WATCHING THE WORLD BURN: SUBSTANTIVE DUE PROCESS AND THE RIGHT TO A SUSTAINABLE CLIMATE*

I. INTRODUCTION

Climate change is "the defining issue of our time,"[1] and humanity is at great risk of being defined as an abject failure.[2] Although climate change is a global existential threat, the problem has one clear leading culprit: the United States.[3] As a nation, the United States is more culpable than any other for the impending destruction and doom to be unleashed by the warming planet.[4] Not only has the United States collectively released more greenhouse gases than any other nation since 1751,[5] but its government has also known of the dangerous effects of such emissions since at least the 1970s, if not earlier.[6] Despite that knowledge, the government has actively promoted energy policies that accelerate climate change, failing to adequately stem the tide and roll back the ongoing damage to the planet.[7]

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1. *Climate Change*, UNITED NATIONS, http://www.un.org/en/global-issues/climate-change [https://perma.cc/5NVG-LMA4] (last visited May 1, 2021) [hereinafter *Climate Change*, UNITED NATIONS].

2. *See* Timothy Gardner, *Failure To Curb Climate Change a Top Risk: Davos Survey*, REUTERS (Jan. 16, 2019, 5:10 AM), http://www.reuters.com/article/us-davos-meeting-climatechange/failure-to-curb-climate-change-a-top-risk-davos-survey-idUSKCN1PA13J [https://perma.cc/6S5B-JU92]; Joel Scata, *Failure To Mitigate and Adapt to Climate Change Is Biggest Global Risk*, NRDC (Jan. 20, 2016), http://www.nrdc.org/experts/joel-scata/failure-mitigate-and-adapt-climate-change-biggest-global-risk [https://perma.cc/F4C4-5V3Z] ("[C]limate change-related risks have moved from hypothetical to certain because insufficient action has been undertaken to address them." (quoting WORLD ECON. FORUM, THE GLOBAL RISKS REPORT 2016, at 10–11 (11th ed. 2016))).

3. Justin Gillis & Nadja Popovich, *The U.S. Is the Biggest Carbon Polluter in History. It Just Walked Away from the Paris Climate Deal*, N.Y. TIMES (June 1, 2017), http://www.nytimes.com/interactive/2017/06/01/climate/us-biggest-carbon-polluter-in-history-will-it-walk-away-from-the-paris-climate-deal.html [https://perma.cc/84LK-V6RQ].

4. *Id.*

5. Hannah Ritchie, *Who Has Contributed Most to Global CO_2 Emissions?*, OUR WORLD IN DATA (Oct. 1, 2019), http://ourworldindata.org/contributed-most-global-co2 [https://perma.cc/Y4E3-L9MT].

6. Kaitlin Sullivan, *U.S. Government Knew Climate Risks in 1970s, Energy Advisory Group Documents Show*, CLIMATE DOCKET (Mar. 18, 2019), http://www.climatedocket.com/2019/03/18/national-petroleum-council-climate-change/ [https://perma.cc/DAL8-UT95]; *see also* Juliana v. United States (*Juliana II*), 947 F.3d 1159, 1166 (9th Cir. 2020) ("As early as 1965, the Johnson Administration cautioned that fossil fuel emissions threatened significant changes to climate . . . .").

7. *Juliana II*, 947 F.3d at 1167 ("The record . . . establishes that the government's contribution to climate change is not simply a result of inaction. The government affirmatively promotes fossil fuel use in a host of ways, including beneficial tax provisions, permits for imports and exports, subsidies for domestic and overseas projects, and leases for fuel extraction on federal land."). Since 1975, annual emissions from the United States have *increased* from 4.426 million metric tons (mmt) to 5.267 mmt in 2018. *Carbon Dioxide Emissions from Energy Consumption in the U.S. from 1975 and 2020*, STATISTA, http://www.statista.com/statistics/183943/us-carbon-dioxide-emissions-from-1999/ [https://perma.cc/999D-LWYD] (last visited May 1, 2021).

This failure is not just a moral and political embarrassment;[8] it may also be a constitutional violation.[9] Government action supporting the fossil fuel industry and inaction against anthropogenic global warming have been the subject of a number of lawsuits throughout the United States.[10] These lawsuits assert that the U.S. Constitution grants the people a fundamental right to a stable, or sustainable, climate.[11] At least one federal district court agreed, reasoning that a life-sustaining climate is "fundamental to a free and ordered society"—relying on the same due process reasoning that the Supreme Court used when it held that same-sex marriage could not be prohibited.[12]

These climate rights cases have run into roadblocks, however.[13] In *Juliana v. United States*,[14] after the District Court of Oregon denied the government's motion to dismiss in a landmark opinion,[15] the Ninth Circuit reversed the decision.[16] The Ninth Circuit acknowledged that the plaintiffs "presented compelling evidence that climate change has brought [the 'eve of destruction'] nearer" but held that the plaintiffs-appellees lacked standing to sue.[17] The court, however, left the constitutional rights issue undecided, assuming for its analysis that the asserted right exists.[18]

It remains unclear what constitutional climate change litigation will look like in the wake of the Ninth Circuit's decision.[19] This Comment focuses on the merits of the due process arguments for and against judicial recognition of a fundamental right to a

8. *See Climate Change: 'A Moral, Ethical and Economic Imperative' To Slow Global Warming Say UN Leaders, Calling for More Action*, UN NEWS (May 9, 2019), http://news.un.org/en/story/2019/05/1038231 [https://perma.cc/W6QD-S4HA]; *Pope Francis to US Leaders: We Have a Moral Imperative To Act on Climate*, CLIMATE REALITY PROJECT (Sept. 25, 2015, 9:30 AM), http://www.climaterealityproject.org/blog/pope-francis-us-leaders-we-have-moral-imperative-act-climate [https://perma.cc/Y7VK-ER2M]; Jeffrey Sachs, *Trump's Failure To Fight Climate Change Is a Crime Against Humanity*, CNN (Aug. 19, 2019, 12:33 PM), http://www.cnn.com/2018/10/18/opinions/trumps-failure-to-fight-climate-change-sachs/index.html [https://perma.cc/B3F9-ULT4]; Jim Tankersley, *Quitting the Paris Climate Agreement Is a Moral Disgrace*, VOX (June 1, 2017, 3:45 PM), http://www.vox.com/2017/5/31/15719386/trump-paris-climate-agreement-moral-failure [https://perma.cc/DXG2-E3BR].

9. *See* Juliana v. United States (*Juliana I*), 217 F. Supp. 3d 1224, 1248–50 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020) (holding that the right to a sustainable climate is protected by the Constitution's Due Process Clauses).

