

**Is there a Constitutional Right to a Climate Capable of Sustaining Human Life?
The Youth Climate Movement and the Problem of Natural Rights**

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We the young, have started to move. We are going to change the fate of humanity, whether you like it or not. United we will rise until we see climate justice. We demand the world's decision-makers take responsibility and solve this crisis.

--Letter to *The Guardian* newspaper announcing the March 2019 #Fridays4Future mass school strikes by the global organizing strike committee

Introduction

As I write this Article, Australia is burning. Over 15.6 million acres are on fire.¹ Two thousand homes have been destroyed, and 20 people have died. The latest estimates are that 1 *billion* animals have perished.² The wildfires are so hot they are generating thunder and lightning “similar to conditions during a volcanic eruption or atomic bomb blast.”³

Earlier predictions that could have justified the complacent sense that climate change was a far-off threat seem to have been wrong. Climate change is already a reality for millions of people, with extreme weather events -- record-breaking temperatures, 1,000-year floods -- happening at increasingly rapid rates. The Intergovernmental Panel on Climate Change (IPCC) once believed that “large-scale discontinuities” in the climate system, or “tipping points,” were likely only if temperature rise exceeded 5 degrees C. But in two recent special reports, the IPCC has revised its projections and suggested that tipping points could occur even at temperature rise between 1 and 2 degrees C.⁴ These frightening realities, though denied by government leaders and many in older generations, are being taken in by young people as truths that are not just inconvenient but transformative.

They are fighting back, in the streets and in the courts. Although climate-related litigation has been undertaken by a wide variety of plaintiffs, this Article focusses mainly on the work of the Eugene, Oregon-based nonprofit law firm Our Children’s Trust (OCT). Our Children’s Trust has initiated state litigation or administrative actions on behalf of youth and children in the United States and, in cooperation with local collaborators, in foreign countries such as India and the Netherlands.⁵ These cases are deeply morally compelling, as they pit young people who will be the generation most affected by climate change against the governments, run by adults, which are failing in their duty to protect them from climate change.

¹Australia fires: A visual guide to the bushfire crisis, BBC.com (January 8, 2020), <https://www.bbc.com/news/world-australia-50951043> (last visited January 8, 2020).

² Josephine Harvey, “Number of Animals Feared Dead in Australia’s Wildfires Soars to over 1 Billion,” Huffington Post (January 6, 2020), <https://www.huffpost.com/entry/billion-animals-australia-fires> (last visited January 8, 2020).

³ David Winning and James Glynn, “Australia’s Wildfires Are So Hot, They’re Generating Thunder and Lightning,” Wall Street Journal (January 8, 2020), <https://www.wsj.com/articles/australias-wildfires-are-so-hot-theyre-generating-thunder-and-lightning-11578214818> (last visited January 8, 2020).

⁴ <https://www.nature.com/articles/d41586-019-03595-0>.

⁵ The state actions are based either on state constitutions or on regulatory actions.

While perhaps the biggest win so far has occurred in the Netherlands where a Dutch Court of Appeal upheld a lower court ruling ordering the Dutch government to reduce CO2 emissions 25% below 1990 levels, in the United States, the case garnering the greatest attention is a lawsuit against the federal government, *Juliana v. United States*. The plaintiffs are all young people who were under the age of twenty when the case was originally filed, with some as young as eleven and eight years old.

Unlike earlier climate litigation, which was based on environmental statutes, the *Juliana* lawsuit rests on the Constitution. *Juliana* asserts that the failure of the federal government to act on curbing climate change violates the youth plaintiffs' constitutional rights—claims based not on constitutional text but on rights that are “inherent, inalienable, natural, and fundamental.”⁶

But the question of whether the Constitution protects “natural rights” or “fundamental rights” or due process that is “substantive” goes to some of the most central and hotly-contested arguments in constitutional jurisprudence and scholarship – those involving judicial review, the Ninth Amendment, and the Founders' views of natural law. To some, the Ninth Amendment (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”) appears on its face to recognize natural rights, but the conservative interpreters of the Constitution who favor “originalism” see the Ninth Amendment as referring merely to rights guaranteed in state constitutions. If natural rights appear at all in Supreme Court jurisprudence, they are usually denominated under the euphemisms of “substantive due process doctrine” or “fundamental rights” and are not seen as inherent in human beings or nature but as deriving from “emanations” and “penumbras” of other constitutional rights. They are also subject to various vague, slightly differently worded tests. Is a right “so rooted in the traditions and conscience of our people as to be ranked fundamental?”⁷ Is it “deeply rooted in this Nation's history and traditions?”⁸ Or rather, is it “implicit in the concept of ordered liberty?”⁹

Since the *Juliana* case was filed, a mass youth movement has emerged, with global reach, protesting governments' inaction on climate change and their support for fossil fuel industries. This Article examines the potential significance of the emerging youth movement for the natural law claims the plaintiffs are making in *Juliana*. The aim at this point is not to produce a comprehensive case study about how litigation has impacted, or been impacted, by a social movement, as has been done retrospectively for example about the civil rights movement or the campaign to pass the Equal Rights Amendment. The movement against climate change, which seems increasingly urgent, is still incipient but can be expected to gather strength in the coming years as ever more apocalyptic signs suggest that catastrophic climate change is already upon us. Rather, my aim is to put forward a theory to explain how the youth climate movement could be seen as constitutive of constitutionally relevant natural rights.

⁶ First Amended Complaint, at para. 304.

⁷ *Snyder v. Com. of Massachusetts*, 291 U.S. 97, 105.

⁸ *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (internal citations omitted).

⁹ *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.)).

Unlike in the field of international human rights, where there has been comparatively little scholarship about the role of social movements in shaping the understanding of human rights, constitutional law scholarship has seen a flood of research into the role of social movements in shaping the understanding and interpretation of the U.S. Constitution.¹⁰ But none of the existing legal scholarship specifically focusses on a particular type of social movement referred to in well-developed sociological and political science literature as “nonviolent civil resistance” movements, or “people power.” And none of the legal scholarship looks at such social movements as a possible expression or *source* of natural rights.

What is nonviolent civil resistance? The following definition will be used here:

Nonviolent resistance is a civilian-based method used to wage conflict through social, psychological, economic, and political means without the threat or use of violence. It includes acts of omission, acts of commission, or a combination of both. Scholars have identified hundreds of nonviolent methods—including symbolic protests, economic boycotts, labor strikes, political and social noncooperation, and nonviolent intervention—that groups have used to mobilize publics to oppose or support different policies, to delegitimize adversaries, and to remove or restrict adversaries’ sources of power.¹¹

Nonviolent civil resistance or “people power” is a practice taking place outside of formal political or legal institutions and is a form of *demos-centric* direct action “distinct from other nonviolent political processes such as lobbying, electioneering, and legislating,” though it can co-occur alongside such political processes. Nonviolent civil resistance has been most studied in its relation to independence, state formation, and pro-democracy movements; but it has also been used in civil and human rights campaigns (e.g., abolition, women’s suffrage, labor rights). It is a means of implementing Mahatma Gandhi’s insight that “[E]ven the most powerful cannot rule without the co-operation of the ruled.”¹²

Elsewhere, in the context of international human rights, I have made the argument that, with its use of tactics of disobedience, nonviolent civil resistance is a natural law practice.¹³ It is *natural* in the sense that it does not reflect existing positive laws and makes claims that are inherent and pre-legal. It is legal in nature if not *law* because it is a *rights* practice, a demand rather than a request, an expression of entitlement rather than an exercise in moral suasion. When Greta Thunberg tells world leaders that “change is coming, whether you like it or not,” she is not just stating a moral claim. She is articulating an intent to *enforce* that moral claim and an implied right to enforce that claim. Natural law is usually thought of as an absolute term – something existing in an eternal state, independent of human making—but it can also be thought

¹⁰ For overviews of this literature, see Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360, 361 (2018); Scott L. Cummings, *The Puzzle of Social Movements in American Legal Theory*, 64 UCLA L. REV. 1554, 1596 (2017).

¹¹ Erica Chenoweth & Maria J. Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict*, 33 INT’L SECURITY 7, 9-10 (2008).

¹² 5 COLLECTED WORKS OF MAHATMA GANDHI 8.

¹³ ELIZABETH A. WILSON, PEOPLE POWER MOVEMENTS AND INTERNATIONAL HUMAN RIGHTS: CREATING A LEGAL FRAMEWORK (International Center for Nonviolent Conflict (2017; rev. 2019), available at <https://www.nonviolent-conflict.org/wp-content/uploads/2017/08/People-Power-Movements-and-International-Human-Rights.pdf>).

of as a relative term that reflects the process of *jurigenesis* (rights-creation), a creative envisioning of an alternative legal order that is being asserted intersubjectively through the collective work of human beings engaged in social action. This Article explores how this *demos-centric* view of natural law might inform the *Juliana* litigation.

Part I provides background on the *Juliana* litigation, with emphasis on the issues of natural law that *Juliana* raises, outlining the claims, the arguments against them, and the district court's holding.

Part II documents the rise of the youth climate movement and how it is interfacing with the climate litigation

Part III explains what nonviolent civil resistance is and why the youth climate movement is a nonviolent resistance movement.

Part IV elucidates the main controversies about natural law and substantive due process.

Part V argues that grassroots movements – particularly nonviolent civil resistance movements – can help bring more coherence to this doctrine.

Part I: Climate Litigation: *Juliana v. United States*

The *Juliana* lawsuit was filed in 2015 in the District Court of Oregon. Besides the twenty-one young people, the plaintiffs include a youth environmental group Earth Guardians, and “Future Generations through their guardian Dr. James Hansen,” former Director of the NASA Goddard Institute for Space Studies. The suit named as defendants the United States, the President of the United States, the Office of the President, the Environmental Protection Agency, and a host of federal departments (transportation, defense, agriculture, state, and others) whose organizational remit touch on climate policy.¹⁴

Plaintiffs allege a wide array of injuries resulting from climate change – from spiritual and emotional harms to increased asthma and allergies to loss of livelihoods and opportunities to recreate – attributed to algae blooms, loss of fish in salmon runs, reduced water supply to family farms, receding glaciers, wildfires, record-setting heatwaves, increased acidification of oceans, adverse impacts on air and water from fracking for natural gas, extreme flooding, pine-beetle infested forests, among other weather and ecological disruptions.

The complaint avers that defendants had knowledge – for more than 50 years – that burning fossil fuels was producing enough carbon dioxide to destabilize the climate system, thus endangering plaintiffs now and in the future. Despite that knowledge, plaintiffs allege, defendants “permitted, encouraged, and otherwise enabled continued exploitation, production,

¹⁴ The National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute quickly intervened, but after Donald Trump was elected, they asked to be released from the case, correctly perceiving that the Trump Administration would be zealous advocates of the fossil fuel cause.

and combustion of fossil fuels” and thus “deliberately allowed atmospheric CO₂ concentrations to escalate to levels unprecedented in human history[.]” The plaintiffs seek a declaration that their rights have been violated and “an enforceable national remedial plan to phase out fossil fuel emissions and draw down excess atmospheric CO₂ so as to stabilize the climate system and protect the vital resources on which Plaintiffs now and in the future will depend.”¹⁵

The *Juliana* case is brilliantly creative and novel in a number of ways – the assertion of standing for future generations; its styling of the public trust doctrine as a federal, quasi-constitutional doctrine; its audacious breadth (calculated to avoid the objection that climate change is so large, the contribution of any one source is arguably negligible).¹⁶ But its greatest novelty no doubt is the overall assertion of a constitutional right to a stable climate and the consequent transformation of an environmental case into a constitutional and human rights case. As District Court judge Ann Aiken remarked in her opinion, “This is no ordinary lawsuit.”

A. The Constitutional Claims

The *Juliana* plaintiffs make constitutional claims under the Fourteenth, Fifth, and Ninth Amendments. The complaint styles its first claim under the Fifth Amendment as a natural law claim:

The Constitution recognizes and preserves the fundamental right of citizens to be free from government actions that harm life, liberty, and property. These inherent and inalienable rights reflect the basic societal contract of the Constitution to protect citizens and posterity from government infringement upon basic freedoms and basic (or natural) rights (para. 278).

