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### January 10, 2017: The Public Trust Litigation

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Title: The Public Trust Litigation

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1/10/2017—the last session I was able to attend in San Francisco at the AALS meeting was the Hot Topic Program Juliana v Atmospheric Trust Litigation. The session was organized by Professor Mary Wood of the University of Oregon School of Law. Professor Wood pioneered the principles of the public trust litigation movement that is now engendering lawsuits around the world.

The premise of this line of litigation is that the climate is constitutive of a portion of the public trust, which is a common law concept concerning the government's responsibility to protect the citizenry by maintaining public natural resources. Global warming seriously threatens the public trust for future generations. The idea is that the courts can order the government to draft the plan, at least, to protect the climate.

Public trust litigation is felt to be necessary because Congress has so abdicated its responsibility to protect the people and generations yet unborn. There is no longer any time to wait because the danger to people in the future from global warming is now so great.

When Professor Wood was at Duquesne University last year, she and I had an email exchange in which I voice my serious hesitation in allowing courts such a central role simply because the legislature has not adopted certain programs felt to be necessary. The premise of the public litigation movement seems to be that a democratic response is simply impossible. But if that is the case, because of big money or for whatever reason, democracy is at an end. That seems a result only a little less dire than global warming itself. So serious was my reservation years ago that I actually abandoned the position I had taken about a fundamental right to a healthy environment in an earlier Law Review article.

I have not changed my mind about the antidemocratic nature of this litigation. However, after listening to Professor Wood, I have tempered my views. There are two reasons that this. First of all, Professor Wood finds herself in essentially the same place that FDR did in trying to get America ready for war despite the isolationist mood of the electorate. FDR simply did whatever he needed to do in order to get the country ready, knowing that later, when the country finally was ready for war, might have been too late. History has just FDR's actions rather kindly, I believe.

The second reason that I no longer oppose this kind of litigation, despite its antidemocratic character, is that, after all, whatever the courts find, the courts will be unable to force Congress literally to do anything at all. So there is no chance of an actually antidemocratic result. On the other hand, the finding by a federal judge that global warming is real, that it is caused by humans, that it will be immensely harmful and that the Congress is doing nothing about it, would in and of itself change public opinion on the matter of global warming. So the courts could be part of a genuinely democratic turn in fighting global warming. But that could not happen unless litigation were going on. So I guess I have to offer Professor Wood an apology.