10. *See, e.g.*, Animal Legal Def. Fund v. United States, 404 F. Supp. 3d 1294, 1297 (D. Or. 2019); Clean Air Council v. United States, 362 F. Supp. 3d 237, 242 (E.D. Pa. 2019); *Juliana I*, 217 F. Supp. 3d at 1233.

11. *See, e.g.*, *Clean Air Council*, 362 F. Supp. 3d at 242–43; *Juliana I*, 217 F. Supp. 3d at 1233.

12. *See Juliana I*, 217 F. Supp. 3d at 1248–50.

13. *See, e.g.*, Juliana II, 947 F.3d 1159, 1175 (9th Cir. 2020) (reversing the lower court's decision); *Animal Legal Def. Fund*, 404 F. Supp. 3d at 1302 (dismissing the plaintiffs' claim); *Clean Air Council*, 362 F. Supp. 3d at 254 (dismissing the plaintiffs' claims).

14. 947 F.3d 1159 (9th Cir. 2020).

15. *Juliana I*, 217 F. Supp. 3d at 1233–34.

16. *Juliana II*, 947 F.3d at 1175.

17. *Id.* at 1664–65 ("Reluctantly, we conclude that such relief is beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented to the political branches of government.").

18. *Id.* at 1664. ("The central issue before us is whether, *even assuming such a broad constitutional right exists*, an Article III court can provide the plaintiffs the redress they seek." (emphasis added)).

19. The *Juliana* plaintiffs-appellees filed a petition for rehearing *en banc* in the Ninth Circuit. *See* Petition for Rehearing *En Banc* of Plaintiffs-Appellees, Juliana v. United States (*Juliana III*), 986 F.3d 1295 (9th Cir. 2021) (mem.) (No. 18-36082). The Ninth Circuit denied this petition in February 2021. *Juliana III*, 986 F.3d at 1296.

sustainable climate. Under the doctrine of substantive due process, recognizing such a right as fundamental would subject government action that advances anthropogenic climate change—or, potentially, government inaction that fails to mitigate it[20]—to the elevated strict scrutiny standard.[21] This heightened level of scrutiny would pave the way for courts to compel the federal government to take actions needed to preserve a stable climate for current and future generations.[22]

Section II of this Comment reviews the current state of the climate threat, the historical application of substantive due process in federal court, the modern cases seeking judicial recognition of a fundamental right to a sustainable climate, the public trust doctrine as it relates to the Constitution, and prior efforts to protect the environment through the substantive due process doctrine. Section III analyzes the merits of substantive due process arguments both in favor of and against recognizing the right to a sustainable climate as fundamental.

II. OVERVIEW

Greenhouse gases (GHGs) emitted through human activity are causing the planet to warm at a dangerous rate.[23] The consequences are expected to be catastrophic if the warming continues unabated.[24] As the Ninth Circuit recently recognized in *Juliana*, "[t]he problem is approaching 'the point of no return.'"[25] Indeed, the planet has already felt the effects through the increased intensity and frequency of natural disasters, displacement due to rising sea levels, and record high temperatures throughout the

20. Though the Due Process Clause does not generally compel governmental action, there is an exception when the government creates the danger. *See Juliana I*, 217 F. Supp. 3d at 1250–52 (ruling on a motion to dismiss that plaintiffs "adequately alleged a danger creation claim" that the government knowingly interfered with the climate system).

21. *Id.* at 1248.

22. *See id.* at 1233.

23. *The Causes of Climate Change*, NASA: GLOBAL CLIMATE CHANGE, http://climate.nasa.gov/causes/ [https://perma.cc/9QXK-4SYT] (last visited May 1, 2021) [hereinafter *Causes of Climate Change*, NASA].

24. Juliana II, 947 F.3d 1159, 1166 (9th Cir. 2020) ("Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies.").

25. *Id.*

globe.[26] Climate change threatens all facets of human life, including the financial system,[27] food security,[28] national security,[29] energy security,[30] and human health.[31]

Part II.A reviews key facts regarding the threats that climate change poses, the United States' contributions to the problem, and the federal government's failure to address the issue. Part II.B discusses the doctrine of substantive due process and focuses on how courts determine whether a right is fundamental. Part II.C examines *Juliana* and other recent climate rights cases that have pushed for recognition of a fundamental right to a sustainable climate. Part II.D explains the public trust doctrine and its relation to the Constitution and substantive due process. Finally, Part II.E outlines older efforts seeking to establish a more general right to a healthy environment.

A. The Climate Crisis

Part II.A.1 gives a brief overview of how climate change works and the threats it presents to American life. Part II.A.2 provides historical context for understanding how the United States helped drive climate change to its current threat level.

1. The Threat

Earth's temperature is a "balancing act."[32] The Earth absorbs energy from the sun, keeping the planet warm, and releases absorbed energy back into space, keeping the planet cool.[33] Certain gases in the atmosphere—such as carbon dioxide (CO_2) and methane (CH_4)—trap the absorbed energy (heat) radiating from Earth toward space.[34] These GHGs act like a "blanket" and make the Earth warmer.[35] The greenhouse effect is

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26. *Climate Change: How Do We Know?*, NASA: GLOBAL CLIMATE CHANGE, http://climate.nasa.gov/evidence/ [https://perma.cc/C6A7-26CB] (last visited May 1, 2021).

27. Gregg Gelzinis & Graham Steele, *Climate Change Threatens the Stability of the Financial System*, CTR. FOR AM. PROGRESS (Nov. 21, 2019, 12:01 AM), http://www.americanprogress.org/issues/economy/reports/2019/11/21/477190/climate-change-threatens-stability-financial-system/ [https://perma.cc/L2KZ-MXRP].

28. Chase Sova, Kimberly Flowers & Christian Man, *Climate Change and Food Security: A Test of U.S. Leadership in a Fragile World*, CTR. FOR STRATEGIC & INT'L STUD. (Oct. 15, 2019), http://www.csis.org/analysis/climate-change-and-food-security-test-us-leadership-fragile-world [https://perma.cc/MD4V-3YHK].

29. David Hasemyer, *U.S. Military Precariously Unprepared for Climate Threats, War College & Retired Brass Warn*, INSIDE CLIMATE NEWS (Dec. 23, 2019), http://insideclimatenews.org/news/23122019/military-climate-change-unprepared-national-security-conflict-heat-risk-war-college-2019-year-review [https://perma.cc/7UK7-Y4DD]; Neil Oculi, *Climate Change as a Security Threat for the United States and China*, HUMAN. IN ACTION (Oct. 2016), http://www.humanityinaction.org/knowledge_detail/climate-change-as-a-security-threat-for-the-united-states-and-china/ [https://perma.cc/7F8Z-LUHE].

