



Summer 2020

## Creative Legal Approaches to Protect Youth's Constitutional Rights in the Face of Climate Change

Andrea Rodgers

### Recommended Citation

Andrea Rodgers, *Creative Legal Approaches to Protect Youth's Constitutional Rights in the Face of Climate Change*, 60 NAT. RES. J. 289 (2020).

Available at: <https://digitalrepository.unm.edu/nrj/vol60/iss2/10>

This Symposium is brought to you for free and open access by the Law Journals at UNM Digital Repository. It has been accepted for inclusion in Natural Resources Journal by an authorized editor of UNM Digital Repository. For more information, please contact [disc@unm.edu](mailto:disc@unm.edu).

## CREATIVE LEGAL APPROACHES TO PROTECT YOUTH'S CONSTITUTIONAL RIGHTS IN THE FACE OF CLIMATE CHANGE

*Symposium Editor's Note: This interview with Andrea Rodgers was produced through written responses to prompts from Ariel MacMillan-Sanchez<sup>2</sup> in April 2020.*

*Q: How did you become involved with the Juliana case?*

In 2010, Julia Olson, the founder of Our Children's Trust and the lawyer who developed the legal strategy that we are implementing, approached me about writing a litigation manual for how to bring Atmospheric Trust Litigation in courts across the Nation. Atmospheric Trust Litigation is a legal strategy originally developed by University of Oregon School of Law Professor Mary Wood, that serves as "an organizing legal framework based on the public trust doctrine to define government responsibility in climate crisis."<sup>3</sup> Put succinctly, Atmospheric Trust Litigation calls upon the judicial branch of government to declare that the government holds crucial natural resources in trust for its citizens, recognize government has a corollary fiduciary obligation to protect and prevent substantial impairment to the atmosphere, and order government to come up with a science-based plan to protect public trust resources from the dangers of climate change.<sup>4</sup> Julia asked me to draft a manual analyzing how to get these claims into court. The manual identified viable claims, jurisdictional hurdles, potential defenses, feasible remedies, etc. After the manual was prepared, Julia enlisted attorneys across the country to represent groups of youth, largely on a pro bono basis, in atmospheric litigation cases. I was one of these attorneys and, along with Washington lawyer Richard Smith, represented a group of Washington youth in the first round of atmospheric trust cases.<sup>5</sup> This case was unsuccessful, with the Washington Court of Appeals finding the claims raised nonjusticiable political questions "within the purview of the legislature" under the separation of powers doctrine.<sup>6</sup> However, the Court also

---

1. Andrea Rodgers is Senior Litigation Attorney at Our Children's Trust, where she serves as co-counsel on *Juliana et al. v. United States et al.*, No. 18-36082 (9th Cir. Jan. 17, 2020) and as lead counsel on *Aji P., et al. v. State of Washington, et al.*, No. 96316-9 (Wash. Jan. 22, 2019); *Reynolds et al. v State of Florida et al.*, No. 2018-CA-00819 (Fla. Cir. Ct. Jan. 6, 2020).

2. Ariel MacMillan-Sanchez is the Symposium Editor for the University of New Mexico, School of Law, *Natural Resources Journal*.

3. Mary C. Wood, *Atmospheric Trust Litigation*, in *CLIMATE CHANGE READER* 1019 (W.H. Rodgers, Jr. and M. Robinson-Dorn, eds., Carolina Academic Press 2011).

4. *See id.*; *see also* Mary Christina Wood, *Law & Climate Change: Government's Atmospheric Trust Responsibility*, 10 *ENVTL. L. REP.* (Sept. 2008).

5. *Svitak v. State of Washington*, No. 69710-2-I, 2013 WL 6632124 (Wn.App. Dec. 16, 2013).

6. *Id.*, at \*1.

suggested that the issue would be justiciable if the plaintiffs were to allege a “violation of a specific statute or constitution.”<sup>7</sup> So, we followed the Court of Appeals’ advice and filed a petition for rulemaking on behalf of a new group of Washington youth with the Washington Department of Ecology, which resulted in another case in 2015 after the Department of Ecology denied the petition for rulemaking.<sup>8</sup> Ultimately, this litigation resulted in the Nation’s first court order directing a state agency to cap and regulate carbon dioxide emissions, but the order was overturned on procedural grounds after the rule was promulgated.<sup>9</sup> Because we were not yet able to obtain relief that would actually protect Washington children, in 2018, we filed a third case against Washington state government, bringing constitutional claims to challenge the state’s contribution to climate change.<sup>10</sup>

In 2017, Julia asked me to join the staff of Our Children’s Trust staff to help litigate the *Juliana v. U.S.* case against the federal government because, at that time, the case was moving to trial and they needed more litigation support. I continue to litigate constitutional climate change cases against state governments as well.

