NOTE

BUILDING BLOCKS OF A FUNDAMENTAL RIGHT: A THOUGHT EXPERIMENT ON THE CONSTITUTIONAL RIGHT TO A LIVABLE CLIMATE

Melanie Hess

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When civil rights lawyers sought to overturn Plessy v. Ferguson *in the years leading up to* Brown v. Board of Education, *they faced a history of institutionalized segregation and inequality, constitutional acceptance of the "separate but equal" doctrine, and sharp social divisions on the issue. Other landmark cases of rights recognition, such as* Obergefell v. Hodges *and* Roe v. Wade, *similarly built upon years of evolution in law, precedent, and social opinion that made them inconceivable before their time. Early versions of the litigation strategies envisioning these judgments might have been tentative and vague, lacking in factual, legal, and political support. Drawing encouragement from these episodes, this Note aims to set out a theoretical blueprint for litigation to establish the right to a livable climate. The Note proceeds by discussing the foundation laid by preceding environmental litigation, particularly with regards to standing and establishing injury and causation. It then seeks to establish the government's duty and culpability, grounded in existing doctrines of government action and inaction in the realm of rights protection. Finally, it highlights the judicial role in the recognition of and protection of individual rights.*

INTRODUCTION: JUDICIAL RECOGNITION OF FUNDAMENTAL CONSTITUTIONAL RIGHTS

The jurisprudence of defining Constitutional liberty interests and fundamental rights is among the most emblematic of the American judicial process. No matter one's views on the appropriate standards to apply or on the role of the judge in this realm, grappling with fundamental rights has played an important role in expounding upon the values animating the Constitution and American society and has allowed judges to articulate their role in the protection and enforcement of these values.

The Supreme Court's decision in *Loving v. Virginia*[1] exemplifies this process and role. The Court unanimously held that Virginia's statute that forbade interracial marriage violated the Fourteenth Amendment, spending the majority of its opinion analyzing the issue as a violation of the Equal

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[1] Loving v. Virginia, 388 U.S. 1 (1967).

Protection Clause of the Fourteenth Amendment and finding that the statute must be struck down.

However, the Court did not stop there with an already clear and supported decision. Instead, it further declared that, in depriving the Lovings of the liberty to marry, the state had violated a fundamental right to marriage. The Court declared that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[2] In 2015, the Court held that the fundamental right to marriage necessarily extended to same-sex couples in *Obergefell v. Hodges*.[3] In doing so, the Court did not create or even expand a right; rather it recognized that the evolved understanding of the same fundamental right to marriage was characteristic of a nation where new dimensions of freedom become apparent to new generations.[4]

Today, litigants are turning to federal courts in hopes that they translate the increasingly partisan problem of climate change into a fundamental right: the right to a stable and livable climate.[5] In a landmark case, *Juliana v. United States*, child plaintiffs asserted that the actions and omissions of the federal government, which increased carbon emissions and endangered the planet, infringed upon the plaintiffs' fundamental right to a climate system capable of sustaining life in violation of their substantive due process rights.[6] *Juliana* and similar lawsuits face an unresolved challenge: they lack a convincing theory for why the Constitution should be interpreted to

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[2] *Id.* at 12.

[3] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[4] *Id.* at 2588.

[5] The right to a stable or livable climate as a fundamental right is the subject of this paper, but may be referred interchangeably as the right to a stable or livable climate or environment, given the interchangeability of these terms and how in both theory and practice they address the same issue.

[6] Juliana v. United States, 217 F. Supp. 3d 1224, 1263 (D. Or. 2016). At the time of publishing this Note, a Ninth Circuit panel in January 2020 had granted interlocutory appeal and then reluctantly reversed the decision of the district court that had held that the plaintiffs had standing to proceed. The panel, in a 2-1 vote, held that the record had established facts of record climate change, convincingly established that the government's contribution to climate change was not mere inaction. Furthermore, the panel held that plaintiffs had established both standing and causation enough to proceed in trial, but failed to establish redressability by Article III courts; given the complex policy questions, the panel held it was a political question. Judge Staton dissented, and would have held that the plaintiffs established standing and articulated constitutional claims with sufficient evidence to present at trial. Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020). "Plaintiffs bring suit to enforce the most basic structural principle embedded in our system of ordered liberty," she declared: "that the Constitution does not condone the Nation's willful destruction." *Id.* at 1175. Given that this Note proceeds more theoretically, it will primarily reference the opinion of the district court which denied dismissal based on standing.

protect the right to a stable environment.

Recognition of such a right may be "groundbreaking" or "unprecedented;"[7] yet at the same time, the Supreme Court has noted that "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution."[8] The Constitution, through safeguarding fundamental rights, including unenumerated rights, has room for the recognition of even groundbreaking rights: courts need only apply a long-recognized and well-established standard of fundamental rights recognition.[9]

By examining the judicial process and current rights-recognition jurisprudence in cases like *Loving* and *Obergefell*, we can draw conclusions not just about the suitability of recognizing the right to a livable climate as a fundamental right, but also how we might get there through the 'incremental approach,' a litigation strategy employing a step-by-step education of the courts that demonstrates this right's connection to the values animating the Constitution and our understanding of liberty. The end goal of getting the right recognized requires changing courts' and judges' understanding of how vague environmental harms have actual impacts on the individuals of the United States. Specifically, it requires the understanding that climate change represents a concrete threat to the lives and liberties of individuals, that it is a deprivation caused or culpably facilitated by government policies and activities, and that it threatens the core values of our Constitution and society.

History and precedent remain an obstacle as courts do not consider a stable environment to be a fundamental right that is constitutionally protected under the Due Process Clause of the Fifth Amendment.[10] But as the *Juliana* court, which was the first to allow plaintiffs to proceed on this fundamental rights theory, noted: "[t]he genius of the Constitution is that its text allows 'future generations [to] protect . . . the right of all persons to enjoy liberty as we learn its meaning.'"[11]

To build up a case for this right, a successful litigator must further develop several ideas that fall into three main categories: first, the reality of the deprivations and harms suffered by real people; second, the connection of these harms to governmental action; and finally, how this right fits into theories of right recognition and the court's role in recognizing

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[7] *Id.* at 1262.

[8] Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

[9] *See* McDonald v. City of Chicago, 561 U.S. 742, 767-68 (2010) (The Due Process Clause's substantive component safeguards fundamental rights that are "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition.").

[10] U.S. CONST. AMEND. V.

[11] Juliana v. United States, 217 F. Supp. 3d 1224, 1249 (D. Or. 2016) (*quoting* Obergefell v. Hodges, 135 S. Ct. 2584 (2015)).

fundamental rights. This paper will proceed by examining important precedential building blocks that address these issues, explore the issues that could be further developed, and attempt to put the blocks together (or at least neatly arrange them) for future litigators.

