Two Environments of Rights: A Comparative Examination of Contemporary Rights-Based Climate Lawsuits in the Netherlands and the United States

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Abstract: Two recent global developments in approaches to climate change governance are, first, an increased attention to the connections between climate change and basic human and environmental rights, and second, an increased use of litigation to pursue change in national-level climate policies. These approaches intersect in a pair of contemporary climate lawsuits alleging failures on the part of national governments to properly honor the human and environmental rights of citizens: the Urgenda case in the Netherlands and the American case of *Juliana v. United States.* This article compares the legal and media discourses surrounding the two cases in order to contribute to scholars' understanding of the relationship between climate change, basic rights, and law in the United States and Europe, two crucial arenas for the ongoing development of climate litigation globally. It finds that, while the legal discourse surrounding the Urgenda decision is characterized by notions of technocracy and internationalism and is attentive to its place within the larger global response to climate change, the discourse of *Juliana v. United States* is marked by an unresolved struggle between rights and tradition that sees itself as occurring solely within the American judicial context. Further, the media discourse around the Urgenda case ignores the centrality of rights to the case in favor of attention to its global ramifications, while the *Juliana* media rhetoric focuses on rights, suggesting a different popular prioritization of basic rights and overall climatic significance between the two jurisdictions. The article begins with a background section introducing the recent confluence of human and environmental rights with the rapidly evolving tradition of climate change litigation. It then proceeds to analyses of the presentation of human and environmental rights in the Urgenda and *Juliana v. US* cases in turn, before discussing how these cases fit into their respective legal-cultural contexts and concluding with some reflections on the larger significance of such lawsuits.

I. Introduction

The philosopher Hannah Arendt remarks in her book *The Origins of Totalitarianism* that the most fundamental right in political life is not any of those enumerated in the constitution of this or that country and thought to be universal, but a "right to have rights" endowed by the very fact of being a recognized member of a political community (Arendt 1951, 376). If there is a 21st-century update to be made to Arendt's insight in light of contemporary problems, it is undoubtedly that, since supposedly inalienable political rights are not much use without a planetary system that can support human life, perhaps some version of a right to a livable environment is also truly fundamental. The United Nations certainly thinks it must be: recently, members of its Human Rights Council issued a statement commemorating the 70th anniversary of 1948's Universal Declaration of

Human Rights and "[calling] on States to fully integrate human rights standards and principles in the rules for implementing the Paris Agreement on climate change" ('Joint Statement' 2018). The UN is not alone in its efforts to promote a role for human rights in climate change governance. The idea that climate change and basic rights should be understood as closely connected is being promoted and disputed in courtrooms around the world. Lawsuits in several countries are testing whether, and in what sense, a human right to a livable environment is in fact enforceable law (Nachmany and Setzer 2018, 6-8). This article captures how human rights regarding the environment are understood in two similar cases at the cutting edge of contemporary climate change litigation, the Netherlands' Urgenda case and *Juliana v. United States* in the US, and situates those understandings in the present legal-cultural contexts of each country regarding climate change.

i. Background: Human Rights and Climate Change Litigation

The linking of human rights to the environment has recently become increasingly prominent in official international discourse regarding climate change. Several major international agreements, including the 2030 UN Sustainable Development Goals, explicitly include provisions linking human rights and the natural environment. However, only in 2010 was the first UN resolution connecting the UNFCCC to human rights passed (United Nations Office of the High Commissioner for Human Rights, n.d.), and in 2012 the UN established a permanent Special Rapporteur on Human Rights and the Environment. The Special Rapporteur has advanced UN climate action by writing human rights language into the landmark Paris Agreement on climate change policy in 2015, publishing a full set of framework principles in 2018, and issuing a resolution from the Human Rights Council affirming climate change to be a human rights issue, among other measures. In the international context outside the UN, entities like the Inter-American Court of Human Rights and the African Commission on Human and People's Rights have issued opinions and resolutions linking climate change to the concept of human rights and requesting further study of connections between the two (Pinto-Bazurco 2018).

