

2018

Juliana v. United States: Debating the Fundamentals of the Fundamental Right to a Sustainable Climate

Erin Ryan

Follow this and additional works at: <https://ir.law.fsu.edu/articles>



Part of the Law Commons

Recommended Citation

Erin Ryan, *Juliana v. United States: Debating the Fundamentals of the Fundamental Right to a Sustainable Climate*, 45 *FLA. ST. L. REV. ONLINE* 1 (2018),
Available at: <https://ir.law.fsu.edu/articles/713>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

*JULIANA V. UNITED STATES: DEBATING THE
FUNDAMENTALS OF THE FUNDAMENTAL RIGHT TO A
SUSTAINABLE CLIMATE*

ERIN RYAN*
MARY WOOD*
JIM HUFFMAN*
IRMA RUSSEL*
RICHARD FRANK*

FSU LAW REVIEW REHEARING 2018
TRANSCRIPT*
APRIL 13, 2018

ERIN RYAN: Welcome, everyone, to the inaugural *FSU Law Review Rehearing*! I'm Erin Ryan, a professor here at the Florida State University College of Law, and I am delighted to be hosting the first of this annual colloquium series. The *Rehearing* is designed to bring together a small group of scholars with big ideas to discuss a critical case of the day. After our conversation, we will publish both the audio recording and a transcript of the discussion as part of *FSU Law Review's* online journal.

This year, we've chosen a case that has been generating an unusual amount of attention even among those who don't normally follow litigation moving through the lower courts. It's the landmark federal climate lawsuit, *Juliana v. United States*.¹ The case is part of a series of legal actions brought by youth plaintiffs around the country (and the world) challenging government failures to regulate to prevent climate change.² Bill McKibben, the internationally renowned environmentalist, has called it "the most important lawsuit on the planet right now."³

* Elizabeth C. & Clyde W. Atkinson Professor, Florida State University College of Law.

* Philip H. Knight Professor of Law, University of Oregon School of Law.

* Emeritus Dean and Professor of Law, Lewis and Clark Law School.

* Edward A. Smith / Missouri Chair in Law, the Constitution, and Society and Professor of Law, University of Missouri-Kansas City School of Law.

* Professor of Environmental Practice and Director, California Environmental Law and Policy Center, U.C. Davis School of Law.

* NOTE: Portions of this text have been edited from the original audio transcript for clarity and context.

1. 217 F. Supp. 3d 1224 (D. Or. 2016).

2. Indeed, the day after this discussion, a group of eight youths filed a similar lawsuit in a Florida state court against Governor Rick Scott. See *Reynolds v. Florida*, No. 37 2018 CA 000819 (Fla. Cir. Ct., Apr. 16, 2018).

3. *Landmark U.S. Federal Climate Lawsuit: Details of Proceedings*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/federal-proceedings/> [<https://perma.cc/UGZ2-VPUN>].

To set the stage for our discussion, I also want to share a statement by plaintiff Kelsey Juliana, who was a teenager when the case was initially filed in 2015. Back then, here's what she told us about the motivation behind the case:

Our nation's top climate scientists . . . have found that the present [carbon dioxide] level is already in the danger zone and leading to devastating disruptions of planetary systems. The current practices and policies of our federal government include sustained exploitation and consumption of fossil fuels. We brought this case because the government needs to immediately and aggressively reduce carbon emissions and stop promoting fossil fuels, which force our nation's climate system toward irreversible impacts. If the government continues to delay urgent annual emissions reductions, my generation's well-being will be inexcusably put at risk.⁴

Julianna and her fellow plaintiffs have been assisted by Our Children's Trust, a nonprofit advocacy group, in bringing similar lawsuits around the country in state and federal courts (and I should note that several of us have participated in professor amicus briefs on some of these cases). But few of them have come as far as *Juliana*, which has survived motions to dismiss from both the government and fossil fuels industry, a motion for interlocutory appeal to the Ninth Circuit to dismiss the case, and even a rare petition for writ of mandamus by the Trump Administration, all attempting to end the case before the trial even began.⁵ But these efforts have not been successful, and just yesterday, the trial was finally scheduled to begin in the federal District Court for the District of Oregon on October 29, 2018.⁶

In denying the motions to dismiss, federal District Court Judge Ann Aiken wrote that "[t]his is no ordinary lawsuit."⁷ The case is novel, not only because it takes on climate change, and not only because of the coordinated political advocacy that accompanies it, and not even because the primary advocates are children. It's novel because it raises

4. *Id.*

5. On July 30, 2018, after this conversation was recorded, a further attempt by the Trump Administration to get the case dismissed was denied by the U.S. Supreme Court. See *United States v. U.S. District Court OR*, 585 U.S. (Kennedy, Circuit Justice 2018) <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5b5f6e246d2a734c55c26e57/1532980772367/18A65+United+States.+v.+USDC+OR+Order.pdf> (order denying the federal government's request to halt discovery and the trial in the youth climate lawsuit).

6. Press Release, Our Children's Trust, U.S. Supreme Court Rules in Favor of Youth Plaintiffs, Allows *Juliana v. U.S.* to Proceed to Trial (July 30, 2018), available at <https://www.ourchildrenstrust.org/s/20180730-SCOTUS-decision-on-defendants-application-for-stay.pdf> [<https://perma.cc/VRN3-K3KN>].

7. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1234 (D. Or. 2016).

several new legal claims involving issues of both common and constitutional law. As we'll talk about today, the plaintiffs are relying on a very old common law theory of sovereign obligation over common pool resources, the public trust doctrine, but they apply it in a very new way, obligating federal action to protect the atmospheric commons. They also rely on a relatively newer theory of constitutional obligation—arguing that the federal government must act to protect the plaintiffs' fundamental right to a stable climate, and that its failure to do so represents a violation of substantive due process.

As I expect our panel will reveal, these claims have generated substantial interest and controversy among legal scholars. Opponents worry about their departure from established common law norms, given that the American public trust doctrine is mostly applied to state action impacting water resources, rather than federal action involving air resources. Some worry about the practical impacts of the advocacy strategy and the workability of the requested remedy—which would make it the responsibility of the court to order and then oversee ambitious legislative and executive activity. For others, the judicial remedy raises serious concerns about the horizontal separation of powers and the limits of sovereign authority. Others worry about the implications of reinvigorating judicial oversight of substantive due process and the limits of unenumerated fundamental rights.⁸ Still others worry about the implications of not pushing these boundaries in the face of the looming harms associated with climate change.

Clearly, we have a lot to talk about, so let me introduce the panel of experts who will help us unpack these issues. I am so pleased to be joined today by four experts participating from all around the country: Mary Wood, Jim Huffman, Irma Russell, and Rick Frank. I'm going to briefly introduce each of them before asking them to share a brief overview of their take on the case, starting with Mary.

8. Substantive due process refers to the principle that the Due Process Clause of the Fourteenth Amendment “applies to matters of substantive law as well as to matters of procedure. . . . [A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.” *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 846-47 (1992). Additionally, “[s]ubstantive due process ‘forbids the government to infringe certain “fundamental” liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” *Id.* at 1248-49 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). Relatedly, “[f]undamental liberty rights include both rights enumerated elsewhere in the Constitution and rights and liberties which are either (1) deeply rooted in this Nation's history and tradition or (2) fundamental to our scheme of ordered liberty.” *Id.* at 1249 (internal quotations omitted) (citation omitted).

Mary Wood is the Philip H. Knight Professor and Faculty Director of the Environmental and Natural Resources Law Center at the University of Oregon. She is the principal architect of the atmospheric trust litigation project from which *Juliana* draws its public trust theory of action, and the author of *Nature's Trust*,⁹ the authoritative scholarly treatment of the idea. She is a frequent speaker on global warming issues and has received national and international attention for her sovereign trust approach to global climate policy. Welcome, Mary, and please, give us your short take on the case.

MARY WOOD: Thank you. The *Juliana* case is part of a global campaign called Atmospheric Trust Litigation, launched on behalf of youth in 2011 by Our Children's Trust. That campaign turns to the courts at this eleventh hour of climate crisis, to force government climate protection before the planet passes an irrevocable tipping point that would trigger runaway heating and leave young people with a world that is essentially uninhabitable. The campaign began with legal proceedings in virtually every state, as well as a case filed against the federal government. And these administrative petitions and lawsuits all characterize the government as a public trustee of our vital national resources, such as air and water, with a fiduciary duty to protect these resources for present and future generations. The public trust principle¹⁰ has origins dating back to Roman times and is described as an attribute of sovereignty itself. It represents an essential restraint that citizens hold against their government, and as Professor Joseph Sax once said, it distinguishes a society of citizens from one of serfs.¹¹

By premising the litigation on the public trust, the youth campaign pulled the climate crisis out of the deep canyons of statutory law—where it has only worsened for decades—and placed it squarely in the realm of fundamental rights jurisprudence. This litigation also underscored the need for a macro remedy in the form of enforceable science-based climate plans. Finally, because the public trust principle is found in some form in most nations of the world, it served as the fulcrum for a truly global campaign, at a time when the serial

9. MARY CHRISTINA WOOD, *NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* (2014).

10. The public trust principle is the proposition that the sovereign holds certain natural resources in trust for the public. See J. INST. PROEMIUM, 2.1.1. (T. Sandars trans., 4th ed. 1867) (translation from the Institutes of Justinian, by the Byzantine Emperor, Justinian I ("By natural law, these things are the common property of all: the air, the running water, the sea, and with it, the shores of the sea.")).

11. See Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 484 (1969).

failures of international climate negotiations were becoming all too obvious.

Some early decisions in these cases, including in the first federal case, granted the government's motions to dismiss based on political question and displacement grounds. These courts basically said, "it's not our job to deal with climate; it's the job of the other two branches." And of course, that is exactly the point of this litigation; it is the job of the government trustees to protect our climate system—but instead, the agencies continue to push a catastrophic fossil fuel policy.

