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## Constitutional Protection for Future Generations from Climate Change

*Ylan Nguyen\**

No challenge poses a greater threat to our future and future generations than a change in climate.

– President Barack Obama<sup>1</sup>

[O]ur inability to think seriously about future generations is linked to our inability to broaden the scope of our present interests and to give consideration to those who remain excluded from development.

– Pope Francis<sup>2</sup>

### Introduction

Whether you chose to believe it or not, climate change is an unavoidable problem that the United States can no longer ignore. President Obama has strongly emphasized that we should not “condemn our children to a planet beyond repair.”<sup>3</sup> While people are slowly starting to recognize that climate

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\* J.D. Candidate 2017, University of California, Hastings College of the Law. B.A. 2014, Syracuse University. A special thank you to Professor David Takacs who has provided me with invaluable academic and professional guidance. I also thank all the wonderful editors of the *Hastings Constitutional Law Quarterly* for their help finalizing this Note. Lastly, I would like to thank my loving parents, Son and Thanh, whose endless love, support, and encouragement motivates me everyday.

1. Barack Obama, President of the United States, State of the Union Address, 113th Cong., 2nd Sess. (Jan. 20, 2014).

2. Pope Francis, *Encyclical Letter of the Holy Father on Care for Our Common Home*, [http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco\\_20150524\\_enciclica-laudato-si\\_en.pdf](http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf) (last visited Jan. 31, 2016).

3. Serena Marshall, *President Obama: Don't Condemn Our Children to a Planet Beyond Repair*, ABC NEWS (Sept. 1, 2015, 1:06 AM), <http://abcnews.go.com/Politics/president-obama-condemn-children-planet-repair/story?id=33445514>; Ben Geman, *Obama: 'No Challenge Poses a Greater Threat to Future Generations Than Climate Change'*, THE ATLANTIC (Jan. 20, 2015) <http://www.theatlantic.com/politics/archive/2015/01/obama-no-challenge-poses-a-greater-threat-to-future-generations-than-climate-change/446841/>. After presenting his climate change efforts in his State of the Union Address, President Obama warned, “I will not let this Congress endanger the health of our children by

change is an intergenerational issue,<sup>4</sup> the federal government has failed—and continues to fail—in its efforts to protect future generations from climate change. Furthermore, “environmental protection is insufficient if it does not include the consideration of all life, present and future.”<sup>5</sup> Frustrated with the lack of response from the federal government, Our Children’s Trust filed a federal suit on behalf of twenty-one children across the nation on August 12, 2015.<sup>6</sup> Our Children’s Trust, a nonprofit organization whose purpose is to protect earth’s natural systems for current and future generations, claims that the federal government has violated their constitutional rights by failing in its efforts to curb greenhouse gas (“GHG”) emissions and address climate change concerns.<sup>7</sup> While this ambitious suit has been labeled as controversial and far-fetched, courts will be confronted with questions regarding the constitutional rights of future generations and the government’s role and duty in protecting future generations from climate change with increasing frequency. In fact, last June 2015, a judge in Washington State ordered Washington’s Department of Ecology to reconsider a youth-proposed rulemaking petition for reducing carbon emissions.<sup>8</sup> On April 8, 2016, Magistrate Judge Thomas Coffin of the federal district court in Eugene, Oregon ruled in favor of the twenty young plaintiffs represented by Our Children’s Trust—rejecting the government and fossil fuel industry’s motions

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turning back the clock on our efforts.”

4. Edith Brown Weiss, *In Fairness to Future Generations and Sustainable Development*, 8 AM. U. INT’L L. REV. 19 (1993); see generally Oliver P. Hauser et al., *Cooperating with the Future*, 511 NATURE 223 (July 10, 2014), [http://www.nature.com/articles/nature13530.epdf?referrer\\_access\\_token=e9ZpoyiuNGCKNAR5FrPXW9RgN0jAjWel9jnR3ZoTv0P0C2bBw75eBwYYCyKxtzrGt7ENMwSudPerhGiOr\\_r-E\\_5fhhZrFam7glPV95C-Rf2CEWB0MKMSIENKAGqfY5LF2\\_IW96RXP55ZOnCQ2H1FCD\\_BdQX6jwZvY1ZK20H9XD5dj7fVA66RclqjNZUROfd\\_Zf7Y1INGBdhjOhc7WdBcJw1ZtL0KLxLBTrZmdXM8FLPAAzBs2ksBRs\\_F7Q7abcGba&tracking\\_referrer=thinkprogress.org](http://www.nature.com/articles/nature13530.epdf?referrer_access_token=e9ZpoyiuNGCKNAR5FrPXW9RgN0jAjWel9jnR3ZoTv0P0C2bBw75eBwYYCyKxtzrGt7ENMwSudPerhGiOr_r-E_5fhhZrFam7glPV95C-Rf2CEWB0MKMSIENKAGqfY5LF2_IW96RXP55ZOnCQ2H1FCD_BdQX6jwZvY1ZK20H9XD5dj7fVA66RclqjNZUROfd_Zf7Y1INGBdhjOhc7WdBcJw1ZtL0KLxLBTrZmdXM8FLPAAzBs2ksBRs_F7Q7abcGba&tracking_referrer=thinkprogress.org). *Cooperating With the Future*—a study from Harvard and Yale researchers—looks at how people weigh decisions that are dependent on the continued help of future generations, such as climate change. Results from the study suggest that a substantial majority of people is willing to bear the costs to benefit future generations.

5. LAURA WESTRA, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF UNBORN AND FUTURE GENERATIONS: LAW ENVIRONMENTAL HARM AND THE RIGHT TO HEALTH, 3 (Taylor & Francis 2006).

6. Complaint, *Juliana ex. Rel Loznak v. United States* (D. Or. 2015) (No. 6:15-cv-01517-TC) 2015 WL 4747094.

7. *Id.*

8. WESTERN ENVTL. LAW CENTER, *Washington Youth Win Unprecedented Decision in Their Climate Change Lawsuit* (June 24, 2015), <http://www.westernlaw.org/article/washington-state-youth-win-unprecedented-decision-their-climate-change-lawsuit-press-release>; Rona Fried, *Teenagers Win on Climate Change in Washington State Court*, SUSTAINABLE BUS. (Nov. 23, 2015), <http://www.sustainablebusiness.com/teenagers-win-on-climate-change-in-washington-state-court-53069/>. Judge Hill noted that Washington’s Ecology Department had a “mandatory duty” to regulate emissions to “preserve, protect, and enhance air quality for current and future generations, and found that Washington’s current goals failed dramatically in that respect.

