a private interest." (internal citation omitted)); see also *Waiāhole Ditch*, 9 P.3d at 450 ("[T]he public trust has never been understood to safeguard rights of exclusive use for private commercial gain. Such an interpretation . . . eviscerates the trust's basic purpose of reserving the resource for use and access by the general public.").

Government co-created the climate crisis as part of its close alliance with the fossil fuel industry. For decades, it has issued leases and permits for oil, gas, and coal extraction, permits for coal fired plants and export facilities, and has given massive subsidies to the industry. As James Speth shows in his book, *They Knew*, presidential administrations going back decades knew that climate disruption would start spinning out of control around just this time—with rising sea levels, megafires, droughts, and monster storms eventually threatening all life on Earth.<sup>75</sup> Yet our government still promoted this perilous energy policy because of the iron grip the fossil fuel industry had on American politics. Years were squandered that could have been spent in an orderly transition to renewable energy. And then President Trump came into office with a campaign pledge to develop fifty trillion dollars' worth of American fossil fuels.<sup>76</sup>

Statutory law legalized all facets of this dangerous fossil fuel system. Even though the 2007 Supreme Court case *Massachusetts v. EPA*<sup>77</sup> affirmed that EPA had authority all along to regulate carbon dioxide,<sup>78</sup> now fifteen years later, still no comprehensive program has ever gotten off the ground. Obama's Clean Power Plan, which in one commentator's words, was "too unambitious to matter,"<sup>79</sup> was stayed by the Supreme Court, then tossed out by Trump, and has been abandoned in any event by the Biden Administration, but is now the subject of the Supreme Court case, *West Virginia v. EPA*.<sup>80</sup> If nothing else, that case spotlights the rank detachment of statutory law from climate reality and its ticking time bomb.

Now we find ourselves in an almost unthinkable position. U.N. scientists stress that the world must slash greenhouse gas emissions 43 percent by 2030 and fully decarbonize by 2050.<sup>81</sup> That 43 percent is not just some arbitrary milestone, but an imperative to prevent us from going over tipping points that could send our world into runaway heating that we cannot call back. We are dealing with Nature's Law—the non-negotiable law—but there is no statute that calibrates to those requirements. So, in 2011, the Oregon-based organization Our Children's Trust launched a litigation campaign called Atmospheric Trust Litigation, precisely coupled to what scientists determine is

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<sup>75</sup> JAMES GUSTAVE SPETH, *THEY KNEW: THE US FEDERAL GOVERNMENT'S FIFTY-YEAR ROLE IN CAUSING THE CLIMATE CRISIS* 10–11 (2021).

<sup>76</sup> Annie Sneed, *Trump's First 100 Days: Climate and Energy*, SCI. AM., (Nov. 29, 2016), <https://perma.cc/EC8W-KQW4>.

<sup>77</sup> *Massachusetts v. U.S. Env't Prot. Agency*, 549 U.S. 497 (2007).

<sup>78</sup> *Id.* at 528–29. For discussion the Clean Air Act and the case, see WOOD, *supra* note 1, at ch. 1.

<sup>79</sup> Ian Millhiser, *The Absurd Supreme Court Case that Could Gut the EPA*, VOX (Feb. 23, 2022), <https://perma.cc/EDC3-5R6K>.

<sup>80</sup> *See id.* The case was decided several months after these remarks, on June 30, 2022. *West Virginia v. U.S. Env't Prot. Agency*, 142 S. Ct. 2587 (2022). The Court held that EPA's effort to regulate greenhouse gases by making industry-wide shifts violated the "major-questions" doctrine. *Id.* at 2610.

<sup>81</sup> Press Release, Intergovernmental Panel on Climate Change, *The Evidence is Clear: The Time for Action is Now. We Can Halve Emissions by 2030* 2 (April 4, 2020).



necessary to recover the climate system.<sup>82</sup> Lawsuits or administrative petitions were filed in every state in this country on behalf of youth asserting their public trust rights to inherit a stable atmosphere. In 2015, lawyers filed the landmark case *Juliana v. United States*<sup>83</sup> on behalf of twenty-one youth plaintiffs in the Federal District Court of Oregon, challenging the entire fossil fuel energy system and demanding declaratory and injunctive relief in the form of a court-supervised plan to decarbonize the energy system according to scientific standards.<sup>84</sup> Solidly invoking the sovereign obligation frame, the plaintiffs made constitutional claims under the Due Process Clause and public trust.<sup>85</sup> Finding in favor of the young plaintiffs, Judge Anne Aiken framed the case in the same way, calling it a “civil rights” action.<sup>86</sup> She described the trust as an attribute of sovereignty that government may not disclaim and found it enforceable through the constitution’s due process clause.<sup>87</sup> In words that would sweep across Earth within hours, Judge Aiken declared, “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”<sup>88</sup> That case inspired cases worldwide, and plaintiffs have gained victories in Columbia, the Netherlands, Germany, Pakistan, France, Ireland, and Australia.<sup>89</sup>