In a parallel series of developments, actors within various countries have been challenging and advancing current understandings of climate change-related liability and harm in domestic judicial systems. "Climate change litigation" is a broad emerging field, and includes a range of actions with a variety of intentions. The global database on the subject kept by Columbia University's Sabin Center for Climate Change Law and the UK's Grantham Institute on Climate Change and the Environment contains over 1000 explicitly climate change-related lawsuits. Of these, 276 are outside the US, with two-thirds involving climate change only peripherally, and 40% involving corporations suing governments, mostly in attempts to win development concessions contested for environmental reasons (Nachmany and Setzer 2018, 6-8). The more than 800 US climate cases also involve many kinds of disputes, including permitting disagreements, grid decarbonization issues and demands for greater government transparency on climate. These suits are occurring at municipal, state, and federal levels, and the appropriate jurisdiction for various kinds of climate claims remains contentious. For example, in two similar California lawsuits, groups of cities and counties sued oil companies for anticipated expenses related to climate change. Two federal judges working in the same district courthouse then issued opposing rulings on whether each case should be tried in state or federal court (Hasemyer 2018).

Many climate lawsuits assert specific injuries from climate change, or demand redress for failures to mitigate or adapt to climate change on the part of governments or corporations. These legal battles constitute a "bottom-up strategy" of climate activism (Nachmany and Setzer 2018, 7) wherein citizens, civil society groups, and sometimes local governments, frustrated by slow political movement on the issue, are taking legal action to attempt to force faster emissions reductions or other climate policy goals. Perhaps most prominent in the US context have been suits brought by New York City, San Francisco and Oakland against fossil fuel companies (Mogensen 2018). These cities argued that companies' extraction and sale of fossil fuels constituted justiciable civil violations, including public nuisance creation and trespassing, due to the measures the cities will have to take to adapt to climate change-caused issues like rising sea levels. These suits failed, mainly due to problems conclusively linking specific actors to specific damages. More broadly, judges in the US have appeared reluctant to set precedents that could make

the courts central sites of climate and energy policymaking, at the expense of the legislative and executive branches (Rogers 2018).

The most potentially explosive strain of activist climate litigation, both in and outside of the US, lies at the intersection of climate law and the evolving international understanding of environmental human rights. These cases assert rights-based claims to a healthy and livable natural environment (Nachmany and Setzer 2018, 6-8). Though the details vary, each alleges that government actions in aggregate have violated the plaintiffs' implicit or explicit fundamental rights by endangering the healthy livability of the Earth's climate system, and that the government in question must redress these injuries by making wholesale improvements to its climate or environmental policies. Though there are relatively few rights-based climate lawsuits within the huge set of cases constituting the field of climate litigation, they have been brought around the world, with high-profile cases already decided or ongoing in the judicial systems of Pakistan, Colombia, the African Union, and the EU, to name a few (Nachmany and Setzer 2018, 6-8). By asserting that basic rights have been violated by an *aggregate* of actions (or inactions) over time, the plaintiffs of these lawsuits hope to get around some of the causal linkage issues engendered by other climate lawsuits and hold governments broadly accountable at a single judicial stroke.

