

Using the “Public Trust” to frame “Break Free From Fossil Fuels” Actions

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Thousands of us in the climate movement will engage in civil disobedience for “Break Free from Fossil Fuels” and other climate actions. We may be arrested and face legal consequences.

What if we defined ourselves – to the movement, the public, and the courts – not as law-breakers but as law-enforcers trying to halt governments and corporations from committing the greatest crime in human history?

Fundamental principles embodied in the laws and constitutions of countries around the world provide strong bases for such a claim. Basic human and constitutional rights include the unalienable rights to life and liberty. Under the “public trust doctrine,” governments must manage the vital natural resources on which human well-being depends for the benefit of all present and future generations. Governments have no right to authorize their destruction to the detriment of constitutional rights to life, **and** liberty. These legal rights can serve as an important frame for the public messaging and legal strategy of climate-protecting civil disobedience.

Can we “flip the script” in our civil disobedience or nonviolent direct actions, making it clear that the fossil fuel industry and the government that does their bidding are unlawful, and we are upholding the constitution and the public trust? This could help legitimize our actions in the eye of the public and mainstream participation, massively increasing both participation and support.

A working group of activists and organizers involved in the “Break Free from Fossil Fuels” mobilization has been working on a framework for thinking through what a “Public Trust” framework for civil disobedience might look like.

The legal “intervention” two weeks ago of the entire fossil fuel and manufacturing industry, joining the government as defendants against a constitutional and public trust lawsuit of 21 youth in Oregon, shows that these constitutional principles and the public trust doctrine, in the words of Julia Olson, attorney for the youth and Our Children’s Trust, “. . . is a momentous threat to fossil fuel companies.”

We can say loud and clear: The people of the world have a right, indeed a duty, to demand that our governments protect the Public Trust we own in common — the earth's climate, in order to exercise our constitutional rights to life **and** liberty.

What is the “Public Trust Doctrine”?

The governments who permit and protect climate destruction may rule the world, but they do not own the world. Under many legal systems the earth's shared natural resources belong to the world's people and their posterity, as the common heritage of humanity.

Governments have long served as trustees for rights held in common by the people — specifically, rights to the public natural resources on which we all depend. In American law, this role is defined by the “public trust doctrine,” under which our federal and state governments serve as trustees of natural resources on behalf of the present and future generations of its citizens. As trustee, the government has a strict “fiduciary duty” to the owners — the citizen beneficiaries. This legal duty requires government officials to act in the citizens' interest, with “the highest duty of care.” Our officials have no legal right to harm the public trust for the benefit a corporation or other private interest — no matter how politically powerful it may be.

This fundamental principle is embodied in the laws and constitutions of countries around the world. It was codified in the Institutes of Justinian, issued by the Roman Emperor in 535 A.D., which stated, “By the law of nature these things are common to mankind — the air, running water, the sea and consequently the shores of the sea.”

Use of the Public Trust Doctrine for climate protection has been pioneered by young people represented by Our Children's Trust, who have brought lawsuits or rulemaking petitions in every U.S. state, against the federal government, and in countries around the world, to require governments to act on their public trust duty to protect the climate, and to protect fundamental constitutional rights. Xiuhtezcatl Martinez, one of the lead youth plaintiffs in the federal case, and Youth Director of Earth Guardians, another plaintiff in the federal case, said, “The Federal government has been making decisions in the best interest of multinational corporations and their profits, but not in the best interest of my generation and those to come. Instead of changing their business model to meet the scientific reality of climate change, these companies are demanding we adapt to an uninhabitable world that supports their profits. When you compare the two, I think it's clear that our right to clean air and a healthy atmosphere, is more important than their ‘need’ to make money off destroying our future.”

Courts have begun to adopt the principles raised by Our Children's Trust in these cases. In 2015, Washington and New Mexico both ruled that the atmosphere is a constitutionally protected public trust resource entitled to state protection. This expansion of the public trust doctrine to the atmosphere, as was specifically done in each case, is ground breaking. Additionally, both courts found constitutional

underpinnings to that public trust responsibility of the state governments. The WA decision compels the state, based on constitutional principles, to conduct rulemaking that establishes more aggressive greenhouse gas emission requirements, in accordance with those constitutional and public trust responsibilities. The NM decision sets a similar precedent against which future climate action by the state of New Mexico will be gauged.

In November, attorneys for American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and The National Association of Manufacturers, filed a motion to “intervene” and join forces with the government as co-defendants in the Federal Constitutional and Public Trust lawsuit of Our Children’s Trust. They argued that, “If Plaintiffs succeed in this Court ordering the elimination or massive reduction of U.S. conventional fuel consumption and manufacturing processes that emit GHGs beyond existing federal and other regulations, the members of each of the Proposed Intervenor-Defendants will be harmed.”