*Q: What was the most challenging thing that you encountered along the way?*

We have had many ups and downs! At times, the workload has been challenging. For example, we took and defended nearly 50 depositions in 60 days leading up to a *Juliana v. U.S.* trial date of October 29, 2018. That was exhausting, but exhilarating as we were finally getting the chance to present the massive amount of evidence we accumulated regarding how the federal government has known about the dangers of climate change for decades, yet continued to perpetuate an energy system based on fossil fuels in the face of that danger. It is such an important story that needs to be told in the courtroom. It was incredibly disappointing when Chief Justice Roberts stayed the case only 10 days before trial. Since then we have been tied up in the appellate process, which is particularly frustrating as we see the climate crisis continue to worsen before our eyes. It has also been frustrating how some mischaracterize the nature of our claims and remedies. While the factual basis of our case is novel, many aspects make it more of a run-of-the-mill constitutional case similar to other institutional reform cases that have been decided by courts for decades, like *Brown v. Board of Education*. For some reason, some judges and legal scholars just treat climate change differently, as we have seen in the over 30 years of climate change litigation being largely unsuccessful in U.S. courts.

*Q: What was the most rewarding?*

Working with the youth plaintiffs is tremendously rewarding. They are a group of people who are experiencing tremendous climate change impacts and see full well how their government and courts understand their injuries, but continue to

---

7. See *id.*

8. See Foster v. Wash. Dep’t of Ecology, No. 14-2-25295-1 SEA, 2015 WL 7721362 (Wash. Super. Ct. Nov. 19, 2015).

9. See Foster by & through Foster v. Wash. Dep’t of Ecology, No. 75374-6-I, 2017 WL 3868481 (Wash. App. Sep. 5, 2017).

10. See Aji P., *supra* note 1.

do nothing to protect them. It is very difficult to be a young person in today's world, and I so admire these youth who put the time and effort in to take their claims to court to stand up for themselves and future generations. It is also rewarding to court towards establishing a pathway for courts to protect the constitutional rights of youth and get engaged in solving the climate crisis. Our country was founded on the notion that no branch of government has unfettered authority to deliberately harm its citizens. But that is exactly what is happening with climate change, so it's our job as lawyers to figure out how to present this reality to courts so that judges can fulfill their responsibility of interpreting and enforcing the Constitution.

*Q: How do you think this case generates social change?*

So far, the judicial branch has largely been absent from the climate change space. History has taught us that all three branches of government must get engaged when society is faced with systemic, government-sanctioned harm. For example, in the civil rights and LGBTQ rights arena, courts have played a crucial role, along with civil disobedience, legislative/policy work, etc. in making sure that the rights of citizens were established, protected, and upheld. Unless, and until, Courts recognize the fundamental constitutional rights of youth that are at stake in light of climate change, I believe very little progress will be made. We just hope the courts won't wait to engage until it's too late. That is a very real possibility given how fast and severe climate change is happening.

*Q: How does/might Juliana effect the legal landscape?*

The *Juliana* litigation provides a comprehensive legal approach to ensure that the legislative and executive branches of government cease their energy policies and affirmative actions that knowingly cause climate change and harm children. Our strategy is unique in that it can be replicated at the state, federal, and international level because all levels of governments have policies and engage in actions that are causing and contributing to climate change. Climate change isn't just an accident that is happening; government is deliberately creating and controlling the way we get energy. Unfortunately, governments are choosing to do so in a way that causes direct and lasting damage to children and future generations.

Our cases are also unique in that they present the court with the best available science as to what is needed to stabilize the global climate system. Specifically, because carbon dioxide (CO<sub>2</sub>) is the primary driver of climate destabilization and ocean warming and acidification, all government policies regarding CO<sub>2</sub> pollution and CO<sub>2</sub> sequestration should be aimed at reducing global CO<sub>2</sub> concentrations below 350 parts per million (ppm) by 2100.<sup>11</sup> Global

