

**CHILDREN'S RIGHTS TO A LIFE-SUSTAINING CLIMATE:
THE FOUNDATIONAL RULE OF LAW TO ACHIEVE SUSTAINABLE
ABUNDANCE FOR HUMANITY**

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INTRODUCTION

The global democratic community faces paramount and exigent questions about unalienable human rights, rights that no government shall erode or extinguish. The fossil fuel-imposed climate crisis is forcing a reckoning that will decide the future of the species *Homo sapiens* and millions of other species with which we share this planet. Climate chaos holds up a mirror of morality before us, forcing us to examine whether our foundational human laws will be able to root us in intergenerational justice and prevent one of the greatest crimes against humanity, especially for our children. These questions are being asked by youth around the world in judicial tribunals from the U.S. federal courts;¹ the federal courts of Brazil;² the European Court of Human Rights;³ and trial courts in the capital cities of Montana⁴ and Uganda,⁵ among others.⁶

Principally, youth are asking these tribunals whether humans have a protected right to a climate system that sustains life—not just in theory but also in enforceable law that will hold governments accountable in time to provide meaningful redress. Courts are being asked to find that the climate right is implicit in the fundamental rights to life and liberty⁷ or that the climate right is rooted in modern codifications of the

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- 1 *See, e.g.,* *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).
 - 2 J.F.-14a São Paulo, Ação Popular no. 5008035-37.2021.4.03.6100, Relator: Thalita Silva e Silva, 27.05.2021 (Braz.), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210528_Acao-Popular-no-5008035-37.2021.4.03.6100_decision-1.pdf [*Six Youths v. Minister of Environment and Others*]; *Six Youths v. Minister of Environment and Others*, SABIN CTR. FOR CLIMATE CHANGE L., U.S. LITIG. CHART, <http://climatecasechart.com/non-us-case/six-youths-v-minister-of-environment-and-others/> (last visited Apr. 24, 2022).
 - 3 Duarte Agostinho v. Portugal, App. No. 39371/20, <https://hudoc.echr.coe.int/eng?i=001-206535> (pending before the European Court of Human Rights).
 - 4 Complaint for Declaratory & Injunctive Relief, Held v. Montana, No. CDV-2020-307 (Mont. 1st Dist. Ct. Mar. 13, 2020) [hereinafter *Held* Complaint].
 - 5 Amended Plaintiff, Mbabazi v. Attorney General, No. 283 of 2012 (High Court of Uganda Holden at Kampala Aug. 25, 2015), http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2015/20150828_Civil-Suit-No.-283-of-2012_complaint.pdf.
 - 6 *Other Global Actions*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/other-global-actions> (last visited Mar. 15, 2023).
 - 7 *See, e.g.,* First Amended Complaint for Declaratory and Injunctive Relief at 84–92, *Juliana v. United States*, No. 15-cv-01517 (D. Or. Sept. 10, 2015) [hereinafter *Juliana* Amended Complaint]; Complaint for Declaratory and Injunctive Relief at 71–72, *Layla H. v. Virginia*, No. CL22000632-00 (Va. Cir. Ct. Feb. 9, 2022).

right to a clean and healthy environment and public trust.⁸ A threshold question underlies the youths' claims: whether children will be given access to justice to enforce that fundamental right at a time when their lives—more than anyone else's—are jeopardized by affirmative government actions depriving them of a life-sustaining climate.⁹ Some courts will also be asked to decide whether children will finally be given the protected status they deserve in claims about government conduct that endangers them.¹⁰

Judicial declaration of the unalienable climate right has unique implications unlike almost any other question of rights faced by humanity. It will be harder—if not impossible—to meaningfully protect the right going forward if we fail to define and protect it now. The right has an expiration date: when our Earth is too far gone to return to sustainability on meaningful human time scales. This will occur not just for the individuals who died fighting for it but for all generations to come. In a recent *New York Times* interview, longtime science writer Bill McKibben put it this way:

I mean, we've been talking about, say, national health care as long as I've been alive. And to our great shame, we've never gone all the way there. Some day, doubtless, we'll join other industrialized countries in guaranteeing health care as a right. People will have died or gone bankrupt in the meantime, but it won't be harder to do it because we delayed when we finally get around to it.

Climate change isn't like that. Once you've melted the Arctic, no one has a very good plan for how you freeze it back up again.¹¹

8 See, e.g., Complaint for Declaratory & Injunctive Relief at 67–69, *Navahine F. v. Hawai'i Dep't of Transp.*, No. ICCV-22-0000631 (Haw. 1st Cir. Ct. June 1, 2022); *Held* Complaint, *supra* note 4, at 90–102.

9 See, e.g., Corte Suprema de Justicia [C.S.J.] [Supreme Court], abril 5, 2018, Radicación n. 11001-22-03-000-2018-00319-01 (p. 33) (Colom.), <https://www.escri-net.org/sites/default/files/caselaw/fallo-corte-suprema-de-justicia-litigio-cambio-climatico.pdf>; *Future Generations v. Ministry of the Environment and Others*, SABIN CTR. FOR CLIMATE CHANGE L., U.S. LITIG. CHART, <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/> (last visited Apr. 24, 2023).

10 See, e.g., *Held* Complaint, *supra* note 4, at 95–98; *Sacchi v. Argentina*, CRC/C/88/D/104/2019, Decision, Committee on the Rights of the Child [CRC], (Oct. 8, 2021) (raising a claim under the U.N. Convention on the Rights of the Child).

11 The Ezra Klein Show, *Transcript: Ezra Klein Interviews Bill McKibben*, N.Y. TIMES (Nov. 15, 2022), <https://www.nytimes.com/2022/11/15/podcasts/transcript->

For fifty years, governments, voters, politicians, market economies, industries, entrepreneurs, scientists, international bodies, movements, and the global citizenry have completely and disastrously failed to stop the climate crisis, even though there has been more than enough information to act and more than enough public opinion supporting it.¹² Until recently, one governmental body has been sitting on the sidelines: the world's courts.¹³ When it comes to this most intractable issue of social injustice, judges now have no choice but to step into their role as interpreters of law and arbiters of right and wrong. Judges—and only judges—hold the power to enforce the right to life for our children. History has demonstrated that without such enforcement, we will not turn this ship around in time to protect our children, much less our children's children.¹⁴

The importance of a stable climate system cannot be overstated. It is foundational to children's ability to exercise all other rights. Children need a safe climate for their physical and emotional health; for their access to education, food, recreation, and cultural practices; and for the safety of their homes and communities.¹⁵

A constitutionally protected right to a stable climate—whether codified or implied—is also foundational to support and compel the transformation needed in our society. It sets the stage for an agenda of sustainable abundance¹⁶—one that promotes the thriving of our children

ezra-klein-interviews-bill-mckibben.html.

- 12 See generally JAMES GUSTAVE SPETH, THEY KNEW: THE US FEDERAL GOVERNMENT'S FIFTY-YEAR ROLE IN CAUSING THE CLIMATE CRISIS (MIT Press 2022) (describing the U.S. government's knowledge of, role in bringing about, and failure to prevent climate change).
- 13 See *Search*, SABIN CTR. FOR CLIMATE CHANGE L., U.S. LITIG. CHART, <http://climatecasechart.com/search/> (use drop-down menu in "Filter by Filing Year"); *Search*, SABIN CTR. FOR CLIMATE CHANGE L., U.S. LITIG. CHART, <http://climatecasechart.com/search-non-us/> (use drop-down menu in "Filter by Filing Year").
- 14 See generally SPETH, *supra* note 12.
- 15 See generally FREDERICA PERERA, CHILDREN'S HEALTH & THE PERIL OF CLIMATE CHANGE (2022) (describing the effects of climate change on children's lives, including their mental and physical health, and demonstrating that such effects will be felt by *all* children).
- 16 Agnes Kalibata et al., *The Race to Sustainable Abundance*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (July 14, 2021), <https://climatechampions.unfccc.int/the-race-to-sustainable-abundance/> ("Abundance in a zero-emissions world means no longer exploiting and wasting finite resources, but rather valuing the nature that sustains and protects us."); see Ezra Klein, *The Economic Mistake the Left is Finally Confronting*, N.Y. TIMES (Sept. 19, 2021), <https://www.nytimes.com/2021/09/19/opinion/supply-side-progressivism.html>; see also Derek

rather than the exploitation of our land. Without law we can enforce, abundance is up for anyone's defining agenda.¹⁷ Sustainable abundance imagines forward-looking communities where government and industries accept the binding, science-based standard of a life-sustaining climate system.¹⁸ Imagine a country where fundamental human rights jurisprudence requires that we build our energy systems, transportation systems, agricultural systems, housing systems, and new technologies so that they comply with protecting life in all of its nourishing abundance.

Until we envision, and then create, the rule of law we need, we will never achieve it. If we fail to achieve this rule of law for the world our children deserve to thrive in, this great experiment in human democracy will also fail. Regardless of whether the words *life-sustaining climate* are ever written in ink in constitutions around the world, these values are embedded in the molecules that grew the trees that became the paper for those constitutions and that allow our every breath.

I. TIMING THE CODIFICATION OF HUMAN RIGHTS

The codification of important human rights has historically been the reactionary result of oppression at the hands of governments or individual rulers.¹⁹ Quite often, it takes decades (or even centuries)

Thompson, *A Simple Plan to Solve All of America's Problems*, THE ATLANTIC (Jan. 12, 2022), <https://www.theatlantic.com/ideas/archive/2022/01/scarcity-crisis-college-housing-health-care/621221/>.