The judicial tides started turning when the horrors of our climate reality became more apparent, through the sea level rise in Florida, the superstorms hitting the east coast cities, and the wildfires that devoured California subdivisions. Courts delivered clear victories to youth in cases from Washington State, where the court found a state constitutional public trust duty, and from the Netherlands, Massachusetts, Pakistan, and elsewhere. That momentum has continued with more cases being filed both in the United States and in other countries, in anticipation of a judicial domino effect, holding governments accountable for climate protection across the globe.

Judge Aiken's decision allowing *Juliana* to go forward is widely viewed as a landmark opinion because it expressed federal constitutional public trust and substantive due process rights to a stable climate system that is capable of supporting human life.¹² The plaintiffs are challenging the entire fossil fuel policy of the United States, with multiple allegations that government officials have acted for decades to promote fossil fuels with deliberate indifference to the peril they knowingly created. The eight- to ten-week trial, scheduled to begin in Eugene, Oregon in late October, has been called the "trial of the century,"¹³ because it will be the very first time U.S. fossil fuel policy will meet climate science in court. And with tipping points looming dangerously close,

12. In ruling on the defendant's 12(b)(6) motion to dismiss, Judge Aiken articulated a substantive due process right to a climate system capable of sustaining human life, allowing the plaintiffs the opportunity to prove that this right had been violated during the subsequent trial. *See Juliana*, 217 F. Supp. 3d at 31-32 ("The idea is that certain rights may be necessary to enable the exercise of other rights, whether enumerated or unenumerated. . . . Exercising my 'reasoned judgment,' I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'" (citations omitted)).

13. *See* Karen Hollweg, *Trial of the Century: Juliana v. U.S. Climate Trial Set for October 29, 2018*, N. AM. ASS'N FOR ENVTL. EDUC. (April 17, 2018), <https://naaee.org/ee-pro/blog/trial-century-juliana-vs-us-climate> [<https://perma.cc/B9E4-N6Q5>].

and an American president who has stated his intention to develop fifty trillion dollars' worth of fossil fuels, global attention will be very much focused on this case.

I appreciate being a part of this and thank you so much.

ERIN RYAN: Thank you, Mary, thank you—we look forward to talking more about these ideas. We are also lucky to be joined by James Huffman, Dean Emeritus and Professor of Law at the Lewis & Clark Law School in Portland, Oregon. He is a member and former Chair of the Executive Committee of the Environment and Property Rights Practice Group of the Federalist Society. Jim was recently the Republican nominee in Oregon's 2010 U.S. Senate election, facing incumbent Ron Wyden. He is the author of more than 100 articles on a wide range of topics, and his most recent works address property, sovereign authority, and constitutional law. Jim, give us your take.

JIM HUFFMAN: Thank you very much, Erin. I, too, am delighted to be a part of this. And I commend the Law Review on this initiative; I think is a great idea.

The strategy that Mary described has suffered a lot of setbacks, but the advocates of the atmospheric trust theory struck gold with Judge Aiken's preliminary ruling in *Juliana*. Having declared in that ruling that a right to be free from climate change derives from both the due process clause and the public trust doctrine, she has left little doubt how she will rule on the merits. Judge Aiken's opinion is an astonishing combination of creative legal interpretation and unabashed judicial usurpation of the legislative and executive roles of government. I don't doubt that "a climate capable of sustaining human life is fundamental to a free and ordered society,"¹⁴ but so too are a lot of other things that the Constitution does not and could not guarantee. The existence of a problem—even a problem of predicted apocalyptic proportion—does not amend the constitutional separation of powers or legitimize abandonment of the rule of law.

On due process, Judge Aiken cites Supreme Court cases recognizing constitutional rights to abortion and same sex marriage as precedent for "a right to a climate system capable of sustaining life."¹⁵ While acknowledging that the due process clause ordinarily functions only as a limit on government interference with the exercise of individual

14. *Juliana*, 217 F. Supp. 3d at 1250.

15. *Id.*

rights, and does not impose affirmative duties on government, she finds an exception where government inaction is alleged to cause harm to plaintiff's dignity. But life is filled, particularly on university campuses it seems, with things that offend people's dignity.

Recognizing that she is out on a jurisprudential limb, I think, Judge Aiken vowed "to strike a balance and to provide some protection against the constitutionalization of all environmental claims."¹⁶ That, apparently, is her idea of judicial restraint. The leap from the almost universally condemned substantive due process of *Lochner* to the right of privacy was big,¹⁷ but defensible as a protection of liberty. The leap from the right of privacy to a due process right to be free from the indignities of climate change is magnitudes wider. If the due process clause guarantees such a right, there is little remaining limit on the power of the courts to govern.

The last third of Judge Aiken's opinion is devoted to plaintiff's claim that both the actions and omissions of government have violated its "obligation to hold certain [natural] resources in trust for the people and for future generations."¹⁸ Through most of English and American history, the public trust doctrine, on which Aiken relies, guarantees only a public right to navigate and fish on navigable waters. Two generations of academic lawyers have endeavored to free the doctrine from what Professor Sax called its "historic shackles,"¹⁹ or what most lawyers would think of as "precedent." But the reality is that the so-called atmospheric trust doctrine²⁰ has no foundation whatsoever in the common law public trust doctrine. It is cut from whole cloth.

16. *Id.*

17. This "leap" was from the Court, in *Lochner v. New York*, finding that a substantive due process claim existed with regard to employer/employee contracting, to the Court, in *Griswold v. Connecticut*, concluding that marital privacy was a fundamental right.

18. *Id.* at 1233.

19. Joseph L. Sax, *Liberating the Public Trust Doctrine from its Historical Shackles*, 14 U.C. DAVIS. L. REV. 185 (1980).

20. The atmospheric trust doctrine has been described as follows: "Atmospheric Trust Litigation is a macro-approach that considers the atmosphere to be held in trust for the public. The purpose of this litigation is not to ask courts to devise a solution to climate change, but to compel the other branches of the government to protect human health and the environment by devising a comprehensive strategy. Atmospheric Trust Litigation applies the public trust doctrine, which is a legal doctrine that limits governmental authority entity to transfer or develop natural resources that they hold in trust for the public, including future generations, except for uses that are consistent with the public trust." Ipshta Mukherjee, *Atmospheric Trust Litigation: Paving the Way for a Fossil-Fuel Free World*, STAN. L. SCH. BLOGS: ENV'TL. AND NAT. RES. L. & POL'Y PROG. BLOG (July 5, 2017), <https://law.stanford.edu/2017/07/05/atmospheric-trust-litigation-paving-the-way-for-a-fossil-fuel-free-world/> [<https://perma.cc/3D7W-GPSR>].

Finally, I would say that Judge Aiken quotes Chief Justice Marshall's famous statement in *Marbury v. Madison* that it is "emphatically the province and duty of the judicial department to say what the law is."²¹ But that language has always been understood as a simple confirmation of the constitutional power of judicial review, not as an assertion of judicial authority to ignore several centuries of common law precedent and rewrite the due process clause of the U.S. Constitution.

ERIN RYAN: Thank you, Jim. We are so fortunate to have you with us. We are equally fortunate to have with us Irma Russell, who is the Professor of Law and the Edward A. Smith/Missouri Chair in Law, The Constitution, and Society at the University of Missouri-Kansas City. She has served as Chair of the ABA Section of Environment, Energy and Resources and also of the AALS Section of Natural Resources and Energy Law, and she currently serves on the Board of Dividing the Waters, an organization of judges and lawyers focused on issues of water adjudication in the Western United States. Her most recent writings address the implementation of constitutional environmentalism in the United States. Irma, why don't you share with us your take on the case.

IRMA RUSSELL: Thank you so much, Erin. I'm also delighted to be here and want to applaud Florida State University Law School for this new vehicle for discussion.

So I have three concepts, three simple points, and some of these have already been spoken of. And we will come back to speak of them at greater length, so I don't plan at this point to get into the defense of these concepts, but rather simply to state the general basic concepts—and these are substantive due process, fundamental rights, and core government functions.

Now, I want to note that my view of these concepts comes both from the Constitution and from decisional law. I think that's inevitable. The genius of our Constitution is the sharing of powers, and I think the sharing of powers goes back a little further. The common law is often referred to, both by conservative and more liberal Justices and judges, to note that both of these sources of power—the judiciary and the legislature—are repositories of public policy and the public good. So I think that our evolving conception of the judiciary has been, to some degree, to put it in a narrower, more cabined role of interpreting only

21. *Juliana*, 217 F. Supp. 3d at 1263 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

the laws that the legislature has enacted—but of course, there is other law. So these three concepts—substantive due process, fundamental rights, and core government functions—are interwoven, interrelated in my view, and subject to judicial interpretation, and they all indicate to us the seriousness at the heart of the legal matter of human rights and democracy.

On substantive due process and fundamental rights—I think we’re looking here at core human rights. We’re also looking at core governmental functions and the bedrock of our view of individual rights and liberties, and the incursion on those rights. So on all of these points, I want to point out the significance of the origins of government as a solution to the problem. The central concept of government is as old as law itself, and that is the protection of people. The phrase is *salus populi suprema lex esto*—the good of the people is the supreme law—and without that (though most times, of course, it’s readily identifiable), there’s really no justification for law at all.

To substantive due process: On this I just want to say that the fact that we generally look to the Fifth and Fourteenth Amendments to identify these rights does not mean that they are the full expression of those rights. After all, the Ninth and Tenth Amendments make very clear that there is no parole evidence rule²² in the Constitution. To the contrary, the Constitution stakes out the requirement that other rights be recognized in the text of the Ninth Amendment.²³

On fundamental rights, of course, some of these are enumerated, but the Ninth and Tenth amendments²⁴ remind us that we are already charged with the somewhat mysterious and puzzling discovery of those rights.

So on core government functions: I just want to say that, referring back to that core government function of protecting the common good, protection of the people has both an individual and a collective dimension. And government cannot shed that duty, or walk away from it. We see

22. The parole evidence rule is “[t]he common-law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing.” *Parol Evidence Rule*, BLACK’S LAW DICTIONARY (10th ed. 2014).