30. *See* David Toke & Sevasti-Eleni Vezirgiannidou, *The Relationship Between Climate Change and Energy Security: Key Issues and Conclusions*, 22 ENVTL. POL. 537 *passim* (2013).

31. David Introcaso, *Climate Change Is the Greatest Threat to Human Health in History*, HEALTH AFF. (Dec. 19, 2018), http://www.healthaffairs.org/do/10.1377/hblog20181218.278288/full/ [https://perma.cc/X3FY-3QA5].

32. *Balancing Act*, NATURE CLIMATE CHANGE, Feb. 2016, at 113,113; *Causes of Climate Change*, EPA, http://19january2017snapshot.epa.gov/climate-change-science/causes-climate-change_.html [https://perma.cc/T3G3-9RAH] (last updated Dec. 27, 2016) [hereinafter *Causes of Climate Change*, EPA].

33. *Causes of Climate Change*, EPA, *supra* note 32; *see also Balancing Act*, *supra* note 32.

34. *Causes of Climate Change*, NASA, *supra* note 23.

35. *Causes of Climate Change*, EPA, *supra* note 32.

natural and GHG levels have varied over history.[36] Human activity, however, has disrupted the balancing act, exaggerating the greenhouse effect by emitting excessive amounts of GHGs, causing the planet to warm rapidly.[37]

Since the late-nineteenth century, the average surface temperature on Earth has increased by approximately one degree Celsius.[38] If GHG emissions continue at the current rate, global warming is likely to reach 1.5 degrees Celsius between 2030 and 2052.[39] According to the Intergovernmental Panel on Climate Change, such an increase will have "severe, pervasive and irreversible impacts for people and ecosystems."[40] Climate change has already caused warming oceans, shrinking ice sheets, glacial retreat, decreased snow cover, sea level rise, declining arctic sea ice, extreme weather events, and ocean acidification.[41]

The more the United States ignores climate change, the worse the damage will be.[42] The threat is "approaching 'the point of no return.'"[43] Passing that point will result in a "Hothouse Earth" of "self-perpetuating or runaway global warming."[44] Seabeds will warm, permafrost will melt (allowing methane—a far more potent GHG than CO_2—to escape), soil will absorb fewer GHGs, and sea ice will melt.[45] These events will accelerate the planet towards what "scientists increasingly describe as total dystopia."[46]

Unmitigated climate change will affect both natural and human systems—the global community can expect a destabilized climate to result in flooded cities, more frequent and powerful natural disasters, outbreaks of disease, and the degradation of critical food and water supplies.[47] For example, rising seas and flooding will compromise our water systems and increase the risk of waterborne diseases, while severe storms are expected to increase food contamination.[48] Rising temperatures and the increased frequency and intensity of wildfires will damage air quality, leading to "hundreds of thousands of premature deaths, hospital admissions and causes of acute respiratory illnesses."[49] Even infrastructure is at risk: "[h]ot weather, flooding and other extreme

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36. *Id.*

37. *Id.*

38. MYLES ALLEN ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SUMMARY FOR POLICYMAKERS 4 (2018).

39. *Id.*

40. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT 8 (Core Writing Team et al. eds., 2015) [hereinafter IPCC 2014 REPORT].

41. *Climate Change: How Do We Know?*, *supra* note 26.

42. *Climate Impacts*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/climate/impacts [https://perma.cc/7VH5-WYHB] (last visited May 1, 2021) ("The more carbon, the worse the impacts will be.").

43. Juliana II, 947 F.3d 1159, 1166 (9th Cir. 2020).

44. Introcaso, *supra* note 31 (citing Will Steffen et al., *Trajectories of the Earth System in the Anthropocene*, 115 PROC. NAT'L ACAD. SCI. 8252, 8252 (2018)).

45. *Id.*

46. *Id.*

47. *Juliana II*, 947 F.3d at 1166.

48. Introcaso, *supra* note 31; *see also How Climate Change Plunders the Planet*, ENVTL. DEF. FUND, http://www.edf.org/climate/how-climate-change-plunders-planet [https://perma.cc/DFV8-29XM] (last visited May 1, 2021).

49. Introcaso, *supra* note 31; *see also How Climate Change Plunders the Planet*, *supra* note 48.

weather events damage infrastructure, put heavy burdens on electrical supplies and disrupt how we travel and commute."[50]

Climate change is also a national security threat.[51] For example, extreme weather events can "cripple[] the strategic capability of multiple U.S. military bases."[52] The U.S. Army War College warns that the Department of Defense is "precariously unprepared for the national security implications of climate change-induced global security challenges."[53] The institution also warns that climate change is likely to force widespread migration, with rising seas displacing tens to hundreds of millions of people.[54] Such mass migrations can result in increased conflict and turmoil.[55]

Further, climate change threatens the stability of the financial system.[56] The risks are twofold: the physical and environmental consequences can destabilize insurance companies, banks, and other financial intermediaries, and the need to transition to a greener economy threatens destabilization through "potentially rapid losses to carbon-intensive assets."[57]

Limiting these consequences will require significant reductions in greenhouse gas emissions.[58] The greenhouse gas driving most of the warming has been CO_2.[59] For at least eight hundred thousand years, the level of CO_2 in the atmosphere never exceeded three hundred parts per million.[60] In May 2019, atmospheric CO_2 exceeded 415 parts per million, the highest in human history.[61] This drastic change is due mostly to the burning of fossil fuels—such as oil, natural gas, and coal.[62] The burning of solid waste, trees, and wood also emits CO_2, as does deforestation and soil degradation.[63]

Emission projections vary greatly depending on social and political factors, but more frequent and longer heat waves and extreme weather events are already "very

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50. *How Climate Change Plunders the Planet*, *supra* note 48.

51. *See* MAX BROSIG, PARKER FRAWLEY, ANDREW HILL, MOLLY JAHN, MICHAEL MARSICEK, AUBREY PARIS, MATTHEW ROSE, AMAR SHAMBALJAMTS & NICOLE THOMAS, U.S. ARMY WAR COLL., IMPLICATIONS OF CLIMATE CHANGE FOR THE U.S. ARMY 1 (2019).

52. Hasemyer, *supra* note 29.

53. BROSIG ET AL., *supra* note 51, at 1.

54. *Id.*

55. *Id.*

56. Gelzinis & Steele, *supra* note 27.

57. *Id.*

58. IPCC 2014 REPORT, *supra* note 40, at 8.

59. *Why Does CO2 Get Most of the Attention when There Are so Many Other Heat-Trapping Gases?*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/resources/why-does-co2-get-more-attention-other-gases [https://perma.cc/N8NW-8LPP] (last updated Aug. 3, 2017); *see also Causes of Climate Change*, EPA, *supra* note 32.

