JULIANA V. UNITED STATES: CLIMATE CHANGE, YOUTH ACTIVSM, AND THE LAW

by

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The youngest people alive today and all future generations have something in common: they will suffer the greatest consequences of climate change, yet they have no voice in the political process with which to defend themselves. In response to political inaction, motivated young people take their activism to the courts or to the streets. This thesis examines the growing movements of youth-oriented climate litigation and activism that both appear reframe climate as an issue of justice. Specifically, I focus on *Juliana v. United States*, the 2015 lawsuit coordinated by Our Children's Trust in which 21 youth plaintiffs accuse the federal government of willfully violating their fundamental rights, in order to show how a lawsuit can frame its legal arguments to make a compelling argument even beyond the courtroom. This research contributes to the fields of climate law and activism by drawing connections from litigators to activists to demonstrate how *Juliana* can be viewed as another aspect of the growing wave of youth-led climate activism.

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Introduction

On October 29th, 2018, a crowd braves the rain to gather in front of the Eugene, Oregon federal courthouse. A banner announces the even to be in support of the "Trial of the Century." At the microphone, 11-year-old Levi Draheim leads the crowd in a chant: "though our leaders are silent, let the youth be heard" (Draheim, 2018, 0:18). Eighteen-year-old Journey Zephier invokes the Due Process clause of the Constitution to warn that "climate change threatens the life, liberty, and property of not just my generation, but everyone" (Zephier, 2018, 22:10). These are just two of the 21 youth plaintiffs who partnered with non-profit Our Children's Trust (OCT) in 2015 to file a lawsuit called *Juliana v. United States*. As the courts (and the world) would come to realize, this was "no ordinary lawsuit" (*Juliana v. United States*, 2016, 3).

Also known as Youth v. Gov, the case uses its novel legal arguments to tell a story that resonates with its audience. Instead of holding a specific polluter accountable or objecting to weak enforcement by the EPA, *Juliana* aims higher and names the federal government as defendant. The legal arguments for climate protection are also new. *Juliana* makes 5th Amendment Due Process and Equal Protection arguments to accuse the government of intentionally violating the youth plaintiffs' rights to life, liberty, and property—as well as their newly defined right to a stable climate. *Juliana* elevates climate to the ranks of historic civil rights., invoking cases like *Brown v. Board of Education (1954)*, all while shifting the climate conversation away from atmosphere and data and towards people and justice. The justice issue in question is intergenerational, which *Juliana* incorporates by including a representative for "future generations" among the plaintiffs. *Juliana* further sets up the government as having

breached a duty by invoking the Public Trust Doctrine (PTD). The PTD dates back beyond United States common law to the Roman Empire and requires stewardship of the natural resources upon which society depends for its continued existence. The principle establishes shared natural resources such as air, water, and wildlife as assets that must be protected by the trustee: in this case, the United States government.

Juliana's framing of the climate crisis through fundamental rights language and the obligation of the PTD combines to create a compelling narrative, one that has persisted in court despite repeated government opposition. But the reception from those courts has been mixed. Most lawsuits are either dismissed or sent to trial, but *Juliana* has bounced between courts through three different presidential administrations (see Table 1 for timeline). So, why do the youth plaintiffs rest their hopes on a novel claim with slim chances of persuading typically restrained judges to grant them favorable rulings? One potential answer is that victory in court is not the only way *Juliana* achieves its goals. Even beyond dissenting opinions that support the plaintiffs, which OCT senior litigator Andrea Rodgers considers "part of the success column," *Juliana* may benefit from its power to grab attention and shape the global climate change narrative (Drugman, 2020).

Juliana is not alone in reframing climate in the court of public opinion. Young people across the world face the same challenge as the *Juliana* plaintiffs: they will be most impacted by climate change in their lifetimes, yet they have no voice in the political process to demand change. Instead of heading to court, many of these young people take to the streets to spread their message. And what is that message? For some

activists like Swedish teenager Greta Thunberg who has become the movement's reluctant figurehead, it is remarkably similar to that of *Juliana* in its priorities.

Many legal scholars have written about the legal basis of *Juliana* and countless journalists cover the growing wave of youth-led climate activism. But less research links the two. When law and activism are primarily evaluated separately, this creates a gap that misses how a lawsuit can function as activism. The goal of this thesis is to position *Juliana* within the larger fields of law and activism in a way that could expand the measure for success in the case. By viewing *Juliana* within the larger legal and activist contexts, we will see how the lawsuit represents just one dimension of the current climate activist movement which prioritizes human rights rather than the intrinsic value of coral reefs, shrinking forests, or melting glaciers.

Date	Event
August, 2015	*Juliana v. United* States filed in the Eugene District Court.
November, 2015	Federal government files motion to dismiss, arguing that the plaintiffs lacked standing and failed to make a legitimate constitutional or public trust claim.
November, 2016	District Judge Aiken denies motion to dismiss and publishes opinion in favor of the plaintiffs. Aiken grants standing and largely accepts the public trust and constitutional claims.
March, 2017	Defendants file a motion asking for interlocutory appeal, meaning that the case would be reviewed by the Appellate Court before discovery or trial could take place.
June, 2017	District court denies interlocutory appeal, the following day the government files a writ of mandamus asking the Ninth Circuit to stay the proceedings.
December, 2017	Oral arguments before the Ninth Circuit.
March, 2018	Ninth Circuit declines to intervene, allowing the case to proceed.
July, 2018	Supreme Court denies government's request to stay the case.
October, 2018	District Court Judge Aiken hears oral arguments on another motion from the defendants. In October, she dismisses President Trump from the case, and states that the youth plaintiffs are not a suspect class (though

	their Equal Protection claim can proceed based on the alleged fundamental rights violation).
October, 2018	Government files a second writ of mandamus and application for a stay with the Supreme Court. The Supreme Court denies the application, though the trial start date is delayed.
November, 2018	Government files a third petition for a writ of mandamus and motion for a stay. The case is certified for interlocutory appeal.
June, 2019	Oral arguments before the Ninth Circuit, lead attorney for the plaintiffs Julia Olson argues that the case should proceed. Assistant Attorney General Jeffrey Clark argues that the plaintiffs lack standing, that the plaintiffs have turned to the wrong branch, and that the plaintiffs should have relied on the Administrative Procedures Act (APA), which concerns agency action.
January, 2020	Ninth Circuit Court of Appeals issues an opinion dismissing the case based on the determination that they were unable to fulfill the plaintiffs' requested redress of a Climate Recovery Plan.
March, 2020	Plaintiffs file a petition for the case to be heard by a new panel with 11 Ninth Circuit judges.
February, 2021	The Ninth Circuit declines to rehear the case.
March, 2021	Plaintiffs file a motion to amend their initial complaint to remove the Climate Recovery aspect of the remedy request. The requested remedy would instead include only the declaration that the plaintiffs' rights were violated.
May, 2021	Judge Aiken schedules oral arguments and orders both sides to convene for settlement talks.

Table 1: Timeline of events in *Juliana v. United States*, including important petitions, decisions, and turnings points in the case, but not every single filing by either side. Sources: Our Children's Trust and Climate Case Charts

Methods

The research for this thesis was categorized into two broad areas: climate litigation and youth-led activism on climate. I explored these topics through legal cases, news coverage, primary sources like speeches and Congressional testimony, and literature bridging the gap between the two areas. My research strategy fell into the broad category of "law and." This means that the first part of the research was purely a legal analysis (of older environmental law, *Juliana*, and post-2015 climate cases). The "and" refers to the research extending beyond the cases and law review articles to scholarship that links youth-led climate litigation and activism.

I selected the pre-*Juliana* cases based on whether they established a precedent still in place or if they represented a major shift in the climate litigation field. The

purpose of reading these cases was to construct a picture of the legal landscape from which *Juliana* emerged and to determine if there was a contrast between these older cases and OCT's Atmospheric Trust Litigation campaign. To investigate *Juliana* itself, I relied on press releases, written and media coverage, and the timeline of major court orders from the OCT website. My goal in reading about *Juliana* beyond the court documents was to see how OCT framed and communicated their strategy to a non-legal audience. Finally, within the legal category, I searched for cases that either directly cited *Juliana* or attempted the ATL strategy by invoking the PTD or constitutional violations regarding climate protection. After finding these cases on Westlaw or Climate Case Charts, I filled out a questionnaire to determine how each case's approach to climate protection compared to *Juliana's*, how the case fared in court, and what the case as a whole might mean for the trajectory of climate litigation.

The goal of this thesis was not to analyze the entire field of climate change activism, so the first step of my activism research had to be narrowing down which figures, organizations, or campaigns were relevant to me. The selection criteria I employed were qualitative, based either on prominence in the movement or closeness to *Juliana*. I looked to speeches, news and media coverage, and the writings of the selected activists in order to determine what the key themes of their message were, what motivated them, and what their message might mean in comparison to *Juliana*.

Section I: Legal Foundations of Climate Rights

Research on climate litigation spans several fields, from narrow analyses of legal procedure (Cooney 2007) to interdisciplinary interactions between law and legislation, media, or public opinion (Gloppen and St. Clair 2013). One study by law professors Jacqueline Peel and Hari M. Osofsky dedicated to identifying trends in the field suggests that the diversity of literature is "a reflection of the breadth of climate change itself" (Peel and Osofsky 2020). The most important trend for this thesis is the "human rights turn" emerging in climate litigation (Setzer and Vanhala 2019, Peel and Osofsky 2020). To understand this trend, we will consider the legal foundations that comprise climate change litigation starting with the theory of using the constitution to protect future generations, then moving to the application via Atmospheric Trust Litigation (ATL). Finally, this section will address the question of whether climate belongs in the courts at all.

Constitutional Protections for Future Generations

As is true of several constitutional protections in place today, the right to a stable climate (or even to breathe air free from harmful pollution) is not in the language of the Constitution. But that does not mean that this right does not exist. Alternatively, *Juliana's* argument may fall into the category of *implicit* rights that can be identified and safeguarded by the courts. The idea of conserving the environment with either existing constitutional mechanisms or with new additions is now new. In this section, legal scholars will provide the crucial background of intergenerational justice, which is key to a case like *Juliana* that aims to level the field between adults in power, youth with political voice, and often-overlooked future generations.

The evolution of the right to privacy exemplifies how a fundamental right can be recognized by the courts. While an explicit right to privacy was not enumerated in the text of the Constitution, the Supreme Court reasoned in the case *Griswold v. Connecticut (1965)* that the concept was implied in the other protections cemented in the document. In *Griswold*, the Supreme Court looked back to the time of the founders and inferred that they clearly meant for a zone of privacy free from government intervention to exist. In a modern example, the Supreme Court determined in *Obergefell v. Hodges (2015)* that gay marriage was "implicit in the concept of ordered liberty." Oregon District Court Judge Ann Aiken later quoted *Obergefell* when ruling on *Juliana* to proclaim that "the identification and protection of fundamental rights…required courts to exercise *reasoned* judgment in identifying interests of the person so fundamental that the State must accord them respect" (*Obergefell v. Hodges,* 2015). There is even an entire amendment dedicated to ensuring that "the enumeration" of certain rights within the Constitution "shall not be construed to deny or disparage others retained by the people" (U.S. Const. amend. IX). Yet the 9th Amendment is rarely treated as a viable basis for a lawsuit. These examples lead to the questions: what constitutes a fundamental right? How can a stable climate, foundational to humanity's continued existence, not be implicit in ordered liberty? Considering the judicial history of identifying previously unrecognized constitutional protections when novel issues arise, the legal scholars in this section will demonstrate how it may not be so radical to consider the possibility that the right to a stable climate existed all along.

