



ESSAY

Litigating Separate and Equal: Climate Justice and the Fourth Branch

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Introduction

There are two kinds of climate cases proceeding through the courts that intersect with racial discrimination. One, the carbon tort, has the potential to address the more severe impacts of climate change on black and brown communities and, if crafted carefully, has the potential to correct or reverse the effects of racist policies that have separated communities and amplified vulnerabilities to climate change. The other, *Juliana v. United States* or, informally, the “Youth v. Gov” case,¹ invokes the struggles and legacy of those fighting for racial equality in the civil rights movement. The strategic roadmap laid by *Brown v. Board of Education*, as well as the rhetorical effect of aligning with that rights struggle, have been valuable. Drawing meaningful parallels to the indignities the civil rights movement sought to redress has the immediate effect of situating the climate crisis among the greatest recognized injustices in our country’s history. Together, these tort and constitutional law cases can address the *separate* treatment of communities of color, as well as the threats to the dignity and *equal* treatment of young people, particularly black, brown, and indigenous youth at the frontlines of the climate crisis.

While the tort cases are still weaving through the pretrial phase, the *Juliana v. United States* case suffered a significant setback earlier this year. In its opinion, the Ninth Circuit acknowledged that we are at the “eve of destruction.”² The majority nonetheless dismissed *Juliana* for lack of standing and encouraged the complainants to seek remedy in the political branches,

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1. *See Our Case*, YOUTH V. GOV, <https://perma.cc/W46L-TKMK> (last visited Mar. 7, 2020) (describing the case brought by young plaintiffs against the federal government to enjoin the government from violating the plaintiffs’ constitutional rights to life, liberty, and property by substantially causing or contributing to a dangerous concentration of carbon dioxide in the atmosphere).

2. *Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020) (quoting BARRY MCGUIRE, *Eve of Destruction*, on EVE OF DESTRUCTION (Dunhill Records, 1965), *writ of mandamus dismissed sub nom. In re United States*, 140 S. Ct. 16 (2019)).

which have been notable for their active support of fossil fuels and active disengagement in reducing emissions. We are now at the point at which all three branches are hastening our approach to points of no return in our climate system.

This Essay explores the “separate” and “equal” themes in these two lines of cases and, particularly relevant to the latter, suggests that the appeals for equality and dignity may continue to find inspiration in the broader strategies of the civil rights movement, for which litigation was just one lever. It discusses the carbon tort’s potential to obtain substantial funding from fossil fuel companies. That funding can aid cities in building appropriate levels of resilience to climate impacts, which disproportionately harm communities of color. It then explores the important parallels between the deprivation-of-rights claims of *Juliana* and those of *Brown v. Board of Education*. It closes with consideration of the role and relevance of protest movements to climate litigation and what those movements suggest about where the academy may need to turn its attention in the years to come.³

I. The Carbon Tort

A. Claims Against Fossil Fuel Companies

A “second wave” of emissions-related climate litigation has emerged. These cases are armed with the Carbon Majors study,⁴ rapidly improving attribution science, and direct and compelling evidence of the fossil fuel industries’ remarkably clear understanding of the catastrophic risks of global warming and the industries’ decades-long deception campaign.⁵ The carbon tort comprises cases brought by a state and municipalities that seek damages from fossil fuel companies in order to subsidize adaptation initiatives, such as building coastal protections and storm-resilient infrastructure. The cases share a number of similarities. Almost all of the cases are brought by states or cities against defendant fossil fuel companies that are responsible for a significant portion of past and present greenhouse gas emissions. The plaintiffs all cite the defendants’

3. For example, there are almost two dozen cases involving protesters charged with criminal offenses for, among other things, valve turning at pipeline facilities. *See, e.g., State v. Ward*, 438 P.3d 588, 592 (Wash. Ct. App. Div. 1 2019).

4. *See Carbon Majors*, CLIMATE ACCOUNTABILITY INST., <https://perma.cc/EME5-ZAAQ> (last visited Mar. 5, 2020) (“trac[ing] the emissions from fossil fuels produced and made available to the world markets and consumers”). “The research attributes 63 percent of the carbon dioxide and methane emitted between 1751 and 2010 to just 90 entities.” *Id.* These entities are referred to as the “Carbon Majors.” *Id.*

5. *See* Geetanjali Ganguly et al., *If at First You Don’t Succeed: Suing Corporations for Climate Change*, 38 OXFORD J. LEGAL STUD. 841, 846, 849 (2018) (arguing that there is a new, second wave of private climate change lawsuits that may clear judicial thresholds with regard to the standing, proof of harm, causation, and justiciability hurdles that dogged the “first wave” of cases brought from roughly 2005 to 2015).

emissions and their contribution to climate-related sea-level rise, devastating flooding, and, among other things, negative impacts to public health, including extreme heat. They all assert public nuisance claims, with many adding product liability claims, noting product defects the companies understood well.⁶ Some combination of private nuisance, trespass, and negligence claims are also made.