17 See Tony Dutzik, *When Is Enough Enough? The Abundance Agenda America Needs*, FRONTIER GRP. (Feb. 17, 2022), <https://frontiergroup.org/articles/when-enough-enough-abundance-agenda-america-needs/>; see generally JEFFREY A. WINTERS, OLIGARCHY (2011) (discussing how oligarchy can arise amidst weak rule of law or can create strong rule of law to enforce its own power); see also TERRY BOUTON, TAMING DEMOCRACY: "THE PEOPLE," THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION (2007) (describing how after the American Revolution, Pennsylvania's elites used their political power to enrich their own estates and entrench their own political hegemony).

18 See Kalibata, *supra* note 16; Dutzik, *supra* note 17.

19 See, e.g., NICHOLAS VINCENT, MAGNA CARTA: ORIGINS AND LEGACY 19 (2015) (detailing the history of the Magna Carta, which documents fundamental liberties and which was "intended to supply remedies to the abuses perpetrated not just by one bad ruler but by an entire dynasty of English kings"); MITHI MUKHERJEE, INDIA IN THE SHADOWS OF EMPIRE: A LEGAL AND POLITICAL HISTORY, 1774–1950 213–15 (3d impression 2009) (describing how universal adult franchise was codified in the Indian constitution as a result of the anti-colonial movement, led by Gandhi); G.A. Res 217 (III) A, Universal Declaration of Human Rights, preamble (Dec. 10, 1948) (citing the "disregard and contempt for human rights [that] have resulted in barbarous acts which have outraged the conscience of mankind"). *But see*

to codify human rights.²⁰ Take the 1776 Virginia Declaration of Rights, which informed the Declaration of Independence and later the U.S. Constitution's Bill of Rights.²¹ By the express terms of the 1776 Declaration of Rights, white men took leave of an oppressive monarchy that would not allow them to hold property rights, practice the religions they chose, engage in free speech, or choose the form of government that would protect their liberty and happiness.²² The founders of the 1776 Declaration of Rights imagined a government that would give them a voice they did not possess under the King's reign.²³ The assertion of these rights inspired those now codified in the U.S. Constitution,²⁴ which are enforced by the institution of a judiciary.²⁵

Decades later, the Thirteenth,²⁶ Fourteenth,²⁷ and Fifteenth²⁸ Amendments emerged as codifications of the rights too many people previously lacked because of their race.²⁹ It took another fifty years thereafter to codify women's right to vote³⁰ and another fifty after that for eighteen-year-olds to gain the same right.³¹ Across history, the

Lawrence Glickman, *How White Backlash Controls American Progress*, Atlantic (May 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914/> (describing the ways in which those in power react to the codification of rights with fury and violence).

20 See, e.g., Glickman, *supra* note 19 (noting that the civil rights movement of the 1960s was an effort to codify the values of racial equality underlying the Civil War).

21 *The Virginia Declaration of Rights*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/virginia-declaration-of-rights> (last updated Sept. 29, 2016).

22 See TERRY BOUTON, *TAMING DEMOCRACY: "THE PEOPLE," THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION* 51–57 (2007).

23 See *id.*

24 See *The Virginia Declaration of Rights*, *supra* note 21.

25 U.S. CONST. art. III.; *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

26 U.S. CONST. amend. XIII (abolishing slavery and involuntary servitude, except as punishment for a crime).

27 U.S. CONST. amend. XIV (establishing that the government may not deny to any person the equal protection of its laws).

28 U.S. CONST. amend. XV (establishing that the right to vote “shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude”).

29 See generally DAVID A. J. RICHARDS, *CONSCIENCE AND THE CONSTITUTION: HISTORY, THEORY, AND LAW OF THE RECONSTRUCTION AMENDMENTS* (1993) (advancing a constitutional interpretation of the Reconstruction Amendments imagining them as both an expression of abolitionism and of human rights).

30 U.S. CONST. amend. XIX; *Amendments to the U.S. Constitution*, NAT'L ARCHIVES FOUND., <https://www.archivesfoundation.org/amendments-u-s-constitution/> (last visited Apr. 25, 2023).

31 U.S. CONST. amend. XXVI; *Amendments to the U.S. Constitution*, *supra* note 30.

codification of human rights has thus emerged from the antecedent denial of those rights by the ruling class—be it a monarchy, autocracy, or democracy.

Some rights, however, are so basic they are rarely codified: the right to conceive and birth a child;³² the rights to drink water, breathe air, be clothed, and eat food;³³ the rights to laugh, sing, and make music or art; or even the rights to swim the sea, run through woods, or climb a mountainside. Those aspects of humanity are so natural, so inherent, that democratic people rarely believe the rights must be codified to be protected from government deprivation.³⁴ The first national anthem of 1831, *America*, by Samuel Francis Smith³⁵ and the 1843 Abolitionist version by A.G. Duncan³⁶ convey the visceral connection between nature and human freedom—the love of “woods and templed hills,” “mounts

32 *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (finding that the right to procreation is a fundamental right). The codification of reproductive freedom—that is, the right to an abortion—has been aflame ever since the Supreme Court struck down *Roe v. Wade*, 410 U.S. 113 (1973), in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). Vermonters codified the Reproductive Liberty Amendment, Article 22, by statewide referendum in November 2022. VT. CONST. ch. 1, art. 22. Californians also codified abortion and contraception rights to the State Constitution via Proposition 1 in November 2022. CAL. CONST. art 1, § 1.1. Many more similar efforts are underway. See, e.g., Steve Karnowski, *Minnesota Governor Signs Broad Abortion Rights Bill into Law*, AP NEWS (Jan. 31, 2023), <https://apnews.com/article/abortion-politics-minnesota-state-government-timothy-walz-11c3b1d5269c929e442b979f1bac73b>. Again, the deprivation of the right was the antecedent to its constitutional codification.

33 See *Goldberg v. Kelly*, 397 U.S. 254, 264, 266 (1970) (holding that termination of welfare benefits without a hearing violated procedural due process because “welfare provides the means to obtain essential food, clothing, housing, and medical care”). On November 2, 2021, Maine voters passed the nation’s first “right to grow, raise, harvest, produce and consume the food of their own choosing” constitutional amendment. ME. CONST. art. I, § 25; Patrick Whittle, *Maine Passes Nation’s 1st ‘Right to Food’ Amendment*, AP NEWS (Nov. 2, 2021), <https://apnews.com/article/election-2021-maine-right-to-food-605019e60df5b3e32bc70c86dcf957b3>. This codification is in response the increasing assault on our soils, our waters, and our lands that support subsistence and agriculture.

34 See Thomas Nagel, *Personal Rights and Public Space*, 24 PHIL. & PUB. AFFS. 83 (1995) (arguing that, in liberal democracies, the most basic rights are the most easily taken for granted).

35 SAMUEL FRANCIS SMITH, *America* (1831); *My Country, ‘Tis of Thee*, GILDER LEHRMAN INST. OF AM. HIST., <https://www.gilderlehrman.org/history-resources/spotlight-primary-source/my-country-tis-thee> (last visited Apr. 26, 2023).

36 A.G. DUNCAN, *Hymn 17 6s & 4s* (1843), reprinted in JARIUS LINCOLN, *ANTISLAVERY MELODIES: FOR THE FRIENDS OF FREEDOM. PREPARED FOR THE HINGHAM ANTISLAVERY SOCIETY 28–29* (1843).

and pleasant vales,” “rocks,” “trees,” “the breeze,” “land,” and “seas.”³⁷

AMERICA ³⁸	HYMN 17 6s & 4s ³⁹
<p><i>My country, 'tis of thee, Sweet land of liberty Of thee I sing; Land where my fathers died, Land of the Pilgrims' Pride, From every mountain side Let freedom ring.</i></p>	<p><i>My country! 'tis of thee, Stronghold of slavery, Of thee I sing; Land where my fathers died, Where men man's rights deride, From every mountainside, Thy deeds shall ring.</i></p>
<p><i>My native country, thee, Land of the noble, free, Thy name I love; I love thy rocks and rills, Thy woods and templed hills; My heart with rapture thrills, Like that above.</i></p>	<p><i>My native country! thee, Where all men are born free, If white's their skin; I love thy hills and dales, Thy mounts and pleasant vales, But hate they negro sales, As foulest sin.</i></p>
<p><i>Let music swell the breeze, And ring from all the trees Sweet freedom's song; Let mortal tongues awake, Let all that breathe partake, Let rocks their silence break, The sound prolong.</i></p>	<p><i>Let wailing swell the breeze, And ring from all the trees, The black man's wrong; Let every tongue awake, Let bond and free partake, Let rocks their silence break, The sound prolong.</i></p>
<p><i>Our fathers' God, to Thee, Author of liberty, To Thee we sing, Long may our land be bright, With freedom's holy light, Protect us by Thy might, Great God, our King.</i></p>	<p><i>Our father's God! to thee, Author of Liberty, To thee we sing; Soon may our land be bright, With holy freedom's right, Protect us by thy might, Great God, our King.</i></p>

Though they are no less essential or cherished in human existence, these most basic of rights are taken for granted in our

³⁷ *Id.*; SMITH, *supra* note 35.

³⁸ SMITH, *supra* note 35.

³⁹ DUNCAN, *supra* note 36.

founding documents . . . until they are threatened. The interactions of our planet's five major components—the atmosphere, the hydrosphere, the cryosphere, the land surface, and the biosphere—created the climate system necessary for life on Earth.⁴⁰ Our sustenance, reproduction, modes of travel, even our communication, socialization, and innovation are dependent on these natural forces. The human condition is inseparable from—and entirely dependent on—Earth's climate system.