I. WHAT ENVIRONMENTAL LITIGATION HAS TAUGHT US ALREADY

The question of whether courts can even hear cases regarding the protection of environmental interests has arisen with mixed results through the past decades. One of the primary obstacles to these suits even being heard on the merits is whether plaintiffs have Article III standing to enforce environmental protections where the harm is widespread and causation uncertain.[12] *Lujan v. Defenders of Wildlife* is a seminal case that defines these requirements in the realm of environmental litigation.[13] In that case, the Court reemphasized the Article III standing doctrine that plaintiffs must demonstrate: 1) an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized and actual or imminent; 2) causation, or that the injury is fairly traceable to defendant and not the result of independent action by a third party; and 3) redressability, where the injury would be redressed by a favorable decision.[14]

In that case, the Court famously observed that plaintiffs could not claim a concrete injury to their interest of observing animals in Sri Lanka when they had not even purchased plane tickets.[15] Even where Congress created a citizen suit provision for the enforcement of environmental protections, the possibility of an environmental harm that caused no cognizable injury, only outrage, could not satisfy the injury requirement.

As much as it presents an obstacle, environmental standing litigation has also created an opportunity: by developing a substantial body of standing precedent in environmental litigation, we better understand the kinds of cognizable harms experienced by plaintiffs that are more than outrage or speculation. They have also begun laying groundwork for establishing causation and redressability.

A. Climate Change-Related Harms as Injury-in-Fact

Principles supporting injury-in-fact have become particularly robust through decades of environmental litigation. For example, quoting

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[12] *See* Washington Envtl. Council v. Bellon, 732 F.3d 1131 (9th Cir. 2013).
[13] Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
[14] *Id.* at 560-61.
[15] *Id.* at 563-64.

Supreme Court decisions,[16] the Ninth Circuit has held that an environmental plaintiff may satisfy the injury requirement in a suit against the government by showing that the challenged activity impairs his or her "economic interests or '[a]esthetic and environmental well-being.'"[17] Injury may also include the risk of future harm–*i.e.,* "'a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable–that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction–if the area in question remains or becomes environmentally degraded.'"[18]

A wave of climate change litigation over the past decade has yielded even more relevant and targeted principles that develop the harms faced by ordinary people in the wake of climate change. In 2007, the Supreme Court found in *Massachusetts v. E.P.A.* that Massachusetts had standing to bring suit, challenging a decision of the EPA in order to protect its territory and people from dangers posed by climate change.[19] The Court noted that "[t]he harms associated with climate change are serious and well recognized," and that the EPA's "steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'"[20] A few years later, the Supreme Court in *American Electric Power Co. v. Connecticut* held, for an equally divided court, that at least some plaintiffs had Article III standing to challenge electric power companies that owned fossil fuel burning plants for their contributions to climate change.[21] In 2013, the Ninth Circuit held that plaintiffs demonstrated an injury-in-fact where they alleged that greenhouse gas emissions caused damage to plaintiffs' land, increased their health problems, and interrupted hobbies like snowshoeing.[22]

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[16] Sierra Club v. Morton, 405 U.S. 727, 734 (1972); Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000).

[17] Natural Res. Def. Council v. E.P.A., 526 F.3d 591, 601 (9th Cir.2008) (quoting Sierra Club v. Morton, 405 U.S. 727, 734 (1972)). *See also* Friends of the Earth, 528 U.S. at 183, ("[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." [citation and quotes omitted]).

[18] Ocean Advocates v. U.S. Army Corps of Eng'rs, 402 F.3d 846, 859 (9th Cir. 2005) (quoting Ecological Rights Found. v. Pac. Lumber Co., 230 F.3d 1141, 1149 (9th Cir. 2000)).

[19] Massachusetts v. E.P.A., 549 U.S. 497, 508 (2007).

[20] *Id.* at 521 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).

[21] Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 423 (2011). Plaintiffs were ultimately unsuccessful on their federal common law right as a nuisance claim because the Court held that their right was displaced by federal legislation, the Clean Air Act.

[22] Washington Envtl. Council v. Bellon, 732 F.3d 1131, 1140-41 (9th Cir. 2013). The court dismissed the claims for want of standing for the failure to establish causation, and is typically cited by climate change defendants.

Recently, a district court found that child plaintiffs had adequately alleged a concrete injury when they alleged that they suffered exacerbated allergies and asthma as a result of the government's unconstitutional acts,[23] but rejected that their injury was traceable to defendants or redressable by a favorable ruling. For example, regarding their due process claims for loss of property due to rising sea levels, "Plaintiffs have not alleged that they have suffered the loss of any property."[24]

These plaintiffs' failures here are reminiscent of the *Lujan* plaintiffs' technical failure to purchase plane tickets before bringing suit. The plaintiffs bringing the suit did not–and could not–allege that they had suffered the loss of any property.[25] But, the ruling left the door open for a future plaintiff that alleges that the consequences of climate change, including the rise in sea levels, do result in a deprivation of property without due process. These injuries relating to land, health, and happiness play a role in educating courts as to what is at stake when it comes to the proposed liberty of the right to a livable climate and world.

B. Massachusetts v. E.P.A.*: Causation and Redressability*

Causation and redressability remain thornier problems for two primary reasons: the existence of numerous potential contributing factors, and the involvement and intervention of the independent acts of third parties.[26] *Massachusetts v. E.P.A.* addresses these elements, and in doing so, brings forward an important theme for future litigation: the idea that state and private action and inaction *causes danger* to ordinary people through failing to adequately address climate change.[27] The Court ruled that Massachusetts had standing as a sovereign to protect the harms to its land and people, and then directed the EPA to determine "whether sufficient information exists to make an endangerment finding" for greenhouse gases.[28] The resulting "Endangerment Finding,"[29] asserted that climate change itself, rather than just general environmental harms (which can still constitute injuries) represented an imminent threat to American society and the world:

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[23] Clean Air Council v. United States, 362 F. Supp. 3d 237 (E.D. Pa. 2019).

[24] *Id.* at 253.

[25] *Id.* at 254.

[26] *See* WildEarth Guardians v. U.S. Dep't of Agric., 795 F.3d 1148, 1158 (9th Cir. 2015) ("[C]ausation was lacking [in that case] because the defendant oil refineries were such minor contributors to global greenhouse gas emissions, and the independent third-party causes of climate change were so numerous, that the contribution of the defendant oil refineries was 'scientifically indiscernible.'") (discussing Washington Envtl Council v. Bellon, 732 F.3d 1131, 1143-44 (9th Cir. 2013)).

[27] Massachusetts v. E.P.A., 549 U.S. 497 (2007).

[28] *Id.* at 534.

[29] 42 U.S.C.A § 7521 (current through P.L. 116-135).