The climate conditions that defendants have created are alleged to injure plaintiffs’ “dignity,” including their “capacity to provide for their basic human needs, safely raise families, practice their religious and spiritual beliefs, maintain their bodily integrity, and lead lives with access to clean air, water, shelter, and food” (para.). Defendants’ interference with the climate system is causing such “irreversible and catastrophic consequences as to shock the conscience.”

The second claim alleges “violation of the equal protection principles of the Fourteenth Amendment, embedded in the Fifth Amendment” and defines children as a suspect class without alternative avenues of influencing defendants.

The third claim for relief rests on “the unenumerated rights preserved for the people by the Ninth Amendment”:

Fundamental to our scheme of ordered liberty, therefore, is the implied right to a stable climate system and an atmosphere and oceans that are free from dangerous

¹⁵ First Amended Complaint at 94.

¹⁶ Opinion and Order at 24 (distinguishing *Wash. Env’t Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013)). Between 1751 and 2014, the US produced more than twenty-five percent of global CO₂ emissions. First Amended Complaint at para. 151.

levels of anthropogenic CO₂. Plaintiffs hold these inherent, inalienable, natural, and fundamental rights (para. 304).

The fourth claim asserts the “rights implied by the Public Trust Doctrine” – a well-recognized state law doctrine – and applies it against the federal government by construing it as “secured by the Ninth Amendment and embodied in the reserved powers doctrines of the Tenth Amendment and the Vesting, Nobility, and Posterity Clauses of the Constitution.”

Relying on “inherent, inalienable, natural, and fundamental rights” is a risky strategy for the *Juliana* plaintiffs. As Roman Catholic philosopher Frederick D. Wilhelmsen observed, “An appeal to the natural law will gain no lawyer his case in court—unless he is a spellbinder arguing before a jury uncorrupted by legal positivism and higher education, nor will such an appeal protect the rights of man before the higher judicial courts of appeal.”¹⁷ Wilhelmsen called the Supreme Court “possibly the highest repository of the denial of natural law in the nation.”¹⁸

If the Constitution protects natural law rights beyond those recognized in the text of the first ten amendments, it arguably does so through the Ninth Amendment. But, like natural law, the Ninth Amendment is disfavored as a litigation strategy: “In sophisticated legal circles,” wrote John Hart Ely in 1980, “mentioning the Ninth Amendment is a surefire way to get a laugh.”¹⁹

Throughout the history of constitutional jurisprudence, unenumerated rights have traditionally been cognized through the doctrine of substantive due process doctrine. Though substantive due process has a textual thread, it is almost as controversial as the Ninth Amendment. The consensus anxiety is that in finding a substantive due process right, judges are substituting their subjective policy preferences for the policy preferences that rightfully should be the outcome of a democratic process. In *Collins v. City of Harker Heights*, the Court held that in crafting new rights through the doctrine of substantive due process, “we must exercise the utmost care whenever we are asked to break new ground in this field.”²⁰ *Washington v. Glucksberg* reinforced this caution, and the infamous *Dred Scott* and *Lochner* case came to stand for the dangers posed by a run-away view of substantive due process. After the Court’s decision in *Obergefell v. Hodges* (recognizing a right to same-sex marriage), conservatives on and off the Court were upset that the substantive due process doctrine seemed to be expanding without limits.²¹ *Juliana* could be seen as pushing the envelope on substantive due process even further.

B. Defendant’s Motion to Dismiss

¹⁷ Frederick D. Wilhelmsen, *The Natural Law Tradition and the American Political Experience*, in CHRISTIANITY AND POLITICAL PHILOSOPHY 191 (1978).

¹⁸ *Id.*

¹⁹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)

²⁰ *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125, (1992)(quoted in *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

²¹ Justice Alito has expressed the view that *Obergefell* introduced a very “postmodern” idea of liberty as “self-expression,” an idea without “historical pedigree.” “So we are at, we are at sea,” he said. “I don’t know what the limits of substantive liberty protection under the 14th Amendment are at this point.”

<https://www.nationalreview.com/bench-memos/justice-alitos-conversation-bill-kristol-substantive-due-process-ed-whelan/>.

The U.S. government (USG) defendants moved to dismiss the complaint by arguing that the youth lacked standing because they failed to allege particularized harm traceable to defendants through a sufficient causal connection,²² among other things, and that future generations were lacking an injury-in-fact.²³ The generalized grievance asserted by the plaintiffs, defendants argued, “raises substantial separation of powers concerns because its resolution would transform the district court into a super-regulator setting national climate policy.”²⁴

On the merits, USG defendants argued for the narrow view of substantive due process exemplified by *Glucksberg*: “No court has ever recognized” a right to be free of CO₂; to the contrary, “courts have consistently held that ‘there is no right to a pollution-free environment.’”²⁵

On the equal protection claims, defendants argued that they “lack any basis in law,”²⁶ because children have never been held to be a suspect class.²⁷ Further, defendants asserted, the court should not now recognize children as a suspect class because plaintiffs are “clearly not differently situated from any other person of any age when it comes to respect to current impacts of climate change.” Nor was it true that plaintiffs were shut out of the political process even though they were not eligible to vote because a number of them were already engaged in political activism. And claims as to harms for future generations had “a ripeness issue.”

The USG defendants rejected the Ninth Amendment claims by citing a variety of lower court decisions holding that the Ninth is a “rule of construction” merely and does not independently secure any constitutional rights.²⁸

C. The Holding

Plaintiffs won a startling first-round victory when, two days after the election of Donald Trump, Judge Aiken denied the defendants motions to dismiss.²⁹ After finding that the youth plaintiffs had standing, she carried out a substantive due process analysis, largely following Justice Kennedy’s expansive reading of substantive due process outlined in *Obergefell v. Hodges*. After exercising her “reasoned judgment,” she concluded, “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,” she reasoned by analogy, “a stable climate system is quite literally the foundation ‘of society, without which there would be neither civilization nor progress.’”

Nothing in Judge Aiken’s opinion rests explicitly on natural rights or the Ninth Amendment. In her opinion, she subsumes all of the plaintiffs’ claims, including the equal

²² Federal Defendants Memorandum of Points and Authorities in Support of their Motion to Dismiss, at 13 (hereafter Defendants Memorandum).

²³ *Id.* at 16.

²⁴ *Id.* at 16-17

²⁵ Defendants Memorandum at 21 (quoting *Nat’l Sea Clammers Ass’n v. City of New York*, 616 F.2d 1222, 1237-38 (3rd Cir., 1980), *dismissed and vacated in part on other grounds*, 453 U.S. 1 (1981)).

²⁶ Defendants Memorandum, at 23.

²⁷ Citing *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir., 1988).

²⁸ Defendants Memorandum at 26. *Strandberg v. City of Helena, United States v. Bifield*.

²⁹ In doing so, she adopted the findings of the Magistrate Judge.

protection claims and the public trust claims, under the rubric of substantive due process. Plaintiffs’ public trust rights were a matter of substantive due process because they are “related...to inherent aspects of sovereignty and the consent of the governed, from which the United States’ authority derives.”³⁰ She notes that these rights “also” derive from the Ninth Amendment but “it is the Fifth Amendment that provides the right of action.”³¹

However, since substantive due process is entangled in the same kind of interpretive controversy about natural rights as the Ninth Amendment, simply avoiding the Ninth Amendment does not avoid controversy.³² Defendants immediately asked Judge Aiken to certify an interlocutory appeal on the injury, causation, and redressability prongs of standing, the finding of a new fundamental constitutional right to a climate system capable of sustaining human life, and the finding of a new federal public trust cause of action.³³

When she denied that request, the federal defendants filed a writ of mandamus to the Ninth Circuit, which the Ninth Circuit denied unanimously. Defendants then petitioned the Supreme Court for a stay of trial proceedings; this was also denied. Eventually, the appeal was certified, and on January 17, 2020 the Ninth Circuit set down its long-awaited ruling on the USG’s appeal from Judge Aiken’s ruling. It overturned the decision largely on the redressability prong of the standing analysis, holding that Article III courts did not have the power to make the plaintiffs whole.

The U.S. government – both the Obama and the Trump administrations -- have been fighting for five years, stalling the proceedings, mounting challenges on every front, and when they lose, immediately running to higher courts and asking them intervene instead of pursuing the usual litigation processes.³⁴ Whether the plaintiffs win or lose, on standing or on the merits, the case is perceived as hugely threatening to the government and the fossil fuel industries.

Part II: The Youth Movement Against Climate Change and Its Relation to Climate Litigation

Since the *Juliana* case was filed, a global mass movement has emerged, protesting governments’ inaction on climate change and support for fossil fuel industries – a mass movement catalyzed largely by young people. While environmentalists and scientists have been sounding the alarm about climate change for decades, it has only been within the last year that

³⁰ Opinion p. 51.

³¹ Id.

³² See *Griswold v. Connecticut*, 381 U.S. 479, 522 (Justice Black dissenting)(“And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law”). Justice Black argued that any needed updates to the Constitution could be achieved by the amendment process.

³³ 2017 WL 1100598 (D.Or.).

³⁴ E.g., *In re United States*, 884 F.3d 830, 835 (9th Cir. 2018)(denying the government’s request for a writ of mandamus and noting “Mandamus relief is inappropriate where the party has never sought relief before the district court to resolve a discovery dispute”). And to the extent the defendants argue that the President himself has been named as a defendant unnecessarily and that defending this litigation would unreasonably burden him, this argument is premature because the defendants never moved in the district court to dismiss the President as a party. *In re United States*, 884 F.3d 830, 836 (9th Cir. 2018).

the fog of denial thrown up by the fossil fuel industries and their government allies has been partially dispelled, and public consciousness about the realities of climate change is beginning to shift.

Part II first briefly traces the movement's emergence and its relation to the *Juliana* litigation. Social movements have been increasingly at the forefront of legal scholarship in recent years, but the question of how social movements relate to law, particularly how they relate to litigation on behalf of the same causes as espoused by a movement, has proven controversial. Litigation exposes social movements to the courts, raising analogous counter-majoritarian concerns as judicial review. It has been criticized for having various deleterious effects on social movements as well as praised for realizing the demands of social movements in substantive structural change. The deleterious effects include sacrificing large-scale structural change for incremental and easily-overturned improvements.³⁵

A. A Mass Movement Coalesces

After a few earlier isolated actions, the current mass movement erupted after Thunberg undertook a solitary *Skolstrejk för Klimatet* [school strike for climate] in front of the Swedish Parliament building in August 2018. In October, a new climate organization Extinction Rebellion (XR) announced its plans for a mass civil disobedience campaign.³⁶ Thunberg gave a TEDx event in November 2018 in Stockholm and was invited to address the Conference of the Parties to the UN Framework Convention on Climate Change (COP24) in Katowice, Poland, in December. Both videoed events went viral.

At the same time, warnings from scientists became more dire. A special report put out by the IPCC before COP24 warned that the world was far off track to meet even the conservative goals of the Paris Accords and that to keep global heating to less than 1.5 degrees centigrade, swift and radical actions would need to be taken in the next twelve years.³⁷

Demonstrations began to proliferate. On November 30, 2018, Australian schoolchildren demonstrated, by hundreds and thousands, in at least 20 cities across Australia.³⁸ Inspired by Thunberg, Alexandria Villasensor in the United States started her own solitary strike in front of the United Nations in December 2018, eventually becoming the U.S. liaison for global school

³⁵ See, e.g., Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L. J. 470, 476-77 (1976); Catherine Albiston, *The Dark Side of Litigation As A Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 76 (2011) (“The law, in this view, helps stave off revolution and justify the status quo of unequal social relations by providing nominal individual remedies for unequal treatment”); JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM* (1978); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 137-38 (1974).

³⁶ <https://www.theguardian.com/environment/2018/oct/26/we-have-a-duty-to-act-hundreds-ready-to-go-to-jail-over-climate-crisis>.

³⁷ <https://www.wri.org/blog/2018/10/8-things-you-need-know-about-ipcc-15-c-report>.