Our connection to the physical environment in which we live is most notably acknowledged in the laws of Indigenous communities.⁴¹ And as early as 533 C.E., Emperor Justinian's Roman Civil Code codified protections for components of the Earth's climate system.⁴² The Code declared that the air, the sea, and the shores of the sea are common to all,⁴³ creating the law now known as the Public Trust.⁴⁴ Western codifications of those natural truths—the ability of *Homo sapiens* to live and thrive on Earth—did not begin until the latter part of the 20th century.⁴⁵

Thus, we have long recognized the importance of our natural world. People across history have sought to codify protections for the environment. But it is equally important to remember the age-old concept (embraced by our founders), that we need not codify every

40 A.P.M. Baede et al., *The Climate System: An Overview*, in CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS 85, 87 (J.T. Houghton et al. eds., 2001).

41 See, e.g., John Bortows, *Earth-Bound: Indigenous Resurgence and Environmental Reconciliation*, in RESURGENCE AND RECONCILIATION: INDIGENOUS-SETTLER RELATIONS AND EARTH TEACHINGS 49, 62 (Michael Asch et al. eds., 2018); Peter Wood, *Seventh Generation Sustainability – A New Myth*, NAT'L ASS. OF SCHOLARS (Dec. 28, 2009), https://www.nas.org/articles/Seventh_Generation_Sustainability_-_A_New_Myth; University of Arizona, *Oren Lyons: Looking Toward the Seventh Generation*, UNIV. OF ARIZ. NATIVE NATIONS INST. (2008), <https://nnigovernance.arizona.edu/oren-lyons-looking-toward-seventh-generation>; Act Preventing the Patenting of Organisms, IV WOTCL § 4.1001 (2023) (patent statute recognizing the interconnection between the Tribe's health and welfare, biodiversity, and the purity of air and water).

42 See J. B. MOYLE, THE INSTITUTES OF JUSTINIAN 35 (4th ed. 1913).

43 *Id.* (“[T]he following things are by natural law common to all—the air, running water, the sea, and consequently the sea-shore.”).

44 MICHAEL C. BLUMM & MARY CHRISTINA WOOD, THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW li (3d ed. 2021).

45 See, e.g., National Environmental Policy Act, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4331–4370) [hereinafter National Environmental Policy Act]; Clean Air Act, 77 Stat. 392 (1963) (codified as amended at 42 U.S.C. § 7401–7671) [hereinafter Clean Air Act] (providing for regulation of air pollution); Clean Water Act, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251–1387) [hereinafter Clean Water Act] (providing for regulation of water pollution and dredge and fill activities); MONT. CONST. art. IX, §1; PA. CONST. art. I, § 27.

inalienable right for the right to be secured, protected, and enforced by our courts.⁴⁶

II. THE 1970S' TREND TO CODIFY THE RIGHT TO A CLEAN AND HEALTHFUL ENVIRONMENT

In response to the clarion call of Rachel Carson in *Silent Spring*,⁴⁷ the youth-led Earth Day movement⁴⁸ and a relatively small handful of courageous lawyers, politicians, and activists,⁴⁹ governments began codifying environmental protection in statutes and constitutions across the United States.⁵⁰ People saw rivers on fire;⁵¹ acid rain;⁵² the threat of nuclear waste and meltdowns;⁵³ the prevalence of pollutants in air, water, and people's bodies;⁵⁴ and the decline of nature due to industrialization.⁵⁵ And so they rose up to codify that which was threatened⁵⁶—not to claim a new right but to re-commit to protecting perhaps the oldest right of all.

Today, in the United States, close to a dozen environmental rights or public trust rights exist in state constitutions, all enacted since the early 1970s.⁵⁷ Pennsylvania State Senator Franklin Kury led

46 U.S. CONST. amend. IX; *The Virginia Declaration of Rights*, *supra* note 21.

47 RACHEL CARSON, *SILENT SPRING* (Mariner Books 2002) (1962); MARK HAMILTON LYTLE, *THE GENTLE SUBVERSIVE: RACHEL CARSON, SILENT SPRING, AND THE RISE OF THE ENVIRONMENTAL MOVEMENT* 204–28 (2007) (describing the overwhelming praise of Carson's work following the publication of *Silent Spring*).

48 LYTLE, *supra* note 47, at 211–12.

49 *Id.* (activists); Brigham Daniels et al., *The Making of the Clean Air Act*, 71 HASTINGS L. J. 901 (2020) (lawyers and politicians creating, enforcing, and interpreting the Clean Air Act).

50 *See, e.g.*, Clean Air Act, *supra* note 45; Clean Water Act, *supra* note 45.

51 LYTLE, *supra* note 47, at 209.

52 Peringe Grennfelt et al., *Acid Rain and Air Pollution: 50 Years of Progress in Environmental Science and Policy*, 49 *AMBIO* 849, 850 (2020).

53 *The Meaning of Three Mile Island*, N.Y. TIMES (Apr. 12, 1979), <https://www.nytimes.com/1979/04/12/archives/the-meaning-of-three-mile-island.html>.

54 *See, e.g.*, LYTLE, *supra* note 47, at 209–10.

55 *See generally* CARSON, *supra* note 47 (accusing the chemical industry of causing environmental harm).

56 *See, e.g.*, Clean Air Act, *supra* note 45; Clean Water Act, *supra* note 45.

57 *See* Martha F. Davis, *The Greening of State Constitutions*, BRENNAN CTR. FOR JUST. (Apr. 20, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/greening-state-constitutions>. *See generally* Jack R. Tuholske, *U.S. State Constitutions and Environmental Protection: Diamonds in the Rough*, 21 WIDENER L. REV. 239 (2015) (discussing environmental protections in state constitutions and the difficulties of enforcing them). Nearly one half of U.S. state constitutions contain some policy statement or procedural or substantive protections for environmental rights. James May & William Romanowicz, *Environmental Rights in State Constitutions*, in

one of the earliest efforts to codify environmental rights in the late 1960s, culminating in the 1971 Environmental Rights Amendment of the Pennsylvania Constitution, advanced with the overwhelming approval of voters.⁵⁸ As Kury writes:

Article I, Section 27, sets forth three essential principles:

1. The people have a right to a healthy environment;
2. Public natural resources are the common property of all people; and
3. The government is the trustee with responsibility to maintain that public estate.⁵⁹

In 2013, the Pennsylvania Supreme Court held that a state law designed to facilitate the extraction of gas from Marcellus Shale violated Article I, Section 27 because the law would impair the state's public natural resources and a healthy environment.⁶⁰ The case, *Robinson Township*, noted that “[t]he plain meaning of the terms conserve and maintain implicates a duty to prevent and remedy the degradation, diminution, or depletion of our public natural resources.”⁶¹ The court further stated: “[T]he Commonwealth has a duty to refrain from

Principles of Constitutional Environmental Law, in PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 306, 306 (James R. May ed., 2011). “The number of constitutions that define environmental protection as a right is a smaller subset, perhaps eight to ten states depending on how one views the provisions.” Tuholske, *supra* note 57, at 239 n.3. New York is the most recent state to ratify an environmental amendment in November 2021. Abe Musselman, *How New Yorkers Won the Right to a “Healthful Environment,”* SIERRA (Nov. 19, 2021), <https://www.sierraclub.org/sierra/how-new-yorkers-won-right-healthful-environment>. Pending or recently ratified substantive environmental rights amendments include New York, New Jersey, Iowa, Kentucky, Maine, New Mexico, Oregon, Vermont, Washington, and West Virginia. *Green Amendments in 2023: States Continue Efforts to Make a Healthy Environment a Legal Right*, NAT’L CAUCUS OF ENV’T LEGISLATORS (Mar. 27, 2023), <https://www.nceleenviro.org/articles/green-amendments-in-2023-states-continue-efforts-to-make-a-healthy-environment-a-legal-right/>; *Active States*, GREEN AMENDS. FOR THE GENERATIONS, <https://forthe generations.org/active-states/> (last visited Apr. 27, 2023).

58 PA. CONST. art. I § 27; *The People’s Right to a Clean Environment*, PA. DEP’T CONSERVATION NAT. RES. (May 12, 2021), <https://www.dcnr.pa.gov/GoodNatured/pages/Article.aspx?post=171>.

59 FRANKLIN L. KURY, *THE CONSTITUTIONAL QUESTION TO SAVE THE PLANET: THE PEOPLE’S RIGHT TO A HEALTHY ENVIRONMENT* xv (2021).

60 *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 913 (Pa. 2013); Michael Blumm & Mary Christina Wood, “No Ordinary Lawsuit”: *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 47–48 (2017) (opinion “defined public trust rights as ‘inherent and indefeasible’ rights as impliedly reserved by citizens when forming government”).

61 *Robinson Twp.*, 83 A.3d at 957.

permitting or encouraging the degradation, diminution, or depletion of public natural resources, whether such degradation, diminution, or depletion would occur through direct state action or indirectly, *e.g.*, because of the state's failure to restrain the actions of private parties."⁶² Importantly, the Pennsylvania Supreme Court affirmed that environmental and public trust rights are "preserved rather than created by the Pennsylvania Constitution."⁶³ Justice Castille made clear that the constitutional amendment did not create a new right; it simply affirmed what has always been inherent in the people.⁶⁴

Just a year after Pennsylvania's environmental amendment, Montana also held a Constitutional Convention to codify the people's right to a "clean and healthy environment."⁶⁵ The codification of this right (in Article II, Section 3 and Article IX, Section 1) "was noteworthy in that it was identified as an 'inalienable right' and applied to both present and future generations."⁶⁶ Article IX, Section 1 states, in part: "The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations."⁶⁷ Through these amendments, Montana's Constitution has explicitly required the State to not just *prevent* the degradation of environmental life-support systems but also to *improve* the quality of the environment.⁶⁸ In one of the most important decisions to date from the Montana Supreme Court on the right to a clean and healthful environment, the court ruled that the right was intended to be "both anticipatory and preventative" so that the people of Montana could "be free of [environmental harms] in the first place."⁶⁹

62 *Id.*

63 *Id.* at 948.

