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The Potential of Climate Change Litigation and Courts as Actors in Climate Governance
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Germany and the USA in Comparison

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Abstract

Climate Litigation is on the rise. Cases where plaintiffs seek to hold their states accountable for their inaction in curbing climate change, or their willful contribution to climate change while knowing its implications, have seen a stark increase in numbers over the last decade. Those plaintiffs claim injuries that have been caused therefrom and are turning to courts to right their wrongs. However, only a few of those cases have been ruled in favor of the plaintiffs so far. This thesis aims at taking a look at two cases that share a great area of congruence: filed during almost the same time; by plaintiffs similar in nature; on a similar legal basis; but that came to different conclusions. The working hypotheses for this thesis are that judicial activism has a positive influence on creating outcomes favorable to plaintiffs in climate litigation, while a conservative approach to the separation of power principle bears a negative influence. Therefore, by comparing and analyzing the rulings in the *Juliana* case (dismissed) in the USA with the *Neubauer* case (successful) in Germany via qualitative content analysis, this thesis seeks to discern the conditions under which a court can successfully rule in favor of climate litigation and assume a strong role as an actor in climate governance.

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I. Introduction

In March 2023, the Intergovernmental Panel on Climate Change (IPCC) published its Synthesis Report of the Sixth Assessment Cycle, a summary of reports over the last five years. It reiterated that Global Warming can still be limited to the crucial 1,5 degrees, but it takes cooperation of a myriad of actors to help achieve this goal, whereas failing to do so would lead to irreversible damages, even if Global Warming only temporarily rises beyond 1,5 degrees (IPCC, 2023). It is already well known that addressing climate change requires sustained, coordinated action across multiple sectors and actors who are subject to boundless interdependencies that restrain them from finding tangible resolution (Lazarus, 2009). This is the wicked problem nature of climate change, and the more time it takes to address the problem, the more costly it will be (Xiang, 2013). Academia has already produced a commendable amount of literature that covers suggestions for policy-makers and different stakeholders on how to overcome this wicked problem stricken with complexity (Perry, 2014). However, the potential of courts in this regard has been introduced only recently in what is known as "climate litigation". Legal cases brought before courts challenging the action or inaction of actors in relation to climate change combat have been on the rise for over a decade, reflecting the growing awareness of the impacts of climate change and the need for legal accountability for its causes and consequences (Peel & Osofsky, 2020). Climate governance cannot be wholly accomplished through the intergovernmental climate regime, nor can it be accomplished in silos, and this fact has also been recognized in the preamble to the Paris Agreement, which clarifies that it necessitates the engagement of all levels of government and various actors in addressing climate change (Setzer & Vanhala, 2019; Paris Agreement, 2015). As government efforts to address climate change have been disappointing for many, individuals, private actors, and NGOs have stepped up by bringing climate related cases to courts, seeking remedies, adaptation, mitigation, and demanding more proactive action (Markell & Ruhl, 2012). The role courts can play became increasingly important with each decisive ruling around the world, exerting real policy changes and leading to a proliferation of cases before various jurisdictions (Peel & Osofsky, 2020). In this proliferation of cases, *Juliana* (USA) and *Neubauer* (Germany) stand out particularly and will be this thesis' objects of study, as they came to different outcomes, albeit in a similar setting. Both instances present two fairly similar cases that emerged and evolved during almost the same time span. Both cases were filed by a group of young plaintiffs who claimed their constitutional rights were infringed by their respective governments through their failure to successfully implement climate laws and through positive action without respect to fundamental rights. Although similar in nature, the *Bundesverfassungsgericht* and the Ninth District Court of Appeals, came to two different conclusions: while the *Bundesverfassungsgericht* unanimously ruled in favor of the plaintiffs, thus requiring the German legislator to amend its climate law, the majority in *Juliana* decided to dismiss the case. Both judicial systems are known to be among the most powerful and influential systems worldwide; this is especially the case in the US, where court decisions have led to monumental societal revolutions before. (Quint, 2004). Thus, the question that arises concerns the factors that influenced the different ruling and the reason as to how the judiciary justified its decision. Can courts truly fill the aforementioned gap in the climate governance regime? Hence, this thesis will aim at investigating this question by taking a look at the *Neubauer v. Germany* and the *Juliana v. US* cases, thus providing answers to the following Research Question:

Under what conditions can courts take on a strong role in climate governance?

II. Theory

The underlying empirical observations and theories in academia that are of interest in determining the conditions under which courts are more or less likely to take on a strong role in climate governance through climate litigation shall be elaborated in the following. Namely, these include: courts as governance actors; judicial review; judicial activism; and the principle of separation of powers.

II.a. Courts as Governance Actors

Generally speaking, there is consensus in academia that judicial bodies have assumed a significant role in liberal democracies as actors that exert a certain type of influence in a governance system (Vanberg, 2004). Courts in established democracies have been described as global governors that foster transnational judicial governance (Whytock, 2007). This is especially true for the German and the American judicial systems that have widely been regarded as among the most powerful and influential judicial systems of the globe (Quint, 2004). Traditionally, a court's role as a governance actor has been that of a notion of descriptive and normative limitations, as described by Scott & Sturm (2006), who insinuate that law "is about rule elaboration and enforcement" (Scott & Sturm, 2006: 568). As such, courts make use of analogy, logic, and moral intuition to define problems, formulate and apply a standard to them, and lastly construct a hierarchical relationship between the judiciary and other state bodies to implement said rules (Scott & Sturm, 2006). According to this conception, the traditional function of courts would merely complement the decision making process of the legislative and executive bodies, and in case of uncertainty, courts would be reluctant to override or reverse an outcome, since they move within the border of judicial legitimacy derived from a rigid separation of powers. However, in real-life empirical observation of courts this conception is contested (Harlow & Rawlings, 2007). The relationship of courts to the executive and legislative branches, and the governance system as a whole, is not at all of such static nature. As such, courts do more than simply "defer or dictate outcomes, [they], hold other institutions accountable for their decisions" (Scott & Sturm, 2006: 570). Therein, in a multi-level governance structure, courts can play a role as a "catalyst" via facilitation of implementation through one of its most powerful tools, the judicial review, which will be elaborated upon in the following. In addition to interpreting and applying the law, courts also play an important role in promoting democratic accountability within the governance structure (Harlow & Rawlings, 2007). This accountability function is particularly important in cases where the actions of other state entities may be called into question, as it helps to promote transparency and prevent abuses of power. Finally, courts serve as important protectors of individual rights, especially human rights, within a society by upholding the rule of law, thus helping to safeguard fundamental human rights guaranteed by the constitutions (Markell & Ruhl, 2012). This protection of individual rights is a cornerstone of democratic governance, and courts play a critical role in maintaining these protections through their decisions and actions. Thus, in general, courts can serve as vital actors in a governance system, performing essential functions that help to promote accountability, protect individual fundamental rights, and ensure the fair and consistent application of the law, sometimes extending over the rigid notion of traditional law-application. Given these developments and potentials, climate litigation cases before courts appear as a promising tool to help steer societies on the path of sustainable development and a resilient future.