> Relying again upon substantial scientific evidence, EPA determined that anthropogenically induced climate change threatens both public health and public welfare. It found that extreme weather events, changes in air quality, increases in food-and water-borne pathogens, and increases in temperatures are likely to have adverse health effects.[30]

But the Court, in this case, does more than recognize an injury and holds that this injury was caused (in part) by government inaction; it addresses redressability, holding that proper regulation could mitigate climate change and thereby dress their injuries.[31]

While appropriately categorized as administrative law as opposed to rights recognition jurisprudence, the Endangerment Finding and *Massachusetts v. E.P.A.* establish important precedent for the recognition of the right to a livable environment for three reasons. First, they acknowledge the government's awareness of the danger that climate change represents to American society.[32] Second, they put the onus for taking action to address the problem, because of its colossal potential danger and impact, on the government (albeit for statutory reasons).[33] Finally, *Massachusetts v. E.P.A.* solidifies an important theme for future litigation: the idea that state and private action and inaction poses real danger to ordinary people when it comes to climate change.[34]

C. Takeaways from Environmental Litigation and Standing

In the cases that form part of Thurgood Marshall's famous incremental approach culminating in the declaration that separate is inherently unequal in *Brown v. Board of Education*,[35] states attempting to maintain their "separate but equal" educational systems began falling into an interesting trap. In response to finer distinctions of what constituted equality,[36] states wised up to the Court's disposition and attempted to create "substantially equal" educational facilities according to existing doctrines. By doing so, the states and schools only pushed Marshall's point further: by attempting to build separate but equal law facilities, it became even more clear that it was

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[30] Coal. for Responsible Regulation, Inc. v. E.P.A., 684 F.3d 102, 121 (D.C. Cir. 2012) (rejecting a challenge that uncertainty must invalidate the Endangerment finding).

[31] Massachusetts v. E.P.A., 549 U.S. 497 at 499.

[32] *See* 42 U.S.C.A § 7521; Massachusetts v. E.P.A., 549 U.S. 497 (2007).

[33] *Massachusetts v. E.P.A.* is about an administrative law challenge to the EPA's enforcement of the Clean Air Act when it comes to greenhouse gases; Massachusetts v. E.P.A., 549 U.S. at 499.

[34] Massachusetts v. E.P.A., 549 U.S. at 534.

[35] Brown v. Bd. of Ed., 347 U.S. 483 (1954).

[36] *See* Gong Lum v. Rice, 275 U.S. 78 (1927) (substantial equality had to be available contemporaneously and could not be deferred); State of Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) (subsidizing an out-of-state education with the promise of an in-state option in the future constituted such a deferral).

impossible to create equal educational experiences.[37]

Similarly, in using standing as their crutch to escape litigation, defendants in environmental and climate change litigation have in some respects played a similarly shortsighted game. The result has been the narrowing of the standing doctrines that warrant dismissal and the building of a strong body of case law that demonstrates that plaintiffs are suffering real and concrete injuries from an unstable climate; injuries that will presumably become more dire.[38] The strength of the injury-in-fact precedent has pushed defendants backward into the "causation" and "redressability" prongs of standing, which have recently started to crumble.[39] The more these prongs are relied on, particularly where the government can be accused of knowledge of these imminent dangers, the more feeble they are likely to become as legs to stand on. The litigation has set precedent specifically implicating the fossil fuel industry[40] and government inaction[41] as being causes of real injuries because of their contributions to climate change.

Furthermore, by relying on standing, these defendants have made important concessions. For example, in *Massachusetts v. E.P.A.*, the Court noted that: "EPA does not dispute the existence of a causal connection between manmade greenhouse gas emissions and global warming. At a minimum, therefore, EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries."[42] Climate change-type defendants have effectively conceded the existence of the real dangers and even their involvement in creating these dangers in many of the litigation over the past decade.[43] Finally, where state defendants try to dismiss standing because of the independent actions of the third party fossil fuel industry, they help

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[37] *See* Sweatt v. Painter, 339 U.S. 629 (1950).

[38] *See* Massachusetts v. E.P.A., 549 U.S. 497, 521 (2007) ("The harms associated with climate change are serious and well recognized."); Washington Envtl. Council v. Bellon, 732 F.3d 1131, 1141 (9th Cir. 2013) ("Defendants do not dispute the accuracy of these statements of injuries. Nor do they challenge their legal sufficiency."); Juliana v. United States, 339 F. Supp. 3d 1062, 1091 (D. Or. 2018) ("Federal defendants have admitted that "from 1850 to 2012, CO_2 emissions from sources within the United States including from land use 'comprised more than 25 [percent] of cumulative global CO_2 emissions.'"); City of Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1029 (N.D. Cal. 2018) (noting that both sides "accept[] the science behind global warming," and that the "dangers raised in the complaints are very real.").

[39] *See* Massachusetts v. E.P.A., 549 U.S. 497 (2007); Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016).

[40] *See, e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011); Massachusetts v. Exxon Mobil Corp., D. Mass., No. 1:19-cv-12430, notice of removal 11/29/19.

[41] *See, e.g.*, Massachusetts v. E.P.A., 549 U.S. 497 (2007); Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016).

[42] Massachusetts v. E.P.A., 549 U.S. at 517.

[43] *See* cases cited *supra* note 38.

establish causation between that third party–fossil fuel emitters– and the harm,[44] relevant to the discussion of state and private actor complicity and state-created danger theories, discussed in Part III.

Juliana demonstrates that the causation requirement of standing provides significant support for the finding of a deprivation of a fundamental right at the hands of the state. Particularly where the causation and redressability elements remain undeveloped, it is necessary to establish stronger theories of state liability.

II. STATE LIABILITY: THE *DESHANEY* PROBLEM AND OPPORTUNITY

With regard to rights under substantive due process, there is a well-established principle that the government does not have to protect people from every ill. This principle is infamously laid down in *DeShaney v. Winnebago County*:[45] "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[46] In other words, the state has no duty to protect someone from injury at the hands of a third person where the state "played no part in their creation, nor did it do anything to render" an individual "more vulnerable" to danger.[47]

III. THEORIES OF STATE LIABILITY

That climate change represents a real danger is not much in dispute; as much is conceded by governments and oil corporations in litigation.[48] The difficulty lies in building the bridge between a recognized threat to liberty and the party responsible for creating that danger. Under *DeShaney*, to establish the right to a stable climate as a fundamental right, however, present or future plaintiffs must establish that the deprivation of a liberty interest is attributable to the state.

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[44] *See* Clean Air Council v. United States, 362 F. Supp. 3d 237, 253 (E.D. Pa. 2019) ("Once again third parties–not the Government–are polluting the air. As I have discussed, 'a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.'") (quoting DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989)).

[45] DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

[46] *Id.* at 195. In *DeShaney*, the Court emphasized that Joshua had not suffered a deprivation of his life or liberty at the hands of the government; rather, his plight was the tragic result of a situation not of the government's creation.

[47] *Id.* at 190; *see also* Cert. Petition, 2016 WL 6803676 (U.S.), *for* Estate of Jimma Pal Reat v. Rodriguez, 824 F.3d 960 (10th Cir. 2016), *cert. denied*, 137 S.Ct. 1434 (Apr. 03, 2017) [hereinafter Estate of Reat Cert. Petition].