Plaintiffs do not seek a remedy that requires courts to set policy or limit defendants' emissions. Instead, the plaintiff states and cities seek to hold the companies responsible for impacts rather than require their citizens and taxpayers to pay for essential (and financially crushing) adaptations. These companies, plaintiffs allege, were acutely aware of these impacts and profited immensely from them. State tort law, unlike federal statutes like the Clean Air Act, is uniquely positioned to provide some measure of relief by compensating current and future victims of climate change.⁷ These cases, if either won or successfully settled, hold the promise of addressing the history and legacy of racism, which has had a disproportionate impact on black and brown communities' exposure and limited resilience to climate shocks.

B. Race, Class, and Climate Exposure

The impacts of climate change are not evenly distributed. The local effects in cities like New York, the plaintiff in *City of New York v. BP P.L.C.*,⁸ especially affect the City's communities of color.⁹ These divergent effects result from past policies or practices that have led, for example, to disproportionate exposure to extreme heat resulting from redlining,¹⁰ as well as community clusters in

6. See, e.g., Complaint, Mayor and City Council of Baltimore v. BP P.L.C., 388 F. Supp. 3d 538 (D. Md. 2019) (No. 1:18-cv-02357-ELH); Complaint, Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142 (D.R.I. 2019) (No. PC-2018-4716); Amended Complaint, City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 1:18-cv-00182-JFK), 2018 WL 8064051; Amended Complaint, City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017 (N.D. Cal. 2018) (No. 3:17-cv-06012-WHA).

7. See Thomas McGarity et al., *Climate Justice: State Courts and the Fight for Equity*, CTR. FOR PROGRESSIVE REFORM 5 (Nov. 2019), <https://perma.cc/3TPJ-AYSQ>; see also Maxine Burkett, *Climate Justice and the Elusive Climate Tort*, 121 YALE L.J. ONLINE 115, 115-16 (2011), <https://perma.cc/A3AK-T8WD>.

8. Amended Complaint, City of New York v. BP P.L.C., 325 F. Supp. 3d 466 (S.D.N.Y. 2018) (No. 1:18-cv-00182-JFK), 2018 WL 8064051.

9. Brief for Natural Resources Defense Council et al. as Amici Curiae Supporting Plaintiff-Appellant at 29-40, City of New York v. BP P.L.C., No. 18-2188 (2d. Cir. Nov. 15, 2018), 2018 WL 6042659 [hereinafter Environmental Justice Organizations' Amicus Brief].

10. Jeremy S. Hoffman et al., *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, 8 CLIMATE 1, 9 (2020). The researchers conducted a spatial analysis of 108 urban areas in the United States to better understand how historically redlined neighborhoods, which remain predominately lower-income and of-color, related to current patterns of intra-urban heat. Their research revealed that 94 percent of the areas studied experienced

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marginal coastal spaces.¹¹ Storms like Hurricane Sandy defy truisms claiming that extreme weather events are “social equalizers.”¹² In fact, experience varies across ethnicity, race, and class.¹³ Further, once hit by an extreme event, lower-income residents have a harder time recovering, from the household to the community level.¹⁴ When climate extremes strike, New York, like most local entities, is a primary provider of services, including health services such as emergency room care.¹⁵ Millions of dollars of investment are necessary for cities to avoid increased suffering and death.¹⁶

C. The Promise of Correcting Separate Legacies

There is an opportunity to correct for the impacts of past policy and provide a roadmap for a more just resilience. Present-day planning practices that fail to focus on historically underserved communities risk further exacerbating inequities that resulted from a potent combination of historical policies. With a better understanding of how climate aggravates “existing, historically-codified inequities,”¹⁷ there is an opportunity to avoid the “urban

elevated land surface temperatures in formerly redlined areas, with temperature differences averaging nearly 5°F (2.6°C) warmer and as great as 12.6°F (7°C) above non-redlined neighborhoods. *Id.* at 1; see also Linda Poon, *Housing Discrimination Made Summers Even Hotter*, CITYLAB (Jan. 22, 2020), <https://perma.cc/6DHA-T96S> (“The finding adds to the body of research on how redlining has imposed decades of economic and health disparities on black and brown communities—in ways that are now being exacerbated by climate change.”). The drastic temperature difference between redlined and non-redlined neighborhoods is attributable to the preponderance of impervious land cover, lack of tree canopy and green space generally, and diminished access to social and ecosystem services historically. See Hoffman et al., *supra*, at 2 (“[G]reenspace, trees, or water bodies within a city have been correlated with cooler land surface temperatures (LST), and more greenspace or water is related to lower urban LST at the location of that greenspace.” (citations omitted)).