³⁸ Naaman Zhou, “Climate change strike: thousands of school students protest across Australia,” *theguardian.com* (November 30, 2018), available at <https://www.theguardian.com/environment/2018/nov/30/climate-change-strike-thousands-of-students-to-join-national-protest> (last visited January 14, 2020).

strikes organizing committee.³⁹ In the same month, youth activists from the Sunrise Movement staged a sit-in in House Speaker Nancy Pelosi’s office at the U.S. Capitol in Washington DC. Fifty-one people were arrested in an event that grabbed national headlines and put the demand for a Green New Deal on the political map.⁴⁰ Young people joined environmentalists to protest in Katowice, Poland, at COP24, the twenty-fourth Conference of the Parties to the UN Framework Agreement on Climate Change.

By early 2019, Friday school strikes started happening with regularity in Europe. One hundred thousand turned out on the streets of Brussels in early February.⁴¹ In March 2019, school strikers coordinated the first mass global school strikes(#FridaysforFuture). By some estimates, strikes took place in 120 countries and involved 1.6 million students, provoking UN Secretary-General Guterres to call for a special climate summit in September during the UN’s annual meeting of the General Assembly. After the March demonstrations, XR shut down a handful of London landmarks in dramatic fashion, with over 1000 people being arrested. Thunberg addressed the UK Parliament on April 23, 2019. On April 29th, Scotland declared a climate emergency, as did the UK on May 1, and Ireland on May 9th.⁴² A second wave of student strikes in May attracted even more participants from 125 countries. New York City declared a climate emergency on June 26th.

More strikes were called in September, this time with adult allies involved in the planning. The number of countries that saw strikes reached 160 in September 2019 across all seven continents. With four million participants by some counts, this global strike is now considered the largest environmental strike in history. XR, which had grown rapidly since its inception, staged an “Autumn Uprising” following on the school strikes, with shutdown actions in London and in more than 60 cities across the globe. Despite some tactics backfiring, XR won concessions from the UK government, which agreed to convene a “citizen’s assembly” to address the climate crisis. Jane Fonda moved to DC to lead “Fire Drill Fridays” during which ordinary people and celebrities like Martin Sheen, Joachin Phoenix, Sam Waterson and Fonda herself four times, were arrested to call attention to climate change. Plans are now underway for a 72-hour strike around the next Earth Day, April 22, 2020.

This movement did not materialize out of thin air. The established environmental organizations – Sierra Club, Greenpeace, Nature Conservancy – were seen as white and middle-class and had notably failed to mobilize public opinion about climate change. Alternative organizations, more social media savvy and formed by or for youth, had been springing up in the years before 2018. In the United States, these included Zero Hour, Sunrise Movement, Earth

³⁹ https://www.washingtonpost.com/national/how-a-7th-graders-strike-against-climate-change-exploded-into-a-movement/2019/02/15/e20868e2-2fb4-11e9-86ab-5d02109aeb01_story.html.

⁴⁰ <https://www.eenews.net/stories/1060108439>.

⁴¹ <https://www.buzzfeednews.com/article/lesterfeder/europe-climate-change-protests-teens>

⁴² Elizabeth Wilson, “The Youth Climate Movement Early Tactics and Gains: Declaring a Climate Emergency,” Minds of the Movement Blog (Sept. 17, 2019), https://www.nonviolent-conflict.org/blog_post/the-youth-climate-movements-early-tactics-and-gains-declaring-a-climate-emergency/

Uprising, among others. Some were seeded by more traditional environmental organizations,⁴³ others grew out of groups that formed in the aftermath of the shooting at Parkland High School.⁴⁴

The oldest of these youth-oriented groups – the organizational plaintiff in *Juliana*, Earth Guardians – began in 1992 as an accredited high school in Hawai'i dedicated to studying environmental awareness and action. In 1997, it relocated to Colorado and began to morph into a nonprofit.⁴⁵ Earth Guardians has supported hundreds of young people in environmental activism as they take on locally relevant environmental actions ranging from planting trees and rooftop gardens to resisting hydroelectric power stations to youth voter registration drives.

What Thunberg did was catalyze synergies and cooperation among the emerging groups, which are now collaborating on actions around agreed-upon collective dates. In the U.S., the organizing for the Earth Day 2020 strikes is being led by eleven youth climate organizations,⁴⁶ along with many other organizational partners, with Future Coalition acting as the umbrella.

B. Moral Authority

Youth have asked to lead the climate change movement, and since they have brought the issue to visibility, adults are deferring. Earth Guardians' youth director Xiuhtezcatl Martinez, who is also one of the plaintiffs in *Juliana*, says, "As young people, we have the advantage that the world will listen to us more so than adults, because we're vulnerable and we're innocent. People will look at this generation as really the generation that was able to overcome one of the greatest issues that humanity has ever been faced with."⁴⁷ The youth movement is confronting adults with the reality that the younger generation's collective inheritance will be an Earth drowning along coastlines and burning alive inland. The greater risk being born by young people lends them moral authority on the issue.

Does the unequal climate burden younger generations will face make them a "suspect class" for the purposes of the Constitution? The sympathetic district judge in *Juliana* first declined to reach the equal protection claim because she found that plaintiffs' fundamental rights had been violated. In revisiting the issue at the behest of the Ninth Circuit, she relied on past precedent and declined to identify youth as "a suspect class."

But if youth are not a "suspect class" in legal terms, they certainly are in moral terms. Young people have flipped the switch on adults by calling out their climate denialism. "Stop denying the Earth is dying" read protest signs. Thunberg shames adults: "You are not mature enough to tell it like it is. Even that burden you leave to us children. But I don't care about being popular. I care about climate justice and the living planet." Young people are saying, in no uncertain terms, that the emperor has no clothes.

⁴³ <https://www.eenews.net/stories/1060108439>

⁴⁴ The Future Coalition was founded by groups that grew out of the Parkland shootings, March for Our Lives, 50 Miles More and National School Walkout.

⁴⁵ <https://www.earthguardians.org/story>.

⁴⁶ <http://www.mtv.com/news/3152275/earth-day-2020-strikes-coalition/>. Divest Ed, Earth Guardians, Earth Uprising, Extinction Rebellion Youth US, Fridays for Future USA, Future Coalition, International Indigenous Youth Council, Sunrise Movement, US Youth Climate Strike, Zero Hour.

⁴⁷ *Kid Warrior -The Xiuhtezcatl Martinez Story*, available at https://www.youtube.com/watch?v=M_EK_9m1H88.

The extreme youth of the new wave of climate activists is striking. Thunberg was 15 when she began striking, Villasenor only 13. The current youth director of Earth Guardians Xiuhtezcatl Martinez has been active since he was six years old and addressed the United Nations General Assembly at 15. Jamie Margolin founded Zero Hour when she was 16 years old. Co-founder of an organization called the Affected Generation Jeremy Clark began his activism in 2013 when he was just nine, after he saw a National Geographic magazine cover picturing the Statue of Liberty standing in water up to her waist.⁴⁸ Any picture of a recent climate demonstration reveals many participants under ten years old. A father at a DC march in September 2019 carried his three-and-a-half year-old daughter on his shoulders, saying she had staged a “hunger strike” when told she could not attend the march with her older siblings, by refusing to eat her breakfast.

The youth movement has amplified and been amplified by the actions of XR. XR has organized its more disruptive acts of civil disobedience – occupying public squares, blocking highways, gluing themselves to public transportation – in relation to the global school strike actions, often following them in close temporal proximity. Thunberg has shown her support for XR by speaking at their protests, saying, “Humanity is now standing at a crossroads. How do we want the future living conditions for all species to be like? We are the ones making a difference, we the people in this Extinction Rebellion and the children school-striking for the climate, we are the ones making a difference.”⁴⁹

Though XR is not a youth-founded organization, it has a youth wing, and it is conscious of adults’ moral obligation to the next generation. Its literature declares, “Our absolute power over nature has so thoroughly corrupted us that we are now intent on destroying that part of nature which is our children.”⁵⁰ XR has a protest tactic called “Blood of Our Children,” in which protesters bring “red paint or other safe red liquid in buckets,” walk to government buildings and throw the red liquid on the ground “as a symbol of the blood of the children who are set to die.”⁵¹

C. Relation to Litigation

Synergies and interactions have emerged between legal claims on behalf of youth claimants and this emerging movement. Although legal actions preceded the movement in time, all signs now point to coordination. Our Children’s Trust was involved in planning calls for the September strikes and helped to arrange meetings with individual Members of Congress and hearings. After testifying before Congress, along with Zero Hour founder Margolin, Thunberg spoke alongside the *Juliana* plaintiffs at a press conference in front of the Supreme Court. In turn, many of the *Juliana* plaintiffs have spoken at climate strike rallies.

As friends of the court, the youth movement is supporting the litigation. Both Zero Hour and Sunrise Movement’s Education Fund filed amicus briefs in the *Juliana* appeal to the Ninth

⁴⁸ <https://network.changemakers.com/challenge/tmochangemaker2019/entry/affected-generation>.

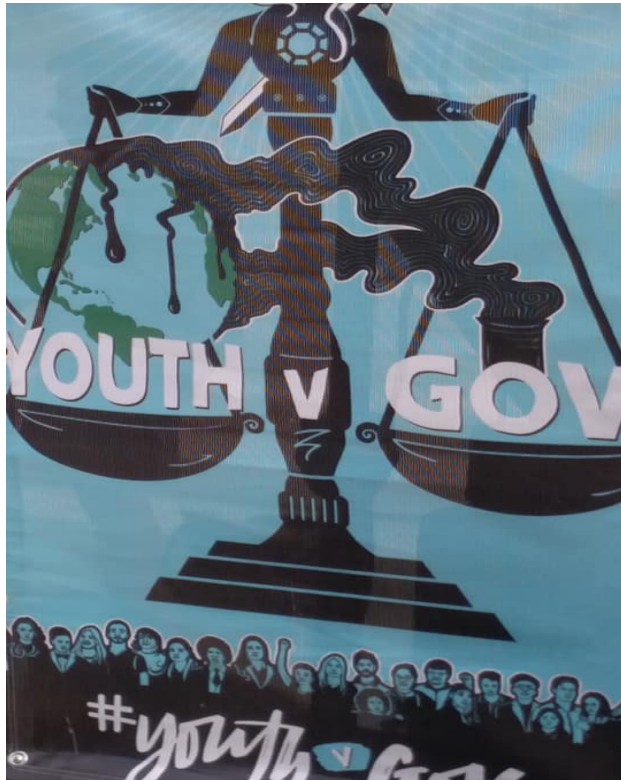
⁴⁹ <https://www.youtube.com/watch?v=hKMX8WRw3fc>.

⁵⁰ COMMON SENSE FOR THE 21ST CENTURY, at 77

⁵¹ COMMON SENSE FOR THE 21ST CENTURY, at 34.

Circuit. The Sunshine Movement Education Fund’s brief submitted 21 pages of testimonials from its members about the harms they have experienced from climate change.

Zero Hour posted its brief online to the website www.joinjuliana.org and announced a nationwide campaign to help thousands of young people add their names to the “Young People’s amicus.”⁵² In just 11 days, the brief gathered 32,340 signatures, of which 24,137 were from youth and children residing in the United States, and their relatives. In the eventuality the case would be appealed, Zero Hour announced the goal of attaining 100,000 signatures for its next amicus brief; Our Children’s Trust has already stated it will appeal to the Ninth Circuit *en banc*. Signage at the September strike in DC showed that the litigation is being sloganized as “Youth v. Gov.”



Further, there is overlap between the plaintiffs and the leadership of the youth climate movement. In 2014, lead plaintiff Kelsey Juliana walked 1600 miles to Washington D.C. in the “Great March for Climate Action.”⁵³ Alexander Loznak started school and climate groups.⁵⁴ Margolin is a plaintiff in another lawsuit filed by Our Children’s Trust, *Aji P. v. State of Washington*. Several of the *Juliana* plaintiffs lobbied municipal and state governments to pass comprehensive or other climate-related legislation. Earth Guardians youth director Martinez is also an individual plaintiff in the *Juliana* case.

Of course, a significant part of the movement rhetoric expressed in public demonstrations is just framed to sound an alarm. “I want you to panic,” says Thunberg.