Here, I focus on two cases alleging such aggregate failure on the part of national governments to honor citizens' basic rights: the so-called Urgenda decision in the Netherlands, which at the time of writing is under appeal in the Netherlands' highest court, and the ongoing US case of *Juliana v. United States,* which has undergone complex preliminary court proceedings for several years and has not yet received a trial. The initial Urgenda decision in a Dutch district court was "the first court decision in the world to order a state to limit its greenhouse gas emissions for reasons other than a statutory mandate," and thus marked a "watershed moment" for climate litigation internationally (Adler 2018). The plaintiffs in *Juliana* seek to advance a similar argument to that of the winning side in the initial Urgenda case, and a victory for them could require a fundamental overhaul of the US's energy, transportation, and agricultural systems (Wallace-Wells 2018). These cases each have obvious import to the global effort to mitigate climate change through cuts in GHG emissions. But, viewed together, their significance is wider still: because they raise substantially similar questions about the connection between climate change and fundamental legal rights in two different jurisdictions, they allow a fruitful comparison of how such novel legal questions are being approached in different judicial and cultural contexts. This comparison is all the more provocative because of the historically deep differences between these two countries' climate politics and policy. The Netherlands has forged a reputation as a climate policy leader among EU member states (Climate Action Network Europe 2018, 4), while American recalcitrance has been a foremost obstacle in international climate agreements since well before the Trump Administration (Depledge 2005, 11). Prior to the development of each case, it was not immediately obvious how these opposing patterns of politics and policy would manifest in the specifically *legal* realm of each country's protected basic rights. I next summarize the study's methodology before examining the Urgenda decision and the *Juliana* case in turn.

ii. Methodology

The methodology of this study follows a tradition of scholarship analyzing environmental policy, law, and politics through discourse analysis, especially the approach to discourse analysis pioneered by Foucault (1980). Discourses use language to communicate views about the way the world is and how the things in it relate (and ought to relate) to one another. They are "shared, structured ways of speaking, thinking, interpreting, and representing things in the world" (Tuler 1998, 65) created by "language-in-use" (Hajer 2005, 176), communal "ways of apprehending the world" (Dryzek 2005, 8) that embody assumptions and mark out relationships. Major contributions to the discourse analysis tradition in environmental politics and policy include those of Hajer (1995) on the discourse of ecological modernization, Dryzek (2005) characterizing environmental discourses generally, and Young's and Coutinho's (2013) two-country comparison of the rhetoric of climate denial. As Hajer and Versteeg summarize it, "discourse analysis sets out to trace a particular linguistic regularity that can be found in discussions or debates" (2005, 175-176). Here, I analyze four discourses in the context of the Urgenda and *Juliana* cases, two sets

of two types each: the judicial discourse of and media discourse regarding each case.

Rights-based climate lawsuits constitute a provocative site for discourse analysis because the entities discussed range from physically concrete (the climate system) to conceptually abstract and morally aspirational (fundamental political rights), from extraordinarily broad (the climate system again) to narrow and technical (various laws and legal procedures). Using language to make sense of all this together requires assumptions and rhetorical choices. Because of this, there is no obvious single way that a discourse regarding a rights-based climate lawsuit must develop, and the way it does develop allows for some insight into the culture that gave rise to it. Here, I follow the basic methodological approach exemplified by such scholars as Hajer and Dryzek, who analyze environmental discourses by identifying the basic entities, agents, and relationships recognized in their language, as well as the key metaphors they use and normative viewpoints they imply (see, e.g., Hajer 1995, Dryzek 2005). The essence of this approach is critical qualitative scrutiny rather than quantitative analysis, and while quantitative methods can enrich critical discourse analyses (as in, e.g., Supran and Oreskes, 2017), this article does not rely on them for its conclusions.

The boundaries of a "single" discourse inherently involve some degree of subjectivity, so it can be difficult to give an airtight method for the selection of texts to represent one. Nonetheless, some useful lines can be drawn: in this study, the *judicial* discourse of each case is composed of the set of texts used in its formal legal proceedings. In each country, the lawyers and judges who produce these motions, petitions, briefs, and rulings understand themselves to be engaged in a shared exercise with certain defined structures and a similar social purpose, namely to carry out the polity's judicial function. Texts that contribute to this exercise's purpose according to its rules are part of the judicial discourse. For the Urgenda case, I use the lengthy 2015 and 2018 district court and appeals court rulings as the sample representing the judicial discourse, since they summarize the arguments made by both sides and provide final legal decisions. The rulings also have the advantage of being available in English, unlike the other texts in the Urgenda case's proceedings. In the *Juliana* case, no final rulings are yet available, and so many legal documents exist that an analysis of all of them is unworkable, Therefore, a sample of several of these documents was selected. The sample includes one text issued by each of the three courts in which the case has had proceedings, as well as motions filed by both the plaintiffs and defendants arguing for their overall view of the case. This sample represents over two hundred pages of *Juliana* proceedings.