Scholars who propose constitutional safeguards for young people and future generations against climate change rely on sources including the Posterity Clause in the

preamble to the Constitution, the values of the Founders, or broader philosophies about what we owe to each other. One of the most influential texts defining intergenerational justice and public trusts is *In Fairness to Future Generations*, a 1988 book by Georgetown Law Professor Edith Brown Weiss. In a prior law review article, "The Planetary Trust: Conservation and Intergenerational Equity," Weiss explains that "the human species holds the natural and cultural resources of the planet in a trust for all generations" (Weiss, 1984, 498). Thinking about the planet in terms of fiduciary responsibility means that future generations are the beneficiaries, while present generations serve as both beneficiary and trustee. This dual role is important because Weiss is not suggesting that present generations should not extract resources for their own benefit during their lifetimes. Instead, she merely argues that their usage should not supersede the freedom of future generations to do the same. Weiss' prescribed obligation for the trustee involves preserving "the diversity of the resource base and to pass the planet to future generations in no worse condition that it receives it" (Weiss, 1984, 500). While this may sound like a difficult task, concern for future generations can be seen throughout politics, religion, and culture for eons. There is, in fact, "nearly universal recognition and acceptance among peoples" of this obligation (Weiss, 1984, 500). Weiss treats the creation of institutions, artwork, and technology that will outlive the current generation as evidence that "human beings appear to have a basic physiological need to transcend the self by relating to the future" (Weiss 1984, 500). Why else would we plant trees that take a century to grow?

But a shared concern, or even a moral obligation, cannot be made into a commitment unless the duties become legally enforceable. *Juliana* advocates for that

enforceability on the basis that the government has known about the impending changing climate for decades and ignored it. In its Amended Complaint, *Juliana* exposes 50 years of legislative and executive awareness of the impending climate crisis followed by lukewarm policy recommendations and inaction (*Juliana v. United States,* 2015). Greta Thunberg echoed this sentiment when she used her Earth Day speech before Congress to accuse the lawmakers in her audience of being "so naive" that they "believe things will be solved through countries and companies making vague, distant, insufficient targets" (Thunberg 2021). Weiss deals with the lack of legal backing to intergenerational justice by drawing upon a body of law known as charitable trust law. She explains how a charitable trust could meet the needs of a long-term crisis because its beneficiaries do not need to be individually named, the duration is unlimited, and—since "its existence is implicit in the nature of the relationship between generations"—its creation is informal (Weiss, 1984, 504). A trust could be further beneficial because it does not differentiate between the very next generation and one a thousand years away in terms of care, nor does it support the idea that resources can be used up presently so long as wealth and knowledge are passed down in their place (Weiss, 1984, 508).

By putting forth the idea of a trust all the way back in 1984, Weiss helped to build the foundation for OCT's central legal argument that the federal government has an affirmative public trust obligation to preserve a life-sustaining climate system. Some aspects of the two trust proposals are the same—both would grant standing to a representative of future generations and have the primary goal of sustaining life-supporting systems. Despite the benefits and the ever-increasing need, Weiss recognizes also that a trust of this scale would be nearly impossible to realize. She cites a similar

problem that OCT plaintiffs turn to the courts to remedy—that "[o]ur state and international institutions are designed to handle relatively short-term problems which last no more than a few years" due to "[p]olitical incentives [that] encourage those in positions of power to focus primarily on issues that will bring tangible results in a short time" (Weiss, 1984, 563). The two differ in scale, Weiss' trust is global while OCT's is necessarily based in the United States legal system, and in their specific requests, Weiss's implementation strategy includes a literal trust fund for future generations, while OCT asks for a declaration of rights and for a plan to end federal involvement in the fossil fuel industry.

Weiss' intergenerational perspective made her influential to subsequent scholarship. In 1994, retired president of one of the largest environmental organizations, Defenders of Wildlife, Rodger Schlickeisen argued for a constitutional amendment to protect biodiversity for future generations. He agrees that society has a moral responsibility to future generations, even citing Weiss, though his proposed solution is quite different. He also explains why the topic of intergenerational fairness may have seemed newfangled or even unnecessary in 1994: because the science behind biodiversity loss was still emerging. "Until scientists proved otherwise, there was no reason to pursue the issue of responsibility of present generations to their descendants" (Schlickeisen, 1994, 190).

Schlickeisen differs from Weiss, however, in a few crucial ways. First, instead of focusing on preserving resources for people to benefit from, Schlickeisen argues that biodiversity alone has enough inhIerent value to deserve constitutional protection. This viewpoint is reflective of the wilderness focus of mainstream environmentalism, as

opposed to the more anthropocentric focus of the environmental justice (EJ) movement. In a list of threats to the planet, Schlickeisen lists "global warming, ozone depletion, [and] industrial chemicals," yet singles out biodiversity loss as "uniquely menacing because of its accelerating speed and irreversibility" (Schlickeisen, 1994, 184). This does not mean that EJ proponents do not care about conservation for its own sake, it is just a question of prioritization. The evolution of the environmental movement from preserving nature for its own sake to advocating for climate justice in an intersectional way has been observed even by the *Juliana* plaintiffs over their much more recent journeys into activism (Center for Environmental Futures, 2020).

Schlickeisen also chronicles a shift in the environmental movement, writing that the biggest challenges in the past "such as contaminated air and water, were easily seen by the naked eye, and it was clear to the public that the problems were intensifying," while present threats "involve more subtle, long-term ecological degradation" (Schlickeisen, 1994, 183-184). An individual factory leaking chemicals into drinking water, for example, presents a visible injury, attributable blame, and there is a clear solution to remedy the problem. With challenges like this, people were able to alert their elected officials, which led directly to a series of new environmental statutes in the 1970s. Schlickeisen calls the resulting Clean Air Act (CAA) and Clean Water Act (CWA) the "crown jewels of our environmental protection," but acknowledges that they are still not equipped to fight his battle against biodiversity loss. These statutes can even turn into obstacles by giving "the public the impression that all critical environmental problems are being solved" though "the contrary is true" (Schlickeisen, 1994, 184). *Juliana* faces a similar challenge. Over its six-year course, there have been three

different presidents with three different approaches to climate change yet with the same confrontational approach to *Juliana* in court. On the one hand, President Biden's climate platform receives praise in the media. Economics professor and Director of the Center for Sustainable Development at Columbia University Jeffrey Sachs penned an op-ed titled "Biden's remarkable success on climate" (Sachs, 2021). However, on the other hand, OCT's lead counsel Julia Olson lamented the fact that the Biden administration ignored the plaintiffs' repeated requests to discuss a settlement agreement that could end the adversarial relationship between *Juliana* and the government defendants (Olson and Cooper, 2021).

Another of Schlickeisen's 1994 observations doubtless rings true for the *Juliana* plaintiffs today: "American action specifically to protect biodiversity, a movement the major stakeholders in which cannot vote and mostly are not yet alive, is woefully inadequate" (Schlickeisen, 1994, 197). And to remedy this proposal, Schlickeisen makes a more radical proposal than Weiss. He argues that the omission of "something as basic as society's need to assure the sustainability of our living natural resources" was an oversight that cannot be remedied by any means of the existing legal system (Schlickeisen, 1994, 201). To overcome "the formidable reality of the Constitution's silence of stewardship of natural resources," Schlickeisen considers statutory and common law approaches, including public nuisance and the public trust doctrine (PTD), and deems them all to be inadequate. Despite the fact that public nuisance "by definition involves harm to an interest common to the general public, "it also "has never been extended to a subject as complex as conserving biodiversity for human benefit" (Schlickeisen, 1994, 202). Public trust similarly fails for Schlickeisen due to its limited

legal track record, he calls it only "arguably" available (Schlickeisen, 1994, 203). Schlickeisen's reticence to consider the PTD, in combination with his bold proposal to amend the Constitution itself, seems to be representative of the literature prior to University of Oregon Law professor Mary Wood's development of Atmospheric Trust Litigation (ATL) and OCT's application of the theory.

Even before Weiss and Schlickeisen, legal scholars had begun to recognize the growing threat of discrimination against future generations. In 1978, former president of Lewis and Clark Law School Jim Gardner suggested that "intergenerational fairness" could be achieved through the existing language and spirit of the Constitution. Like Weiss, Gardner argues that intergenerational fairness is not a new idea. In fact, the spirit of the theory has been expressed in political speeches, mentioned in at least one Supreme Court ruling, and "a close examination of the debates of the Federal Convention of 1787 reveals that the draftsmen of the Constitution invariably took the view that their generation had an obligation to protect the well-being of future generations" (Gardner, 1978, 35). While a strict reading of the Constitution would not permit forays into the philosophies, notes, or other writings of the Framers, Gardner's theory does not rely solely on centuries old debates. Instead, he argues that a key line, "and our Posterity," of the Preamble to the Constitution demonstrates an ideal that is made concrete within the following articles and amendments. If the founders' belief "that they were obliged to act in the best interests of posterity" serves as an "intellectual backdrop" for the development of the nation's enduring laws and customs, then the only task remaining for Gardner was to determine whether this "can provide the basis for judicial review" over two hundred years later (Gardner, 1978, 39).

Gardner is not the only one to look back to 1787 for clues as to how to protect future generations. In a recent interview, Julia Olson references a speech from James Madison in which he asserts, all the way back in 1818, that "the atmosphere is the breath of life. Deprived of it, they all equally perish" (Olson and Cooper, 2021, Madison, 1818). This is just one example of the founders' affinity for the environment. Retired University of Oregon professor John Davidson provides another example by referencing the "abundant discussions of intergenerational justice that the framers (and their intellectual predecessors) saw fit to preserve in writing" (Davidson, 2003, 195). In addition to strengthening the backbone of *Juliana's* intergenerational argument, Davidson supports the case by submitting an amicus brief in 2016. He explains the "reserved powers" doctrine, which inhibits the current leaders at any given time from infringing upon the "equal sovereignty of later legislatures" (Davidson, 2016, 2). Through this lens, the District Court should fulfill its duty of checking the legislative branches lest they grievously limit the power of future elected officials.

Unlike Schlickeisen's or Weiss's later proposals, the extent of Gardner's solution to remedy discrimination lies in judicial review based on the current language of the Constitution. He recognizes the difficulty of this task, however, since the language in question "appears no longer to be capable of serving its intended purpose adequately because of an unanticipated change in extrinsic circumstances" (Gardner, 1978, 48). One of these barriers revolves around practical applications of intergenerational fairness. It takes only a few mentions of the term "unborn" before it becomes apparent how this doctrine could add to the proverbial toolbox of pro-life, anti-reproductive choice activists. Only five years after *Roe v. Wade (1973)*, Gardner

nevertheless concludes it to be "irrelevant to the question of the existence…of a constitutional principle of intergenerational fairness" (Gardner, 1978, 49). He argues that, despite the similar terminology, the bodily autonomy and intergenerational justice debates are very different. Later scholarship affirms this conclusion, citing the distinction between generalized rights like a stable climate and the individual right to bodily autonomy (Davidson, 2003, 189). Alternatively, the potentially messy issue of granting standing for future generations could be avoided by using prospective parents as stand-ins (Nguyen, 2017, 198). While the Constitution may lend implicit (or explicit, depending on who you ask) support to the concept of intergenerational justice, no scholars in this review assume that the task of implementing solutions to the climate crisis using this framework would be simple. The abortion aspect is just one question that those seeking to apply constitutional protections for future generations may have to reckon with.

Not all legal scholars agree that protections for future generations should be (or already are) enshrined in the judicial system. While Cincinnati Law professor Bradford C. Mank agrees with Weiss, Schlickeisen, Gardner, Davidson, and Nguyen that "there are important moral reasons to protect the future" and that "current environmental laws fail" to do so, he argues that the courts are not properly equipped to handle a crisis of this scale (Mank, 1996, 446-450). None of the three branches, according to Mank, are up to the task. Congress and the executive are too susceptible to "short-term political pressures," while the courts, which purportedly operate as an independent, even countermajoritarian, body are less effective in answering questions "at the frontiers of science" where judges may lack expertise (Mank, 1996, 446). 20 years later, Mank

again disagreed with judicial action on climate change in response to Judge Aiken's *Juliana* decision. In a law review article titled "Can Judges Use Due Process in *Obergefell* to Impose Judicial Regulation of Greenhouse Gases and Climate Change?: The Crucial Case of *Juliana v. United States*," Mank answers no, arguing that both *Juliana*'s district court ruling and *Obergefell* itself were wrongly decided. There are two major ways to address discrimination under the Constitution: equal protection or due process. Juliana plaintiffs invoke both arguments, but Aiken relied only on due process and used *Obergefell* as precedent. *Obergefell* held that gay marriage was a fundamental right, denial of which resulted in violation of due process. But Mank argues that "fundamental due process rights must be rooted in the nation's history and traditions," thus *Obergefell* (and *Juliana* in relying on it) overstepped the bounds of judicial power to "invent new due process rights and usurp the role of the legislature" (Mank 2020, 278). Whether one agrees with Mank or with the pro-intergenerational justice expects, *Juliana* has clearly tapped into a large and contentious body of scholarship by constitutionalizing climate. To understand how *Juliana* fits into this field, we will next ask what constitutionalizing climate does for the case.