II.b. Judicial Review

Juliana and *Neubauer* are both cases in which the plaintiffs question, inter alia, the constitutionality of certain acts of the governments/legislator, drawing on, among others, their constitutional and fundamental rights. In the most general sense, judicial review can be defined as "the power of judicial bodies to set aside ordinary legislative or administrative acts if judges concluded that they conflict with the constitution" (Vanberg, 2004: 2). Both the American and German judicial systems provide for judicial review, albeit in a different manner. The American constitution does not explicitly include judicial review, although it might be inferred from the language of Articles III and VI of the Constitution. More importantly, however, the landmark ruling in *Marbury v. Madison* of 1803 has set a precedent for the judiciary to declare an act unconstitutional (Kmiec, 2004). *Marbury* implies that American courts' authority to perform judicial review extends only to the scope of cases set out in Article III, out of which the doctrines of "standing" and "justiciability" arise and limit the American judicial review to only those cases. (Deshpande, 1971; Quint, 2004). Standing, refers to the right of a person to sue or seek relief in a court, while justiciability refers to the types of matter that the court can adjudicate, typically the issue cannot be one that is inherently political (Cornell, 2023). The German judicial review, on the other hand, has developed in sharp contrast to its American counterpart, which leads to differences in the exercise of judicial review. First, with the introduction of the German constitution (the *Grundgesetz*), courts were established with specific purposes, not as ordinary courts (Quint, 2007). As such, the highest court in Germany, the *Bundesverfassungsgericht*, has express conferrals to adjudicate matters that lie well outside of the authority of its American counterpart. The *Verfassungsbeschwerde* comes closest to the controversies adjudicated before American courts and is the most common constitutional complaint, even though the German judicial system allows for more, different types of complaints (BVerfG, 2023). However, even though the scope of German constitutional depth and breadth appears deeper and wider than that in the US, academic literature is widely in consensus that no German Court decision has had political and societal implications of a magnitude that rival the US judicial system (Quint, 2007; Gardbaum, 2018). That is not to say that German Courts have not made influential rulings, on the contrary, many rulings have far-reaching implications that established the Court as a formidable actor nationally as well as internationally, and the most recent of those rulings is arguably its stance on *Neubauer* in regards to intergenerational duties and human rights protections in courts (Kotzé, 2022). Nevertheless, none of these rulings come close to the significance and magnitude of rulings in the US such as in *Brown v. Board of Education*, which led to an extraordinary social revolution in the abolishment of the racial segregation system. For the case of Germany, its judicial system has also never exercised its authority to actually strike down constitutional amendments if they are not consistent with certain characteristics of the *Grundgesetz* (Quint, 2007). Hence, academic literature supports the assumption that in Germany the authority of courts extends beyond the breadth of the American judicial system, but the latter has historically brought greater effective societal change and change in political institutions.

II.c. Separation of Powers

The principle of separation of powers is a fundamental concept in constitutional law that establishes a system of governance, wherein the powers of a government are divided among different branches, aiming to prevent the concentration of power in a single entity, thus safeguarding against potential abuses and ensuring checks and balances within a political system (Ackerman, 2000). The traditional notion of the separation of powers

can be traced back to Montesquieu, who argued that this strict separation ensures a fundamental safeguarding of the citizens' liberties, as all three branches would have to abuse their authority to infringe the citizens' rights (Currie, 2008). It is widely accepted that this principle is implemented in most liberal democracies nowadays (Nedevska, 2021). Nonetheless, depending on a country's constitutional system, what this principle entails may have drastically different implications (Parenteau, 2023). The constitutional system in the US has been described as one of checks and balances, in which solely the legislative branch (Congress) makes new laws that get implemented by the executive branch (President and Agencies) and which is subject to oversight by the judicial branch (Courts) (Farah & Ibrahim, 2023). The checks and balances are ensured by the fact that the President can veto laws from Congress; the Court can declare laws unconstitutional; Congress has the ability to impeach the President; and Supreme, District, and Appellate Court Judges are appointed by the President and confirmed by the Senate for lifetime (and can be removed by the House of Representatives) (Farah & Ibrahim, 2023). In contrast, the principle of separation of powers in Germany differs to that in the US most strikingly in the sense that Germany has a bicameral parliamentary system marked by separation of functions, not structure, where the executive (the Chancellor and their cabinet of Ministers) is dependent on the trust of the parliament (*Bundestag*) and the Judges are "quite independent" and "better protected from executive or legislative influence" (Currie, 2008: 2115) as they are not appointed but elected by a special parliamentary committees for a fixed tenure (Id.). Furthermore, both countries provide for a vertical separation of powers along federal and state levels as well (Id.). Academia suggests that the parliamentary system of separation of power in Germany allows for some sacrifice of strict separation in favor of better coordinating policy and safeguarding against the abuse of other branches' power, or worded differently, the judiciary enjoys more independence with broad powers of judicial review to "ensure actual observance of the Constitution" (Currie, 2008: 2178).

II.d. Judicial Activism

What is known as "judicial activism" is oftentimes regarded to have a negative connotation to it (Cross & Lindquist, 2006). Kmiec (2004) has delivered an insightful paper in which he theorizes about the definition of judicial activism, which he describes at its most basic definition as simply "judicial invalidation of legislative enactments" (Kmiec, 2004: 1464). A more nuanced definition of judicial activism extends to defining it as manifesting itself when courts declare an act by any of the political branches as unconstitutional (Itoh, 1990). However, an even broader conception of judicial activism is regarded to be one where judges become judicially active when they, expressly or *sub silentio*, create a new rule, reinterpret an existing rule, or reject a well-established principle resulting in the new formation of law (Amarini, 2017). This last conception of judicial activism is adopted in this thesis. While critics of judicial activism often remark that judges impose their personal policy preferences, becoming political actors with little to no democratic accountability, there are also plenty of instances where judicial activism is generally celebrated, like the aforementioned *Brown v. Board of directors* case in the US (Cross and Lindquist, 2006). In this sense, judicial activism can be seen as a departure from the traditional view of judges as neutral arbiters who simply apply the law as written. More so, judicial activism is a reality observed in both countries that are objects of study. Nevertheless, both courts have ruled different outcomes in a fairly similar manner. The *Bundesverfassungsgericht* unanimously decided and declared certain paragraphs of an ordinarily enacted statute, the *Klimaschutzgesetz* (Federal Climate Change Protection Act) as unconstitutional and inconsistent

with the German constitution, therefore forcing the legislature to amend said law with its ruling. The material legal basis was not too different in *Juliana*, where a group of plaintiffs argued that their fundamental rights of life and liberty were violated by the government's actions and failure to protect public grounds with an intergenerational perspective. The majority of judges decided in a 2-1 ruling to dismiss the case. The question arises then, what are the reasons that the American court failed to deliver a favorable ruling for the plaintiffs?