“I want you to act like your house is on fire. Because it is.” Youth activists have had the aim of shifting public consciousness into “emergency mode” like the one that had driven the rapid mobilization for World War II. They have pushed cities, local communities, and even nation states to adopt “climate emergency declarations”; this had been a goal of earlier climate activists but one that had stalled until youth activists took it up.⁵⁵

⁵² Brief of Amicus Curiae Zero Hour on Behalf of Approximately 32,340 Children and Young People in Support of Plaintiffs-Appellees. The brief was filed by PowerShift Network, the parent organization of Zero Hour, with the Ninth Circuit Court of Appeals on March 1, 2019.

⁵³ First Amended Complaint at para. 16.

⁵⁴ *Id.* at para. 30.

⁵⁵ https://www.nonviolent-conflict.org/blog_post/the-youth-climate-movements-early-tactics-and-gains-declaring-a-climate-emergency/.

Another mid-twentieth century crisis used as a reference point for climate activists is the New Deal. The Sunrise Movement has been most vocal in calling for a “Green New Deal” and getting preliminary legislation introduced in the U.S. Congress. Naomi Klein, author of *This Changes Everything: Capitalism vs. the Climate* and *On Fire: The Burning Case for a Green New Deal*, has been influential in persuading young climate activists and their allies that tackling climate change cannot be done without tackling the system that created climate change. The Green New Deal is an imagined major works package that seeks “to achieve net-zero greenhouse gas emissions through a fair and just transition for all communities and workers,” create good-paying jobs, secure the environment, and ameliorate the past, present, and future oppression of various marginalized by neo-liberal capitalism -- indigenous peoples, communities of color, women, and de-industrialized communities, to name a few.⁵⁶

As this last point indicates, the youth movement stresses that climate change is an “intersectional” issue, implicating class, race, and gender. “Climate justice” is a rallying cry, and at many climate marches, in the United States at least, indigenous youth are front and center. This is something that separates it from the traditional environmental movement, which has long been chided for its “unbearable whiteness of green.” Intersectionality puts the youth climate movement on an equal protection footing and increases the likelihood that “rights” will come to the forefront. As Zero Hour puts it, “We cannot afford to wait any longer for adults to protect our right to the clean and safe environment, the natural resources we need to not just survive, but flourish. We know that we are the leaders we have been waiting for!”⁵⁷

How the movement and litigation interact in the future will be at least somewhat dependent on the make-up of the courts in the shadow of which they are working. The legal scholarship on law and social movements is conflicted in its conclusions, in part because it does not sufficiently take into account the variable and unstable relationship between social movements and courts. The legal realists perceived the courts as hostile to progressive ideals and as sympathetic to laissez-faire capitalism, so they wanted as little judicial review as possible.⁵⁸ The *Brown v. Board of Education* highpoint of “legal liberalism” corresponded to the Warren Court, when lawyers could feel some confidence that courts shared their progressive ideals. Conservative winds began to blow in the 1970s, amid economic contraction, when Warren Burger became Chief Justice. After Justices Black and Harlan died in 1971, they were replaced by Justices Rehnquist and Powell, the latter of whose Memorandum on Free Enterprise for the U.S. Chamber of Commerce became a blueprint for the American conservative movement. Though eventually Justices O’Connor and Kennedy would hold the liberal and conservative wings of the Court in a kind of balance for the next three decades, a conservative remaking of the Court has taken place under Senate Majority Leader Mitch McConnell’s unscrupulous leadership. If nothing happens to cause change, it is likely that the youth climate movements will look at the courts the way the legal realists did – as activist enforcers of an

⁵⁶ <https://www.sunrisemovement.org/gnd-strategy>

⁵⁷ <http://thisiszerohour.org/who-we-are/>

⁵⁸ Scott L. Cummings, *The Social Movement Turn in Law*, 43 LAW & SOC. INQUIRY 360, 366 (2018) (“Realists thus attacked aggressive judicial review of economic regulation and zealous legal advocacy for corporate clients, both of which were seen as promoting unbridled industrial capitalism,” citing Gordon 1988 and Singer 1988).

intolerable status quo that must be overcome, in other words, as the legal arm of the fossil fuel industry.

When the *Juliana* case was originally filed, it embodied the kind of heroic impact litigation characteristic of the *Brown* phase of “legal liberalism.” The litigation was spearheaded by Julia Olsen who founded the non-profit law firm Our Children’s Trust, but the litigation strategy was largely the brainchild of Oregon law professor Mary Christina Wood. Though the *Juliana* lawsuit might have been in the avant-garde at the time it was filed, the youth climate movement has now caught up with it, and the litigation now has the backing of a social movement.

Although the Ninth Circuit’s decision has been called “a devastating blow” to climate litigation,⁵⁹ it is likely to galvanize the youth movement even more, as it proves yet again that adults lack the courage to act on climate change. As the plaintiffs appeal to the Ninth Circuit *en banc*, the youth movement is preparing ever more far-reaching actions. How should these actions be understood in legal terms? Before answering that question, it is first necessary to understand what people power is and why the climate movement should be understood as a people power movement.

Part III The Climate Movement as People Power

Nonviolence is a core principle of most new climate groups.⁶⁰ This Part shows how activists involved in creating this mass movement against climate change are studying and learning from the sociological and political science literature on “nonviolent civil resistance.”⁶¹ It then describes the main characteristics of nonviolent civil resistance movements and shows how the climate movement is adapting their tactics.

A. Learning from the Past

When journalist Ezra Klein interviewed Varshini Prakash, a founder of the youth activist group Sunrise Movement, Prakash said that the movement quickly realized it needed “people

⁵⁹ Jon Queally, “Our Planet Is Seriously Burning and the Adults Keep Letting Us Down’: Ninth Circuit Throws Out Youth Climate Case,” Commondreams.org (Jan. 18, 2020).

⁶⁰ Zero Hour Guiding Principles: “In this movement: · We will be peaceful and non-violent,” (<http://thisiszerohour.org/files/zh-guiding-principles-web.pdf>); Sunrise Principles: “4. We are nonviolent in word and deed,” <https://www.sunrisemovement.org/principles>; Earth Guardian Agreements: “I am fully committed to practicing Nonviolence because it is critical to building just, and effective movements. We’ve seen throughout history the power of compassion, kindness and creativity to create lasting change. So while the systems we are trying to change may be violent I will continue to embody nonviolence in my words and my actions,” <https://www.earthguardians.org/beaneearthguardian>.

⁶¹ See, e.g., GENE SHARP, THE POLITICS OF NONVIOLENT ACTION, Vols. I-III (1973). For other scholarship, see PETER ACKERMAN & CHRISTOPHER KRUEGLER, STRATEGIC NON-VIOLENT CONFLICT: THE DYNAMICS OF PEOPLE POWER IN THE TWENTIETH CENTURY (1994); PETER ACKERMAN & JACK DUVALL, A FORCE MORE POWERFUL: A CENTURY OF NONVIOLENT CONFLICT (2000); SHARON ERICKSON NEPSTAD, NONVIOLENT CIVIL RESISTANCE: THEORIES, STRATEGIES, AND DYNAMICS (2015); SHARON ERICKSON NEPSTAD, NONVIOLENT REVOLUTIONS: CIVIL RESISTANCE IN THE LATE TWENTIETH CENTURY (2011); KURT SCHOCK, UNARMED INSURRECTIONS: PEOPLE POWER MOVEMENTS IN NON-DEMOCRACIES (2005); Elizabeth A. Wilson, *People Power' and the Problem of Sovereignty in International Law*, 26 DUKE J. COMP. & INT'L L. 551, 594 (2016);

power,” which she defined as “a large vocal active base of public support.” She referred directly to the scholarly literature on nonviolent civil resistance, citing political scientist and nonviolent resistance scholar Erica Chenoweth and saying that “if 3.5 percent of a population gets active on a particular issue...that movement inevitably wins. 3.5 percent of the population in America would be about 11 million people.”⁶²

Like Sunrise, XR has the goal of “mobilizing 3.5% of the population to achieve system change.” One of XR’s founders, the outspoken Roger Hallam, studied nonviolent resistance at Kings College after his organic farm was destroyed by extreme weather events he understood as resulting from climate heating. Hallam has published a climate change manifesto, intentionally echoing Thomas Paine, called *Common Sense for the 21st Century: Only Nonviolent Rebellion Can Now Stop Climate Breakdown and Social Collapse* in which he outlines the necessary steps, including the core elements of nonviolent resistance – e.g., mass mobilization in a capital city with the objective to break the law while strictly maintaining “nonviolent discipline even, and especially, under conditions of state repression.”

B. Characteristics of Nonviolent Resistance Movements

Though it has a long history, nonviolent resistance was first practiced on a large scale in India by Mahatma Gandhi, who was, initially, a lawyer. After becoming frustrated when he tried to use the colonial legal system to vindicate the rights of Indians in South Africa, Gandhi perfected the use of mass demonstrations, strikes, and boycotts to resist British rule. Realizing that disobeying the law was an extreme measure, Gandhi – a lawyer – always pled guilty and asked for the most severe penalty, spending significant time in jail. When great masses of people disobeyed the law at once, it overwhelmed the authorities and proved an effective tactic. Gandhi felt that taking the penalty for law-breaking showed respect for the law. Resistance should be always be nonviolent, he maintained, because no one has certain access to the “Truth.”

Though still almost unknown to legal scholars, the study of “people power” movements has blossomed in the sociological and political science literature, leading to the growth of an interdisciplinary sub-field referred to as civil resistance studies. The most influential study thus far -- Erica Chenoweth and Maria Stephan's *Why Civil Resistance Works* -- is a quantitative analysis comparing the effectiveness of nonviolent and violent movements that definitively shows that nonviolent resistance is indeed an effective resistance tool -- indeed, a *more* effective resistance tool than violence. Chenoweth and Stephan created a database comparing 323 violent and nonviolent campaigns occurring between 1900 and 2006 that had aims that the authors describe as “maximalist,” meaning that the campaign aimed to change a governmental regime, expel a foreign military occupation force, or secede and create a new state. They reached the startling conclusion that nonviolent campaigns achieve their objectives at over twice the rate of violent campaigns (53% of the time for nonviolent campaigns versus 26% for violent campaigns).

⁶² Erica Chenoweth and Maria J. Stephan, “How the World is Proving Martin Luther King Right about Nonviolence,” *Washingtonpost.com*, Monkey Cage (blog) (January 18, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/18/how-the-world-isproving-mlk-right-about-nonviolence/>.

This greater rate of success Chenoweth and Stephan attribute to the greater ability of nonviolent movements to attract a broad base of support. Because the barriers to participation are lower, nonviolent movements are typically much more inclusive than violent movements, drawing in more women, elderly people, and youth. Although the number of active participants may still be a relatively small proportion of the entire population, the proportion of the population that participates in nonviolent movements is generally much greater than in most violent movements.

From historical examples such as India's independence movement and South Africa's Anti-Apartheid movement to the Velvet Revolution in Czechoslovakia, Solidarity in Poland, the "Color Revolutions" in Eastern Europe, nonviolent protests have continued to multiply and now outpace violent rebellions by a large margin. Between 2010 and 2015, nonviolent protests occurred in more than 60 countries around the world and in every region.⁶³ In the decade between 2009 and 2019, Africa saw the highest number of nonviolent protests in the world aimed at overthrowing dictatorships, and since the 1970's, nonviolent uprisings in Africa have had the highest success rate in the world (58%).⁶⁴ Not only are nonviolent uprisings more likely to succeed than violent uprisings, they are almost three times *less likely* than violent uprisings to provoke mass killings in response.⁶⁵ Furthermore, transitions driven by nonviolent civil resistance movements are more likely to result in democracies than those driven by violent movements (74% versus 29%).⁶⁶

Chenoweth's 3.5% statistic, cited by climate movement leaders, is drawn from her quantitative research and refers to 3.5% of the total population participating in a peak event. That would mean in the U.S. context 11 million people demonstrating or striking on a single day.

Whether this number will translate to the climate movement remains to be seen. The types of movements that statistic is drawn from are arguably different from the climate movement, which is addressing a much more complex problem than typical nonviolent movements. While most nonviolent movements are national in scope and aimed at "regime change" within one country, climate change affects all sectors of societies and all countries across the globe. For instance, how can the international climate movement affect the climate elephant, China? Though individual Chinese have reached out to climate movement leaders, the reality is that China is unconcerned with climate change. Chinese leaders recently announced the opening of 148 gigawatts worth of coal-fired plants.⁶⁷ This matches the *entire capacity* of coal-plants in the European Union, so even if the EU completely phases out coal, as it has promised to do, this will be entirely offset by China.