to dismiss.<sup>9</sup> Most recently, on November 10, 2016, District Judge Ann Aiken of the federal district court in Eugene, Oregon affirmed Judge Coffin's decision and issued an opinion and order denying the government and fossil fuel industry's motion to dismiss.<sup>10</sup>

This Note posits that future generations, born and unborn, are entitled to constitutional protection from climate change. Accordingly, this Note seeks to establish that the right to a healthy environment is a fundamental right under the Due Process Clause of the Fifth Amendment, thus, invoking the Equal Protection Clause of the Fourteenth Amendment requiring the federal government to protect future generations and combat the effects of climate change. One cannot address climate change without recognizing the responsibility owed to future generations, as future generations will inevitably be affected by climate change.<sup>11</sup> To ensure the survival of future generations, present generations must be proactive in securing constitutional rights for them. Failing to do so could result in the deprivation of many basic rights, such as access to clean air, water, shelter, or food for future generations.<sup>12</sup>

This Note consists of five sections aimed at showing that future generations are entitled constitutional protection from climate change and seeks to establish that the federal government has a duty to protect future generations by combating the effects of climate change. Section I argues that present generations owe a moral duty to future generations to combat the effects of climate change, thereby creating a constitutional duty owed to future generations. Section II explores atmospheric trust litigation and the Public Trust Doctrine and establishes the two theories as the most viable option for future generations to hold the federal government responsible. Section III considers standing for future generations (for children currently alive and for unborn children via future parents). Section IV discusses what constitutional rights future generations have with respect to climate change by (1) establishing that the right to a healthy environment is a fundamental right under the Due Process Clause of the Fifth Amendment and, thus, (2) warranting protection under the Equal Protection Clause of the Fourteenth Amendment. Section V discusses the possible remedies future generations can pursue against the federal government.

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9. Order Denying Motions to Dismiss, *Juliana ex. Rel Loznak v. United States*, (D. Or. 2015) (No. 6:15-cv-01517-TC) 2015 WL 4747094.

10. *Id.*

11. Robert Heeger, *Climate Change and Responsibility to Future Generations: Reflections on the Normative Questions*, 1 *DE ETHICA* 9 (2014), [http://www.de-ethica.com/archive/articles/v1/i1/a03/de\\_ethica\\_14v1i1a03.pdf](http://www.de-ethica.com/archive/articles/v1/i1/a03/de_ethica_14v1i1a03.pdf).

12. Complaint, *Juliana ex. Rel Loznak v. United States* (D. Or. 2015) (No. 6:15-cv-01517-TC) 2015 WL 4747094.

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## I. Duty to Protect Future Generations

To fully understand why future generations are entitled to constitutional protection from climate change, one must first establish that current generations have a duty to protect future generations. Traditionally, the protection and health of future generations has been the responsibility of parents, family, or the community.<sup>13</sup> However, future generations are exposed to many environmental hazards that fall beyond parental and familial control.<sup>14</sup>

Present generations often aim to “leave something” for their children, most often in the form of money or property.<sup>15</sup> However, no amount of money or property will suffice if future generations are in danger of an unstable climate that would rob them of vital resources, such as fresh air and clean drinking water, which would make catastrophes caused by climate change inescapable.<sup>16</sup> According to scientific data obtained by experts at the National Resources Defense Council, more than 150,000 Americans may die by the end of this century due to rising temperatures from climate change.<sup>17</sup> Ensuring the survival of future generations requires the recognition and acceptance that we owe a duty to future generations.

Many argue that current generations owe no duties to future generations either because (1) we cannot ascertain the preferences or predict the conditions for future generations; or (2) because future generations do not yet exist and, therefore, we are not statutorily or morally bound to protect them.<sup>18</sup> Critics have argued that science cannot accurately predict the future, noting that those living in the 1900s could not have predicted or provided for the problems that we now face.<sup>19</sup> Admittedly, there is some truth in these criticisms. Future generations cannot vote and there are many current critical issues facing the federal government that must be addressed presently.<sup>20</sup>

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13. Westra, *supra* note 5, at 22.

14. *Id.*

15. Gertrude Schaffner Goldberg & Sheila D. Collins, *Leaving Something to Future Generations: A Climate Change Challenge*, THE HUFFINGTON POST (May. 15, 2015, 5:09 PM), [http://www.huffingtonpost.com/gertrude-schaffner-goldberg/leaving-something-to-futu\\_b\\_5333221.html](http://www.huffingtonpost.com/gertrude-schaffner-goldberg/leaving-something-to-futu_b_5333221.html).

16. *Id.*

17. Peter Altman, *Killer Summer Heat: Projected Death Toll from Rising Temperatures in America Due to Climate Change*, NAT. RESOURCES DEF. COUNCIL (May 2012), <http://www.nrdc.org/globalwarming/killer-heat/files/killer-summer-heat-report.pdf>; Goldberg & Collins, *supra* note 15.

18. Bradford C. Mank, *Protecting the Environment for Future Generations: A Proposal for a Republican “Superagency,”* 5 N.Y.U. ENVTL. L.J. 444, 448–49 (1996).

19. Christopher D. Stone, *Beyond Rio: “Insuring” Against Global Warming*, AM. J. INT’L L. 445, 447–48 (1992).

20. Kathleen Dean Moore, *Pope Francis Is Right: We Can’t Make Future Generations Solve Climate Change*, YES! MAGAZINE (Sept. 25, 2015), <http://www.yesmagazine.org/peace-justice/pope-francis-is-right-we-cant-make-future-generations-solve-climate-change->

However, we have made vast scientific advances.<sup>21</sup> These criticisms also fail to recognize that our actions inevitably affect the composition of future generations. Our selfishness in failing to consider future generations could be and already is a detriment to an already vulnerable population. Moreover, our choices regarding the environment will determine and shape the values our future generations will hold.<sup>22</sup> Given the weight of the consequences, current generations have a duty to make future generations better, not worse.<sup>23</sup> Even the Environmental Protection Agency (“EPA”) under the Obama Administration has noted that the government has a moral obligation to leave a healthy planet for future generations.<sup>24</sup>

Admittedly, it is easier to recognize our moral responsibilities on some theoretical level, but when it comes to making *actual* changes and taking action, few are willing to pay the price to do so.<sup>25</sup> Given that Congress and the Executive Branch are focused on today’s voters, neither is well suited to protect future generations from climate change.<sup>26</sup> Our current environmental statutes— that are inadequate to address the impact of climate change on future generations—evidence this obstacle.<sup>27</sup> Although current regulatory schemes advance environmental protection in many ways, such as setting emissions standards or requiring environmental impact statements, these regulations fail to adequately account for future generations and the long-term damage of climate change.<sup>28</sup> Many environmental statutes are completely devoid of the impacts of pollution and climate change to future generations.