Taking that into consideration, academic literature suggests that climate litigation is advancing, especially in the US, which has seen more cases than the rest of the world combined (Setzer & Highham, 2022). However, it appears to be the US which has not yet produced an influential landmark ruling. The lack of willingness of a US court to rule in favor of the plaintiffs in a major case can also be seen in *Juliana*, which was dismissed on the grounds of lack of standing. The *Bundesverfassungsgericht*, on the other hand, has arguably ruled more progressively in favor of the plaintiffs. Consequently, the question arises as to what the reasons are for the success of litigation in Germany, and for the reluctance of judges in the US to rule in favor of plaintiffs. Hence, drawing on this theoretical backdrop from the literature, this thesis will try to link the empirical success, or lack therefore, of climate litigation in *Juliana* and *Neubauer* to analyze why the willingness of the courts differed so much when it comes to rule in favor of the plaintiffs and assuming a strong role as actors in climate governance.

II.e. Hypotheses

Based on the aforementioned theories, concept, and facts pertinent to the cases, this thesis establishes two working hypotheses regarding the underlying conditions that make a court more or less likely to take on a strong role in promoting climate governance through climate litigation. First, this thesis hypothesizes that the German Court is more willing to engage in judicial activism and take on a supervisory role over the executive and legislative branches to ensure that they perform their constitutional duties than its American Counterpart. Hence **H1**: the more a court is willing to engage in judicial activism, the likelier it is to promote climate governance. Second, this thesis hypothesizes that American Courts courts are more conservative in their separation of powers of doctrine when it comes to climate litigation, while the German Court has been remarkably proactive and with a transnational perspective, clearly making use of its judicial review power. Hence **H2**: the more a court is to follow a strict separation of powers doctrine when deciding climate litigation cases, the less likely they are to take on a strong role in climate governance through climate litigation.

III. Methods

The research design applied in this thesis is a textual analysis, more specifically, a qualitative content analysis of primary documents, in this case, the rulings issued by the *Bundesverfassungsgericht* and the Court of Appeals for the Ninth Circuit, as well as supplementary documents and literature. The rulings used in this study will be systematically examined, juxtaposed, and interpreted to infer meaning. While content analysis has its roots in quantitative analysis, it can be either quantitative or qualitative in application and the latter will be used in this thesis. The qualitative content analysis applied here draws on Mayring's (1994)

model, precisely, on the explaining model of qualitative content analysis, which is used to take words or phrases from a given text and provide them with explicatory meaning. The court rulings used in this thesis are the major units of analysis and both rulings are openly available to the public. A description of each case is provided below in **III.a** & **III.b**. The analysis marks and collects paragraphs of interest from the rulings based on a twofold search pattern: first, expressly stated content by the courts; second, content that can be deduced. In regards to the first category, references by the courts that expressly mention corroborating scientific evidence for the detriment of the environment caused by climate change (also in relation to the plaintiffs injuries) are collected as data of interest. Additionally, express references by the Courts to international climate agreements are also collected as data of interest. Further, the analysis is particularly interested in the issue of standing and the legal reasoning that the courts provide as to why they did or did not grant standing. Legal reasonings are cardinal to the analysis, they form the heart of the expressly mentioned reasons why cases are successful or not. This is especially the case in instances where Judges go beyond traditional jurisprudence and reinterpret existing law and/or create or find new rights by establishing new jurisprudence. Moreover, paragraphs that contain reasoning that deny certain rights are of equal importance. In general, paragraphs containing these express legal reasonings and justifications are the most critical type of data to be collected. In addition, the analysis also searches for instances where unusual language is used, as for example unusually strong or noticeably different language. The second pattern is mainly deduced relying on the paragraphs found and by using supporting literature. As such, conditions that cannot be mentioned expressly, for example constitutional or institutional qualities, but that are likely to be of influence to the position that courts can take as actors in climate governance are deduced using theory or supplementary documents, namely scholarly contributions to the cases. What becomes clear when reading the documents is that the German and American Courts have differing approaches when it comes to climate litigation. The goal of the content analysis is to identify the factors that might be of importance in influencing a court in their decision in a given climate litigation case. Taking into account the aforementioned theories, a total of four groups of such factors can be identified. First, legal precedents that have established a particular interpretation or application of the law can influence judges in their decision making, this is especially important in common law systems that build on precedent cases like the US. Second, the institutional context in which judges operate. This can include the legal system, the political climate and political independence of the judiciary, prevailing legal cultures, or potential pressure from higher ranking authorities. Third, legal reasoning, such as “why or why not was standing or justiciability granted in a case?“, or “did the judges draw on scientific expertise in making their decision?“. Therefore, the aim of the analysis is to take a look at the *reasoning* that courts have used in the rulings to justify their decision. As mentioned, the express reasoning of justification can be read directly from the text, and needs not to be deduced. Thus, a distinction can also be made between express reading of the rulings and latent reading that require further interpretation.

The rulings of the two cases brought before the respective courts constitute the data that is used for this thesis. Albeit with different strategies, the intentions that both cases have in common is to hold their respective governments accountable for their failure to respond to climate change in an adequate manner and to assert that citizens should enjoy a right that protects their freedoms from the consequences of climate change.

III.a. Juliana v. US

In 2015, a group of youths, represented by the non-profit organization "Our Children's Trust" and an expert climatologist, sued the US government claiming a violation of their fundamental, constitutional rights as a result of the government's failure to sustain a healthy climate. The case was filed at the Oregon Federal District Court and the material legal basis that the plaintiffs built their complaint on rests on the 5th, 9th, and 14th amendments of the US constitution. In citing the 5th and 14th amendment, the plaintiffs first argued that the government had infringed upon their rights to life, liberty, and property. Further, the plaintiffs argued that the government, by promoting fossil fuel development, has knowingly caused interference with the climate system, thus endangering the health and welfare of the plaintiffs. The plaintiffs went on to claim that this violated the due process clause and the equal protection clause that puts a disproportionate burden on future generations and children who are unable to affect neither the environment in which they grow up in, nor participate the in political process needed to make their voice count and who will have to bear the consequences of this neglect (Juliana v. US, 2020). Additionally, the plaintiffs asserted that the 9th amendment that ensures the rights to life, liberty, and property is linked with an inseparable right to a stable climate. Lastly, the plaintiffs drew on the public trust doctrine which states that the public has a right to essential natural resources from which the federal government has a duty to refrain from infringing (Id.). In sum, the plaintiffs built their suit on the following rights which they claimed violated and used as the legal basis for their claim: first, violations of substantive rights under the Due Process of the 5th amendment; second, violation under the 5th amendment to equal protection of the law; third, violation of the 9th amendment rights; and lastly, the public trust doctrine (Id.). As a remedy, the plaintiffs asked, inter alia, for injunctive relief that would order the government to implement a plan for phasing out fossil fuel emissions (Id.). The plaintiffs submitted extensive scientific evidence to back up their claims and prove that they have suffered injuries directly caused by the effects of climate change (eg. damages caused by flooding etc.) (Id.). Then District chief Judge Aiken made several outstanding key decisions in allowing the case to proceed to trial, denying multiple attempts by the government to have the case dismissed or blocked (Farah, 2023). Following several more attempts to halt the case which lasted over two years, under pressure from the Supreme Court and the Ninth Circuit Court, District Judge Aiken reluctantly granted the government's motion to reconsider and the Ninth Circuit Court certified an interlocutory appeal with oral hearings scheduled before it in 2019. The government's defence remained unchanged, it argued that the plaintiffs did not have standing to sue, that the injuries are not redressable by a court as it would interfere with the principle of the separation of powers by granting courts to seize control of national energy production, and that there is no public trust doctrine regarding the atmosphere that could bind the government (Juliana v. US, 2020). The final decision by the Ninth Circuit Court was delivered in 2020 in a divided decision (2-1), and reversed the decision of the District Court. Ultimately, the Ninth Circuit held that the plaintiffs lacked Article III standing to sue because the injuries claimed were not redressable by an Article III court (Id.). Consequently, the majority reversed the initial decision and dismissed the case.