[48] *See* cases cited *supra* note 38.

A. State-Created Danger Theory[49]

An avenue to finding the government liable for failure to protect a fundamental right is through the state-created danger doctrine coming out of *DeShaney*.[50] *DeShaney* held that where the state is not involved with the invasion of a fundamental right, there was no actionable deprivation under the Due Process Clause of the Fifth Amendment.[51] However, *DeShaney* explicitly applies only where the state played "no part in [the situation's] creation," which led to the development of a theory of a "danger creation" or "state-created danger" exception, where a state may be liable for failure to protect liberty interests where it did play a part in creating the dangerous situation that resulted in deprivation of a liberty interest.[52]

The state-created danger theory has led to a circuit split. The majority approach "interprets *DeShaney* as providing for two separate paths to liability: first if the individual has a special relationship with the government due to it placing limitations on their freedom, or second, if there is a state-created danger."[53] The Second Circuit explained that the state-created danger exception necessarily applies where the "state itself facilitated and encouraged the private attack at issue, thus creating the danger."[54] In short, "the relevant inquiry is whether or not the state actor created the danger or made the individual more vulnerable to harm"[55] by the independent actions of a third party assailant. On those lines, the Second Circuit has reasoned that the danger creation theory implicates a relationship between the state actor and the third party who harmed the victim,[56] as in an Eighth Circuit ruling of liability where the police chief instructed subordinates to ignore victim's pleas for protection from her husband, who was the chief's

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[49] *DeShaney* and the cases in this section center around § 1983, a claim to redress constitutional violations inflicted by state actors. It is relevant for this reason, but other procedural and substantive details of the § 1983 scheme are ignored for purposes of this paper.

[50] DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

[51] *DeShaney*, 489 U.S. at 195.

[52] *DeShaney*, 489 U.S. at 197; The principle in *DeShaney* is also distinguishable in that it refers to government inaction. Government cannot, through action, invade protected interests. *See DeShaney*, 489 U.S. at 196 (noting that the purpose of the substantive due process clause "was to protect the people *from the State*, not to ensure that the State protected them from each other") (emphasis added).

[53] Estate of Reat Cert. Petition, *supra* note 47, at 11. The Second, Sixth, Seventh, Eighth, and Ninth Circuits "expressly reject the requirement [of the minority approach] that a state actor impose limitations on a persons [sic] freedom in state created danger claims."

[54] Pena v. DePrisco, 432 F.3d 98, 109 (2d Cir. 2005).

[55] Estate of Reat Cert. Petition, *supra* note 47, at 16. The circuits that follow this approach have applied varying tests, which are described in the cert petition.

[56] *See id.*

friend.[57]

While scholars debate the correctness of *DeShaney* in the first place as inaccurately reflecting the protections the state owes its people,[58] the right to a stable climate need not disrupt its holding because the actions of the government arguably fall into the state-created danger doctrine. In other words, because of government actions and omissions, the government created the danger or rendered the plaintiffs more vulnerable to harm from the actions of a third-party assailant (e.g. the fossil fuel industry) through their relationship with that party. A litigator seeking to advance this theory must strengthen the evidence and theories that affirmative government action encouraged and perpetuated the release of greenhouse gases that have caused the current climate change crisis, creating a danger that threatens the due process and equal protection rights of the current and future plaintiffs.

There is ample support for the theory that the government "facilitated" the danger created by the fossil fuel industry. For decades, the oil and gas energy industry have been the beneficiaries of government programs and policy that primarily takes the form of subsidies and regulations that contributed significantly to their activities.[59] A conservative calculation estimates that the fossil fuel industry receives $20.5 billion from the government in direct production subsidies every year.[60] This number leaves out consumption subsidies ($14.5 billion) and subsidies for overseas projects ($2.1 billion).[61] Analysts tend to agree that estimates undervalue the total subsidies doled out to fossil fuels.[62]

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[57] Freeman v. Ferguson, 911 F.2d 52, 54 (8th Cir. 1990).

[58] *See* Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 40 DUKE L.J. 507 (1991).

[59] *See* David Roberts, *Friendly Policies Keep US Oil and Coal Afloat Far More Than We Thought*, VOX (Jul. 26, 2018, 7:54 AM), https://www.vox.com/energy-and-environment/2017/10/6/16428458/us-energy-coal-oil-subsidies.

[60] *Id.* The Vox article cites a study by Oil Change International, but examines its methodology before deeming its calculation "conservative;" *see also* JANET REDMAN, DIRTY ENERGY DOMINANCE: DEPENDENT ON DENIAL – HOW THE U.S. FOSSIL FUEL INDUSTRY DEPENDS ON SUBSIDIES AND CLIMATE DENIAL (Oil Change International, 2017), available at http://priceofoil.org/2017/10/03/dirty-energy-dominance-us-subsidies/.

[61] Roberts, *supra* note 59.

[62] *See, e.g.*, David Victor, *The Politics of Fossil Fuel Subsidies* 9, 13, in UNTOLD BILLIONS: FOSSIL-FUEL SUBSIDIES, THEIR IMPACTS AND THE PATH TO REFORM (Global Subsidies Initiative of the International Institute for Sustainable Development 2009), *available at* https://www.iisd.org/gsi/sites/default/files/politics_ffs.pdf. A recent report by the International Monetary Fund (IMF), for example, calculated total U.S. subsidies of fossil fuels at $649 billion. David Coady et al., *Working Paper*, Global Fossil Fuel Subsidies Remain Large: An Update Based on Country-Level Estimates, IMF (May 2, 2019). This number also puts fossil fuel subsidies ahead of spending for defense ($599 billion in spending

What does this mean? "[A]t recent US oil prices of US$50 per barrel, tax preferences and other subsidies *push nearly half of new, yet-to-be-developed oil into profitability*."[63] With regard to other policies, Professor Simms of Howard University describes a "furtive" regulatory scheme that has historically and systematically "lighten[ed] the regulatory burden for fossil fuels in the context of clean air regulation, water resource protection, and solid waste disposal requirements."[64] Additionally, federal leasing policy resulted in leasing US land to over thirty million acres to fossil fuels, where 782 million barrels of oil and 421 million tons of coal were produced on federal lands.[65] In short, "[t]he profits of US fossil fuels are built on a foundation of government assistance."[66]

The Eighth Circuit observed that "[i]t is not clear, under *DeShaney*, how large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect. It is clear, though, that at some point such actions do create such a duty."[67] Certainly, the significance of these subsidies, regulations, and policies suggests that there is a direct link between affirmative government action and the continued survival of a large portion of the industry.

This theory already has support from the *Juliana* court, which rejected Defendants' arguments that causation could not be established because the causal connection was based on the actions of third-party emitters.[68] The court noted that Plaintiffs had challenged not only the direct use of fossil fuels by Defendants, but also emissions "caused and supported by their policies"[69]–in other words, it accepted allegations that the danger was created by the state itself and its complicity with the third-party assailant.