Concern and recognition of a duty to future generations is not a novel concept. In 1933, President Franklin Delano Roosevelt created the Civilian Conservation Corps (“CCC”) and the Natural Resources Conservation Service programs, believing that natural resources were “the rightful heritage of all.”<sup>29</sup>

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21. Mank, *supra* note 19, at 449.

22. *Id.* at 449.

23. *Id.*

24. Tony Dokoupil, ‘Future Generations’ Sue Obama Administration Over Climate Change, MSNBC (Aug. 12, 2015, 12:54 PM), <http://www.msnbc.com/msnbc/future-generations-sue-obama-administration-over-climate-change>.

25. Laura Maguire, *The Moral Costs of Climate Change*, PHILOSOPHY TALK (Nov. 21, 2014, 12:00 AM), <http://philosophytalk.org/community/blog/laura-maguire/2015/04/moral-costs-climate-change>.

26. Mank, *supra* note 18, at 446.

27. *Id.* at 445–46 (citing CASS R. SUNSTEIN, *AFTER THE RIGHTS OF REVOLUTION: RECONCEIVING THE REGULATORY STATE* 104 (Harv. Univ. Press 1990) (noting that statutes aimed at protecting future generations are often inadequately implemented)).

28. Clean Air Act, 42 U.S.C. § 7401 (2012); The International Human Rights Clinic at Harvard Law School, *An Environmental Right for Future Generations: Model State Constitutional Provisions and Model Statute* (Nov. 2008), [http://www.sehn.org/pdf/Model\\_Provisions\\_Mod1E7275.pdf](http://www.sehn.org/pdf/Model_Provisions_Mod1E7275.pdf).

29. Goldberg & Collins, *supra* note 15; David B. Woolner, *FDR and the New Deal*

Upon encountering the Grand Canyon for the first time, President Roosevelt declared, “[k]eep it for your children and your children’s children who come after you . . . .”<sup>30</sup> In fact, national parks are still protected and enjoyed by many today. Although, President Roosevelt probably did not envision climate change as an issue facing future generations, one can assume that he meant to protect natural resources for future generations. By creating the CCC, President Roosevelt not only tackled unemployment but also slowed down the depletion of lumber.<sup>31</sup> The CCC created jobs for those unemployed as a result of the Great Depression and also restored the nation’s forests, helping with soil conservation, flood control, and wildlife conservation.<sup>32</sup> President Roosevelt’s programs marked one of the first efforts in conservation and set precedent for sustainable and long-term development with future generations in mind.<sup>33</sup>

Taking into consideration the shortcomings of environmental statutes and our nation’s history in protecting natural resources for future generations, this Note adopts the view advanced by Edith Brown Weiss and champions a rights-based approach in protecting future generations. Weiss posits the idea of intergenerational equity as she draws a connection between present actions and future generations, conveying a notion of rights and responsibilities owed by present generations to future generations.<sup>34</sup>

The theory of intergenerational equity states that we must hold the natural environment as a trust for future generations and are thus responsible for the robustness and integrity of the planet, not only for our benefit but also for the benefit of future generations.<sup>35</sup> Intergenerational equity holds that all generations have an equal place in relation to the natural system such that every generation should use the system to improve the human condition.<sup>36</sup> Thus, we must ensure that future generations do not inherit an environment that is worse than the one we received from our predecessors. While it may be true that we cannot fulfill this obligation completely, as the world continues to change, we must recognize that we have a duty and the power to minimize the harms.<sup>37</sup> Recognizing that current generations owe a moral duty to future generations is the first step in recognizing that future generations are entitled to constitutional protection from climate change. Given that

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*Response to an Environmental Catastrophe*, ROOSEVELT FORWARD (June 3, 2010), <http://rooseveltinstitute.org/fdr-and-new-deal-response-environmental-catastrophe/>.

30. Goldberg & Collins, *supra* note 15.

31. *Id.*

32. *Id.*

33. Woolner, *supra* note 29.

34. Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT’L L. 198, 206 (1990).

35. Weiss, *supra* note 4, at 20.

36. *Id.* at 21.

37. Burns H. Weston, *Climate Change and Intergenerational Justice: Foundational Reflections*, 9 VT. J. ENVTL. L. 375, 376–77 (2008).

current generations have a moral duty in protecting future generations, we must now act proactively to combat climate change. It is through this moral duty that a constitutional duty arises to protect future generations under the Fifth and Fourteenth Amendment of the Constitution.

## II. Atmospheric Trust Litigation

### a. What Is Atmospheric Trust Litigation?

Climate change demands broad and creative legal solutions.<sup>38</sup> Atmospheric trust litigation (“ATL”) invokes the Public Trust Doctrine and holds federal and state governments accountable for climate change.<sup>39</sup> ATL presents the planet’s atmosphere as a single public trust.<sup>40</sup> Characterizing all states as co-trustees, ATL binds all states together with a duty to protect the environment and natural resources as a trust for its citizens.<sup>41</sup>

The Public Trust Doctrine had early roots in American jurisprudence with *Illinois Central Railroad v. Illinois*, where the Supreme Court set forth the Public Trust Doctrine as foundational law in 1892.<sup>42</sup> In *Illinois Central*, the Court opined that the State of Illinois could not convey the entire Chicago shoreline to a private railroad company, rather the state had to hold the land in trust for the public because its citizens used the land for fishing, navigation, and commerce.<sup>43</sup> Mary Christina Wood, a law professor and advisor to Our Children’s Trust, notes that the Public Trust Doctrine embraces inherent and unalienable rights of citizens in the Constitution, thereby warranting constitutional protection.<sup>44</sup> Concerted federal effort is imperative as climate change threatens human survival.<sup>45</sup> Wood firmly believes that if the *Illinois Central* holding is to mean anything, then the Supreme Court justices should have no hesitation in holding the government accountable in protecting citizens against climate change.<sup>46</sup>

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38. Mary Christina Wood, *Atmospheric Trust Litigation*, in CLIMATE CHANGE: A READER, 3 (W.H. Rodgers, Jr. et al. eds., 2009), <https://law.uoregon.edu/images/uploads/entries/atmo.pdf>.

39. Mary Christina Wood, *The Planet on the Docket: Atmospheric Trust Litigation to Protect Earth’s Climate System and Habitability*, 9 FLA. A & M U. L. REV. 259, 260 (2014).

40. *Id.* at 270.

41. *Id.* at 270–71.

42. *Id.* at 260.

43. *Id.*; *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 457 (1892).

44. Wood, *supra* note 39, at 266.

45. *Id.* at 264.

46. *Id.* at 260.



