

# TRIBES, CITIES, AND CHILDREN: EMERGING VOICES IN ENVIRONMENTAL LITIGATION

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## I. INTRODUCTION

For decades, the typical pro-environment lawsuit has been filed by an environmental nongovernmental organization (“NGO”) on behalf of a neighbor or hiker.<sup>1</sup> The NGO would allege that the individual faced health risks, that her property was contaminated, or that she could no longer hike, fish, swim, or view wildlife such as the endangered Nile crocodile, as in the well-known case of *Lujan v. Defenders of Wildlife*.<sup>2</sup> The NGO accordingly would

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1. *E.g.*, James R. May, *Now More Than Ever: Environmental Citizen Suit Trends*, 33 *Env. L. Rept.* 10704 (2003) (“Early on, environmental groups brought nearly all citizen suits. [As of 2003], one in three citizen suits are brought by nontraditional citizens, including companies, landowners, developers, industry, and ever more frequently, states and faith-based organizations.”) Citizen suits filed by nongovernmental organizations continue to be a mainstay.

2. 504 U.S. 555 (1992). In that case, the NGO, on behalf of the individuals, challenged the government’s rule interpreting the Endangered Species Act not to apply extraterritorially. *Id.* at 557–58. The case famously foundered on the shoals of standing doctrine. Although the individuals had previously visited the habitats of the endangered Nile crocodile and the Asian leopard, the Court found they had inadequately concrete future travel plans to demonstrate the concrete and imminent injury-in-fact required for standing. *Id.* at 563–64. The Court also rejected standing for individuals who studied or cared for the animals in other parts of the world. *Id.* at 565–67.

Many other well-known environmental law suits fit the same mold of an NGO representing an injured member. *See, e.g.*, A. Dan Tarlock, *The Story of Calvert Cliffs: A Court Construes the National Environmental Policy Act to Create a Powerful Cause of Action*, in *ENVIRONMENTAL LAW STORIES* 77, 90 (Richard J. Lazarus & Oliver A. Houck eds., 2005) (noting that the Calvert Cliffs Coordinating Committee in the landmark case of *Calvert Cliffs’ Coordinating Comm., Inc. v. United States Atomic Energy Comm.*, 449 F.2d

challenge private conduct or government action. Legal advocacy by NGOs on behalf of their members remains critical to environmental protection and to holding government and corporations accountable under the environmental laws.<sup>3</sup> Such lawsuits have been especially important given decades of congressional dysfunction on environmental issues and wild swings in executive branch environmental policy. But in the last several years, distinctive sets of plaintiffs have begun to emerge: Tribes, cities, and children.

These developments were foreshadowed by the State of Massachusetts' 2007 litigation in the Supreme Court. In *Massachusetts v. EPA*,<sup>4</sup> the State of Massachusetts led the challenge to EPA's denial of a Clean Air Act petition that it regulate greenhouse gases from new cars. The original petition had been filed by a group of environmental NGOs, but by the time litigation began, the State of Massachusetts had taken over the case.<sup>5</sup> The lead plaintiff in challenging EPA's petition denial was neither an individual, a corporation, nor a nongovernmental organization, but instead a democratically elected government with its own constituency of close to seven million people and an entire congressional delegation to represent its interests in the political arena.<sup>6</sup>

Massachusetts famously won the case, persuading the Court that EPA had improperly rejected the petition. Massachusetts convinced the Court not only that it had standing owing to its potential loss of coastal property to rising seas, but that greenhouse gases are Clean Air Act "air pollutants" and that EPA's petition denial should be set aside.<sup>7</sup> Justice Stevens, writing for a majority of the Court, emphasized that a State's

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1109 (D.C. Cir. 1971) was selected as plaintiff because organizational members had homes on Maryland's western shore); *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009) (case brought by NGO on behalf of hiker-members).

3. *E.g.*, Sara Mogharabi, Dacia Meng, Anthony Papetti, Zaheer Tajani, *Environmental Citizen Suits in the Trump Era*, 32 Nat. Res. & Env't. 3 (Fall 2017) (noting that increased fundraising for environmental nongovernmental organizations "will support an expansion of citizen suits").

4. 549 U.S. 497 (2007).

5. Lisa Heinzerling, *Climate Change in the Supreme Court*, 38 ENVTL. L. 1, 5 (2008) (International Center for Technology Assessment led the petition to EPA to regulate greenhouse gases from new cars in 1999; "the largest and most established environmental organizations did not join the initial petition.").

6. Heinzerling, who represented the State of Massachusetts, has argued that relying on injury to a more typical environmental plaintiff, an Alaskan hiker, would have been a mistake. Heinzerling, *supra* note 5, at 14 (arguing that if plaintiffs had relied on the hiker's allegations to establish injury, they "would just be hosed in the Supreme Court.").

7. *Massachusetts v. EPA*, 549 U.S. 497, 532-35 (2007).

claim to standing, given its quasi-sovereign interests and limited ability to protect its own environment, would be considered with “special solicitude.”<sup>8</sup>

Massachusetts’ victory over EPA in the Supreme Court has invigorated the engagement of States with the federal government in court. We’ve now seen numerous challenges to federal action brought by State governments, including challenges to environmental rules,<sup>9</sup> Obama-era policies to “defer action” under immigration laws against so-called “Dreamers,”—illegal aliens who came to the United States as children<sup>10</sup>—and the so-called “travel bans” of the Trump era.<sup>11</sup>

Beyond States, however, three new sets of plaintiffs have become increasingly visible in environmental litigation. Tribes, cities, and children have been acting as plaintiffs and taking their environmental claims to court. Like the State of Massachusetts, Tribal and municipal governments are in court in these cases on behalf of democratically constituted communities. Children are also in court attempting to speak for themselves and their generation, as well as for future generations.<sup>12</sup> In my view, we should welcome these emerging voices in litigation. These relative newcomers are not only trying to use lawsuits to protect their communities, but, as representative groups, are contributing importantly to our public dialogue on environmental policy, both inside and outside the courts. Section II of this essay discusses recent environmental litigation brought by these plaintiffs. Section III assesses normative issues presented by these lawsuits. Section IV briefly concludes.

## II. THE PLAINTIFFS

### A. Tribes

Over 500 federally recognized Native American Tribes reside within the borders of the United States.<sup>13</sup> Tribes possess formal sovereignty, though like States, they are internal to the United

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8. *Id.* at 520.

9. *E.g., id.*; *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (challenging EPA decision to regulate power plant mercury emissions).

10. *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016) (per curiam).

11. *E.g., Trump v. Hawaii*, 138 S. Ct. 2392 (2018); Tara Leigh Grove, *When Can a State Sue the United States?*, 101 CORNELL L. REV. 851 (2016).

12. Tim Stelloh, *Kids’ climate change lawsuit against federal government can proceed without naming Trump, judge rules*, NBC NEWS (Oct. 15, 2018, 8:06 PM).

13. TRIBAL NATIONS & THE UNITED STATES: AN INTRODUCTION, <http://www.ncai.org/about-tribes> (last visited Mar. 3, 2019).

States. Both because of that and as a result of congressional action, their governmental powers have been significantly limited.<sup>14</sup>

Tribes have long sought to enforce the treaties under which they relinquished their claims to vast portions of their homelands.<sup>15</sup> But in recent years, we have seen Tribal litigators turn their attention more specifically to environmental protection, recognizing how critical environmental quality is for the welfare and well-being of Tribal communities.

Consider the 2008 suit brought by the Native Village of Kivalina, Alaska, a federally recognized Tribe of Inupiat Eskimos.<sup>16</sup> The village is a small one that has been located within the Arctic Circle since time immemorial. It lies at the end of a roughly six mile barrier island, and its survival is threatened by climate change, since the sea ice on the coastline that has protected the village from sea storms is forming later and has been thinner and less extensive in nature.<sup>17</sup>

The Native Village filed one of the earliest public nuisance suits against energy producers. They sought damages on the theory that unrestricted fossil fuel emissions from the major oil companies they named as defendants have contributed to the existential threat facing the Native Village.<sup>18</sup>

The Village was ultimately unsuccessful, but its suit nonetheless was one of the earliest to bring attention to specific, concrete human losses from climate-caused environmental damage. The Native Village of Kivalina's imminent need for relocation has become a leading indicator of what the world is facing from climate change.<sup>19</sup>

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14. *E.g.*, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1872 (2016) (“[U]nless and until Congress withdraws a tribal power . . . the Indian community retains that [sovereign] authority in its earliest form.”); RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 21 (Am. Law. Inst., Tentative Draft No. 2, 2018) (“Indian tribes are domestic nations possessing the powers of a limited sovereignty subject to modification by Congress.”).

15. *E.g.*, *Washington v. Washington State Com. Passenger Fishing Vessel Ass’n*, 443 U.S. 658 (1979); Dennis J. Donohue, *New Mining Projects in Michigan: Opportunities & Obstacles*, 93 MICH. B.J. 22 (2014).

16. *See generally* *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009), *aff’d*, 696 F.3d 849 (9th Cir. 2012).

17. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012) (“If the village is not relocated, it may soon cease to exist.”).

18. *Id.*

19. *E.g.*, Julie Hirschfeld Davis, *Obama Takes Climate Message to Alaska, Where Change is Rapid*, N.Y. TIMES, (Sept. 2, 2015), <https://www.nytimes.com/2015/09/03/us/politics/obama-takes-climate-message-to-alaska-where-change-is-rapid-in-alaska.html>.