In all these cases, judges choose a frame. They must decide whether to allow their government the political discretion to continue a fossil fuel system that will bring the planet to ruin, or to hold their governments accountable for climate recovery. Nowhere was that choice more dramatically displayed than in the opinion of the Ninth Circuit panel that took the *Juliana* case on a premature appeal.<sup>90</sup> The majority opinion, written by Judge Hurwitz, declared that government’s failure to end fossil fuels “may hasten an environmental apocalypse,” but he said the courts play no role: climate policy falls entirely to the political branches of government—exactly those branches that brought us this crisis.<sup>91</sup> This judge gives full loyalty to the political discretion frame that has so disrupted the balance of power in our nation. Judge Staton wrote a demolishing dissent in which she challenged the political discretion frame in near disbelief, saying the government “insists that it has the absolute and unreviewable power to destroy this Nation,” and that “[m]y colleagues throw up their hands.”<sup>92</sup> She insisted that courts provide an

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<sup>82</sup> See WOOD *supra* note 1, at 227–29 (describing “The ATL Hatch”); see also OUR CHILDREN’S TRUST, <https://perma.cc/J2NA-KJGJ> (last visited Oct. 21, 2022).

<sup>83</sup> *Juliana*, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev’d and remanded*, 947 F.3d 1159 (9th Cir. 2020).

<sup>84</sup> *Id.* at 1233.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1233–34.

<sup>87</sup> *Id.* at 1252, 1261.

<sup>88</sup> *Id.* at 1250.

<sup>89</sup> For discussion of these cases, see Wood, *supra* note 39, at 286–92.

<sup>90</sup> *Juliana*, 947 F.3d 1159 (9th Cir. 2020).

<sup>91</sup> *Id.* at 1164–65.

<sup>92</sup> *Id.* at 1175 (Staton, J., dissenting).

“ultimate backstop” and must enforce government’s duty to “preserve the nation.”<sup>93</sup>

In cases abroad, several courts have squarely rejected the political discretion frame. But in the United States, we have judges using both frames. The atmospheric trust cases in state courts are gaining vigorous dissents that echo a sovereign obligation frame, but the majority of judges still say that it’s not their job to step into climate crisis; the political branches have unrestrained power and discretion.<sup>94</sup> I often wonder how law professors should explain such an impotent outcome of our legal system. Should we tell our students and other young people, “sorry, the entire body of law that has served this country for over 200 years has no principled way of imposing responsibility on government to abate the pollution that will bring catastrophe in your lifespan and end civilization as we know it? That our legal system is just too brittle for judges to have any impact, even though they have been presented with a logical remedy structure well within their judicial tradition that could still force a rational response in time?”

But let us instead focus on the unparalleled potential of the American judiciary. Throughout history, judges have decided transformative cases, and dissents like Judge Staton’s bring the sovereign obligation frame into clear and powerful focus.<sup>95</sup> Reading the *Illinois Central* opinion, the lodestar public trust case, one senses that this *Juliana* case would have been an easy one for those justices, and that they would not have hesitated to hold our government accountable under the very same doctrine that they invoked to protect the Chicago shoreline. The judges back then said, “[i]t would not be listened to that the control and management of the harbor of that great city—a subject of concern to the whole people of the State—should thus be placed elsewhere than in the State itself.”<sup>96</sup> You can practically hear those justices saying today, “it would not be listened to” that government would let fossil fuel profiteers pollute our air, heat up our atmosphere, threaten our children’s future, and destroy the habitability of this Nation and entire planet. “It would not be listened to.”

But let’s admit, this does come down to judicial courage. Courageous judges think about which side of history they want to be on and draw the resolve to enforce rights from the citizens who collectively assert the moral imperative to do so. Judge Staton’s dissent leaves judges around the world with no way to escape her final question: “[H]istory will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage

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<sup>93</sup> *Id.* at 1177, 1181.

<sup>94</sup> Wood, *supra* note 39, at 258–59.

<sup>95</sup> See also *Juliana*, 217 F. Supp. 3d 1224, 1252 (D. Or. 2016) (“In its broadest sense, the term ‘public trust’ refers to the fundamental understanding that no government can legitimately abdicate its core sovereign powers.”).

<sup>96</sup> *Ill. Cent. R.R. Co.*, 146 U.S. 387, 455 (1892).

everything between, those remaining will ask: Why did so many do so little?<sup>97</sup>

### VIII.

Let me close by saying that only a frame of government obligation holds promise of an enduring nation. The statutory frame of political discretion has been ruinous for our ecology, our people, and our society. A frame change is not a panacea, but it is the kind of transformational step that can bring with it change across all sectors of society. So let me offer some concluding thoughts on how we can use this frame.

First, let us not think we have to bring only cases to use this frame. We cannot possibly litigate all environmental harms, and there is no need. The frame of sovereign obligation carries a powerful logic. We can announce it everywhere: to all levels and branches of government, in all forums, and to the press, educators, and to businesses. Once government officials themselves begin to embrace the frame, a new culture of governance can take hold.