## 1. What Is the Public Trust Doctrine?

The Public Trust Doctrine traces back to ancient Roman law, as the Romans recognized that certain types of property were communal property for the benefit of the public.<sup>47</sup> The Public Trust Doctrine suggests that the government must act as a trustee and hold certain resources, such as water and/or property in trust for its citizens.<sup>48</sup> As stated above, the Supreme Court gave formal recognition to the Public Trust Doctrine in *Illinois Central*, concluding that Illinois' conveyance of land to the Illinois Central Railroad was invalid as it violated the state's public trust in preserving lands for the public.<sup>49</sup> Numerous state constitutions, statutes, and judicial decisions have since adopted the Public Trust Doctrine rationale put forth in *Illinois Central*.<sup>50</sup>

In the modern context, the Court applies an expansive view of the Public Trust Doctrine. In *Phillips Petroleum Co. v. Mississippi*, the Court held that states have broad authority to define the scope of their Public Trust Doctrine.<sup>51</sup> In other cases involving the Public Trust Doctrine, courts have implicitly and explicitly recognized states' interests in protecting natural resources for future generations.<sup>52</sup>

## 2. The Public Trust Doctrine as Applied to Climate Change and Future Generations

The Public Trust Doctrine has great potential to protect future generations from climate change. Various states' constitutions—such as Hawaii, Illinois, and Pennsylvania—explicitly declare that the states have a duty to preserve the environment for future generations, while other states—such as Connecticut, New York, Washington, and West Virginia—have statutes that mention the states' duty to preserve natural resources for future generations.<sup>53</sup> Furthermore, California has invoked the Public Trust Doctrine to protect future generations.<sup>54</sup> The California Supreme Court noted in *National Audubon Society v. Superior Court* that the Los Angeles Department of Water had a duty to consider the impacts of water diversions on future generations.<sup>55</sup>

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47. Bradford C. Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1 (2009).

48. David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. ENVTL. L. J. 711, 713 (2008).

49. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. at 410–11.

50. Mank, *supra* note 47, at 86.

51. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988).

52. Mank, *supra* note 47, at 89.

53. *Id.* at 90.

54. *Id.*

55. *See Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419 (1983); Takacs, *supra*

Although the Court recognizes the Public Trust Doctrine, various states have applied it differently. The Public Trust Doctrine should be invoked under the unenumerated powers of the Ninth Amendment, thereby requiring the federal government to recognize the climate system as protected as a public trust.

### 3. Why Atmospheric Trust Litigation Is a Viable Option for Future Generations

ATL has been criticized as having flaws that undercut its viability in addressing the climate crisis.<sup>56</sup> Caroline Cress opines in her comment, *It's Time to Let Go*, that ATL is an ineffective solution in addressing climate change.<sup>57</sup> Cress first argues that the Public Trust Doctrine is built on inconsistent historical precedent and applied inconsistently, with great variation among the states.<sup>58</sup> Second, Cress contends that expansion of ATL would expand police power to an unaccountable judiciary.<sup>59</sup> Finally, Cress maintains that ATL would face a variety of political obstacles, making it infeasible.<sup>60</sup>

Despite the criticism, utilizing courts through ATL to protect future generations is not only feasible, but has already begun.<sup>61</sup> Last June 2015, Judge Hollis Hill ordered Washington State to reconsider eight youths' petition for rulemaking.<sup>62</sup> The youths petitioned Washington's Department of Ecology to create a rule addressing GHG emissions in light of the most current climate change science, arguing the state had a duty to protect the youth and future generation's constitutional rights to essential public trust resources.<sup>63</sup> Rejecting the petition, Washington's Department of Ecology reasoned they wanted to delay taking action until the international climate conference in Paris in December.<sup>64</sup> However, Judge Hill rejected Washington Department of Ecology's argument, relying on an expert declaration from NASA climate

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note 48 at 749.

56. Caroline Cress, *It's Time to Let Go: Why the Atmospheric Trust Won't Help the World Breathe Easier*, 92 N.C. L. REV. 236, 240 (2014).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. Julia Olson, *Judges Can Save Us From Climate Change, and They've Already Started*, DAILY KOS, (July 6, 2015, 1:48 PM), <http://www.dailykos.com/story/2015/07/06/1399668/-Judges-Can-Save-Us-From-Climate-Change-And-They-ve-Already-Started>.

62. Order Remanding Denial of Petition for Rulemaking, *Foster v. Wash. Dep't of Ecology*, (2015) (No. 14-2-25295-1 SEA), [http://ourchildrenstrust.org/sites/default/files/Order\\_Fosterv.Ecology.pdf](http://ourchildrenstrust.org/sites/default/files/Order_Fosterv.Ecology.pdf); Olson, *supra* note 61.

63. *Id.* Olson, *supra* note 61.

64. Olson, *supra* note 61.

scientist, Dr. Pushker Kharecha.<sup>65</sup> Dr. Kharecha noted that atmospheric carbon dioxide (“CO<sub>2</sub>”) concentrations had exceeded the level estimated to be safe (350 ppm) in 1988.<sup>66</sup> He cautioned that if no action is taken to return the atmospheric concentration of CO<sub>2</sub> to 350 ppm within the next 100 years, then the Earth’s climate system will be pushed past a point of no return, leading to disastrous and irreversible impacts on today’s youth and future generations.<sup>67</sup> Indeed, the youths were successful in Washington, as the court recognized that the state must not only consider what emission reductions are required to achieve climate stability but also make the reductions a reality.<sup>68</sup> More recently, in April 2015, in a historic decision, Judge Coffin decided in favor of the twenty-one plaintiffs represented by Our Children’s Trust, rejecting the government and fossil fuel industry’s motion to dismiss.<sup>69</sup> Judge Coffin characterized Our Children’s Trust’s lawsuit as an “unprecedented lawsuit”<sup>70</sup> addressing “government action and inaction,”<sup>71</sup> believing that the plaintiffs’ case was justiciable by “asserting the harms that befall or will befall them personally,”<sup>72</sup> thus “necessitat[ing] the need for the courts to evaluate the constitutional parameters of the action or inaction taken by the government.”<sup>73</sup> Accordingly, “when combined with the EPA’s duty to protect the public health from airborne pollutants and the government’s public trust duties deeply ingrained in this county’s history, the allegations in the compliant state—for the purposes of a motion to dismiss—a substantive due process claim.<sup>74</sup> These encouraging decisions bring a sense of optimism and show that courts are open and willing to consider ATL as a legitimate solution to address climate change.<sup>75</sup>

Furthermore, much statutory law is deficient in protecting future generations from climate change.<sup>76</sup> Current statutes are narrow in their focus and largely procedural, as the statutes exclusively focus on regulating power

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65. *Id.*

66. Declaration of Pushker Kharecha, Ph.D., in Support of Brief for Petitioner ¶¶ 4, 9, *Foster v. Wash. Dep’t of Ecology*, (2015) (No. 14-2-25295-1 SEA), <http://ourchildrenstrust.org/sites/default/files/WA.KharechaDeclaration.pdf>.