B. Relationship and Complicity in Danger Creation and Equal Protection

In many ways, the relationship between the government and the fossil fuel industry looks similar to the relationship between the state and third-

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by the Pentagon that same year) and education. Tim Dickinson, *Study: U.S. Fossil Fuel Subsidies Exceed Pentagon Spending*, ROLLING STONE (May 8, 2019, 4:48 PM), https://www.rollingstone.com/politics/politics-news/fossil-fuel-subsidies-pentagon-spending-imf-report-833035/.

[63] Roberts, *supra* note 59.

[64] For an at-length discussion of how regulatory schemes have supported the fossil fuel industry in a myriad of ways, see generally Patrice L. Simms, *Furtive Subsidies: Reframing Fossil Fuel's Regulatory Exceptionalism*, 35 VA. ENVTL. L.J. 420 (2017); *see also* Roberts, *supra* note 59.

[65] Juliana v. United States, 339 F. Supp. 3d 1062, 1092 (D. Or. 2018).

[66] Roberts, *supra* note 59.

[67] Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990).

[68] Juliana v. United States, 339 F. Supp. 3d 1062, 1093 (D. Or. 2018).

[69] *Id.* at 1092.

party assailant relationships that have invoked the state-created danger doctrine in certain circuits. The First Circuit observed that "in scenarios in which government officials actively direct or assist private actors in causing harm to an individual . . . . the government officials and the private actor are essentially joint tortfeasors, and therefore, may incur shared constitutional responsibility."[70] In accepting upwards of $350 million in campaign financing and lobbying,[71] and creating government programs that benefit the incumbent oil and gas corporations where all parties know that doing so is at the expense of the health and safety of the general public,[72] the relationship between the government and the fossil fuel industry arguably begins to resemble the kind of complicity noted in cases establishing liability through the state-created danger doctrine. Particularly in light of the pending cases against Exxon, which insinuate that Exxon knowingly endangered the public for decades,[73] the state's failure to intervene to protect the public–instead, providing active assistance to Exxon and similarly powerful fossil fuel interests–is analogous to the police chief refusing to send help where doing so would incriminate his friend.[74]

The idea that a relationship of complicity between the government and the fossil fuel industry could provide a basis for liability is supported by a principle of Fourteenth Amendment Equal Protection established in *Burlington v. Wilmington Parking Authority*.[75] Where the State has "so far insinuated itself into a position of interdependence" with a private party, the private party action cannot avoid being held as state action for purposes of violating the Fourteenth Amendment.[76] Similar logic strengthens the state-created danger theory of joint tortfeasors in constitutional violations: where the State has insinuated itself into actions of the private actors, it cannot cite *DeShaney* and escape accountability..

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[70] Velez-Diaz v. Vega-Irizarry, 421 F.3d 71, 79 (1st Cir. 2005) (internal quotations omitted).

[71] Dana Nuccitelli, *America Spends Over $20bn Per Year on Fossil Fuel Subsidies. Abolish Them*, THE GUARDIAN (July 30, 2018, 6:00 AM) https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/jul/30/america-spends-over-20bn-per-year-on-fossil-fuel-subsidies-abolish-them ("In the 2015-2016 election cycle oil, gas, and coal companies spent $354 million in campaign contributions.").

[72] The cases against Exxon claim defrauding the shareholders, alleging that Exxon falsely represented the risks of climate change despite sitting on reliable information of those risks for 40 years. *See* Massachusetts v. Exxon Mobil Corp., D. Mass., No. 1:19-cv-12430, notice of removal 11/29/19.

[73] *Id.*

[74] *See* Freeman v. Ferguson, 911 F.2d 52, 54 (8th Cir. 1990).

[75] Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

[76] *Id.*

IV. THE JUDICIAL PROCESS AND FUNDAMENTAL RIGHTS: RIGHTS RECOGNITION AS EVOLVED UNDERSTANDING

One of the greatest obstacles to recognizing the right to a stable climate is that this right, as framed, was not in contemplation by the Framers, nor at the time of the passage of the Fourteenth Amendment. How, then, can it be a fundamental right? The following discussion aims not to suggest that any of the referenced courts, judges, or commentators would agree with the proposition of this particular right, but rather, to support the idea that the judicial process legitimately bases recognition of fundamental rights on evolved understandings of the values animating the Constitution, democracy, and society, as opposed to a strict historical inquiry of the rights that were contemplated by the Founders.

The recognition of 'novel' rights generally butts up against certain popular constitutional theories of interpretation, particularly originalism and textualism, while it finds support in other 'isms,' like pragmatism and living constitutionalism.[77] However, rights recognition jurisprudence tends to rebuke the idea that the original meaning of the text is necessarily inconsistent with an evolving understanding of an issue.[78] History and tradition, judges recognize, is a starting point and a guide, "but not in all cases the ending point of the substantive due process inquiry."[79]

For example, the principle that emerged from *Brown v. Board* was inconsistent with the Framers' understanding of equality. Yet it does not represent a departure from the original understanding of what equality means. The *Obergefell* Court noted: "[R]ights come not from ancient sources alone. They rise, too, from a better-informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[80]

Commentators across time have urged this understanding of fundamental rights: that 'new' applications reflect the accurate manifestations of enduring rights, as our understanding of the animating principles behind the right expands. Justice Cardozo observed of the Fourteenth Amendment's guarantee of liberty:

> Liberty is not defined. Its limits are not mapped and charted. How shall they be known? Does liberty mean the same thing for successful generations? May restraints that were arbitrary yesterday be useful and rational and therefore lawful today? . . . . I have no doubt that the answer to these questions must

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[77] *See generally* J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY 108 (2012).

[78] ANTONIN SCALIA, A MATTER OF INTERPRETATION 41 (1997).

[79] Lawrence v. Texas, 539 U.S. 558, 572 (2003) (quoting Cty. of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) ("History and tradition guide and discipline this inquiry but do not set its outer boundaries.").

[80] Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015)

be yes.[81]

"From all this," Justice Cardozo goes on, "it results that the content of constitutional immunities is not constant, but varies from age to age. . . . A *constitution* states or ought to state not rules for the passing hour, but principles for an expanding future."[82] Put another way by Justice Stewart, "[g]reat concepts like . . . 'liberty' . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."[83]

Moreover, while the understanding that human rights and liberties are not defined or stuck in time is likely a good thing,[84] it does leave to the judges a role that commentators fear is not properly restrained.[85] But judicial restraint may play a different role when it comes to liberties:

> To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges, for whom the independence safeguarded by Article III of the Constitution was designed and who are presumably guided by established standards of judicial behavior. . . . But these are precisely the presuppositions of our judicial process.[86]

In fact, the courts have a special responsibility to the Constitution when it comes to fundamental rights to be "open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter,"[87] regardless of legislative action or inaction, or even broader public disagreement.[88]

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[81] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 76 (1921).

[82] *Id.* at 82-83.