But when lawyers do litigate against government, let's call out positions of the state attorneys general and federal attorneys who constantly defend government agencies for even ghastly harm to our ecology. These public lawyers play a key role in propping up the corruptive frame of political discretion. They continue to defend government agencies as if those agencies were private parties. In the *Juliana* case, the Department of Justice lawyers still align almost precisely with industry against the youth. At an unforgettable point in the trial court, Magistrate Coffin probed the limits of federal power by asking both the industry attorney and the DOJ attorney if they thought Congress had the power to sell the nation's Pacific territorial waters off the coast of Oregon to a private corporation.<sup>98</sup> Without hesitation, both the industry and DOJ attorney said yes.<sup>99</sup> They basically hollowed out the entire public trust, assuming unfettered political power in the federal government. Judge Coffin disagreed. So next time you are walking on the Oregon beach, think of how precarious our rights are if the attorneys who we pay through tax dollars and who are supposed to represent the public take extreme positions that perpetuate this dangerous and corruptive discretion frame. In the climate cases, public attorneys could have played a key role in being problem solvers and moving agencies forward on climate recovery, instead of providing the shield behind which these agencies continued to push us all towards the climate cliff. But, speaking in broader terms, let us imagine key cases as opportunities to galvanize a planetary defense effort. As Tony Oposa—the lawyer who brought a famous public trust case protecting the

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<sup>97</sup> *Juliana*, 947 F.3d at 1191 (Staton, J., dissenting).

<sup>98</sup> Order and Findings & Recommendation, *Juliana v. United States*, 15-CV-1517, 1, 23 (D. Or. Apr. 8, 2016).

<sup>99</sup> *Id.*

Philippines' ancient rainforests<sup>100</sup>—says, “[t]he Court is a good venue to light a STAR: to tell a Story, put the issues on the Table for orderly discussion, spark Action, and arrive at a Resolution.”<sup>101</sup>

It is going to take every single discipline to reorganize society in the next eight years to accomplish even the short-term imperative of 43 percent reduction of carbon dioxide emissions. As Paul Hawken says, there isn't one thing that doesn't require a remake.<sup>102</sup> That challenge must call to everyone, and the *Juliana* case propelled a global youth climate movement that spread well beyond the courts. Plaintiffs took to the press, gave speeches, met with legislators, and connected with youth all over the world. So even as litigation pursues a concrete remedy in court, can we use it also to catalyze a broader remedy in the court of public opinion?

This is the time for environmental law to remake itself to build economies in service of life, a time when lawyers must raise their heads out of the narrow body of statutory law and dive into the business of creating new systems—energy, food, transportation, housing, waste treatment—and if those systems are in fact sustainable, the need for regulation retreats. We lawyers have to be highly transactional: making deals, finding partners, engaging other disciplines, forming vision and strategy, and solidifying commitments. And if we are not operating in those capacities, even the most dramatic litigation victories will have little effect.

I'll conclude by returning to where I started: recognizing that our reality is now colored by the atrocities of war. But war can ignite patriotism and persuade massive sacrifice; it can also galvanize people around core values of democracy and freedom. The war against Ukraine and the war against Nature are both fueled by oil and gas. The children of the world need us to end both. Can we harness the massive effort and momentum in securing freedom to also remake our very existence on Earth and, as we pursue worldwide peace, can we also pursue global ecological peace?

## IX. CONCLUSION

We should never underestimate the power of people to rise up against intolerable harm to our shared natural endowment. But we need to make the call. Let us tap that wellspring of human understanding that is instinctive, passion-bound, and deeply shared among citizens of distant cultures. Trust-imbued words of rightful inheritance can be spoken anywhere in the world, for the trust covenant rings in the hearts

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<sup>100</sup> *Juan Antonio Oposa et al., v. The Honorable Fulgencio S. Factoran, Jr., G.R.* (July 30, 1993) S.C. No. 101083 (Phil.), reprinted in JAN G. LAITOS ET AL., NATURAL RESOURCES LAW 441–44 (2006).

<sup>101</sup> Antonio Oposa, Jr., *Let Me Tell You a Story*, 149 (4) DÆDALUS 207 (Fall 2020).

<sup>102</sup> THE 11<sup>TH</sup> HOUR (Warner Bros 2007), cited in WOOD, *supra* note 1, at 5, n. 9; see also Paul Hawken, Commencement Address at University of Portland: Healing or Stealing? (May 3, 2009) (discussing the need for change to reverse damage done to the planet).

of all humanity. Like those generations before us, it calls us to stake our moral claims in history. This call echoes in the razed forests of Oregon, in the blasted hollows of Appalachia, in the cancer alleys of industrial corridors, on the banks of rivers that carry only ghost-fish anymore, and at the base of immortal mountains that weep their last glaciers into the sea. It summons people everywhere to rise up and defend this glorious sanctuary we call Earth.

We did not live 100 years ago when people could not even imagine the climate crisis. And if we wait even ten years, it will be too late. This moment belongs only to us alive right now. We cannot throw it all away. Let us together claim our moment by asserting not the power of life, but the trust of life. Thank you.