Juliana's *Right to a Stable Climate*

The constitutional aspect of *Juliana* could yield both narrative and procedural benefits. Not only does the claim that the government violated Posterity's fundamental rights set *Juliana* apart from the field of not-too-successful environmental lawsuits and elevate it to the narrative ranks of cases like *Brown v. Board of Education,* but the level of scrutiny to be applied by the judges also shifts. There are three different lenses through which a judge can evaluate a case that raises a constitutional question: rational

basis, intermediate scrutiny, and strict scrutiny. As the level of scrutiny increases, judges give decreased deference to the legislature. The lowest level, rational basis, merely asks whether the policy in question is reasonably related to a legitimate state interest. At the highest level, strict scrutiny, the actions must be found to be the least restrictive means of achieving a compelling state interest. Rational basis rarely leads a policy to be overturned, while few government actions can survive a strict scrutiny evaluation.

There are two avenues through which the scrutiny level can be raised, either through a due process or an equal protection claim. A 5th Amendment due process claim involves the violation of a fundamental right, which could either be a right enumerated in the Bill of Rights or a right that the courts otherwise determine to be fundamental. When legislation discriminates against an entire category of people based on characteristics that raise judicial suspicion, then the 5th Amendment Equal Protection Clause is implicated. A judge typically identifies a suspect class, like race or religion, by asking whether the members of that class constitute an insular minority with immutable traits. *Juliana* argues that its plaintiffs "are a separate suspect class in need of extraordinary protection from the political process" because of the defendants' "long history of deliberately discriminating against children and future generations in exerting their sovereign authority over our nation's air space and federal fossil fuel resources for the economic benefit of the present generation of adults" (*Juliana v. United States,* 2015, 89). This is aggravated by the fact that young people have no voting rights or political power, which they are largely unable to change. *Juliana* argues that the due process and equal protection claims build upon each other; the "reason why a stable

climate system is inherent to our fundamental rights of life, liberty, and property becomes more clear and compelling because of the grave and continuing harm to children that results from discriminatory laws (*Juliana v. United States,* 2015, 89*).* Because the two alleged violations are intertwined, when considered on its merits *Juliana* could receive a higher level of scrutiny than a statutory climate case. Thus far, the only judge to consider *Juliana* on its merits was District Judge Aiken. While she did not hold that the children were a suspect class, she still wrote that the case "must be evaluated through the lens of strict scrutiny" which would only "be aided by further development of the factual record" (*Juliana v. United States*, 2016). Since *Juliana* is still ongoing, it is too early to determine what level of scrutiny it will ultimately receive. But by invoking both due process and equal protection, the plaintiffs have two bites at the apple to constitutionalize climate.

The Public Trust Doctrine and Atmospheric Trust Litigation

In order to understand how *Juliana* incorporates intergenerational justice theories, we can look to the ambivalent body of scholarship on the doctrine and to how OCT's ATL campaign puts the PTD into practice. While the PTD had been applied primarily to navigable waters and the sea floor prior to OCT's campaign, there is a growing body of literature by a select group of authors who write in support of or in opposition to the principle. Sometimes they even respond to each other directly to criticize the others' approach.[1]

[1] See Professor Lazarus's "Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make it Right" in 2015 followed the next year by Professor Blumm's "Two Wrongs: Correcting Professor Lazarus's Misunderstanding of the Public Trust Doctrine"

The writings most fundamental to *Juliana* are by University of Oregon Law professor Mary Wood, who originated the concept of atmospheric trust litigation. She debuted the concept in a 2007 keynote address with key points including "The Dawn of Planetary Patriotism" and "A Race Against Time: Arresting Emissions Growth by 2010" (Wood, 2007). While emissions may not have been arrested by 2010, Wood's legal frameworks have since been implemented by Our Children's Trust in state, national, and international lawsuits. One of her articles, "No Ordinary Lawsuit: Climate Change, Due Process, and the Public Trust Doctrine" with Lewis and Clark Law professor Michael C. Blumm provides an in-depth analysis of the first, and only thus far, ruling to hear the *Juliana* case on its merits and rule in favor of the plaintiffs. Wood and Blumm argue vehemently for the application of the PTD and chronicle the evolution of OCT's national and international ATL campaign. The two authors emphasize the desperate situation—both climatically and legally—that led to OCT's campaign. The case was not filed on a whim to empower "a single district court in Oregon," (United States Court of Appeals, 2019) as the government asserts. It was filed because "at a time when the political system seems prepared to shun responsible climate action, the lawsuit may be the only legal mechanism that can 'trump' the incumbent administration" (Blumm and Wood, 2017, 8).

Adding to the literature supporting OCT's campaign is an article by Monmouth University political science and sociology professor Randall Abate that highlights the shift in moral and legal priorities that the constitutionalization of climate signals. Similar to the suggestions of the intergenerational fairness scholars, Abate recognizes the transformation from "focusing on the intrinsic value of resources," to addressing

"the ways in which human health had become imperiled from the rise in pollution in the industrial age" that recent environmental law has undergone (Abate, 2019, 1). While "rights-based thinking" used to be "confined to the social justice domain," separate from environmental law, the two are no longer so far apart (Abate, 2019, 2). Abate calls the recent combination "environmental justice litigation," which seeks "to inject a civil rights-based theory throughout the nation by seeking remedies for how contamination burdens were disproportionately burdening minority and low-income communities" (Abate, 2019, 2). While Abate explains how ATL could be considered modern reincarnation of this early 2000s attempt to constitutionalize climate, there are key differences in the strategies. Both the constitutional backing and the plaintiffs differ. The earlier environmental justice litigation relied only on equal protection, while that is only a minor part of *Juliana's* claim (and so-far overlooked by the courts' analyses), and the earlier cases concerned themselves only with present discrimination in safe environmental conditions, but ATL has a future-focused strategy where the plaintiffs are children and future generations (Abate, 2019, 2). Further, ATL is a coordinated campaign conceived and carried out by one non-profit organization, while Abate's examples cover a range of similar, but disconnected, cases (Abate, 2019, 3).

There is also an area of literature dedicated to questioning the existence and criticizing the modern applications of the Public Trust Doctrine.[2] In an acerbic assessment of the PTD, former professor and dean of the Lewis and Clark Law School James L. Huffman writes that there are two histories of the PTD: "One founded in

[2] See Lazarus, Richard. "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine" (1986) or Huffman, J. "Speaking of Inconvenient Truths - A History of the Public Trust Doctrine" (2007).

Anglo-American custom and case law. Another founded in the imaginations of now two generations of advocates search of a fail-safe guardian of the environment" (Huffman, 2019, 1). Huffman's central critique of the doctrine and the supporting literature like Blumm and Wood's is one of inadequate the justification. The urgency of climate change is insufficient, for Huffman, to justify "rewrit[ing] history in the name of establishing new public rights" beyond the scope of the "rule of law system with constitutional separation of powers" (Huffman, 2019, 20). OCT's coordinated ATL campaign provides evidence for Huffman of the dire nature of the problem. As more and more of these lawsuits proceed, he fears they will eventually find "judges willing to make new law in the name of urgency of necessity" (Huffman, 2019, 20). Support or derision of the application of the PTD appears to come down to personal philosophies regarding the extra-textual beliefs of the founders or the appropriateness of judicial response to climate change. With the notable exception of Huffman, post-2015 literature typically engages with *Juliana* and OCT's national campaign of Atmospheric Trust Litigation (ATL) and largely comes out in support.

Does Climate Belong in the Courts?

An essential question underpinning *Juliana* is not just whether the courts can but also whether they *should* take on the matter. Advocates of judicial restraint say no (Gifford, 2011, 202). Instead, the courts should value the "wisdom in the traditional limits courts have placed on themselves" and dismiss these cases via standing or the political questions doctrine (Gifford, 2011, 207). But others answer affirmatively and even argue that the courts abdicate their constitutional responsibility by dismissing cases like *Juliana* without considering their merits (Ewing and Kysar, 2011, Weaver

and Kysar, 2017, and Kuh, 2019). Law professors Douglas Kysar and Benjamin Ewing developed a new framework to evaluate when and why the courts should answer controversial questions, which they call "prods and pleas" (Ewing and Kysar, 2011, 359). They argue that the traditional understanding of the relationship between the three branches as checks-and-balances should be expanded to include the more subtle ways in which the branches "can push each other to entertain collective political action when necessary" (Ewing and Kysar, 2011, 350). If checks and balances protect against overreach, then Ewing and Kysar's prods and pleads guard against underreach (Ewing and Kysar 2011, 364). Instead of demanding, they explain that each branch can invite action by another. For example, "by struggling to apply common law principles to the harms of an ever more complex and interconnected world…courts deliver dignified, public pronouncements that legislative and administrative inertia have left our basic ideals unprotected" (Ewing and Kysar, 2011, 375).

The responsibility to deal with complicated issues like climate change does not have to fall on the shoulders of the court alone. Instead, Ewing and Kysar argue that the novel challenges posed by the scale and relative lack of visibility of climate change would be best confronted from multiple angles, rather than any one branch working alone (Ewing and Kysar, 2011, 410). Even if climate legislation ends up advancing faster and farther than lawsuits like *Juliana* can work their way through the courts, it would still "be unwise to disable an institution such as the tort system from engaging in the substance of the problem" (Ewing and Kysar, 2011, 410). Similarly, OCT suggests that the Biden administration should diverge from the previous administration's

"scorched earth tactics" by working with the plaintiffs to either let the case proceed to trial or engage in settlement talks (Our Children's Trust, 2021).

These two professors are not the only ones who argue that the relationships between branches are often misunderstood. Outside of the context of climate, legal scholar Mark Graber proposes that elected officials routinely invite the courts to deal with messy political issues that they would rather not touch. Graber argues that "rather than treat judicial review as a practice that either sustains or rejects the measures favored by lawmaking majorities," the public should "pay closer attention to the constitutional dialogues that take place between American governing institutions on the crosscutting issues that internally divide the existing lawmaking majority" (Graber, 1993, 36). Graber cites cases like *Brown v. Board* and *Roe v. Wade* as rare but important examples of when "prominent elected officials consciously invite the judiciary to resolve those political controversies that they cannot or would rather not address" (Graber, 1993, 36). These articles were both published before *Juliana*, but Kysar later considered the case with another Yale Law professor R. Henry Weaver. The two argue that common law and constitutional law approaches are "fraught with analytical and practical difficulties" yet remain "essential" (Weaver and Kysar, 2017, 295). In fact, when judges "use weak preliminary and procedural maneuvers" to dodge controversial issues (like the Ninth Circuit dismissing *Juliana* on redressability) they "reinforce a sense of the law's disappearance" (Weaver and Kysar, 2017, 295). Judicial response to climate change seems to be gaining acceptance within the field of legal scholarship. Another author adding to the commentary on whether climate belongs in the courts is Pace University Professor of Environmental Law Katrina Fischer Kuh in

the 2019 law review article "The Legitimacy of Judicial Climate Engagement." Kuh traces the history of "judicial climate avoidance" from the displacement of federal public nuisance as a viable legal strategy to the "dogged effort to avoid a trial" by the government defendants in *Juliana* (Kuh, 2019, 742). Similar to Ewing and Kysar, she counters the government's argument that the issues raised by *Juliana* should be left to lawmakers alone by arguing that "the need for judicial engagement on core climate questions does not disappear even if Congress enacts a robust federal decarbonation statute" (Kuh, 2019, 764). And, ending on an optimistic note, she suggests that *Juliana* "may signal an increased judicial willingness to adjudicate climate suits" (Kuh, 2019, 742).