64 Similarly, in March 2023, an Associate Justice on the Hawai'i Supreme Court wrote in a concurring opinion that the Hawai'i Constitution's codified environmental rights, which include the implied right to a life-sustaining climate system, are equally protected by the public trust doctrine and the substantive due process clause of the constitution. *Matter of Haw. Elec. Light Co., Inc.*, 526 P.3d 329, 337 (Haw. 2023).

65 *Montana Frames New Constitution*, N.Y. TIMES (Mar. 19, 1972), <https://www.nytimes.com/1972/03/19/archives/montana-frames-new-constitution-assemblys-document-will-go-to.html>.

66 Nathan Bellinger & Roger Sullivan, *A Judicial Duty: Interpreting and Enforcing Montanan's Inalienable Right to a Clean and Healthful Environment*, 45 PUB. LAND & RES. L. REV. 1, 5 (2022).

67 MONT. CONST. art. IX, §1.

68 *See id.*

69 *Park Cnty. Env't Council v. Montana Dep't of Env't Quality*, 477 P.3d 288, 303–04 (Mont. 2020).

A growing number of states are putting environmental rights amendments on the ballot. How these codified rights operate in the courts in climate cases will be a measure of their effectiveness.

III. *HELD v. MONTANA*: A STORY OF CODIFIED RIGHTS

In 2020, just as the world went into lockdown with the COVID-19 pandemic, sixteen youth plaintiffs (aged two to eighteen), filed suit against the State of Montana for violating their clean and healthful environment rights under the Montana Constitution; their public trust rights; their rights to life, liberty, dignity, personal security, and equal protection; as well as other rights.⁷⁰ The case—*Held v. State of Montana*—claims the state was and is perpetuating a fossil fuel energy system that contributes to climate change, particularly at a time when every tonne of carbon exacerbates the climate crisis.⁷¹

Like nearly every other government defendant in groundbreaking constitutional climate cases,⁷² Montana argued that the children had no standing or right to be in court and that the court therefore had no jurisdiction to hear the case.⁷³ However, Montana District Court Judge Kathy Seeley assumed jurisdiction of the case and gave the youth

70 *Held* Complaint, *supra* note 4, at 1–3. The Montana Constitution provides that, “All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment” MONT. CONST. art. II, § 3. Moreover, “In enjoying these rights, all persons recognize corresponding responsibilities.” *Id.* Consistent with the provision of these rights and responsibilities the Montana Constitution further provides that, “The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.” MONT. CONST. art. IX, § 1.

71 Order on Motion to Dismiss at 2, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Dist. Ct. Aug. 4, 2021). The plaintiffs are represented by Our Children’s Trust, including the author of this Essay, along with co-counsel Roger Sullivan and Dustin Leftridge of McGarvey Law, and Melissa Hornbein and Barbara Chillcott of the Western Environmental Law Center. *Montana, OUR CHILDREN’S TRUST*, <https://www.ourchildrenstrust.org/montana> (last visited Mar. 8, 2023). According to the IPCC, “[e]very tonne of CO₂ emissions adds to global warming.” Richard P. Allan et al., *Summary for Policymakers*, in *CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS 28* (Valérie Masson-Delmotte et al. eds., 2021).

72 *See, e.g.*, Defendants’ Brief in Support of Motion to Dismiss at 1, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct. Apr. 20, 2020); Federal Defendants’ Memorandum of Points and Authorities in Support of Their Motion to Dismiss at 1, *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or. Nov. 17, 2015).

73 Defendants’ Brief in Support of Motion to Dismiss at 1–2, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct. Apr. 20, 2020).

permission to proceed to trial on the merits.⁷⁴ Judge Seeley ruled that “whether the State’s energy statutes violate the Montana constitution is a question for the courts, not the other branches of government.”⁷⁵ She further explained, “Constitutional and statutory interpretation are ‘the very essence of judicial duty.’ . . . At the most basic level, the judiciary is not subservient to the legislature.”⁷⁶ As Justice Elena Kagan pointedly questioned during a recent U.S. Supreme Court oral argument: “[I]sn’t the point of a right that you don’t have to ask Congress? Isn’t the point of a right that it doesn’t really matter what Congress thinks or what the majority of the American people think as to that right?”⁷⁷ Judge Seeley and Justice Kagan are correct. That which is fundamental and unalienable to our lives is beyond the reach of any political majority and is squarely in the realm of the judiciary.

At the time of this writing, trial in *Held v. Montana* is set for June 2023.⁷⁸ Plaintiffs will present the best available climate, medical, and energy science through expert testimony in open court with live streaming making the trial accessible for the broader public.⁷⁹ The youth will also take the stand to tell deeply personal stories of harm to their health, their Native cultural practices, their ranches, and their families’ livelihoods.⁸⁰ They will testify about excessive heat and smoke inhalation

74 Order on Motion to Dismiss at 24, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct. Aug. 4, 2021).

75 Order on Second Rule 60(a) Motion for Clarification at 6, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct. Sept. 22, 2022).

76 *Id.* (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

77 Oral Argument at 1:07:29, *Whole Women’s Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463), <https://www.oyez.org/cases/2021/21-463>.

78 Minute Entry, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct. Apr. 27, 2023) (“Parties will proceed to Trial. A Bench has been previously set for Monday, June 12, 2023 at 9:00 am.”); Press Release, Our Children’s Trust, Montana Climate Youth Announce New Dates for Historic Trial (Oct. 4, 2022), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/633c491b5c4a93522390877e/1664895260077/2022.10.04.Montana+Trial+Dates.pdf> [hereinafter OCT Press Release].

79 *See Id.*; Home, LISE VAN SUSTEREN, <https://www.lisevansusteren.com/> (last accessed Apr. 29, 2023).

80 Plaintiffs’ Response Brief in Opposition to Defendants’ Motion for Summary Judgment at 1–3, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct. Feb. 16, 2023) [hereinafter *Held* Plaintiffs’ MSJ Response Brief]; Megan Michelotti, *Montana Youths Take Climate Case to Trial in Historic First*, INDEP. REC. (Feb. 15, 2023), https://helenair.com/news/local/montana-youths-take-climate-case-to-trial-in-historical-first/article_a457d52f-lac2-5fdc-8b60-29cb4f46a626.htm; David Gelles, *In Montana, It’s Youth vs. the State in a Landmark Climate Case*, N.Y. TIMES (Mar. 24, 2023), <https://www.nytimes.com/2023/03/24/climate/montana-youth->

from fires, drought and loss of snow, and the profound mental health harms climate crisis causes them, alongside so many children of their generation.⁸¹

For its part, the State of Montana is one of the biggest fossil fuel producers in the nation, responsible for a level of climate pollution equivalent to countries like the Netherlands, Argentina and Pakistan.⁸² To process even more oil and gas from their state, Montana has gone so far as to sue the City of Portland, Oregon, because Portland rejected the expansion of its fossil fuel export infrastructure, limiting the amount of oil and gas it will receive from Montana.⁸³ In its Answer in the *Held* case, the State denies nearly every scientific fact of climate change.⁸⁴ And the State intends to put on the stand experts who are skeptical of climate science and the harms caused by climate change.⁸⁵

The youths' experts, on the other hand, will show that the buildup of carbon dioxide (and other greenhouse gases) in our atmosphere—

climate-lawsuit.html.

81 See *Held* Plaintiffs' MSJ Response Brief, *supra* note 80, at 1–3.

82 Expert Report of Peter A. Erickson at 1, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct. Sept. 30, 2022); see also *Greenhouse Gas Emissions from Energy Data Explorer*, IEA, <https://www.iea.org/data-and-statistics/data-tools/greenhouse-gas-emissions-from-energy-data-explorer> (last visited Apr. 29, 2023). Courts of these countries are stepping up to require emission reductions. In 2019, the Supreme Court of the Netherlands held that the government is legally obligated to reduce its greenhouse gas emissions. *Urgenda Foundation v. State of the Netherlands*, SABIN CTR. FOR CLIMATE CHANGE L., <http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/> (last visited Apr. 29, 2023). In 2021, a court in the Hague ordered Royal Dutch Shell to reduce its global CO₂ emissions by 45 percent compared to 2019 levels, by the end of 2030. Rb. Den Haag, 26 mei 2021, JOR 2021, 208 m.nt. B. Arentz (Milieudefensie/Royal Dutch Shell PLC) (Neth.).

83 Complaint for Declaratory and Injunctive Relief at 2–3, *Montana v. Portland*, No. 3:23-cv-00219 (D. Or. Feb. 14, 2023), <https://dojmt.gov/wp-content/uploads/001-Complaint-USDC-Oregon-Portland-Fossil-Fuel-Terminal-Code-Amendments-4888-3618-8986-v.17.pdf>; *State of Montana Sues Portland, Oregon Over Illegal Fossil Fuel Terminal Ordinance*, MONT. DEP'T OF JUST. (Feb. 15, 2023), <https://dojmt.gov/state-of-montana-sues-portland-oregon-over-illegal-fossil-fuel-terminal-ordinance/>.

