Atmospheric Trust Litigation: Foundation for a Constitutional Right to a Stable Climate System?

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The Anthropocene era has triggered a recent wave of judicial and legislative developments in the United States and abroad that seek enhanced government stewardship responsibilities of the atmosphere and natural resources, and legal protections for future generations. The recent case, *Juliana v. United States*, attempts to secure these protections for future generations in the United States.[1] This promising and hopeful case is attracting national and international attention, and has been characterized as "no ordinary lawsuit"[2] and the "trial of the century."[3] This article traces the developments that led to this historic moment in U.S. environmental law and discusses the opportunity that this case may present for potential recognition of a constitutional right to a stable climate system in the United States.

Inherited from English common law, the public trust doctrine[4] is the earliest example of environmental rights-based thinking in U.S. environmental law jurisprudence. The concept of government stewardship of resources—and corresponding rights of the people to enjoyment and protection of resources—can serve as the foundation for a broader rights-based jurisprudence in U.S. environmental law. The atmospheric trust litigation theory advanced in the *Juliana* case builds on this public trust doctrine foundation and provides an opportunity to develop federal constitutional environmental rights and responsibilities in the United States. Regardless of the outcome of the *Juliana* litigation, *Juliana* will continue to build public awareness and lay a strong conceptual foundation for climate justice initiatives in federal and state constitutional and legislative contexts.

Part I of this Article discusses the environmental justice movement and how it served as a platform for climate justice litigation, which in turn laid a common-law foundation for atmospheric trust litigation. Part II examines the evolution of atmospheric trust litigation ("ATL") and discusses how it represents an ambitious but appropriate expansion of the traditional foundations of the public trust doctrine. Part III analyzes how the *Juliana* case can secure a right to a stable climate system because such a right, like the right to marry,[5] serves as a foundation for the enjoyment of other constitutionally protected rights under the Due Process Clause.

I. Evolution of the Rights-Based Approach to U.S. Environmental Law

Environmental law in the United States began as a crusade to protect natural resources. Federal laws mandating government stewardship of resources in national parks and wilderness area were enacted to protect those resources for their intrinsic value and to ensure that humans respect and appreciate nature's splendor in these areas.[6] This preservationist paradigm shifted with the advent of the federal pollution control laws of the 1970s and their "command-and-control"[7]regulation of contamination of air, water, land, and

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1. 217 F. Supp. 3d 1224, 46 ELR 20175 (D. Or. 2016).
2. *Id.* at 1234 ("This is no ordinary lawsuit."). *See also* Michael C. Blumm & Mary C. Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 Am. U. L. Rev. 1 (2017).
3. *See* Karen Hollweg, *Trial of the Century: Juliana v. U.S. Trial Set for October 29, 2018*, N. Am. Ass'n Envtl. Educ. (Apr. 17, 2018), https://naaee.org/eepro/blog/trial-century-juliana-vs-us-climate [https://perma.cc/Y73P-BSSX].
4. The public trust doctrine provides that the tidelands, and the lands beneath tidal and navigable waterways, are held in trust by the states for the benefit of public interests. Barton H. Thompson Jr., *The Public Trust Doctrine: A Conservative Reconstruction & Defense*, 15 SE Envtl. L.J. 47, 67 (2006). The public interests at the foundation of the public trust doctrine were navigation, commerce, and fishing, but those interests later expanded to include other public values. *See id.* at 67–70 (recreation, environmental protection, aesthetics); Gerald Torres & Nathan Bellinger, *The Public Trust Doctrine: The Law's DNA*, 4 Wake Forest J.L. & Pol'y 281, 297 (2014) (groundwater, wetlands).
5. For a discussion of Judge Ann Aiken's reasoning in which she analogizes the right to a stable climate system to the right to marry as comparable foundational fundamental rights, see *infra* Part III.
6. *See, e.g.*, National Park Service Organic Act, 16 U.S.C. §§ 1-460bbbb-7 (2018); Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136 (2018).
7. Command-and-control regulation refers to federal or state government regulators establishing standards to which the regulated community must adhere such as an emissions limitation or a performance requirement. Government

other human health-based objectives.[8] Rather than focusing on the intrinsic value of resources, the regulatory imperative to protect the environment shifted in these laws to address the ways in which human health had become imperiled from the rise in pollution in the industrial age.