Scholars who argue that the courts can (and *must*) step up to resolve controversial matters like climate change offer us new tools with which to think about the purpose a lawsuit, especially one like *Juliana* with novel claims or arguable merit. The works of Ewing, Kysar, Graber, Weaver, and Kuh add complementary contributions to the viewpoint that addressing a hot-button issue does not automatically constitute judicial overreach.

Pre-*Juliana* Legal Landscape

Statutory and Nuisance Claims

Before asking whether Juliana has provided any viable new legal pathways for subsequent youth-led climate cases, we must first find out where Juliana came from. The state of climate litigation in the early 2010s can tell us what led OCT to—as Mary Wood puts it—turn to the judiciary "for eleventh-hour relief" (Wood, 2017, 21). The

climate crisis continues to intensify and capture the attention of the world, yet it has largely failed to attract meaningful action from the two elected branches of government. In response, more and more activists and public interest groups have turned to the third branch. The Climate Case Chart website by the Sabin Center for Climate Change Law at Columbia Law School has compiled data on legal and administrative proceedings since 1986 (Sabin Center for Climate Change Law, 2021). The database now contains 1250 cases within the United States alone. Despite this prodigious growth (see Figure 1), the decades-old debate among scholars as to whether the courts are able to confront climate change risks, liabilities, and adaptations continues to this day and only intensified with the filing of *Juliana v. United States* in 2015. Whether or not OCT's state, federal, or international cases will end with favorable rulings for the plaintiffs, they already represent a major switch in the existing body of climate change lawsuits which had previously applied ordinary statutory and tort-based approaches to the extraordinary circumstances. In 2012, law professors David Markell and J.B. Ruhl analyzed 201 examples of climate change litigation in order to provide a thorough data set for scholarship to rely on to characterize and to project the future of the field (Markell and Ruhl 2012, 15).

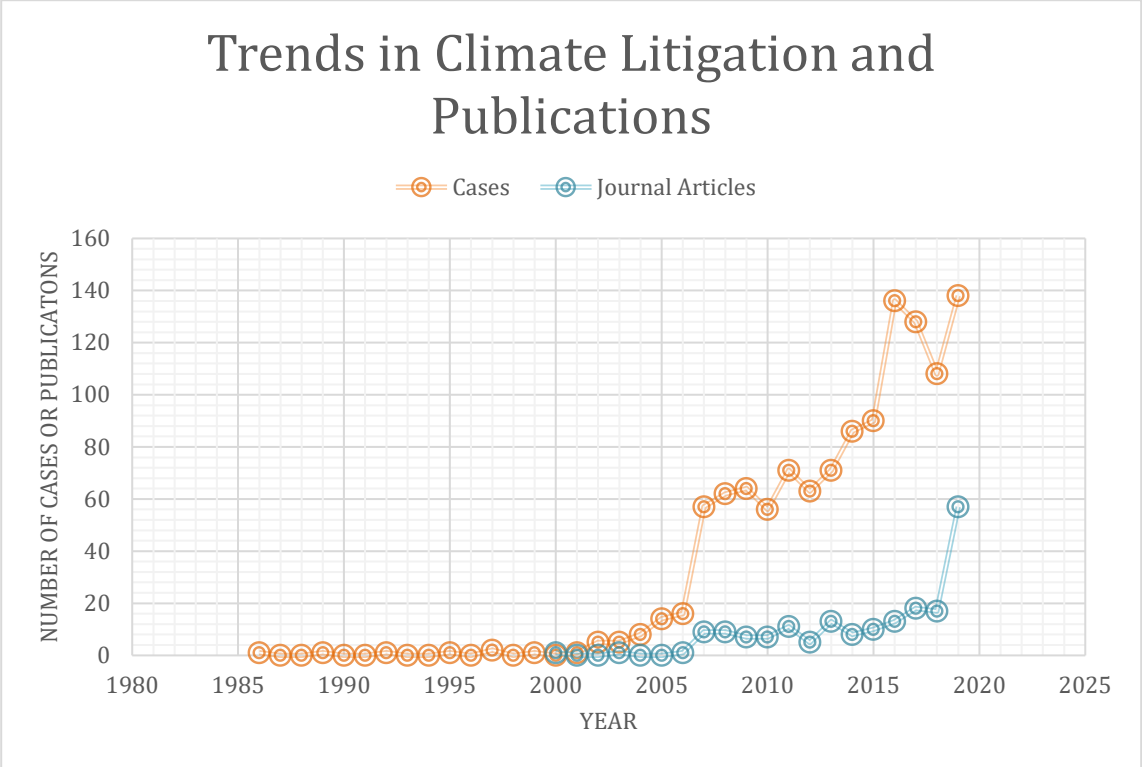

Figure 1: Climate-related lawsuits and scholarly articles published from 1986-2020.

Sources: Case data from the Climate Case Charts database on U.S. litigation and publication data 2000-2018 from Setzer and Vanhala (2019) and 2019 from Peel and Osofky (2020).

Climate litigation is a broad field, yet up until OCT's ATL campaign, the majority of cases had small scopes and unremarkable legal arguments. Markell and Ruhl categorized the 201 cases in their study as either "pro" or "anti" interests seeking to either increase or decrease regulations or liability. This system allowed them to tell the "story of climate in the courts" and find the majority of cases to be "grinding away at fairly narrow factual and legal issues" (Markell and Ruhl 2012, 86). OCT's combined law and constitutional framework falls under their "pro" category, more specifically under the "rights and liabilities" heading, which as of 2012 Markell and Ruhl reported to be "scattershot" and largely unsuccessful (Markell and Ruhl 2012, 68). Most of these

pre-*Juliana* lawsuits were not novel. Ninety percent relied on statutes like the Clean Air Act (CAA), National Environmental Policy Act (NEPA), and the Endangered Species Act (ESA). This narrow focus "limits the latitude for courts to chart novel new interpretations" as "the statutes involved have been on the books for decades and have substantial preexisting jurisprudence, little room is available for the courts to depart from precedent and forge new law…even if they were so inclined" (Markell and Ruhl 2012, 69, 25). The authors agree that "climate change demands a new policy model for legislatures" and lament the "judicial baggage" that continues to accumulate limiting the discretion of judges who may wish to chart a new course (Markell and Ruhl 2012, 62).

Despite the uninspiring conclusion drawn by Markell and Ruhl, some so-called "ordinary" statutory claims still prevailed in court and set the stage for *Juliana* to emerge. One landmark case in which the environmental interests received a favorable ruling is *Massachusetts v. EPA (2007)*. Yet Markell and Ruhl call *Mass* "a resounding judicial *rejection* of climate exceptionalism in terms of how existing statutes are to be applied" (Markell and Ruhl, 2012, 67). In *Mass*, several states petitioned the Environmental Protection Agency (EPA) to regulate emissions of greenhouse gases (GHGs) under the existing CAA framework. The EPA declined and the case eventually advanced to the Supreme Court, which ruled in favor of the states. The majority opinion declared that the CAA's broad definition of an "air pollutant" that could be regulated necessarily included GHGs, although the agency retained discretion at to the actual regulation. While Markell and Ruhl describe the case as a "rather vanilla statutory interpretation" (Markell and Ruhl, 2012, 55), others insist that the case was

"momentous progress" (Dowling, 2007). One specific step forward for climate cases provided by *Mass* was later cited by the Ninth Circuit in its 2020 *Juliana* ruling. The Supreme Court has generally held that, to meet standing requirements, injury in a case must be particular as opposed to general. But in *Mass*, the Supreme Court clarified that "it does not matter how many persons have been injured" to meet the particularized injury requirement, so long as the plaintiffs themselves were impacted. Even though Markell and Ruhl identified significant judicial baggage barring the way for many climate claims, cases like *Mass* show judicial recognition of climate change and early support for action that could potentially lead to tighter regulations of GHGs.

Federal Public Nuisance Displacement

Juliana could have invoked the more familiar common law approach of public nuisance—which has a track record of being applied to harmful emissions that the PTD lacks—were it not for the ultimate consequence of *Mass*: displacement of federal common law in favor of CAA claims. Despite the apparent success of the environmental interests in *Mass*, the case could also be considered a serious setback for climate litigators. Two cases, *American Electric Power v. Connecticut (2011)* and *Native Village of Kivalina, Alaska v. ExxonMobil (2012)* demonstrate this change. Once displaced by federal regulation in a particular policy area, a common law claim can no longer be heard by federal judges at any level. This displacement helped set the stage for novel claims like *Juliana's* because public nuisance had been one of the only available mechanism through which plaintiffs could bring up harms to the general public rather than individual property damage. Federal public nuisance claims made up

only 4% of Markell and Ruhl's pre-2012 cases, but the concept has a long history within and beyond climate litigation (Markell and Ruhl, 2012, 17).

Public nuisance is a common law doctrine that protects the public from unreasonable interference into their health, safety, or property. Common law principles originated centuries ago in medieval England (some can even be traced back to Ancient Rome) and derive from traditions rather than policy. Public nuisance cases are not always about climate. Notably, the 1998 case leading to a $206 billion settlement from tobacco companies was partially based on a public nuisance claim by 46 states. This type of "social impact litigation" earns mixed reactions. Either climate nuisance cases were right to be displaced since they step on the toes of lawmakers (Miller, 2010, Tribe, 2010) or they should persist as viable claims since the judicial branch is the only forum for a common law claim to be heard (Ewing and Kysar, 2011). Law professors Kysar and Ewing contextualize tort law within the bigger picture of common law jurisprudence and the relationships between the branches of government. Unlike statutory or constitutional claims, public nuisance cases rely entirely on common law—an area in which the other two branches have no involvement. Thus, the two authors argue that "it is wrong to suggest that dismissing climate change cases as nonjusticiable political questions merely passes them on to a more suitable branch. Instead, dismissal constitutes a backdoor rejection of the substance of the plaintiff's claims" (Kysar and Ewing, 2011, 412).

The two cases in question, *AEP* and *Kivalina*, both began as ordinary public nuisance claims that pitted state or local governments against GHG emitters. First, in 2004 a group of states sued several power companies including American Electric

Power on the grounds that their emissions contributed to global warming and therefore constituted a public nuisance. This case advanced to the Supreme Court in 2011, which unanimously ruled in favor of the power companies. They reached this conclusion by interpreting *Mass v. EPA* to mean that future climate-related cases should rely on the statutes like the CAA instead of common law. This precedent was affirmed in *Kivalina*, a case in which climate change led to erosion of the barrier reef holding up the tiny town of Kivalina in northern Alaska. The indigenous community was forced to relocate and sued ExxonMobil for financial damages. The Ninth Circuit dismissed the case, thereby cementing *AEP's* interpretation of *Mass* by telling the plaintiffs in *Kivalina* that they could no longer sue under a theory of public nuisance.

Beyond the impact on public nuisance, the Supreme Court rulings in *Mass* and *AEP* signaled the difficulty for climate lawsuits of all kinds moving forward. First, a 5-4 Supreme Court ruling along ideological lines also reveals the mismatch between elements of climate change claims and existing judicial standards. Specifically, standing has proven particularly difficult to establish in environmental cases. Supreme Court Chief Justice John Roberts cites this among the reasonings for his dissent in *Mass*, stating that the "very concept of global warming seems inconsistent with this particularization requirement…and the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere" (*Massachusetts v. EPA,* 2007). Justice Ginsburg provide the second negative omen for climate cases in the majority opinion of *AEP*. Due to the competing considerations of economics, science, and law in climate cases, Ginsburg explains that the "courts are particularly ill-suited to addressing" such matters (Adler 2011, 111). Instead, the EPA

should be left alone to make climate change policy since they are "surely better equipped to do the job than individual district judges issuing ad hoc, case-by-case injunctions" (*American Electric Power v. Connecticut,* 2011).