60. Brandon Miller & Jen Christensen, *The Science Behind the Climate Crisis*, CNN (Sept. 4, 2019, 10:38 AM), http://www.cnn.com/2019/09/04/us/climate-change-science-101-basics/index.html [https://perma.cc/7Y8R-HCPU].

61. Ryan W. Miller & Doyle Rice, *Carbon Dioxide Levels Hit Landmark at 415 PPM, Highest in Human History*, USA TODAY (May 13, 2019, 8:07 AM), http://www.usatoday.com/story/news/world/2019/05/13/climate-change-co-2-levels-hit-415-parts-per-million-human-first/1186417001/ [https://perma.cc/N8QK-9B23].

62. *Climate Change Indicators: Greenhouse Gases*, EPA, http://www.epa.gov/climate-indicators/greenhouse-gases [https://perma.cc/3ET8-NLRY] (last updated Nov. 9, 2020).

63. *Id.*

likely," regardless of development and policy.[64] One estimate warns that failing to reduce emissions by 55% by 2030 will likely have catastrophic consequences, including widespread famine, disease, and death.[65]

2. The United States' Contributions to Climate Change

The United States is the "biggest carbon polluter in history,"[66] having emitted nearly four hundred thousand billion tonnes[67] of CO_2 since 1750—nearly double the roughly 214,000 billion tonnes that China emitted over the same period.[68] Though China now accounts for more annual total emissions of CO_2 (27% in 2018), the United States is the next highest emitter (15% in 2018).[69] The U.S. Energy Information Administration projects that the United States will continue to emit CO_2 at its current level through 2050.[70]

The U.S. government has "long understood the risks" of climate change,[71] yet governmental efforts to mitigate climate change have been anemic.[72] In 1983, the Environmental Protection Agency (EPA) cautioned that a "wait and see" approach to climate policy was "extremely risky."[73] In 1990, the EPA proposed a plan to stabilize the global climate, but it was never implemented.[74]

The Ninth Circuit recently recognized that the government contributes to climate change—and not just by inaction.[75] The government "promotes fossil fuel use in a host of ways," including through the tax code, subsidies, leases, and permits.[76] The

64. IPCC 2014 REPORT, *supra* note 40, at 7–8.

65. Eillie Anzilotti, *Global Emissions Must Drop 55% by 2030 To Meet Climate Goals*, FAST COMPANY (Nov. 27, 2018), http://www.fastcompany.com/90272330/global-emissions-must-drop-55-by-2030-to-meet-climate-goals [https://perma.cc/4PNJ-5Q2X]; *see also* Miller & Christensen, *supra* note 60.

66. Gillis & Popovich, *supra* note 3.

67. "Tonnes" are metric tons, which are one thousand kilograms (or 2,204.6 pounds). *Tonne*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/tonne [https://perma.cc/G3ZY-J5WW] (last visited May 1, 2021); *Metric Ton*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/metric%20ton [https://perma.cc/X9EN-JDT5] (last visited May 1, 2021); *see also Metric Tons (or Tonnes) to Pounds*, METRIC CONVERSIONS, http://www.metric-conversions.org/weight/metric-tons-to-pounds.htm [https://perma.cc/96MN-FTD6] (last visited May 1, 2021).

68. Carbon Brief (@CarbonBrief), TWITTER (Apr. 23, 2019, 11:48 AM), http://twitter.com/CarbonBrief/status/1120715988532629506/ [https://perma.cc/8FMQ-NA98].

69. *See* Jeff Tollefson, *The Hard Truths of Climate Change – By the Numbers*, NATURE (Sept. 18, 2019), http://www.nature.com/immersive/d41586-019-02711-4/index.html [https://perma.cc/NWD8-6J9C].

70. *EIA Projects U.S. Energy-Related CO2 Emissions Will Remain Near Current Level Through 2050*, U.S. ENERGY INFO. ADMIN. (Mar. 20, 2019), http://www.eia.gov/todayinenergy/detail.php?id=38773#:~:text=Carbon%20dioxide%20emissions%20from%20U.S.,EIA's%20Annual%20Energy%20Outlook%202019.&text=As%20travel%20demand%20continues%20to%20rise%2C%20transportation%20consumption%20and%20emissions%20increase [https://perma.cc/B2ZS-XE5R].

71. Juliana II, 947 F.3d 1159, 1166 (9th Cir. 2020).

72. Introcaso, *supra* note 31.

73. *Juliana II*, 947 F.3d at 1166.

74. Complaint for Injunctive and Declaratory Relief ¶ 3, Juliana I, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 15-cv-1517-TC).

75. *Juliana II*, 947 F.3d at 1167.

76. *Id.*

government did not dispute these facts when it was before the Ninth Circuit.[77] Accordingly, this Comment accepts as fact the government's substantial role in fostering climate change and focuses on the question of a citizen's right to hold the government responsible as a matter of due process. These facts formed the basis for the legal claims in *Juliana* and similar lawsuits that allege the government has violated substantive due process rights.[78]

B. Substantive Due Process and the Identification of Fundamental Rights

Part II.B.1 provides a basic overview of the foundations of substantive due process. Part II.B.2 dives further into the various tests that Supreme Court Justices use to analyze substantive due process claims.

1. Substantive Due Process and Strict Scrutiny

The Fifth Amendment of the U.S. Constitution declares that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[79] The Fourteenth Amendment contains a nearly identical clause, which applies the provision to state governments.[80] Though seemingly procedural, courts have interpreted the Due Process Clauses to include substantive protections from governmental action.[81]

The doctrine of substantive due process rests upon the idea that certain rights are so fundamental that practically no process of law can excuse governmental infringement upon them.[82] When a challenged government action deprives a claimant's life, liberty, or property interest, courts use a "means-end scrutiny" test to evaluate whether the deprivation is justified.[83] This test considers the government's interests and the means used to serve them, as well as whether less oppressive means were available.[84]

One of two levels of scrutiny may apply: rational basis or strict scrutiny.[85] The rational basis test is highly deferential to the government,[86] asking only whether the action is rationally related to serving a valid government interest.[87] In contrast, the strict scrutiny test is more difficult for the government to pass,[88] requiring the deprivation to

77. *Id.*

78. *See Juliana I*, 217 F. Supp. 3d at 1233.

79. U.S. CONST. amend. V.

80. *See id.* amend. XIV, § 1.

81. *See* Reno v. Flores, 507 U.S. 292, 301–02 (1993).

82. *Id.*; *see generally* Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 625–26 (1992) (explaining that deprivations must be "substantively reasonable").

83. Galloway, Jr., *supra* note 82, at 626–27.

84. *Id.* at 627 & n.12.

85. *Id.* at 627.