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

24. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

that in the *Illinois Central* case²⁵ and the public trust doctrine, in general. So that gets me started on those concepts that we will continue to be talking about. Thanks again for including me; I'm delighted to be among you.

ERIN RYAN: And we are delighted to have you, Irma. Thank you so much. Well, our last (but not least!) contributing expert is Richard Frank, Professor of Environmental Practice at the University of California at Davis, and Director of the California Environmental Law and Policy Center there. Before joining academia, Rick practiced law with federal and state agencies for 32 years, mostly with the California Department of Justice, where he served as California's Chief Deputy Attorney General for Legal Affairs. At UC-Davis, Rick continues to participate in litigation that implicates public trust and constitutional concerns. Welcome, Rick—share with us your take on the case.

RICHARD FRANK: Thank you, Erin, for inviting me to participate, and thanks to the Florida State Law Review for putting on this event and the symposium that will come out of it. I guess I agree with Bill McKibben about the importance of this litigation. I think it probably is the single most important environmental case currently pending in the United States. It's certainly the most intriguing.

To provide a little jurisprudential context for this, my opinion is that this litigation is in the tradition of public interest, so-called "impact litigation" going back in this nation's legal history for generations. For example, *Brown v. Board of Education*²⁶ in the early 1950s, and more recently, the same-sex marriage litigation adjudicated by the United States Supreme Court a few years ago. The tobacco litigation, where the tobacco industry—after decades of hiding the public health impacts of tobacco products—are being brought to account, as a result of courageous litigation brought by state attorneys general. The lead paint litigation that was brought in in my home state of California against manufacturers and sellers of lead paint. (And parenthetically, that successful litigation was brought by a law firm that is one of the firms representing the plaintiffs in the *Juliana* case.)

25. *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 463-64 (1892) (holding that the public trust doctrine limited the state's ability to convey the bed of Chicago Harbor to a private railroad company).

26. 347 U.S. 483 (1954).

In the area of environmental law, there is the Mono Lake litigation, *National Audubon Society v. Superior Court*, where the California Supreme Court in 1983 held that the public trust doctrine fully applies to the water rights system of the state of California (a case I had the privilege of working on when I was with the California attorney general's office). And *Massachusetts v. U.S. EPA*,²⁷ where the U.S. Supreme Court held that greenhouse gas emissions were pollutants subject regulation under the Clean Air Act.

I dare say that all of those cases, when they were initially brought, raised similar criticism from some quarters—that they were untethered to precedent, and were a “fool’s errand,” if you will—and I think history obviously proved them wrong. At the same time, I think the *Juliana* case is subject to some formidable obstacles before a decision of the point in favor can be reached. They include issues of causation, of redressability, of the extent to which the public trust doctrine is applicable to our national government, and the extent to which federal courts will be an appropriate forum to adjudicate public trust claims. And the degree to which federal judges will exercise and interpret those rights broadly. I think I’ll stop there for now, and we’ll get back to these issues in more detail as we continue.

ERIN RYAN: And we most definitely will. Thank you, Rick. I guess truly last and least, I will briefly introduce myself. I’m Erin Ryan, the Elizabeth C. and Clyde W. Atkinson Professor of Law here at FSU. I write frequently about issues in environmental and constitutional law, especially those involving the public trust doctrine, environmental federalism, and the horizontal separation of powers. I’m currently writing a book about the case that Rick mentioned, the Mono Lake case,²⁸ some groundbreaking public trust litigation unfolding just east of Yosemite National Park at Mono Lake—where I was a U.S. Forest Service Ranger before the case inspired me to become a lawyer and then a law professor. That case, the *Mono Lake* case, laid important foundation for many later public trust claims like the ones that Rick mentioned, and like the one before us today in *Juliana*.

27. 549 U.S. 497, 534-35 (2007) (holding that the State of Massachusetts had standing to petition for review EPA’s regulation of greenhouse gas emissions from motor vehicles, and that the EPA “arbitrarily and capriciously” refused to decide whether greenhouse gases “cause or contribute to climate change”).

28. *Nat. Audubon Soc’y v. Superior Court*, 658 P.2d 709, 712, 732 (Cal. 1983) (After the plaintiffs filed suit alleging that “the waters of Mono Lake are protected by a public trust,” the Supreme Court of California held that the public trust doctrine was not displaced by the prior appropriations doctrine and must be considered by the State Water Board in reconsidering the proper allocation of the waters of the Mono Basin).

As for my take on the case, the only thing I'll add to my colleagues' collective wisdom is that I think *Juliana* reveals a fascinating and important feature of how our democratic republic's separation of powers actually works—which is to say that the separation of powers is not the same thing as powers working in complete isolation.

That's because the citizens' use of the judicial process—getting their day in court—inevitably becomes part of the wider political process, and that's a feature of our democratic design. We want our judges to be neutral, of course, but advocates are not neutral. And in the constitutional process, the public trust doctrine opens up a conversation between the three branches of government about public rights and duties—especially when they involve urgent public policy issues that have gotten stuck in the gears of good governance, so to speak.

So this is a chance for the litigants to draw attention to their issue, when they feel shut out of the political decision making process taking place in the other branches. And even if the litigation were to fail to deliver the remedy the plaintiffs are seeking in court, I think it's worth noting how it could still advance the policy outcomes they want, indirectly, by motivating members of the public to pressure their elected leaders for results. So I thought I would add that point.

And now that we are all well acquainted, let's dive in to what I suspect will be a lively conversation about the legal theories, strategic issues, and future implications of the *Juliana* case.

Here's where we're going to go from here. The next part of our colloquy is going to be structured around some questions that we have already identified as important, and I'm going to pose them to our panelists, dividing our time among three basic issues. The first thing we're going to address are the atmospheric trust issues raised by the case. Then we're going to address the constitutional issues raised by the case. And finally, we'll talk about the pragmatic and strategic issues raised by the case. Then after that, we'll have some open discussion.

But let's go ahead and start with the atmospheric trust claim at the heart of the case. As we've discussed, the *Juliana* case began with an appeal to the public trust doctrine, though as we've also already mentioned, the plaintiff's claim takes an expansive view of the doctrine. It embraces a wider array of natural resources—extending from water resources to atmospheric resources; and also a wider conception of sovereign authority—expanding from claims of state obligation to federal obligation. I want to open our discussion by asking folks what they

think about this use of the public trust doctrine, and what that may reveal about the nature of the doctrine itself.

So what do we think, exactly, the plaintiffs are drawing on here in their claim? Is the public trust doctrine a regular common law doctrine? And if so, then can the legislature simply abrogate it, as the government defendants here have argued—that whatever public trust obligations there may be were displaced by statutory laws like the Clean Water Act and the Clean Air Act? Or is the public trust something different? Perhaps a quasi-constitutional limit on sovereign authority²⁹ that the sovereign can't easily extinguish, as Judge Aiken suggests in her refusal to dismiss the claim? Or is it something else entirely? I want to put that question to the panel—and let me start by asking Rick. Do you want to give us a breakdown of your thoughts about this?

RICHARD FRANK: Well sure, let's start at the beginning. Fundamentally, the public trust doctrine is based on the notion that certain natural resources are held in trust by government for the people, for current and future generations. And the doctrine goes on to say that government trustees—that is, the government managers of those natural resources that are subject to the public trust—have a fiduciary duty to protect and preserve those resources, not just for the use by current generations, but by future generations as well.

The public trust doctrine has strong historical roots, going back to Rome. In the *Institutes of Justinian*, Emperor Justinian wrote about the public trust doctrine, applying to air, water, the shoreline, and other resources.³⁰ It's a longstanding feature of English common law, and for those of us who work and practice and teach in the southwestern United States it's also a fundamental part of Spanish and Mexican law, which is part of the origin of the legal systems in the southwestern United States.

It is our late colleague Joe Sax who really deserves most of the credit for transforming the public trust doctrine from an ancient doctrine of property law into a cornerstone principle of modern environmental law, based on his historic scholarship and writings beginning in the late nineteen-eighties. And the public trust doctrine, importantly and

29. Sovereignty entails having authority in the “decisionmaking process of the state and in the maintenance of order.” *Sovereignty*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/sovereignty> [<https://perma.cc/EB4L-DCTL>].

30. J. INST. PROEMIUM, 2.1.1. (T. Sandars trans., 4th ed. 1867).

directly relevant to the *Juliana* case, incorporates the principles of sustainability and intergenerational equity.

As to your comments about what is the source of the public trust doctrine—where does it fall? It is a common law doctrine, and in many states, it is broadly incorporated into state constitutions. Hawaii and Pennsylvania are examples of that, and other states, including my state of California. Aspects of the public trust doctrine are incorporated in our state constitution; other parts are embedded in state statute, as in California and a number of other states. And many scholars have written that the public trust doctrine is a fundamental and inherent attribute of state sovereignty. So for all those reasons, I think it would be erroneous to think that it is simply a figment or principle of judge-made law that can be easily rejected by state legislatures, or even by federal congressional action.

ERIN RYAN: Thank you, Rick. So I know the panelists will want to respond. I know, Mary, that you might want to talk about how your theory would expand what we've seen previously applied to water resources to air resources. And I know, Jim, that you have a robust critique of some of what we've heard so far. Mary, do you want to go first?

MARY WOOD: Yes, I might comment first on the constitutional aspects of the public trust, if I may. The *Illinois Central*³¹ case is the case that Judge Aiken relied on most fundamentally in characterizing this as a constitutional doctrine. That case lodges the public trust in the reserved powers that citizens hold against their government; in other words, citizens give government power, not the reverse. The well-known recent opinion in *Robinson Township*,³² which was issued by the Pennsylvania Supreme Court, also dealt with public trust quite extensively. And while it interpreted an express public trust provision in Pennsylvania's constitution, part of the opinion directly characterized the public trust as a reserved, inalienable, fundamental right held by citizens. That part of the characterization is meaningful to states outside of Pennsylvania that don't have an express constitutional public trust provision, and it describes the federal government as well. Since that *Robinson* opinion, we've seen not only the *Juliana* opinion

31. 146 U.S. 387 (1892).