⁶³ THOMAS CAROTHERS & RICHARD YOUNGS, *THE COMPLEXITIES OF GLOBAL PROTESTS* (2015).

⁶⁴ <https://www.foreignaffairs.com/articles/africa/2019-04-25/people-power-rising-africa>.

⁶⁵ EVAN PERKOSKI AND ERICA CHENOWETH, *NONVIOLENT RESISTANCE AND PREVENTION OF MASS KILLINGS DURING POPULAR UPRISINGS* (2018).

⁶⁶ JONATHAN PINCKNEY, *WHEN CIVIL RESISTANCE SUCCEEDS: BUILDING DEMOCRACY AFTER POPULAR NONVIOLENT UPRISINGS* (October 2018), <https://www.nonviolent-conflict.org/civil-resistance-building-democracy-popular-nonviolent-uprisings/>.

⁶⁷ Leslie Hook, *China Ramps up Coal Power in the Face of Emissions Efforts*, FT.com (November 30, 2019).

Nevertheless, the core principle behind nonviolent civil resistance also applies to climate change. Whether they always realize it or not, ordinary people retain the ultimate power in any political system and can exert that power by withdrawing consent from the everyday mechanisms of rule. Theorists of nonviolence note that even in the most centralized, authoritarian systems, power is multidimensional and includes at least six facets – legitimacy; human resources; material resources; coercive forces; technical skills and intelligence; and intangible cultural factors such as religion or ideology.⁶⁸ All of these facets are constituted by power’s human assets. The goal of nonviolent resistance is to persuade these human assets to withdraw their support from mechanisms of power and transfer that support to resisters.

Maintaining nonviolent discipline, even in the face of violent repression, is considered the most important, if most difficult, aspect of civil resistance, because it enables the people to keep the moral high ground. This is why repressive governments will so often use provocateurs to incite nonviolent resisters to violence. Studies of nonviolent movements through history have shown that use of force against nonviolent demonstrators often “back-fires” on the government, often leading to larger and more determined nonviolent demonstrations in the days after.

When nonviolent resistance movements are engaged in long struggles, they often develop alternative institutions – publishing houses, schools, even shadow governments.⁶⁹ This helps to build an alternative consciousness capable of envisioning a new way of ordering the world.

C. The Climate Movement as People Power

Climate strikers are using various tools from the nonviolent civil resistance toolkit to draw supporters away from the sources of repression. In the climate context, that means drawing support away from politicians who take money from fossil fuel industries and away from the executives and other high-level employees of fossil fuel companies. The Sunrise Movement created a “presidential scorecard” to rate candidates for president based on their support for the Green New Deal and action on climate change. At climate rallies, puppet images of fossil fuel executives can be seen, dripping with blood and bearing signs labelling them as “climate criminals.” Boycotts of modes of transportation that use too much fossil fuel so far have been an underused feature of the climate movement, although shaming people for flying (cf. “Flugscham” [flying shame]) has had some impact in Europe.

Youth activists are pressing their moral claims by identifying themselves with the Earth in crisis. Signs appearing at strikes: “Like the sea levels, we rise.” “Dinosaurs thought they had more time too.” “The ice is wearing thin, like our patience.”

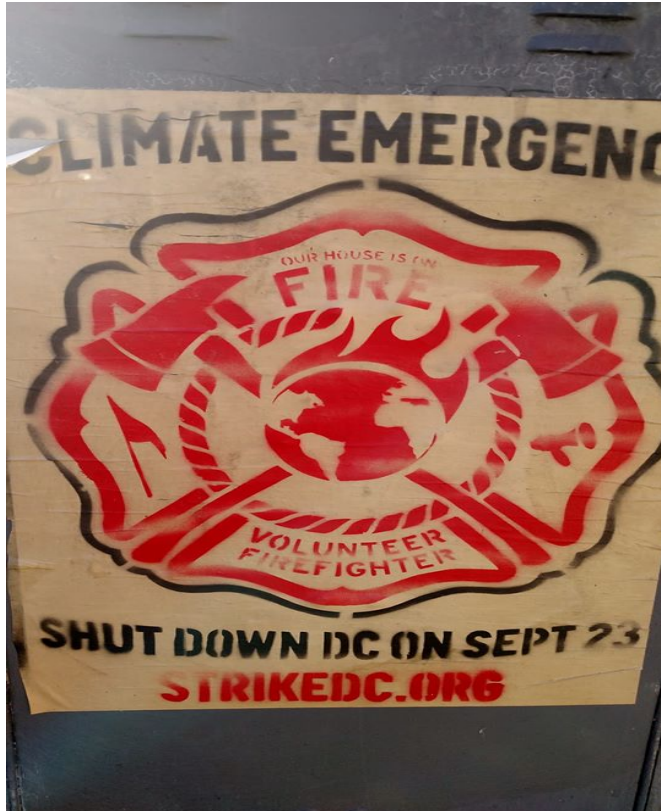
They are developing alternative institutions. Movement groups are organizing “teach-ins” to spread information about climate change and at the end of January the Sunrise Movement is organizing launch parties for the Green New Deal. Co-founder of the Affected Generation Clark lobbied Oregon public schools to include scientifically accurate education about the

⁶⁸ COL. ROBERT HELVEY, ON STRATEGIC NONVIOLENT CONFLICT: THINKING ABOUT THE FUNDAMENTALS 4-8 (2004)(summarizing GENE SHARP, THE POLITICS OF NONVIOLENT ACTION, VOL. I: POWER AND STRUGGLE 7-10 (1973)).

⁶⁹See HOWARD CLARK, CIVIL RESISTANCE IN KOSOVO (2000) for the classic study of alternative institution building.

climate crisis.⁷⁰ Climate strikers are questioning “growth” as a measure of economic good, with signs at climate rallies demanding, “Change the system, not the climate.”

The aspect of nonviolent civil resistance that gives it its revolutionary potential is that it is a declaration that existing laws are illegitimate in the eyes of the governed. Where law has lost its legitimacy, where it is perceived to be unfair or corrupt, the people who are subject to that law have the option of turning to civil disobedience, noncooperation, boycotts, stay-a-ways and so on. These should be understood as means of expressing a natural sense of justice, or natural rights.



The climate strikers feel justified, and arguably are justified, in their conclusion that the United Nations process has failed to curb global CO2 emissions. As Greta stated in her TEDx talk that went viral and helped to catapult her to fame: “Today we use 100 million barrels of oil every single day....There are no rules to keep that oil in the ground. So we can't save the world by playing by the rules. Because the rules have to be changed.”⁷¹

The school strikes for climate can be understood as age-appropriate acts of civil disobedience, since they entail the principled breaking of laws mandating that children attend school, even if the children cannot be jailed for striking. The Sunrise Movement, formed by young adults, has at times embraced direct action and joined coalitions engaged in technically illegal “shut-down” activities.

These actions are premised on a larger sense that the social contract legitimating current governments has collapsed. The letter in the *Guardian* announcing XR declared:

When a government willfully abrogates its responsibility to protect its citizens from harm and to secure the future for generations to come, it has failed in its most essential duty of stewardship. The “social contract” has been broken, and it is therefore not only our right, but our moral duty to bypass the government’s inaction and flagrant dereliction of duty, and to rebel to defend life itself.

In its principles, Zero Hour says, “As a movement, we believe...The people must take action rather than waiting for elected officials to lead....This is a revolution.”

⁷⁰ Though approved, the plan was not implemented correctly.

⁷¹ https://www.fridaysforfuture.org/greta-speeches#greta_speech_tedx

Part IV Substantive Due Process and Natural Law

This Part considers the doctrinal context for *Juliana*'s natural law claims and examines the problem of substantive due process, the legitimacy of which draws in the Ninth Amendment. For most of the history of the United States, the Ninth Amendment was almost never invoked in judicial decisions, as judges treated it as if it were entirely superfluous to constitutional text. Even today, the only Supreme Court case that even glancingly relies on the Ninth Amendment is *Griswold v. Connecticut* (1965), but only Justice Goldberg in his concurrence ventured to expound on the meaning of the Ninth. Even so, his analysis did not go beyond the usual tests of substantive due process/fundamental rights employed in the incorporation jurisprudence.⁷² After *Griswold*, invocations of the Ninth Amendment became more frequent but not more scrutable. Pressed by the Ninth Circuit to revisit her original decision, Judge Aiken dismissed the *Juliana* plaintiffs' "freestanding" Ninth Amendment claim as "not viable as a matter of law"⁷³ based on the Ninth Circuit's decision in *Strandberg v. City of Helena*,⁷⁴ thus keeping the analysis within the substantive due process framework. But substantive due process has been often criticized for natural law appurtenances, for "being a simplistic version of natural law theory, but without most of the historic elements of that discipline."⁷⁵ The doctrine of substantive due process remains intellectually incoherent, betraying the misgivings about recognizing rights beyond those with a firm textual foundation.

A. The Ninth Amendment: History and Controversies

Given that the U.S. Constitution is over 230 years old, it is extraordinary that the question of the Ninth Amendment's meaning remains unresolved. To recap the history very briefly, at the time the Constitution was originally sent to the states for ratification, it did not include a Bill of Rights. There ensued an important debate between the federalists and anti-federalists about whether to include a bill of rights specifically enumerating rights of the people that were protected from encroachment by federal power. The anti-federalists wanted such a bill of rights. And the federalists did not.

Federalist James Madison warned that a bill of rights might result in *fewer* rights for citizens because it could be interpreted as limiting rights only to those that were specifically enumerated. He came around to supporting a bill of rights only because it eventually contained

⁷² *Griswold v. Connecticut*, 381 U.S. 479, 493–94 (1965)(Justice Goldberg concurring)("The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' 'Liberty' also 'gains content from the emanations of ... specific (constitutional) guarantees' and 'from experience with the requirements of a free society'"(internal citations omitted).

⁷³ Opinion and Order federal defendants' Motion for Judgment on the Pleadings and federal defendants' Motion for Summary Judgment (October 15, 2018) at 56.

⁷⁴ 791 F.2d 744, 748 (9th Cir. 1986)(The Ninth Amendment "has never been recognized as independently securing any constitutional right, for purposes of pursuing a civil rights claim").

⁷⁵ Loren A. Smith, *The Morality of Regulation*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 507, 513 (1998); *Griswold v. Connecticut*, 381 U.S. 479, 515 (1965)(Justice Black dissenting)(criticizing the "same natural law due process philosophy found in *Lochner v. New York*).

the Ninth Amendment (which he initially wrote), providing that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

By referencing rights not enumerated in the Constitution but nonetheless “retained by the people,” the Ninth Amendment created a hole in the constitutional text and a conundrum for constitutional interpretation. It has been called a mystery,⁷⁶ a “joker,”⁷⁷ “a constitutional Cheshire Cat.”⁷⁸

Clearly, the Ninth indicates that there are rights outside those enumerated in the first ten amendments to the Constitution. But what those rights are and whether courts can enforce them remain, to this day, points of rancorous controversy. Scholars are divided as to how the Ninth Amendment should be interpreted among those who think enumeration makes no difference, those who think unenumerated rights are or should be enforceable, those who think enumeration matters but does not per se determine enforceability, and those who view the Ninth as a rule of construction.⁷⁹ Randy Barnett identified five schools of thought only aimed to elucidate what the Ninth Amendment was originally intended to reference: 1) the states rights law model (protecting entitlements guaranteed by laws of the states, including natural rights, but not turning these into federal constitutional law)⁸⁰; the “residual rights” model (construing the Ninth as a kind of “hold harmless” clause blocking an inference of implied powers based on the enumeration of rights (like the inference of a right to restrict the press based on the First Amendment));⁸¹ the individual natural rights model (the Ninth Amendment ensures that nonenumerated natural rights are recognized and protected to the same extent as enumerated rights);⁸² a collective (natural) rights model (in which the Ninth stands for the collective rights of “the people” [as understood elsewhere in the Constitution as a collective] to abolish or reform the government);⁸³ and, finally, a federalism model (viewing the Ninth “as a judicially enforceable rule of construction limiting the power of the federal government to interfere with the retained right of the people to local self-government”).⁸⁴

These debates have drawn in other debates about whether the Founders intended the Ninth Amendment to incorporate natural law into the Constitution and even whether the Founding generation believed in natural rights at all. Some constitutional scholars have made the

⁷⁶ ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 74-75 (1955).