Until recently, rights-based thinking was confined to the social justice domain of American jurisprudence, whereas environmental law was governed almost exclusively through "command-and-control" regulation.[9] Although the command-and-control regime was highly successful in cleaning up the air, water, and land from the scourge of pollution that inspired the enactment of these laws, a glaring gap in these laws started to surface in the late 1980s. Human health was not being protected in an evenhanded manner in how these laws were enforced and in the degree to which environmental contamination problems manifested in communities throughout the nation. Minority and low-income communities were bearing a disproportionate share of the environmental contamination burden in the United States, and there was no mechanism in these federal environmental laws to address that inequity. Environmental protection was developing a human face. The environmental justice movement was born.[10]

Environmental justice litigation ensued, seeking 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. These early efforts to apply Fourteenth Amendment protection to these communities ultimately failed in the federal courts,[11] resulting in a devastating setback for the environmental justice movement.[12] However, these advocates had just begun to fight. The effort to constitutionalize environmental rights was an important first step in what would be revisited and conveyed in a more compelling manner under the Due Process Clause just 15 years later in the *Juliana* case. The constitutional foundation was different (Due Process Clause rather than the Equal Protection Clause) and the plaintiffs were different (youth and future generations, rather than minority and low-income communities), but the underlying theory was the same: the U.S. Constitution should be interpreted to protect environmental human rights through some mechanism and to some degree.[13]

Just a few years after the disappointing setbacks in 2001, environmental justice thinking was embraced to help propel the emerging climate justice movement. Two significant developments in this domain were the Inuit petition[14] and the *Kivalina*[15] case. The Inuit petition before the Inter-American Commission on Human Rights in 2005 can be credited with establishing the connection between climate change impacts and possible human rights violations.[16] Alleging a broad spectrum of human rights violations—ranging from the concrete (rights to property, health, food, and life) to the more conceptual (rights to culture and rights to self-determination)—the Inuit characterized the collective impacts of climate change on all of these rights as a deprivation of their collective "right to be cold."[17]

Perhaps the most valuable lesson from the environmental justice movement that continues to be relevant today is that the command-and-control approach to environmental problems cannot be the exclusive response to environmental degradation. Common-law and constitutional law theories that address the human rights dimensions of environmental problems need to be included as a weapon in the environmental lawyer's arsenal. During the peak of the command-and-control era in the 1970s and 1980s, the common-law domain was not entirely supplanted; however, common-law theories in environmental litigation were used

enforcement actions, as well as citizen suits under several federal environmental laws, can seek to compel compliance with the standards that have been violated and can seek penalties for the noncompliance. OpenStax, *12.2 Command-and-Control Regulation*, Principles of Economics (2017), https://opentextbc.ca/principlesofeconomics/chapter/12-2-command-and-control-regulation/ [https://perma.cc/8NSL-5A57].