32. 623 Pa. 564, 585 (2013) (holding that several provisions of the Pennsylvania Oil and Gas Act were unconstitutional, and that several of the provisions "violat[ed] the Commonwealth's duties as trustee of Pennsylvania's public natural resources under the Environmental Rights Amendment").

but also the Washington court's opinion paralleling that analysis in the successful atmospheric trust litigation cases.

As to the air—air is an essential resource just like water, and the very logic that brought the water resources within the scope of the public trust means that the air resource is within the scope of the public trust as well. In fact, the *Institutes of Justinian*³³ directly named air as one of the resources the public held rights to. Many courts now have expressly found that air is part of the public trust. Those courts include ones in Texas, New Mexico, Washington, and Pennsylvania, but Judge Aiken actually stopped short of making that determination. She included a comprehensive footnote saying that air could be justified as a public trust resource, but she specified that she need not decide that question because she found that the traditional public trusts resources of submerged lands and marine waters, which are unquestionably public trust resources, are so affected by climate crisis that she actually didn't need to find air as a separate public trust resource.

ERIN RYAN: Thank you, Mary. And we should clarify that at this point, Judge Aiken's opinion was allowing the case to go forward. So, she is allowing the plaintiffs to make their argument, against the defendants' claim that there is not even a cause of action upon which relief can be granted. We'll continue to watch how the litigation unfolds now that we know that it can go forward. But Jim, why don't you share with us your perspective on this aspect of the public trust doctrine.

JIM HUFFMAN: Well, Erin, I have written ad infinitum (and some would say ad nauseum!) on the history of the public trust doctrine, and my critique is much longer than I can offer in just a few minutes here—but let me just say a couple of things. My critique is rooted in a commitment to the rule of law, and I think that that commitment is strained by the claims that are made in the name of the public trust doctrine in this expansive way, because they are an effort to get the legal provenance of history and of precedent to support the interpretation that's being proposed.

But there is just no foundation for that in the actual history. Rick cited *Justinian*—everybody cites *Justinian*—but if you understand Roman law, the concept of trust, for one thing, didn't exist in the Roman law in the sense that we understand it. And secondly, the Roman understandings of what resources were protected, and what it meant to be protected by the public trust, were fundamentally different than any

33. See *supra* note 29.

notion that we might have today. And similarly with a lot of older English law. But as I say, there's not time to really unscramble all of that.

The point I would make is that the proponents of the atmospheric trust theory—and other expansive theories of the public trust doctrine—rely on this history because they feel a need to have that provenance, that precedent and support. My conclusion is they really need to find other justifications for this doctrine. Calling something the public trust doctrine and locating it in the Constitution, or statute, or wherever, does not make it so.

The common law doctrine was a very narrow doctrine developed in English law, originally as a way for the king to acquire access to waters that he was being kept out of by the barons. And in American law, it evolved into protection of navigation and fishing, and in a few cases, bathing on navigable waters—and nothing more. It was never any different from that until about the time Joe Sax wrote his first article.

On the question of whether or not the legislature can abrogate it—absolutely the legislature can abrogate it, except to the extent that there are actual rights that are being asserted. And those rights have been limited historically and in the precedent to navigation and fishing on navigable waters. The root of the problem, I think, is that people have taken the general concept of trust and plugged it all into the public trust doctrine. But the public trust doctrine was really nothing more than an easement that the public held in the use of these waters, and therefore operated as a limit on the rights of private rights holders in those waters. So if the legislature is going to change it, it can change it—but not in a way that abrogates the rights of those people who already hold existing rights in the waters.

Putting it out into the atmosphere really makes it apply to everything. The power of the doctrine, and the reason the environmental community has been so enamored of it ever since Joe Sax's work, is because it preempts any claims of taking of private property—because, by definition, the claim is that these rights predate any subsequent rights that were acquired. Yet there is not a single responsible lawyer in this country who would say that when I acquired a piece of property, I acquired it subject to atmospheric trust limitations. Nobody had any clue what that was, and if those kinds of rights exist, then my property rights really amount to nothing. So I think that the problem here is deep, and the threat to the rule of law is severe. And no matter how serious the climate problems are, I think it's the wrong pathway to try to solve those problems.

ERIN RYAN: You know, all three of your answers do raise the question that the case has to grapple with, which is the reason I'm pressing on what the nature of the public trust doctrine itself is, because that might help us understand one of the more controversial aspects of the case, which is the plaintiffs' attempt to expand the public trust obligation, whatever it is, to the federal government.

That's controversial, especially because of some dicta in a recent Supreme Court case, *P.P.L. Montana*, which makes a passing statement that the public trust doctrine is a matter of state law only.³⁴ Here is where it matters whether the doctrine is regular common law or something different—some fundamental aspect of sovereignty that can't just be willed away. Because if it is part of sovereignty, then one can see the logic of the extension—the route of saying, “oh, it impacts not only state sovereign activity, but federal sovereign activity.”

And your answer, Jim, was interesting, because what you seem to say is that there is some aspect of the doctrine that is fundamental to sovereignty, that can't be conveyed away by the state. Your interpretation just limits its applicability to water resources. Is that right? Do you see it as a fundamental aspect of sovereignty?

JIM HUFFMAN: No, I don't believe that. I don't think it's a function of sovereignty at all. It is, as I said, an easement that members of the public have in the uses of waters and submerged lands that others hold private property rights in.

ERIN RYAN: But an easement that can't be legislatively abrogated?

JIM HUFFMAN: The legislature cannot abrogate the public right by granting the entire lake front of a city as the Supreme Court ruled in *Illinois Central*. But any legislative action—including the disposal of publicly held land and water—that promotes the purposes of the public trust doctrine, which are navigation and fishing, does not constitute an abrogation of the public rights.

ERIN RYAN: Now I understand your point. But I still think there's something interesting there—when you say it's an easement that cannot be legislatively abrogated—that makes it somewhat different

34. *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012) (holding that the alleged “non-navigable” segments of the three rivers at issue—where the plaintiff's hydroelectric facilities lie—are not held in title by the State of Montana under the equal-footing doctrine).

from a regular common law doctrine. That means there's something inherent in the constraints of the doctrine that constrains sovereign decisionmaking. And the dispute right now, here at this table, may be about the reach of that doctrine.

JIM HUFFMAN: The reason it can't be abrogated is the same reason that my property right in the house that I'm sitting in cannot be abrogated: I have a property right in this house. As a member of the public, I have a right—in the nature of an easement—on the use of navigable water for fishing and navigation. They're both rights—one that I hold pursuant to the title in my house, and the other that I hold in common with everybody else under the public trust doctrine. Neither right can be abrogated without due process and just compensation.³⁵

ERIN RYAN: Then do you see the doctrine as extending to federal power—the constraint as extending to the federal government?

JIM HUFFMAN: Well, to the extent that the federal government is constrained by the takings clause, of course it is—but I think the *P.P.L. Montana* court that you referenced got it right. It has been historically and remains a doctrine of state law.

ERIN RYAN: Rick, you wanted to add something about the *P.P.L. Montana* case. How do you interpret that constraint, in the context of our conversation?

RICHARD FRANK: Well, that was a decision of the United States Supreme Court about six or eight years ago that involved the question of who owned the bed and banks of three rivers in Montana. And Justice Kennedy, speaking for a unanimous United States Supreme Court, rejected one part of the State of Montana's claim—that it was the sovereign owner of the bed and banks of those rivers. And in the process, he indicated that the issue of who owns the rivers is an issue of federal law. Whereas the public trust doctrine—which had been advanced as a defense to the quiet-title claim brought against by the utility, which had claimed the beds were privately owned—the Supreme Court held that the public trust doctrine is purely a matter of state law, and so was relevant to the defense.

Now the larger question, and what's relevant about *P.P.L. Montana* to the *Juliana* case, is that for many of us, *P.P.L. Montana* was a bit of a

35. See *supra* note 40.

surprise. It was surprising that the Court so unanimously and categorically held that the public trust doctrine was purely a creature of state law, when of course, the most important and sweeping public trust decision in American history is the Supreme Court's 1892 *Illinois Central* case that Jim mentioned, which indicated that the Illinois legislature lacked the authority by statute to convey the entire Chicago waterfront, as a prior legislative act has done. So there's that. And then the other issue, which was not developed in detail in *P.P.L. Montana* but is implicit in the decision—and maybe the others in this program can speak to it—is that the strongly implicit message in the *P.P.L. Montana* case is that federal courts were perhaps not the best, or maybe even an appropriate forum at all, for pursuit and vindication of these public trust claims.

ERIN RYAN: Thank you, Rick. And Mary, I'd love to invite you to weigh in on this as well, since your theory on the atmospheric trust really depends on being able to apply the doctrine to federal action.

MARY WOOD: Yes. The public trust was clearly characterized by the *Illinois Central* Supreme Court as an attribute of sovereignty that couldn't be abdicated by a legislature. And it's been characterized as an attribute of sovereignty in other Supreme Court cases, like the *Geer v. Connecticut* case.³⁶ As an attribute of sovereignty, it would apply to the federal government just as much as it would apply to states. It wasn't some doctrine that just kind of appeared when states were created in this nation. Judge Aiken recognized that and said this doctrine precedes this nation. It was applied to the government of England—the national government of England—and there are federal cases that already apply it to our federal government: *In re 1.58 Acres of Land*³⁷ is a very notable one.

The *P.P.L. Montana* case was grabbed by defendants and taken much farther than its dicta would allow. This is a very short passage we're talking about, in *P.P.L. Montana*. The issue was not whether or not the federal public trust existed at all; it was an issue of who owns the beds to these navigable waterways, and the court said that the federal law determines who owns the beds, and then once you determine that

36. *Geer v. Connecticut*, 161 U.S. 519, 601 (1896) (affirming the conviction of Mr. Geer for violating game law in Connecticut by “unlawful[ly] inten[ding] to procure the transportation beyond the limits of the state, certain woodcock, ruffed grouse, and quail, killed within [the] state”).