11. See, e.g., Jacob William Faber, *Superstorm Sandy and the Demographics of Flood Risk in New York City*, 43 HUM. ECOLOGY 363, 373 (2015).

12. See Environmental Justice Organizations’ Amicus Brief, *supra* note 9, at 38.

13. See *id.* at 29–40.

14. See *id.* at 30.

15. See CITY OF NEW YORK, ONE NEW YORK: HEALTH CARE FOR OUR NEIGHBORHOODS: TRANSFORMING HEALTH + HOSPITALS 5 (2016), <https://perma.cc/7UY8-KJC8>.

16. See, e.g., Environmental Justice Organizations’ Amicus Brief, *supra* note 9, at 17 (describing New York City’s efforts to mitigate the harms of extreme heat in the City, including “launching Cool Neighborhoods NYC: a \$106 million program designed to help keep New Yorkers safe during hot weather, mitigate urban heat island effect drivers and protect against the worst impacts of rising temperatures from climate change” (quoting NEW YORK CITY, COOL NEIGHBORHOODS NYC (2017))).

17. Hoffman et al., *supra* note 10, at 9.

forms and policies that gave rise to these inequities.”¹⁸ Further, by “crafting climate equity-centered” policies, there is the potential to affirmatively repair dangerous gaps in the livability of our built environments.¹⁹ Meaningful and adequate funding of adaptation programs can and should center on the disparate treatment and outcomes of the historically underserved and aim to correct for those injustices. Successful resolution of the carbon tort cases can advance those goals, as cities would have damages paid by fossil fuel companies to subsidize these efforts.

II. *Juliana v. United States*

A. Youth v. Gov: The Right to a Stable Climate

References to racial inequality, the civil rights movement, and the contemporary environmental and climate justice appeals are explicit throughout the *Juliana* case. In an interview, Plaintiffs’ Chief Legal Counsel Julia Olson explained, “Our work is very much modeled after the strategic litigation the NAACP has done historically, especially throughout the Civil Rights Movement.”²⁰ The kids, themselves, have leveraged the rhetorical and substantive power in aligning with the storied movement, with one youth plaintiff stating: “Much like the civil rights cases, we firmly believe the courts can vindicate our constitutional rights and we will not stop until we get a decision that says so.”²¹ In short, the youth are seeking protection of their right to a stable climate—an indispensable precursor to the realization of every other right.

Successful resolution of the *Juliana* case would yield direct benefit to communities of color, to be sure. Children in vulnerable populations—including communities of color, immigrant groups, and indigenous peoples—are disproportionately affected by climate impacts today, particularly poor health outcomes.²² They are also negatively affected by fossil fuel production

18. *Id.* at 12. Elsewhere, Jeremy Hoffman noted optimistically, “Understanding how we got here can help us be honest about the present situation Our study suggests that decisions that were made almost 100 years ago are playing out today as a climate and health inequity. That makes me hopeful that by making good, inclusive, equitable decisions today, we might positively change the lives of people right now and for the next 100 years.” Yessenia Funes, *Extreme Heat Is Another Legacy of Segregation*, GIZMODO (Jan. 14, 2020, 11:22 AM) (quoting Hoffman), <https://perma.cc/SB92-656P>.

19. Hoffman et al., *supra* note 10, at 12.

20. Olivia Molodanof & Jessica Durney, *Hope Is a Song in a Weary Throat: An Interview with Julia Olson*, 24 HASTINGS ENVTL. L.J. 213, 224 (2018).

21. Mark Kaufman, *The Kids’ Climate Lawsuit Just Got Thrown Out*, MASHABLE (Jan. 17, 2020), <https://perma.cc/X4RP-MFMM>.