8. *See, e.g.*, Clean Air Act (CAA), 42 U.S.C. §§ 7401–7671q, ELR Stat. CAA §§ 101–618 (2018); Clean Water Act (CWA), 33 U.S.C. §§ 1251–1387, ELR Stat. FWPCA §§ 101–607 (2018); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6992k, ELR Stat. RCRA §§ 1001–11011 (2018); Toxic Substances Control Act (TCSA), 15 U.S.C. §§ 2601–2692, ELR Stat. TCSA §§ 2–412 (2018).
9. Openstax, *supra* note 7.
10. "Environmental Justice is rooted in several social movements within the United States, including the Civil Rights Movement of the 1950s, 1960s, and 1970s; the Anti-Toxics Movement; the struggles of indigenous communities; the Labor Movement; and the traditional environmental movement." Elizabeth Ann Kronk Warner & Randall S. Abate, *International and Domestic Law Dimensions of Climate Justice for Arctic Indigenous Peoples*, 43 Ottawa L.J. 113, 120–21 (2013) (internal citations omitted). For a discussion of the background of the environmental justice movement, see generally Robert D. Bullard: Dumping in Dixie: Race, Class, and Environmental Quality (3d ed. 2008); Luke W. Cole & Sheila R. Foster, From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement (2001). For a comprehensive evaluation of the legal framework for environmental justice claims, see generally Barry E. Hill, Environmental Justice: Legal Theory and Practice (4th ed. 2018); Michael B. Gerrard & Sheila R. Foster eds., The Law of Environmental Justice: Theories and Procedures to Address Disproportionate Risks (2d ed. 2009).
11. Two cases closed the door on this potential avenue of relief for environmental justice litigants. *See* Alexander v. Sandoval, 532 U.S. 275 (2001) (holding that Title VI of the Civil Rights Act does not authorize a private right of action alleging evidence of disparate impact); S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 274 F.3d 771, 32 ELR 20425 (3d Cir. 2001) (holding that evidence of intentional discrimination is required in private right of action under Title VI).
12. *See generally* John Arthur Laufer, *Alexander v. Sandoval and Its Implications for Disparate Impact Regimes*, 102 Colum. L. Rev. 1613 (2002); Brendan Cody, *South Camden Citizens in Action: Siting Decisions, Disparate Impact Discrimination, and Section 1983*, 29 Ecology L.Q. 231 (2002).
13. A possible federal constitutional amendment addressing environmental protection has been considered in the United States and has been the subject of debate for decades. *See generally* Robin Kundis Craig, *Should There Be a Constitutional Right to a Clean/Healthy Environment?*, 34 ELR 11013 (Dec. 2004); J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 Notre Dame L. Rev. 245 (1999); Richard O. Brooks, *A Constitutional Right to a Healthful Environment*, 16 Vt. L. Rev. 1063 (1992).
14. Inuit Circumpolar Conference, *Petition to the Inter-American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused by Acts and Omissions of the United States*, Dec. 7, 2005, http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf.
15. Native Vill. of Kivalina v. ExxonMobil Corp. (*Kivalina II*), 696 F.3d 849, 42 ELR 20195 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2390 (2013).
16. *Petition to the Inter-American Commission*, *supra* note 14.
17. *See generally* Sheila Watt-Cloutier, The Right to Be Cold: One Woman's Story of Protecting Her Culture, The Arctic and the Whole Planet (2016) (exploring the parallels between the melting Arctic and the loss of the Inuit's culture).

intermittently at best, and in limited circumstances.[18] That approach provided a foundation for a creative combination of public nuisance doctrine and the federal common law of interstate pollution in a line of climate change litigation cases in U.S. courts.[19]

The *Kivalina* case was the best opportunity to date for the climate justice movement to gain traction in the U.S. court system. A Native Alaskan Village of 400 residents sued the 24 leading multinational oil and energy companies seeking to recover the estimated $400 million necessary to relocate the village 10 miles inland.[20] It was predicted that the village would have to evacuate its existing location due to the threat of inundation from sea-level rise.[21] The case was dismissed on standing and political question grounds in the U.S. District Court for the Northern District of California.[22] The U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal, and the U.S. Supreme Court subsequently denied certiorari in the case.[23] For purposes of advancing the climate justice movement, however, both the Inuit petition and the *Kivalina* case can best be characterized as "losing the battle, but winning the war." The best evidence of the success of these creative climate justice litigation efforts is that the use of these theories to seek governmental and private-sector accountability for climate change impacts continues to this day in the United States and abroad.

The most recent—and potentially most promising—development in this line of public nuisance climate justice litigation is the efforts of cities in California seeking to rely on state public nuisance law to recover for climate change impacts in their cities. The federal displacement doctrine from *American Electric Power Co. v. Connecticut* applies only to public nuisance claims under federal common law.[24] This case left the door open for potential recovery on public nuisance claims under state law, which in now being tested in the courts.