37. 523 F. Supp. 120, 121 (D. Mass. 1981) (holding that the U.S. Coast Guard could take property, in full fee simple, for “use in connection with the redevelopment and improvement to Coast Guard Support Center, Boston,” was appropriate so long as it was “below the low-water mark”).

the land is held by the state, then the state public trust doctrine applies to determine the uses of that land. Well that is quite correct; we do have state public trust doctrines in every state, but we also have a federal public trust. The *P.P.L. Montana* Court never said there was no federal public trust; it just contained a very brief statement saying that once you determine the ownership belongs to the state, then the contours of that public trust are determined in that instance by state law. And that is true, but that doesn't foreclose the federal public trust.

Judge Aiken and also Judge Coffin have pointed out on multiple occasions that *P.P.L. Montana* was misread by the government defendants in *Juliana*.

ERIN RYAN: Thank you, Mary. Now I feel like we could talk about this for much longer, because it's a fascinating issue—but I'm going to push our conversation forward, so we can also address the constitutional issues that are raised by the case. As we've mentioned earlier, an equally controversial aspect of the plaintiffs' claim is the argument that the government's failure to regulate represents a violation of the plaintiffs' fundamental rights, and accordingly, of substantive due process. Irma has already given us a good introduction to this, but I want to invite our panelists to help us understand that argument even a little better.

So Irma, I'm going to ask you to expand on your earlier statement, helping us understand the fundamental right that we're talking about and where it comes from? What does the Constitution say about fundamental rights that are not otherwise enumerated in the text? You mention the Ninth Amendment and perhaps the Tenth Amendment, and if the court accepts the plaintiffs' argument, what other fundamental rights might we expect to follow, or arguments for them might we expect to follow? I want to throw this question first to Irma.

IRMA RUSSELL: Ok, and I'm going to meld it just a little bit with where we left off—and that's on public trust. You know, we always have the question of saying here, "we have the full rule, we have the full knowledge" versus "we're discovering." The case-and-controversy method³⁸ is very sound, I think; it keeps. This, to me, is all about the balance—rather than the hierarchy—of our branches of government.

38. Article III of the U.S. Constitution limits judicial review to only "cases and controversies." See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

So, case and controversy, at its very heart, means that we don't necessarily know the extent of rights until we have a case or controversy to unpack it. I think that we sometimes do a closed-end analysis by saying, "well this is all that *Illinois Central* said." But maybe we don't really know yet until we apply it in a new case in controversy.

So, I think that when we run into fundamental rights, we quite rightly start in the most logical place—looking at the fundamental rights adverted to in the Constitution and at other points in history, and even those nonenumerated rights that were not very full-throated. But now, we recognize in the face of this new threat, that perhaps the fundamental right to continue to live is part of the protected rights of life, liberty, and property. And that if there's a hierarchy of constitutional concerns, then the hierarchy is not that property comes first—it would be that rights come first. So that's a little bit of a nebulous place to start, but it's where I start.

ERIN RYAN: Yes, and you mention the Ninth Amendment as being a locus in the Constitution that makes reference to the principle of unenumerated rights.³⁹ Maybe you could tie this into the *Obergefell*⁴⁰ decision?

IRMA RUSSELL: Yes I think that's right. And I want to tie it into the flow of our conversation about case and controversy. You know, it's one thing to say that we are finding, or even creating new rights, but it's another to recognize that, because of a case and controversy put in front of us, we see that legislation in Tennessee and other states denied a right to someone, and now we may need to look at that right more carefully, even if it's for the first time. I think it's important to note that if no state had denied the right to same sex marriage, then we would have no pronouncement of that right. So we heard . . .

ERIN RYAN: I am sorry to interrupt Irma, but just to bring those who are unfamiliar along, can you give us a synopsis of the *Obergefell* case?

IRMA RUSSELL: Yes. In *Obergefell* the Supreme Court held, five to four, that there is a right—a fundamental human right—to the liberty

39. That Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

40. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the fundamental right to marry under the Due Process Clause of the Fourteenth Amendment applies equally, across all fifty states, to same-sex couples as it does to opposite-sex couples).

in expression of one's love; to choose the person that you love even if that person is the same sex as you.

Now, that right had been denied by several states, and one of my points here is that this is the system we have of evaluating political decision and legislation. Even once the political decision and legislation is made, it can go too far. We're really on a rocking boat at sea, and the judiciary is one of the players that keeps the vessel upright. So in *Obergefell*, the Court said we do have a legislative statement here, and it goes too far—it's an incursion on the judicial role. The role of the judiciary within the rule of law is not merely to wait until the legislature has applied a law that it has enacted; that's a narrow view of the judicial function. Even if the legislature has only spoken, sometimes the political process goes too far, and it is within the realm of the court to say what is too far.

Just one more point and then I want to yield the floor. And it is that when we say: "where will this lead?" That's part of the unfolding of our world and law. We don't know where it will lead, but I think that the fear of rights gone wild in the future shouldn't be the kind of specter that keeps us from protecting lives right now.

ERIN RYAN: Thank you, Irma. I appreciate that I'm artificially separating out the fundamental right question from the substantive due process question, which we'll come back to momentarily. But first, Jim—I want to invite you to weigh in on the fundamental rights issue as well.

JIM HUFFMAN: Well, if you look at *Lochner* and *Griswold v. Connecticut*⁴¹—which was really the beginning of the modern substantive due process and privacy cases—what they show us, I think, is that substantive due process is in the eyes of the beholder. Unless you are a libertarian, in which case, you think that both *Locher* and *Griswold* are correct.

ERIN RYAN: Jim, I'm going to interrupt you for a moment, the same way I interrupted Irma, just to bring everyone on board with us. We haven't yet introduced the substantive due process issue, so can you

41. 381 U.S. 479, 487 (1965) (holding that the state law forbidding the use of contraceptives as among married couples is unconstitutional, for the "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms").

help us bridge the gap? How does this conversation about fundamental rights relate to substantive due process?

JIM HUFFMAN: Well, the theory of substantive due process is that people have unenumerated, substantive, fundamental rights that are protected by the Due Process Clauses of the Fifth and Fourteenth Amendments.⁴² I am one who believes that the Ninth Amendment is a better place to have rooted those, because I think it speaks directly to them. But in either case, these fundamental rights are said to be rights that we have, even though they're not expressly enumerated in the Constitution. Substantive due process in *Lochner* was about freedom of contract; in *Griswold v. Connecticut* it was about freedom to use contraceptives for privacy reasons.

And, as I say, in my worldview, both *Lochner* and *Griswold* got it right. But the core of the problem with the case we're talking about is the leap from *Griswold*, *Roe*, and *Obergefell* to *Juliana*, and that is one from negative to positive rights. By which I mean that the rights that are argued for in *Juliana* are rights to something that government has to provide you, and not a limit on government's treatment or denial of rights that you have. In American constitutional law, we simply have never done—for good reason—positive rights, because they constitute promises we cannot really make. We can't guarantee that we will be able to assure the kinds of positive rights that constitutions all over the world assure and don't deliver—like health care, minimum income, housing, or the right to a climate free of warming, as is claimed in *Juliana*.

Not only can we not promise to keep them as a practical matter, but it is not a role for the courts, because the courts have neither the authority nor the capacity to make whatever is supposed to happen actually happen. This eventually goes to the question of remedy, which I know you want to talk about later—but courts are simply not an institution philosophically intended for, or practically designed for, delivering on positive rights. And that is what is at the heart of the *Juliana* case.

ERIN RYAN: So, Jim is raising the question of separation of powers⁴³ as well as the question of positive and negative rights. And there is

42. See *supra* note 8; see also, e.g., U.S. CONST. amend. V (“[N]or shall [any person] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”); U.S. CONST. amend XIV, § 1 (“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

43. Separation of powers refers to limiting “any one branch from exercising the core functions of another. . . . [And] prevent[ing] the concentration of power and provid[ing] for checks

clearly some anxiety about what it means to go down a road where the judiciary gets to second-guess the statutory and regulatory decisions of the other branches. Irma, do you want to respond to Jim's concerns about positive versus negative rights, and the separation of powers?

IRMA RUSSELL: Well, I can start by saying that when we talk about this, it throws us into the vortex of deciding things. I think we've always been there—struggling with the idea that we can't do well enough to deliver on the Due Process Clause itself. In administrative law, we have had to interpret, with a rule of reasonableness, what "due process" is—and in a way that people in prior generations would never have considered due process. Administrative courts have the power to say "this is enough"—this low-level decision maker is not giving anything we would think of as a real hearing in a judicial setting, but it's enough. We have had to accommodate the promises that we make.

I see these kinds of promises to a livable environment in the same way. It's not a magic wand; the remedy can't make the skies around the entire globe clear and blue and non-carbon threatened—but it is of such importance that sometimes the debate about positives and negatives can be a mirage for us. So that issue of sufficiency, and I think the issue of remedy that Jim notes, is one that could bedevil us—but like other things, we live in a world where we have to do good enough.

So, the remedy in *Illinois Central* was for the court to say to the legislature something like: "You need to do your job—you just can't give away all of those rights!" That was appropriate. And as to the depth of judicial scrutiny going forward, I don't think we should suggest that the legislature cannot be trusted to do what the judiciary says they should do. We talk about (vertical) cooperative federalism between state and federal government, and this is another kind of (horizontal) cooperative federalism required between the branches of the federal government as well.

ERIN RYAN: Yes, and we'll come back to the remedy in not too long. But before we go there, Mary, I think you also wanted to weigh in on the positive rights versus negative rights issue?

MARY WOOD: Yes, just very briefly. It's important to note that the entire framing of this case focuses on the decades of affirmative fossil

and balances. *Separation of Powers – An Overview*, NAT. CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-an-overview.aspx> [<https://perma.cc/84NG-N4QH>].

fuel policy. In other words, every day the federal government is taking actions to drill and mine and offshore drill and frack for natural gas and coal and petroleum, and these are ongoing, affirmative government actions every day. So that framing is really important to the constitutional analysis, because it is not as if the government is a passive player; the government is affirmatively, every day putting children and future generations in harm's way. I wanted to add that, because it provides an important constitutional aspect to the discussion.