III.b. Neubauer v. Germany

In 2020, a group of youths backed by environmental NGOs such as "FridaysForFuture", sued the German legislator and government by filing a legal challenge to the country's constitutional court, the *Bundesverfassungsgericht*. The plaintiffs alleged that Germany has failed to sufficiently adopt statutory

provisions and measures to curb climate change by challenging certain provisions of the Federal Climate Protection Act of 2019 that aimed at reducing GHG emission by 50% until 2030 compared to 1990 levels (BVerfG, 2021). Backing their complaint with extensive scientific evidence, the plaintiffs contend that the Climate Protection Act cannot stay within the previously determined CO2 budget that is necessary to comply with the 1,5 degree goal that Germany had obligated itself to under the Paris Agreement (Id.). The material legal basis of the plaintiff's complaint arose out of the alleged violation of a right to a future consistent with human dignity enshrined in Article 1 (1) and on the duty of the state to protect its citizens (their life, physical integrity and personal freedom), as enshrined and arising from their fundamental rights sourced in Article 2 (2) and Article 14 (1) of the German constitution, the Basic Law (*Grundgesetz*). Additionally, the aforementioned Articles were filed in conjunction with Article 20a of the Basic Law, which binds the state to protect the natural foundations of life with a mindful responsibility towards future generations (Id.). In sum, the plaintiff's complaint alleged that Germany had acted unconstitutionally in a twofold manner: first, the plaintiffs alleged that the state had failed to protect them from climate change (positive duty to protect), thus violating their human rights enshrined in the constitution; second, they alleged that, absent adequate action to tackle climate change, the German state had restrained the plaintiffs constitutionally protected freedom (negative duty to guarantee freedom) (Id.). The case was picked up by the eight judges of the first senate of the *Bundesverfassungsgericht* who delivered their ruling in 2021 after detailed consideration. Per German law, the Court examined if the government had failed to fulfill its duty to protect or taken action that limits the plaintiffs freedom. The Court did not find a violation to the first allegation of a failure to protect the plaintiffs from climate change, insofar the Climate Protection Act was not inadequate enough to fall out of that margin (Id.). However, regarding the duty to guarantee certain freedoms, in its judgment the court did find that the Climate Protection Act creates disproportionate, intertemporal risks for future generations, whose freedoms will be impaired should the status quo not change (Kirchner, 2022). In other words, the court found that the Climate Change Protection Act has an advance interference effect on future generations, burdening them by using much more than the predetermined CO2 budget (Kircher, 2022). As a result, the court unanimously declared certain provisions of the Act in question to be unconstitutional, insofar as the legislature had not proportionally distributed the budget between the current and future generations, which would lead to a drastic exposure of future lives to serious losses of freedom (BVerfG, 2021). Subsequently, the court ordered the *Bundestag* to amend the Climate Protection Act before the year 2023 and provide clear reduction targets beyond 2030, in accordance with the Paris Treaty. This amended Act was quickly crafted and was implemented in August 2022.

IV. Analysis

The Climate Change Database in 2022 has recorded over 2000 ongoing or completed climate litigation cases worldwide, out of which the absolute majority of cases, nearly three-quarters, have been filed in the USA (Setzer & Highham, 2022). The sheer volume of cases, however, fails to reflect the general naught that its success rate holds. So far, no case in the US has been able to bring about effective policy change, that is, mandating the government/legislator to reduce GHG emissions like the *Bundesverfassungsgericht* landmark decision did in *Neubauer*. This section aims at analyzing the conditions under which the court in *Juliana* came to its conclusion of dismissing the case and how these conditions differ in the German counterpart. The

analysis is structured in two parts: first, the expressly mentioned legal reasonings in the judgments will be highlighted and juxtaposed; second, the underlying constitutional and institutional factors will be assessed in order to determine the conditions that either make for a proactive or conservative court in deciding climate litigation cases.

IV.a. Legal Reasoning of the *Bundesverfassungsgericht*

In its verdict, the German Constitutional Court starts off by dedicating roughly a third of the verdict's paragraphs to facts pertaining to the case. Therein, the Court mentions the obligations under the Paris Agreement and, in an extraordinarily extensive manner, makes several references to widely regarded scientific evidence by the likes of the IPCC or climate change experts. As a matter of fact, over 20 paragraphs are solely dedicated to the factual bases of climate change and climate action. The Court acknowledges that the "only way to significantly slow down human-induced climate change is by reducing CO2 emission" (BVerfG at 31). Further, the Court goes on to refer to the "carbon budget" which the IPCC set out in its special report and links it to Germany's own budget by asserting that irreversible damages will occur should the global temperature rise not be limited to a maximum of 1,5 degrees (Id. at 28). The Court does not shy away from explicitly naming Germany's contribution in GHG emissions, which stands at 2% of all GHG emissions while hosting only about 1% of the world's population (Id. at 30). Lastly in this introductory note to its verdict, the Court links this scientific evidence to the tenets of the Climate Act - achieving climate neutrality by 2050 (Id. at 37). The Court did not have to go to such extensive lengths in mentioning scientific reports that corroborate the severity of human-induced climate change should drastic measures not be taken, but it nevertheless decided to do so in what could be seen as an attempt to "set the stage" for the remainder of the verdict. In light of the admissibility requirements, the Court continues to determine whether the plaintiffs have standing to sue. In German Law, the constitutional complaint is open to all natural and legal persons if they can prove that at least one of their fundamental human rights (Articles 1 through 19 of the Basic Law) have been violated (Kirchner, 2019). Thus, Article 20a on which the plaintiffs partly build on, does not entail any subjective rights and cannot be solely relied upon to establish standing in a constitutional complaint (BverfG at 112). Nonetheless, the Court goes on to determine that the plaintiffs have standing to lodge a complaint, insofar the Climate Change Act violates their fundamental right of freedom flowing from Article 2 of the Basic Law. The Court reasons that the law offloads a significant portion of the determined GHG reduction to the post 2030 period, which subsequently results in a burden for future generations who would have to make far-reaching efforts under additional strain and short notice to stay within the goal of reaching climate neutrality by 2050 as laid out by the law (BverfG at 117). In German constitutional jurisprudence, the human rights enshrined in the Basic Law have a twofold function: first, they have a negative function that protects the "individual from state action that impedes the freedoms protected by the Basic Law" (Hellner & Epstein, 2023: 10). Second, they have a positive function that "establishes a duty of protection for the state" by which the "state is required to take positive action to prevent human rights violations" (Hellner & Epstein, 2023: 10-11). The Court then continues to examine whether there exists an apparent violation of the positive and negative duties to protect committed by an action or omission thereof from the German state. Therein, the Court contends that the state does have a duty to protect life and health that are posed at risk due to the effects of climate change and that this duty flows from the duty of protection from Article 2 (2) of the Basic Law (BverfG at 148). However, the Court also finds that the