22. See ALLISON CRIMMINSET AL., U.S. GLOBAL CHANGE RESEARCH PROGRAM, *Executive Summary to THE IMPACTS OF CLIMATE CHANGE ON HUMAN HEALTH IN THE UNITED*
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itself, as communities of color are more likely to live closer to fossil fuel infrastructure and its byproducts.²³ Comprehensive and equity-based strategies to aggressively draw down emissions would have immediate and long-range benefits.²⁴

B. Looking to *Brown*: Climate Justice as Civil Rights Litigation

Unlike typical environmental lawsuits, however, *Juliana* eschews statutes and regulations and instead grounds itself in rights that the plaintiffs argue are implicit in the Constitution. In this regard, the plaintiffs make this case's kinship with *Brown* explicit. The youth in *Juliana* are fighting for foundational rights that are integral to liberty and democracy.²⁵ The experience of the harm is also shared for the young plaintiffs, as it was in *Brown*: "[I]t was not just Linda Brown (age 9) and her co-plaintiffs who were harmed, but all African American children in segregated schools subjected to government-sanctioned racial discrimination."²⁶ For *Juliana*, the plaintiffs are pressing their case on behalf of younger generations, who are simultaneously the most endangered and the least able to engage in meaningful decisionmaking about their shared future. Not only was drawing the comparison to *Brown* important for arguments related to standing but, as a narrative device, the comparison underscored the shared vulnerability of a broad class of litigants.

STATES: A SCIENTIFIC ASSESSMENT 4 (2016); *see generally* Expert Report of Catherine Smith, J.D., Prepared for Plaintiffs at 44-45, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (No. 6:15-cv-01517-TC) (providing expert opinion, from a historic and socio-legal perspective, on government actions that discriminate against and harm children, with a specific focus on certain groups of children who are more vulnerable to the effects of climate change).

23. *See* LESLEY FLEISCHMAN & MARCUS FRANKLIN, FUMES ACROSS THE FENCE-LINE: THE HEALTH IMPACTS OF AIR POLLUTION FROM OIL & GAS FACILITIES ON AFRICAN AMERICAN COMMUNITIES 3 (Nov. 2017), <https://perma.cc/ZK3B-GRZN>; FOOD & WATER WATCH, PERNICIOUS PLACEMENT OF PENNSYLVANIA POWER PLANTS: NATURAL GAS-FIRED POWER PLANT BOOM REINFORCES ENVIRONMENTAL INJUSTICE 2 (June 2018), <https://perma.cc/65FU-BKKX>; ADRIAN WILSON ET AL., NAACP, COAL BLOODED: PUTTING PROFITS BEFORE PEOPLE 4 (2012), <https://perma.cc/4B5A-LZPH>.
24. Consider, for example, the simultaneously celebrated and maligned Green New Deal. *See* Recognizing the Duty of the Federal Government to Create a Green New Deal, H.R. Res. 109, 116th Cong. (2019) (seeking "to achieve net-zero greenhouse gas emissions through a fair and just transition for all communities and workers").
25. *See* Memorandum of Plaintiffs' in Opposition to Federal Defendants' Motion to Dismiss at 15-16, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC), 2016 WL 11663204 [hereinafter *Juliana* Memorandum of Plaintiffs].
26. Brief for Respondents in Opposition to Petition for Writ of Mandamus at 25, *In re United States*, 140 S. Ct. 16 (2019) (No. 18-505), 2018 WL 6134241. As such, "[t]hat redress of their constitutional deprivations might also redress harm to those similarly situated, as was true for other African American children after *Brown*" *Id.* at 26.

Ultimately, the “Youth” and their supporters invoke *Brown* to highlight the courts’ pivotal role in protecting against the tyranny of the majority, particularly for those with absent or inadequate political representation. It is perhaps worth stating the obvious: The political branches are inaccessible to the kids who cannot cast the ballots that have meaningful impact on near-term decisionmaking—decisionmaking that will have very long-term consequences. The fact that, like *Brown*, the plaintiffs “have diminished voice”²⁷ and raise issues that are systemic in nature does not preclude their claims, but instead demands an exercise of jurisdiction.

The civil rights litigation suggested that racial equality was supported by latent rights in the Constitution that simply needed awakening. The series of cases and the size and scope of the remedies sought (still significant if judged against its time) also underscored that despite the depth or breadth of the remedy, the judiciary could and should act to affirm and protect those rights. Rhetorically, the civil rights movement broadly understood and underscored the moral weight of the issue at hand and the deep injustice that required urgent disruption and redress. Arguing a parallel between the injustice of systemic racism and racial segregation itself was an authentic and sensible strategy for the Youth.