84 See Defendants' Answer, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct. Sept. 17, 2021).

85 See Lesley Clark, *Climate on Trial: Montana Youth Take on State Energy Policy*, CLIMATEWIRE (Dec. 1, 2022), <https://www.eenews.net/articles/climate-on-trial-montana-youth-take-on-state-energy-policy/>; Judith Curry, DESMOG, <https://www.desmog.com/judith-curry/> (last visited May 17, 2023); Dana Drugmand, *Montana is Paying a Climate Denier to Give Expert Testimony in Upcoming Trial*, DESMOG (May 15, 2023), <https://www.desmog.com/2023/05/15/judith-curry-denier-montana-climate-trial/>.

primarily due to the burning of fossil fuels—is causing continued heating of our planet,⁸⁶ resulting in approximately 1.1°C of warming.⁸⁷ The scientific consensus “indicates that to restore the stability of Earth’s climate so as to protect human life and health, States must reduce atmospheric concentrations of CO₂ to an equitable and environmentally sustainable level of 350 [parts per million]” by 2100,⁸⁸ where current concentrations are above 419 parts per million (ppm).⁸⁹ Medical experts will testify to the profound physical and mental health harms climate change imposes on these young plaintiffs.⁹⁰ The evidence will also show that feasible pathways have been developed by leading energy scientists to eliminate nearly all fossil fuel consumption in Montana by mid-century through a rapid transition to 100 percent clean, renewable energy.⁹¹ The experts will testify that Montana’s pollution matters.

86 Plaintiffs’ Response Brief in Opposition to Defendants’ Motion to Partially Dismiss for Mootness, at 4–7, 10–11, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct. Apr. 14, 2023).

87 Hoesung Lee et al., *Summary for Policymakers*, in CLIMATE CHANGE 2023: SYNTHESIS REPORT 1, 4 (2023); CATHY WHITLOCK ET AL., 2017 MONTANA CLIMATE ASSESSMENT XXVI (2017) (“Annual average temperatures, including daily minimums, maximums, and averages, have risen across the state between 1950 and 2015. The increases range between 2.0-3.0°F (1.1-1.7°C) during this period”); ALEXANDRA ADAMS ET AL., CLIMATE CHANGE AND HUMAN HEALTH IN MONTANA XVII (2021) (“Annual temperatures have risen 2-3°F (1.1-1.7°C) since 1950”).

88 Written Submission on Behalf of Our Children’s Trust, Oxfam, the Centre for Climate Repair at Cambridge, and the Centre for Child Law at University of Pretoria at 2, *Verein KlimaSeniorinnen Schweiz v. Switzerland*, App. No. 53600/20, *Duarte Agostinho v. Portugal*, App. No. 39371/20, *Carême v. France*, App. No. 7189/21 (Eur. Ct. H.R. Dec. 5, 2022); see also Karina von Schuckmann et al., *Heat Stored in the Earth System: Where Does the Energy Go?*, 12 EARTH SYS. SCI. DATA 2013, 2029 (2020); James Hansen et al., *Assessing “Dangerous Climate Change”: Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, 8 PLoS ONE e81648 (2013); James Hansen et al., *Ice Melt, Sea Level Rise and Superstorms: Evidence from Paleoclimate Data, Climate Modeling, and Modern Observations that 2°C Global Warming Could be Dangerous*, 16 ATMOSPHERIC CHEMISTRY & PHYSICS 3761, 3801 (2016).

89 *Global Atmospheric Carbon Dioxide Levels Continue to Rise*, NOAA RSCH. NEWS (Nov. 14, 2022), <https://research.noaa.gov/article/ArtMID/587/ArticleID/2914/No-sign-of-significant-decrease-in-global-CO2-emissions>; *Trends in Atmospheric Carbon Dioxide*, GLOB. MONITORING LAB’Y, <https://gml.noaa.gov/ccgg/trends/monthly.html> (last visited May 16, 2023).

90 See Expert Report of Lori G. Bryon, MD, MS and Robert G. Byron, MD, MPH, *Held v. Montana*, No. CDV-2020-307 (Mont. 1st Jud. Dist. Ct. Sept. 30, 2020).

91 See generally MARK Z. JACOBSON, 100% CLEAN, RENEWABLE ENERGY AND STORAGE FOR EVERYTHING (2020) (laying out the scientific, technological, and economic basis for getting the world to 100 percent clean, renewable energy); Christian Breyer et al., *On the History and Future of 100% Renewable Energy Systems Research*, 10 IEEE

Over the course of two weeks during the summer equinox, the nation's (and likely the world's) first-ever trial about children's constitutional climate rights will be held in Helena, Montana.⁹² The outcome has the potential to fully realize the meaning of the environmental right codified fifty years ago in Montana's Constitution. Hopefully, that right will still mean something more than the paper it is written on fifty years hence. Outside the courtroom, the world will be watching.⁹³

IV. UN-CODIFIED RIGHTS ARE IMPLICITLY RIGHT

Children. Climate. Women.⁹⁴ Energy. Mothers. Marriage. Health. Babies. Air. Water. None of those words can be found in the U.S. Constitution or most state constitutions.

The movement for an environmental rights amendment of the 1970s never succeeded in amending the U.S. Constitution.⁹⁵ Relatedly, the other ERA, the Equal Rights Amendment, never succeeded either.⁹⁶ Neither became the Twenty-Eighth Amendment because amending the U.S. Constitution in modern times has been virtually impossible with our partisan divide.⁹⁷ In the past 100 years, there have been only eight ratified amendments.⁹⁸ Climate-injured plaintiffs seeking to vindicate their rights must rely on other explicit rights deprived by climate chaos, or must argue that the climate right is an implicit and unalienable

ACCESS 78176, 78195–96 (2022).

92 OCT Press Release, *supra* note 78.

93 See e.g., Gelles, *supra* note 80. *Written Media Coverage*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/written-media-coverage> (last visited Apr. 30, 2023).

94 Julia Olson & Andrea Rodgers, *Guest Commentary: Dobbs v. Jackson and Juliana v. United States: "Innumerable Human Lives,"* CLIMATE L: A SABIN CTR. BLOG (Dec. 6, 2021), <https://blogs.law.columbia.edu/climatechange/2021/12/06/guest-commentary-dobbs-v-jackson-and-juliana-v-united-states-innumerable-human-lives/>.

95 See generally KURY, *supra* note 59 at xiv.

96 *The Equal Rights Amendment Explained*, BRENNAN CTR. FOR JUST. (Jan. 23, 2020), <https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained>.

97 Drew Desilver, *Proposed Amendments to the U.S. Constitution Seldom Go Anywhere*, PEW RSCH. CTR. (Apr. 12, 2018), <https://www.pewresearch.org/fact-tank/2018/04/12/a-look-at-proposed-constitutional-amendments-and-how-seldom-they-go-anywhere/>.

98 See GPO, AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA (2017), <https://www.govinfo.gov/content/pkg/GPO-CONAN-2017/pdf/GPO-CONAN-2017-7.pdf>.

fundamental right that need not be codified to be enforced.⁹⁹

The Ninth Amendment to the Constitution is clear: “*The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.*”¹⁰⁰ The Constitution was intended as a backstop against injustice and a framework for securing liberty.¹⁰¹ It was never intended to be an all-knowing piece of parchment that could name every right known to “man.” And without a woman or a child at the table,¹⁰² it is no wonder that some basic rights went without ink.

As with the “right to marry” movement—another right only codified in the modern era when people denied that right rose up to do so¹⁰³—those deprived of uncodified rights must argue that the right is implicit in the federal or state constitutions. Women know this plight only too well, having never been explicitly incorporated into the U.S. Constitution through the Equal Rights Amendment. The pathway for women’s equality came instead under the implied rights and guarantees of the Fifth, Ninth, and Fourteenth Amendments—amendments written for the benefit of men only but visionary enough to eventually embrace all genders and races.¹⁰⁴ In fact, our courts have already implied in our constitution that “[w]omen shall have equal rights in the United States and every place subject to its jurisdiction,” as proposed by Section 1 of

99 See, e.g., *Juliana v. United States*, 217 F. Supp. 3d 1224, 1263–64 (D. Or. 2016) (“Plaintiffs further allege defendants’ acts and omissions violate the implicit right, via the Ninth Amendment, to a stable climate and an ocean and atmosphere free from dangerous levels of CO₂.”); Blumm & Wood, *supra* note 60, at 47–49 (describing how Judge Aiken, in the *Juliana* case, found the public trust doctrine to be implicit in the due process clause of the Fifth Amendment, citing other cases also finding an implied right).

100 U.S. CONST. amend. IX (emphasis added).

101 See U.S. CONST. pmbl. (“We the People of the United States, in Order to . . . establish Justice . . . and secure the Blessings of Liberty to ourselves . . .”).

102 *Meet the Framers of the Constitution*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/founding-fathers> (last visited Mar. 23, 2023).

103 See, e.g., *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (case challenging denial of marriage licenses under Hawaii Constitution); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding recognition of same-sex marriage is required under the Fourteenth Amendment); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding interracial marriage is protected under the Fourteenth Amendment); *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948) (same).

104 See, e.g., *Reed v. Reed*, 404 U.S. 71, 73–74 (1971) (Idaho statute that preferred men over women in probate matters violated the equal protection clause of the Fourteenth Amendment); *United States v. Virginia*, 518 U.S. 515 (1996) (male-only admission at Virginia school violated the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (Constitution protects right of marital privacy from state restrictions on contraception).

the Equal Rights Amendment.¹⁰⁵ The failure to codify can never serve as a legitimate basis to deny freedom and equality.