The Supreme Court foreclosed public nuisance in federal courts but did not comment on its fate at the state level. With the door still ajar for common law claims in state court, a new type of climate suit emerged. One such case is *Mayor & City Council of Baltimore v. BP p.l.c.*, in which the city of Baltimore asks that over a dozen oil and gas companies pay for the costs of climate change adaptation. Both sides argued before the Supreme Court in January 2021 on the narrow yet crucial jurisdictional question: would the case stay in state court and keep its nuisance claim, or would the case be removed to federal court? Since climate nuisance was displaced by *Mass, AEP,* and *Kivalina*, a verdict moving the case to federal court would signal a victory for the corporations. Based on the "Carbon Majors" database that found 108 companies to be responsible for nearly 70% of global emissions dating back to the 1800s, cases like *Baltimore* are quite different from *Juliana* and invert several of its central values (Heede, 2020). Suddenly the government becomes the plaintiff. Instead of a declaration of rights, the government asks for money. And instead of prevention, the focus is on adaptation. These cases tell quite a different story to *Juliana's* Youth v. Gov framing. Like *Juliana*, however, the goal of these cases goes beyond a favorable ruling. Climate litigation researcher Joana Setzer writes that a case like *Baltimore* could be "increasingly viewed as a tool to influence policy outcomes and corporate behavior" (Setzer and Byrnes 2019, 1). Setzer also describes how the reputational costs for publicly traded corporations can further guide their behavior (Setzer 2020). This

common law approach may persist in state court if the finance-focused climate plaintiffs can survive motions for removal. While this may seem distantly related to *Juliana*, the first of OCT's attempts at federal ATL actually faced the same jurisdictional question in its common law public trust approach.

Early Atmospheric Trust Litigation

Juliana has received international acclaim as the principal incarnation of atmospheric trust litigation, but it was not the very beginning of OCT's campaign to hold the federal government accountable on behalf of youth. The first case emerged in 2011 and was named *Alec L v. McCarthy* after 17-year-old plaintiff Alec Loorz. Loorz also founded a group called iMatter, which partnered with OCT in the case to get young people involved in climate activism. The similarities in presentation by Our Children's Trust, in contrast with the crucial legal differences make *Alec L* an instructive example of early ATL to explore. The basic structures of the two actions are quite similar: young plaintiffs and at least one organizational plaintiff pitted against several federal agencies, a central claim that the government is violating its duty as trustee of the atmosphere for young people, and both declaratory and injunctive relief demands. In the press releases announcing each case, OCT made similar proclamations; in *Alec L,* "Youth Sue The Government To Preserve The Future And Halt Climate Change," in *Juliana*, "America's Youth File Landmark Climate Lawsuit Against U.S. Government and President" (Our Children's Trust 2011, 2015).

Beyond the basic setup and initial presentation, the implementation of the ATL theory and reception from the courts was markedly different. In *Alec L*, the group of youth plaintiffs was smaller, and the organizations took on a larger role. In fact, one

2011 press release described the federal suit and legal actions in 49 states as "part of the international iMatter Campaign" (Our Children's Trust, 2011). The plaintiffs even organized a march that would be "the largest-ever mobilization of youth against climate change" at the time with "many of the same youth" protesting that "have joined as plaintiffs and petitioners in the legal and administrative actions that were filed today" (Our Children's Trust, 2011). *Alec L* sought "Climate Recovery Plans" as injunctive relief that would require carbon emissions to peak by 2012, after which the government would ensure that they decreased by "at least" 6 percent every year, accompanied by widespread reforestation (Our Children's Trust, 2011). *Juliana* still asks for a plan but leaves it up to the courts working with the legislature to work out the details. The two declaratory relief requests get at the main difference in the cases: *Alec L* asked for the courts to affirm the existence of an atmospheric trust and the government's responsibility, while *Juliana* asked the courts to say that the government violated the youth's fundamental rights. This addition of constitutional framing to Juliana was the biggest change from the first to the second federal suit.

Alec L was eventually dismissed for a familiar reason. The district court relied on a case called *PPL Montana (2012),* which held that the PTD was a matter of state law. But the judge also clarified that, even if the PTD did apply to the federal government, the CAA would displace any common law claim following *AEP* (*Alec L* Memorandum Opinion 2012). The court's treatment of *Alec L* shows us how crucial the constitutional framing of *Juliana* proved to be. The novel PTD without the familiar due process and equal protections claims to ground it could not launch the first federal ATL case to the level of media and scholarly attention that *Juliana* has enjoyed.

Section II: *Juliana v. United States*

Progression Through the Courts

The first judicial opinion on Juliana was published in 2016 following two motions to dismiss from the defendants. Judge Ann Aiken released a forceful opinion in support of the plaintiffs, even saying that she has "no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society" (*Juliana v. United States*, 2016, 32). She famously called the case "no ordinary lawsuit" and granted standing to the youth plaintiffs (though she did not consider the future generations plaintiff) (*Juliana v. United States*, 2016, 3). Multiple trial dates have been set over the past six years, but none have proceeded due to the government's multitude of petitions for the case to be dismissed or delayed. In one instance in 2018, the Supreme Court denied both the Trump administration's application for a stay and their request to review the case. After many more legal proceedings (see Table 1), the Ninth Circuit Court of Appeals heard oral arguments, which resulted in the January 2020 ruling that reversed the district court with directions to dismiss the case. The two-judge majority concluded that, although the government's fossil fuel regime represents a "clear and present danger," the court was powerless to act (*Juliana v. United States*, 2020). On top of the declaration that their rights were violated, the plaintiffs originally asked for a court-supervised plan to reduce the nation's environmental impact and support of the fossil fuel industry. But the majority balked at the idea of becoming involved in such complex policy issues. The panel (like many *Juliana* dissenters) decided that addressing climate change is a task best left to legislation, rather than judicial intervention.

Reactions to this setback were mixed. Sabin Center for Climate Change director Michael Gerrard was unsurprised, stating that the "courts are good at acting as a shield against attempts to disregard laws that are on the books. They're not going to come up with brand new rules. That's left to the ballot box," (Carlisle, 2020). On the other hand, Director of the Environmental Law Center at Vermont Law School Jennifer Rushlow adopted OCT's view of the dismissal that the court erred by over-simplifying and even misinterpreting the request for remedy (Carlisle, 2020). There were even some hopeful notes in the ruling for *Juliana* supporters. The judges remained divided as to their ability to alleviate harm but conceded many critical points of the plaintiff's arguments. They acknowledged the injuries suffered by the young people and labeled the government's actions as the direct cause. The third member of the panel, judge Josephine Staton, vehemently supported the plaintiff's case. She writes in her dissent that her fellow judges "throw up their hands" by dismissing the case (*Juliana v. United States*, 2020, 33). Rather than stepping back, she argued that the judiciary should be at the forefront of complex climate change issues. She was alarmed by the government's insistence "that it has the absolute and unreviewable power to destroy the Nation" (*Juliana v. United States*, 2020, 33). In a forceful rebuke of the majority's reasoning, Staton wrote that:

> in these proceedings, the government accepts as fact that the United States has reached a tipping point crying out for a concerted response—yet presses ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses. (*Juliana v. United States*, 2020, 32)

The idea that *Juliana's* impact might be felt most beyond its own rulings also emerged in the wake of the dismissal. The gravity of both the majority opinion and the dissent,

combined with the narrowness of the dismissal may, according to Yale Law professor Daniel Esty open up the door for more litigation to follow (Carlisle, 2020). Given the slim 2-1 defeat for *Juliana*, both Esty and another Yale professor Paul Sabin told TIME that another court "with a different set of judges" might reach a different conclusion (Carlisle, 2020).

OCT is now pursuing several different approaches for *Juliana* to proceed. They have filed a motion to amend their 2015 complaint to change the request for redress. Instead of asking for the court to work with the legislature to implement an emissions-reduction plan, the plaintiffs now ask only for a declaration that their rights were violated. In the press release announcing the new strategy, OCT states that the updated complaint focuses on "winning a declaratory judgment that the nation's fossil fuel-based energy system is unconstitutional—much like the plaintiffs in *Brown v. Board of Education* argued the public school system of segregation was unconstitutional" (Our Children's Trust, 2021). On May 13th, 2021, District Court Judge Aiken announced that oral arguments on the matter of the amended complaint would be held in June 2021. She also ordered attorneys for the plaintiffs and defendants to convene for the first ever settlement talks in the case (Our Children's Trust, 2021). In the meantime, OCT is also preparing a petition for the case to be elevated to the Supreme Court in the event that their request to amend the complaint is denied.

Cases Citing *Juliana*

In my initial quest to assess the impact of *Juliana*, I set out to discover whether any cases had been filed after 2015 that directly cited or indirectly relied upon the legal arguments of *Juliana,* as well as to ask how the case had influenced the broader field of

climate change law. A Westlaw search reveals 30 cases in total: 10 citing the 2016 District Court ruling and 20 citing the Ninth Circuit decision. Out of these, only 11 raise constitutional questions and only two are about climate. The other cases cite *Juliana* for minor procedural reasons or for a more traditional application of the public trust doctrine to water rights. For example, a district court ruling from the case with the highest "depth" ranking (Westlaw's quantitative measurement of how much the cited case is examined) quotes whole paragraphs of Judge Aiken's ruling only to state that "*Juliana* was no ordinary lawsuit; *Juliana* does not support Plaintiff's position on this issue" (*Lewis v. United States*, 2019). In all but two of these examples, the citation of *Juliana* is just in passing. These cases do not attempt anything like ATL, nor do they mimic OCT's specific legal framework (minus one example of plagiarism).[3] The two cases that were inspired by *Juliana* demonstrate the early impact the case has had on climate litigation and illuminate how the different aspects of *Juliana's* argument could be applied creatively to new situations, whether successful or not.

Clean Air Council v. United States

In 2017, environmental non-profit Clean Air Council (CAC) requested a declaration from a Pennsylvania district court that the rollback program of President Obama's climate change regulations by President Trump constituted a violation of their fundamental rights. Specifically, *CAC* invokes the public trust doctrine, 5th Amendment

[3]After learning about *Juliana* from a *60 Minutes* segment, psychologist Dr. Christian Komor asked OCT to amend *Juliana* to incorporate the experimental technique of algae sequestration to capture GHG emissions into their request. When OCT declined, he plagiarized large parts of *Juliana's* complaint to represent himself in his own suit *Komor v. United States*. The Arizona Federal Court stayed the proceedings pending the resolution of *Juliana* and nothing has been filed since 2019.

Due Process, and 9th Amendment unenumerated rights to justify their claim. Like *Juliana*, the case has youth plaintiffs, though the Clean Air Council itself is the lead plaintiff. Three aspects of *Clean Air Council* make it notable: the different defendant targeted in *CAC* as opposed to *Juliana*, *CAC's* reliance on *Juliana's* exhaustive investigation into government awareness of climate change, and the contrast between the mixed judicial reception to *Juliana* and harsh dismissal of *CAC*.

The Obama and Trump administrations were initially named in *Juliana*, but they were dismissed as defendants by Judge Aiken who determined the federal agency defendants to be sufficient if the case ever got to the point of receiving its requested remedy (Our Children's Trust, 2018). Further, OCT consistently clarified that the case was about government actions as a whole, rather than whoever was in the Oval Office (Our Children's Trust, 2018). *Clean Air Council*, on the other hand, pointed to the pivot from the Obama administration that, "recognizing the imminent dangers presented by climate change…undertook steps in the last decade to reduce the threats and protect United States citizens and planet" to the Trump administration that "embarked on a program of reversing, unravelling, dismantling, and eliminating" the recent progress (*Clean Air Council* Complaint, 2017, 9). This framing of the Obama-era federal government's actions is crucial for *CAC's* public trust claim since it allows them to argue that by

> acting to prevent the devastating and life-endangering consequences of climate change, the United States Government has acknowledged its obligation as the trustee of our country's natural resources not to take affirmative acts to enhance, increase, or intensify those dangers. (*Clean Air Council* Complaint 2017, 31)

But it also reduces the scale of the problem; if rolling back the changes made by the Trump administration in 2017 alone would serve as remedy for the *CAC* plaintiffs, then that is quite different from *Juliana*'s story. *Juliana*'s intentionally apolitical claim of overarching government failure over the past half century makes it less likely that a judge would feel they were intruding on the purview of the executive branch like the *CAC* court feared.