[83] Roe v. Wade, 410 U.S. 113 (1973) (J. Stewart, concurring) (citing National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (J. Frankfurter, dissenting)).

[84] *See* Rochin v. California, 342 U.S. 165, 169 (1952) ("In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions.").

[85] In advocating for judicial restraint, Judge J. Harvie Wilkinson argued: "The more volatile the issue, the less justification there often is for constitutionalizing it. Restraint is only restraint when we reject what we want most." J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY 108 (2012). Still, he acknowledges, "where law commands intervention, it would transgress our oath to do otherwise." *Id.*

[86] Rochin v. California, 342 U.S. 165, 171-72 (1952).

[87] Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

[88] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

V. THEORIES OF RIGHTS RECOGNITION FOR RIGHT TO LIVABLE CLIMATE

The Fifth Amendment's substantive Due Process Clause component safeguards fundamental rights that are "implicit in the concept of ordered liberty"[89] or "deeply rooted in this Nation's history and tradition,"[90] such that "neither liberty nor justice would exist if they were sacrificed."[91] Rights recognition cases have often approached understanding the values by examining history, state law and practice, international laws and norms, and other values and fundamental rights.[92]

The case for the right to a livable climate is strengthened by similar theories: that the right is protected under Equal Protection in the Fourteenth Amendment, the right's prevalence in state law and practice, the consensus in international law about the right, and the right's connection with other fundamental rights–both enumerated and unenumerated.[93]

A. The Fourteenth Amendment and Equal Protection

By consistently favoring short-term economic interests over the protection of future generations and implementing affirmative policies that systematically discriminate against minority and lower-income communities, the State has violated the Equal Protection rights of these groups–at least, this is the theory a litigator must advance.[94] At the core of environmental justice litigation is this very idea: that environmental policies made by states, municipalities, and the federal government knowingly expose racial and ethnic minority communities to unfavorable environmental conditions while white communities are treated more favorably by government

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[89] McDonald v. City of Chicago, 561 U.S. 742, 761 (2010) (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)).

[90] *Id.* at 767 (quoting Washington v. Glucksberg, 521 U.S. 702, 721).

[91] Palko v. Connecticut, 302 U.S. 319, 326 (1937).

[92] *See* McDonald v. City of Chicago, 561 U.S. 742 (2010).

[93] It is clear that the Ninth Amendment would be an interesting avenue to explore regarding the concept of recognizing unenumerated rights; unfortunately, a discussion of the implications of the Ninth Amendment are outside the scope of this paper.

[94] To invoke Equal Protection claims, it is not enough to for plaintiffs to demonstrate disparate impact; rather, there must be evidence of discriminatory intent in fashioning these policies, a standard that is difficult to reach. For this reason, establishing true equal protection violations for environmental policy has remained difficult and largely unsuccessful, despite strong evidence of the disparate impact of these policies. Nonetheless, commentators urge that there is a path forward on claims of equal protection in the environmental context. For a greater exploration of this potential, *see* Brian Faerstein, Note, *Resurrecting Equal Protection Challenges to Environmental Inequity: A Deliberately Indifferent Optimistic Approach*, 7 U. PA. J. CONST. L. 561 (2001).

environmental policies.[95]

Evidence shows that the effects of pollution and other detrimental environmental impacts are felt disproportionately by racial and ethnic minority and low-income communities while white communities reap a disproportionate amount of the benefits of the emitting activities.[96] Similarly, the effects of climate change threaten to have vastly unequal consequences to be suffered disproportionately by different racial and income groups, as well as future generations. Where these activities continue despite awareness of the dire consequences for these groups, the case for intent–or at least, deliberate indifference–grows stronger.[97] Other potential background facts include evidence that younger generations are more likely to live shorter, less healthy lives than previous generations.

B. State Law and Constitutions as Laboratories for the Right

"It is inherent in Americans' attitudes toward their constitutional system that when a sufficient number of them care deeply enough about a problem they seek to give it constitutional dimensions."[98] State law and practice plays a large part in demonstrating the values of the American people, thus serving as laboratories for the development of fundamental rights.[99] To that point, issues relating to the right to a livable environment are being widely constitutionalized at the state level; at least twenty-three states have environmental protections explicitly incorporated into their

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[95] *See, e.g.*, Ammons v. Dade City, 783 F.2d 982 (11th Cir. 1986) (affirming district court finding of intentional discrimination in lack of adequate maintenance of the streets and storm drainage system in a minority community); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983) (affirming district court finding that city council intentionally discriminated against a primarily minority sector of the city by not providing the same level and quality of maintenance of the streets and water distribution system in that area as compared to other parts of the city).

[96] *See, e.g.*, Christopher W. Tessum et al., *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, 116 PNAS 6001 (Mar. 26, 2019), https://www.pnas.org/content/116/13/6001 (finding that that whites experienced a "pollution advantage," meaning that they experienced 17 percent less pollution than could be attributed to their consumption, while Blacks and Hispanics experienced a "pollution burden" of 56 percent and 63 percent excess exposure, respectively, relative to the exposure caused by their consumption).

[97] *Id.*

[98] A. E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 193 (1972).

[99] *See, e.g.,* Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059 (2019) (examining presence of educational rights in state constitutions as support for recognizing education as a fundamental right).

constitutions.[100] In 1972, constitutional law scholar Professor A. E. Dick Howard observed in a law review article that: "In a number of state constitutions, environmental quality has joined the list of 'fundamentals.'"[101] Professor Howard's article precedes this one by almost fifty years, but his article focuses entirely on the relevance of these provisions in state constitutions in exploring the right to a 'quality environment' as a federal constitutional right. "[T]here has been little more than talk about a federal constitutional right to a decent environment," he observed, "[b]ut there has been action on another constitutional front–that of state constitutions."[102]

While most of these additions advancing environmental protections occurred in the 1960s and 1970s, an era where federal legislation aimed at environmental protections were also being advanced, some state constitutions have long contained such provisions, particularly ones that addressed access to shorelines and the right to fish.[103] The state constitutional environmental protections vary in their purpose and scope. Michigan's constitution states: "The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people."[104] Many other constitutions with express environmental provisions emphasize protection and conservation as being of primary importance for the public welfare.[105] Other state constitutions couch their protections more generally,

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[100] James May et al., *Environmental Rights in State Constitutions, in* PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW 315-21 (Am. Bar Assoc. 2011) (listing relevant state constitutional provisions).

[101] Howard, *supra* note 98, at 197.

[102] *Id.* at 196.

[103] *Id.* For example, in 1842, Rhode Island provided that "the people shall continue to enjoy and freely exercise . . . privileges of the shore, to which they have been heretofore entitled . . . ." R.I. CONST. of 1842, art. I, § 17.

[104] MICH. CONST. art. IV, § 52.