Even earlier, bands of the Cherokee Indian Nation tried unsuccessfully to halt the Tellico Dam in Tennessee after Congress overrode the Supreme Court's famous decision in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978) and specifically funded the dam. Two bands of the Nation and three individual Cherokee Indians argued that the dam would flood their “sacred homeland,” destroying sacred sites, flooding graves, and impacting the

In 2016, the Standing Rock Sioux and the Cheyenne River Sioux Tribe brought suit over the federal government's authorization of the Dakota Access Pipeline crossing under Lake Oahe, which forms part of the Missouri River. These areas of the Missouri River have long been sacred to the Tribes. They supply water for drinking, irrigation, and ritual needs. The Tribes alleged that construction of the pipeline itself desecrated sites important to the Tribe.<sup>20</sup> The Tribes also claimed that the government violated the National Environmental Policy Act by failing to perform a full analysis of the pipeline's environmental impacts prior to authorizing the crossing; the district judge agreed, requiring the government to more fully assess impacts to environmental resources implicated by the Tribe's hunting and fishing rights.<sup>21</sup>

And five Tribes, led by the Hopi Tribe and the Navajo Nation, are in court challenging the 2017 Trump Administration order to substantially reduce the recently-declared Utah Bears Ears National Monument, a spectacular stretch of red rock canyons dotted with historic and sacred Native American sites.<sup>22</sup> The complaint alleges that the Tribes rely on Bears Ears to collect "plants, minerals, objects, and water for religious and cultural ceremonies and medicinal purposes; hunt, fish, and gather. . . and conduct ceremonies on the land."<sup>23</sup> The ordered reduction is understood to effectively open the lands to uranium mining and other uses.

In both the pipeline and national monument litigations, the Tribes are arguing for expanded notions of environmental values.

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plaintiffs' culture and history. The Sixth Circuit reasoned, however, that the plaintiffs had not adequately demonstrated the centrality of the area to their religious observances, and refused a preliminary injunction against the flooding. *See Sequoyah v. Tennessee Valley Auth.*, 629 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980).

20. *See, e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77 (D.D.C. 2017) (rejecting arguments under the Religious Freedom Restoration Act and summarizing arguments regarding pipeline route), *appeal dismissed*, 2017 WL 4071136 (D.C. Cir. 2017).

21. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 131, 133–34 (D.D.C. 2017) (agreeing that the government failed to adequately consider impacts to environmental resources implicated by the Tribe's fishing and hunting rights, though declining to require further analysis of potential "existential" meaning of such resources).

22. *See Complaint for Injunctive and Declaratory Relief, Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C. filed Dec. 4, 2017). As of March, 2019, a motion to dismiss the case is pending in the district court. *See generally* Briefs on Federal Motion to Dismiss in Bears Ears Litigation, *Turtle Talk*, Nov. 20, 2018, <https://turtletalk.wordpress.com/2018/11/20/briefs-on-federal-motion-to-dismiss-in-bears-ears-litigation/>.

23. *See Complaint for Injunctive and Declaratory Relief* ¶ 244, *Hopi Tribe v. Trump*, No. 1:17-cv-02590 (D.D.C. filed Dec. 4, 2017); *id.* 4 ("Bears Ears is so culturally and spiritually significant that some ceremonies use items that can *only* be harvested from Bears Ears.").

They are identifying impacts on land, the purity of water in nearby waterbodies, sacred sites, historic sites, and ancestral lands; they are also alleging harm to the ability of Tribal members to “engage in rituals and ceremonies around sacred sites.”<sup>24</sup> In short, Tribes are calling on the courts to think more broadly about the costs of environmental degradation, including to community identification and individual emotional well-being.

Finally, in the early 2000s, twenty-one Pacific Northwest Tribes, together with the United States, sued to enforce treaty salmon fishing rights. The Tribes depend on the fisheries both for subsistence and to earn a living. The point of the suit, however, was to establish that the treaty rights also legally obligate Washington State to remove culverts under state roads that obstruct salmon passage to spawning grounds.<sup>25</sup>

The Tribes obtained a forceful opinion in the Ninth Circuit in 2017 which was affirmed by an equally divided Supreme Court. The hope is that implementation of the decree will help stem a dramatic decline in the salmon population in the Puget Sound and its tributaries. The Tribes were successful in convincing the courts that treaty rights should be more expansively understood to encompass habitat protection as essential to the fishing resource.

As with any litigation effort, only some Tribal suits have been successful thus far. The twenty-one Northwest Tribes won their fishing rights case regarding Washington State culverts, but Tribes have not yet been successful in opposing the Dakota Access Pipeline crossing under Lake Oahe, and the Native Village of Kivalina did not win its climate change lawsuit either.

But, by filing these lawsuits, Tribal governments are communicating in very specific ways how environmental quality matters in these communities: to survival, to subsistence, to public health, but also in the intimate connection of spiritual practices to place.<sup>26</sup>

Outside of the courts, the lawsuits have prompted greater public dialogue over Tribal characterization of their environmental injuries, as well as their claims to greater environmental rights.

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24. The Rosebud Sioux and Fort Belknap Indian Community also filed suit in September 2018, challenging the presidential permit granted to build the Keystone XL pipeline through eastern Montana, the Dakotas, and Nebraska. *See* Complaint for Declaratory and Injunctive Relief, *Rosebud Sioux Tribe v. U.S. Dep’t of State*, No. 18-cv-0-0118-BMM (D. Mont. filed Sept. 10, 2018) (arguing that government action should be set aside as violating the National Environmental Policy Act, the National Historic Preservation Act, and the Administrative Procedure Act, among other things).

25. *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *aff’d by an equally divided court*, 138 S. Ct. 1832 (2018).

26. Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENVTL. L. 42, 47–48 (2014).

Because of these lawsuits, we have seen more discussion of why and to whom environmental quality matters. That's taken place in the popular press, to be sure, but also on the floors of the House and the Senate.<sup>27</sup>

### *B. Cities*

Cities, too, are significant new entrants into environmental litigation.<sup>28</sup> In the 1980s, municipal entities, particularly significantly-sized cities, began more often to take their grievances to court, bringing public nuisance claims against manufacturers of tobacco and asbestos, firearms, lead paint, and opioids for harm both to the city and to their communities.<sup>29</sup> In the last several years, municipalities have expanded their efforts into the environmental arena. For example, New York City and numerous other cities brought tort claims against Exxon, along with other fuel additive manufacturers, for contamination of drinking water supplies with the additive MTBE.<sup>30</sup> These claims were largely successful and the cities recovered millions of dollars in settlements and judgments.<sup>31</sup>

As of 2019, the City of Seattle and other municipalities are in court with public nuisance and other claims against Monsanto, the

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27. *E.g.*, 162 CONG. REC. H7065-01 (2016) (statement of Rep. Gabbard); 162 CONG. REC. S6598-01 (2016) (statement of Sen. Hoeven); 162 CONG. REC. S6505-07 (2016) (statement of Sen. Reid).

28. Cities appear to have filed substantially more citizen suits after 2000 than before. In April, 2019, I ran the query, ti(city) and "citizen suit" and (pollution or environment!), in the Westlaw database of federal district opinions, both published and unpublished. The search yielded 338 opinions. I reviewed these individually, locating opinions in seven citizen suits total filed by cities in the 1970s and 1980s, compared with eight citizen suits filed by cities in the 1990s, twenty-five suits filed from 2000 to 2009, and sixteen suits filed between 2010 and 2018. This data is merely impressionistic, since not all citizen suits filed by cities may have resulted in opinions in the Westlaw database, and my search may have underrepresented suits filed by municipal entities titled, for example, "village" or similar. The search also did not include common law tort claims or claims for, say, cleanup liability under the Comprehensive Environment Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601 et seq. Nonetheless, along with the public nuisance cases described in the text, the search results strongly suggest an overall rise in environmental litigation brought by city plaintiffs.

29. *See generally* Kathleen S. Morris, *Cities Seeking Justice: Local Government Litigation in the Public Interest*, in HOW CITIES WILL SAVE THE WORLD: URBAN INNOVATION IN THE FACE OF POPULATIONS FLOWS, CLIMATE CHANGE AND ECONOMIC INEQUALITY 189, 201 (Ray Brescia and John Travis Marshall eds., 2016) (arguing that cities are "units of representative democracy").

30. *E.g.*, *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 725 F.3d 65, 84 (2d Cir. 2013) (tort claims included product liability claims, negligence, nuisance, and trespass).

31. *E.g.*, Reuters, *Oil Companies Settle MTBE Pollution Suit*, N.Y. TIMES (May 7, 2008), <https://www.nytimes.com/2008/05/07/business/rtoil.html> (reporting a settlement of \$423 million); Mireya Navarro, *City Awarded 105 Million in Exxon Mobil Lawsuit*, N.Y. TIMES, Oct. 19, 2009 (reporting a jury award of \$104.7 million over MTBE contamination of groundwater).

American manufacturer of PCBs, to hold it responsible for cleaning up PCB contamination of waterways and drainage systems in those cities.<sup>32</sup> They are alleging that Monsanto's promotion and sale of PCBs to numerous consumer product manufacturers essentially made waterway contamination inevitable.

Finally, Oakland, San Francisco, and New York City filed suit in 2017 against five of the largest petroleum conglomerates for damages on a public nuisance theory.<sup>33</sup> The cities are arguing that even as the major oil and gas companies raised the decks of offshore platforms and changed the design of facilities in the warming Arctic to stave off the risks of climate change, they continued to promote the sale of petroleum products widely to the public. Their products, of course, were made to be combusted and greenhouse gas emissions were the inevitable result.

New York City in particular has pointed out its vulnerability to sea-level rise due to its long coastline and its large flood plain.<sup>34</sup> It is now spending billions on "climate resiliency," including elevating facilities and streets and waterproofing infrastructure such as its subway system.<sup>35</sup> All the cities are seeking damages to cover the costs of adapting to climate change. New York City, of course, is litigating on behalf of its population of 8.6 million; San Francisco and Oakland on behalf of a population of over a million combined. The cities are in court on behalf of the health and welfare of their residents, as well as the city's own territory.