67. *Id.*

68. Olson, *supra* note 61.

69. *Id.*; Order Denying Motions to Dismiss, *Juliana ex. Rel Loznak v. United States*, (D. Or. 2015) (No. 6:15-cv-01517-TC) 2015 WL 4747094. Most recently, in reviewing Judge Coffin’s opinion and order, Judge Aiken affirmed the decision.

70. Order Denying Motions to Dismiss at 1, *Juliana ex. Rel Loznak v. United States*, (D. Or. 2015) (No. 6:15-cv-01517-TC) 2015 WL 4747094.

71. *Id.*

72. *Id.* at 8.

73. *Id.*

74. *Id.* at 23.

75. WESTERN ENVTL. LAW CENTER, *supra* note 8.

76. Wood, *supra* note 39, at 270.

plants or carbon emissions from vehicles.<sup>77</sup> The present statutory law is not geared toward achieving overall lower carbon emission and is narrow in orientation.<sup>78</sup> The climate crisis is beyond what many of these narrow statutes can handle, making ATL an ever-more viable solution because ATL is a comprehensive strategy characterizing the atmosphere as a single trust that must be protected.<sup>79</sup> ATL calls for courts to intervene because only courts can enforce a wide-encompassing response with the urgency necessary to combat against climate change.<sup>80</sup> ATL is an attainable solution, which can be utilized towards gaining constitutional protection from climate change for future generations.

### III. Standing for Future Generations

#### a. Standing for Children Currently Alive

Standing is the threshold question that enables federal courts to hear a case.<sup>81</sup> The “case or controversy” requirement under Article III of the Constitution requires the plaintiff(s) to show he or she has suffered an “injury in fact.”<sup>82</sup> For the Court to have jurisdiction, the plaintiff(s) must show: (1) they have suffered an injury; (2) there is a causal relationship between the injury suffered and the defendant’s conduct; and (3) the injury is redressable by the Court.<sup>83</sup> It is well established that only one plaintiff needs to have standing to permit the Court to consider the petition.<sup>84</sup> However, it is “substantially more difficult” for a plaintiff to establish standing when the injury arises from the government’s unlawful action, as he or she cannot raise a generally available grievance about the government when the plaintiff claims harm to him or herself and every citizen’s interest in the proper application of the Constitution and laws.<sup>85</sup> Thus, the injury cannot be a generalized interest of all citizens. Rather, a plaintiff must show that he or she was injured in a “personal and individual way” and that the relief he or she seeks will “directly and tangibly” benefit him or her, which is distinct from

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77. *Id.*

78. Wood, *supra* note 38.

79. *Id.*; Wood, *supra* note 39, at 270.

80. Wood, *supra* note 39, at 272.

81. CLIMATE CHANGE LIABILITY 196 (Michael Faure & Marjan Peeters eds., 2011).

82. U.S. CONST., art. III, § 2.

83. Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (But Unrecognized) Separation of Powers Problem*, 162 U. PA. L. REV. 1373, 1375 (2014); *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992).

84. *Lujan*, 504 U.S. at 562.

85. *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Lujan*, 504 U.S. at 562, 574.

benefitting the “public at large.”<sup>86</sup> While Our Children’s Trust bypasses the issue of standing in its complaint, establishing standing is crucial for the youth to assert their constitutional rights against the federal government. If the youth are not found to have standing, then their case will be dismissed and the courts will not reach the merits of their arguments.<sup>87</sup>

Unfortunately, proving standing in environmental cases is no easy feat, as standing has been a major challenge for climate change plaintiffs.<sup>88</sup> The decision of *Native Village of Kivalina v. ExxonMobil Corp.* comes to mind, where a district court dismissed the Kivalina people’s claim, after they could not satisfy the elements under Article III standing.<sup>89</sup> While the court recognized that the Kivalina people clearly suffered a concrete and imminent injury, as the village was—and continues to be—slowly sinking, flooding, and eroding away, the court found the Kivalina people could not establish with reasonable certainty that ExxonMobil’s operations harmed the waterway leading to their injuries.<sup>90</sup> The court noted that ExxonMobil’s violations of the discharge permits were insufficient to establish causation because the injuries were not “fairly traceable” to ExxonMobil’s actions, reasoning that there could have been many sources leading to the Kivalina people’s injuries.<sup>91</sup> Thus, establishing a casual connection will likely require a showing that GHG emissions are “fairly traceable” to the government’s inaction, which has led to injury to a plaintiff.<sup>92</sup> Furthermore, since climate change is a global issue, courts could very well reason that no one has a particularized injury because everyone is injured.<sup>93</sup>

However, the Supreme Court found climate change claims justiciable in *Massachusetts v. EPA*, noting that the EPA’s refusal to regulate GHG emissions presented a risk of harm to Massachusetts that was “actual and imminent.”<sup>94</sup> In 1999, Petitioners filed a rulemaking petition with the EPA asking it to

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86. *Lujan*, 504 U.S. at 573–74.

87. CLIMATE CHANGE LIABILITY, *supra* note 81, at 196.

88. *Id.* at 197.

89. *See* *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863 (N.D. Cal. 2009).

90. CLIMATE CHANGE LIABILITY, *supra* note 81, at 197; *Native Vill. of Kivalina*, 663 F. Supp. 2d at 878.

91. *Native Vill. of Kivalina*, 663 F. Supp. 2d at 879, 881 (The court ultimately determined that there could have been a “multitude of alternative culprits” responsible for the erosion of Kivalina.).

92. Nikita Perumal & Jessica Wentz, *Lawsuit Alleges that U.S. Government Violated Constitutional Rights of America’s Youth by Promoting the Development and Use of Fossil Fuels*, CLIMATE LAW BLOG: SABIN CENTER FOR CLIMATE CHANGE LAW (Aug. 25, 2015), <http://blogs.law.columbia.edu/climatechange/2015/08/25/lawsuit-alleges-that-u-s-government-violated-constitutional-rights-of-americas-youth-by-promoting-the-development-and-use-of-fossil-fuels/comment-page-1/>.

93. *Climate Change in the Courts: Jurisdiction and Common Law Litigation* 5, <http://law.lclark.edu/live/files/13427-chapter-17--climate-in-the-courtspdf>.