[105] *See, e.g.*, CAL. CONST. art. X, § 2 ("It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use . . . and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."); LA. CONST. art. IX, § 1 ("The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people."); MICH. CONST. art. IV, § 52 ("The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people."); N.M. CONST. art. XX, § 21 ("The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare."); N.C. CONST. art. XIV, § 5 ("It shall be the policy of this State to conserve and protect its lands and waters for the benefit

in terms of preservation and conservation, economic development, or the state prerogative to regulate.[106]

Importantly, several states expressly call the right to a healthful or quality environment a constitutional right.[107] The constitution of Montana, for example, declares: "All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . . ."[108] Along with Montana, the constitutions of Hawaii, Illinois, Massachusetts, and Pennsylvania declare constitutional rights to healthful environments,[109] and Hawaii even provides a cause of action for the enforcement of the right.[110]

C. Consensus in International Law

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of all its citizenry . . ."); OHIO CONST. art. VIII, § 2o ("It is determined and confirmed that the environmental and related conservation, preservation, and revitalization purposes . . . are proper purposes of the state and local governmental entities and are necessary and appropriate means to improve the quality of life and the general and economic well-being of the people of this state; to better ensure the public health, safety, and welfare . . ."); P. R. CONST. art. VI, § 19 ("It shall be the public policy of the Commonwealth to conserve, develop and use its natural resources in the most effective manner possible for the general welfare of the community."); VA. CONST. art. XI, § 1 ("[I]t shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.").

[106] *See, e.g.*, ALA. CONST. art. XI, § 219.07(1); COLO. CONST. art. XVIII, § 6; FLA. CONST. art. II, § 7; IDAHO CONST. art. XV, § 1; MINN. CONST. art. XIII, § 12; MO. CONST. art. III, § 37(b); N.Y. CONST. art. XVI, §§ 3, 4; ORE. CONST. art. XI-H, § 1; UTAH CONST. art. XVIII, § 1.

[107] May et. al., *supra* note 100, at 306.

[108] MONT. CONST. art. II, § 3.

[109] HAW. CONST. art. XI § 9 ("Each person has the right to a clean and healthful environment"); ILL. CONST. art. XI, § 2 ("Each person has the right to a healthful environment."); MASS. CONST. art. XLIX ("The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment . . ."); PA. CONST. art. I, § 27 ("The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all people, including generations yet to come."). Montana's Supreme Court has declared the right enshrined in their constitution a "fundamental right." Cape-France Enters. v. Estate of Peed, 29 P.3d 1011, 1016 (Mont. 2001); *see also* Mont. Envtl. Info. Ctr. v. Dept. of Envtl. Quality, 988 P.2d 1236, 1246 (Mont. 1999) ("[W]e conclude that the right to a clean and healthful environment is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution, and that any statute *or rule* which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to effectuate that interest . . . .").

[110] HAW. CONST. art. XI § 9.

Historically, the international community has explored the issue of human rights and the environment for decades, and several instruments produced over the decades address the right directly. The Universal Declaration of Human Rights of 1948 states that: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family."[111] In 1972, the United Nations Conference on the Human Environment adopted the Declaration of the United Nations Conference on the Human Environment (the "Stockholm Declaration"), considered to be the first international agreement recognizing the right to a healthy environment.[112] The Stockholm Declaration was affirmed in the Rio Declaration on Environment and Development of 1992.[113] The Convention on the Rights of the Child instructs states to take into consideration "the dangers and risks of environmental pollution,"[114] and the UN Charter of Economic Rights and Duties of States calls the protection of the environment a responsibility to future generations.[115] Foreign law and practice also reflect a growing consensus of these rights as fundamental rights,[116] and the United Nations reported that one hundred countries recognize the right to a healthy environment in their constitutions.[117] In 2018, the special rapporteur on human rights and the environment, David Boyd, reported on the fifty countries entertaining lawsuits similar to *Juliana*,[118] including a landmark case in the Netherlands, where an appeals court recently upheld a ruling that the

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[111] G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

[112] U.N. Conference on the Human Environment, *Stockholm Declaration*, Preamble, para. 2, U.N. Doc. A/CONF.48/14 (June 16, 1972), 11 I.L.M. 1416.

[113] U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), principle I (Aug. 12, 1992), 31 I.L.M. 874 [hereinafter Rio Declaration].

[114] Convention on the Rights of the Child art. 24(2)(c), *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

[115] G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties of States, at 1-3 (Dec. 10, 1974).

[116] Additional international instruments that call for a consideration of a right to a healthy environment include the African Charter on Human and Peoples' Rights; *see* African Charter on Human and Peoples' Rights art. 24, June 26, 1981, 21 I.L.M. 59 (entered into force Oct. 21, 1986) ("All peoples shall have the right to a general satisfactory environment favorable to their development."); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights art.11, Nov. 17, 1988, O.A.S.T.S. No. 69.

[117] Ucilia Wang, *UN Urged to Recognize Healthy Climate as a Human Right*, CLIMATE LIAB. NEWS (Oct. 26, 2018), https://www.climateliabilitynews.org/2018/10/26/un-climate-human-rights-david-boyd/.

[118] *Id.*

government must cut emissions more aggressively.[119] Boyd urged the United Nations to officially recognize the right to a livable environment as an international human right.[120] The increasing prevalence of this right in international human rights norms supports its fundamental nature.

D. Rights Inextricably Linked to Fundamental Rights

Further supporting the right to a livable climate as a fundamental right is the idea that "certain rights may be necessary to enable the exercise of other rights, whether enumerated or unenumerated."[121] "Often, an unenumerated fundamental right draws on more than one Constitutional source."[122]

In a long line of cases, the Supreme Court has held that along with the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, have children, direct the education and upbringing of one's children, marital privacy, use of contraception, abortion, and an enduring commitment to the legal protection of bodily integrity.[123]

Building the case for the right to a livable environment should emphasize that this right is "necessary to enable the exercise" of well-established fundamental rights, and that failing to protect the right interferes with other fundamental rights. A litigator should look to develop how these unenumerated rights are threatened by state action and inaction regarding climate change, and therefore how the right to a stable climate is necessary for the realization of these other fundamental rights. The endangerment of a livable climate particularly endangers property rights enshrined in the Constitution, as well as unenumerated fundamental rights like rights to family, the right to bodily integrity, and the right to travel.

The values animating broad and sacrosanct rights surrounding family[124] as "the foundation of the family and of society, without which there would be neither civilization nor progress,"[125] are intrinsically linked to the right

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[119] Press Release, The Hague, State Must Achieve Higher Reduction in Greenhouse Gas Emissions in Short Term (Oct. 9, 2018), https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-Den-Haag/Nieuws/Paginas/State-must-achieve-higher-reduction-in-greenhouse-gas-emissions-in-short-term.aspx.

[120] Wang, *supra* note 117.

[121] Juliana v. United States, 217 F. Supp. 3d 1224, 1249 (D. Or. 2016) (*citing* Roe v. Wade, 410 U.S. 113 (1973)).

[122] *Id.*

[123] Washington v. Glucksberg, 521 U.S. 702, 720 (1997); *see also* Ingraham v. Wright, 430 U.S. 651, 673-74 (1977).