### C. Youth

*Juliana v. United States* is a climate change lawsuit with a bold set of claims. It was filed in 2015 by twenty-one "youth plaintiffs," now ages 11 to 22, against the federal government. In the *Juliana* case, the youth plaintiffs are arguing that the federal government has failed in its responsibility to them to carefully

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32. *E.g.*, *City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096 (W.D. Wash. 2017). So have the City of San Jose and others. *E.g.*, *City of San Jose v. Monsanto Co.*, 231 F. Supp. 3d 357 (N.D. Cal. 2017). Washington State appears to have filed its own claim. See Gene Johnson, *Washington State Suing Agrochemical Giant Over PCB Pollution*, WASH. POST (Jan. 5, 2018), [https://www.washingtonpost.com/national/health-science/washington-state-sues-monsanto-over-pcb-pollution/2016/12/09/e914b59c-be7c-11e6-91ee-1adddfe36cbe\\_story.html?utm\\_term=.9ce40396e596](https://www.washingtonpost.com/national/health-science/washington-state-sues-monsanto-over-pcb-pollution/2016/12/09/e914b59c-be7c-11e6-91ee-1adddfe36cbe_story.html?utm_term=.9ce40396e596).

33. See *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018), *appeal filed* (9th Cir. Sept. 4, 2018); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 469 (S.D.N.Y. 2018), *appeal filed* (2d Cir. July 26, 2018).

34. See generally Amended Complaint ¶ 64, *City of New York v. BP, p.l.c. et al*, No. 18-cv-00182-JFK (S.D.N.Y. filed Mar. 16, 2018).

35. New York City has launched a \$20 billion program in "climate resiliency, including constructing levees and sea walls, elevating facilities and streets, and waterproofing and hardening infrastructure." *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 469 (S.D.N.Y. 2018), *appeal filed* (2d Cir. July 26, 2018).



manage coastal areas and the atmosphere consistent with its obligations under the public trust doctrine, as well as that the federal government has violated the plaintiffs' rights to a stable climate, a right the youth plaintiffs are asking to be recognized as a constitutional right. They are asking that the court both overturn federal actions, including some particular federal authorizations related to export of liquefied natural gas ("LNG"), and order the federal government to implement an "enforceable national remedial plan" regarding greenhouse gases that will at least "stabilize" the climate system.<sup>36</sup> *Juliana* was originally scheduled for trial on October 29, 2018, but in November, 2018, the district judge certified her orders to the Ninth Circuit.<sup>37</sup> *Juliana* is the most prominent of numerous lawsuits filed by youth plaintiffs, including actions in Alaska, Florida, Massachusetts, North Carolina, and elsewhere.<sup>38</sup>

Like many more typical environmental lawsuits, this group is represented by an NGO, Earth Guardians. But it is distinctive because although it is not styled as a class action, the youth plaintiffs are in court as a group seeking to put a human face not only on their generation, but on the interests of future generations. The plaintiffs mention climate change's impact on their own health, life, and opportunities, but also explicitly and publicly describe their role as representing their generation and, more generally, young people.<sup>39</sup> The case may involve the first major U.S. trial in which we can expect to see oral testimony offered by the federal government on climate change science in an adversarial setting and a record created under stringent federal

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36. First Amended Complaint for Declaratory and Injunctive Relief ¶ 7, *Juliana v. United States*, No. 15-cv-01517-TC (D. Or. filed Sept. 10, 2015). Its plaintiff group also includes the climate scientist James Hansen as a guardian for future generations.

37. Although 28 U.S.C. § 1292(b) (2012) appears to contemplate certification of individual orders for appeal, District Judge Aiken appears to have certified *all* previous orders in the case for appeal. Order, *Juliana v. United States*, No. 6:15-cv-01517-AA, (D. Or. Nov. 21, 2018) at 6 (order staying the case pending a decision by the Ninth Circuit Court of Appeals) ("this Court . . . immediately certifies this *case* for interlocutory appeal") (emphasis added).

38. *E.g.*, First Amended Complaint, *Reynolds v. Florida*, No. 18-CA-000819 (Leon Cty, Fl. filed Dec. 26, 2018) (seeking to enforce state's public trust obligations and constitutional rights to stable climate). The nongovernmental organization Our Children's Trust maintains a list of youth lawsuits pending in state court. See [www.ourchildrenstrust.org/pending-state-actions](http://www.ourchildrenstrust.org/pending-state-actions) (last visited Apr. 8, 2019).

39. *E.g.*, Sophie Kivlehan, *Your View by 2017 Parkland Grad: Why I sued the federal government over harmful air pollution*, MORNING CALL (Nov. 5, 2018), <https://www.mcall.com/opinion/mc-climate-change-lawsuit-paris-accord-kivlehan-ithink-0623-20170622-story.html> ("Climate change is the biggest threat facing my generation."); Jennifer Hackett, *Kids versus Fossil Fuels: A Chat with a Teenage Activist*, SCIENTIFIC AMERICAN (Apr. 15, 2016), <https://www.scientificamerican.com/article/kids-versus-fossil-fuels-a-chat-with-a-teenage-activist/> (Plaintiff Kelsey Juliana stated that climate change "could have an impact on my livelihood" and that "we're arguing that the U.S. government has betrayed its youth . . .").

evidentiary standards. Overall, it's fair to say that the plaintiffs are seeking a very high impact judicial ruling. One indicator of this may be how hard the U.S. government is fighting this suit. The United States filed two motions in the Supreme Court to stay discovery and trial pending a petition for certiorari or mandamus. Both such motions were ultimately denied, the first in July, 2018, and the second in November, 2018.<sup>40</sup> Nonetheless, the strong signals of concern from the Supreme Court likely prompted the district judge to delay the trial in order to certify her rulings for interlocutory appeal to the Ninth Circuit, which she did on November 21, 2018.<sup>41</sup> As of April, 2019, oral argument in the Ninth Circuit had been scheduled for June, 2019.<sup>42</sup>

### III. A NORMATIVE PERSPECTIVE ON THE SUITS

The environmental claims in the Tribal, city, and youth suits range widely; the plaintiffs are asserting claims based on treaties, statutes, the Constitution, and common law. Their injuries range from the very local to the global.

Nonetheless, there are some commonalities. First, these plaintiffs, even though their claims may encompass injury to themselves as governmental entities or as individuals, are also in court overtly to represent a community or a nation.<sup>43</sup> The City of New York, for example, is seeking damages both for injury in its

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40. See Order, *United States v. U.S. District Court for the District of Oregon*, No. 18A65 (U.S. July 30, 2018) (order denying application for stay) (“The Government’s request for relief is premature and is denied without prejudice. The breadth of respondents’ claims is striking, however, and the justiciability of those claims presents substantial grounds for difference of opinion.”); Order, *In re United States*, No. 18A410 (U.S. Nov. 2, 2018) (order denying stay “because adequate relief [on the mandamus petition] may be available in the United States Court of Appeals for the Ninth Circuit” and citing the July order’s comment that “the ‘striking’ breadth of plaintiffs’ . . . claims ‘presents substantial grounds for difference of opinion.’”).

41. Order, *Juliana v. United States*, No. 6:15-cv-01517-AA (D. Or. Nov. 21, 2018) (order staying the case pending a decision by the Ninth Circuit Court of Appeals); *e.g.*, Order, *Juliana v. United States*, No. 18-36082 (9th Cir. Dec. 26, 2018) (accepting appeal, given district judge’s interlocutory appeal certification, over dissent from Judge Friedland that district judge’s findings did not appear to indicate that district court was “of the opinion” that interlocutory appeal would materially advance the litigation’s termination but instead indicated that it was “compelled” to issue the certification).

42. See Order, *Juliana v. United States*, No. 18-36082 (9th Cir. Feb. 4, 2019).

43. *E.g.*, Amended Complaint ¶ 15, *City of New York v. BP, p.l.c. et al.*, No. 18-cv-00182-JFK (S.D.N.Y. filed Mar. 16, 2018). (“The City is responsible for the public health, safety, and welfare of its more than 8.5 million residents and the millions of additional people who work in or visit New York City each day.”).

proprietary capacity and injury to its community.<sup>44</sup> The complaint of the twenty-one *Juliana* plaintiffs claims that they aim to “represent the youngest living generation.”<sup>45</sup>

Further, these plaintiffs are arguing to expand our understanding of environmental injury. Tribal plaintiffs are focusing attention on losses to ways of life from degradation of waterbodies, as in the Dakota Access Pipeline challenges and salmon treaty rights claims; other plaintiffs are arguing that injury risks need to be taken more seriously, such as a greater risk of injury from extreme weather events and other anticipated climate-related changes. Those latter arguments are being made in the municipal cases against oil companies and in the youth cases, including *Juliana*, on behalf of future generations.

And perhaps predictably, given the evolving nature of environmental challenges combined with the relative stasis in federal environmental statutes, the plaintiffs are often advancing legal claims that seek to move both statutory and common law toward greater environmental protection.

Consider the Tribal claim in the treaty rights case involving Washington State’s culverts. The twenty-one Tribes were seeking to enforce the Stevens treaties of 1854 and 1855, which “guaranteed ‘the right of taking fish . . . in common with all citizens of the Territory.’”<sup>46</sup> They succeeded in arguing that the right was broad enough to bar the State of Washington from taking action such as building the so-called barrier culverts that interfered with salmon reproducing and contributed to the decline in salmon population. This was so even though the Ninth Circuit found simply that the barrier culverts had a negative effect upon the salmon population, rather than finding that the State’s affirmative purpose was to reduce the salmon available to the Tribes.<sup>47</sup> The Supreme Court affirmed the Ninth Circuit with an

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44. New York is asserting injury in its proprietary capacity, *e.g.*, *id.* ¶ 12 (“The costs of these largely unfunded projects [to protect public health and safety and City property and infrastructure] run to many billions of dollars and far exceed the City’s resources.”), as well as to the community, *id.* ¶ 130 (describing harms from defendants’ conduct as including “injuries to public health resulting from more frequent and more intense heat waves and flooding.”).