ERIN RYAN: It reminds me of the act/omission distinction problem that we discuss in every first-year law school class! But before we leave constitutional issues altogether, I do want to press the panel about the remarkable turn of the case in asking courts to protect substance of due process, when we generally talk unfavorably about the last time courts did that, during the *Lochner*⁴⁴ era that Jim mentioned. So I want to ask the panel, and especially those who support the plaintiff's claim: should we not worry about a return to the *Lochner* era, asking the judiciary to protect claims for substantive due process? And I open this to whoever would like to take the question.

JIM HUFFMAN: I would say that we long ago, with *Griswold v. Connecticut*, returned to the *Lochner* era. But if we're going to embrace the idea that there are fundamental rights buried in the Due Process Clause, it's kind of an open-ended search. For me, that search, as I said earlier, is better founded on the Ninth Amendment—but if we're going to do it on the Due Process Clause, I think it is about individual freedom, individual liberty. And I think that libertarian argument is very persuasive—but that is not what is being proposed, or is likely to be found, by Judge Aiken in the *Juliana* case.

IRMA RUSSELL: I'd like to jump in on a minor point. I agree with Jim about the Ninth Amendment, and what you said, Jim, about if we are going to believe there are fundamental rights there that we need to find. But I think maybe it takes on too much responsibility; we don't need to "find" them. The case and controversy method means that when they arise and are presented to the court, the court has to make a decision on them. I think that individual and collective dichotomy is a worthwhile one, and I think it's important to see that they are holding hands tightly all the time. That is my individual right. We can talk

44. *Lochner v. New York*, 198 U.S. 45, 52, 57 (1905) (holding that New York's "labor law," which stated that "no employee shall be required or permitted to work" more than 10 hours a day, "interferes with the right of contract between the employer and employees," for "[t]here is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.").

about it in freedom of expression: is it not only to protect me as an individual, but to protect our collective. And I think the same thing is true here of the right to the air commons, and to life based on a sustainable planet. (Of course, we come to standing issues when we address that individual and collective nature of those rights.)

MARY WOOD: I just wanted to highlight the court's language. Judge Aiken builds upon the *Obergefell* reasoning, saying that recognition of a fundamental right to marry was grounded in an understanding of marriage as a right underlying and supporting other recognized vital liberties. So in concluding that section on constitutional rights, she said that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the foundation of the family, a stable climate system is quite literally the foundation of society, so it flows directly from the *Obergefell* reasoning.

ERIN RYAN: All right, thank you panel. Once again, I feel like we could spend a lot of time here, but I'm going to push us forward to the third part of our structured discussion. And that is the part in which we're going to address the pragmatic and strategic issues raised by the case.

The case has raised some fascinating pragmatic issues for litigators—and maybe for the three branches of government—if the plaintiffs prevail and the remedy must be put into effect. So to begin with, let's talk about the requested remedy. It has been critiqued as ambitious. I want to ask the panel: What are the plaintiffs asking for? How would it actually work? What foreseeable problems might it create? And, what foreseeable problems might it create if we *don't* go down this difficult road? So, Rick let me turn to you first, to help us understand the remedial issues raised by the case.

RICHARD FRANK: Yes, the complaint that was filed several years ago in this case is interesting. It asks the court to grant them a number of specific remedies. Some are very broad, and dare I say somewhat amorphous; some are much more concrete. One of them, which I think is very straightforward, is that the plaintiffs are asking the court to

order the federal government to prepare a consumption-based inventory of U.S. carbon dioxide emissions.⁴⁵ Now that would be a formidable undertaking, but in terms of a requested remedy, it is conceptually, I think, relatively straightforward.

On the other hand, some other remedies are sought to enjoin the federal government from further violations of the Constitution, underlying each claim that they're making in the complaint, and some of these are pretty open-ended and fairly amorphous. Now, Judge Aiken—in her decision in 2016 denying the government's motion to dismiss—has already grappled with these issues, but in the context of standing to bring the case because under Article III of the Constitution, the plaintiffs in federal court must demonstrate that they have standing to sue. And a key element of that is what the courts have referred to as “redressability”: is the court able to fashion an appropriate remedy that will redress the claimed injuries of the plaintiffs?

Judge Aiken said that for purposes of standing analysis, and drawing on some earlier climate change cases, the plaintiffs had satisfied the burden of establishing their standing to bring the action. But she also mentioned that that's not the end of the substantive inquiry. When the case gets to the merits (and now we know that it will, at least in the district court), there are some formidable questions about whether the court is able to fashion an appropriate remedy—given the fact that, for example, the majority of greenhouse gas emissions are released by nations collectively other than the United States. China, for example, recently passed the United States as being the largest nation in terms of aggregate greenhouse gas emissions, and there's nothing that a district federal court here in the United States can do to affect those emissions from other nations.

So this is a very ambitious lawsuit in terms of the remedy and relief that it's seeking. I think it's one of the formidable challenges of this litigation, for the both the plaintiffs and for the federal court judge—even if she believes the theories being espoused by the plaintiffs—how she can fashion an appropriate and meaningful remedy.

ERIN RYAN: Yes, and she and Judge Coffin have stated that they'll take these two problems—the problem of liability and the problem of remedy—separately, for that reason. Mary, do you want to weigh in on the issue of remedies?

45. Complaint, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-CV-01517-TC).

MARY WOOD: Yes, sure. Well, as a starting point, this is not properly characterized as an environmental case. It's really a fundamental rights case, and it draws the remedies structure from institutional litigation rather than from the area that we're all probably more familiar with, which is statutory law. In statutory law, the courts give very narrow remedies; they remand to the agencies. In this case, the proposed remedy is an enforceable plan to lower carbon dioxide emissions according to the best available science.

Rick mentioned another part, which was the carbon emissions accounting, so to speak. But looking to the requested plan, this really puts the case squarely into institutional litigation, where courts play what Irma began to describe as a partner role. As a co-equal, third branch of government, the courts provide a planned, methodical, and strict forum for the parties to develop actions, and judges force the parties to move forward and make progress. In this way, the courts require the parties to grapple with a problem that is violating the fundamental rights of citizens.

So it's really not a sort of old-school, adversarial, unilateral role for the court that characterizes so many other cases. This is an administrative, institutional, very modern judicial role that takes a page more from treaty rights litigation, prison litigation, educational funding litigation, complex land-use cases, and desegregation cases, where the court will supervise the work to be done by the defendant agencies. The court won't tell the agencies what to do; the court will establish parameters that reflect the fundamental rights of citizens and then tell the agencies to do the job they really should have been doing for the last three decades.

And so that is a much different approach from statutory law enforcement. And also to build on what Irma says, the separation of powers doesn't really come into focus until you get to the remedy stage. The flexibility of that stage will allow the court to walk a very careful line, respecting the separation of powers between the three branches.

ERIN RYAN: Irma, I'm about to come to you to talk about precedent, but first, I think you wanted to weigh in with one last thing about the remedy?

IRMA RUSSELL: Yes. I would say that it's always overwhelming when we get to remedy, but I'd like to emphasize something that Mary

spoke of earlier—the affirmative acts of the government in this situation, and how comprehensively the emissions system is a combined government and private enterprise. This is not a laissez-faire system,⁴⁶ with light touch of regulation here and there. This is a co-equal contribution of government and industry together. I think the difficulties that courts will address here are the same difficulties they have addressed in other contexts involving Congress and the EPA, in striking the kinds of regulation we are looking at now.

So just as Congress delegates to EPA—these almost imponderable tasks—this is the same sort of thing, where the court says to Congress that the EPA now needs to do something counterbalancing to protect not just property rights, but also human rights. We already concede that we do that, with the balance the EPA strikes, and this is a way of saying, well, we need to do that part of it better.

ERIN RYAN: Jim, you also wanted to weigh in on remedy. Go ahead.

JIM HUFFMAN: I think that there is no way the judicial remedy can take place in this case without the judiciary exercising what are clearly executive and/or legislative functions.

Let me just give you a hypothetical example, one that I think is the kind of thing that might well flow out of this case if the plaintiffs are successful. One could reasonably say that safe neighborhoods capable of sustaining human life are fundamental to a free and ordered society—borrowing the language from the *Juliana* case—and that, therefore, I would argue there's a due process violation when government fails to assure safe neighborhoods. Well what's the remedy in that case?

The remedy is for the government to do something that it hasn't been doing before, but what is it? And is a court in a position to guide them, in the sense that Mary suggests, to supervise them to get to that end? Those questions are resource allocation questions—public resource allocation questions—which are inherently political questions. And that's why there is no judicial remedy; there are only political remedies in allocating the scarce resources of the state to solving these problems—which are very real problems, but which courts have neither the

46. A laissez-faire system refers to “a doctrine opposing governmental interference in economic affairs beyond the minimum necessary for the maintenance of peace and property rights. *Laissez-faire*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/laissez-faire> [<https://perma.cc/UXL3-LNH2>].

authority nor capacity to solve without performing what is clearly a legislative or executive function.

ERIN RYAN: Jim's comment presses us towards the next part of our conversation, which is about the ramifications for this case going forward—perhaps extending into other cases, or perhaps other cases within the atmospheric trust litigation project.

I want to talk about the ramifications and *Juliana* precedent, and really, this raises three separate questions about precedent. The first question is about the potential precedent created by *Juliana* if the plaintiffs are successful. What do we think are the prospects for *Juliana* on appeal to the Ninth Circuit, and potentially the Supreme Court?

I'm also going to flag where I'm going next so we can organize the conversation. Next, I am going to ask about the potential precedent if the plaintiffs fail in *Juliana*, and in the other sibling cases where related plaintiffs have already failed. Finally, I'm going to ask about the potential ramifications of the *Juliana* case going forward in other areas of law, and perhaps internationally.