Clean Air Council further relies on *Juliana* for the exhaustive investigation that OCT conducted into the long history of government awareness and disregard of climate change. Not only is *Juliana* providing an official record of the science behind climate change and the government's acknowledgement thereof, but the legal strategy of the defendants does not deny any of these facts. This admittance is key—future cases can build upon the basis that "the United States Government has been and is aware of the severe consequences of climate change…and admitted the existence of most of them in *Juliana v. United States" (Clean Air Council* Complaint 2017, 25). In subsequent cases like *CAC*, the government can no longer quibble over whether climate change exists, thanks to the record provided by *Juliana.* Even if *Juliana*'s journey ends with the 9th Circuit dismissal, the evidence that "the United States admitted in *Juliana* that officials and persons in the Federal Government have been aware of the evidence of climate change, its causes, and its consequences for over fifty years" could serve to benefit future lawsuits (*Clean Air Council* Complaint 2017, 26). By conceding that climate change is an undisputed problem but arguing that the courts are the wrong branch of government to attempt to solve it, the defendants in *Juliana* provide a foundation for future cases like *Clean Air Council* to build upon.

The third and final reason why *Clean Air Council* is instructive for the potential pathways that *Juliana* could provide to citing cases is less optimistic. *CAC* was dismissed in 2019 at the district court level in a particularly negative opinion. Judge Diamond first denied the standing of the non-profit to bring a claim on its members behalf, then considered and rejected each prong of standing for the *Clean Air Council* individual plaintiffs. In one instance, Judge Diamond writes that it would be "absurd" for him to trace the specific challenged actions of the defendants to the plaintiff's alleged injuries. And it does sound absurd when Judge Diamond singles out individual actions by the defendants (like the EPA deleting its climate science website or President Trump firing Secretary of State Rex Tillerson) that the plaintiffs had treated as a collective pattern of behavior (*Clean Air Council,* 2019, 11).

While a procedural reason would have been sufficient to dismiss the case, Judge Diamond went further and provided an "alternative" dismissal that tore apart each of the legal arguments (*Clean Air Council,* 2019, 14). According to Judge Diamond, there is no due process right to environmental quality, the 9th Amendment does not support their claims, and the public trust claim "has no basis in law" (*Clean Air Council* Opinion, 2019, 14). The opening paragraph of the opinion is particularly forceful in its interpretation of the plaintiff's request for relief. It was a big ask; the plaintiffs requested the declaration that defendants "cannot effectuate or promulgate any rollbacks that increase the frequency and/or intensity of the life-threatening effects of climate change" (*Clean Air Council*, 2019, 1). Judge Diamond fears that this would "effectively ask me to supervise any actions that the President and his appointees take that might touch on the 'environment'' (*Clean Air Council*, 2019, 1). As he puts it, since he had

"neither the authority nor inclination to assume control of the Executive Branch" he granted the motion to dismiss.

Not only was *Clean Air Council's* application of *Juliana's* legal framework unfounded according to Judge Diamond, but he also suggests that the decision in *Juliana* was wrong in the first place. Since both decisions were at the same level and in different districts, neither can overturn the other. But Diamond can still call Aiken's reasoning "less than persuasive" that "certainly contravened or ignored longstanding authority" (*Clean Air* Council Opinion, 2019, 15-25). While one district court judge calling another's ruling unimpressive is not enough to signal a trend in post-*Juliana* litigation, Judge Diamond does invoke a long list of cases that combine to form a massive barrier to any claim of a constitutional right to a pollution-free environment. This harkens back to the "judicial baggage" possibility that Markell and Ruhl introduced (Markell and Ruhl, 2012, 62) and demonstrates the uniqueness of *Juliana*. Despite the similarity of the legal arguments and the timing (after the 2016 ruling in favor of the *Juliana* plaintiffs but before the Ninth Circuit 2020 dismissal), *CAC* demonstrates the barriers in place that make climate litigation so difficult.

Animal Legal Defense Fund v. United States

The second relevant case using *Juliana's* fundamental rights argument is *Animal Legal Defense Fund v. United States (2019)*. This case was filed in the district court of Oregon by two non-profit environmental groups on behalf of all of their members, three adults, one youth plaintiff, and a representative of future generations—making it the first outside of OCT's ATL campaign to assert standing for future generations. This case follows the model of *Juliana* by claiming a new fundamental right on top of the

right to a safe and sustainable environment: the right to be alone in the wilderness. They justify building upon the stable climate right, which had not yet been overruled by the Ninth Circuit Court of Appeals, by quoting *Juliana* to state that "a right that is a 'necessary condition to exercising a fundamental right may itself be implied as fundamental" (*ALDF* Original Complaint 2018, 59). In *Juliana*, a stable climate is required to exercise the rights to life, liberty, and property. *ALDF* extends that to say that "the freedom to choose not to associate by seeking solitude in wilderness" is essential in order to exercise that right to a stable climate (*ALDF* Original Complaint, 2018, 60). The original *ALDF* complaint cites a long history of privacy cases to demonstrate how that right has expanded into new areas over the years and how this would just be an extension of already existing ideas. The government defendants countered that position by arguing that the freedom to be alone in wilderness is too far afield and too narrow to be encompassed by any existing constitutional right (Sullivan, 2019). This case makes a natural law argument to suggest that the right to be free in wilderness has always existed implicitly, similar to the justification of the PTD by intergenerational justice scholars. However, the link between the Posterity clause of the Preamble to the Constitution and the goal of preserving livable conditions for future generations is a significantly more direct than between "the concept of freedom as political separation from others" and the words "We the People" (*ALDF* Original Complaint, 2018, 5). ALDF was dismissed at the district court level when the judge did not grant standing, nor found merit in any of the legal claims. Though *ALDF* inverted the central values of *Juliana* by placing nature at the center rather than people, as one of

two substantive citations of *Juliana*, *ALDF* shows the potential for *Juliana* to be invoked in pursuit of even more novel constitutional claims.

Victories Beyond Favorable Rulings

One genre of legal literature particularly relevant to my research explores the opportunities for climate litigation to achieve meaningful benefits without necessarily receiving a favorable ruling in court. These potential benefits for *Juliana* are threefold: the case and surrounding media campaign by OCT could help to catalyze legislative action, update judicial standards by pushing past procedural hurdles to set the stage for future cases, or shaping larger public narrative regarding the case's significance and the urgency of the climate crisis.

Catalyzing Legislative Action

In a Student Note in the Harvard Environmental Law Review Nathaniel Levy argues that "Juliana can—win or lose—lead to constructive legal and political responses to climate change" (Levy, 2019, 1). Levy discusses "availability cascades," which occur when information with a specific point of view about a topic becomes rapidly available. When this happens, Levy explains that people who are unsure of their stance on the issue are more likely to accept the newly prevalent viewpoint (Levy, 2019, 3). Levy identifies availability cascades in the emergence of environmental law, from the enactment of early pollution statutes to Rachel Carson's Silent Spring and DDT regulation. He asks how the success of previous availability cascades can be replicated within the context of climate litigation and determines that "advocates might be able to accelerate Congress' development of the climate agenda by parlaying Juliana—

whatever the outcome—into political messaging and communications designed to rapidly move climate to the top of the policymaker's to-do lists" (Levy, 2019, 13). Juliana is especially suited to gain the attention of lawmakers and the general public because "litigation, like the judicial decisions it can yield has expressive or symbolic value, especially when it seeks the recognition or vindication of constitutional rights" (Levy, 2019, 9). Juliana has already made progress towards that goal. In September 2020, a handful of Senators and Representatives introduced the Children's Fundamental Rights and Climate Recovery Resolution which "supports the principles underpinning Juliana" by "stating that a stable climate system is fundamental to a free and ordered society and is preservative of other fundamental rights" (Our Children's Trust, 2020). The joint resolutions in the House and Senate were reintroduced on Earth Day, 2021. Motivating new legislative action is just one of the possible achievements for Juliana outside of court.

Easing Standing Requirements

Beyond legislative connections, another way that novel legal cases like *Juliana* can make their mark is procedural. In "Will Climate Change the Courts?" journalist David Murray argues that by considering *Juliana* on its merits, decisions like Aiken's 2016 ruling loosen standing requirements for future cases (Murray, 2019). If the courts ended up accepting injury shared worldwide, causation by the whole federal government, and either the injunctive or declaratory relief, climate cases would have to clear a lower hurdle in the future. Murray and Justice Department attorney Jeff Clark, who told the Ninth Circuit during oral arguments that the case would "change standing law," view this potential shift as a negative. But for OCT, this procedural shift would

make the courts more amenable to the types of claims they file as the climate crisis advances. *Juliana* was denied by the Ninth Circuit on the basis of redressability, but with oral arguments to consider amending the original complaint scheduled for June 25th, 2021, the potential for *Juliana* to update the injury and causation standards is not entirely shut off.

The Power of Narrative

To understand the potential for the narrative power of *Juliana* to aid the case itself and future climate cases, we first must examine how scholars think about legal storytelling. Executive Director of the Sabin Center for Climate Change Law Michael Burger writes that there is a "dynamic relationship between law, literature, and narrative"—even to the point of viewing all of environmental law "as a battle" between "competing stories" (Burger, 2013, 1-12). Law professors Ewing and Kysar add to this framing by proposing that novel legal arguments be viewed as moves in a cultural and political debate over society's basic values (Ewing and Kysar, 2011, 350). They argue that common law and constitutional cases like *Juliana* frame their issues in terms of "compelling victim narratives," which allows them to "push past special interests and congressional inertia" (Ewing and Kysar, 2011, 371). Although going to trial and receiving recognition that the government violated the plaintiff's fundamental rights are the stated goals of *Juliana*, the case continues to benefit from media attention and catalyze public debate the longer it stretches on; Kysar and Ewing argue that achievements of this nature are valuable in their own right (Kysar and Ewing 2011, 350). Kysar later returns to the idea of legal narrative in light of *Juliana*, writing that the case builds upon a literary tradition which centers the fundamental principles of

"humility, stewardship, and responsibility toward future generations," departures from which "risk catastrophic collapse" (Kysar and Weaver, 2017, 352). These four legal scholars describe the power of storytelling to extend litigation beyond the courtroom, which helps to bridge the gap between climate litigation and activism by consolidating their methods and goals.

The narrative aspect is evidently important for OCT, which has used the sizeable attention gained from suing the federal government to raise awareness about the pressing urgency of climate change. Even beyond the courtroom, OCT makes an effort to spotlight the plaintiffs. The documentary about the case focuses on the lives of the plaintiffs to tell a story "about more than just a lawsuit" of "empowered youth finding their voices and fighting to protect their rights and our collective future" (YOUTH V. GOV, 2021). Compelling victim narratives also appear throughout the initial *Juliana* complaint, which dedicated over 80 paragraphs to the plaintiffs' injuries. Self-described scholar, storyteller, and climate justice advocate Grace Nosek highlights the work of OCT in this area in a 2018 law review titled "Climate Change Litigation and Narrative: How to Use Litigation to Tell Compelling Climate Stories" (Nosek, 2018, 734). Although climate harms may "seem distant in time and space" and "less visceral than other threats," Nosek argues that "litigation offers a unique opportunity to reframe…and overcome" this challenge (Nosek, 2018, 734). For Nosek, who gets to tell the story of a lawsuit can be as important as the legal merits. The communicators for *Juliana* are often the plaintiffs, who make the already "vivid description of climate threats" employed by the case "even more salient to the American public given [their] age" (Nosek 2018, 789). OCT recognizes the power of their young advocates, whose "personal narratives

gave life to the lawsuit" (Martinez, 2017, 47). Plaintiff Xuihtezcatl Martinez writes it was important for every plaintiff to attend the court hearings because they "wanted the judge to see who we were, so he could put a face to this lawsuit" (Martinez, 2017, 47). In addition to the role of the plaintiffs, other features of OCT's climate framing that Nosek highlights include the all-encompassing scale and "how the case centers blame" (Nosek, 2011, 790).