It is worth observing that some cities also are environmental defendants—perhaps for sewage treatment or waste disposal violations. In these instances, suits brought by cities may represent efforts to seek contribution.

45. First Amended Complaint for Declaratory and Injunctive Relief ¶ 96, *Juliana v. United States*, No. 15-cv-01517-TC (D. Or. filed Sept. 10, 2015) (“Youth Plaintiffs represent the youngest living generation, beneficiaries of the public trust.”); *id.* ¶ 10 (“This Court is Plaintiffs’ last resort to ensure their reasonable safety, and that of our Posterity, from the harm perpetrated by Defendants.”).

46. *United States v. Washington*, 853 F.3d 946, 954 (9th Cir. 2017).

47. *Id.* at 956–66.

equally divided vote despite concern expressed by eleven States that the ruling would enable other treaties to be “expanded to create wholly new rights.”<sup>48</sup>

The municipal public nuisance lawsuits also seek an expansive understanding of common law nuisance doctrine. The prototypical environmental public nuisance case involves the large industrial plant that spews soot into the air and onto neighboring properties; the air emissions interfere with the public use and enjoyment of a shared resource, and most courts would agree that this amounts to a public nuisance.<sup>49</sup> In the municipal cases, though, the cities want the courts to recognize an expanded notion of proximate causation. Seattle is arguing that Monsanto has created a public nuisance not by dumping PCBs into the waterways directly, but by promoting and selling PCBs to makers of a wide array of consumer products then used in Seattle. Even though the conduct was legal at the time, and even though Monsanto could not control what happened to these consumer goods, Monsanto, so the argument goes, was aware of PCB’s toxicity and their propensity to leach, and its conduct thus has “unreasonably interfered” with public use of shared resources.<sup>50</sup>

In the New York City, San Francisco, and Oakland cases against the oil companies for damages from climate change, the cities’ suits are not based on greenhouse gases emitted by the oil companies themselves. Instead, the cities are arguing that the major oil companies’ promotion and sale of fossil fuels itself should be seen as a public nuisance—because of environmental consequences that inevitably, and thus foreseeably, follow when fossil fuels are purchased and then burned.<sup>51</sup>

Plaintiffs in *Juliana v. United States* are also arguing to expand the government’s common law obligations. The youth plaintiffs are arguing that the federal government has a fiduciary

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48. See Brief of Amici Curiae States of Idaho, Indiana, Kansas, Louisiana, Maine, Michigan, Montana, Nebraska, Oklahoma, Wisconsin and Wyoming In Support of Petitioner at 3, *Washington v. United States*, No. 17-269 (U.S. filed Sept. 20, 2017).

49. *E.g.* *Georgia v. Tennessee Copper*, 237 U.S. 474 (1915); see generally ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY* 73 (7th ed. 2013) (“The doctrine of public nuisance . . . later expanded to embrace actions against those who fouled public waters or emitted noxious fumes.”).

50. *City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096, 1107 (W.D. Wa. 2017) (finding that Seattle successfully pleaded causation by alleging Monsanto, the sole US producer of PCBs, who promoted its use in a “wide range of industrial and commercial products” also “knew that its chemicals were dangerous, and that as early as 1969 Monsanto knew that . . . ‘nearly all [PCBs used in highway paint]’ wind up in the environment.”).

51. Amended Complaint ¶ 80, *City of New York v. BP, p.l.c. et al*, No. 18-cv-00182-JFK (S.D.N.Y. filed Mar. 16, 2018). (despite knowledge of the risks of climate change and their sophistication, defendants “decided to continue [their] conduct and commit [themselves] to massive fossil fuel production.”).

duty under the so-called public trust doctrine to manage shared resources, including coastal areas and the atmosphere, on behalf of the whole public. That duty, however, has only previously been imposed on State governments,<sup>52</sup> and not with respect to the atmosphere as yet.<sup>53</sup> The *Juliana* plaintiffs are also arguing that the federal courts should recognize a new due process right under the Constitution—the right to a stable climate capable of sustaining human life.<sup>54</sup> These are bold claims. As noted above, the boldness of these claims has ultimately led to the district judge certifying her rulings in favor of the plaintiffs to the Ninth Circuit for interlocutory review.<sup>55</sup>

These plaintiffs have not advocated for every imaginable environmental value; research has not uncovered claims by these plaintiffs to protect the existence value of a resource,<sup>56</sup> for example, or to advocate directly on behalf of a plant or animal species.<sup>57</sup> Even so, these plaintiffs are bringing suits that ask the courts to take an expansive understanding of the human consequences associated with environmental injury.

So, what should we think of these lawsuits from Tribes, cities, and children? They might give us pause, especially if we hark back to Justice Marshall's comment in *Marbury v. Madison*, that the "province of the court is, solely, to decide on the rights of individuals."<sup>58</sup> While judicial rulings obviously can have impact

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52. Cf. MARY CHRISTINA WOOD, *NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE* (2013) (arguing for expansion of public trust doctrine to federal government and to atmosphere).

53. The public trust doctrine has previously applied centrally to waterbodies, natural resources, and parkland. *E.g.*, *In re 10 E. Realty v. Vill. of Valley Stream*, 854 N.Y.S.2d 461 (N.Y. App. Div. 2008). In rejecting a motion to dismiss the youth climate change lawsuit, Judge Aikens did not reach the atmospheric trust issue, finding it sufficient that the plaintiffs alleged impacts on marine resources. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1255–56 (D. Or. 2016).

54. First Amended Complaint for Declaratory and Injunctive Relief ¶ 279, *Juliana v. United States*, No. 15-cv-01517-TC (D. Or. filed Sept. 10, 2015) ("Our nation's climate system, including the atmosphere and the oceans, is critical to Plaintiffs' rights to life, liberty, and property.").

55. *Juliana v. United States*, No. 6:15-cv-01517-AA (D. Or. Nov. 21, 2018) (order staying the case pending a decision by the Ninth Circuit Court of Appeals).

56. *E.g.*, *Ohio v. Dep't of the Interior*, 880 F.2d 432, 464 (D.C. Cir. 1989) (vacating natural resource damages assessment regulations for failure to require full consideration of existence values).

57. Cf. *Sierra Club v. Morton*, 405 U.S. 727, 742 (1972) (Douglas, J., dissenting) ("Contemporary public concern . . . should lead to the conferral of standing upon environmental objects to sue for their own preservation"); *Naruto v. Slater*, 888 F.3d 418, 424 (9th Cir. 2018) (implying availability of animal standing, as "the complaint includes facts sufficient to establish Article III standing" for macaque monkey, though ultimately rejecting standing on statutory grounds).

58. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803); see also *Spokeo v. Robins*, 136 S. Ct. 1540, 1547 (2016) (reasoning that standing doctrine helps "prevent the judicial process from being used to usurp the powers of the political branches' . . . and confines the

outside the scope of an individual case, whether through precedent or through the relief granted,<sup>59</sup> and judges have the final word on what the law requires, including of executive agencies,<sup>60</sup> the argument here could be that these claims essentially seek to vindicate the public interest by advocating for policy change, and appeals to vindicate the public interest should be made in the political arena.<sup>61</sup>

The Supreme Court has sounded similar themes in cautioning against using the courts to re-fight battles over policy preferences. Thus, the court has suggested that large groups of people, particularly those with diffusely spread losses, should rely on the political process.<sup>62</sup> Taxpayer challenges are the most extreme example; injuries are generally individually small, and taxpayer challenges are treated as a stand-in for policy disagreement. Thousands of taxpayers potentially can vote, and vote together, to raise their issues in the political arena. Courts typically refuse to hear these claims, finding that such plaintiffs lack standing to sue.<sup>63</sup> Concern has similarly been expressed over the issuance of

federal courts to a properly judicial role.” (quoting *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1446 (2013))).

59. See *infra* notes 64-65 and accompanying text (on nationwide injunctions); cf. Robert F. Nagel, *Controlling the Structural Injunction*, 7 HARV. J. L. & PUB. POL’Y 395, 396 (2006) (“Today federal courts control more important public decisions and institutions [including schools, prisons, jails, mental health systems, public housing, welfare programs, and fisheries] in more detail and for more extended periods of time than at any time in our history.”).

60. *E.g.*, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984) (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”); *Fed. Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (Courts “must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.”).

61. Cf. Tara Leigh Grove, *Government Standing and the Fallacy of Institutional Injury*, 167 U. PA. L. REV. (forthcoming 2019) (manuscript at 1, 29) (on file with William and Mary Law School) (arguing against government assertions of harm to “their official powers and duties” to establish standing; arguing state governments should be able to interact with other political institutions over their prerogatives without going to court).

62. *E.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992) (rejecting argument that “undifferentiated public interest in executive officers’ compliance with the law” can ever be basis for standing.) With extraordinarily rare exceptions, for example, the courts do not take up taxpayer grievances that government funds are being poorly, illegally, or even unconstitutionally spent. Individual taxpayers cannot claim that the U.S. government inappropriately contracted out security functions to Blackwater or Halliburton, for example, or that the U.S. government isn’t collecting sufficient royalties from a lease to drill for oil on federal lands. Federal courts are of the view that even if they are collectively important, taxpayers’ individual interests in these claims may not be all that significant. Meanwhile, taxpayers have the ability to vote—and enough potential allies in the political process—that courts have concluded that their interests do not warrant judicial intervention.