But let's start with the question of what happens if *Juliana* succeeds at trial. What do we think are the prospects for *Juliana* on appeal to the Ninth Circuit, and potentially the Supreme Court? Rick, what do you think?

RICHARD FRANK: Well, I think the higher this case goes up the appellate ladder, the stronger case the federal government has—and conversely, the more formidable case the plaintiffs have. The Ninth Circuit has a vote in this case, and last month it issued a published decision refusing to grant a writ of mandate that would have required the district court to dismiss the case. But at the end of that decision, it said, and I'll quote here, that “some of the plaintiff's claims as currently pleaded are quite broad, and some of the remedies the plaintiffs seek may not be available as redress.”⁴⁷

There have been several recent climate change cases where the Ninth Circuit has not been terribly solicitous toward the plaintiffs' claims.

47. United States v. U.S. District Court, District of Or., D.C. No. 6:15-cv-01517-TC-AA (9th Cir. March 7, 2018), available at cdn.ca9.uscourts.gov/datastore/opinions/2018/03/07/17-71692.pdf.

The *Bellon*⁴⁸ case comes to mind—analogous to this case, it involved an environmental groups’ attempt to convince a court to direct the state of Washington to affirmatively regulate greenhouse gas emissions from five already-sited refineries—and the Ninth Circuit rejected that claim. On the other hand, there’s a recent case—the *Esplanade Properties*⁴⁹ case that Jim mentioned—where the Ninth Circuit was somewhat solicitous of a public trust claim, finding it an appropriate and effective defense to a regulatory takings claim by a private party. But I think the Ninth Circuit has already signaled—not skepticism, but the fact that it sees some formidable obstacles for the plaintiffs prevailing on the merits.

And when we talk about Supreme Court—of course, we have the *Massachusetts v. EPA*⁵⁰ decision, which I had the opportunity to work on. That was a big victory for states and environmental groups arguing that the federal government has an affirmative responsibility to address climate change. But more recently, the court has taken a somewhat narrower and more skeptical view, in cases like *American Electric Power*.⁵¹

So, going back to the trial court level, I don’t share Jim’s view that the district court result is preordained here, and that Judge Aiken has already made up her mind in her decision. She has also indicated some reservations about the plaintiffs’ ability to prevail on the merits. So it will be a very interesting trial, but I don’t think we know for sure where she’s going to wind up on the merits.

ERIN RYAN: Thanks, Rick. Irma, do you want to weigh in on the precedent? The question of what will happen if the *Juliana* plaintiffs succeed?

48. Wash. Env’tl. Council v. Bellon, 732 F.3d 1131, 1141 (9th Cir. 2013) (holding that the plaintiffs could not establish standing because they could not establish a causal connection between the failure of environmental agencies to “set and apply [reasonably available control technology] standards” and the harms they suffered).

49. Esplanade Prop., LLC v. City of Seattle, 307 F.3d 978, 987 (9th Cir. 2002) (concluding that the plaintiff’s “proposal to construct concrete pilings, driveways and houses in the navigable tidelands of Elliot Bay, an area regularly used by the public for various recreational and other activities, was inconsistent with the public trust that the State of Washington is obligated to protect”).

50. 549 U.S. 497 (2007).

51. Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011) (holding that corporations cannot be sued for greenhouse gas emissions under federal common law, because the Clean Air Act delegates the management of these emissions to EPA).

IRMA RUSSELL: Yes, in a general way. Sometimes, we say we can't grant a right because it will lead to this expansive nature, like Jim's example of safe neighborhoods. We see the Supreme Court sometimes saying something like, "we are not going to fully define a right."

But consider, from the due process area, the *Caperton* case.⁵² You all remember—that case involved a donation of millions of dollars to a judge's campaign in West Virginia, and the judge did not recuse himself from a case that involved the party who had donated these millions of dollars. The Supreme Court noted that finding a due process violation would open up the issue of how far due process extends—what about all of the other cases that would follow? But the Court said something along the lines of, "we can't decide all those now, but we can say that this one goes too far; these facts offend due process." And I think that is inherent in the way our law develops. So we all have an understandable desire to know then what follows now, but it's really not our system's way of addressing what is next.

ERIN RYAN: Well, let's talk about the second question relating to the potential precedent from this case. What if the plaintiffs fail in *Juliana*, or in the other sibling cases where related plaintiffs have already failed. What about the potential for the strategy that's being used by Our Children's Trust and the Atmospheric Trust Project to create precedent counter to what the plaintiffs are trying to accomplish? Precedent that runs counter to the hopes of the plaintiffs who brought the case to begin with? What do you think about that, Rick?

RICHARD FRANK: Well, that's always a calculated risk when you're filing and pursuing impact litigation. So certainly, there's a potential here—if the courts, particularly on appeal, reject the *Juliana* claims—that you're going to have precedent that will serve as a setback to advocates of climate change regulation. But on the other hand—and this is something I dealt with a lot when I was directing litigation in the California Attorney General's office—the fact that you may have a questionable case in terms of the outcome doesn't necessarily mean you shouldn't advance or pursue the claim. Because, like all of the cases I mentioned, starting with *Brown v. Board of Education* earlier in this presentation, those were all considered long shots when they were filed. But look how they turned out!

52. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009).

ERIN RYAN: That's true, but—if I could interject Rick, because I want to press you on this—were those cases filed, perhaps, more strategically than the approach taken in the early Atmospheric Trust cases? It was extremely compelling on a poetic level, with cases being brought in many states simultaneously, even knowing that many of those cases would almost certainly be rejected. Doesn't that stand in contrast to strategic impact litigation, in which the bringers of the litigation carefully choose the plaintiff, and carefully choose a venue where they think they might be successful? It seems like there are two different approaches to impact litigation: the carpet bomb approach and the surgical strike approach. What do you think about that?

RICHARD FRANK: Well I think that's right, but in response I would say I wouldn't equate the *Juliana* case with that first-generation strategy of the first round of atmospheric trust cases. This is a much more surgical case, and perhaps it's also different because of the fundamental role of climate science and climate scientist James Hansen in helping to frame the complaint this time. I see the *Juliana* case squarely in the tradition of earlier successful impact litigation. And conversely, while this is not the time and place for a detailed discussion, I had some substantial qualms about the filing of fifty-one actions from the same template in fifty-one jurisdictions. I didn't think that was the wisest strategy at the time, and I think the results, which, Erin, you allude to, reflected that in some ways, providing a temporary setback to the proponents of atmospheric trust theory. But I think that this case, the *Juliana* case, is a different kettle of fish altogether.

ERIN RYAN: I understand. Also, I understand that Mary wants to correct the record on how the early Atmospheric Trust cases were brought. Mary, go ahead.

MARY WOOD: Actually, James Hansen was involved in the early cases too, but he is even more involved in *Juliana*, where he is serving as the plaintiff guardian of future generations, and he is now able to serve as an expert against the federal government (which he could not do when he headed NASA's Goddard Institute).

I should also note that the initial suite of legal proceedings consisted primarily of administrative petitions, as well as a select group of initial cases filed in state court. In the initial launch of Atmospheric Trust Litigation, there were about seven or eight state cases, and these were very strategic, with lawyers filing cases in only states that had solid public trust doctrines. So the initial strategy was not to file lawsuits in every single state, or even most states. What we are talking about

is administrative petitions for the most part, and then as those were denied—because agencies would not enter into rule-making for carbon emissions reduction—then, in a few states with those denials, more lawsuits were filed. One example is a recent lawsuit filed right there in Florida.

I want to say, too, that with respect to the precedent, I think the trial will have an enormous impact on the understanding of climate science generally around the world. And we really can't predict what happens on appeal until we find out what comes out at trial. In other words, the goal of the plaintiffs is to tell a story about the other two branches of government putting children in danger, knowing full well the consequences of this fossil fuel policy. And I think the framing of that will really determine the chances on appeal, as we'll see courts shepherding the remedy side of the equation. If the country follows the model of treaty rights litigation in this region, providing a productive forum where the parties can come together, then I think chances for a successful appeal are very great.

RICHARD FRANK: And if I can jump in, I would echo Mary's statement. I mean, there are a number of reasons to file litigation, and public education is one of them. I also agree that the trial itself will be very revealing, and the record that will be developed will be very important. And I dare say that in that context, the plaintiffs have a far stronger case than the federal government. So it provides a great opportunity—and a very public, very heavily reported opportunity—to develop before the court of public opinion, as well as before Judge Aiken, the existential peril of climate change.

ERIN RYAN: I want to follow up Mary's point, to bring me to the last formal question I have for the panel. And that's about the potential ramifications of the *Juliana* case for other cases going forward internationally, as well as domestically. So Mary, you mentioned the impact of the case internationally. Tell us about that.

MARY WOOD: Well, Jim May and Erin Daly of the Dignity Rights Project of Widener University⁵³ have really focused on this. Lawyers in countries around the world are looking at this case, and there is

53. "The Dignity Rights Project works in tandem with legal, academic, non-profit, community-based organizations in all parts of the world to advance the human right to dignity" through education, advocacy, and action." *Dignity Rights Project: Dignity in Action*, WIDENER UNIVERSITY: DELAWARE LAW SCHOOL, <https://delawarelaw.widener.edu/prospective-students/jd-program/jd-academics/signature-programs/dignity-rights-project/> [https://perma.cc/6CBQ-9NAN].

interest in bringing cases patterned after *Juliana* to fit within those unique legal systems that exist elsewhere. What is happening is an inspiration, sparked by *Juliana*, to bring climate cases against government officials.

Also, *Juliana* suggests a constitutional right to a stable climate system as part of a personal liberty, enforceable within our U.S. Constitution, which does not expressly address environmental rights. So legal strategists in other countries are formulating arguments for a similar right and infusing public trust logic in their constitutions, particularly through provisions containing an express right to life and healthy environment. As we know, many constitutions across the world have express environmental rights, even though the United States lacks them. Thus, the right to a stable climate system in the U.S. must be tied to the fundamental due process right, or other basic rights, and/or the public trust doctrine.