A. *The Uncodified Climate Right: Juliana v. United States*

In 2015, twenty-one children and youth—including eleven Black, Brown, and Indigenous youth—set out to prove that the U.S. Constitution meant what it said: that they had a right to life, liberty, property, public trust and equal protection of the law.¹⁰⁶ From Alaska to Florida, Oregon to New York, and six states in between, these youth have experienced harm from rising temperatures, increased wildfires, evacuation and flooding of their homes, and loss of spiritual and cultural practices.¹⁰⁷ They are losing their public trust resources, from stable shorelines to flowing rivers, and air free from dangerous climate pollution.¹⁰⁸

The landmark case, *Juliana v. United States*, was brought under the Fifth Amendment’s Due Process and Equal Protection clauses, the latter incorporated through the Fourteenth Amendment.¹⁰⁹ The youth plaintiffs are suing over the United States’ fossil fuel energy system, including the systematic federal policies and practices that continue to promote fossil fuel development and use across the nation.¹¹⁰

At its core, this case is about the unalienable rights of children to a life-sustaining climate system. It is also a case about stopping the U.S. government’s dominant role in causing and perpetuating the climate crisis. Finally, it is a case about intergenerational rights and protecting the vital natural systems that children and future generations need for survival.

In November 2016, District Court Judge Ann Aiken ruled *for the first time in history* that the U.S. Constitution secures the fundamental right to a climate system capable of sustaining life and allowed the case

105 H.R.J. Res. 33, 115th Cong. (2017); *See e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 687–88 (1973) (statutory scheme in which female members of the uniformed service could not claim dependents as male members could violated the Equal Rights Amendment).

106 *See Juliana Amended Complaint*, *supra* note 7; Olson & Rodgers, *supra* note 94.

107 *Juliana Amended Complaint*, *supra* note 7, at 6–33, 35, *Juliana v. United States*, No. 15-cv-01517 (D. Or. Sept. 10, 2015). To learn more about these youth, see *YOUTH V. GOV* (Netflix 2020), <https://www.youthvgovfilm.com/>; LEE VAN DER VOO, *AS THE WORLD BURNS: THE NEW GENERATION OF ACTIVISTS AND THE LANDMARK LEGAL FIGHT AGAINST CLIMATE CHANGE* 9–12 (2020).

108 *See Juliana Amended Complaint*, *supra* note 7, at 35, 92.

109 *Id.* at 84–91.

110 *See id.* at 1–5.

to proceed to trial.¹¹¹ The court's declaration ricocheted like a beacon of light to citizens and courts across the world.¹¹² The court held:

[W]here a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. To 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.¹¹³

Plaintiffs supported their argument of an implied climate right with history from the nation's founding.¹¹⁴ The founders, who were farmers, understood that the atmosphere, air, and water were vital to life and indivisible from their liberties.¹¹⁵ The long history of the public trust predating our nation—which explicitly protects both air and water as common property of all people across time—provides deep roots for the *Juliana* plaintiffs' asserted climate right as integral to their Fifth Amendment rights.¹¹⁶ James Madison, drafter of the Fifth Amendment,¹¹⁷ gave an historic speech in 1818, declaring: "Animals, including man, and plants may be regarded as the most important part of the terrestrial creation. . . . To all of them, the atmosphere is the breath of life. Deprived

111 *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (2016) ("I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the 'foundation of the family,' a stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'").

112 See, e.g., *American Youth to Bring US Federal Government to Trial in Ground-Breaking Climate Change Lawsuit*, UN ENV'T PROGRAMME (Nov. 16, 2016), <https://www.unep.org/news-and-stories/story/american-youth-bring-us-federal-government-trial-ground-breaking-climate>; Anne-Sophie Brändlin, *How to Sue Your Government Over Climate Change*, DW (Nov. 16, 2016), <https://www.dw.com/en/citizens-across-the-world-are-suing-their-governments-over-climate-change/a-36413833>.

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

114 Plaintiffs-Appellees' Answering Brief at 42–48, *Juliana v. United States*, No. 18-36082 (9th Cir. Feb. 22, 2019).

115 Expert Report of Andrea Wulf, Historian and Author at 4, 8–15, *Juliana v. United States*, No. 15-cv-01517 (D. Or. June 28, 2018).

116 Mary Christina Wood, Essay, *Nature's Trust: Protecting an Ecological Endowment for Posterity*, 52 ENV'T L. 749, 755–56, 765–67 (2022); Mary Christina Wood, "On the Eve of Destruction": Courts Confronting the Climate Emergency, 97 IND. L. J. 239, 286–292 (2022).

117 *Bill of Rights*, NAT'L ARCHIVES, <https://www.archives.gov/legislative/features/bor> (last visited May 1, 2023).

of it, they all equally perish.”¹¹⁸

In extraordinary efforts to deny children both their unalienable climate rights and access to their courts, the U.S. Department of Justice filed an unprecedented six petitions for writs of mandamus—four in the U.S. Court of Appeals for the Ninth Circuit and two before the U.S. Supreme Court—seeking dismissal of the *Juliana* case.¹¹⁹ On October 19, 2018, mere days before the scheduled start of a six-week trial and in a striking example of misuse of the Court’s shadow docket, Chief Justice John Roberts granted a temporary stay of the district court proceedings without any briefing from the youth plaintiffs, postponing the trial start date.¹²⁰ Two weeks later, the Supreme Court lifted the stay,¹²¹ but the ongoing interference of the appellate courts with Judge Aiken’s docket forced the case before the Ninth Circuit on interlocutory appeal.¹²²

In 2020, a 2–1 majority in the Ninth Circuit found that “[a] substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.”¹²³ The court went on to warn: “The problem is approaching ‘the point of no return.’ Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies.”¹²⁴ Yet, Judge Andrew Hurwitz, writing for the majority, denied the youth standing, saying that “it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs’ requested remedial

118 *Address to the Agricultural Society of Albemarle, 12 May 1818*, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/04-01-02-0244> (last visited May 1, 2023).

119 According to Eric Grant, former Deputy Assistant Attorney General, “If you as a practitioner file one mandamus petition in a U.S. Court of Appeals in your career that’s probably above average. It’s just not a thing that you do. . . . For us to have to file four in the Court of Appeals and one in the U.S. Supreme Court, yeah, that’s crazy, that’s not normal.” The Federalist Society’s Environmental Law & Property Rights Practice Group, Student Division & Northwestern Law School Chapter, *Climate Change Litigation for Kids: Juliana v. United States*, FEDERALIST SOC’Y, at 23:15 (Dec. 6, 2022), <https://fedsoc.org/events/pg-15-fedsoc-study-break-study-break-climate-change-litigation-for-kids-juliana-v-united-states>.

120 *See In re U.S.*, 139 S. Ct. 16 (2018); Stephen I. Vladeck, Essay, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 144–46 (2019).

121 *In re U.S.*, 130 S. Ct. 452 (2018).

122 *See Juliana v. United States*, 949 F.3d 1125, 1127–28 (9th Cir. 2018) (Friedland, J., dissenting).

123 *Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020).

124 *Id.* at 1166.

plan.”¹²⁵ Apologetically, the majority denied the nation’s children access to seek an equitable solution to a government-imposed danger that all agreed existed, was worsening, and is existential in nature.¹²⁶ The majority did not, however, deny that the rights the youth sought to protect were unalienably theirs.¹²⁷

Dissenting Judge Josephine Staton objected, writing:

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. Seeking to quash this suit, the government bluntly insists that it has the absolute and unreviewable power to destroy the Nation.¹²⁸

She further opined, “As fundamental rights, these ‘may not be submitted to vote; they depend on the outcome of no elections.’”¹²⁹

As of this writing, the *Juliana* plaintiffs are back on track for trial. On June 1, 2023, Judge Aiken granted plaintiffs’ motion for leave to amend their complaint, writing: “It is a foundational doctrine that when government conduct catastrophically harms American citizens, the judiciary is constitutionally required to perform its independent role and determine whether the challenged conduct, not exclusively committed to any branch by the Constitution, is unconstitutional.”¹³⁰ In addition, eighteen Republican¹³¹ state Attorneys General have been denied intervention, with leave to refile after Judge Aiken’s next opinion issues on amendment.¹³² The youth plaintiffs remain hopeful

125 *Id.* at 1171.

126 *Id.* at 1164–65.

127 *See id.* at 1173–75.

128 *Id.* at 1175 (Staton, J., dissenting).

129 *Id.* at 1177.

130 Opinion and Order, *Juliana v. United States*, No. 15-cv-01517 (D. Or. June 1, 2023), 2023 WL 3750334, at *8.

131 *Meet the AGs*, REPUBLICAN ATT’YS GEN., <https://republicanags.com/ags/> (last visited May 1, 2023); *Meet Leslie*, LIEUTENANT GOV. LESLIE RUTLEDGE, <https://www.ltgovernor.arkansas.gov/meet-leslie-rutledge/> (last visited May 1, 2023); *Eric Schmitt*, *Senator for Missouri*, U.S. SENATE, <https://www.schmitt.senate.gov/about/> (last visited May 1, 2023); *Doug Peterson (Nebraska)*, BALLOTEDIA, [https://ballotpedia.org/Doug_Peterson_\(Nebraska\)](https://ballotpedia.org/Doug_Peterson_(Nebraska)) (last visited May 1, 2023); *Dawn Cash*, BALLOTEDIA, https://ballotpedia.org/Dawn_Cash (last visited May 1, 2023).

132 Motion for Limited Intervention and Memorandum in Support, *Juliana v. United States*, No. 15-cv-01517 (D. Or. June 8, 2021); Proposed Defendant-Intervenor State of Kansas’s Motion for Limited Intervention and Memorandum in Support, *Juliana v. United States*, No. 15-cv-01517 (D. Or. June 23, 2021); Order Denying Motion to

for a declaratory judgment affirming both the rights they hold to a life-sustaining climate and a ruling that the nation's fossil fuel-based energy system is unconstitutional. The year 2023—eight years into the constitutional fight of their lives—could be the year the twenty-one young plaintiffs finally get to proceed to the merits of their claims.