The media discourse surrounding each case is trickier to represent because media activities are less formally defined than judicial proceedings, but again some intuitive guidelines are useful. In the sample representing each case's media discourse, only print media sources were included for simplicity and consistency. Only texts from professional media outlets were used, so that the writers would understand themselves to be intentionally portraying the cases and their significance to a broader audience, and any sources quoted in the texts would know themselves to be contributing to that purpose. Further, only outlets with wide circulation at a national or international level were used, in an attempt to capture the central features of the mainstream portrayal of the two cases. While analysis of the cases' depiction in more local or niche media outlets might well produce an analysis valuable in its own right, that task is not taken up here. To construct the Urgenda media discourse sample, all English-language media articles linked from the Urgenda Foundation's website were included, as well as several other articles from English-language outlets in Europe discussing both the 2015 and 2018 decisions and featuring perspectives from both the plaintiffs and defendants. For the *Juliana* case, a selection of ten articles about the case in major American national news outlets was chosen, some but not all of which were culled from the hundreds of media links on the Juliana plaintiffs' public website. For a complete listing of all sources examined in the analysis of both the judicial and media discourses, see the Appendix.

II. Urgenda Foundation v. The Kingdom of the Netherlands

The case that the climate policy of the Netherlands was failing to uphold its citizens' constitutional rights was initially brought in 2012 by the Urgenda Foundation, a Dutch environmental NGO, and over 900 citizen co-plaintiffs. Collectively, the plaintiffs claimed that the Dutch government's failure to

rapidly reduce its GHG emissions constituted a violation of their human rights to life and occupation. In 2015, they won: a district court ruled that the Dutch government has a 'duty of care,' stipulated in Dutch civil law and fleshed out by Articles 2 and 8 of the European Convention on Human Rights (to which the Netherlands is party), to protect the environment for its citizens in light of the "imminent danger" posed to them by climate change (The Hague District Court 2015, 1). The court ruled that the government must cut Dutch emissions of CO2-equivalent GHGs by 25%, relative to 1990 levels, in order to comply with the IPCC's developed-nation standard (non-binding on its own) of 25-40% cuts by 2020. The Dutch government, already committed to contributing to the EU's Paris Agreement pledge to reduce total European emissions by 40% by 2030 and 80-95% by 2050 (Latvian Presidency 2015, 1-3**)**, was on track for only a 17% reduction by 2020 (Hague District Court 2015, 1). The government appealed the case and lost again in 2018 (The Hague Court of Appeals 2018, 19-20). It is appealing yet again to the country's highest court, which as of this writing has not reached a final decision on the case (Kaminski 2019). In the meantime, the government has announced its intentions to respect the decisions of the lower courts and take steps to comply with them.

This analysis of the discourse on rights in the Urgenda case is somewhat hampered by the lack of English translations for certain case documents and media reports. However, a clear picture still emerges from the 2015 and 2018 court decisions, both available in English, and the plethora of press releases and articles representing the views of parties on both sides of the case. The rights discourse of the original 2015 decision can be best summarized as internationalist (attentive to ideas, events, and entities from outside the Netherlands), technocratic (informed by technical concepts and scientific information from expert sources), and scolding towards the state. In deciding for Urgenda, the Hague District Court notably argued that the provision of the Dutch constitution requiring the state to protect and improve the natural environment was not by itself binding in this case (Hague District Court 2015, at 4.52). Instead, the specific relevant content of the general constitutional "duty of care" the state owed Urgenda and the citizen co-plaintiffs was endowed by the state's commitments under international law—in particular, the rights to life and domestic privacy guaranteed by the European Convention on Human Rights (ECHR)—and informed by the technical conclusions of the IPCC about actions needed to avoid dangerous 2-degree Celsius warming. The human rights at issue were European, not global: in their interpretation, the court confined its rights analysis to the ECHR and a 2005 handbook on the relation of human rights and the environment produced by the Council of Europe, the international organization responsible for the ECHR (Hague District Court 2015, at 4.47). The IPCC and its 4th and 5th assessment reports were viewed as authoritative on all scientific matters, with plenty of the IPCC's language of targets, cuts, reprinted graphs, and percentages included throughout the report, and the threatened rights to life and privacy were defined with respect to the emissions reductions pathway "deemed necessary" by the IPCC to avoid dangerous warming.