⁷⁷ RAKOVE, *ORIGINAL MEANINGS* 289.

⁷⁸ Mitchell Gordon, *Getting to the Bottom of the Ninth: Continuity, Discontinuity, and the Rights Retained by the People*, 50 *IND. L. REV.* 421 (2017).

⁷⁹ *Id.* at 426.

⁸⁰ Russell L. Caplan, *The History and Meaning of the Ninth Amendment*, 69 *VA. L. REV.* 223 (1983).

⁸¹ Thomas McAfee, *The Original Meaning of the Ninth Amendment*, 90 *COLUM. L. REV.* 1215, 1215 (1990).

⁸² This is Barnett’s own view. “[N]atural rights precede the Constitution... the Ninth Amendment refers to these preexisting rights and requires that all natural rights be protected equally--not be “disparaged”--whether or not they are enumerated.” Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 *TEX. L. REV.* 1, 14 (2006).

⁸³ AKHIL REED AMAR, *THE BILL OF RIGHTS* 120 (1998) (“the most obvious and inalienable right underlying the Ninth Amendment is the collective right of We the People to alter or abolish government, through the distinctly American device of the constitutional convention”); Kurt Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 *TEX. L. REV.* 331, 345 (2004).

⁸⁴ LASH, *LOST ORIGINAL MEANING*, *supra* note ___, at 346.

argument that founders merely paid lip service to the idea of natural rights.⁸⁵ Other scholars disagree – and point to evidence that not only the founders but average people in the founding era were familiar with the ideas of natural rights⁸⁶

Since originalists are textualists, they don't like natural law – like they don't like substantive due process -- because it points toward the existence of rights beyond the enumerated rights. Often these are socially progressive rights like birth control, abortion, and same-sex marriage to which conservatives are opposed.⁸⁷

Robert Bork, the originalist's originalist, famously called the Ninth Amendment an “inkblot” during his failed confirmation hearings for the Supreme Court and construed it as either meaningless or as saying that “like powers, the enumeration of rights shall not be construed to deny or disparage rights retained by the people in their State Constitutions.”⁸⁸ During Bork's confirmation hearings, constitutional scholar Philip Kurland testified against Bork saying that the research and a colleague he had done for a five-volume documentary history called *The Founders' Constitution* established the Ninth Amendment as a declaration of unenumerated natural rights.⁷ Constitutional scholar (and Federalist Society contributor) Kurt T.

⁸⁵ Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L. J. 463, 487 (2007) (noting “the universal-sounding language in the Declaration of Independence and other texts must be understood in light of eighteenth-century views about the limited utility of natural rights rhetoric and the nature and purpose of sovereignty and republican government generally, and bills of rights specifically”); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 88-90(1986)(noting that natural rights claims during the founding era were “abstract,”; “nebulous,”; “void of any practical application”; “the shared platitudes of mankind, not standards for controlling governmental conduct that [could] be translated into legal rights.” JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 39 (1980)(asserting that the doctrine of natural law was “far from universally accepted”); Joseph Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 16 (1981)(describing as “disappointing” the efforts to prove that the founding generation “believed in natural law”). It is perplexing how originalists can assert with a straight face that early legal generations did not “believe” in natural law or rely on it in litigation. A search for “natural law” or “natural rights” or the “rights of man” turns up 286 cases before 1900 in federal courts where one of these terms was discussed either by the presiding judge in his opinion or a dissenting judge or one of the advocates (in the old style of presenting the opposing arguments more fully in the holding). A very random sampling includes Henfield's Case, 11 F. Cas. 1099, 1120 (C.C.D. Pa. 1793) (“Emigration is, undoubtedly, one of the natural rights of man”); Talbot v. Jansen, 3 U.S. 133, 142–43, 1 L. Ed. 540 (1795)(“Such laws would not be an infraction of the natural right of individuals; for, the natural rights of man are personal; he has no right to will for others”); Shaw v. Cooper, 32 U.S. 292, 302–03, 8 L. Ed. 689 (1833)(“So far, then, as the natural rights of men to this species of property (copyright), independently of statutory provisions, are in question, they retain all their rights to such property, notwithstanding the public have innocently gotten possession of it...”). The same search in state courts yields no less than 1,785 mentions.

⁸⁶ Terry Brennan, *Natural Rights and the Constitution: The Original “Original Intent,”* HARV. J.L. & PUB. POL'Y 965, 981 (stating most of the founding generation “thought that natural law was superior to positive law”).

⁸⁷ Natural law does have conservative iterations, so there are a few conservative scholars (in the tradition of Leo Strauss) like Harry Jaffa and Robert P. George who criticize originalists for embracing legal positivism and failing to see that natural rights are embedded in the Constitution. However, this natural law critique of originalism from the right does not typically come from within law schools. Erik Linstrum, *Political Scholar Jaffa defends moral foundation of government*, The Daily Princetonian (September 30, 2003), <https://web.archive.org/web/20090605200549/http://www.dailyprincetonian.com/2003/09/30/8663/> (last visited January 6, 2020).

⁸⁸ Quoted in Kurt T. Lash, *Inkblot: The Ninth Amendment As Textual Justification for Judicial Enforcement of the Right to Privacy*, 80 U. CHI. L. REV. DIALOGUE 219, 220–21 (2013)

Lash has since devoted himself to proving that Bork was correct and that Kurland left out key historical evidence that would have proved it.⁸⁹

The problem with Bork's approach – the rights reserved in state constitutions – is that that *isn't what the Ninth Amendment says*.⁹⁰ And since we have the Tenth Amendment (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”), we know that when the Founders wanted to say “states” they knew how to say it. And even if the Ninth refers back to state constitutions, at the time many state constitutions recognized natural rights in some form or another.⁹¹

The most natural reading of the Ninth Amendment is the one that Randy Barnett identifies through his reconstruction of constitutional debates – that it protects individual (and perhaps also collective) natural rights. During the debates over ratifying the Constitution, it was a widely recognized danger that enumerating certain rights and not others left open the possibility that *only* enumerated rights would be protected. Nor did it appear that the founding era had a clear and fixed notion of natural rights beyond those enumerated.⁹²

But Barnett avoids the question of substantively identifying the content of natural rights by postulating a “presumption of liberty” and then putting the “burden on the federal government whenever legislation restricts the exercise of liberty.”⁹³ This presumption is rebuttable with a showing “that a particular law was a necessary regulation of a rightful act or a prohibition of a wrongful act,” though Barnett's concedes there may be a “tricky” bit distinguishing “wrongful acts--which are not exercises of liberty but rather are acts of license--that can be prohibited, from rightful exercises of liberty that can only be regulated reasonably, not prohibited altogether.” But he goes on to say that “this difficulty should not be exaggerated because any liberty may properly be regulated, provided that such regulation can be justified as necessary.”⁹⁴ Much of Barnett's libertarian reading of the Ninth Amendment oddly relies on the language in Madison's “precursor” draft, which more clearly suggests that the Ninth should be construed as a limitation

⁸⁹ *The Lost History of the Ninth Amendment*.

⁹⁰ Cf. Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1 (2006)(interpreting the meaning of the Ninth Amendment from its function in constitutional debate at the time).

⁹¹ Massachusetts Constitution of 1780: “Article I. All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness”; The Bill of Rights to the Virginia Constitution of 1776: “SECTION 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. [note: the “state of society bit was added to mean that the text excluded slaves, women, and Native Americans].”

⁹² See the comments of James Iredell, Debates in the Convention of the State of North Carolina, on the Adoption of the Federal Constitution (July 29, 1788), in 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 1, 167 (Jonathan Elliot ed., 2d ed. 1907) (remarks of James Iredell)(“Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it”). Or those of James Wilson, *The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution* (Dec. 4, 1781), in 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 415, 454 (Jonathan Elliot ed., 2d ed. 1907).

⁹³ Barnett, at 15.

⁹⁴ Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 Tex. L. Rev. 1, 81, fn 65. (2006).

on enumerated powers.⁹⁵ However, this was not the language ultimately adopted.⁹⁶ Relying on the unadopted language ensconces more of a negative view of liberty than is absolutely necessary.

Whether or not the Ninth Amendment was meant to incorporate natural law into the Constitution, there has been no substantial Supreme Court jurisprudence developing constitutional norms explicitly invoking natural law. To the contrary, natural law has been invoked as an epithet, usually by dissenters to explain how the Majority went wrong. Substantive due process is the preferred doctrine courts have used to identify unenumerated rights and give them some legal force. But although a kind of consensus exists that some interests exist beyond those explicitly explicitly protected by the Constitution, little consensus exists about when and how to recognize these interests.⁹⁷

B. The Substantive Due Process Compromise Formation

Like the Ninth Amendment, the doctrine of substantive due process has been derided with colorful epithets: a “contradiction in terms -- sort of like ‘green pastel redness’”,⁹⁸ an “oxymoron,”⁹⁹ a “momentous sham” that “has been used countless times since by judges who want to write their personal beliefs into a document,”¹⁰⁰ among others. Despite its obviously procedural implications, the idea of due process came to be invoked against government action that was arbitrary or unreasonable and thus to have some substantive content. It has come to stand for rights that are not enumerated but can be linked to enumerated rights through what has been perjoratively described as judicial “alchemy.”

1. Origins of the Doctrine

Broadly speaking, substantive due process is the name retrospectively given to a jurisprudential practice of striking down legislative and executive acts because they were seen to conflict with the Constitution. In the Nineteenth Century, cases that are now sometimes considered antecedents of the modern substantive due process jurisprudence might better be

⁹⁵ “The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.”

⁹⁶ “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Gordon notes: “Unfortunately, these changes obscured not only the point of the proposed amendment, but the point of enumeration itself. The revised version preserved only the guidance that retained rights were not to be ‘diminished’ (changed to “den[ie]d” or disparage[d]”) by enumeration. The rest of Madison’s explanation was entirely removed. The revised version omitted the guidance that enumeration was not to enlarge delegated powers. It omitted the guidance that enumerated rights were actual limitations of delegated powers. It threw Madison’s ‘greater caution’ to the winds.” Mitchell Gordon, *Getting to the Bottom of the Ninth: Continuity, Discontinuity, and the Rights Retained by the People*, 50 IND. L. REV. 421, 430 (2017).

⁹⁷ David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL’Y 795, 838 (1996)(noting different Justices “have vastly different views, however, concerning sources and justifications for these protections”).

⁹⁸ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980).

⁹⁹ *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) (“If I thought that ‘substantive due process’ were a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch taxation.”).

¹⁰⁰ ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31 (1990).

called “police powers jurisprudence.” They were intended as a “structural restraint on government regulation” and were “premised on a set of interlocking ideas: that property was a natural, prepolitical right before any state or society; that government existed to safeguard such property; and that only limited governmental interference in the sphere of private life these property rights protected could ever be justified, and then only if pursued for the general good.”¹⁰¹

The most notorious phase of this early history – the so-called *Lochner* Era – struck down a wide variety of legislative acts intended to regulate working conditions and protect workers in favor of a *laissez-faire* economic worldview.¹⁰² These cases rested on a view of the liberty said to include:

the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.¹⁰³

The beginning of the end of the *Lochner* Era can be traced to the dissent of Justice Oliver Wendell Holmes in *Lochner*, though the official end did not come until 30 years later. Justice Holmes said, “I think that the word ‘liberty,’ in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”¹⁰⁴ Thus began a presumption that government regulation is rational and the beginnings of a limiting test that would result in only “fundamental principles” that are rooted in “tradition” being the only guardrail. In his dissent, Justice Holmes, considered by some the first positivist Justice, made no overtures to natural law or natural rights. Neither in his willingness to cede to legislation as “dominant opinion” nor in his reference to tradition did he make any mention to either.

Lochner v. New York was overturned in 1937 by *West Coast Hotel v. Parrish*, which suggested that liberty is not static and fixed in time by some originary hypothetical state of nature but that “in each of its phases” had a “history and connotation.”¹⁰⁵ Liberty could evolve.