V. ACCESS TO JUSTICE DENIED—WE DISSENT

Denying access to justice to vindicate codified or implied rights is justice denied. Too often, judges have balked at their constitutional duty to interpret law and declare rights and wrongs in climate cases brought by the world's youth. However, as Judge Aiken stated in *Juliana*, “Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government.”¹³³ A growing number of dissenting opinions, “rich sources of all that is potential and possible in law,”¹³⁴ argue that it is time for courts to open the courthouse doors to children and act on climate, in the case of codified or uncoded rights:

- In *Juliana v. United States* before the Ninth Circuit, Judge Staton asked in dissent, “When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?”¹³⁵ She challenged the majority's refusal to protect the rights of the *Juliana* plaintiffs: “In this case, my colleagues say that time is ‘never’; I say it is

Intervene, *Juliana v. United States*, No. 15-cv-01517 (D. Or. Mar. 14, 2023).

133 *Juliana v. United States*, 217 F. Supp. 3d 1224, 1263 (D. Or. 2016). Indeed, Chief Justice John Roberts has reflected a similar sentiment as to the role of the courts. In oral argument for *United States v. Texas*, he posited, “Now it's our job to say what the law is, not whether or not it can be possibly implemented or whether there are difficulties there. And I don't think we should change that responsibility just because Congress and the executive can't agree on something that's possible to address this -- this problem. I don't think we should let them off the hook. So shouldn't we just say what we think the law is, even if we think 'shall' means 'shall,' and then leave it for them to sort that out?” Oral Argument at 15:31, *United States v. Texas* (Nov. 29, 2022) (No. 22-58), <https://www.oyez.org/cases/2022/22-58>. He further questioned, “Should we still fulfill our responsibility to say what the law is, and then it's up to Congress and the executive to figure out a way to comply with that?” *Id.* at 16:26.

134 Claire L'Heureaux-Dubé, *The Dissenting Opinion: Voice of the Future?*, 38 OSGOODE HALL L. J. 495, 498 (2000).

135 *Juliana v. United States*, 947 F.3d 1159, 1191 (9th Cir. 2020) (Staton, J., dissenting).

now.”¹³⁶

- In 2020 the dissenting Chief Justice of the Oregon Supreme Court, in *Chernaik v. Brown*, argued: “Courts also must not shrink from their obligation to enforce the rights of all persons to use and enjoy our invaluable public trust resources. How best to address climate change is a daunting question with which the legislative and executive branches of our state government must grapple. But that does not relieve our branch of its obligation to determine what the law requires.”¹³⁷
- In the Washington Supreme Court, the dissent in the 2021 case *Aji P. v. State* stated: “A declaration of rights from this court is meaningful relief, even if it is not a magic wand that will eliminate climate change The court should not avoid its constitutional obligations that protect not only the rights of these youths but all future generations who will suffer from the consequences of climate change.”¹³⁸
- In *Sagoonick v. State*, a 2022 case before the Alaska Supreme Court, the dissent stated: “In my view, the law requires that the State, in pursuing its energy policy, recognize individual Alaskans’ constitutional right to a livable climate. A declaratory judgment to that effect would be an admittedly small step in the daunting project of focusing governmental response to this existential crisis. But it is a step we can and should take.”¹³⁹

These dissents will grow until they are majority opinions the nation over.

The rule of law in Europe is advancing ahead of the United States. In *ASBL Klimaatzaak v. Belgium*, the court held that “in pursuing their climate policy[,] the [government] defendants infringe the fundamental rights of the plaintiffs, and more specifically Articles 2 and 8 of the [European Convention on Human Rights], by failing to take all necessary measures to prevent the effects of climate change on the plaintiffs’ life and privacy”¹⁴⁰ In *Neubauer v. Germany*, the court held that “[t]he state’s duty of protection . . . also includes the duty to protect

136 *Id.*

137 *Chernaik v. Brown*, 475 P.3d 68, 93 (Or. 2020) (Walters, C.J., dissenting).

138 *Aji P. v. State*, 198 Wash.2d 1025 (2021) (González, C.J., dissenting).

139 *Sagoonick v. State*, 503 P.3d 777, 811 (Alaska 2022) (Maassen, J., dissenting).

140 Civ. [Tribunal of First Instance] Brussels (4th ch.), June 17, 2021, p. 83, http://climatecasechart.com/wp-content/uploads/sites/16/non-us-case-documents/2021/20210617_2660_judgment-1.pdf (unofficial English translation).

life and health against the risks posed by climate change”¹⁴¹

As a strong signal the tide is changing, on March 13, 2023, the Supreme Court of Hawai‘i unanimously recognized (like Judge Aiken) that constitutional rights “encompass[] the right to a life-sustaining climate system[,]” rooting the right in “the Hawai‘i Constitution’s article XI, section 9 right to a clean and healthful environment”¹⁴² In finding that the climate right is also protected under substantive due process, Justice Michael Wilson’s concurrence explained: “Climate change is a human rights issue at its core; not only does it inordinately impact young people and future generations, but it is also a profound environmental injustice disproportionately impacting native peoples.”¹⁴³ Justice Wilson recognized a science-based standard is necessary and judicially manageable: “Limiting atmospheric [CO₂] levels to below 350 ppm is essential to ‘preserve coastal cities from rising seas and floods (caused in part by melting of Antarctic and Greenland ice) [] and otherwise to restore a viable climate system on which the life, liberty, and property’ of all people depend.”¹⁴⁴ To underscore his point, Justice Wilson concluded:

We are facing a sui generis climate emergency. The lives of our children and future generations are at stake. With the destruction of our life-sustaining biosphere underway, the State of Hawai‘i is constitutionally mandated to urgently reduce its greenhouse gas emissions in order to reduce atmospheric [CO₂] concentrations to below 350 ppm.¹⁴⁵

A strategic and concerted impact litigation effort can move the rule of law in dramatic ways to right the entrenched wrongs of prior generations. A single declaratory judgment can begin to change everything. Thurgood Marshall became chief of the NAACP Legal Defense Fund in 1940, leading the transformative legal assault on segregation.¹⁴⁶ Fourteen years later, in *Brown v. Board of Education*, the Supreme Court overruled fifty years of precedent to give children equal rights under the law and to make segregation unconstitutional.¹⁴⁷ Without access to their courts and a factual trial record, that infamous

141 BVerfG, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, March 24, 2021, ¶ 148, http://www.bverfg.de/e/rs20210324_1bv1265618en.html.

142 Matter of Haw. Elec. Light Co., Inc., 526 P.3d 329, 335 (Haw. 2023).

143 *Id.* at 342 (Wilson, J., concurring).

144 *Id.* at 340.

145 *Id.* at 350.

146 See *Thurgood Marshall*, OYEZ, https://www.oyez.org/justices/thurgood_marshall (last visited Mar. 23, 2023).

147 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

opinion might not have been written. Black children in the 1940s and 1950s were allowed to present their evidence against systemic racism, go to trial, and argue for the reversal of *Plessy v. Ferguson*.¹⁴⁸ Today's Black, Brown, Indigenous, and White children seeking judicial protection of their constitutional rights have been routinely shut out of court in historically unprecedented ways,¹⁴⁹ undermining our democracy—until now. They, too, deserve to have their cases heard by an impartial judge who could reverse at least fifty years of systematic destruction of their life support system on Earth.

In this watershed year of rights-based climate litigation when evidence will finally see the light of day at trial—first in Helena, Montana, and later in other courts around the world—access to the third branch will prove to be invaluable in addressing climate crisis.¹⁵⁰

VI. THE UNANSWERED QUESTION BEYOND UNALIENABLE RIGHTS

Beyond the question of unalienable climate rights, a growing number of youth-led cases filed in the wake of *Juliana* raise an equally important, and often unanswered question: will children be afforded

148 *Id.* at 493–95 (discussing findings that segregation of children “generates a feeling of inferiority,” thereby overruling the “separate but equal” principle of *Plessy v. Ferguson*).

149 *See e.g.*, *Alec L. v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014) (affirming dismissal of youths' case and refusing to issue published opinion); *Juliana v. United States*, 947 F.3d 1159 (2020); Memorandum Decision and Order, *Natalie R. v. Utah*, No. 220901658 (Utah 3d Jud. Dist. Ct. Nov. 9, 2022) (dismissing youth plaintiffs' climate case); Denis Lavoie, *Virginia Judge Dismisses Youth Climate Lawsuit*, AP (Sept. 16, 2022), <https://apnews.com/article/richmond-lawsuits-virginia-climate-and-environment-8c9b90ec8dcc33b0419ed6e3fdddd460> (describing court's dismissal of *Layla H.* case); *Aji P. v. State*, 497 P.3d 350 (Wash. 2021) (unpublished table decision) (denying review of dismissal of youths' case); *Foster v. Washington Dep't of Ecology*, 200 Wash. App. 1035 (2017) (unpublished) (concluding trial court could not grant relief to youth plaintiffs); *Svitak v. State*, 178 Wash. App. 1020 (2013) (unpublished) (affirming dismissal of youth complaint); *Sagoonick v. State*, 503 P.3d 777 (Alaska 2022), *reh'g denied* (Feb. 25, 2022) (affirming dismissal of youth case and finding claims were not justiciable); *Kanuk v. State, Dep't of Nat. Res.*, 335 P.3d 1088 (Alaska 2014) (affirming dismissal of non-justiciable claims by youth plaintiffs).

150 Another constitutional climate case on behalf of 14 Hawaiian youth, represented by Our Children's Trust and Earthjustice, is cleared for trial this year. Order on Motion to Dismiss, *Navahine F. v. Hawai'i Dep't of Transp.*, No. ICCV-22-0000631 (Haw. 1st Cir. Ct. Apr. 6, 2023). Portuguese youth will also argue a case in the European Court of Human Rights in September 27, 2023. *Duarte Agostinho v. Portugal*, App. No. 39371/20, <https://www.echr.coe.int/Pages/home.aspx?p=hearings/gcpending&c>.

protected status?