As with many judicial decisions, what the district court did *not* say also conveys a great deal about its understanding of the issues at hand. In the Urgenda case, lofty or moralizing language about human rights was entirely absent, with references to basic rights wrapped, perhaps predictably, in a mishmash of technical references to domestic and international laws. No specific new rights related to climate were created by the decision. Its most morally inflected language was reserved for the Dutch state itself, which the court ordered not to "hide behind the argument that the solution to climate change does not depend solely on Dutch efforts" (Hague District Court 2015, 1). The 2018 appeals decision followed in the 2015 decision's internationalist and technocratic approach to the definition and legal status of rights, re-emphasizing the "real threat" of climate change to the current generation of Dutch citizens and expanding somewhat the scope of the ECHR's rights to life and privacy as they applied to the decision.

In English-language statements in the Dutch and international media, rights were treated much differently: they were mainly ignored, indicating that human rights served as more of a legal instrument than a culturally relevant idea in this case. Of the dozen English-language press articles about the victory linked on the Urgenda website, several did not mention rights at all, and only a few discussed at any length how rights informed the Dutch responsibility to cut carbon emissions. The equal international responsibility of the Dutch state was often discussed.

Also prominent and internationally oriented was how the Netherlands had fallen behind other European nations in cutting emissions. Where rights were discussed in the media, they were framed in a manner starkly different from that found in the decisions. Where quoted, representatives for Urgenda presented rights not as a European issue, based on an international charter, but as a *moral* issue on the level of the civil rights established in the civil rights movement of the 1950s and 1960s. Supporters of the decision envisioned an ever-expanding sphere of rights protecting people from the harmful effects of climate change: as one campaigner put it, "This is the climate case that started it all, inspiring similar lawsuits worldwide" (Schiermeier 2018). On the other side, the Dutch government avoided discussion of human rights in protesting the case's outcome, arguing instead that "democracy has been sidelined" (Neslen 2018) and state sovereignty diminished by the court.

III. Juliana v. United States

Like the Netherlands, many countries around the world have seen fit to include provisions explicitly defining a basic right to a healthy or sustainable natural environment in their constitutions (May and Daly 2016, throughout). The United States, boasting the world's oldest and most widely emulated constitution, has not: the U.S. Constitution was written well before widespread worries about national or global environmental quality took hold, and has proven nearly impossible to amend in the decades since the environmental movement's birth in the 1960s and 1970s. The ongoing (at the time of writing) case of *Juliana v. US*, filed by 21 minors and their guardians against the US federal government, seeks to establish a basic environmental right in the United States. Its plaintiffs assert the existence of an implicit, previously unrecognized constitutional right to a sustainable environment based on the explicit rights to life, liberty and property. The plaintiffs' argument also draws upon the doctrine of public trust, a judicial doctrine which charges the state with the responsible oversight of its natural resources (Kwaterski Scanlan 2000, 137-138). The plaintiffs also hope to compel the federal government to explicitly delineate a plan to decrease its emissions over time in order to comply with its asserted environmental right (Our Children's Trust 2018).