The final nail in the coffin of the *Lochner* Era came in the next year in *United States v. Carolene Products*, which declared that “legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally

¹⁰¹ Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 Tex. L. Rev. 275, 282 (2014)

¹⁰² *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁰³ *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897). As Justice Souter has observed, *Allgeyer* “offered a substantive interpretation of ‘liberty’ that in the aftermath of the so-called *Lochner* Era has been scaled back in some respects but expanded in others and never repudiated in principle.”

¹⁰⁴ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Justice Holmes dissenting), overruled in part by *Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421 (1952), and overruled in part by *Ferguson v. Skrupa*, 372 U.S. 726 (1963), and abrogated by *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹⁰⁵ *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391, 57 S. Ct. 578, 581, 81 L. Ed. 703 (1937)

assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis.” *Carolene Products*’ famous Footnote 4 took Holmes’s positivism a step further by underscoring the presumption of legislative rationality unless such legislation “appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”¹⁰⁶ In this formulation, unenumerated rights would be subject only to a rational basis test, assuming they were considered at all. This is how substantive due process began to have “penumbras” and other ghostly qualities.

2. The Modern Doctrine of Substantive Due Process

With antecedents in *Meyer v. Nebraska*, 262 US 390 (1923) and *Pierce v. Society of Sisters* 268 U.S. 510), the modern era in substantive due process as protecting fundamental rights associated with privacy and autonomy began to take shape with *Griswold v. Connecticut*, a case that “discovered” a right to marital privacy justified by earlier cases suggesting that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”¹⁰⁷ Justice Goldberg wrote a famous concurrence in *Griswold* largely devoted to expounding the Ninth Amendment (which the Majority only glancingly alluded to). His concurrence stated squarely that the Ninth Amendment “simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.”¹⁰⁸ But in identifying a methodology by which unenumerated rights should be divined, Justice Goldberg did not stray outside of troubled substantive due process jurisprudence:

The Court stated many years ago that the Due Process Clause protects those liberties that are ‘so rooted in the traditions and conscience of our people as to be ranked as fundamental’¹⁰⁹....

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the “traditions and (collective) conscience of our people’ to determine whether a principle is ‘so rooted (there)...as to be ranked as fundamental.’ The inquiry is whether a right involved “is of such a character that it cannot be denied without violating those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’” “Liberty” also “gains content from the emanations of ... specific (constitutional) guarantees” and “from experience with the requirements of a free society.”¹¹⁰

¹⁰⁶ *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 (1938). Other cases possibly implicating more stringent review were those involving access to democratic political processes, or the differential treatment of “discrete and insular minorities.”

¹⁰⁷ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)

¹⁰⁸ *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965)

¹⁰⁹ *Griswold v. Connecticut*, 381 U.S. 479, 487 (1965)

¹¹⁰ *Griswold v. Connecticut*, 381 U.S. 479, 493–94(1965) (dissenting opinion of Mr. Justice Douglas).

The “new” substantive due process includes “the rights to marry; to have children; to direct the education and upbringing of one's children; to marital privacy; to use contraception; to bodily integrity; and to abortion, as well as “the traditional right to refuse unwanted lifesaving medical treatment” (internal citations omitted).¹¹¹ After *Obergefell v. Hodges*, it includes the right to same-sex marriage.

Until *Obergefell*, *Glucksberg v. Washington* was the leading case outlining the modern doctrine of substantive due process. The law at issue in *Glucksberg* criminalized “promoting a suicide attempt” when a person “knowingly causes or aids another person to attempt suicide.”¹¹² A lower court ruling overturning the law was appealed by the state of Washington. Respondants were physicians practicing in the state of Washington who occasionally treated “terminally ill, suffering patients,” three pseudonymous such gravely ill patients, and the nonprofit Compassion in Dying. In *Glucksberg*, the Court invalidated a Washington State right-to-die statute, articulating a two-part test for substantive due process. First, the right asserted must be “deeply rooted in this Nation’s history and tradition.” Second, courts must describe this asserted right in the most limited and “careful” way.

[Discussion TK of *Obergefell v. Hodges* and Justice Kennedy’s reasoning on the convergence of substantive due process and equal protection.]

The conservative Justices now believe that a tension exists between the holdings of *Glucksberg v. Washington* and *Obergefell v. Hodges*.

3. The Controversies About Substantive Due Process

The problems with the “traditional” substantive due process test have been stated in different ways. Hanging unenumerated rights on the thread of the due process clause leaves the doctrine open to the flat-footed but not wildly implausible criticism leveled by Justice Thomas that the “liberty” as used in the clause most likely refers to absence of physical constraint.¹¹³

Further, it seem patently circular. “It tests whether a given interest should be protected by asking whether it has been respected in the past.”¹¹⁴ [Discussion TK].

¹¹¹ *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

¹¹² Wash. Rev. Code Ann. § 9A.36.060 (West).

¹¹³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2632, 192 L. Ed. 2d 609 (2015)(Justice Thomas dissenting)(“As used in the Due Process Clauses, ‘liberty’ most likely refers to “the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law,” quoting 1 W. Blackstone, Commentaries on the Laws of England 130 (1769)”).

¹¹⁴ David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 861 (1996); see also Branson D. Dunlop, *Fundamental or Fundamentally Flawed? A Critique of the Supreme Court's Approach to the Substantive Due Process Doctrine Under the Fourteenth Amendment*, 39 U. DAYTON L. REV. 261, 274 (2014).

The tradition approach provides no clear guidelines as to *how* the past is to be taken into account, thus allowing subjectivity to enter through the back door. [Discussion TK].

The second prong of *Glucksberg* (that the right should be construed in the narrowest possible way) seems intended to forestall the criticism that the Court is engaging in judicial activism but it has had the unintended effect of analysis depending on what might be called semantic legerdemain. For instance, the Court in *Glucksberg* assessed the “right to assist someone in committing suicide,” while the respondents asserted a “right to die,” or a “right to control one’s final days.” Neither side asserted the most limited version of the right – “the right of a mentally-competent, terminally ill, and suffering patient to choose the time and means of her own death.”

The *Glucksberg* injunction (not followed) to construe the asserted right as narrowly as possible led respondents in *Obergefell* to argue that the petitioners were not seeking the “right to marry,” a deeply traditional right, but a new and previously-non-existent “right to same-sex marriage.”¹¹⁵ Justice Kennedy, writing for the majority, observed that previous cases involving marriage such as *Loving v. Virginia*, *Turner*, and *Zoblocki* did not describe the rights narrowly as the “right to interracial marriage,” or the “right of inmates to marry,” or the “right of fathers with unpaid child support to marry.”

[TK Discussion of problem with SDP analyses instead of relying on natural law. Harder to get at social and collective rights, or arbitrariness and oppressiveness, or corruption of political processes].

V. An Alternative Approach to Natural Law

Space does not permit me here to fully make the argument as to why it is correct to assume the Ninth Amendment was meant to incorporate natural law; but even assuming that it was, natural law is not a unitary tradition and appealing to it as traditionally done does not settle any fundamental questions about what are, or are not, fundamental rights.

A. The Problem with Natural Law

Natural law was once considered as objective as the eternal God. Though most often associated with the Roman Catholic church, natural law has roots that reach back to ancient Rome. In a classic definition, the Roman orator Cicero said that “[t]rue law is right reason in agreement with nature; it is of universal application, unchanging and everlasting.... there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times...” This law is superior to every positive law, because “[w]e cannot be freed from its obligations by senate or people.” The “author” of this law, said Cicero, “its promulgator, and its enforcing judge” is God. To apprehend it, “we need not look outside ourselves for an expounder or interpreter,” we find it in

¹¹⁵ 2682.

our minds and hearts, through the use of reason.” Natural law was later incorporated into Christian theology through the work of St. Thomas Aquinas, among others.¹¹⁶ The individual was seen as entitled to rights because of an inherent faculty of reason, an ability to make moral and other choices out of free will. While God had endowed all things with natural properties, only man had this faculty of reason.

But it was the Stoics that inspired the Enlightenment philosophers to locate in nature a state of ordinary equality, leading them to secularize natural law and thus revivify it. Legal education in the eighteenth century “included a large dose of ‘natural’ law,” the sources of which were Hugo Grotius, Samuel Pufendorf, among others, both of whom were influenced by the Stoics.¹¹⁷

As legal positivism began to gain the upper hand in the later Nineteenth Century, it came to be thought that believers in natural law “were in fact spinning the web of a system out of their own brains as if they were legislators of the world,” in Martii Kostkienenmi’s striking image. Similarly, Judge Bork remarked, “The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else.”¹¹⁸ The scientific revolution led to a loss of faith in reason as an objective standard and definitely a collapse of the idea that reason is a window into the mind of God. Natural law is now considered little more than subjective judicial preferences. And “judicial activism” – otherwise known as “policy-making” -- is regarded as a threat to democratic processes.

But even when natural law was considered the objective expression of God’s meaning, it had different iterations. Natural law as an intellectual tradition is fractured and can be invoked, legitimately, to justify contradictory – conservative and liberal – propositions (and some in between). One iteration ratifies hierarchical human relationships (“natural slavery,” the oppression of women)¹¹⁹ and can be traced back to Aristotle,¹²⁰ who posited that some human beings “are from birth marked out by nature as slaves.”¹²¹ Another iteration, traced back to the Stoics¹²² in whom the sixteenth and seventeenth centuries saw a resurgence of interest, espoused the idea that there exists a general “humanity” that is characterized by equality among human

¹¹⁶ Cf. Lauterpacht (1950), at 84 (“[St. Thomas Aquinas] was reproducing the central idea of the Stoics, the idea of a law superior to the external authority of the State”).

¹¹⁷ ROBERT M. COVER, *JUSTICE ACCUSED*, *supra* note __, at 10; *see also* Eds. Hans W. Bloom & Lauren C. Winkel, *Introduction*, in *GROTIUS AND THE STOA* 7 (2002) (stressing the “important presence of Stoic themes and issues” in the Grotian corpus, including natural law).

¹¹⁸ DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 174 (Cambridge UP: 2005).

¹¹⁹ *See, e.g.*, Charles H. McIlwain, *THE GROWTH OF POLITICAL THOUGHT IN THE WEST: FROM THE GREEKS TO THE END OF THE MIDDLE AGES* 114-15 (1932) (“the idea of the equality of men is the profoundest contribution of the Stoics to political thought”). The word “humanity” itself derives from the Latin “*humanitas*” which has been taken by some scholars as a rough equivalent of human rights. Richard A. Bauman, *HUMAN RIGHTS IN ANCIENT ROME* n.p. (2000).

¹²⁰ John R. Kroger, *The Philosophical Foundations of Roman Law: Aristotle, the Stoics, and Roman Theories of Natural Law*, *WIS. L. REV.* 905, 919-920 (2004) (discussing how according to Aristotle, nature establishes hierarchies: men are superior to animals and women, and masters are superior to slaves).

¹²¹ Nicholas D. Smith, *Aristotle's Theory of Natural Slavery*, 37.2 *PHOENIX* 109, 110 (1983).

¹²² John R. Kroger, *The Philosophical Foundations of Roman Law: Aristotle, the Stoics, and Roman Theories of Natural Law*, 2004, *WISC. L. REV.* 905, 931 (2004) (noting the Stoics stressed “the natural commonality and equality of all men, and in some texts, women”).

beings.¹²³ During the time of the Atlantic revolutions and afterwards, the two traditions of natural law were both contending for persuasive authority. In *Justice Accused: Antislavery and the Judicial Process*, Robert Cover showed that in hundreds of cases in the 75-year period between roughly 1783 and 1858, juridical discourse on slavery articulated itself through the language of natural law, framed either *for* or *against* the proposition, “slavery is contrary to natural law.”¹²⁴

And yet something like natural law is needed to describe the actual historical processes of constitution making and interpreting, in which claims are asserted, not just as moral rights but as legal rights that have yet to be realized. Before constitutional rights were positive law, they were imagined natural rights that motivated the founding generation to throw off British rule. A constitution was created but it did not recognize slaves, women, and unpropertied men as constitutional subjects with equal rights. But these rights were claimed before – sometimes long before – they were recognized in constitutional text. When the Declaration was first written, “All men are created equal” really meant all *white, propertied men*; but this nominal universalism was radically untethered and could be turned against itself and applied to new contexts and situations.¹²⁵ The nominal universalism of the phrase—the reading of “men” as referring to “human beings” enabled blacks and women to appropriate rights language and turn it to their purposes.