One specific way in which OCT advances the narrative of *Juliana* in order to make the public feel invested and support the plight of the plaintiffs is by drawing frequent comparisons to *Brown v. Board of Education (1954)*. There are two reasons why this connection helps *Juliana*. First, the comparison emphasizes the significance of the youth's discrimination claim. In the press release first announcing the filing of *Juliana,* OCT writes that they "seek judicial action no less important, from a strictly legal basis, than *Brown v. Board of Education*" (Our Children's Trust, 2015). OCT later writes that:

> The climate movement aligns with the historic civil rights movement which once again is being led by the nation's courageous youth. In *Brown v. Board of Education*, children fought for their constitutional rights and sought a court order to desegregate schools. The *Juliana* plaintiffs are similarly fighting for their constitutional rights to a stable climate system, so that their generation and future generations can flourish. An additional parallel is evident as today's youth demand racial justice and environmental justice, two issues especially intertwined given the disproportionate impact of climate change on BIPOC and frontline youth and communities. (Our Children's Trust, 2021)

Plaintiff Aji Piper affirms these parallels, stating that "climate change is no different" from the lingering effects of segregation he grew up with (Our Children's Trust, 2021). The second benefit to *Juliana* from drawing connections to the historic civil rights case rests in the fact that *Brown* is a persuasive precedent to invoke in court. *Brown* involves

both the recognition of a fundamental right that the government had been violating, and a court-supervised plan to remedy the newly recognized discrimination. During December 2017 oral arguments Julia Olson reminded a panel of Ninth Circuit judges that *Juliana* is not the first case to ask for dramatic remedy to a novel discrimination claim (United States Court of Appeals 2017).

Section III: Youth Activism on Climate Change

Young people who want to catalyze change are not limited to the courtroom. Activists have been marching, striking, litigating, and lobbying for various environmental pursuits for centuries. But up until recently, the movement was pioneered by adults. In 2013, the United Nations asked teenagers from around the world what issues mattered to them most and learned that education, health, and jobs took precedent over "action on climate change," which ranked dead last (Cocco-Klein and Mauger, 2018, 93). However, these priorities changed dramatically in the late 2010s. A few big moments exemplify the shift: the US branch of the September 2019 school strike for climate that attracted over four million marchers worldwide was organized by a group of 13-16-year-olds. That same week, then 16-year-old Greta Thunberg addressed the UN General Assembly and 30,000 signed OCT's "Young People's Brief" in support of Juliana proceeding to trial. Not only has the age of the strikers shifted, but the message is also different. As Juliana plaintiff and [activism job] puts it, "climate change isn't just about temperature and weather, it's about people" (Mignucci, 2017). By reframing climate change as an issue of justice, youth activists move in the same direction as Juliana, albeit in a different venue and with different potential outcomes. This section will provide context for the older climate movement; then it will consider four possible reasons that experts have proposed to explain the youthful shift in the climate movement. Finally, this section will examine three communication tools in common between Juliana and climate activists and what that might tell us about the trajectories of both movements.

Contextualizing the Youth Climate Movement

To understand how the modern climate activist movement might have changed, we first need background information on how environmentalism used to be. In a University of Washington blog, Master's student Karin Otsuka zooms out to see how the shape of the environmental movement has evolved from the late 1800s to present day (Otsuka, 2019). When the American conservation movement began, the participants were motivated by notions of "preservation, such as maintaining wilderness for leisurely activities, sustaining natural resources for future generations, or having a pristine environment free from human presence" (Otsuka, 2019). These values evolved into the "mainstream environmentalism" of the 1960s in order to respond to crises of the time like chemical exposure, industrial pollution, and overpopulation which were "at the forefront of concern for the white, urban environmentalists" (Otsuka, 2019). The varied embodiments of mainstream environmentalism shared several common goals, including the preservation of pristine wilderness for its own sake. However, when the issues confronting the activists began to change, so too did the movement. Reminiscent of the shift in focus away from individual instances of harm that environmental litigation has undergone, Otsuka observes that activists in the late 1990s faced "a great challenge in framing climate change" since "up until this point, issues of environmental degradation have been largely visible and localized, directly impacting individuals and communities" (Otsuka, 2019). Old tactics like direct appeals to lawmakers demonstrating visible harm, or even emotional campaigns to save the polar bear or slow glacial melt would no longer be sufficient.

Mainstream environmentalism was not the only branch of the movement. In an article in The Atlantic called "Environmentalism Was Once a Social-Justice Movement," Columbia Law Professor Britton-Purdy explains how environmental-justice arose as a critique of mainstream environmentalism that was "too elite, too white, and too focused on beautiful scenery and charismatic species" (Britton-Purdy, 2016). UC Davis professor and founding director of the Environmental Justice Project Julie Sze makes the origin story more explicit, stating that "[e]nvironmental justice (EJ) was formulated in the United States in response to the articulation of environmental racism (ER)," which "suggests that race and racism are independent factors that influence environmental harms" (Sze, 2020, 10). Otsuka further describes the formulation as a response to the focus of groundbreaking works like Rachel Carson's *Silent Spring*, writing that Carson focused on the impacts to "urban, white, and Anglo Americans" which "misses the Latino, black, Native American, and low-income white families disproportionately exposed to pollution throughout this time period and continuing to this day" (Otsuka, 2019). The EJ movement "connects race, class, indigeneity, gender, and environmentalism and fundamentally involves social justice" in order to correct present injustices (Sze, 2020, 5). There is even a litigation branch of EJ, which confronts inequities in distribution of environmental resources or harm (Cole, 1994). But this legal strategy is rarely successful since the plaintiffs must prove that the discrimination they faced was intentional, rather than coincidental (King, 2020). The current campaign of youth activism is not quite the same as EJ because the justice in question is more intergenerational than race or class-based, but the limitations of mainstream environmentalism motivated the emergence of both movements.

Why the youthful shift?

Technology

A central component of the messages of youth activists, and the news coverage surrounding them, revolves around *why* young people should lead the movement. One reason for their involvement is practical—Earth Guardians youth leader and *Juliana* plaintiff Xuihtezcatl Martinez explains that young people "have a greater understanding of technology because we grew up with it" which allows them to create movements that are "more global, more connected, more diverse, younger, and more intergenerational than ever before" (Young-Powell, 2019). Technology provides a platform with which activists can organize worldwide movements or even appeal directly to decision-makers. *New York Times* reporter Somini Sengupta writes that "at a time of fraying trust in authority figures, children—who by definition have no authority over anything—are increasingly driving the debate" which they are able to do "[u]sing the internet…like no generation before them" (Sengupta, 2019). This, for Sengupta, explains why "though their outsize demands for an end to fossil fuels mirror those of older environmentalists, their movement has captured the public imagination far more effectively" (Sengupta, 2019). This logistical reason can help explain how the marches and strikes grow so large but does not fully encapsulate why young people in particular are positioned to effectively communicate their new messages.

Youthful thinking

The second reason is also practical; in addition to technology, Xuihtezcatl Martinez explains that his generation just "think differently" with an increased sense of

urgency (Young-Powell, 2019). And brain science could help support this theory. In a 2019 article titled "How Youth Have Changed the Climate Movement," sociologist Mike Males cites research to explain why teens could have "broader, more flexible thinking" (Males, 2019). It comes down to the "wide-open neural connections in adolescence, while the 'pruning' of neural pathways as adulthood progresses renders adult brains more efficient for a narrower range of tasks" (Males, 2019). Males also argues that "[y]outhful thinking across multiple dimensions is better at imagining innovative policies to adapt to future contingencies; elder thinking is suited to resolving the practicalities" which means that older leaders "fixate on the short-range dollars-and-cents costs of change, while the climate-strike youth focus on the long-term price of inaction" (Males, 2019). These first two suggestions—technology and perspective—contribute to the position that young people should take the lead in climate activism.

Moral authority

A third explanation for the boom in youth-led initiatives is that the presence of young people in decision-making spaces makes the concept of future generations seem more immediate for older leaders. Senior Advisor and Associate Director of non-profit organization Equity for Children Samantha Cocco-Klein and Beatrice Mauger argue that children, "as representatives of the 'generation most affected,' have a unique role in advocating for mitigation policy" (Cocco-Klein and Mauger, 2018, 90). They explain that young people "can play an important role in motivating action by adults, by making the issue more immediate and personally relevant" (Cocco-Klein and Mauger, 2018, 94). Climate change may seem to be a far-off threat that will not catastrophically impact the lives of most people living today, which makes it hard to care about; similarly,

"[r]isks to one's own children are more likely to elicit action than appeals for generalized and hazy 'future generations'" (Cocco-Klein and Mauger, 2018, 94).

The inclusion of youth could do more than make the future seem closer. University of Leeds environmental social scientist Harriet Thew researched the role of 14-24-year-old participants in UN climate negotiations and found that "adults perceive these activists as having greater moral integrity" (Marris, 2019). Thew argues that young people are most effective as messengers in adult-dominated spaces when they highlight their own present vulnerability. Because youth activists represent themselves and are not career-motivated, adults often view them as having an "unvarnished" view (Marris, 2019, Sengupta, 2019). Cocco-Klein and Mauger also suggest the benefits of youth for climate activism and even cite OCT for support. Specifically, they reference *Alec L's* partnership with the iMatter organization. The two authors explain how iMatter "re-focused their campaign on mobilizing young people" who "rely on their 'moral authority' to shift decision-making away from a focus on the present to one in which the interests of future generations are also given considerations" (Cocco-Klein & Mauger, 2018). By highlighting the unique role of young people within the context of adult decision-making spaces, Cocco-Klein, Mauger, and Thew contribute to the explanation behind the increased activism that relies on their status and characteristics as young people. This is part of the story but is not enough to fully explain the drastic shift in climate activist movements in recent years.

Shut out of the political process

The fourth and final potential reason behind the frequent dichotomy of young activists versus old people in charge is simple. Children cannot vote, nor hold office,

and, thus, their interests are often pushed aside. Activism (or litigation) can provide a platform with which impassioned young people can gain political capital. The problem was exemplified in 2019, when a small class of young activists from a group called the Sunrise Movement travelled from California to Washington, D.C. to meet with their recently re-elected Senator, Dianne Feinstein. They planned to present her with their hand-written, brightly colored letters advocating for the Green New Deal and warning of the urgency of climate change, and they hoped that the Senator would listen to them. Instead, Feinstein denounced the youth. She did not want their Green New Deal; she had her own "with a much better chance of passing," nor did she want their feedback. The Senator responds to one girl's worries that "scientists have said we have 12 years to turn this around," with "well, it's not going to get turned around in 10 years." Before the group could present their letter, the Senator touts her own 30 years in office and dismisses the group who "come in here and say it has to be my way or the highway. I've gotten elected…maybe people should listen a bit" (Guardian News, 2019). The clip went viral, with over 200,000 views on the original video and even a Saturday Night Live parody of the episode (Saturday Night Live, 2019). But this was not an isolated incident for many young activists who view Senator Feinstein's casual rejection as representative of the larger obstacles youth face when attempting to do something about climate change.