legislator has a certain margin in designing the precautionary measures it takes in guaranteeing said freedom, and the measures taken in form of the legislative wording of the Climate Protection Act are suitable enough to afford protection against risks posed by climate change (Id. at 156). Even so, the Court does find a violation of the plaintiffs' freedom when it takes a look at the state's negative duty to guarantee freedom. It argues that the legislator has:

"failed to take sufficient precautionary measures to manage the obligations to reduce emissions in ways that respect fundamental rights - obligations that could be substantial in later periods due to the emissions allowed by law until 2030" (BverfG at 182).

The Court continues to contend that the sections in question from the Climate Act have an "advance interference-like effect" on the freedom of the plaintiffs that is protected by the Basic Law (Id. at 183). Subsequently, those sections create disproportionate risks that will impair freedoms protected by Basic Law in the future (Id. at 183). Moreover, the Court claims that "intertemporal guarantees of freedom" are afforded to the plaintiffs because the burdens of the Climate Act are disproportionately shifted to the future and that if those provisions allow GHG emission to be emitted in a such a manner, then it will pose an "irreversible legal risk to future freedoms" (Id. at 184; Id. at 186). In other words, with the advance interference-like effect, the Court argues that constitutional justification is already required now, even if the injuries that could and will probably occur are in the future, as emissions will have an irreversible impact when not evenly distributed as per the state objective of Article 20a which creates the obligation to improve (and create) law over time that favors ecological interests (Hellner & Epstein, 2023: 11). Penultimately, the Court references the principle of proportionality in establishing that:

"one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom. […] It is thus imperative to prevent an overly short-sighted and thus one-sided distribution of freedom and reduction burdens to the detriment of the future" (BverfG at 192).

Lastly, the Court strongly addresses the international dimension of the problem of climate change and holds Germany accountable for fulfilling "its part" in combating climate change by acknowledging that its contribution alone will not be able to prevent climate change. Inasmuch as Germany is part of international agreements that promote climate action, the state cannot "evade its responsibility […] by pointing to GHG emissions in other states" (Id. at 203). As such, the Court determines that Article 20a furthermore obliges the state to resolve climate change beyond the domestic level, compelling the government not only to engage and enforce international treaties, but also to continue to take climate action irrespective of the possibility of whether or not international cooperation might seem feasible or not (Id. at 201). Worded differently, the Court asserts that Germany cannot point at other countries' GHG emissions but must, in any case, fulfill the obligations from Article 20a to ameliorate its own emissions output. Further, the Court establishes a legally binding vow for Germany to implement the goals set out in international agreements, most notably the Paris Agreement, and requires the state to actively engage in internationally oriented activities for tackling climate

change. With all these arguments in consideration, the Court comes to the conclusion that it is constitutionally required to plan the transition to net zero emissions timely and with regard to future generations who cannot be burdened with the negligence of the present(Id. at 210). As a result, the Climate Protection Act is not adequate to limit Global Warming to 1,5 degrees and is insufficiently designed to achieve climate neutrality by 2050.

The expressly said content of the verdict by the *Bundesverfasungsgericht* is surprisingly strong and far-reaching. In fact, it has been considered to be the most far-reaching judgment on climate protection by any Constitutional Court so far and it breaks with many of the traditional views in German jurisprudence (Setzer & Vanhala, 2019). The Court changes its former perspective and acknowledges that environmental protection necessitates balancing and weighing different spheres, in this case the economic freedom to produce GHG emissions and the preconditions to the fundamental freedom of life and health, including the freedom of future generations that pertains to this and is disproportionately affected by the burdens of the Climate Act. As such, the judgment contends that the human rights enshrined in the German constitution does not only protect fundamental preconditions of freedom of today's generations, but also those freedoms of future generations that will irreversibly be violated and infringed upon (Ekardt & Heyl, 2022). It is a novel jurisprudence to consider that this duty to protect freedoms does not only intervene when violations have occurred, rather, it is also directed towards the future and can, in this regard, create obligations to protect the plaintiffs and their kin in the future. The principle that was applied here for the first time in relation with fundamental rights in German jurisprudence is the "precautionary principle". The precautionary principle is an "environmental standard that requires decision makers to take measures to prevent a polluting from causing harm" (Amoakuh, 2023: 222), and this also includes harm that is yet to occur to the plaintiff (Amoakuh, 2023). This is an astonishing claim by the Court since this entails that fundamental rights cease to exist when confronted with unavoidable, irreversible damage, which in turn would render any debate about causality as partially moot since the harm has yet to happen (Stuart-Smith, 2021). Additionally, the Court has made it obviously clear, by dedicating tens of paragraphs to the value of scientific evidence, that the latest scientific evidence is absolutely crucial to serve as the basis on which policies shall be built on. Another key insight from the verdict is the aforementioned binding nature to the international treaties in combating climate change (especially the binding nature of the 1,5 degrees goal) and the fact that Germany cannot evade responsibility in realizing its climate goals by referencing the inaction of other states. In concluding this section, the key words of the expressly stated legal reasonings shall be enumerated once again: advance-interference effect; intertemporal freedoms; irreversible damages; proportionality; precautionary principle; international binding dimension; value of scientific evidence. With most of these reasonings the *Bundesverfassungsgericht* breaks from its previous jurisprudence and reinterprets provisions of the German constitution in favor of climate action. This is clearly a sign of judicial activism. Further, it is also in line with the aforementioned theory of courts as governance actors, serving as a catalyst to the implementation of policies when they determine that the other state branches are lacking in their duties. The Court has taken, to a commendable extent and with judicial authority, decisions in interpreting the law, which by no means have not been uncontroversial, that have opened a new path for future plaintiffs within and potentially beyond the German borders.

IV.b. Legal Reasoning of the Ninth Circuit Court

Although the majority in *Juliana* decided to dismiss the case due to it not being redressable by an Article III. Court (hence, due to lack of standing), the decision was actually very favorable to the plaintiffs in many regards (Mank, 2020). In opening up the majority opinion, the Judges start by reaffirming the well documented scientific evidence that the plaintiffs have presented in claiming that:

> "a substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse" (Juliana at 11).