Nonviolent resistance is another way to conceptualize natural law that recognizes these historical developments and does not completely cede rights recognition to judicial subjectivity.

B. People Power as Natural Law

Since the long-ago time when Antigone defied the edicts of Creon, King of Thebes, in order to bury her brother in accord with proper rituals, disobedience of positive law in the name of a higher justice has been recognized as a justifiable transgression. As Cover noted, “Antigone’s star has shown brightly through the millennia.”¹²⁶ The justice Antigone pursued was not the law of the land, but its content was clear and so were the actions that she took based upon it—covering her brother’s body with earth and reciting burial rites—actions for which she was condemned to death. She was engaged in nonviolent resistance.

Nonviolent resistance can thus help us conceptualize natural law in a new way that dissociates it from a theological, or any eternal, foundation, and thus makes it more concrete and usable as a source of law. Cover’s work is helpful in developing an alternative approach to conceiving natural law as nonviolent resistance, in that he theorized law as not just created by

¹²³ Other traditions fell somewhere in between; the Roman Justinian declared slavery contrary to the law of nature, while recognizing its legality from *ius gentium*.

¹²⁴ JUSTICE ACCUSED at 8.

¹²⁵ Neither immediate nor straight-forward, this process does not usually acknowledge normative change upfront. Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1961 (2006) (“Normative judgments about group members, which are necessary to make sense of both the stated facts and the legal reasoning, remain unmentioned. Only later, if group-related norms become more settled, do courts acknowledge the normative judgments about group members that were implicit in their earlier decisions”).

¹²⁶ JUSTICE ACCUSED at 1.

courts but socially created by people: “No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.” Instead of reflecting an absolute, eternal truth, we can envision natural law as a relative term reflecting a new world in the process of being imagined and created through the active work of individuals collectively resisting and changing existing legal and political realities.

But whereas Cover’s idea of *jurisgenesis* was unbounded, available to all social groups, the doctrine of substantive due process requires some constraints that would limit constitutionally relevant *jurisgenesis* to practice that is consistent with the Constitution as a whole and to the principles of the country.

We can see this practice of *jurisgenesis* in the history of social movements employing the elements of nonviolent resistance. Moral ideals in the United States became positive legal rights through different phases of *jurisgenesis*. During the Nineteenth Century, they were propelled by activism of regular people demanding rights. Natural rights were important points of reference for disenfranchised groups excluded from textual protections of the Constitution. They were invoked in the rippling discursive circles by which originally excluded groups – African-Americans, abolitionists, radicals, Quakers, workers, socialists, and suffragettes – asserted their legal subjectivity, their right to have rights, thereby expanding the categories of what could be considered rights and who could be considered as having them.

The rights of man gave rise, almost immediately, to the rights of women. After Thomas Paine published *The Rights of Man* in 1791, Mary Wollstonecraft followed up with *A Vindication of the Rights of Women* in 1792. In France, Olympe de Gouges in 1791 modeled her Declaration of the Rights of Woman and the Female Citizen on the French Declaration of the Rights of Man and the Citizen – and for her pains was put to death during the Terror.¹²⁷

The “first wave” of feminism in the nineteenth century further extended the logic of natural rights expressed in the Declaration.¹²⁸ In the United States, the Declaration of Sentiments and Resolutions adopted at the Seneca Falls Conference in 1848 was modeled on the Declaration of Independence and in fact rewrites it, phrase by phrase, locution by locution, to express the rights women were asserting and the grievances giving rise to them.

Abolitionists also asserted natural rights, with an intention to realize them in law. “Abolitionism was a social movement that had as its goal a change in society,” legal scholar Jenny Martinez observes, “But the change abolitionists sought was also fundamentally a change in law: slavery and slave-trading were legal, and the abolitionists wanted them to be illegal.” In the first issue of *The Liberator*, William Garrison declared:

¹²⁷ Olympe de Gouges, *Déclaration des Droits de la Femme et de la Citoyenne*.

¹²⁸ Female abolitionists like the Grimke sisters had to fight for the right to speak in public against slavery and as a consequence became aware of their own oppression. As Abby Kelly observed, “in striving to strike [the male slave's] irons off, we found most surely that *we* were manacled *ourselves*.” MARLENE LEGATES, *IN THEIR TIME: A HISTORY OF FEMINISM IN WESTERN SOCIETY 184* (2001). Said activist Lucy Stone, “I expect to plead not for the slave only, but for suffering humanity everywhere. Especially do I mean to labor for the elevation of my sex.” <http://sourcebooks.fordham.edu/mod/senecafalls.asp>

Assenting to the "self-evident truth" maintained in the American Declaration of Independence, "that all men are created equal, and endowed by their Creator with certain inalienable rights -- among which are life, liberty and the pursuit of happiness," I shall strenuously contend for the immediate enfranchisement of our slave population.¹²⁹

Similarly, Frederick Douglass, in his great "Fourth of July" speech, delivered in 1852, asked, "What have I, or those I represent, to do with your national independence? Are the great principles of political freedom and of natural justice, embodied in that Declaration of Independence extended to us?"¹³⁰ If there were any doubt as to the answer, Douglass ends his Fourth of July oration by quoting from a poem by William Lloyd Garrison, which includes the lines: "God speed the year of jubilee.../That year will come, and freedom's reign,/To man his plundered rights again/Restore."

In turn, abolition inspired the labor movement. Although the labor movement in different countries had many strands and mutations, a common and recurring theme was the "degradation" of the worker under the yoke of industrial "wage slavery."¹³¹

It is true that some of these social movements ended up in amendments to the constitution, changing its textual meaning. But "through most of our history, the amendment process has not been an important means of constitutional change,"¹³² especially recently. As William N. Eskridge Jr. has shown, "big changes" in twentieth-century constitutional law rarely occurred because of the formal amendment process and or because "scholars or judges 'discovered' new information about the Constitution's original meaning."¹³³ For example, in the wake of the defeated effort to pass the Equal Rights Amendment to the Constitution the Supreme Court began to interpret the Fourteenth Amendment as prohibiting discrimination "on the basis of sex."¹³⁴ The social movement to amend the Constitution failed to amend the Constitution but it succeeded in changing the meaning of the Constitution as judges began to interpret the Fourteenth Amendment to prohibit sex discrimination. The logic of how social movements relate to constitutional change throughout history provides constitutionally-relevant interpretive guidance.

[TK discussion of how these examples reinforce Justice Kennedy's claim of how equal protection and substantive due process can come together].

¹²⁹ "To the Public," THE LIBERATOR (Jan. 1, 1831), <https://www.pbs.org/wgbh/aia/part4/4h2928t.html>.

¹³⁰ Oration, Delivered in Corinthian Hall, Rochester (July 5th, 1852)(Lee, Mann, & Co.: 1852).

¹³¹ James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997)(noting the early twentieth century labor movement's alternative vision of the Constitution "was embedded in narratives of slavery, emancipation, and freedom").

¹³² David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458 (2001).

¹³³ William N. Eskridge, Jr, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 (2002)

¹³⁴ Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era 2005-06 Brennan Center Symposium Lecture*, 94 CAL. L. REV. 1323 (2006)

[TK Why nonviolent resistance movements solve some of the problems with SDP. They obviate some of the “silliness” in David Crump’s phrase that can attach to newly-asserted rights, such as the right to jog topless on a Florida street.]

Nonviolent civil resistance movements are especially strong indicators of deeply held beliefs that the current legal and political systems are deeply flawed and represent miscarriages of justice. Broad-based movements – and individual events making up such movements – are more quantifiable and “objectifiable” than hunt-and-peck approaches to history, though when well-done as in *Obergefell* they can be extremely effective. Nonviolent activists put their human vulnerability on the line, manifesting a conviction that they are possessed of the natural right they are asserting – that it is theirs, inherently and inalienably. As Zero Hour’s Amicus brief stated on behalf of 32,340 children and young people, “Our rights are inherent and inalienable. The Declaration of Independence, the Bill of Rights, and the 14th Amendment recognize our rights, but did not create them.”¹³⁵

Perhaps in light of the extreme youth of today’s climate protesters, lawyers are developing “justification” defenses, but some defenders of nonviolent resistance have welcomed punishment and indeed sought to have high numbers of participants flood the prisons.

If history is any indication, the social energy now catalyzed on behalf of rights to a stable climate has the potential to alter upcoming legal outcomes, especially given the moral authority the youth movement is wielding and the noncontroversial social norm of protecting children from harm.¹³⁶

Lochner itself is a prime example. When the Court overturned *Lochner* in 1937 with *West Coast Hotel v. Parrish*, the number of labor strikes was the highest for any year in the country’s history up to that point. As well, the number of “man-days of idleness” was more than for any year since 1927, when such statistics were first available.¹³⁷

But the analysis into the history and legal traditions of the United States that is a component of the substantive due process analysis, even under *Obergefell*, does not thereby become irrelevant. It is possible – though not likely if history is any indication – that a nonviolent could emerge in support of intolerant or anti-democratic values – white supremacy for example. The values that nonviolent movements stand for will have to come into play as well. The nonviolent aspect of nonviolent movements means that they are less likely to assert rights that violate the rights of others. [Discussion TK]

Conclusion

In its long-awaited opinion in the *Juliana* case, the Ninth Circuit reversed Judge Aiken’s landmark decision, not on the merits but on the question of whether Article III courts could give

¹³⁵ Brief of Amicus Curiae Zero Hour on Behalf of Approximately 32,340 Children and Young People in Support of Plaintiffs-Appellees.

¹³⁶ This does not mean that the youth activists are immune from harsh emotional attacks and even threats of physical injury.

¹³⁷ U.S. Department of Labor, Bureau of Labor Statistics, Monthly Labor Review, Serial No. R 789 (May 1938). The number individual men who participated in strikes was highest in 1919 however.

plaintiffs the relief they sought. The opinion turned on standing, not on the asserted rights which, except for equal protection, were assumed for the purpose of the motion to dismiss. Despite ruling against the young people, the Court made numerous damning factual findings – “this unprecedented rise [in CO2] stems from fossil fuel contribution and will wreak havoc on the Earth’s climate if unchecked”¹³⁸ – before “reluctantly” holding that “plaintiffs’ case must be made to the political branches at large.¹³⁹ This case is going to be appealed, whether to the Ninth Circuit *en banc* or Supreme Court remains to be seen. The misstep in the panel’s opinion is arguably the admission that action on their part “could well goad the political branches into action” and the dumb-founding willingness to concede that the “dissolution of the Republic” may be at stake.”

Against the pessimistic views of litigation held by the critical legal theory bystanders, the Ninth Circuit decision is likely to galvanize a youth movement already convinced that existing legal and political institutions are so bankrupt as to justify broad disobedience. This does not mean that youth and youth organizations are entirely boycotting the political processes, but it is to acknowledge their clear-eyed recognition that there is not unlimited time left for “normal” political process to play out. If plaintiffs are able to craft a remedy that courts will feel more comfortable administering, it may well be that in future phases of the litigation young people are found to be a suspect class for the purposes of climate litigation.

As James Madison wrote to Thomas Jefferson: “The [governmental] improvements made by the dead form a debt against the living, who take the benefit of them. This debt cannot be otherwise discharged than by a proportionate obedience to the will of the Authors of the improvements...*And all that seems indispensable in stating the account between the dead and the living, is to see that the debts against the latter do not exceed the advances made by the former* (italics added).³⁸

With climate change, courts must confront an issue where the dead – or soon to be dead -- are imposing an insuperable debt against the living, as well as imperiling the Nation as a whole.

¹³⁸ The court also held: “The record leaves little basis for denying that climate change is occurring at an increasingly rapid pace...the record also conclusively establishes that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions...The record also establishes that the government’s contribution to climate change is not simply the result of inaction. The government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects and leases for fuel extraction on federal land (14-16).

¹³⁹ Opinion at 32.