---

11. Tellingly, more than 45 eminent scientists from over 40 different institutions have published in peer-reviewed journals finding that the maximum level of atmospheric CO<sub>2</sub> consistent with protecting humanity and other species is 350 ppm, and no one, including the Intergovernmental Panel on Climate Change, has published any scientific evidence to counter that 350 is the maximum safe concentration of CO<sub>2</sub>. See, e.g., James Hansen, et al., *Target Atmospheric CO<sub>2</sub>: Where Should Humanity Aim?*, 2 OPEN ATMOSPHERIC SCI. J. 217 (2008); James Hansen, et al., *Assessing "Dangerous Climate Change": Required Reduction of Carbon Emissions to Protect Young People, Future Generations and Nature*, 8 PLOS ONE at 10 (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*

atmospheric CO<sub>2</sub> levels, as of 2019, are approximately 411 ppm and rising.<sup>12</sup> An emission reductions and sequestration pathway back to 350 ppm could limit peak warming to approximately 1.3°C this century and stabilize long-term heating at 1°C above pre-industrial temperatures.<sup>13</sup> Many climate change advocates do not present courts with the evidence of what scientists say is needed to avert climate change. Instead, they present courts with what the governments themselves say is politically feasible or what they have committed to pursuant to international agreements in the UNFCCC process. This is a grave error as it encourages judges to set constitutional standards based upon a level of warming that would be catastrophic, particularly for the most vulnerable people on the planet. If the court in *Juliana* issues the relief that we seek, we believe that will have ramifications across the planet as the U.S. is not only the largest cumulative emitter of GHG emissions, it can be very influential on the international stage.

*Q: What do you think activism means/is?*

I believe activism can be defined as any activity that individuals and groups undertake to facilitate social change. It can include expressing oneself, educating others, filing lawsuits or other forms of civil disobedience, etc. For me, as an officer of the court, activism means zealously advocating for my clients who are seeking protection from government actions that cause and contribute to climate change and violate their constitutional rights. The term “judicial activism” has become a loaded term, often with very negative connotations. But I believe this country has a long-standing tradition of courts being called upon to vindicate constitutional rights, even when the claims involve issues of social or political importance. That’s why we don’t consider our work to be judicial activism, but rather a reflection of what the Founders contemplated.

*Q: What do you think social change means/is?*

I think 2020 has been a pivotal year in terms of a clarion call for social change, whether it be racial justice, LGBTQ rights, indigenous rights, or health equality. I think the social change that people are calling for is at a systemic level, not just recognition of a problem, but real change and real results. In the climate change context, I think social change means transforming the way we get energy. There is much to be done to help both the general public and decision-makers better understand how and why we are currently dependent on fossil fuels, why and how

*Dangerous*, ATMOSPHERIC CHEMISTRY & PHYSICS 3761, 3801 (2016); James Hansen, et al., *Young People’s Burden: Requirement of Negative CO<sub>2</sub> Emissions*, 8 EARTH SYS. DYNAMICS 577, 579 (2017); J.E.N. Veron, et al., *The Coral Reef Crisis: The Critical Importance of <350 ppm CO<sub>2</sub>*, 58 MARINE POLLUTION BULL. 1428 (2009); Katja Frieler, et al., *Limiting global warming to 2 °C is unlikely to save most coral reefs*, 3 NATURE CLIMATE CHANGE 165 (2013).

12. NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, TRENDS IN ATMOSPHERIC CARBON DIOXIDE (last updated Aug. 5, 2020), [www.esrl.noaa.gov/gmd/ccgg/trends/](http://www.esrl.noaa.gov/gmd/ccgg/trends/).

13. OUR CHILDREN’S TRUST, GOVERNMENT CLIMATE AND ENERGY ACTIONS, PLANS, AND POLICIES MUST BE BASED ON A MAXIMUM TARGET OF 350 PPM ATMOSPHERIC CO<sub>2</sub> AND 1°C BY 2100 TO PROTECT YOUNG PEOPLE AND FUTURE GENERATIONS (2019), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5cbf9b1a8165f50477f3d191/1556060958104/2019.04.11.OCTWhy350.Final.pdf>.

the use of fossil fuels for energy causes harm to people (some more disproportionately than others) and environments, and the role government plays in controlling and creating our energy systems. A solid understanding of why these injustices have arisen is key to overcoming them.

*Q: How do you think one informs the other?*

I believe activism can lead to social change and help push the narrative of what kinds of changes are needed. I also think that goes both ways, with social change encouraging activism. I think we are seeing remarkable levels of activism in this country in part as a response to the kind of social change being endorsed by the Trump Administration.