“The fossil fuel industry would not want to be in court unless it understood the significance of our case,” said Philip Gregory, attorney for the youth. “This litigation is a momentous threat to fossil fuel companies. They are determined to join the federal government to defeat the constitutional claims asserted by these youth Plaintiffs. The fossil fuel industry and the federal government lining up against 21 young citizens. That shows you what is at stake here.”

On January 15, after Magistrate Judge Thomas Coffin of the Federal District Court in Oregon accepted the fossil fuel and manufacturing industries’ move to join in opposing the lawsuit, the Global Catholic Climate Movement (GCCM) and the Leadership Council of Women Religious (LCWR) responded by filing an amicus curiae brief in support of the constitutional climate change lawsuit brought by the 21 young plaintiffs. Tomas Insua, Global Coordinator with the GCCM said, “Laudato Si’ reminds us that ‘Intergenerational solidarity is not optional, but rather a basic question of justice, since the world we have received also belongs to those who will follow us.’ By supporting this initiative, we join our voices with the young plaintiffs who are calling for climate justice and the protection of the atmosphere for generations to come.”

You might have heard ([on this week’s Democracy Now!](#)) about the recent public trust legal victory of young people suing the federal government and the fossil fuel industry in Oregon, in [what Rolling Stone said could be the “trial of the Millennium”](#) on climate change.

The Public Trust Doctrine is complementary to Native sovereignty and land rights. In an essay in the American Indian Law Journal, Mary Christina Wood writes, “Tribes have managed and protected resources on this land for millennia, characteristically safeguarding natural bounty for future generations. Within a trust framework, tribes can assert their standing as co-tenants and co-trustees of the atmosphere, just as they do with a shared fishery. There is no more paramount, pervasive, or urgent environmental

threat facing tribes than climate change. Tribes could step into a vacuum of climate leadership by announcing the fiduciary obligation to protect the atmosphere and call for compliance with the six percent annual reduction on the part of all states and the federal government.”

The right of the people to demand that government protect the Public Trust expresses a common sense constitutionalism. In the United States, we enjoy fundamental constitutional rights to life **and** liberty. Government failure to protect the public trust, and governments’ complicity in the destruction of the atmospheric resource and the natural conditions on which human life depends, compromises those constitutional rights in the near term and extinguishes those rights in the longer term.

How can a Constitutional and Public Trust frame help the movement?

Claims that government actions are illegal and unconstitutional have played an important role in empowering social movements. They strengthen participants by lending a sense of clarity that they are performing a public duty. And they strengthen a movement’s appeal to the broader society by presenting action not as wanton law-breaking, but as an effort to rectify governments and institutions that are themselves in violation of the law.

For the civil rights movement, the U.S. Constitution’s guarantee of equal rights meant that those engaged in sit-ins and freedom rides were not criminals, but rather upholders of constitutional law — even if southern sheriffs threw them in jail. For the activists of Solidarity, the nonviolent revolution that overthrew Communism in Poland was not criminal sedition, but an effort to implement the international human and labor rights laws ratified by their own government.

Constitutional Public Trust principles make it possible for the climate protection movement to turn the tables on the governments that purport to represent the world’s people and to have the authority to rule the world. They stand for the proposition that governments do not have the right to destroy the climate — and that the people have the right to stop them when they do so.

Governments have no more right to authorize the emission of greenhouse gases that destroy the climate than the trust officers of a bank have to loot the assets placed under their care. The people of the world have a right to our common natural resources. And we have a right, if necessary, to protect our common assets against those who would destroy them.

The legal obligation of governments to protect fundamental rights and the public trust can play a role similar to governments’ obligation to protect human rights and eschew war crimes. Those who perpetrate climate change, and those who allow them to do so, should not be able to claim that the law is on their side. Those who blockade coal-fired power plants or sit down at the White House to protest fossil fuel pipelines can — and should — insist that they are exercising their fundamental constitutional rights to life and

liberty and their responsibility to protect the atmospheric commons they own along with all of present and future humankind. Climate protesters can proudly proclaim that they are actually climate protectors, upholding the law embedded in the Public Trust.

The constitutional duty of governments to protect the Public Trust, and the right of the people to life, liberty and property, can be valuable tools for the climate movement. Indeed, it could play much the same role the U.S. Constitution's right to equality played for the civil rights movement and the Polish government's legal commitment to human and labor rights played for Solidarity.