In this regard, the majority does similarly as the *Bundesverfassungsgericht* who also scientifically confirmed the severity of the problem. The majority confirms that the record compiled by the plaintiffs leaves little basis for denying the rate at which climate change occurs and draws on expert evidence that establishes that this rise in GHG emissions is traceable to fossil fuel combustion and that, eventually, this problem will reach the "point of no return", alternatively known as the tipping point (Id. at 14). Further, the majority affirms that this has been known to the government, but was, nevertheless, disregarded. On the contrary, the majority confirms that the government did not only contribute to this detriment by solely being inactive, but by affirmatively promoting fossil fuels (Id. at 15). The majority goes on to identify whether or not the tripartite standing requirements consisting of injury, causality, and repressibility are satisfied. Therein, it finds that the injury and causality requirements have been correctly found and reaffirm that those injuries are not merely hypothetical, rather, there is concrete evidence that the plaintiffs have suffered actual damage from climate change (Id. at 18). Moreover, the majority surprisingly concludes that, opposite to what the government had stated in defence, that it does not matter that climate change affects everyone, rather, what matters is that the plaintiffs have been injured concretely (Id. at 19). This is a relatively progressive way to satisfy the injury requirement, as the majority contends that climate change cannot be considered a generalized grievance, which in turn would not have satisfied the requirement. The majority moves on to examine the redressability requirement. It is important to note that the majority starts off this section by mentioning what the plaintiffs assert and what they do not:

> "they do not claim that the government has violated a statute or a regulation […], rather, their sole claim is that the government has deprived them of a substantive constitutional right to a "climate system capable of sustaining human life" and they seek remedial declaratory and injunctive relief" (Id. at 21).

This remark by the majority is tone-setting, as it already hints at one of the fundamental reasons why this lawsuit will not be successful. This will be elaborated upon later on. The majority continues to make favorable assertions towards the plaintiffs in assuming that such a constitutional right, which is heavily debated, exists in the first place. Thereafter, the majority identifies the injunctive relief (the action plan to phase-out fossil fuels) sought by the plaintiffs as the heart of their lawsuit (Id.). The redressability consists of two prongs which consist of demonstrating that the relief sought can at least ameliorate the injury suffered, and that establishing the relief sought is within power of an Article III. Court (Mank, 2023). Yet again, the

majority remains favorable to the plaintiffs in accepting the first prong, albeit with skepticism, but ultimately asserts that the plaintiffs do not have standing because granting the relief is beyond the power of the courts:

> "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan […], any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom of the executive and legislative branches" (Juliana at 25).

Insofar as the majority interprets the relief, it is the judiciary who should be the one to take over this duty, which evidently is of nature to be solely designed and implemented by the other branches of the state. In the following, the majority expressly makes several references to the separation of powers principle from previous case-law, in essence contending that it is necessary to understand what activities are appropriate for each state branch; reaffirming that redressability questions always implicate the separation of powers and that courts cannot allocate political power and influence; and that the separation of powers principle underlies the standing doctrine which requires courts to respect their proper and limited role in a democratic society (Id. at 25, 26, 27, 28). Lastly, the majority concludes its opinion by stating that: "we reluctantly conclude that the plaintiffs' case must be made to the political branches or to the electorate at large, the latter of which can change the composition of the political branches through the ballot box" (Id. at 32). As a result, from the above mentioned expressly written content, one can discern that the legal reasoning for the majority in dismissing the case was mainly that the relief sought by the plaintiffs cannot be addressed by the Court, as doing so would violate the principle of the separation of powers materialized in the notion that the Court (the judiciary) would usurp political power by ordering Congress and the government to design and implement such an action plan and also supervise them by ensuring a long-term compliance of those branches with the plan.

The dissenting Judge, on the other hand, strongly criticizes the majority in her opinion for their decision to defer this question to the political branches, opining that her "colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary" (Id. at 33). Further, the dissenting Judge provides an especially long and deep overview explaining why she disagrees. As a matter of fact, her dissent is almost twice as long as the majority's opinion. Therein, the dissenting Judge argues that the constitution implies a so-called "perpetuity principle", which entails that judges would have the authority to prevent the willful dissolution of the Republic (Id. at 40). The dissenting Judge accepts the irreversible and imminent threat that can be taken from the record compiled by the plaintiffs and asserts that climate change forms just that: a threat that will eventually lead to the dissolution of the Republic. Furthermore, notwithstanding the fact that the dissenting Judge affirms the majority's opinion that it is the role of the political branches to shape and implement policies, she refers to the Supreme Court's decision in *Massachusetts v. EPA* to conclude that the plaintiffs do have standing, even in light of redressability (Mank, 2023). The Judge's strong language is evidently apparent when referencing the majority's justification of the separation of powers principle by proclaiming that:

> "the majority laments that it cannot step in the shoes of the political branches […], but appears ready to yield even if those branches walk the Nation over a cliff. […] The doctrine of standing preserves balance among

the branches […] but the doctrine of judicial review compels federal courts to fashion and effectuate relief to right legal wrongs - even if we instruct the other branches as to the constitutional limitations on their power“ (Id. at 49).

Thus, the dissenting Judge heavily criticizes the majority for deferring to the political branches when it is the political branches themselves who not only continue to turn a blind eye to the issue, but also actively contribute to its worsening (Farah & Ibrahim, 2023). Lastly, on the political questions doctrine which bars political questions from being justiciable, the Judge avers that climate change should be de-politicized as the constitution does, obviously, not explicitly mention climate change, but neither does climate change fall “implicitly within a recognized political-questions area“ (Juliana at 55). In concluding this section, the dissenting Judge’s opinion could be recognized as one of the strongest opinions ever written. The Judge evidently shows strong judicial activism with her wording and reasoning and opines that the judiciary should not shy away from its role of keeping the other branches in check and that the Court should make use of the influence it can yield in adjudication as a coequal branch of the state.