In the first of these cases, *County of Santa Cruz v. Chevron Corp*., the city and county of Santa Cruz, California, sued 29 fossil fuel companies for a wide range of climate change impacts the city and county were experiencing, including sea-level rise, more frequent and severe storms, drought, and heatwaves.[25] In their complaint, filed in December 2017, the plaintiffs sought compensatory and punitive damages, abatement of the nuisance, and disgorgement of profits for climate change-related injuries from defendants' production and promotion of fossil fuel products, concealment of known hazards of those products, and championing of anti-science campaigns.[26] The plaintiffs relied on several state common-law theories to advance their claims, including public and private nuisance, strict liability based on design defect and failure to warn, and trespass. One month after the city and county of Santa Cruz filed against Chevron Corp., the city of Richmond, California, also filed suit against Chevron Corp., asserting the same legal theories.[27]

This progression of retooling and refining climate justice litigation theory reflects a long, successful history of creativity and persistence on the part of environmental lawyers in seeking recovery for environmental damage under common-law theories. The success of environmental litigation against the asbestos, lead paint, and tobacco industries, and federal and state legislation regulating these activities that followed shortly thereafter, offers compelling and inspiring examples of the creativity and persistence of the environmental bar. Climate justice litigation appears to be the next success in this storied tradition. The only question remaining is how soon that success will materialize.

II. From Public Trust to Atmospheric Trust Litigation

In a related but separate theater in the battle for climate justice, the atmospheric trust litigation (ATL) theory was launched in the wake of the *Kivalina* litigation. In a bold and ambitious step, the environmental nongovernmental organization, Our Children's Trust, launched cases throughout the nation with youth plaintiffs leading the charge.[28] The ATL theory sought to extend the public trust to compel federal and state governmental entities to protect the atmosphere for

18. *See e.g.*, Bruce Yandle, *The Common Law and the Environment in the Courts: Discussion of Code Law and Common Law*, 58 Case W. Res. L. Rev. 647, 648–54 (2008).
19. The *Kivalina* case built on a progression of cases in the federal courts relying on public nuisance and the federal common law of interstate pollution to seek redress for climate change mitigation and adaption (*American Elec. Power Co. v. Connecticut*, *California v. General Motors Corp.*, and *Comer v. Murphy Oil USA*) that laid a foundation for the *Kivalina* theory to proceed. For a detailed discussion of this line of cases, see generally Randall S. Abate, *Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time*, 85 Wash. L. Rev. 197 (2010). For a compelling and heart-wrenching account of the legal and cultural context of the *Kivalina* litigation, see generally Christine Shearer, Kivalina: A Climate Change Story (2011).
20. Native Vill. of Kivalina v. ExxonMobil Corp. (*Kivalina I*), 663 F. Supp. 2d 863, 869, 39 ELR 20236 (N.D. Cal. 2009).
21. *Kivalina II*, 696 F.3d at 853 n.2 (citing U.S. Gov't Accountability Office, GAO 04–142, Alaska Native Villages: Most Are Affected by Flooding and Erosion, but Few Qualify for Federal Assistance 30, 32 (2003)).
22. *Kivalina I*, 663 F. Supp. 2d at 868.
23. 133 S. Ct. 2390 (2013).
24. Tracy D. Hester, *A New Front Blowing in: State Law and the Future of Climate Change Public Nuisance Litigation*, 31 Stan. Envtl. L.J. 49, 52 (2012) (citing *American Elec. Power v. Connecticut*, 131 S. Ct. 2527, 41 ELR 20210 (2011)).
25. Complaint at 2, County of Santa Cruz v. Chevron Corp., No. 17CV03242 (Cal. Super. Ct., filed Dec. 20, 2017), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2017/20171220_docket-17CV03242-_complaint.pdf.
26. *Id.* at 123.
27. Complaint, City of Richmond v. Chevron Corp., No. C18-00055 (Cal. Super. Ct., filed Jan. 22, 2018), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180122_docket-C18-00055_complaint.pdf. On July 18, 2018, the U.S. District Court for the Northern District of California granted the city of Richmond's and the city and county of Santa Cruz's motion to remand the case to state court, http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180710_docket-518-cv-00450_order-1.pdf. As of this writing, the defendants' appeal of the remand order is pending.
28. *See, e.g.*, Press Release, Our Children's Trust, Youth Sue the Government to Preserve the Future and Halt Climate Change (May 4, 2011), https://static1.squarespace.com/static/571d109b04426270152febe0/t/576d76cb3e00bec5631952d1/1466791631209/iMatter_Legal_Release_11.05.01.pdf [https://perma.cc/DXH4-E4LD]; Press Release, Our Children's Trust, Kansas Youth Files Climate Change Lawsuit (Oct. 18, 2012), https://static1.squarespace.com/static/571d109b04426270152febe0/t/576d6a2237c581d6b14799b2/1466788389238/2012.10.18-KansasPR_0.pdf [https://perma.cc/DRL6-7YRY].