63. *E.g.*, *United States v. Richardson*, 418 U.S. 166, 176–77 (1974) (“This is surely the kind of generalized grievance [not appropriate for judicial resolution] since the impact on [the taxpayer] is plainly undifferentiated and ‘common to all members of the public.’”) (citations omitted); cf. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445

nationwide injunctions when a single plaintiff challenges government action on the theory that the injunction provides broader relief than to the parties to the case,<sup>64</sup> although many courts accept that a decision to set aside or enjoin a particular government action or to enjoin particular private activity can legitimately benefit more than the plaintiff who brought the case.<sup>65</sup> Similarly, some scholars have criticized suits by governmental entities to seek redress of injury to their official powers (such as the Senate's confirmation prerogative), arguing that these claims, too, belong on political turf.<sup>66</sup>

An argument here could be that Tribes, cities, and children, even if they possess specific, cognizable injuries, are in court centrally to express frustration with or to shift environmental policy. If so, we might question whether that debate over policy preferences belongs in the courts. Perhaps we should encourage these groups to take their concerns to the push and pull of the political arena instead.

Viewing these claims circumspectly is also consistent with a narrow view of the judiciary's institutional competence. The theory here is that courts—particularly unelected judges—lack the competence to decide the subtle and complex policy questions that are intrinsic to assessing the soundness of government policy.<sup>67</sup>

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(1915) (constitutional due process requires no “direct voice” in the adoption of a generalized rule of conduct); *id.* (“Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) (“respondent cannot seek *wholesale* improvement of this program by court decree”) (refusing to find agency “action” under Administrative Procedure Act); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65 (2004) (relying on *Lujan* to find agency inaction insufficiently discrete to be reviewable under the Administrative Procedure Act).

64. *E.g.*, Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 418, 419 (2017) (“federal courts are issuing injunctions that . . . prohibit the enforcement of a federal statute, regulation, or order *not only against the plaintiff, but also against anyone.*”) (emphasis added).

65. *See also id.* at 444 (“When courts want to grant injunctions that go beyond protecting the plaintiffs, they point to the extent of the violation, the permissibility of injunctions benefitting nonparties, the impracticality of giving an injunction benefitting only the plaintiffs, and the need for complete relief.”) (footnotes omitted) (also noting counterarguments.). Judicial recognition of so-called “facial challenges” to laws or regulations also imply the legitimacy of a judgment with an effect beyond the litigants. *E.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STANFORD L. REV. 235, 236 (1994) (“If a court holds a statute unconstitutional on its face, the state may not enforce it under any circumstances”); *cf.* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 682 (1989) (noting that the core of the nonacquiescence issue is whether agency is “entirely free to disregard binding law in the circuit” following litigation of a particular claim); *id.* at 683 (“we believe that any [intracircuit] nonacquiescence that might come close to transgressing constitutional norms would also be proscribed by nonconstitutional constraints.”).

66. *E.g.*, Grove, *supra* note 61 (manuscript at 1, 4) (arguing that such “government institutions” should battle one another on political turf rather than in court).

67. Compare Richard Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?* 45 ENVTL. L. 1139, 1152–53 (2015)

Meanwhile, perhaps adjudication is not well-suited to address the proper balance among wide-ranging and conflicting interests, such as balancing our economic needs for natural resources against environmental preservation.

In my view, however, there are several reasons to welcome these claims. First off, many individuals suffering environmental injury who would wish to enforce their rights under environmental statutes or common law never make it to court. Even if we see such an individual—who generally lacks recourse to the political process—as a relatively appropriate plaintiff, the personal and financial obstacles for individuals seeking legal redress are substantial, despite the occasional availability of pro bono or contingency fee counsel.<sup>68</sup> It seems likely that only a tiny fraction of individuals with environmental injury ever take their claims to court.<sup>69</sup> Environmental nongovernmental organizations have helped take up the slack, but they, too, have finite resources.

Meanwhile, courts are not “self-starting;”<sup>70</sup> they cannot take up potential legal violations or difficult issues unless someone files a lawsuit first. Litigation brought by Tribes, cities, and children may not be a perfect substitute for individual claims. The governmental entities or other plaintiffs may not raise precisely the same claims or be able to seek exactly the same relief as an individual; relief sought might be either broader or narrower. But environmental injury is typically not particularly focused; consequences can be widespread. Numerous individual residents in Seattle who cannot, as a practical matter, bring suit may nonetheless face risks from PCBs in the waterways and may benefit from the City of Seattle acting as a plaintiff. In short, claims of the sort I am describing sometimes can be proxies for individual claims, much like citizen suits to enforce the laws. They can enable courts to hear claims of environmental legal violation or to hold the federal government accountable for complying with the law.<sup>71</sup>

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(arguing that courts possess “neither the competency nor the legitimacy” for environmental policy), *with* Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 WIS. L. REV. 785, 788 (2015) (reasoning that “the third branch must now recognize its obligation to provide a check on government exercise of power over the public trust.”).

68. *E.g.*, Alexandra Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193, 3200–01 (2013).

69. *Cf.* ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 51 (2017) (reporting that a medical malpractice study found that a claim was filed in under 2% of cases in which there was negligence indicated in New York hospital records).

70. Owen M. Fiss, *The Political Theory of the Class Action*, 53 WASH. & LEE L. REV. 21, 21 (1996).

71. *See* Lahav, *supra* note 68, at 3200–01. Municipalities may be unable to sue States without state law authorization. *E.g.*, *City of Trenton v. N.J.*, 262 U.S. 182, 187 (1923) (“A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the state exercising and holding powers and privileges subject to the



Second, these groups may have few other options to address environmental threats. Although Tribes and cities have a genuine stake in their territory and in governing their communities, they have limited direct regulatory power over environmental quality. As the Supreme Court commented regarding States in *Massachusetts v. Environmental Protection Agency*, Tribes and municipalities also cannot invade neighboring States or negotiate foreign agreements.<sup>72</sup> And both because damaging conduct can take place outside their boundaries and because regulatory authority is mostly located in States and the federal government, most municipalities and Tribes have a very limited ability to regulate harmful environmental conduct directly.<sup>73</sup>

Third, even if the political process may be an option for some entities, such as State governments, it is not especially welcoming for children, cities, or Tribes. This is more than a matter of ideology. Whichever party is in control of federal and state legislatures, well-funded, well-organized interest groups seem to be dominating political dialogue. But consider the youth plaintiffs in *Juliana* and the broader community of youth affected by climate change and environmental degradation. Of course, our children cannot vote, and neither can our children's children.<sup>74</sup> Even if parental votes take children's future welfare into account, that may be only one factor informing those votes.

Municipalities also face distinct obstacles to relying on political safeguards. State governments dominate the communication of preferences on the national stage, and they tend to over represent

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sovereign will.") (citation omitted); see also *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979).

72. See *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007).

73. Tribes may apply for EPA approval to administer certain limited provisions of federal environmental laws. See U.S. ENVTL. PROTECTION AGENCY, EPA'S DIRECT IMPLEMENTATION OF FEDERAL ENVIRONMENTAL PROGRAMS IN INDIAN COUNTRY (2016), <https://www.epa.gov/tribal/epas-direct-implementation-federal-environmental-programs-indian-country>. Even that authority may face opposition. See, e.g., Richard A. Monette, *Treating Tribes as States under Federal Statutes in the Environmental Arena: Where Laws of Nature and Natural Law Collide*, 21 VT. L. REV. 111, 111 (1997) (explaining that despite some federal statutes authorizing EPA to permit Tribes to regulate as States, "states and their citizens . . . challenge the EPA's authority to recognize tribal governance over them and their property."). Municipalities also may be restricted from directly regulating environmental issues. E.g., Richard Whisnant, *State Versus Local Government Power to Regulate Environmental Problems in NC*, ENVTL. LAW IN CONTEXT (Apr. 13, 2016), <https://elinc.sog.unc.edu/state-versus-local-government-power-to-regulate-environmental-problems-in-nc/>.

74. Selected jurisdictions now authorize youth to register to vote before the age of 18 and even to vote in a primary, but they must still be 18 years of age to participate in general elections. See generally NAT'L CONFERENCE OF STATE LEGISLATURES, PREREGISTRATION FOR YOUNG VOTERS (Feb. 12, 2019), <http://www.ncsl.org/research/elections-and-campaigns/preregistration-for-young-voters.aspx>.

the views of people living outside municipalities.<sup>75</sup> Representation in Congress tends to be more responsive to States than to municipalities, even though lawmakers may assert they represent local constituencies.<sup>76</sup> And as a number of scholars writing in local government law have observed, “our federalism” is not good for municipalities, even though most Americans live within metropolitan statistical areas.<sup>77</sup> The stronger regional or State governments, the less latitude municipalities have to respond to local preferences.<sup>78</sup> Finally, most people who live in poverty also live in cities, worsening the problem of underrepresentation.<sup>79</sup> 41% of those in poverty live inside the limits of principal cities; 84% of those in poverty live inside metropolitan statistical areas.<sup>80</sup>

Tribes, too, are poorly positioned to rely on the political process to respond to Tribal members’ needs and policy preferences. In addition to the ethnic and race-related prejudice they may face, Tribes represent some of the poorest communities in the country. Native Americans have the highest poverty rate of any racial or ethnic group in the U.S.<sup>81</sup> Tribal members are subject to some of the same voter disenfranchisement efforts that have plagued people of color across the country.<sup>82</sup> Thus, contrary to the

75. Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1188 (2018) (“The problem for American cities is exacerbated by a state-based system that favors rural over urban jurisdictions.”).

76. *Id.* at 1186 (“numerous elected officials—in statehouses and in Congress—can validly assert that they represent locals, even as they do not represent the city as a whole”); cf. Opinion, *America Needs a Bigger House*, N.Y. TIMES (Nov. 9, 2018), <https://www.nytimes.com/interactive/2018/11/09/opinion/expanded-house-representatives-size.html?action=click&module=Opinion&pgtype=Homepage>; Opinion, *A Congress for Every American*, N.Y. TIMES (Nov. 10, 2018), <https://www.nytimes.com/interactive/2018/11/10/opinion/house-representatives-size-multi-member.html>.

77. 86% of the U.S. population resides within metropolitan statistical areas; 32% reside inside the limits of “principal cities.” KAYLA FONTENOT, JESSICA SEMEGA, & MELISSA KOLLAR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2017, at 12 (2018).