86. *See* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1318–19 (2018); Jeffrey D. Jackson, *Putting Rationality Back into the Rational Basis Test: Saving Substantive Due Process and Redeeming the Promise of the Ninth Amendment*, 45 U. RICH. L. REV. 491, 492 (2011).

87. Galloway, Jr., *supra* note 82, at 627–28.

88. *See* Jackson, *supra* note 86, at 492 (explaining that the strict scrutiny test is "almost always 'fatal in fact' for the infringing law").

be necessary[89] and "narrowly tailored to serve a compelling state interest."[90] Strict scrutiny of alleged substantive due process violations is only applied when the deprivation affects a right that is found to be *fundamental*.[91]

Though a controversial doctrine,[92] substantive due process has ancient roots[93] and has been a recognized part of federal constitutional law since the 1890s.[94] Substantive due process has been used to protect fundamental rights, whether enumerated in the Constitution[95] or not.[96] Unenumerated rights can be "penumbral"—formed by the coming together of explicit guarantees in separate provisions of the Bill of Rights[97]—or they can be protected solely by the Due Process Clauses.[98] Fundamental rights not enumerated in the Constitution but nevertheless protected by it include "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion."[99]

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89. Galloway, Jr., *supra* note 82, at 638.

90. Reno v. Flores, 507 U.S. 292, 301–02 (1993).

91. Galloway, Jr., *supra* note 82, at 627; Jackson, *supra* note 86, at 492.

92. *E.g.*, Branson D. Dunlop, *Fundamental or Fundamentally Flawed – A Critique of the Supreme Court's Approach to the Substantive Due Process Doctrine Under the Fourteenth Amendment*, 39 U. DAYTON L. REV. 261, 261 (2014); Richard S. Myers, Obergefell *and the Future of Substantive Due Process*, 14 AVE MARIA L. REV. 54, 55 (2016).

93. The notion of substantive due process "stems from the thirteenth century and chapter thirty-nine of the Magna Carta," which subjected the monarch to the "law of the land"—restraining the monarch from arbitrary infringement of the people's fundamental rights. Michael O'Loughlin, Comment, *Understanding the Public Trust Doctrine Through Due Process*, 58 B.C. L. REV. 1321, 1325–26 (2017) (citing James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320–21, 324 (1999)). The Supreme Court's first interpretation of the Fifth Amendment stated that the phrase "due process of law" was "undoubtedly intended to convey the same meaning as the words, 'by the law of land,' in *Magna Charta*." Den *ex dem*. Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 276 (1855); *see also* O'Loughlin, *supra*, at 1326.

94. Galloway, Jr., *supra* note 82, at 625–26.

95. The courts have used the Fourteenth Amendment's due process clause to apply specific provisions of the Bill of Rights to the states. Duncan v. Louisiana, 391 U.S. 145, 147–148 (1968) ("[M]any of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.").

96. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citations omitted).

97. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."). The *Griswold* court held that "zones of privacy" were implicitly protected by the First, Third, Fourth, Fifth, and Ninth Amendments and that using contraception was a personal choice that fell within the zone. *See id.* at 484–85.

98. In a concurring opinion in *Griswold*, Justice Harlan explained that the Fourteenth Amendment's Due Process Clause "stands . . . on its own bottom." *Id.* at 500 (Harlan, J., concurring). Therefore, the penumbras of the Bill of Rights need not be considered in striking down a statute banning the use of contraceptives. *Id.* at 500–01. Harlan advocated for the theory that the Due Process Clause protects "values 'implicit in the concept of ordered liberty.'" *Id.* at 500 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). His concurring opinion in *Griswold* built upon his dissenting opinion in *Poe v. Ullman*, 367 U.S. 497 (1961), where he explained that the liberty protected by the Due Process Clauses is "not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; [etc.]. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Id.* at 543 (Harlan, J., dissenting).

99. *Glucksberg*, 521 U.S. at 720 (citations omitted).

2. Determining Whether a Right Is Fundamental

Recognizing and protecting unenumerated rights is a weighty responsibility of the judiciary and is not undertaken haphazardly.[100] The list of recognized unenumerated rights is short and rarely expanded,[101] and the ones that have been accepted have invited controversy.[102] Skeptics typically express concern that recognizing unenumerated rights is judicial overreaching and an imposition of judges' personal policy preferences.[103] "Rewriting" the Constitution this way, they argue, takes the matter out of the people's hands.[104] Proponents, however, see it as an essential role of the judiciary and a key vehicle for protecting the people from unjust governmental intrusion.[105]

The proper test for determining whether a right is "fundamental" is itself unclear and evolving.[106] The Supreme Court has considered history and tradition,[107] the concept of ordered liberty,[108] and "reasoned judgment" to varying degrees or some combination thereof.[109]

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100. Obergefell v. Hodges, 576 U.S. 644, 695 (2015) (Roberts, C.J., dissenting) ("[We must] 'exercise the utmost care' . . . 'lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.'" (quoting *Glucksberg*, 521 U.S. at 720).

101. *See* Cty. of Sacramento v. Lewis, 523 U.S. 833, 842 (1998) ("[W]e have 'always been reluctant to expand the concept of substantive due process.'" (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992))); *see also* Lynn Phan, *There Is No Cause of Action Against the US Government Under the Fifth Amendment for Failure To Protect the Global Climate System*, GEO. ENVTL. L. REV. ONLINE, Feb. 28, 2019, http://www.law.georgetown.edu/environmental-law-review/blog/there-is-no-cause-of-action-against-the-us-government-under-the-fifth-amendment-for-failure-to-protect-the-global-climate-system/ [https://perma.cc/D78B-YGPS] ("The Supreme Court has asserted that the list of fundamental liberties is seldom expanded.").

102. *E.g.*, David L. Fitzgerald, Note, *Let Justice Flow Like Water: The Role of Moral Argument in Constitutional Interpretation*, 65 FORDHAM L. REV. 2103, 2103 (1997) ("The Supreme Court's right of privacy jurisprudence has generated significant controversy . . . .").

103. *See, e.g.*, *Obergefell*, 576 U.S. at 686–87 (Roberts, C.J., dissenting) ([T]his Court is not a legislature. . . . Under the Constitution, judges have power to say what the law is, not what it should be. . . . The majority's decision is an act of will, not legal judgment."); Lawrence v. Texas, 539 U.S. 558, 595 (2003) (Scalia, J., dissenting) ("The *Roe* Court . . . based its conclusion . . . on its own normative judgment that antiabortion laws were undesirable.").

104. *See, e.g.*, *Obergefell*, 576 U.S. at 687 ("Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law. Stealing this issue from the people will for many cast a cloud over same-sex marriage . . . .").