94. *See* *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007).

regulate GHG emissions from new motor vehicles, believing the regulation was within EPA's realm of authority.<sup>95</sup> The EPA rejected the Petitioners' rulemaking petition in 2003, concluding it lacked statutory authority to regulate GHGs and was not within the meaning of air pollutant as defined in the Clean Air Act ("CAA").<sup>96</sup> The D.C. Circuit sided with the EPA, holding the Petitioners failed to establish an injury necessary under Article III, noting that global warming was "harmful to humanity at large," and Petitioners could not allege "particularized injuries" to themselves.<sup>97</sup> But, Judge Tatel of the D.C. Circuit dissented, suggesting that the Petitioners had satisfied all three elements of standing: injury, causation, and redressability.<sup>98</sup> Judge Tatel believed that the substantial probability that projected sea level rises would lead to serious losses of coastal property was more than sufficient for an injury under Article III, as Petitioners' affidavits more than adequately supported the conclusion that EPA's failure to curb GHG emissions led to sea level rises that threatened Massachusetts' coasts.<sup>99</sup> For redressability, Judge Tatel noted that one of EPA's former climatologists stated that regulation of GHGs from motor vehicles would delay the adverse impacts of climate change.<sup>100</sup>

Agreeing with Judge Tatel, the Court noted that while the Petitioners allege only "hints" of environmental damage to come, scientific experts have reached a consensus, recognizing that climate change would result in sea levels rising, causing irreversible damage.<sup>101</sup> The Court noted that while climate change risks are "widely shared," that did not minimize Massachusetts' risk, as the severity of the injury would only increase over time.<sup>102</sup> While the EPA did not dispute the causal connection between GHGs and climate change, it contended that the GHG emissions from motor vehicles are insignificant.<sup>103</sup> Rejecting the EPA's argument, the Court noted that the transportation section emits an enormous quantity of GHGs—just considering the transportation section alone would still place the United States as the third largest emitter of CO<sub>2</sub> in the world.<sup>104</sup> Furthermore, requiring the EPA to regulate GHGs would slow the pace of climate change.<sup>105</sup>

Future generations who are currently alive satisfy the standing requirements under *Lujan v. Defenders of Wildlife*. The harms associated with

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95. *Id.* at 510.

96. *Id.* at 511–12.

97. *Id.* at 514–15.

98. *Id.* at 515.

99. *Id.*

100. *Massachusetts v. EPA*, 549 U.S. at 515

101. *Id.* at 521.

102. *Id.* at 522.

103. *Id.* at 524.

104. *Id.* at 525.

105. *Id.* at 527.

climate change are serious and well documented.<sup>106</sup> As a result of climate change, there have a number of environmental changes that have led to significant harms, such as retreating glaciers, rising sea levels, and rising ocean temperatures.<sup>107</sup> As the Court noted in *Massachusetts v. EPA*, the fact that these climate risks are widely shared does not minimize the injury suffered by the youth. The Court was firm in *Massachusetts v. EPA*, noting that the EPA's failure in regulating GHG emissions from motor vehicles contributed to climate change.<sup>108</sup> As advanced by Mary Catherine Wood, current environmental statutes are inadequate in protecting future generations from climate change.<sup>109</sup> The statutes continue to allow entities to pollute through various programs, such as the permitting system, all while failing to take future generations into account.<sup>110</sup> Thus, it is through the federal government's failure to take future generations into consideration and its inadequacy in addressing climate change that establishes a causal connection to the youths' injuries.

Lastly, the youths' plight would be redressable by a favorable court decision, as in *Larson v. Valente*.<sup>111</sup> The youth need not show that a favorable decision will relieve every injury. This would be impossible in the case of climate change, where the youth have already suffered irreversible damage and consequences as a result of our actions.<sup>112</sup> Regardless of what is happening around the world, a domestic reduction would still slow the pace and have an impact on global GHG emission increases.<sup>113</sup> As such, potential remedies will be explored in Section V of this Note.

Accordingly, the youth plaintiffs satisfy the elements required for standing under Article III in the Our Children's Trust suit. With over twenty young plaintiffs, each youth has suffered some particularized injury. Among some examples are Oregon's record setting heat and low water levels killing salmon in Oregon's rivers, which some youth depend on as a food source and for fresh drinking water.<sup>114</sup> Other plaintiffs have suffered from asthma due to increased forest fires—a result of the increasing summer temperatures.<sup>115</sup> As a result of the Department of Energy's approval of the export of liquefied natural gas from the Jordan Cove Liquefied Natural Gas Terminal in Oregon, the export terminal will be the largest source of CO<sub>2</sub> emissions, thereby

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106. *Climate Change in the Courts*, *supra* note 93, at 10.

107. *Id.*

108. EPA, 549 U.S. at 525.

109. Wood, *supra* note 39, at 270.

110. *Id.*

111. *Larson v. Valente*, 456 U.S. 228 (1982).

112. *Id.* at 243–44 n.15.

113. *Climate Change in the Courts*, *supra* note 93, at 12.

114. Complaint at 14–15, *Juliana ex. Rel Loznak v. United States* (D. Or. 2015) (No. 6:15-cv-01517-TC) 2015 WL 4747094.

115. *Id.* at 16.

establishing a direct causal relationship between the federal government's actions and the injuries suffered.<sup>116</sup> The federal government has known about the risks associated with climate change, yet continues to allow GHG emissions by implementing permitting systems that enabled the continued exploitation and production of fossil fuels leading instead of phasing them out.<sup>117</sup> The youth's claims would be redressable by the Court. The Court could require the federal government to issue a nationwide plan requiring adequate reduction of GHG emissions, all while taking future generations into consideration.

### **b. Standing for Unborn Children Via Future Parents**

Although climate change is likely to have a greater effect on future generations who are not yet alive, the political system is inadequate in protecting unborn future generations.<sup>118</sup> Because the unborn cannot vote, elected officials only focus on the short-term interests of current voters.<sup>119</sup> Because federal judges are appointed, rather than elected, they are better suited to protect unborn future generations.<sup>120</sup>

However, establishing standing for unborn future generations is difficult, as they will have trouble satisfying the three requirements of standing under *Lujan v. Defenders of Wildlife*.<sup>121</sup> As previously mentioned, to establish standing, plaintiffs must first have suffered an "injury in fact."<sup>122</sup> A plaintiff's allegations cannot rest on general assertions, but rather must set forth specific facts that requires more than a cognizable interest.<sup>123</sup> The injury must also be "actual and imminent."<sup>124</sup> Second, there must be a causal connection between the injury and the conduct of which the plaintiff complains.<sup>125</sup> Lastly, it must be likely that the injury will be "redressed by a favorable decision."<sup>126</sup>

While unborn future generations will inevitably suffer from the effects of climate change and our choices, the Court was clear in *Lujan* that the injury must be "actual and imminent."<sup>127</sup> Thus, it could be argued that while harm from climate change is actual and imminent, future generations who are unborn currently suffer no injuries because they are not currently alive. The

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116. *Id.* at 6.