IV.c On Judicial Activism

What becomes apparent from the above in-depth textual analysis of the rulings, is that the *Bundesverfassungsgericht* actively made use of its competence to utilize judicial review to right a legal wrong, while the majority in *Juliana* has shied away from taking on its supervisory role as the judiciary in applying a conservative approach, relying of a strict separation of powers principle. The *Bundesverfassungsgericht* proved far more modern in breaking with previous case-law and interpreting the fundamental rights in question together with article 20a of the Basic Law as guaranteeing freedoms that go beyond the current generation: intertemporal freedoms that cannot be encroached upon by the legislator who, in neglecting its duties that arise from the Climate Act in conjunction with the targets of Paris Agreement’s binding character, shifted the burdens of realizing the goals set out in those documents to future generations. Further, the *Bundesverfassungsgericht* made use of its power vested in judicial review and, in a first, established the precautionary principle and advance interference-like effects as jurisprudence. Hence, this is wholly in line with the above mentioned conception of judicial activism, where judges create new laws, reinterpret old laws, and reject well-established principles. It follows that this court readily takes on its role and with creative judicial activism, proves to be an effective actor in (climate) governance. The dissenting Judge in *Juliana* does much the same, she interprets the law in novel ways to affirm that the plaintiffs do, indeed, have standing and that the judiciary should have authority in granting relief, for climate change is not an inherently political question (Juliana at 36). The dissenting judge creatively alludes at the Federalist Papers and the preamble to the constitution as guaranteeing the “perpetuity principle“ (Jualiana at 40). With an analogy to the political dissolution of the US during the Civil War, the Judge states that climate change poses such a threat to the integrity of the Nation, that it follows that this principle should apply to the case, making it possible for the judiciary to override the political branches (Juliana at 42). Insomuch as the dissenting judge interprets the law in that way, her actions, too, wholly fall under the established judicial activism conception. Regrettably for the plaintiffs in *Juliana* though, her colleagues do not assume the same stance. As a bottom line, then, it can be stated that judicial activism is a crucial condition under which courts can take on a strong role in climate governance, as their activism allows them to bypass and reject

established path-dependencies by interpreting the law in novel and, at times, creative ways. Again, unfortunately for the plaintiffs in *Juliana*, the other Judges were more conservative in their approach. Nevertheless, the dissenting Judge's reasoning proves that, through creative legal reasoning, the case might be ruled in favor of climate litigation, and this can be considered an achievement in itself. In addition, it is worthwhile mentioning that the *Juliana* case only made it so far thanks to the extraordinary efforts, sure to be classified as strong judicial activism, of District Judge Aiken, who initially picked up the case in the District Court of Oregon (Farah & Ibrahim, 2023). Judge Aiken stressed the importance and severity of this case and upheld efforts by the defendants to have the case dismissed for a considerable amount of time. Had it not been for her activism the case might have been dismissed without any significant coverage. Thus, this analysis finds evidence for **H1**, that judicial activism has a positive influence on courts taking on a strong role as climate governance actors.

IV.d. On the Separation of Powers

Drawing again on the principle of powers established in **II.d** and how this principle takes effect differently in Germany and the US, scholars have already noted before that US courts are rather status quo oriented with a reticent attitude towards adjudication in climate change cases, whereas EU courts assume a more nuanced attitude in this regard and are more willing to challenge failure on the side of the other branches when they are not performing their legal obligations against the backdrop of climate change (Parenteau, 2023; Farah & Ibrahim, 2023). Indeed, this reluctance on the side of the majority is evident in light of their opinion, where separation of powers is explicitly referenced in conjunction with several case-laws, emanating a sort of path-dependency. The principle of separation of power in the US is tightly intertwined with the standing doctrine (Parenteau, 2023). More so, the Supreme Court explicitly established in case-law that the basic underlying idea of the doctrine of standing is the separation of powers (Kmiec, 2004). Scholars have noted that this entails two basic functions inherent to standing: first, it preserves the balance of power and confines courts to their original, historic function; second it ensures that courts do not resolve matters that are better solved by the political branches (Hessick, 2017). These findings are completely congruent with the majority's reasoning in *Juliana*. The majority primarily focuses on the plaintiffs request to seek injunction relief through the so-called action plan. Therein, it argues that such an action plan would necessarily entail a "fundamental transformation of [the] country's energy system" (Juliana at 23) and that such a plan ordered by the Court would ultimately require the "judiciary to pass judgement on the sufficiency of the government's response to the order, which necessarily would entail a broad range of policymaking" (Id. at 26). Additionally, the majority relies on a previous ruling of the Supreme Court, reiterating that courts have "no commission to allocate political power and influence" (Id. at 28), as doing so could result in judicial power "unlimited in scope and duration" (Id. at 28). Hence, the majority in *Juliana* follows this conservative approach to standing established by the path-dependency of previous Supreme Court rulings. The majority deems this issue presented by the plaintiffs as non-justiciable, for it goes beyond the historic function of courts to preserve the power balance of the separation of power principle and because it is outside the authority of the courts to resolve a matter that is better resolved by the political arms of the state. Although the majority claims to regret this decision, it concludes that this political question cannot be conferred upon the judiciary (Id.) By comparison, the *Bundesverfassungsgericht* never expressly referenced the separation of powers principle, however, it can be deduced that the court solidifies its power in relation to the other

branches when it held that reviewing the state's duty to protect is not "beyond the scope of review" (BverfG at 152). Further, the Court asserts that even though Article 20a, absent express reference to GHG emission, requires further specialization, it is not excluded from judicial review (Id. at 205). As a result of the differing developments of separation of power that arises from the German and from the US constitutional law, the judiciary in Germany is more inclined to reprimand the other branches should they neglect their duties. However, this is not to say that the *Bundesverfassungsgericht* becomes a policy-maker, rather, owing to the separation along functions, the Court assumes its supervisory role and holds the legislator accountable by ordering it to redraft the Act. These findings are largely in line with findings in academia, supporting the notion that standing forms less of a barrier in Germany (and the EU at large) compared to the US (Parenteau, 2023). For the majority in *Juliana* the separation of power entails maintaining a formalist approach, state branches are separated by structure and granting the plaintiffs their relief by initiating an action plan is something that is inherently political. Further, case-law concerning standing, with the concept of case-law being more relevant in the US' common law system than in Germany, has created a path-dependency that makes it difficult for US judges to depart from (Naglieri, 2023). Consequently, US courts appear to merely apply the law, while deferring any accountability to the political branches. Thus, this finds support for **H2** that states that the stricter a court adheres to the separation of power principle, more likely it is not to take on a strong role in climate governance.

IV.e. On Lack of Constitutional Amendments, Legislation, and Treaty Obligations

Lastly, and this cannot be deduced from textual analysis, there is a serious discrepancy in the constitutional and institutional framework in which both courts acted when they came to their conclusions. In the case of Germany, there exists a federal constitutional Amendment in Article 20a of the Basic Law. More so, the Court determined with its verdict that this Article, against previous jurisprudence, is more than a provision of programmatic rank (state objective, *Staatszielbestimmung*), rather, the Court now recognizes, it is a "binding constitutional climate protection mandate incumbent on federal institutions and open to judicial scrutiny" (Naglieri, 2023: 1926). Hence, the government is compelled to take action that leads to climate neutrality. Additionally, the plaintiffs in *Neubauer* were able to build their claim on a concrete piece of legislation - the Federal Climate Change Act (certain sections of it). Further, international climate agreements can also play a substantive role in the success of a case. This is demonstrated when Germany, as part of the EU's commitment to create minimum nationally-determined-contributions (NDCs) in wake of the Paris Agreement, was confirmed by the Court to bindingly commit to even stricter targets than the EU (White, 2022). As has been mentioned above, the Court also made several express references to the Paris Agreement itself and reaffirmed its binding character and the 1,5 degrees goal. Lastly, Germany is also part of more human rights treaties, most notably by having ratified the ECHR. While human rights were already central to the case as they are enshrined in the *Grundgesetz* itself, there was no need for the Court to reference these documents, nevertheless, it is existent and could be used by the Court to find rights in relation to harms caused by climate change. In the case of the US, all of these elements were absent and could not be called upon by the Court. In the US, there is no express constitutional right that offers protection from the consequences of climate change. Notwithstanding the legal reasoning of the dissenting Judge, there is, yet, also no interpretation that would confirm this right as flowing from the 5th Amendment. The majority dismissed the case before it could go into the detail whether there is a right to a climate system capable of