the benefit of their citizens.[29] Case law had already extended the reach of the public trust doctrine in incremental steps beyond the scope of the uses in the traditional triad (navigation, commerce, and fishing) to reach the protection of groundwater, wetlands recreation, and wildlife. If courts have recognized coverage of resources beyond the traditional triad, then extending public trust to the protection of the atmosphere may logically follow.[30]

The first wave of ATL cases was filed against many state governments and the federal government. These state cases enjoyed some preliminary success and favorable language from the courts,[31] but progress has been slow to materialize. Moreover, the federal case, *Alec L. v. Jackson*,[32] ran into trouble regarding whether the public trust doctrine could be applied to the federal government. The court concluded that it could not be applied to the federal government and dismissed the case.[33] In the *Juliana* case, the plaintiffs retooled the theory and added constitutional claims based on the Equal Protection Clause, the Due Process Clause, and the Ninth Amendment.[34]

ATL advances two trends in environmental protection. First, it seeks enhanced duties on regulators to promote stewardship of resources. Second, it seeks to promote rights-based protections of individuals and consideration of future generations' interests. These two strands are reflected in the *Juliana* litigation.[35] The young plaintiffs alleged that the federal government's affirmative actions in establishing a national energy system that accelerates global climate change violated their due process rights to life, liberty, and property and has failed to protect public trust resources.[36]

In 2016, the government filed a motion to dismiss the claims in *Juliana*,[37] which presented Judge Ann Aiken of the United States District Court for the District of Oregon with an opportunity to rule on the validity of this retooled version of the ATL theory. In a landmark decision, Judge Aiken denied the federal government's motion to dismiss the case and held that the plaintiffs' claims against the federal government could proceed to trial.[38]

In the wake of Judge Aiken's decision, and for the next three years, the federal government made multiple attempts to dismiss the case by employing a wide range of procedural mechanisms.[39] The case was originally set for trial in October 2018,[40] but the Ninth Circuit granted the federal government's request for a temporary stay of the district court's proceedings.[41] In November 2018, Judge Aiken issued an order certifying the case for interlocutory appeal to the Ninth Circuit. As this writing is sent to print, the Ninth Circuit heard oral arguments on the interlocutory appeal in June 2019 in Portland, Oregon.[42]

III. Toward a Constitutional Right to a Stable Climate System

The momentum that the *Juliana* plaintiffs appear to have going into the potential trial in 2019 is promising. This wave of success and optimism would not have been possible without a variety of synergistic developments in related contexts. Rights-based theories for environmental protection have enjoyed many significant victories in the past few years. The public trust doctrine has been used with some success as a rights-based theory for relief in recent climate change cases outside the United States in nations such as Pakistan, the Philippines, and Ukraine.[43] In addition, within the span of one week in March 2017, legal personhood protections were secured for the Whanganui River in New Zealand[44] and the Ganges and Yunama Rivers in India.[45] It is significant for purposes of ATL momentum that the rights-based protections for the rivers in India were secured in court.[46]

Since 2014, the Nonhuman Rights Project (NhRP) has pursued similar efforts in the animal protection domain in a line of ongoing cases seeking to free chimpanzees from unwarranted captivity pursuant to a habeas corpus petition.[47] Like the state-level ATL cases, some courts in these