117. *Id.* at 7.

118. Mank, *supra* note 47, at 2.

119. *Id.* at 3.

120. *Id.* at 4.

121. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992).

122. *Id.* at 560.

123. *Id.* at 561–63.

124. *Id.* at 564.

125. *Id.* at 560.

126. *Id.*

127. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 564 (1992).



injuries the unborn will suffer involve a high degree of speculation compared to other concrete injuries.<sup>128</sup> Because the Court requires a plaintiff to have suffered an injury that is causally related to the defendant's conduct that is redressable by a favorable court decision, it would be very difficult for unborn future generations to satisfy the three elements of standing.

Furthermore, the Supreme Court was firm in *Roe v. Wade* that the unborn are not "persons" entitled to constitutional protection.<sup>129</sup> Advocating that unborn future generations have standing and are entitled to constitutional rights would have astronomical consequences. Not only would it turn decisions like *Roe v. Wade* on its head, but would also invalidate any pro-choice laws, robbing women of the right to choose, while giving unborn future generations constitutional protection.

This Note seeks to avoid those consequences and, instead, seeks to establish standing for unborn future generations via future parents who are planning to have children, thus serving as representatives and conduits for future generations.<sup>130</sup> The Court rejected standing based on the legal interests of third parties in *Sierra Club v. Morton*—noting that the Sierra Club could not be a representative of the public, the environment, or future generations without proof that its members would be injured by the government's actions.<sup>131</sup> Unlike *Sierra Club v. Morton*, future parents are not merely third parties seeking protection for future generations. Although climate change risks are "widely shared," that does not minimize the injury suffered.

Future parents who are planning to have children are injured in two ways: (1) they may be deterred from having children for fear of an unstable climate—thereby threatening the survival of future generations; and (2) pregnant women may also suffer injuries from climate change, such as asthma due to poor air quality or lack of food security. The injuries can be traced back to the federal government's failure to adequately regulate GHG emissions, as many statutes still allow for GHG emissions under permitting systems, causing climate change. Lastly, the injuries suffered would be redressable by the courts, as the courts could issue an injunction, which thereby requires the federal government to create an adequate national plan to regulate GHG emissions. This would not only help future parents, but also help secure a more stable climate for future generations. Seeking to avoid the implications of giving unborn future generations standing, this Note proposes that future generations have standing via future parents, as future parents satisfy all the requisite elements for Article III standing.

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128. John Edward Davidson, *Tomorrow's Standing Today: How the Equitable Jurisdiction Clause of Article III, Section 2 Confers Standing Upon Future Generations*, 28 COLUM. J. ENVTL. L. 185, 212 (2003).

129. *Roe v. Wade*, 410 U.S. 113, 157 (1973).

130. Davidson, *supra* note 128, at 195.

131. See *Sierra Club v. Morton*, 405 U.S. 727, 734–740 (1972).

#### IV. Constitutional Rights of Future Generations

The Constitution's preamble describes a broad intergenerational goal to "secure the blessings of liberty to ourselves and our Posterity . . . ." <sup>132</sup> However, this goal is not specifically enforceable, as nowhere does the Constitution explicitly grant a right to environmental protection. <sup>133</sup> There are many rights not contemplated by the Founding Fathers, yet the Court has determined that many of these rights fall under the constitutional protection of the Fifth Amendment, such as abortion, the right to marry, the right to use contraceptives, among many others. As John Edward Davidson contends, careful historical and legal research has led some to conclude that intergenerational justice can still be derived from the Constitution. <sup>134</sup> While the Due Process Clause of the Fifth Amendment has been construed to consider intergenerational rights and obligations, the Equal Protection Clause of the Fourteenth Amendment can be read to protect future generations from discrimination just as it protects other disenfranchised groups. <sup>135</sup> Thus, the Due Process Clause and the Equal Protection Clause are the doctrinal underpinnings necessary to secure the right to a healthy environment. <sup>136</sup>

##### a. A Healthy Environment as a Fundamental Right Under the Due Process Clause of the Fifth Amendment

The Due Process Clause of the Fifth Amendment guarantees all citizens the right to life, liberty, and property. <sup>137</sup> The Court in *Washington v. Glucksberg* created a two-step test to determine whether a right is fundamental under the Due Process Clause. <sup>138</sup> First, the Court considered whether the right is rooted in out the nation's "[h]istory and tradition." <sup>139</sup> Second, the Court required that the asserted fundamental liberty interest to be narrowly tailored with precise language. <sup>140</sup>

The right to a secure climate system is critical to future generations' fundamental rights of life, liberty, and property. <sup>141</sup> From the early Supreme

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132. U.S. CONST. pmb.

133. CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE, 557 (Richard Lord QC et al., eds., Cambridge Univ. Press 2011).

134. Davidson, *supra* note 128 at 192.

135. *Id.* at 192–93.

136. Bruce Ledewitz, *Establishing a Federal Constitutional Right to a Healthy Environment in Us and in Our Posterity*, 68 MISS. L.J. 565 (1998).

137. U.S. CONST. amend. V.

138. U.S. CONST. amend. XIV.

139. *Washington v. Glucksberg*, 521 U.S. 702, 744 (1997).

140. *Id.* at 721–23.

141 Complaint at 89, *Juliana ex. Rel Loznak v. United States* (D. Or. 2015)

Court decision of *Illinois Central*, to the EPA promulgating various rules to slow the effects of climate change, to *Massachusetts v. EPA*, protecting the environment from the effects of climate change for future generations is embedded in our nation's history and tradition. Our nation's history and tradition continues as President Obama noted—in his 2014 State of the Union address—that current generations owe a duty to future generations.<sup>142</sup> If the federal government continues to inadequately regulate GHGs, climate change may lead to insecurity in clean air, water, shelter, and food, thereby violating the future generation's Due Process rights.<sup>143</sup> A destabilized climate system threatens future generations' bodily integrity and dignity. Material things such as money or property will be meaningless if future generations struggle with basic needs due to an unstable climate. Thus, the federal government's inadequate regulation of GHGs leading to climate change has violated future generation's Due Process Rights under the Fifth Amendment.

**b. The Fundamental Right to a Healthy Environment Must Be Protected Under the Equal Protection Clause of the 14th Amendment**

The Court applied the theory of reverse incorporation in *Bolling v. Sharpe*, noting that the Equal Protection Clause of the Fourteenth Amendment also applies to the federal government, as the federal government may not deny anyone equal protection of the laws.<sup>144</sup> As in *Washington v. Davis*, bringing a successful equal protection claim requires more than a claim of disparate impacts toward future generations, but also proof of discrimination.<sup>145</sup> It is inevitable that future generations, born and unborn, will experience the effects of climate change more severely than current generations. As a result of the federal government's inactions, future generations are continually denied equal protection from the effects of climate change, as protecting future generations from climate change is crucial to future generation's Due Process rights in life, liberty, and property.<sup>146</sup> Future generations have been largely excluded from the political process—unable to vote—which leaves them unrepresented and, thus, discriminated against. Furthermore, those who experience the worst effects of climate change are often low-income and

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142. Elizabeth Fuller Valentine, *Arguments in Support of a Constitutional Right to Atmospheric Integrity*, 32 PACE ENVTL. L. REV. 56, 94 (2015).