78. Schragger, *supra* note 74, at 1186; Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 35–36, 39–40 (2002). *But see* Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J. L. & POL. 187, 191–95, 210 (2005).

79. Cf. Laurence E. Norton, II, *Not Too Much Justice for the Poor*, 101 DICK L. REV. 601 (1997).

80. FONTENOT, *supra* note 76, at 12.

81. See KAISER FAMILY FOUNDATION, POVERTY RATE BY RACE/ETHNICITY (2017) <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Feb. 17, 2019) (reporting poverty rate of 22% among American Indian/Alaska Native ethnicity, higher than any other ethnicity tracked).

82. In the fall of 2018, North Dakota passed legislation requiring a street address to register to vote, even though tens of thousands of North Dakotans, particularly Native Americans, lack street addresses and use post office boxes for their mail. Maggie Astor, *A Look at Where North Dakota’s Voter ID Controversy Stands*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/politics/north-dakota-voter-identification-registration.html>.

assumptions courts make in rejecting “generalized grievances,” Tribes, cities, and children cannot readily rely on direct regulatory powers or the political process.

By the same token, these entities may find their interests inadequately represented in State or federal enforcement. At the time of writing, in 2019, federal enforcement of environmental laws seems especially unlikely.<sup>83</sup> But even during administrations more receptive to environmental enforcement, institutions responsible for enforcement must pick and choose among a national array of potential cases, balancing a wide range of concerns. Enforcement priorities may not be developed in any sort of representative way or even be particularly transparent.<sup>84</sup> In short, going directly to court is one of the few tools that Tribes and cities have to respond to the needs of their communities—or to express their position on what their environmental legal rights should be.

Yet another reason to welcome these plaintiffs is their institutional advantage in identifying environmental injuries, especially compared with federal agencies and national organizations. Tribes and cities have an on-the-ground relationship with residents. They are often uniquely placed to spot environmental injuries, whether those are reports of illness, drinking water problems, or fumes. In 2014, for example, the City of St. Louis, Michigan collected reports of dead blackbirds and robins in people’s backyards. That signaled significant soil contamination with DDTs from a nearby chemical plant site that had already undergone one Superfund cleanup.<sup>85</sup> In turn, the community was able to argue for more extensive cleanup at the site.

And as we know from environmental justice advocates, environmental impacts vary. Environmental injuries are not uniform across the country or even across states. They vary across geographic areas and among communities. Climate-related impacts on coastal Florida will be different from inland impacts. Environmental hazards are often concentrated in poor urban neighborhoods; southwest Detroit is among the nation’s most

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83. *E.g.*, LEIF FREDRICKSON ET AL., ENVTL. DATA & GOVERNANCE INITIATIVE, A SHEEP IN THE CLOSET: THE EROSION OF ENFORCEMENT AT THE EPA (2018), <https://envirodatagov.org/publication/a-sheep-in-the-closet-the-erosion-of-enforcement-at-the-epa/>.

84. *See also* Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1093 (2013) (“because presidents have not claimed responsibility for supervising enforcement in a sustained and transparent way, accountability is limited.”).

85. *E.g.*, Editorial, *Dying Birds & Poisoned Soil: The Toxic Legacy of St. Louis*, PLANET EXPERTS, (Aug. 4, 2014), <http://www.planetexperts.com/dying-birds-poisoned-soil-toxic-legacy-st-louis/>.

hazardous areas for residents.<sup>86</sup> Tribes and cities, and, in some instances, children are in a position to detect these distinct environmental harms, particularly those accumulating gradually, and to speak for injured populations who are not receiving very much attention elsewhere.<sup>87</sup>

Further, Tribes and cities are likely to speak well for their communities' needs and preferences because they are constituted by their obligation to respond to community concerns and to care for their residents.<sup>88</sup> Although cities are located within States, people may feel as great an affinity for their city—or even greater—compared to their connection with their State or country. So when cities become “Plaintiff cities,” as Sarah Swan terms them, that is partly because cities are so closely connected with their distinct communities.<sup>89</sup> When the government of the Rosebud Sioux Tribe files suit, as it has against the federal government for authorizing the Keystone Pipeline to carry oil through the Midwest from the Alberta tar sands, it is both speaking for and accountable to its community of 35,000 members who may be unified geographically, culturally, or both.<sup>90</sup> Their positions in litigation are likely to be informed by dialogue within their communities.

Owing to the demographics of these communities and their place in our political system, it also is worth underscoring that Tribes, cities, and youth plaintiffs are all likely to give a greater voice to viewpoints of the poor and disenfranchised compared with individual or even State government plaintiffs.<sup>91</sup>

Moreover, these entities are democratically accountable for the decisions they make, including in litigation. Tribes and cities cannot rush off to court at will. Litigation is not cheap, even if Tribes and cities are fortunate enough to have access to pro bono or reduced rate legal assistance. They typically do not file lawsuits

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86. *E.g.*, Hannah Stephanz, *The Need to Fight for Michigan's Dirtiest Zip Code*, EARTHJUSTICE (Aug. 11, 2014), <https://earthjustice.org/blog/2014-august/the-need-to-fight-for-michigan-s-dirtiest-zip-code> (noting that southwest Detroit is Michigan's dirtiest zip code and the country's third dirtiest).

87. *See, e.g.*, Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005) (“Disaggregated institutions create the opportunity for global minorities to constitute local majorities.”); *see also* Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227, 1232 (2018) (describing the ability of plaintiff cities to litigate over public health harms with high impacts on minority and vulnerable populations or characterized by a slow accumulation).

88. *E.g.*, Morris, *supra* note 29, at 201.

89. Swan, *supra* note 87, at 1257–58; Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire, Anti-federalism From the Attack on Monarchism to Modern Localism*, 84 NW. U. L. REV. 74, 97–98 (1989); Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 76 (2014).

90. Complaint for Declaratory and Injunctive Relief ¶14, *Rosebud Sioux Tribe v. U.S. Dep't of State*, No. 18-Cv-00118-BMM (D. Mt. filed Sept. 10, 2018) (“Rosebud provides for the health, safety, and welfare of its members . . . Rosebud has almost 35,000 members, many of whom reside in the area that will be crossed by the Pipeline.”).

91. *See* Morris, *supra* note 29; Gerken, *supra* note 87.

until there has been considerable internal deliberation within Tribal and city governments. Meanwhile, elected officials supervise those lawsuits.<sup>92</sup>

Because of these characteristics, Tribes and cities may possess important advantages over individual plaintiffs, both in when they choose to sue and in the content of the arguments they make. Indeed, Lemos identifies the typical primacy of individuals in litigation as a “bug” in the system of litigation; they and their lawyers can shape policy, but without “authorization [from] or accountability [to]” the broader public whose interests may be affected.<sup>93</sup> Further, democratic accountability is not typically a feature of nongovernmental organizations, as important as they are in monitoring governmental action and representing interests that fare poorly in the political process.<sup>94</sup>

Finally, let’s turn back to the youth plaintiffs in cases such as *Juliana*. They are not democratically accountable.<sup>95</sup> But these individual plaintiffs see themselves as taking on the obligation to speak for a large and distinctive group that has not, so far, been able to speak for itself. And they naturally have a longer time horizon than many of us; they seem able to make the interests of future generations relatively less abstract and more concrete in our public dialogue on the environment. That the plaintiffs have expressly claimed this role may prompt them to be more publicly engaged with the views of others.

There is no guarantee of victory in these lawsuits. But even if these plaintiffs ultimately lose their lawsuits, they still gain some important benefits. Litigating is a critical opportunity for underrepresented groups to participate in the broader public

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92. Kathleen S. Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in *WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY* 51, 62 (Columbia University School of Law Attorneys General Program and Yale Law School Liman Public Interest Program 2010) (“The courts, the city budget process, the press, and the people (via elections) serve as rigorous checks” on litigation decisions.) The idea for the lawsuit may not have originated with the city, but this is little different from any process of government decision making that draws on ideas from a wide range of sources. See generally JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (2011).

93. Margaret Lemos, *Three Models of Adjudicative Representation*, 165 U. PA. L. REV. 1743, 1749–51 (2017) (identifying challenges for litigation when individual may not wish to raise claims serving broader constituency).

94. The Supreme Court put a stop to early environmental group efforts to assert broader environmental interests in *Sierra Club v. Morton*, 405 U.S. 727 (1972). See *id.* at 736 (refusing to find standing for environmental group attempting to assert broader interests in the area’s aesthetics and ecology and rejecting arguments that the Sierra Club’s “longstanding concern with and expertise in [the use of natural resources] were sufficient to give it standing as a ‘representative of the public.’”).

95. Perhaps because the relief they seek would necessarily benefit others similarly situated, this suit also has not been styled as a class action. Cf. Lemos, *supra* note 93 (discussing advantages of private class actions).

dialogue. These groups are presenting proof of their environmental injuries and their arguments about rights and obligations to a governmental institution that is obligated to serve the public. The *Juliana* case, for example, has received significant news coverage,<sup>96</sup> and may have made it more likely that environmental policy makers will engage more directly with the interests of future generations.

Similarly, the Standing Rock Sioux and the Cheyenne River Sioux's lawsuits over the Dakota Access Pipeline have sharply raised the visibility of their environmental concerns. Appearing in the federal courts, they have obtained an opportunity to articulate their rights and to seek answers from the government. Even though the Tribes have not so far succeeded, they also have drawn their environmental injuries to the attention of other decision-making bodies.

One more benefit from the lawsuits: litigation is a way to open important information in control of one side to the public.<sup>97</sup> If the *Juliana* case makes it to trial, for example, it will be the first major litigation in which the government will have to present its view of climate science in court and face questioning on that view. So ensuring that Tribes, cities, and children have their day in court is, of course, critical for them.