The legal arguments presented by the two sides in this case, and their reception in the various courts in which they have argued (the Oregon District Court, the U.S. Court of Appeals for the 9th Circuit, and the Supreme Court) create a discourse centered around the role of *tradition* in rights: whether new rights can be recognized by the judiciary, or whether rights already defined by history and precedent must dominate despite changing contemporary circumstances. The plaintiffs in the case assert that history is actually on their side in arguing for a newly recognized right to a livable climate: They argue that it is the traditional province of the judiciary to decide what the law is, and this is nowhere more true than in the domain of basic rights. They claim that each generation has specific rights particular to their circumstances that are rooted in the US Constitution's general rights to life, liberty, and property, and emphasize that children's lives will be deeply affected by climate change: "Without . . . pointing to any United States history, tradition, or a single fact related to liberty, [attorneys for the US government] outright reject the implied fundamental rights these children assert as being essential to their bundle of liberties, to their property, and indeed to their lives and ability to survive and pursue their happiness. That historic analysis is foundational to an analysis of our Constitution and our rights, yet Petitioners ignore it" ("Response Brief" 2018, 54). Furthermore, they insist that, though they want the judiciary to establish a new right to a livable climate in performing its function of interpreting the Constitution, the government has already violated rights well established in the long tradition of American law. According to the *Juliana* plaintiffs, the government is responsible for "violations of well-recognized fundamental rights, including those to personal security, to be free of state-created danger, to family autonomy, and to equal protection under the law" (53).

The Oregon District Court has been sympathetic to the idea of establishing a new climatic right, and defended the possibility of doing so within the historical tradition of the American judiciary. Applying to the climate context the Supreme Court's decision in *Obergefell v. Hodges* (2015) that the Constitution contains an implicit right to same-sex marriage, District Judge Ann Aiken quotes Justice Anthony Kennedy: "The identification and protection of fundamental rights is an enduring part of the

judicial duty to interpret the Constitution" (United States District Court 2016, 31). Further, the court has invoked references to other instances of expanding rights in American legal history, such as quoting in an opinion the Supreme Court's order that American schools be racially integrated with "all deliberate speed" after the landmark *Brown v. Board of Education* ruling in 1954. For its part, the government has engaged little with the idea of rights in the *Juliana* case while leaning heavily on a concrete idea of tradition. Its arguments do not emphasize abstract historical principles which must be honored by the case's decision, but rely instead on the plain fact that no climate-right theory has been advanced in American courts before to argue that such a theory should be dismissed out of hand. The state's lawyers claim that "there is no basis in law" (Wood et al. 2017, 22) for this "utterly unprecedented" kind of suit, and cite a Supreme Court case requiring that "the asserted liberty interest be rooted in history and tradition." The government simply dismisses the plaintiffs as "constructing out of whole cloth a novel constitutional right to a 'climate system capable of supporting human life'" (Wood 2018, 31).

The media discourse surrounding the case is generally more partisan than in the Dutch case, in which the tone was that of exasperated actors who basically agreed on the ends of cutting emissions but not the legal means. The media has presented the case as essentially one of left-wing environmentalists facing off against the right-wing Trump administration (see, e.g., Irfan 2018, Yeo 2018, and Walrath 2018), which is faulty on factual grounds because the Obama administration was equally opposed to the claims the plaintiffs present. Unlike US business and civil society organizations' framing of climate change, which is largely depoliticized (Wetts 2019, 1), the presentation of rights in media coverage of the *Juliana* case is highly politically polarized and value-laden. The most likely outcome for the *Juliana* case, if it does finally go to trial and the Oregon court rules to recognize an unenumerated constitutional right to a livable climate, is one or more rounds of appeal. Ultimately, such a ruling in favor of a livable-climate right is likely to be reversed, if not by the Court of Appeals for the 9th Circuit, then by the currently conservative Supreme Court. The Supreme Court demonstrated its interest in the case's potential constitutional ramifications when it took the unusual step of intervening in the lower court's proceedings to consider using its power to dismiss the case. Though Chief Justice John Roberts ultimately wrote an order permitting the case to proceed according to the normal process, Justices Thomas and Gorsuch would have dismissed it (Supreme Court of the United States 2018, 3).