105. *See* Charles McC. Mathias, Jr., *Ordered Liberty: The Original Intent of the Constitution*, 47 MD. L. REV. 174, 177–78 (1987) ("Federal power is predicated on constitutional authority. Our interpretation of that authority determines when government may act and when it must stay its hand. . . . [T]he Constitution is not only a blueprint for government. It was and is a system of ordered liberty.").

106. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 66 (2006) ("[T]he Supreme Court may now endorse, simultaneously, three different—and inconsistent—theories of substantive due process."); Dunlop, *supra* note 92, at 261–62.

107. *See infra* Part II.B.2.a.

108. *See infra* Part II.B.2.b.

109. *See infra* Part II.B.2.c.

a. Rights Deeply Rooted in History and Tradition

One fundamental rights theory is that the Due Process Clauses protect only rights that are "deeply rooted in this Nation's history and tradition."[110] This traditionalist theory is that history and tradition reveal "the basic values that underlie our society."[111] Legal scholars have long debated the appropriate role of this consideration in substantive due process analysis.[112] To supporters of this view, the test is intended to restrain judges from imposing their policy preferences over that of the legislature.[113]

In *Bowers v. Hardwick*,[114] the Supreme Court applied the traditionalist theory and declined to recognize acts of homosexual sodomy as constitutionally protected, largely on the basis that homosexuality had been condemned throughout ancient and modern history.[115] Justice White, writing for the majority, noted that anti-sodomy laws had "ancient roots" and had been in place in all fifty states until 1961.[116] Chief Justice Burger concurred, citing the "[c]ondemnation" of sodomy by Judeo-Christian morality and Roman law.[117]

The Supreme Court again focused heavily on history and tradition in *Washington v. Glucksberg*.[118] The Court, holding that physician-assisted suicide is not a fundamental right, found "a consistent and almost universal tradition" rejecting assisted suicide and therefore declined to "reverse centuries of legal doctrine and practice."[119] The Court reasoned that this traditionalist approach restrained the subjectivity inherently involved in due process analyses.[120]

There is concern, however, that traditionalism can be too limiting and even "a source of oppression."[121] Historical analysis can be deployed in a selective manner, serving as a *post hoc* justification for judicial policy preferences[122]—contrary to the explicit purpose of traditionalism.[123] For example, Justice Blackmun's dissent in *Bowers*

110. Lawrence v. Texas, 539 U.S. at 558, 588 (2003) (Scalia, J., dissenting) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)); *see also* Katharine T. Bartlett, *Tradition as Past and Present in Substantive Due Process*, 62 DUKE L.J. 535, 536–37 (2012).

111. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (quoting Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)); *see also* Edward P. Steegman, *Of History and Due Process*, 63 IND. L.J. 369, 388 (1987).

112. *See, e.g.*, Bartlett, *supra* note 110, at 536–37; Steegman, *supra* note 111, at 369–71; John C. Toro, Comment, *The Charade of Tradition-Based Substantive Due Process*, 4 N.Y.U. J.L. & LIBERTY 172, 173–74 (2009).

113. Bartlett, *supra* note 110, at 540–41.

114. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

115. *See Bowers*, 478 U.S. at 190–92.

116. *Id.* at 192–94.

117. *Id.* at 196 (Burger, J., concurring).

118. 521 U.S. 702 (1997).

119. *Glucksberg*, 521 U.S. at 723.

120. *Id.* at 721–22.

121. Bartlett, *supra* note 110, at 537; Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101, 102–03 (2002).

122. *E.g.*, Steegman, *supra* note 111, at 398; Toro, *supra* note 112, at 177–78; Wolf, *supra* note 121, at 103.

123. *See* Wolf, *supra* note 121, at 102 ("[T]radition does not facilitate the objectivity that it ostensibly provides. Rather, relying on tradition sanctions jurists' personal beliefs because the judges, acting as historians,

took umbrage with the majority's reliance on "traditional Judeo-Christian values," likening punishment on the basis of "religious intolerance" to that of punishment on the basis of "racial animus."[124] Justice Stevens also dissented, reasoning that a history of seeing a practice as immoral is not itself a good enough reason to implement or continue prohibition of the practice.[125] Justice Stevens pointed to *Loving v. Virginia*,[126] which struck down a law prohibiting interracial marriage despite the deeply rooted history of treating that practice as immoral and even criminal.[127]

Consistent with these concerns, the Supreme Court in *Lawrence v. Texas*[128] overruled *Bowers* and specifically criticized its historical analysis.[129] Justice Kennedy, writing for the majority, explained that *Bowers* had "fail[ed] to appreciate the extent of the liberty at stake" by framing the question as whether homosexuals had the right to engage in sodomy.[130] Rather, the concern is the privacy of individuals in a personal relationship and their right to choose to engage in private acts.[131] After this reframing of the issue, the *Lawrence* Court focused on the matter of history.[132]

Justice Kennedy took issue with the conclusion in *Bowers* that "[p]roscriptions against [homosexual sodomy] have ancient roots."[133] First, he noted that anti-sodomy laws were generally not enforced against *consenting* adults acting in *private*.[134] Second, he reasoned that laws in the United States did not specifically target same-sex couples until the end of the twentieth century.[135] Third, he found that the *Bowers* Court's reliance on Judeo-Christian values improperly imposed religious beliefs upon society through criminal law.[136]

Further, the *Lawrence* Court saw a shift in the laws and traditions within the prior half century.[137] Specifically, the Court noted that same-sex prohibitions had increasingly been abolished or ignored and that the Model Penal Code did not provide for penalties for private, consensual sex acts.[138] Justice Kennedy also pointed to the British

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interpret history from the only perspective they know: their own."); *see also Glucksberg*, 521 at 725–26 (considering a patient's right to remove artificial life support as well as their right to refuse unwanted medical treatment, but concluding that these previously recognized rights were distinct from whether a patient had a right to assisted-suicide).

124. Bowers v. Hardwick, 478 U.S. 186, 211–12 (1986) (Blackmun, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

125. *Id.* at 216 (Stevens, J., dissenting).

126. 388 U.S. 1 (1967).

127. *Bowers*, 478 U.S. at 216 n.9 (1986) (Stevens, J., dissenting); *see also Loving*, 388 U.S. at 12.

128. 539 U.S. 558 (2003).

129. *See Lawrence*, 539 U.S. at 566–78.

130. *Id.* at 566–67.

131. *Id.* at 567.

132. *See id.* at 567–68.

133. *Id.* at 567.

134. *Id.* at 569. Rather, it was *nonconsensual* acts of sodomy that were prosecuted. *Id.* Further, prosecutions against consensual sodomy were more difficult due to the exclusion of testimony by a consenting partner. *Id.*

135. *Id.* at 570.