But at least as critical, in my view, is that the emergence of these plaintiffs groups is likely to improve judicial decision making. Chief Justice Roberts characterized judging as, more or less, calling balls and strikes.<sup>98</sup> That metaphor was never terribly persuasive, given the number of difficult, unsettled legal questions regularly making their way to court, but it certainly doesn't typify environmental cases. First, especially at the present moment, environmental litigation is shot through with difficult questions. Courts must consider the implications of newly recognized forms of environmental harm and an emerging understanding of what causes that harm. Meanwhile, courts handling environmental litigation also must contend with dated federal environmental statutes that are often phrased in vague terms as well as new

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96. *E.g.*, Miranda Green and Timothy Cama, *Overnight Energy: Supreme Court declines to stop kids' climate lawsuit*, THE HILL (July 30, 2018) <https://thehill.com/policy/energy-environment/overnights/399588-overnight-energy-supreme-court-refuses-to-stop-kids>; Fred Pearce, *Meet the 'climate kids' suing the US government over global warming*, NEW SCIENTIST (Aug. 15, 2018), <https://www.newscientist.com/article/mg23931910-500-meet-the-climate-kids-suing-the-us-government-over-global-warming/>.

97. *E.g.*, Alexandra Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193, 3197 (2013).

98. *See* U.S. COURTS, CHIEF JUSTICE ROBERTS STATEMENT – NOMINATION PROCESS, [www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process](http://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process) (last visited Feb. 17, 2019).

arguments to broaden common law obligations. Whatever their qualifications on such matters, judges simply cannot avoid addressing questions of policy and value left unresolved in earlier common law rulings or the statutes they are applying.<sup>99</sup>

Second, to state the obvious, judicial rulings often have impact far beyond the litigants in the case, including through precedential effect for common law rulings or statutory interpretation.<sup>100</sup> In environmental cases in particular, because the government or a major private actor is so often involved, the ruling itself can have impacts far beyond the individual litigants, whether it is a ruling setting aside a federal agency action or imposing a regional or nationwide injunction.<sup>101</sup>

At the broadest level, take the federal constitutional question of standing to sue. Current doctrine calls on the judiciary to determine which environmental values are significant enough so that injury to them entitles a plaintiff to be heard—to assert a real “case or controversy” justifying Article III jurisdiction over the plaintiff’s claims.<sup>102</sup> Courts may be influenced by statutes in deciding these questions,<sup>103</sup> but typically legislative actions have effectively been treated as suggestive rather than governing. For example, courts may find a plaintiff has standing when the plaintiff has suffered lost property value, illness, lost recreational opportunities or aesthetic enjoyment, or injury to some forms of spiritual value,<sup>104</sup> but not stigma from the denial of equal

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99. Cf. Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1507 (2007) (“[A]s compared to courts, legislators plausibly have better information than judges about the factual components and causal consequences of their constitutional decisions.”).

100. *E.g.*, Lemos, *supra* note 93.

101. *Id.* at 1746; *e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (setting aside EPA’s decision not to issue Clean Air Act endangerment finding for automotive greenhouse gases); *South Carolina Coastal Conservation League v. Pruitt*, 318 F. Supp. 3d 959 (D.S.C. 2018) (enjoining Trump Administration delay of the Obama Administration “waters of the United States” Clean Water Act rule); Ariel Wittenberg & Amanda Reilly, *Judge shifts legal brawl, revives WOTUS in 26 states*, E&E NEWS (Aug. 16, 2018), <https://www.eenews.net/stories/1060094329>.

102. *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (“standing is an essential and unchanging part of the case-or-controversy requirement of Article III”).

103. Despite comments in *Lujan v. Defenders of Wildlife* that Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,” deciding which injuries are sufficiently concrete to warrant standing remains an enterprise closely linked to the common law. 504 U.S. at 57. *See, e.g.*, Cass Sunstein, *What’s Standing after Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 167 (1992) (the injury-in-fact requirement of standing “injects common law conceptions of harm into the Constitution” and is “inevitably a product of courts’ value-laden judgments and of governing legal conventions”). *But see* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (arguing that “standing should simply be a question on the merits of plaintiff’s claim”).

104. *See generally* 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.8 (3d ed. 2018).

treatment unless the equal treatment has been personally denied,<sup>105</sup> nor the prospect of lost future recreational opportunities unless the location of loss can be precisely identified.<sup>106</sup> Like common law rulings, these rulings typically cite earlier judicial precedent rather than statutory enactments or any other source.<sup>107</sup>

Statutes also often do not speak in a detailed fashion to core legal questions, leaving it to the courts to delineate environmental rights and obligations in their opinions. For example, consider the National Environmental Policy Act, which requires government entities to perform environmental analysis prior to taking action. NEPA requires discussion of “the environmental impact” of the proposed government decision, but Congress did not further specify the content of those decisions in the statute’s text.<sup>108</sup> The Council on Environmental Quality NEPA regulations that could have further delineated the sorts of impacts to the natural world which must be considered are remarkably nonspecific.<sup>109</sup> It thus has fallen on courts to make the final decision on which “environmental impacts” must be considered.<sup>110</sup>

Similarly, in tasking the EPA with deciding whether power plant mercury emissions warrant regulation, the Clean Air Act asks the agency to assess “appropriate[ness]” of such regulation. It was the Supreme Court that finally decided that statutory language authorizing “appropriate” regulation *required* the EPA to consider cost at that early phase.<sup>111</sup>

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105. *Allen*, 468 U.S. at 755 (so holding despite observing that “this sort of noneconomic injury is one of the most serious consequences of discriminatory government action”).

106. *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

107. *E.g., id.* at 492 (citing *Los Angeles v. Lyons*, 461 U.S. 95, 111–12 (1983)); *Allen*, 468 U.S. at 755 (citing *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984)); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 579 (1992) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983)).

108. *See* National Environmental Policy Act, 43 U.S.C. § 4332(2)(C)(i) (2012) (requirement that analyses include discussion of “the environmental impact” of the proposed government decision); *see also* 43 U.S.C. § 4331(b) (2012) (NEPA goals include federal coordination in order to “assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings”).

109. *See* 40 C.F.R. § 1502.14–1502.16 (2018) (governing agency preparation of environmental impact statements); *see generally* Richard W. Revesz, ENVIRONMENTAL LAW AND POLICY 859 (3d ed. 2015) (noting that CEQ preambles suggest that agencies need not consider economic and social effects alone).

110. *E.g., Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 769 (1983) (“psychological health damage [to nearby residents] and serious damage to stability . . . of the neighboring communities” from reopening Three Mile Island nuclear power reactor not within the impacts agency was required to consider in environmental impact statement; “[t]ime and resources are simply too limited for us to believe that Congress intended to extend NEPA [this] far”).

111. *Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015). As it did in *Michigan*, the Supreme Court has increasingly interpreted statutes to ensure that cost is among the issues an agency considers in regulating. *E.g., Entergy Corp. v. Riverkeeper Inc.*, 556 U.S. 208 (2009) (permissible for agency to interpret “best available technology” statutory language to require it to consider cost); *see also Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 490 (2001) (Breyer, J., concurring) (“... other things being equal, we should read silences or



In sum, courts resolving environmental claims very often must assess new questions under dated, generally phrased statutes, whether those cases are brought by individuals or groups. Because of the dynamic nature of environmental harm and our understanding of it, statutes do not identify every environmental problem that needs a solution. The issues posed to courts often involve questions of value. Moreover, most federal pollution control statutes do not preempt more protective state law; they mostly operate as a “floor” of environmental protection and allow States to go further, including through common law.<sup>112</sup> In part that is a recognition that States may prefer more environmental protection and that federal pollution statutes have gaps.<sup>113</sup>

So common law claims, both state<sup>114</sup> and, in some instances, federal,<sup>115</sup> remain a vital source of environmental legal obligations. Inevitably, the courts are facing the challenge of figuring out how common law should be adapted to address new environmental injuries.<sup>116</sup> For example, a court hearing a claim under the very old

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ambiguities in [statutory language] as permitting, not forbidding” the consideration of adverse effects, including cost, of regulation).

112. *E.g.*, Jim Rossi & Thomas Hutton, *Federal Preemption and Clean Energy Floors*, 91 N. C. L. REV. 1283, 1298 (2013) (discussing floor preemption in multiple pollution statutes and stating that it “allows a minimum level of regulation . . . and provides an option for states and localities so inclined to undertake the additional cost of still better environmental quality”).

113 *Id.*

114. The Supreme Court has interpreted the Clean Water Act not to preempt state common law claims as long as the common law of the source state is applied. *International Paper v. Ouellette*, 479 U.S. 481, 500 (1987). Whether the Clean Air Act specifically preserves state common law is a little less settled. Although the Supreme Court held that a *federal* common law nuisance claim in which the plaintiffs sought emissions abatement was displaced by federal statute, *see infra* note 115, the Second, Third and Sixth Circuits have found state common law claims not preempted by the Clean Air Act. *See Bell v. Cheswick Generating Station*, 734 F.3d 188, 198 (3d Cir. 2013); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.* 725 F.3d 65, 96–103 (2d Cir. 2013); *Merrick v. Diageo Americas Supply*, 805 F.3d 685 (6th Cir. 2015). Some district courts have disagreed. *See Comer v. Murphy Oil U.S.A.*, 839 F. Supp. 2d 849, 865 (S.D. Miss. 2012).

115. *See, e.g.*, *Georgia v. Tennessee Copper Co.*, 237 U.S. 474 (1915) (applying federal common law to state nuisance claim). The courts have found some federal common law claims displaced when federal statutes regulate the issue. For example, the Court has held that the federal common law of nuisance in the area of water pollution is displaced by “the more comprehensive scope” of the Clean Water Act. *See also City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 311 (1981). *See also Connecticut v. Am. Elec. Power Co.*, 564 U.S. 410 (2011) (displacement question is whether the federal statute, specifically the Clean Water Act, “speaks directly” to the issue at hand—emissions of carbon dioxide from the defendants’ plants); *Native Village of Kivalina v. ExxonMobil*, 696 F.3d 849, 868 (9th Cir. 2012) (holding that federal common law nuisance claim for damages also displaced by Clean Air Act). Nonetheless, the federal courts possess residual authority in some instances to develop federal common law. *Milwaukee*, 451 U.S. at 313.