IV. Discussion: Situating Climate Litigation Discourses

The Urgenda decision illustrates well the complexity of the tangled global web of governance and sovereignty emerging to battle climate change. A domestic court, on the basis of an international rights treaty guaranteeing purportedly universal values, ordered its own government to take increased action in order to meet the plan laid out by a global intergovernmental group of scientists and policymakers, all in response to (and, technically, in order to legally compensate) a domestic NGO and 900 citizens of the Netherlands. With this tangled web in mind, it is clear that the Urgenda case is *outward facing* in a fundamental sense, despite being decided in a Dutch court and binding only the Dutch government. Although an immense to-do has been made about it in the international press, the mandated cuts involved are tiny on the world stage: the Netherlands contributes less than 0.5% of global yearly CO2-equivalent emissions. Requiring the government to reduce Dutch output by 25% rather than the previous target path of 17% between 2015 and 2020 therefore affects only a tiny fraction of the world's total warming potential in the long run. The 2015 decision proclaimed proudly that, "with this order, the court has not entered the domain of politics" (Hague District Court 2015, 1), and domestically, at least, that may be true. However, though the decision may have been couched in apolitical terms, its admonitions to the government about honoring its international commitments signal clearly that the judges knew that many beyond the Netherlands would take notice of its ruling. Tellingly, the court also took the atypical step of publishing the decision's main documents in English (Roy and Woerdman 2016, 166). As previously discussed, Urgenda's lawyers and spokespeople were fairly explicit, at least in the media, that they believed that much of the significance of the decision was in what it would say to a larger international audience; it seems that the involved members of the Dutch judiciary shared this view. The judiciary of the Netherlands thus appears to be situated in a legal cultural context that permits,

at least on certain issues, the intentional transcendence of traditionally defined boundaries of national sovereignty. Legal scholars studying the case have noted that "in relation to the separation of powers, there is clearly a marriage of 'diffused' jurisprudence from other jurisdictions and Dutch legal particulars," and that "aspects of the court's reasoning are 'diffusible' or amenable to transnational borrowing" (Roy and Woerdman 2016, 165). Moreover, this cross-border legal permeability is not merely due to the case taking place in a Europe governed in part by a supranational body: the Urgenda case took place not in an EU court, but in a national one with no *a priori* obligation to the larger European community (Government of the Netherlands, n.d.). Indeed, one might expect a domestic Dutch court to be particularly jealous of Dutch sovereign power, but the writers of the Urgenda decision instead repeatedly gestured to the international community that its reasoning might apply to others, too. It is unclear without a much broader study how deeply rooted such transnational jurisprudence and judicial intent is in the history of European law, or what its future path will be, but it is alive now in the climate field.

The same is not true in the United States. The *Juliana* case, examined in comparison with the Urgenda case, illustrates that American skepticism about concepts foreign to its political and judicial system holds in the realm of climate litigation. The American constitutional system, the oldest in the world, has understandably evolved a great deal of doctrinal conservatism. One of the elements of this conservatism is a deep resistance to the introduction of new rights not already understood to be part of the system. However, on purely logical grounds, if there are any fundamental enabling rights underpinning the suite of rights explicitly guaranteed by the US Constitution, a "right to a climate system capable of supporting human life" must be one: as argued in the introduction, guaranteed rights are decreasingly meaningful if mere survival is increasingly difficult in the world we have shaped and must inhabit. Such an underpinning right might be interpreted as truly minimal, and therefore need not imply adherence to any particular environmental or energy policy short of the prevention of total climatic disintegration. But the US government argued forcefully against the idea of such a right, claiming it to be "constructed from whole cloth" (Wood 2017, 31). Rather than object on other grounds, the government frontally attacked the idea that American legal rights can pertain to the climate system at all.