136. *See id.* at 571.

137. *Id.* at 571–72.

138. *Id.* at 569–70, 572.

Parliament's repeal of anti-homosexual conduct laws in 1967, as well as a 1981 decision by the European Court of Human Rights invalidating a law similar to the ones at issue in *Bowers* and *Lawrence*.[139] These trends demonstrated an "emerging awareness" that adults are protected from government invasion into their private, sexual lives.[140]

Thus, in *Lawrence*, the Court indicated that history and tradition do not always control substantive due process inquiries.[141] As Justice Kennedy would write in a later case, the Court must respect and learn from history and tradition, but it cannot "allow[] the past alone to rule the present."[142]

b. Rights Implicit in the Concept of Ordered Liberty

A second fundamental rights theory considers whether the asserted right is "implicit in the concept of ordered liberty"—put differently, whether deprivation of a right would extinguish liberty and justice altogether.[143] The inquiry is not entirely unrelated to, or devoid of, history and tradition. It first appeared in Justice Cardozo's opinion in *Palko v. Connecticut*,[144] where the Court explained that rights "of the very essence of a scheme of ordered liberty" are "rooted in the *traditions* and conscience of our people."[145]

The ordered liberty inquiry is ill-defined.[146] One conception is that liberty is a matter of individual autonomy—fundamental liberty rights are those that are required for personal autonomy.[147] This formulation of liberty has prevailed in cases establishing "the right of the individual to . . . engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[148]

In *Loving*, the Court invalidated statutes that had banned interracial couples from marrying.[149] Although the decision mainly rested on the Fourteenth Amendment's Equal Protection Clause,[150] the Court also held that the statutes violated the Fourteenth Amendment's Due Process Clause, reasoning that marriage is "fundamental to our very

139. *Id.* at 572–73. The European Court's decision is authority in all countries that are members of the Council of Europe, which included forty-five countries at the time *Lawrence* was decided. *Id.*

140. *Id.* at 572.

141. *See id.* at 567–68; Obergefell v. Hodges, 576, U.S. 644, 664 (2016) ("History and tradition guide and discipline this inquiry but do not set its outer boundaries.").

142. *Obergefell*, 576 U.S. at 664.

143. Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

144. 302 U.S. 319 (1937).

145. *Palko*, 302 U.S. at 325 (emphasis added); *see also* Howard J. Vogel, *The "Ordered Liberty" of Substantive Due Process and the Future of Constitutional Law as a Rhetorical Art: Variations on a Theme from Justice Cardozo in the United States Supreme Court*, 70 ALB. L. REV. 1473, 1474–75 (2007).

146. *See* Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 221–23 (2007).

147. Matthew J. Routh, Comment, *Re-Thinking Liberty: Cannabis Prohibition and Substantive Due Process*, 26 KAN. J. L. & PUB. POL'Y 143, 146 (2017) (quoting Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 89 (2003)).

148. Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (collecting cases).

149. Loving v. Virginia, 388 U.S. 1, 2 (1967).

150. *See id.* at 7–12.

existence and survival."[151] The Court's analysis, however, was brief and did not explicitly define its inquiry.[152]

Six years later, in *Roe v. Wade*,[153] the Court held that the right to abortion was implicit in the concept of ordered liberty and was therefore protected by the Fourteenth Amendment.[154] In support of this conclusion, the Court highlighted the range of potential harms that would be imposed upon pregnant women if denied the choice to terminate pregnancies: psychological harm to the mother; psychological harm to the unwanted child; "a distressful life and future" for the mother; and, in some cases, the "stigma of unwed motherhood."[155] These factors led the Court to conclude that the decision to terminate a pregnancy is included in the right of privacy and is therefore fundamental.[156]

In *Lawrence*, the Court again framed liberty partly as a matter of personal autonomy.[157] Citing to the landmark abortion case *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[158] the Court explained that the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[159] The line of cases providing those protections demonstrates that personal autonomy is "central to the liberty protected by the Fourteenth Amendment."[160]

Though the ordered liberty inquiry remains ill-defined and has been criticized for being a circular test,[161] the inquiry has been used to reject history and tradition when an unenumerated right has little historical support.[162] Regardless, history and tradition appear to have some place in the ordered liberty inquiry,[163] but to what extent has been a matter of some confusion.[164] The Court in *Bowers* treated ordered liberty and history and tradition as separate inquiries.[165] In *Glucksberg*, however, the Court's two-pronged test[166] placed history and tradition and ordered liberty within the same prong.[167] Later,

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151. *Id*. at 12.

152. *See id.*

153. 410 U.S. 113 (1973).

154. *Roe*, 410 U.S. at 152–54.

155. *Id.* at 153.

156. *Id.* at 154.

157. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

158. 505 U.S. 833 (1992).

159. *Lawrence*, 539 U.S. at 573–74 (citing *Casey*, 505 U.S. at 851).

160. *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

161. *E.g.*, Farrell, *supra* note 146, at 221 ("[T]he Court has adopted a test for finding implied fundamental rights that is so circular and empty that it is hard to believe it has had any staying power.").

162. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 673–75 (2015); *Lawrence*, 539 U.S. at 593 n.3 (Scalia, J., dissenting).

163. *See* Routh, *supra* note 147, at 144 ("[T]he Supreme Court has unfailingly relied on history and *stare decisis* in guiding our society's incessant search for meaning behind liberty.").

164. *See id.* at 151–52.

165. *See* Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986) (first quoting Palko v. Connecticut, 302 U.S. 319, 325–26 (1937); and then quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1977)), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

166. *See infra* Part II.B.2.d.

167. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

in *McDonald v. City of Chicago*,[168] the Court clarified that fundamental rights are *either* deeply rooted in history and tradition *or*, "in a related context," implied in the concept of ordered liberty.[169]

c. Reasoned Judgment

The Court's most recent landmark substantive due process case rejects any formulaic test at all.[170] In *Obergefell v. Hodges*,[171] Justice Kennedy explained that identification of fundamental rights "has not been reduced to any formula."[172] Instead, courts must "exercise reasoned judgment," which is guided by, but not bound to, history and tradition.[173] In repudiating reliance on history and tradition, Justice Kennedy wrote:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. *When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.*[174]

In *Obergefell*, Justice Kennedy built upon his majority opinion in *Lawrence*.[175] In *Lawrence*, Justice Kennedy had acknowledged the lack of specificity regarding the definition of liberty in the Due Process Clauses but saw such broadness as a feature rather than a defect.[176] In the absence of a satisfying definition of liberty, "persons in every generation" can consider new insight and "invoke [the Constitution's] principles in their own search for greater freedom."[177]

Then, in *Obergefell*, exercising reasoned judgment and writing for the majority, Justice Kennedy relied on new insight to hold that state statutes denying same-sex couples the right to marry violated the Fourteenth Amendment's Due Process Clause.[178] In his formula-rejecting analysis, Justice Kennedy described "four principles and traditions" in support of the Court's holding.[179]

First, marriage is "inherent in the concept of individual autonomy," which is protected by Supreme Court precedent.[180] The Court noted that there is an undeniable

168. 561 U.S. 742 (2010).