C. Which Path Forward? Promise Beyond the Three Branches

Looking to the courts when the alternatives were bleak was critical for the civil rights movement. In her dissent in the recent Ninth Circuit decision in *Juliana*, Judge Josephine Staton made a key distinguishing point in the context of the climate crisis: “The denial of an individual, constitutional right—though grievous and harmful—can be corrected in the future, even if it takes 91 years. And that possibility provides hope for future generations. Where is the hope in today’s decision [to dismiss]?”²⁸ In short, we simply do not have the time. As the majority stated, we are all at the eve of destruction.

The distress is understandable and cynicism regarding the efficacy and integrity of the legal system may be well placed. Yet, there may be an important misapprehension at play regarding the role of litigation. In the postmortem of the Ninth Circuit decision, environmental law professor Patrick Parenteau persuasively argued that “[o]f course the courts don’t view themselves as policymakers or lawmakers But when the other two branches are comatose or worse, you have to have the courts step in.”²⁹ Michael Blumm and Mary Wood, well before the decision came down, noted that *Juliana* may have the

27. Brief of Leagues of Women Voters as Amici Curiae in Support of Plaintiffs-Appellees at 16, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (No. 18-36082), 2019 WL 1069610.

28. *Juliana v. United States*, 947 F.3d 1159, 1191 (9th Cir. 2020) (Staton, J., dissenting) (emphasis added).

29. Kaufman, *supra* note 21 (quoting Parenteau).

same historical significance in the future as *Brown*. They argued that, “[a]lthough it took a decade, *Brown* led to the Civil Rights Act of 1964 and the Voting Rights Act of 1965, which effectively ended U.S. *de jure* racial segregation that had persisted since before the nation’s inception. Someday, *Juliana* may seem in the same broad educative light as *Brown*.”³⁰ I would add, however, that *Brown* did not do the work alone; and that may well be very good news for both the *separate* and *equal* litigation and the life-affirming ends they seek.

As I have argued elsewhere, while it is impossible to precisely apportion the weight and effect of legal versus extralegal efforts in the civil rights movement, ignoring the critical influence of extralegal action is unwise.³¹ Protests and other forms of nonviolent civil disobedience are already proliferating in response to climate inaction. Consider the recent “Greta Effect,”³² which one can cite as an infectious and compelling form of empowerment and mobilization by and for young people today. There is also, in the American context, the tradition of extralegal engagement in response to inadequacies or failures on the part of the three branches of formal government. Indeed, the civil rights movement demonstrated the most effective kinds of mobilization when three branches were not enough. The “Fourth Branch” has been used to describe other informal yet influential actors in the policy space, such as the media or lobbyists. Here, I suggest that a powerful, networked Fourth Branch may continue to emerge and grow for the cause of climate justice. If it does, participants in this critical branch would act in a manner consistent with their predecessors in the civil rights story—maintaining their struggle for dignity and equality in the streets.

III. Engaging the Fourth Branch

As the courts refuse to serve as a bulwark in the “Youth v. Gov” case, understanding the role of a Fourth Branch appears evermore critical. Climate-related disobedience, as an alternative method to advance climate-related law and policy, remains largely overlooked. It is critical, however, to understand the role of *extralegal* efforts to usher in significant, *legal* change. One need not endorse it to remain curious about its influence—as well as its increasing prevalence today.

30. Michael C. Blumm & Mary Christina Wood, “No Ordinary Lawsuit”: *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 86 (2017) (citations omitted).

31. See Maxine Burkett, *Climate Disobedience*, 27 DUKE ENV’T L. & POL’Y F. 1, 5 (2016).

32. The Greta Effect describes the impact of young climate activist Greta Thunberg on climate activism generally, and specifically for children across the world. For a description of the Greta Effect on student activism, see Cindy Long, *The ‘Greta Effect’ on Student Activism and Climate Change*, NEATODAY (Sept. 19, 2019 9:35 AM), <https://perma.cc/N5TU-3T4N>.