Not only is *Juliana* providing the template for cases in other countries, but the climate science that comes out in a methodical way in *Juliana*, under evidentiary standards in this case, will save many other climate litigants from reinventing the wheel in their cases. The *Juliana* case presents a huge opportunity to show where we sit with respect to the planetary climate system, and the trial record will be formalized and available to the public. And, in the age of internet, I imagine that is going to be used, quite profoundly, to pollinate other actions worldwide.

ERIN RYAN: It is also an interesting moment because the international influence of *Juliana*'s "rights of the people approach"—trying to protect climate resources as a fundamental right of the people—is emerging at the same time as a contrasting international approach to protecting natural resources, the "rights of nature approach"—the approach taken in other countries like New Zealand, Ecuador, and Bolivia. I don't have an answer to this question except to raise it, because it raises an interesting question about which approach is more productive. It may just be path-dependent on the legal system within which these claims originate.

But at this point, I want to open the conversation up to the full panel. I want to invite our panelists either to continue the conversation we're having right now, or to raise an additional question we haven't asked previously, or to ask a specific follow up question to any of the other panelists. Let me open the floor. Do we have any additional points that people want to make?

IRMA RUSSELL: This is Irma. Erin, I would like to make a simple point in relation to the rights of nature and individual human rights. I don't see them as compromising each other; I see the potential for interaction in a positive and protective way.

ERIN RYAN: Thank you, Irma.

RICHARD FRANK: I had one question for Jim, following up on his early remarks. Do you consider climate change in general, and the *Juliana* claims in particular, to constitute a political non-justiciable question in the first place?

JIM HUFFMAN: Yes, I do.

RICHARD FRANK: Interesting.

JIM HUFFMAN: For reasons that I partially explained, I think that the remedy, whatever the remedy is, is an inherently political remedy—because the kinds of decisions that legislatures make, whether we like them or not, invariably involve allocation of scarce resources. So whatever a court might order a legislature or an executive branch to do, even if it just says “do something,” it's got to take the place of something else they're doing, or else increase the tax levels on the population.

And to me, that is rooted firmly in the distinction between negative and positive rights. The enforcement of negative rights costs the government nothing, and therefore the taxpayers nothing. The enforcement of positive rights costs the government and the taxpayers something, and that's a political decision as to how public resources should be allocated.

RICHARD FRANK: Well I don't want to detract from the broader conversation, but let me just register the fact that I disagree, as that argument could conceivably apply to bar any number of environmental complaints and concerns from adjudication in the courts.

MARY WOOD: I might jump in. Returning to the remedy question again, while this discussion has focused quite a bit on the remedy as creating a plan, the other side of a remedy is what I call a backstop injunction, which is affirmatively enjoining the harm that is immediate. And, of course, that is what courts do all the time—they enjoin the ongoing harm until there's a plan to abate that harm.

So for example, the Jordan Cove project, a liquefied natural gas pipeline and export project, is part of the complaint. I can imagine a backstop injunction not allowing that to go forward until the government has a plan to reduce carbon dioxide emissions. My question to the panel is—what do you see as the role for backstop injunctions in this litigation?

RICHARD FRANK: Well, I think there's a scope problem here. You've got the one project that you mentioned, which is contained in the complaint, and then you've got the fossil fuel industry interveners, who conceivably could be bound by a broad injunction. But there are a whole lot of other private actors, both here in the United States and otherwise, that are far beyond this court's jurisdiction to frame and impose any remedy.

MARY WOOD: To clarify, the interveners actually backed out. The fossil fuel industry did intervene *en masse* early on in the case; they were allowed intervention status and they participated quite substantially. But when it came time for discovery, around the same time that they were being served with requests for admissions, they all asked the court to be let out of the case—and the court approved that. So now the case is just between the youth plaintiffs and the Trump administration defendants. There are actually no fossil fuel interveners remaining.

RICHARD FRANK: Yes, and that's interesting. Because I think that probably was a smart, strategic route—removing the fossil fuel industry, given the potential ramifications of a ruling favorable to the plaintiff—so I'm not surprised. But that further highlights the limits of the remedy that can be reasonably invoked, even if the district judge is persuaded by the *Juliana* plaintiff's claim on the merits.

ERIN RYAN: I have a question for you, Mary. Earlier, Jim analogized to the *Juliana* claim for violations of substantive due process. Jim—I hope I'm going to correctly quote you—I think you said that if we allow this claim to go forward, it would also allow a claim for a positive right to a safe neighborhood, and that *not* providing a safe neighborhood could then be a violation of substantive due process. Mary, I know you had a point you wanted to make about that. I'm curious—is Jim right? Would allowing the plaintiffs to go forward in *Juliana*, or would granting the relief that the plaintiffs are seeking by finding liability for them, open up a claim like that? Would that be the right thing to do?

MARY WOOD: I certainly don't think the *Juliana* case would open the door to any "safe neighborhoods" claim, because it uniquely focuses on the U.S. government's affirmative fossil fuel policies, and the existential threat they pose to all of humanity.

But what I wanted to point out was that this case does have two different sets of claims. And for the public trust principle, although I know Jim would disagree with this, what we're dealing with is just basic asset management of public natural common wealth, and that management is covered by fiduciary obligations of protection. So when we look at the atmosphere, we do have definable, scientific standards for bringing the atmosphere back into balance. I just want to remind people that the public trust claim is discernible, because it has these standards. Not to say that the other does not—I'm just speaking to the public trust—but the trust governs the management of natural resources.

ERIN RYAN: So that's one way of differentiating them. Let me put the same question to you, Irma. Is that enough to resolve the issue, or should there be an actionable claim to a safe neighborhood as well?

IRMA RUSSELL: Well, you know, I think that my "let's wait and see" approach is relevant here. The concern that allowing one will necessarily open the floodgates for other claims, you know, I think that's perfectly appropriate. We have claims, even now, some of which might seem humorous to people. There have been claims that—I think this is from California—allowing neighbors to plant flowers in their front yard and not vegetables is a due process violation.

I just think that's what our courts are there for. They are the masters of line drawing. And I think we all would like to have clearer, greater certainty, but perhaps one of the blessings of our system is the uncertainty. It tells us, "try to work this out at the political level," and only use judicial remedies in the dire cases where the judiciary sees a need to protect.

I did want to add one thing; maybe it's a bit of a gloomy note. I think we pay for everything, whether it's for vindicating a negative or positive right. There are costs to determining due process of compensation for takings and costs to depriving someone of life. We have a lot of costs that go along with capital punishment. So, I think there's no such thing as a free lunch, either in nature or in the human systems that we create. In my view, it's just choosing which ones are foundational.

ERIN RYAN: Thank you Irma. Does anybody else have any questions or points that we feel should be raised before we finish?

JIM HUFFMAN: This is Jim. Can I just say a couple of things?

ERIN RYAN: Go ahead.

JIM HUFFMAN: One, I think the argument that Irma just put forward—about the courts as an available entity for hearing complaints that haven't been resolved by the political process—is really a mistaken idea of what the courts are intended to be in our constitutional structure, and the role that they can play in a way consistent with the fundamental theories of popular sovereignty on which our government is based. It's not uncommon for people to argue that because their view hasn't prevailed in the political process, their rights have been violated.

But failure in the political process is inherent to the game of politics. I have always appreciated Mary's forthright statements, here to some extent and elsewhere, that what we really face here is a legislative and executive failure—and that something has got to be done, and the courts are the place we're going to look to get it done.

That's a viable view, I suppose, but I don't think it's one that's consistent with the underlying premise of popular sovereignty in a democratic republic. The decisions that are taken by our representatives are what we live with until we persuade them differently, or until the next election. It has long been a central strategy in the environmental movement, and many other movements, to go to the courts and try to get legislative and executive actions reversed. It has often been a successful approach, but it requires giving up on the fundamental principle of popular sovereignty. Do we really want to turn policy decisions over to unelected judges when we think the legislature and executive have made the wrong decisions?

ERIN RYAN: Mary?

MARY WOOD: Yes, well I just want to respond to that briefly. I think Irma has a response as well. But I guess I would take issue with Jim's view of the courts as a sort of wallflower. There's a difference between separation of powers and going to a two-branch system of government. And I don't really see, in the model Jim just presented, any role for the courts in protecting fundamental rights. And yet we do know that

that's what the founders intended this third branch to be—the guardian of our constitutional rights.

Also, you don't have a public trust without enforcement. You would have unfettered tyranny on the part of the other two branches without the courts' role. A judicial enforcement role is what the separation of powers really means within a three-branch system of government. What the court's challenge will be, of course, in the remedy phase of this case, is to make the other branches do their job, which they have been neglecting and ignoring, and not to usurp their role. This judicial supervision role frames the entire case.

And I guess I would just end by stating my view of precedent. The function of precedent differs from what I think Jim has propounded, in the sense that the rule of law, to me, is not the rule of law encased by the eighteenth century law of England. It is taking the logic of precedent—I'm talking in particular about the public trust—and applying that logic to the circumstances of our time. And there are scores of court opinions that say that this is exactly what the public trust is meant to do—to be flexible and respond to the new circumstances of our time.

ERIN RYAN: Irma?

IRMA RUSSELL: Yes, my point may be very similar to what Mary is saying. That is, this idea of protection—anti-majoritarian protections—of the Constitution has always been there. So I don't think it's a failure of our political process. And perhaps that's the genius is this rock-paper-scissors approach that we have in the Constitution, because individual institutions of government will swerve in different directions, and managing that is a challenge. We are sort of changing the tires as we speed down the highway, and in my view, that's the way the framers knew—and then the amenders knew—that it would be.

ERIN RYAN: Well, that is probably a good point for us to end our conversation on—although surely this conversation will continue to go on. Not only with this case, but I presume with many others that will follow, taking inspiration from these ideas. And I think everyone on the panel has contributed valiantly to helping us understand the implications of the problems and the promise of these ideas. So on behalf of the *FSU Law Review*, I want to thank all of you for participating. And we will look forward to seeing what comes next. Thanks!

COLLECTIVELY: Thank you.