The perspective that those who are too young to vote are also too young to deserve political attention partially motivated the US arm of the global climate strike in 2019. The lead organizers, then-13-16-year-olds Isra Hirsi, Haven Coleman, and Alexandria Villaseñor wrote a statement published in The Bulletin periodical titled

"Adults won't take climate change seriously. So we, the youth, are forced to strike" (Hirsi, Coleman, and Villaseñor 2019). They reference Senator Feinstein's rejection of the Sunrise Movement to point out that the Senator "will not have to face the consequences of her inaction on climate change" (Hirsi, Coleman, & Villaseñor, 2019). They make the accusation of political inaction explicit, stating "we strike because our world leaders haven't acknowledged, prioritized, or properly addressed the climate crisis" and instead "play political games" (Hirsi, Coleman, & Villaseñor, 2019). As the currently living generation that will be most impacted by climate change, it is unsurprising that young people turn to activism to attempt to gain a voice in the political process. However, the young age of activists is not enough to explain why their priorities have also changed. To understand how youth activism and *Juliana* may be two pieces of the same puzzle, we must examine what the youth activists are saying.

How has the message changed?

The youth climate activist movement is broad, dynamic, and does not refer to any one coordinated program. However, by examining the repeated themes of a few prominent figures in the movement, we can see three small but significant shifts in the priorities of the broader youth climate activist movement. As the stories of climate activism and litigation move more in line with one another, these three changes can help illuminate that connection and demonstrate how lawsuits like *Juliana* can also serve as a form of activism. This viewpoint reframes the goal of litigation beyond a favorable ruling to include the goals shared by youth activists. These three priorities involve incorporating intergenerational justice via language of betrayal, pinpointing blame, and referencing historic social justice movements to signify the gravity of their missions.

Betrayal

Intergenerational justice is a constant feature of climate change conversations. *Juliana* realizes this concept through the public trust doctrine, which positions the federal government as owing a duty of care to the atmosphere for the sake of future generations. Greta Thunberg communicates the same basic idea, but in simpler and more explicit language. She says that she speaks "on behalf of future generations" and tries to make far away threats seem present by explaining that "if I live to be 100, I will be alive in the year 2103. When you think about 'the future' today, you don't think beyond the year 2050…What happens next?" (Thunberg, 2019, 5). At the 2018 UN Climate Change Conference she addressed the leaders in the audience directly, stating that "you say that you love your children above anything else. And yet you are stealing their future" (Thunberg, 2019, 14). She argues that their "future was sold so that a small number of people could make unimagineable amounts of money. It was stolen from us every time you said that the sky was the limit, and that you only live once" (Thunberg, 2019, 56). Others like OCT Washington plaintiff and co-founder of youth-led activist group Zero Hour Jamie Margolin echo this message. Speaking before Congress in 2019, Margolin likened government involvement with climate change to "a knife to the heart" (Margolin, 2019). Further saying that the politicians she addresses chose "'their wallets over their children. It's very devastating and scary but also it feels like we've been betrayed" (Margolin, 2019). Her fellow Zero Hour co-founder Nadia Nazar testifies that "what disappoints many other youth and I, is that there are elected officials prioritizing money from fossil fuel corporations over the lives of my generation" (Nazar, 2019).

In line with Harriet Thew's research, Greta Thunberg invokes her moral authority as a member of the youngest generation. In one of her first speeches at a 2018 climate march in Stockholm, Thunberg told newspapers, influencers, and politicians that "the future of all coming generations rests on your shoulders," and even further, "our lives are in your hands" (Thunberg, 2019, 4). And the way her target audiences can fulfill the obligation is not via encouragement, but through action (Thunberg, 2019, 22). "The bigger your carbon footprint—the bigger your moral duty. The bigger your platform—the bigger your responsibility" (Thunberg, 2019, 4). She acknowledges at the UN Climate Change Conference in 2018, to the European Parliament in 2019, at the Austrian World Summit in 2019, and to the Montreal Week for Future Climate Strike in 2019 that stopping, or even reducing, emissions would be unpopular, uncomfortable, and unprofitable for the leaders in her audiences. But she does not care and urges them to give back the childhood they have stolen from her (Thunberg, 2019, 96). For Thunberg and for *Juliana*, elected officials owe it to young people and future generations to preserve their future and they are currently violating that obligation. By framing lax emissions regulations or endorsement of the fossil fuel industry as an intentional betrayal, activists like Thunberg feed into the second narrative shift: the narrowing assignment of blame.

Assigning blame

A second way that youth activists communicate their message of climate justice effectively is by identifying those who contribute the most to climate change and absolving the young, people in low-emitting countries, and future generations of blame. Thunberg relies on similar methods as Juliana by attributing blame to specific actors for

climate change. She calls it a "convenient lie" that "climate change is something that we have all created" (Thunberg, 2019, 15). Assigning responsibility to leaders of countries that emit astronomical levels of GHGs without even attempting to meet the obligations they signed on to in the 2017 Paris Agreement is important for Thunberg "because if everyone is guilty then no one is to blame. And someone is to blame" (Thunberg, 2019, 15). In 11 of the 16 speeches in her book, Thunberg uses the apportionment of blame to highlight the equity aspect of the Paris Agreement. She makes sure to mention in her speeches that she and the leaders she addresses "are the lucky ones. Those who will be affected the hardest are already suffering the consequences. But their voices are not heard" (Thunberg, 2019, 57).

Both *Juliana* and Thunberg hold elected officials accountable over violating their rights, rather than corporations or private individuals for violating their property interests. In court, *Juliana* is able to pinpont blame by demonstrating the causation aspect of standing and (if ultimately successful) proving that the government violated their public trust obligation and the plaintiffs' right to a stable climate. OCT also advances this goal outside of court documents. In a 2018 press release, OCT emphasizes the fact that "*Juliana v. United States* is *not* about the government's failure to act on climate" (Our Children's Trust, 2018). Instead, the governments "affirmative actions" cause the harm in question (Our Children's Trust, 2018). This assignment of blame also connects back to scholar Grace Nosek's argument that OCT's strength lies in its compelling storytelling. She writes that by detailing how the federal government knew about climate change for decades, the *Juliana* plaintiffs frame the "public health risk as intentionally created," which can influence "how the public apportions blame for

that risk" (Nosek, 2018, 791). It is easy to look at a global problem like climate change and attribute the blame equally to everyone, but the youth plaintiffs and activists attempt to demonstrate that this is not the case. By addressing politicians in particular, both *Juliana* and youth activists seek to make the sometimes-abstract harm of climate change concrete and visible.

Invoking the past

Climate activists reference successful social justice, activist, or political campaigns in the past to signify the gravity of their own movement. Two frequent references are the 1930s New Deal and the Civil Rights Movement of the 1950s and 60s. Young organizers like Hirsi, Coleman, Villaseñor invoke the New Deal in order to justify their support for proposed congressional resolution, the Green New Deal. They argue that "as the original New Deal was to the declining US economy, the Green New Deal is to our changing climate" (Hirsi, Coleman, & Villaseñor, 2019). Beyond justifying the Green New Deal, the New Deal references solidify the connections between climate, jobs, health, and social justice—which, as the 2013 UN survey of youth indicated, was lacking from previous conceptions of climate change policy. Director of the Green New Deal Strategy at think tank Data for Progress Julian Noisecat makes the connection explicit by saying "we're trying to build the climate equivalent of the civil rights movement" (Goodell, 2019). It is no longer just about melting glaciers or planting trees, now the goal is "articulating the dream of a better world" (Goodell, 2019).

While *Juliana* cites and references historic civil rights cases in its legal documents, the youth plaintiffs also reinforce the idea in their own activism. For

Juliana plaintiff and Fellow with the Alliance for Climate Education Vic Barrett, the connections are clear. While testifying before Congress alongside Margolin and Thunberg, he argues that "just as my federal government sanctioned discrimination in schools and housing until the middle of the last century, a policy that harmed children, my federal government has also orchestrated and sanctioned a system of fossil fuel energy that is harming children in another way" (Barrett, 2019). He reinforces the Youth v. Gov framing by explaining how "Like youth who have come before us in the Civil Rights movement and other social movements it is often the youth that must shine a light on systems of injustice" (Barret, 2019).

The *Juliana* plaintiffs know that the lawsuit's goals extend beyond the courtroom. Speaking online at the Public Interest Environmental Law conference, 21-year-old Vic Barrett is introduced as a climate activist first and plaintiff in *Juliana* second. He explains that "being a plaintiff on this case was never and it's never going to be just about what's written in our complaints, it's about what we've experienced, what we've seen in our lives" (Barrett, 2020). Barrett describes how his fellow young activists were surprised when he joined the lawsuit as a plaintiff. Even though a case like *Juliana* is radical within the context of environmental law, suing the federal government is still "inside action" for Barrett because it involves working within a system that he perceives to be largely broken (Barrett, 2020). However, he also learned as a plaintiff that young activists should "be willing to see that the change that you don't think is the most radical" since "things that we don't think of as diverse, creative, complex, or radical like law and legal action can be—and can bolster the radical movement we need to see the change that a lot of people like me are asking for" (Barret

2020). Barrett is not the only *Juliana* plaintiff who learned that a lawsuit can be another form of activism. Xuihtezcatl Martinez, wrote in his 2017 book *We Rise* that he believes "that as activists in this country it is important to know when to use the existing systems to create change" (Martinez, 2017, 46). By joining *Juliana*, Martinez "had an opportunity to do so from the inside out and infiltrate the system to demand that the government uphold our interests" (Martinez, 2017, 46). These two plaintiffs put forth the perspective of law and activism as two vital pieces that complement and complete each other.

Conclusion

Despite ever-increasing warnings from climate scientists that the current levels of emissions are unsustainable, the United States government continues to invest in the fossil fuel industry, thereby exacerbating the crisis. Dissatisfied with the government's inaction and worried for the future of her children, Julia Olson at OCT launched the ATL campaign in 2011 to hold the legislators and executive accountable via the third branch. The first attempt, *Alec L v. McCarthy,* that relied solely on the novel application of the PTD to atmosphere, was quickly dismissed and *Juliana* has met been met with mixed reception. However, legal scholarship largely answers "yes" to the question of whether climate change mitigation can be pursued via litigation. These scholars provide the background of how intergenerational justice and the PTD underpin the constitutional protections the courts exist to protect, which is crucial to understanding *Juliana's* legal arguments.

Next, this thesis traces the trajectory of climate in the courts. Beginning with a field of statutory and nuisance claims, we see how success for climate plaintiffs was rare—and incremental when achieved. *Juliana* emerged in 2015 and disrupted the field with its constitutional framework, combined with its application of the ancient yet rarely used Public Trust Doctrine (PTD), the involvement of charismatic young plaintiffs, and the fact that the entire federal government (rather than an individual emitter) is the target of the suit. Win or lose, *Juliana's* compelling narrative and connection to modern youth activism could advance the case for climate in the courts and beyond.

Finally, this thesis extends beyond the legal analysis to incorporate the aspect of activism, which is a vital way for young people shut out of the political process to gain a voice. Where *Juliana* invokes the PTD, activists reckon with intergenerational justice through language of betrayal. If by naming the federal government as defendant, *Juliana* narrows the blame for a global crisis, activists assign blame explicitly by calling our world leaders. *Juliana* invokes *Brown v. Board* to communicate the gravity of the rights being violated; youth activists do the same by referencing historic movements that advanced their causes. By bringing both the legal and activist modes of action into the same conversation, we can see how they use the same narrative tactics to advance their message. Further, climate plaintiffs have the potential to gain legal standing and mandate government action via the courts that activists lack. But even without receiving official acceptance by the judiciary, *Juliana* can keep climate justice at the forefront of public debate and even motivate legislative action to achieve their ultimate goal of preserving a stable climate system.

Climate litigation is only growing; even Greta Thunberg is part of an international lawsuit (Harvey, 2020). If we can better understand how these cases, like activists, transform the cold, hard legal facts into compelling stories centered around people we can expand what we consider to be success for climate cases. This research contributes to the studies of climate activism and law by contextualizing Juliana within the literature behind ATL, tracing the trajectory of climate in the courts, extending analysis of Juliana to include its narrative aspects, and drawing preliminary links between the case and youth activists that demonstrate how both are re-centering their goals away from preserving nature and towards protecting vulnerable people.

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