Informal or extralegal engagement in the policymaking process will only increase. And inciting meaningful lawmaking to mitigate climate change through extralegal action and nonviolent civil disobedience is consistent with the civil rights and environmental justice traditions. Protest tactics of social movements are relevant to advances in the law.³³ This appears especially true when the proposed remedy requires a quantum leap in social acceptance, political realignment, and economic restructuring. Grassroots activism can produce outsized and unpredictable shifts in the trajectory of the social and political landscape. This was apparently true for the civil rights movement, for which we give *Brown* credit beyond its plausible reach.³⁴

Distinguished climate scientists, advocates, and activists now extol the potential of nonviolent protest to change the nature of the game and its outcome. Indeed, a January 2020 study suggested that “activism and civil disobedience are helping communicate the science of climate change” with the knock-on effect of “increasing public awareness and engagement with issues of climate change,”³⁵ a very welcome development for the group of weathered climate biologists in Aberdeen who conducted the study.³⁶ One stated, “The climate protests have given us hope, that this wave of public opinion is finally enough to produce the change we need.”³⁷ Relative to the civil rights movement, the rates of activism are still quite low, especially in the United States. In short, it is likely that the current levels of engagement are a small fraction of what is to come!

The rights claims elevated in the *Brown* courtroom were flanked by vivid demands for dignity at the lunch counter and in the streets. Like today, the protests and sit-ins in particular—now understood as cornerstones of the movement—were not always viewed in a positive light. Critics, including those within the civil rights movement, considered them impulsive and unwise. There was a rift, largely generational,³⁸ between those who believed the courts were the soundest avenue for recourse and transformation and those who grew

33. Burkett, *supra* note 31, at 4. There are important caveats, which I elaborate on quite extensively in *Climate Disobedience*. *Id.* at 15-18.

34. Indeed, there is anecdotal evidence that even scientists are noting, and perhaps relying on, the disruptive potential of direct-action activism. See, e.g., Phil McKenna, *Crossing the Line: A Scientist's Road from Neutrality to Activism*, INSIDE CLIMATE NEWS (Feb. 11, 2020), <https://perma.cc/5ZLQ-TD7N> (describing one scientist's own transition from the “passivity” of academia to action, including three non-violent protests against fossil fuel projects since October 2019).

35. *Study Suggests Activism and Civil Disobedience Are Helping Communicate the Science of Climate Change*, UNIV. ABERDEEN (Jan. 23, 2020), <https://perma.cc/8E4Z-QRMK>.

36. *Id.*

37. *Id.* (quoting Professor Sharon Robinson).

38. Christopher W. Schmidt, *Divided by Law: The Sit-ins and the Role of the Courts in the Civil Rights Movement*, 33 LAW & HIST. REV. 93, 114 (2015) (explaining that “[t]he sit-in tactic was at once an expression of [the students'] frustration with the older generation and their approach to civil rights”).

frustrated by the limited results that followed from landmark cases such as *Brown*.³⁹ *Brown*'s failure to meet youth expectations for change resulted in the students rejecting litigation-based strategies. Conversely, lawyers for the NAACP Legal Defense Fund "saw courtroom fights over the meaning of the Constitution as a battleground where they had won before and where they could win again."⁴⁰

Changing the law was not, however, the sole purpose of the protests from the students' perspective. Indeed, "[a] central goal of the lunch counter sit-ins of 1960" was to redefine and renew the "very idea of 'civil rights.'"⁴¹ It was meant to transcend court-based reform and highlight the rights of sentient and worthy citizens. Formal channels of lawmaking did not effectively shine a light on the "central moral problem" or usher in enduring social change.⁴² In time, the sit-in protests transformed both the movement itself—from agenda to tactics—and the larger milieu of the segregated South.⁴³

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It is my sincerest hope that the three branches we have and on which we have relied can rise to the occasion with the necessary speed and skill. In the litigation addressing separate histories and contemporary vulnerabilities, the carbon cases still have the potential to catalyze just transitions. There is additional storytelling power in protests that highlight the fossil fuel industry's deceptions regarding the safety of their products. Litigating equality, on the other hand, continues to meet dispiriting hurdles. We barely have *nine* years, much less ninety-one, to maintain a statistically good chance of avoiding the worst outcomes. A review of the salience of equal rights under the law as a litigation strategy is incomplete without an investigation of the broader context in which those cases were pursued. This moment begs an appreciation of all of the branches at play in our most storied movements. The branch least understood may well save us all.

39. *See id.* at 113-14.

40. *Id.* at 147-48.

41. *Id.* at 93.

42. *Id.* at 135-36 (quoting Ralph McGill, editor of the *Atlanta Constitution*, who wrote: "The sit-ins were, without question, productive of the most change. . . . No argument in a court of law could have dramatized the immorality and irrationality of such a custom as did the sit-ins. . . . Not even the Supreme Court decision on the schools in 1954 had done this. . . . The central moral problem was enlarged." RALPH MCGILL, *THE SOUTH AND THE SOUTHERNER* 16-17 (1963)).

43. *See id.* at 100-02.