29. *See generally* Ipshita Mukherjee, *Atmospheric Trust Litigation—Paving the Way for a Fossil-Fuel Free World*, Stan. L. Sch. Blogs (July 5, 2017), https://law.stanford.edu/2017/07/05/atmospheric-trust-litigation-paving-the-way-for-a-fossil-fuel-free-world/ [https://perma.cc/V8FG-DZDK].
30. Prof. Mary Wood is the pioneer of the ATL movement. For a comprehensive discussion of her groundbreaking scholarship on the ATL theory, see generally Mary Christina Wood, Nature's Trust: Environmental Law for a New Ecological Age (2013); Mary Christina Wood, *Atmospheric Trust Litigation*, *in* Adjudicating Climate Change: State, National, and International Approaches 99–125 (William C.G. Burns & Hari M. Osofsky eds., 2009); Blumm & Wood, *supra* note 2; Mary Christina Wood & Charles W. Woodward, IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 Wash. J. Envtl. L. & Pol'y 663 (2016).
31. For a discussion of these ATL cases from New Mexico, Oregon, Texas, and Washington, see Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?*, *in* Climate Justice: Case Studies in Global and Regional Governance Challenges 554–58 (Randall S. Abate ed., 2016). For updates on ATL cases in the U.S. and abroad, consult the Our Children's Trust website, www.ourchildrenstrust.org/.
32. 863 F. Supp. 2d 11, 42 ELR 20115 (D.D.C. 2012), *aff'd sub nom.*, Alec L. ex rel. Loorz v. McCarthy, 561 Fed. App'x 7, 44 ELR 20130 (D.C. Cir. 2014).
33. *Id.* at 15.
34. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1233–34, 46 ELR 20175 (D. Or. 2016).
35. *Id.*
36. *Id.*
37. *Id.* at 1233.
38. *Id.*
39. For a detailed discussion of these developments, see Our Children's Trust, *Juliana v United States*: Youth Climate Lawsuit, https://www.ourchildrenstrust.org/juliana-v-us.
40. *Id.*
41. *Id.*
42. *Id.*
43. United Nations Env't Programme, The Status of Climate Change Litigation: A Global Overview 23–24 (May 2017), https://www.unenvironment.org/resources/publication/status-climate-change-litigation-global-review [https://perma.cc/JVN3-NC9U].
44. *New Zealand's Whanganui River Granted Legal Status as a Person After 170-Year Battle*, ABC.net, Mar. 15, 2017, http://www.abc.net.au/news/2017-03-16/nz-whanganui-river-gets-legal-status-as-person-after-170-years/8358434.
45. Shynam Krishnakumar, *Could Making the Ganges a "Person" Save India's Holiest River?*, BBC.com, Apr. 5, 2017, https://www.bbc.com/news/world-asia-india-39488527.
46. Salim v. State of Uttarakhand, No. 126 of 2015, High Court of Uttarakhand (Mar. 20, 2017), http://hindi.indiawaterportal.org/sites/hindi.indiawaterportal.org/files/WPPIL-126-14%20HC-UTTARAKHAND%20ORDER%20ON%20GANGA%20AND%20YAMUNA%20RIVER%20RIGHTS-1.pdf.
47. *See generally* Randall S. Abate & Jonathan Crowe, *From Inside the Cage to Outside the Box: Natural Resources as a Platform for Nonhuman Animal Personhood in the U.S. and Australia*, 5 Global J. Animal L. 54, 57–60 (2017) (providing

NhRP cases were receptive to the rights-based legal theory but were not prepared to rule in favor of the plaintiffs' petitions. Nevertheless, two related rights-based efforts to protect animals from abuse and unwarranted captivity were successful in 2016. First, Ringling Brothers agreed to discontinue the use of elephants in its traveling circus shows,[48] curtailing a 150-year tradition; second, SeaWorld agreed to discontinue its orca-captive breeding program[49] after its practices came under public scrutiny following a lawsuit and high-profile documentary.[50]

Most importantly, and in a seemingly unrelated success, the recognition under the Due Process Clause of the right to same-sex marriage in *Obergefell v. Hodges*[51] has laid perhaps the most compelling foundation on which the *Juliana* plaintiffs may prevail. Many of the most significant constitutionally protected rights in the United States have been initially derived from Supreme Court jurisprudence, such as a woman's right to choose in *Roe v. Wade*.[52] The Supreme Court has long recognized the Due Process Clause as a gateway for the recognition of unenumerated fundamental rights. The Due Process Clause's protection of life, liberty, and property—read in conjunction with the Ninth Amendment[53]—has enabled the Court to recognize evolving societal values and articulate unenumerated fundamental rights without engaging the constitutional amendment process.