*Q: How do you think that the law and or politics generates/supports activism and change?*

Well, fortunately our Founding Fathers created a system of government that was intended to protect basic, natural fundamental rights. While society's understanding of the scope of these rights may change and evolve, that is an important issue for courts to address. Fundamentally, the law should be used to protect these fundamental rights (whether from government or private infringement), just like the law is used to protect freedom of speech, the right to practice one's religion or the right to privacy. The role of courts is to interpret the law and apply the law to whatever facts are presented; and through that process our Nation continues to develop and move forward.

*Q: How do you think that the law and or politics generate/support legal activism and change?*

The term "legal activism" is really a controversial term and frowned upon in conservative circles. I think a better term is legal creativity because we aren't asking judges to make up the law; rather to apply well-established principles of law to a new set of circumstances. When foundational laws are created, it is impossible to predict how society will evolve and change through time. When the Bill of Rights was drafted, people did not know about email, but no one disputes that is a protected form of speech. What the Founders protected was the fundamental right of self-expression.<sup>14</sup> Similarly, when the U.S. was founded, no one could have contemplated the environmental destruction that would occur. But there was no question that the Founders sought to protect individual's rights to life, liberty and property. Climate change has become so damaging that those rights are now in jeopardy, so there is an

---

14. See, e.g., Interview with Justice Antonin Scalia (Oct. 1, 2012), <https://lareviewofbooks.org/article/reading-the-text-an-interview-with-justice-antonin-scalia-of-the-u-s-supreme-court/> (Justice Scalia: "I think strict construction gives a bad name to textualism. My approach is to give the text a reasonable meaning that it bore when it was adopted. For instance, if you interpret strictly the First Amendment, it would be the case that Congress could censor handwritten letters, because, strictly, it covers only freedom of speech and of the press. A handwritten letter is neither speech nor press. Come on, that's absurd, that's not the meaning of the First Amendment. The First Amendment reasonably understood is a guarantee of freedom of expression, whether handwritten or oral, or semaphore or burning a flag.").

appropriate role for the Courts to step in and protect fundamental rights, particularly when the victims are children. I don't see that as judicial activism; I see that as well within the judicial role contemplated by our Founding Fathers, just being applied to a new set of social circumstances. I think it is important to emphasize that in our legal work we are not asking courts to impose upon government an obligation to provide a new right or benefit to its citizens. The United States was founded upon a stable climate system, which is what enabled this country to develop and thrive. We are asking the courts to prevent government from acting in a way that affirmatively destroys the climate system and infringes children's existing fundamental rights. That is an important legal distinction.

*Q: How do other mediums of work generate/support activism and change?*

I think it is important that there be a variety of pathways to ensure the protection of human rights. It is just important that they build off one another to move forward as opposed to setting each other back. Climate activists have really come to support the *Juliana* litigation because they believe in supporting the youth plaintiffs and their quest for science-based legal protection of their rights. I think the legal case has really inspired others to get engaged, whether it's in the street protesting or teaching the legal principles underlying the case in the classroom.

*Q: What opportunities do you see for students/practitioners (especially of the law) to effectuate action/change?*

Be creative! Develop new legal theories, implement old ones to new sets of facts. Really study what is the root cause of the problem you are looking to resolve and figure out how the law can be used to facilitate a solution.

*Q: What general opportunities do you see for people to effectuate action/change?*

There are endless opportunities, particularly in the climate space, from joining climate strikes to educating others on climate change to donating to organizations working for a stable climate to putting solar panels on your roof. There are also people who need help relocating their homes or getting medical support for asthma during wildfire season. There is work that needs to be done at the policy level too. I tell students that I work with that they will be working in the climate space whether they want to or not, as climate change will play a role in every sector in the future from banking and insurance to real estate and technology. That is why it is so important students get a good, foundational understanding of climate science from a very young age.

*Q: What's next for you with regards to your career and changing the world?*

We are continuing to pursue the *Juliana v. U.S.* case as far as it can go, and I continue to represent young people in cases against their governments in a variety of different jurisdictions.<sup>15</sup> We hope to argue the merits of our case to judges to help

---

15. See, e.g. Aji P *supra* note 1; Reynolds *supra* note 1.

them better understand their powerful role in this critical and urgent issue so that they can set a constitutional standard of protection, based on science, that protects our youngest, most vulnerable members of society. Climate change is really a question of science: How do we restore Earth's energy balance? It's not rocket science. It may be atmospheric science, but it is a question with an answer that can easily be applied to different governments around the world. We just need the courts to fulfill their traditional role to step in to protect the constitutional rights of children so that governments will stop building and investing fossil fuel energy systems that cause harm to our youth.