143. Complaint at 91, *Juliana ex. Rel Loznak v. United States* (D. Or. 2015) (No. 6:15-cv-01517-TC) 2015 WL 4747094.

144. *Id.* at 93.

145. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

146. Complaint at 94, *Juliana ex. Rel Loznak v. United States* (D. Or. 2015) (No. 6:15-cv-01517-TC) 2015 WL 4747094.

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poverty-stricken and are often minorities, who have suffered a long history of discrimination.<sup>147</sup>

The Court will uphold or invalidate certain laws depending on the level of review. If a right is not fundamental or guaranteed under the Due Process Clause, the Court will apply rational basis review, which is an essentially a rubber stamp, upholding the law—so long as it is rationally related to a legitimate state interest.<sup>148</sup> However, with strict scrutiny review, the court will invalidate a law, unless it is narrowly tailored to serve a compelling/necessary interest.<sup>149</sup> Although the Court has noted that age is not a suspect class and only subject to rational basis review in *Massachusetts Board of Retirement v. Murgia*, determining that the right to retirement is distinguishable, not fundamental, and did not implicate the Due Process Clause.<sup>150</sup> Because the right to a stable climate system implicates fundamental Due Process rights of life, liberty, and property, the Court must apply strict scrutiny.<sup>151</sup>

Furthermore, future generations should be considered a suspect class in need of extraordinary protection as under Justice Stone's footnote 4 in *Carolene Products Co.*, where he notes that "discrete and insular minorities" are entitled to equal protection.<sup>152</sup> Not only are future generations disenfranchised, but also the federal government has long failed to consider the effects of climate change on future generations.<sup>153</sup> Future generations have no political power to influence the federal government over climate change and have immutable characteristics they cannot change.<sup>154</sup> Because future generations will experience the irreversible and catastrophic impacts of climate change more disproportionately than current generations, future generations should be considered a protected class because they are especially vulnerable.<sup>155</sup>

## V. .... Potential Remedies Courts Can Impose to Enforce Climate Policies for Future Generations

This case presents an opportunity for a landmark decision, similar to *Brown v. Board* for racial equality and *Obergefell v. Hodges* for marriage equality.<sup>156</sup>

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147. THE ETHICS OF GLOBAL CLIMATE CHANGE, 234 (Denis G. Arnold, ed., Cambridge Univ. Press 2011).

148. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955).

149. *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

150. *See Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976).

151. Complaint at 94, *Juliana ex. Rel Loznak v. United States* (D. Or. 2015) (No. 6:15-cv-01517-TC) 2015 WL 4747094.

152. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938).

153. Complaint at 94, *Juliana ex. Rel Loznak v. United States* (D. Or. 2015) (No. 6:15-cv-01517-TC) 2015 WL 4747094.

154. *Id.*

155. *Id.* at 95.

156 *See Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955); *see also*

As in *Obergefell*, the Court declared that marriage was a fundamental right as “the identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution.”<sup>157</sup>

There are currently no statutes that directly address the rights of future generations with respect to climate change. Thus, ATL offers a pragmatic remedy where the Court could issue an injunction, thus, requiring the federal government to create and enforce a national plan, phasing out the use of CO<sub>2</sub>, to stabilize the climate system and secure a climate that future generations will be able to live in, without fear of climate insecurity.<sup>158</sup> This is not a radical or novel measure. Many states, such as California, have adopted plans to reduce and address climate change.<sup>159</sup> ATL thus calls courts to intervene; courts have the power to enforce a wide-sweeping response and with the urgency necessary to address the effects of climate change.<sup>160</sup> Furthermore, issuing injunctions is also not novel to the Court, as Justice Warren opined in *Brown v. Board II* that all previously segregated schools were to desegregate with “all deliberate speed” after unreasonable delay after the first *Brown v. Board of Education* decision.<sup>161</sup>

The Court could also issue a declaratory judgment, thereby recognizing that climate change is a fundamental right under the Due Process Clause and that future generations are entitled to Equal Protection from the effects of climate change. Issuing a declaratory judgment would have an enormous impact, as it would be transmitted internationally, helping to set a precedent for countries worldwide.<sup>162</sup> Continued delay in implementing serious climate remedies could have substantial damaging impacts and challenge the visions of our Founders, eviscerating fundamental constitutional rights of life, liberty, and property guaranteed to all.<sup>163</sup>

## Conclusion

Since we can no longer deny the negative effects of climate change, we must now recognize the impacts of climate change on future generations. Future generations, born and unborn are at risk of inheriting an unstable climate that could deprive them of basic human needs, such as access to clean air, water, and food. In ensuring the survival of future generations who

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*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

157. *Obergefell*, 135 S. Ct. at 2598.

158. Complaint at 99, *Juliana ex. Rel Loznak v. United States* (D. Or. 2015) (No. 6:15-cv-01517-TC) 2015 WL 4747094.

159. Wood, *supra* note 39, at 272.

160. *Id.*

161. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 301 (1955).

162. Wood, *supra* note 38, at 51.

163. James E. Hanson, *The Constitutional Right to a Healthier Climate*, BOSTON GLOBE (Mar. 9, 2016), <https://www.bostonglobe.com/opinion/2016/03/09/the-constitutional-right-healthier-climate/0xTKyK1s5SaD0ne78YqRHL/story.html>.

represent the survival of our genes, families, organizations, nations, and the global ecosystem, current generations must strive to establish constitutional rights for future generations. Establishing constitutional rights for future generations with respect to climate change is essential: Not only will future generations be secure knowing that the federal government will protect their fundamental right to a healthy environment, but it will also ensure the federal government has adequately created a national plan protecting the environment. While the outcome of Our Children's Trust's federal suit remains unclear, courts will be increasingly confronted with issues similar to these. The United States has a long tradition of handing off our problems to future generations—such as the Founding Fathers leaving future generations to deal with the horror of slavery.<sup>164</sup> Let us not leave the problem of climate change for our future generations to inherit. Our current generation has the knowledge and power to change our global environment for the better and to help reduce the rate of the damaging effects on the planet we will leave and pass on to future generations. Now, we must take action.

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164. Moore, *supra* note 20.

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