The political scientist Francis Fukuyama has argued that in America courts "have become alternative instruments for the expansion of government," and that "the story of [American] courts is one of the steadily increasing judicialization of functions that in other developed democracies are handled by administrative bureaucracies, leading to an explosion of costly litigation, slowness of decision making, and highly inconsistent enforcement of laws" (Fukuyama 2014, 470). This analysis may hold overall, but in the arena of climate litigation it appears to have things backward. *Juliana v. US* indicates that in the United States, the dominant judicial culture is loath to defy a long tradition of separation-of-powers precedent and feels compelled to justify its actions on traditional grounds. When, by dint of other branches' inactions, the courts must rule on climate change, the question becomes how such a ruling best fits into that tradition.

V. Conclusion

Because of the potentially transformative nature of cases like these, there is value in this sort of situated discourse analysis simply for its reflection of and inquiry into the cultures in which the cases take place. However, it is also worth retreating to a more general position and asking what broader conclusions we can derive from these two cases' discourses of rights. One immediately notable takeaway comes from what was *not* present in them: the basic science of climate change is not contested in either case. At least in these two constitutional republics, the courts are, so far, upholding their basic function of being arbiters of fact. Regardless of the ways in which lawyers argued for or against a link between rights violations and the fact of climate change, they accepted that fact. Where they explicitly referred to it, they typically argued from globally recognized and widely legitimated scientific syntheses like IPCC reports, rather than the work of individual scientists. With political discourse around the world often operating several levels beneath this, such baseline institutional integrity seems worth at least a brief sigh of relief.

A second, more dispiriting general conclusion is that, despite acceptance of the science of climate change, neither case has made use of a pre-established 'science of rights' or gone very far toward developing

one, though the Urgenda case seems more encouraging in this respect than *Juliana*. There is no settled understanding of how human or constitutional rights and climate change hang together, particularly regarding how climate change may or may not be proven to violate rights and how such violations ought to be remedied. This sort of complaint is nothing new in legal cases involving science: more than 20 years ago, the sociologist of science and law Sheila Jasanoff, writing about "toxic torts" cases wherein consumers accuse chemicals manufacturers of causing them harm by selling toxic products, discussed seemingly perpetual "charges of a know-nothing legal system that lets plaintiffs walk away with multimillion-dollar awards although their causal arguments are grossly inadequate by scientific standards" (Jasanoff 1995, 114). In a nascent field of law like that at the nexus of human rights and climate change, the lack of adequate and consistent standards is even less surprising. Without extraordinarily sophisticated methods for tracing causal linkages of emissions to damages, combined with an accurate judgment of the relative responsibilities of the different economic and state actors involved in the process of extraction, refinement, sale, and consumption of fossil fuels, the idea of a judicial science of climate rights seems impossible. Even if some ultimate normative theory of how to allocate responsibility to governments for human rights violations from emissions were to be designed, and, above that, were to be *correct* relative to whatever deep truth there really is about such things, such sophisticated thinking is certainly not at work in these cases.

Overall, it can be said that the Dutch judicial culture, which is at least historically reflective of a broader culture of European civil law (Blankenburg 1998, 1-3), seems more willing than the American to accept the idea that the very *risk* of climate change might implicate the foundational rights of particular parties. The American constitutional law scholar Bruce Ackerman argues that shifts in the content of the Constitution as it is experienced and practiced occur primarily in "constitutional moments" (Ackerman 1991, 51). He claims that in certain historical periods, such as the 1930s' popular demand for and legal acceptance of radically increased government economic activity through the New Deal, citizens have awakened from "long periods of civic slumber" (Sandalow 1992, 312) to successfully demand deep shifts in their rights and in the nature and function of the government that recognizes them. Until and unless such a moment arises that includes sufficient popular pressure to force the constitutional issue on climate change—which, given the extraordinary popular engagement and sense of political liminality that mark American public life today, may not be far away—the *Juliana* case suggests that the American judicial system is ill positioned discursively and doctrinally to perform such fundamental pivots through individual cases, necessary as such pivots may turn out to be.

Appendix: Documents Analyzed

Note: sources also cited as references marked with an asterisk.

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