The list of unenumerated rights is well-entrenched in the Court's jurisprudence and spans decades of groundbreaking jurisprudence. This list of rights includes abortion, contraception, upbringing of children, procreation, sexual intimacy, marriage, and most recently, same-sex marriage.[54] Admittedly, many of these rights are rooted in privacy-related protections. Trying to connect a constitutional *environmental* right to the foundation of these privacy-based liberty protections is ambitious and may explain why such efforts have been unsuccessful in the past. But the *Obergefell* decision opened a door for a Due Process Clause foundation for a constitutional right to a stable climate system in a way that the previous line of Due Process recognition of unenumerated rights could not offer.

In what has been widely recognized as a groundbreaking decision, Judge Aiken's reasoning in *Juliana* provides fertile opportunities for the ATL theory in this case to open the door for possible Due Process Clause protection of the right to a stable climate system. Judge Aiken's decision laid a valuable foundation for extending fundamental rights jurisprudence under the Due Process Clause to environmental rights. In concluding that the case could proceed to trial, Judge Aiken noted that "Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it."[55]

Judge Aiken noted that "[t]he identification and protection of fundamental rights . . . has not been reduced to any formula."[56] Judge Aiken concluded that the plaintiffs had adequately alleged infringement of a fundamental right, explaining that "[t]o hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink."[57]

Judge Aiken relied heavily on the reasoning in *Obergefell*, which recognized "marriage as a right underlying and supporting other liberties" and as "a keystone of our social order."[58] Relying on Justice Kennedy's reasoning in his majority opinion in *Obergefell*, Judge Aiken connected the reasoning on same-sex marriage to the stable climate context in *Juliana*.[59] In "[e]xercising [her] 'reasoned judgment,'" Judge Aiken had "no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'"[60] Accepting as true plaintiffs' allegations that the government

> played a unique and central role in the creation of our current climate crisis; that they contributed to the crisis with full knowledge of the significant and unreasonable risks posed by climate change; and that the Due Process Clause therefore imposes a special duty on defendants to use their statutory and regulatory authority to reduce greenhouse gas emissions,

Judge Aiken held that plaintiffs adequately alleged their claim and may proceed to trial on the due process issues.[61]

The youth plaintiffs also made public trust claims.[62] These claims arose "from the application of the public trust doctrine to essential natural resources."[63] The plaintiffs stated that with respect to these essential resources, "the sovereign's

a summary of NhRP cases). For updates on all of NhRP's cases, see *Litigation: A Legal Team With the Power to Make History for Nonhuman Animals*, Nonhuman Rights Project, https://www.nonhumanrights.org/litigation (last visited July 22, 2018).

48. Susan Zalkind, *"The End of an Era": Ringling Bros Circus Closes Curtain on Elephant Shows*, The Guardian, May 2, 2016, https://www.theguardian.com/stage/2016/may/02/ringling-brothers-elephants-circus-final-show.
49. Brian Clark Howard, *SeaWorld to End Controversial Orca Shows and Breeding*, Nat'l Geographic, Mar. 17, 2016, https://news.nationalgeographic.com/2016/03/160317-seaworld-orcas-killer-whales-captivity-breeding-shamu-tilikum/ (last visited July 22, 2018).
50. *See* Tilikum v. SeaWorld Parks & Entm't, Inc., 842 F. Supp. 2d 1259 (S.D. Cal. 2012); Blackfish (CNN Films 2013).
51. 135 S. Ct. 2584 (2015).
52. 410 U.S. 113 (1973).
53. The Ninth Amendment provides, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.
54. Brief of Amicus Curiae Law Professors for D. Or., at 15–16, United States v. United States Dist. Court for the Dist. of Oregon, No. 6:15-cv-01517-TC-AA (9th Cir. 2017), https://static1.squarespace.com/static/571d109b04426270152febe0/t/59af3d0d3e00be820ce723b6/1504656654021/Law+Prof+Motion+and+Amicus+Brief.pdf [https://perma.cc/7JY8-GN9S].
55. *Juliana*, 217 F. Supp. 3d at 1262.
56. *Id.* at 1249 (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015)).
57. *Id.* at 1250.
58. *Obergefell*, 135 S. Ct. at 2601.
59. *Juliana*, 217 F. Supp. 3d at 1249–51.
60. *Id.* at 1250. Plaintiffs asserted that if the government's actions that contributed to climate change were to "continue unchecked," such actions would "permanently and irreversibly damage plaintiffs' property, their economic livelihood, their recreational opportunities, their health, and ultimately their (and their children's) ability to live long, healthy lives." *Id.*
61. *Id.* at 1251–52.
62. *Id.* at 1253.
63. *Id.*

public trust obligations prevent it from 'depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens.'"[64]