Children are not just little adults or younger people. They have distinct physiologies, abilities, and needs that make them more vulnerable than adults. They cannot vote,¹⁵¹ meaning they lack political or economic power to influence climate and energy policy. Their lives have been economically devalued in government decision-making through discount rates used in cost-benefit analyses and environmental review procedures.¹⁵² And they are dependent on others to protect their rights.¹⁵³ But so far, no court has ever considered or decided the simple question of whether, under an equal protection analysis, children are entitled to suspect classification or other protected status.¹⁵⁴ The time has come for the courts hearing these youth-led climate cases to do so. The marrying of the rights of the child with the right to a life-sustaining climate provides a practical legal framework for measuring the constitutionality of government conduct that contributes to the climate crisis.

According to the American Academy of Pediatrics, children are “uniquely vulnerable” to the threats posed by climate change to human health, safety, and security.¹⁵⁵ Children’s bodies are not fully developed, have greater nutritional and fluid requirements, and breathe more air relative to body weight than adults.¹⁵⁶ Their physiological features and psychological development make them uniquely and disproportionately harmed by climate impacts.¹⁵⁷ Children’s mental health and development are also impacted. A recent survey of 10,000 children found that children across the globe are experiencing emotional distress and anxiety due to climate change.¹⁵⁸

Leading children’s rights scholar Professor Catherine Smith

151 See U.S. CONST. amend XXVI.

152 See Expert Report of Joseph E. Stiglitz, Ph.D. at 41–46, *Juliana v. United States*, No. 15-cv-01517 (D. Or. June 28, 2018) [hereinafter Stiglitz Expert Report].

153 In most states, the age of majority is eighteen years old. See *Age Matrix*, INTERSTATE COMM’N FOR JUVS., <https://www.juvenilecompact.org/age-matrix> (last updated Mar. 15, 2023).

154 Catherine E. Smith, *Brown’s Children’s Rights Jurisprudence and How it Was Lost*, 102 B.U. L. REV. 2297, 2300 (2022).

155 Council on Env’t Health, *Global Climate Change and Children’s Health*, 136 PEDIATRICS 992, 992 (2018).

156 See, e.g., Frederica Perera & Kari Nadeau, *Climate Change, Fossil-Fuel Pollution, and Children’s Health*, 386 NEW ENG. J. MED. 2303, 2303–04 (2022).

157 *Id.*

158 Caroline Hickman et al., *Climate Anxiety in Children and Young People and Their Beliefs about Government Responses to Climate Change: A Global Survey*, 5 LANCET PLANETARY HEALTH e863 (2021).

testified in *Juliana* that “the special characteristics of children and their differential treatment under the law bears on their status as a protected class for purpose of equal protection principles.”¹⁵⁹ She continued:

[F]rom a historical and sociological legal perspective, children in America require extraordinary legal protection from the harm of climate change and the government actions causing the harm. I conclude that based on a historical and sociological legal analysis, at least intermediate scrutiny is warranted when government action imposes a lifetime of hardship on children for matters beyond their control, as in the case of the national energy system causing dangerous climate change.¹⁶⁰

Smith’s expert opinions are not unique to the youth plaintiffs in *Juliana*.

Today, resource extraction, energy and environmental statutory law, and the administrative regulatory state combine to establish a fossil-fuel regulatory regime that constricts an agenda of sustainable abundance and denies equal opportunity for generations of children. Under this fossil-fuel regulatory regime, governments operate with a short-sighted, adult-centric focus in decision-making.¹⁶¹ Governments invest trillions in harmful, finite energy sources,¹⁶² creating energy scarcity and increased global conflict, while blocking our ability to access available innovations that could instead lead us toward a sustainable future.¹⁶³ Governments also routinely grant permits to the destructive forces of industry that pollute without repercussions.¹⁶⁴ Environmentalists routinely focus their participation in objecting to these projects based on harm to nature, other species, and the interests of the adult-members of the environmental organizations. Children are typically absent from these processes.

159 Expert Report of Catherine Smith, J.D. at 1, *Juliana v. United States*, No. 15-cv-01517 (D. Or. June 28, 2018) [hereinafter Smith Expert Report].

160 *Id.* at 1.

161 See generally Stiglitz Expert Report, *supra* note 152 at 12–26 (describing the ways in which the government’s actions exacerbate climate change and ignore the needs of youth); Smith Expert Report, *supra* note 159 at 41–45 (discussing the need to apply child-centric, heightened scrutiny in cases evaluating climate harm); ROMAN KRZANARIC, *THE GOOD ANCESTOR: A RADICAL PRESCRIPTION FOR LONG-TERM THINKING* 71–91 (2020) (describing discounted value given to the interests of future generations and the failure to include future generations in climate decisions).

162 See *Governments Spent Record \$1 Trillion Subsidizing Fossil Fuels Last Year*, YALE ENV’T 360 (Feb. 17, 2023), <https://e360.yale.edu/digest/1-trillion-fossil-fuel-subsidies>.

163 See Stiglitz Expert Report, *supra* note 152, at 6–8.

164 See *id.* at 12.

As Ezra Klein writes, “[W]e need a liberalism that *builds*.”¹⁶⁵ This is especially necessary as we attempt to tackle the climate crisis and quickly build out renewable energy infrastructure. The reality, however, is that our governments still have their thumb on the scale in favor of building a fossil-fuel powered world, grounded in multidimensional inequalities that target children most of all. While some in the legal community assert that administrative procedure and environmental statutory litigation have constrained the ability of agencies to pursue their missions and effectuate change,¹⁶⁶ my review of the climate record of those same defendant agencies in the *Juliana* litigation proves up a very different story. It is not the presence or absence of rigorous procedures involving environmental review, public notice and comment, or even judicial review that drives the status quo today. It is the powerful influence of fossil fuel economic interests, agency fear and exhaustion, the ping-pong priorities of partisan administrations, and ultimately the complete lack of a “children’s constitutional rights” check on the agencies’ conduct that has made the U.S. the single largest contributor to global climate change.¹⁶⁷ A trial will bear that out.

To achieve sustainable and equitable abundance, and an enduring democracy, governments must first ask: is this good for our kids’ health and welfare, and that of the next seven generations of children? Protecting the fundamental constitutional and human rights of children today and tomorrow levels the playing field across generations, opens opportunity for abundance, and clears the way for innovations (governmental, market, societal, and individual) to create a more sustainable freedom for all.

Protecting constitutional climate rights of children fundamentally shifts U.S. policy. Protections of their right to a life-sustaining climate will redirect the attitude of our government leaders and agencies from a path of scarcity to one of opportunity—opportunity that empowers leaders to restabilize our climate system for people today and of future generations. The children of tomorrow will then know a future of sustainable freedom, rather than persistent fear.

165 Ezra Klein, Opinion, *What America Needs Is a Liberalism That Builds*, N.Y. TIMES (May 29, 2022), <https://www.nytimes.com/2022/05/29/opinion/biden-liberalism-infrastructure-building.html>.

166 See, e.g., Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019) (arguing procedural rules constrain agency action and arguing for procedural restraint).

167 Umair Irfan, *Why the U.S. Bears the Most Responsibility for Climate Change, in One Chart*, VOX (Dec. 4, 2019), <https://www.vox.com/energy-and-environment/2019/4/24/18512804/climate-change-united-states-china-emissions>.

CONCLUSION

The judiciary has a mandate to protect people from political processes that are detrimental to the exercise and protection of their unalienable human rights, whether they are expressly or implicitly protected in law. In a January 12, 2023, speech about a political proposal to limit Israel's court's constitutional authority, the President of Israel's Supreme Court, Justice Esther Hayut, said:

[I]f the decisions of the government will be the final word and the court will be without tools to fulfill its role – it will not be possible to guarantee the protection of rights in those cases where government authorities violate those rights, be it through legislation or administrative decision, to an extent that exceeds what is required One of the most important functions of a court in a democratic country is to provide effective protection for human and civil rights in the country.¹⁶⁸

That mandate is heightened when the people seeking protection are children and when the right they seek to protect can be extinguished across multiple generations without their vote. “A central tenet of our democracy is that government . . . should not deprive children (the next generation) of the foundational elements of their lives, liberties or property and should not impose hardships on them for matters of which they have no control.”¹⁶⁹ Climate cases around the world are putting this central tenet to the test.

It is only a return to the democratic rule of law's enforcement of our most unalienable human rights and the laws of nature that will give us the foundation—and the launchpad—for the warp speed transition we need to move away from fossil energy and towards a way of living sustainably on the planet. Without that fundamental human rights foundation, the other mechanisms we attempt to use can be false or incomplete solutions: voting, petitioning your government, environmental statutory and regulatory law, international treaties, market solutions, entrepreneurial innovation, research into new technologies, the Inflation Reduction Act, changing personal habits, and the list goes on. However, with the proper foundation from our courts declaring and enforcing children's fundamental rights to a

168 Jeremy Sharon, *In Fiery Speech, Hayut Says Judicial Shakeup Plan 'Fatal Blow to Israeli Democracy'*, TIMES OF ISR. (Jan. 12, 2023), <https://www.timesofisrael.com/in-fiery-speech-hayut-says-judicial-shakeup-plan-fatal-blow-to-israeli-democracy/>.

169 Smith Expert Report, *supra* note 159, at 46.

climate that sustains their lives, those other mechanisms can propel us forward with new momentum and purpose—with no turning back when political winds blow a different direction. It is time to recognize our life-giving climate system as an unalienable human right, and it is time for the courts to enforce it.