sustaining human life due to lack of standing, but had the majority granted standing, it would have been perhaps more difficult to dismiss this case based on the plaintiffs evidence and claim (Farah & Ibrahim, 2023). Still, courts in the US harbor a certain conservatism when it comes to introducing new rights in legal documents and, hence, recognizing this right to a just climate system is difficult to achieve by interpreting the constitution (Chael, 2019). Moreover, most scholars agree that it is difficult to find any such right in the constitution, as it provides only for negative rights that, as aforementioned, prohibit a certain conduct by the state but that do not impose affirmative duties to take action as positive rights do and as the *Bundesverfassungsgericht* found the German legislator to have (Bruckerhoff, 2008). Further, the plaintiffs in *Juliana* did not refer in their suit to any specific policy, action, or regulation by Agency (say, an EPA regulation for example). This lack of specificity in their claim likely gave the majority even less leeway to decide in favor of the litigants, as the plaintiffs did not seek any specific measures. Rather, the action plan they sought as a remedy was too broad and subjective and would have entailed great consequences for the US economy (Farah & Ibrahim, 2023). In addition, US courts cannot draw on any international or regional binding agreements that would require the government to reduce GHG emissions like the *Bundesverfassungsgericht* did with regards to EU NDCs and the Paris Agreement (Amoakuh, 2023). The US had even briefly left the Paris Agreement during Trump's presidency and previous attempts to sue the government over this were all dismissed due to lack of standing (Farah & Ibrahim, 2023). Lastly, it would furthermore be difficult for US courts to rule in favor of climate litigation without the possibility to draw on obligations that arise from human rights treaties. Recently, there has been a strong rise of litigation in conjunction with human rights claims (Markell & Ruhl, 2012). The US has not adopted any human rights treaties as federal law and has only ratified a handful of Human Rights Conventions compared to other liberal democracies (Amoakuh, 2023). As a result, courts in the US have less tools and substance to work with, even if Judges prove to be judicially active, minting a case and interpreting the laws in a way that would circumnavigate all these difficulties would likely result in an excessive use of judicial power. Constitutional and institutional givens are, to a large degree, influential in determining how much leeway a court can have in making its judgment. Therefore, the presence of environmental constitutional amendments, legislation, and treaty obligations are more likely to make for a court that can take on a stronger role in climate governance.

In recapitulating, this analysis found that the German Court is more inclined to take on a strong role in climate governance. It corroborates **H1**, lending support to the hypothesis that the more willing a court is to engage in judicial activism, the likelier it is to take on a strong role in climate governance. Further, this analysis also finds support in **H2,** suggesting that the more rigid a country's separation of powers principle is, the less likely it is to take on a strong role in climate governance. Additionally, this analysis found that a country's constitutional and institutional givens, or qualities, can also be, to a large degree, influential in determining whether or not courts take on a strong role in climate governance. Therein, a country with a constitution that expressly provides environmental amendments is likely to be favorable towards climate litigation cases. Furthermore, courts can have more leeway in deciding climate litigation cases if there exist concrete pieces of legislation or acts on which the plaintiffs build their claim on. The same holds true for international climate agreements and international agreements on human rights. It is likely that if a country has bindingly ratified more agreements of such kind, the more possibilities exist for courts to take on a strong role in climate governance.

V. Conclusion

In conclusion, this thesis finds evidence that courts can, indeed, fill the gap in the climate governance regime. That is, if they find themselves in the right constitutional setting and are willing to progressively take on their supervisory role when conducting judicial review of climate litigation cases. Therein, this thesis finds that courts are more likely to take on a strong role in climate governance when they are willing to amply use judicial activism, when the lawsuit rests on a concrete legislation/regulations, and when the constitutional setting is favorable. In this example, the *Bundesverfassungsgericht* is willing to go greater lengths to point out the state's inaction to convincingly tackle climate change. By breaking with previous jurisprudence and interpreting the constitution in novel ways, this court exerted extraordinary judicial activism that culminated in the recognition of a set of new rights, namely the positive duty of the state to ensure intertemporal freedoms. The Court was also able to come to this conclusion thanks to the constitutional setting in Germany and has established an important blueprint for future plaintiffs. On the other hand, the majority in *Juliana* finds itself in a constitutional setting inapt to come to a favorable conclusion for its plaintiffs. The remedy sought by the plaintiffs is too broad and effectively entails a complete restructuring of US policies and economy and, thus, the Court rightfully concludes that it is outside its power to grant this relief. The judiciary cannot be the authority that develops, shapes, and implements policies of any sort, as this would, indeed, be a usurpation of power. In a closing remark, there needs to be drawn attention to the importance of judicial activism, even in the ultimately dismissed *Juliana* case. The outstanding argumentation of the dissenting Judge has already been mentioned, but even the majority was helpful in recognizing a set of facts. The Court left no room for doubt that the government is knowingly contributing to the detriment of its very nation and the Court showed that climate litigation cases can reach so far as satisfying most standing requirements. Some scholars have suggested that this can be interpreted as the majority's way of exerting judicial activism, because had the case went on to trial, it would almost certainly ended up before the Supreme Court, which in its current constellation, would be more than likely to reverse the case and render the successfully established facts by the Ninth Circuit Court moot (Farah & Ibrahim, 2023). However, there is no way to confirm if that was the Judge's intent. In any case, judicial activism can prove crucial in overcoming political interests and lack of political will to act. Furthermore, the author of this thesis is not oblivious to the fact that these are not generalizable trends and that there are limitations to this thesis. There is still the need for future research to incorporate more countries in its analyses to better assess the underlying conditions that favor a strong role of courts as climate governance actors, especially countries of the Global South remain underrepresented in such analyses, although they are exponentially more exposed and vulnerable to Global Warming (Setzer & Highham, 2022). Additionally, future research should also take into consideration possibilities that plaintiffs in the US could use to bypass the above mentioned judiciary's restraints. White (2022) made an insightful contribution therein, theorizing how incorporating a set of future-oriented laws in US climate litigation may prove more feasible and effective in using courts to safeguard fundamental freedoms that deserves a mention. Lastly, it should be stressed that *Juliana* should not be considered a failure, instead, it provides a set of valuable lessons that future plaintiffs can take into consideration when they present their case. In the end, it may only be a matter of time until such environmental rights are recognized in the US and until climate change gets de-politicized, but time is of the essence here to avert the irreversible damages that the IPCC referenced in its latest report.

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VII. Appendix

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