Judge Aiken stated, "the government, as trustee, has a fiduciary duty to protect the trust assets from damage so that current and future trust beneficiaries will be able to enjoy the benefits of the trust."[65] She concluded that plaintiffs had adequately alleged harm to public trust assets because "[t]he federal government holds title to the submerged lands between three and twelve miles from the coastlines of the United States" and "a number of plaintiffs' injuries relate to the effects of ocean acidification and rising ocean temperatures."[66] Judge Aiken also stated that plaintiffs' federal public trust claims are recognized in federal court and that "the federal government, like the states, holds public assets—at a minimum, the territorial seas—in trust for the people."[67] Judge Aiken further determined that "[p]ublic trust claims are unique because they concern inherent attributes of sovereignty."[68] "The public trust imposes . . . an obligation [on the government] to protect the *res* of the trust"; a significant "feature of that obligation is that it cannot be legislated away."[69] Thus, "[b]ecause of the nature of public trust claims, a displacement analysis simply does not apply."[70] Judge Aiken noted that "[a]lthough the public trust predates the Constitution, plaintiffs' right of action to enforce the government's obligations as trustee arises from the Constitution."[71]

Judge Aiken further observed that this action is of a different order than the typical environmental case. It alleges that "[the government's] actions and inactions—regardless of whether they violate any specific statutory duty—have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty."[72] In addition, "[e]ven when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government."[73]

Judge Aiken's decision could secure a historic victory for environmental rights in the U.S. federal court system, but it has a long way to go. The outcome in *Obergefell* appeared to be similarly improbable just five years ago as it was working its way through the federal courts, and yet the right to same-sex marriage is now constitutionally enshrined under the Due Process Clause. The *Juliana* case will likely remain in the U.S. federal courts for years to come as it makes its way to the Supreme Court. In the meantime, the ATL movement will continue to be propelled forward by favorable tail winds in the United States and abroad as it seeks to secure recognition of a constitutional right to a stable climate system under the Due Process Clause of the Constitution.[74]

64. *Id.*
65. *Id.* at 1254.
66. *Id.* at 1255–56.
67. *Id.* at 1259.
68. *Id.* at 1260.
69. *Id.*
70. *Id.*
71. *Id.* at 1261.
72. *Id.*
73. *Id.* at 1263.
74. The momentum from the *Juliana* litigation has inspired additional promising ATL cases in U.S. state courts. For example, in *Reynolds v. Florida*, youth plaintiffs sued Gov. Rick Scott for failing to act on climate change and, in many ways, taking actions to deepen the crisis. South Florida is one of the most vulnerable areas in the world to sea-level rise, with the number of high tide floods in Miami Beach increasing by 400% since 2006. The suit alleges that the state government has violated: (1) youth plaintiffs' rights to due process by violating their rights to life, liberty, and property; and (2) the public trust doctrine as reflected in the ATL theory by allowing and sometimes facilitating fossil fuel companies in their carbon-intensive fossil fuel extraction and production activities, including supporting offshore drilling and imposing strict regulations on solar energy development. *See* Complaint, Reynolds v. Florida, No. 18-CA-000819 (Fla. Cir. Ct. Apr. 16, 2018), https://static1.squarespace.com/static/571d109b04426270152febe0/t/5ad6274f575d1f452d0e0015/1523984211940/2018.04.15.FL.Complaint.FINAL.pdf [https://perma.cc/2XS9-AYLZ]; *see also* Press Release, Our Children's Trust, Constitutional Climate Lawsuit Brought by Young Alaskans Heard in Anchorage (Apr. 30, 2018), https://static1.squarespace.com/static/571d109b04426270152febe0/t/5ae7f3f770a6ad3043d94eec/1525150712298/2018.04.30+Sinnok+v.+Alaska+hearing+press+release.pdf https://perma.cc/ZM59-J9Y9].