[124] *See* Moore v. City of E. Cleveland, 431 U.S. 494 (1977); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[125] Maynard v. Hill, 125 U.S. 190, 211 (1888).

sought to be protected here. This is preliminarily illustrated by evidence of how climate change is affecting couple's decisions to have and raise their children,[126] and because "civilization" and "progress" clearly require a livable environment for society to continue to prosper.

E. Evolving Public Opinion and Changing Political and Social Context

Notable cases of rights recognition, like *Brown v. Board of Education*,[127] *Roe v. Wade*,[128] and *Lawrence v. Texas,*[129] were decided in similar contexts to the one we face today with climate change, where the issue had begun gaining support by states and the public, but was prevented from legislative recognition by political realities. "The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right,"[130] Justice Kennedy said in *Obergefell*. In *Brown*, for example, "[those] features of American democracy allowed a regional majority in the South to block the wishes of a national majority," but the Court, not so constrained, was ultimately responsive to shifting public opinion as exemplified by state laws and practice.[131]

Constitutional scholar Jack Balkin contrasts these cases regarding their timing in their reform movements and shift in public opinion, noting, for example, that *Lawrence v. Texas* was decided after general acceptance of its principle was already manifest in law and practice, while *Roe v. Wade* occurred early in the shift of public opinion. Without passing judgment on the Court's timing, he observes the controversy over each decision's legitimacy might play a role in their perceived legitimacy.[132] One takeaway is that the recognition of fundamental rights, inappropriately or appropriately, tends to accompany a tide-change in public opinion.

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[126] Ted Scheinman, *The Couples Rethinking Kids Because of Climate Change*, BBC (Oct. 1, 2019), https://www.bbc.com/worklife/article/20190920-the-couples-reconsidering-kids-because-of-climate-change ("A 2019 poll by Business Insider reported that almost 38% of Americans aged 18 to 29 believe that couples should consider climate change when deciding to have children. A poll the previous year in the New York Times showed that a third of American men and women aged 20 to 45 cited climate change as a factor in their decision to have fewer children.").

[127] Brown v. Bd. of Ed., 347 U.S. 483 (1954).

[128] Roe v. Wade, 410 U.S. 113 (1973).

[129] Lawrence v. Texas, 539 U.S. 558 (2003).

[130] Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

[131] Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1541 (2004).

[132] *Id.* at 1546 ("Perhaps the Court was morally obligated to put an end to Jim Crow much earlier, but it is likely that the earlier it did so, the greater the resistance and the greater the danger to the decision's legitimacy.").

VI. CHALLENGES TO THE RECOGNITION OF THE RIGHT TO A LIVABLE CLIMATE

One challenge faced by the right to a livable climate is its perceived vagueness, which fails "to restrain [judicial] exposition of the Due Process Clause" and provide "guideposts for responsible decision-making."[133] One court objected that it would "invest[] the Federal Government with an affirmative duty to protect all land and resources within the United States–enforceable as a substantive due process right under the Fifth and Ninth Amendments."[134]

Similarly, rights-recognition jurisprudence requests that a right be clearly defined so as to invoke the proper redress,[135] but in the case of this right, the lack of defined redress is the main concern. If causation and responsibility were firmly established, would protecting this right be to cease affirmative support of fossil fuels, or would it require actions to be taken to abate the harm? But after all, federal courts retain broad authority "to fashion practical remedies when confronted with complex and intractable constitutional violations."[136]

In acknowledging that this was no ordinary lawsuit, the *Juliana* court noted that the seriousness of plaintiffs' allegations, far from requiring the court to back away, heightens the stakes for a close and careful look at the right. *Juliana* admonished: "Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it."[137]

CONCLUSION: THE INCREMENTAL APPROACH

The values animating the Constitutional structure are consistent with the necessity of preserving rights for its citizens, and particularly to "secure the Blessings of Liberty to ourselves and our Posterity."[138] As Pennsylvania noted in revising its Constitution: "When our original constitutions were drafted in the 18th century the issue was preserving man's political environment. . . . Now that situation has altered . . . . [W]e must therefore give [our natural environment] the same Constitutional protection we give our political environment."[139]

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[133] Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (*citing* Collins v. City of Harker Heights, 503 U.S. 115, 123 (1992)).

[134] Clean Air Council v. United States, 362 F. Supp. 3d 237, 254 (E.D. Pa. 2019).

[135] Washington v. Glucksberg, 521 U.S. at 720.

[136] Brown v. Plata, 563 U.S. 493, 526 (2011).

[137] Juliana v. United States, 217 F. Supp. 3d 1224, 1262 (D. Or. 2016).

[138] U.S. CONST. PREAMBLE.

[139] May et al., *supra* note 100.

The *Juliana* court took a similar approach, rejecting that the right's novelty meant it was not owed due consideration. "A deep resistance to change runs through defendants' and intervenors' arguments for dismissal: they contend a decision recognizing . . . a fundamental right to [a] climate system capable of sustaining human life would be unprecedented, as though that alone requires its dismissal."[140]

Despite *Juliana*'s victory at the motion to dismiss stage, plaintiffs seeking the fundamental right to a livable environment likely have a few more steps to take before prevailing in the Supreme Court. For now, future litigation might further establish losses caused by climate change, such as loss of property due to flooding or other disasters; it might develop evidence that future generations will enjoy shorter and less healthy lives; and continue exploring the state's culpability. Litigators might explore the possibility of invoking the Ninth Amendment as part of their penumbra of rights, and take an international comparative approach examining how such rights are dealt with, particularly in England, where our common law was born. Litigators will have to define a meaningful remedy with clear limits, an inquiry that will go hand in hand with establishing state deprivation of a liberty interest. Finally, litigators will have to develop the connection between the right to a livable climate and the values animating the Constitution: protecting liberty and society's advancement.

That there are strong building blocks that form a foundation bodes well for the development of the theory of this as a fundamental right. And the fact that some of the blocks have yet to be put together does not mean they cannot be developed and strengthened in the judicial process. To argue otherwise "rests on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum."[141]

When these blocks are strengthened and assembled, it does not feel farfetched to imagine the landmark decision recognizing the fundamental right to a livable climate. The right to a stable climate system capable of sustaining life, you might read, is "fundamental to our very existence and survival,"[142] "necessary to enable"[143] the exercise of fundamental rights to marriage, children, and equal protection. Progress and civilization,[144] including the survival of younger and future generations and their continued

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[140] *Juliana*, 217 F. Supp. 3d. at 1262.

[141] Massachusetts v. E.P.A., 549 U.S. 497, 524 (2007) (*citing* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) ("[A] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind").

[142] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

[143] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

[144] Maynard v. Hill, 125 U.S. 190 (1888).

enjoyment of the Constitutional promises of liberty, make this right "implicit in the concept of ordered liberty,"[145] and central to the values animating our Constitution and our Nation.

[145] *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).