116. And in the setting of climate change, two federal judges have found state common law claims completely preempted by federal common law, although they then concluded that the Clean Air Act displaced those federal common law claims. *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1024 (N.D. Cal. 2018), *appeal filed*, No. 18-16663 (9th Cir. Sept. 4, 2018); *City of New York v. BP P.L.C.*, 325 F. Supp. 3d 466, 472 (S.D.N.Y. 2018), *appeal filed*,

doctrine of public nuisance must assess not only whether there is an “interference” with public resources, but also whether that interference is “unreasonable.” Our understanding of those issues necessarily must evolve as we understand new notions of what counts as shared resources and new sources of environmental harms, and as we consider whether such harms are justified by associated public benefits.

As noted, Seattle and other cities are calling on courts to find public nuisances around PCB contamination of waterways. Seattle won the first round against Monsanto, largely succeeding in convincing the court that public nuisance doctrine can encompass the relatively long chain of causation that underpins Seattle’s claim.<sup>117</sup> In the New York City, Oakland, and San Francisco cases against oil companies, those cities have lost the first rounds against the major oil companies who, the cities allege, created a public nuisance by promoting oil and gas in a warming world. The district judges in those cases acknowledged the difficulty of finding that the oil and gas companies unreasonably interfered with the use and enjoyment of public resources given the public benefit from fossil fuel combustion.<sup>118</sup> The cities are appealing, however, and other suits are pending.<sup>119</sup>

The *Juliana* case also raises difficult legal questions. In that case, the courts must decide whether the federal government must

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No. 18-cv-182-JFK (2d Cir. July 26, 2018) (regardless of how complaint is framed, “the City is seeking damages for global-warming related injuries resulting from greenhouse gas emissions, and not only the production of Defendants’ fossil fuels”). The complete preemption rulings are controversial, since typically such rulings focus on congressional intent and since the rulings in these cases are in tension with the “venerable rule that the plaintiff is the master of her complaint.” See Gil Seinfeld, *Climate Change Litigation in the Federal Courts: Jurisdictional Lessons from California v. BP*, 117 MICH. L. REV. ONLINE 25, 27 (2018).

117. *City of Seattle v. Monsanto Co.*, 237 F. Supp. 3d 1096 (W.D. Wa. 2017); this is one of 12 municipal and State suits over PCB contamination that was pending during 2018. *E.g.*, Gary Smith & Casey Clausen, *West Coast “Super Tort” PCB Suits Have Staying Power*, LAW360, Mar. 7, 2018, <https://www.law360.com/articles/1019286/west-coast-super-tort-pcb-suits-have-staying-power> (municipalities are alleging “special injury,” while States are bringing suits in the States’ *parens patriae* capacity). Although earlier city suits were lost, many of the plaintiffs in the recent suits have been convincing courts that PCB discharge to waterways was “inevitable.” *Id.*

118. *E.g.*, *City of Oakland*, 325 F. Supp. 3d at 1023 (“Without those fuels, virtually all of our monumental progress would have been impossible. All of us have benefitted . . . Is it really fair, in light of those benefits, to say that the sale of fossil fuels was unreasonable? This order recognizes but does not resolve these questions. . . .”); *City of New York*, 325 F. Supp. 3d at 466 (“As an initial matter, it is not clear that the Defendants’ fossil fuel production and the emissions created therefrom have been an ‘unlawful invasion’ in New York City, as the City benefits from and participates in the use of fossil fuels as a source of power, and has done so for many decades.”).

119. Baltimore has a case in Maryland state court; San Mateo County has a claim in California state court. *E.g.*, *County of San Mateo v. Chevron Corp.*, 294 F. Supp. 3d 934 (N.D. Cal. 2018) (granting motion to remand to state court), *appeal filed* (9th Cir. Mar. 27, 2018).

manage public resources subject to a common law trust obligation and whether that obligation extends to the atmosphere. The courts also must consider whether to recognize a new constitutional right to a stable climate. Thus far, the trial judge has ruled in favor of the new constitutional right and the federal common law trust obligation but held only that the trust obligation extends to the waters.

Across the range of environmental cases, courts are confronting challenging legal issues such as whether the Clean Water Act covers discharges to groundwater or certain wetlands,<sup>120</sup> to what extent the Clean Air Act authorizes regulation of particular greenhouse gas sources,<sup>121</sup> and to what extent federal permits foreclose claims based on state environmental standards.<sup>122</sup>

As courts resolve all these claims, they must address whether and how the law—broadly phrased statutes, tort claims, public trust doctrine, and constitutional claims—needs to evolve. For many reasons, we find it desirable to insulate judges from direct political pressure, but the fact that unelected judges resolve these types of claims has given rise to criticism.<sup>123</sup> Even elected judges are not electorally accountable in quite the way that legislators are. But as courts take up these questions, they inevitably must decide questions of environmental obligation and, in so doing, allocate the associated benefits and burdens. Such rulings cannot avoid resolving questions that strongly resemble those facing agencies or even legislatures. Thus, although Tribes, cities, and children are by no means the only environmental plaintiffs around, they are, by design or by commitment, responsive to broadly held interests; their perspectives accordingly ought to be particularly valuable to courts.

#### IV. CONCLUSION

The rise of environmental litigation brought by Tribes, cities, and children should be seen as a welcome development. I alluded earlier to Justice Marshall's statement that courts serve mainly to vindicate the rights of individuals under the law. The participation of representative groups in environmental litigation is a direct challenge to that notion. Groups such as Tribes, cities, and children can, through litigation, raise the visibility of particular

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120. *E.g.*, *Hawai'i Wildlife Fund v. Cty. of Maui*, 886 F.3d 737 (9th Cir. 2018), *cert. granted*, *County of Maui v. Hawai'i Wildlife Fund*, No. 18-260 (U.S. Feb. 19, 2019).

121. *E.g.*, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Oct. 23, 2015) (litigation over Clean Power Plan; currently stayed).

122. *E.g.*, *Ohio Valley Envtl. Coal. v. Fola Coal Co.*, 845 F.3d 133 (4th Cir. 2017).

123. *E.g.*, *Lazarus*, *supra* note 67.

environmental injuries and prompt us to appreciate their potentially broadscale nature in a tangible way. Such plaintiffs can usefully provide the courts with a more representative and democratic perspective on the significance of environmental injuries. And in general, when such parties can widen the range of views heard in court, judges seem likely to reach more carefully reasoned, better decisions on these difficult claims.

While a detailed proposal is beyond the scope of this essay, it's worth identifying at least a few implications. First, courts might consider treating both city and Tribal claims of standing with "special solicitude," as the Supreme Court did for the State of Massachusetts in recognition of its "quasi-sovereign" interests.<sup>124</sup> As discussed above, Tribes and cities might be understood to possess interests similar to States in the "health and well-being . . . of [their] residents," interests they are often unable to protect through unilateral action.<sup>125</sup> Moreover, in view of their democratic and deliberative credentials or, in the case of the youth plaintiffs, their representative commitments, courts should take very seriously these plaintiffs' arguments to recognize new forms of injury related to environmental harm. Those arguments could relate to issues ranging from constitutional standing to the scope of statutory environmental analysis requirements under the National Environmental Policy Act.<sup>126</sup> Finally, judges might pay particular attention to arguments made by Tribes, cities, and children as they assess what should count as "unreasonable

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124. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Courts have not fully resolved whether municipal and Tribal standing claims are entitled to "special solicitude." *E.g.*, *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457 (2d Cir. 2013) (treating Tribal standing claim with special solicitude); *Center for Biological Diversity vs. Department of the Interior*, 563 F.2d 466, 477 (D.C.Cir. 2009) (assuming *arguendo* that Point Hope Native Village was sovereign entitled to "special solicitude," but then rejecting standing on the ground that Point Hope was asserting only "derivative effects on Point Hope's members," rather than impacts on Point Hope's owned territory); *Canadian Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1337 (Fed. Cir. 2008) (mentioning but deferring judgment on the question of whether Tribes are entitled to "special solicitude"); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 882 (N.D. Cal. 2009), *aff'd on other grounds*, 696 F.3d 849 (9th Cir. 2012) (finding that plaintiff Native Village was not entitled to "special solicitude" and lacked standing on basis of inadequate causation); *City and County of San Francisco v. Whitaker*, 357 F. Supp.3d 931 (N.D.Ca. 2019) (finding no special solicitude for city standing claims).

125. *Cf. Alfred L. Snapp & Son., Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (discussing the requirements for a State action in *parens patriae* and noting that quasi-sovereign interests can be understood to include interests a State might, if it could, seek to address through its own lawmaking powers).

126. *See supra* text accompanying notes 108–110 (discussing NEPA analysis issues).

interference” with public resources in nuisance cases, or what should constitute valid public uses of shared resources in public trust cases.<sup>127</sup>

In other words, we should cheer the sight of these plaintiffs converging on the courts. Their lawsuits do not solely indicate an abstract disagreement on policy, the sort that belongs in a political debate—though they can signal that too. Instead, we should understand these suits as a valuable step to ensure that important voices are not effectively silenced or drowned out in a national discussion, to draw our attention to some of our most significant environmental injuries, and ideally to prompt us to develop better solutions that protect both the environment and the people who depend on it.

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127. *E.g.*, *Arno v. Commonwealth*, 930 N.E.2d 1 (Mass. 2010) (public trust doctrine requires that any legislative transfer “must be for a valid public purpose . . . and private benefits must not be primary but merely incidental”).