169. *McDonald*, 561 U.S. at 767.

170. Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015).

171. 576 U.S. 644 (2015).

172. *Obergefell*, 576 U.S. at 663–64 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

173. *Id.* at 664.

174. *Id.* (emphasis added).

175. *See id.* at 674–75; *see also* Lawrence v. Texas, 539 U.S. 558 (2003).

176. *See Lawrence*, 539 U.S. at 578–79 ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific.").

177. *Id.*

178. *See Obergefell*, 576 U.S. at 664–72.

179. *See id.* at 665–71.

180. *Id.* at 665.

connection between marriage and individual liberty because marriage is foundational to the exercise of other rights, such as procreation and childrearing.[181] Second, the right to marry is "unlike any other in its importance to the committed individuals."[182] *Lawrence* had already held that the right to "enjoy intimate association" belonged both to same-sex and opposite-sex couples—and *Obergefell* concluded that stopping there would not "achieve the full promise of liberty."[183] Third, the right to marry "safeguards children and families" and "draws meaning from related rights of childrearing, procreation, and education."[184]

Finally, the Court stated that "marriage is a keystone of our social order . . . [and] 'the foundation of the family and of society, without which there would be neither civilization nor progress.'"[185] With this and the first three principles in mind, the Court found that the right to marry is fundamental "as a matter of history and tradition" and that "a better informed understanding" of liberty reveals that the right cannot be denied to same-sex couples.[186]

d. The "Careful Description" Requirement

There may be an additional component to establishing an unenumerated, fundamental right—*Glucksberg*'s "careful description" requirement.[187] The phrase originated in *Reno v. Flores*,[188] which explained that asserted rights should be carefully described so as to encourage "judicial self-restraint" when "asked to break new ground."[189]

In *Glucksberg*, the respondents challenged a Washington state statute prohibiting the assistance of another person's suicide.[190] The respondents—physicians practicing in Washington—described the asserted right in several ways: the right to "choose how to die," to "control . . . one's final days," to "choose a humane, dignified death," and to "shape death."[191] The Court reframed the issue as whether individuals had a "right to commit suicide which itself includes a right to assistance in doing so."[192] The Court then analyzed the history and tradition supporting the right to assisted suicide rather than a broader right to die.[193] Thus, a narrow description of an asserted right can serve to determine the outcome before analysis begins.[194]

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181. *Id.* at 665–66.

182. *Id.* at 666.

183. *Id.* at 667.

184. *Id.*

185. *Id.* at 669 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

186. *Id.* at 671–72.

187. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

188. 507 U.S. 292 (1993).

189. *Reno*, 507 U.S. at 302 (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

190. *Glucksberg*, 521 U.S. at 707–08, 723.

191. *Id.* at 722.

192. *Id.* at 723.

193. *See id.*; *see also* Peter Nicolas, *Fundamental Rights in a Post*-Obergefell *World*, 27 YALE J.L. & FEMINISM 331, 338 (2016).

194. Nicolas, *supra* note 193, at 337–38 ("[H]ow narrowly or broadly the right is framed [] will nearly always be outcome determinative. If the right at issue is phrased in extremely narrow and specific terms—such

The *Obergefell* Court, however, rejected the "careful description" requirement.[195] Justice Kennedy reasoned that while a careful description in *Glucksberg* "may have been appropriate for the asserted right there involved," such practice is inconsistent with the Court's substantive due process doctrine.[196] A careful description "with central reference to specific historical practices" would define rights "by who exercised them in the past," denying rights to new groups.[197]

C. Substantive Due Process and the Right to a Sustainable Climate

Several U.S. courts have considered whether the Constitution provides a fundamental right to a sustainable climate.[198] Thus far, however, the District Court of Oregon is the only one to have recognized such a right.[199] The Ninth Circuit Court of Appeals overturned that decision on justiciability grounds.[200] The Eastern District of Pennsylvania recently faced similar claims and reached the opposite conclusion of the District Court of Oregon, holding that there is no "fundamental right to a life-sustaining climate system."[201]

1. *Juliana v. United States*—The District Court's Opinion

In *Juliana*, a group of young people (ages eight to nineteen), an association of young activists, and a guardian for future generations sued the United States, then-President Barack Obama, and numerous federal agencies.[202] The plaintiffs alleged that the government had "violate[d] their substantive due process rights" by "permitt[ing], encourag[ing], and otherwise enabl[ing] continued exploitation, production, and combustion of fossil fuels" despite knowing of the significant danger CO_2 emissions pose to the climate.[203]

After establishing that the case was justiciable,[204] the district court turned to the due process claim.[205] Recognizing that the government's affirmative actions at issue would be upheld if subjected only to rational basis review, the court had to decide whether the

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as the right to physician-assisted suicide—one is almost certain not to find support for the right in canvassing the nation's history and traditions.").

195. Obergefell v. Hodges, 576 U.S. 644, 671 (2015).

196. *Id.*

197. *Id.*

198. *See, e.g.*, Animal Legal Def. Fund v. United States, 404 F. Supp. 3d 1294, 1298 (D. Or. 2019); Clean Air Council v. United States, 362 F. Supp. 3d 237, 242 (E.D. Pa. 2019); Juliana I, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016), *rev'd* 947 F.3d 1159 (9th Cir. 2020); Sinnok v. State, No. 3AN-17-09910 CI, 2018 WL 7501030, at *1 (Alaska Super. Ct. Oct. 30, 2018).

199. *Clean Air Council*, 362 F. Supp. 3d at 250 (citing *Juliana I*, 217 F. Supp. 3d at 1248–50). See *also infra* Part II.C.1 for a discussion of the District Court of Oregon's decision in *Juliana v. United States*.

200. Juliana II, 947 F.3d 1159, 1175 (9th Cir. 2020); *see also infra* Part.C.2.

201. *Clean Air Council*, 362 F. Supp. 3d at 250; *see also infra* Part C.3.

202. *Juliana I*, 217 F. Supp. 3d at 1233.

203. *Id.*

204. *Id.* at 1241–42. The Court found that the plaintiffs had Article III standing to sue and that the case did not present a political question. *Id*.

205. *See id.* at 1248. The Ninth Circuit did not address the district court's finding of a constitutional right to a stable climate, overruling the district court on other grounds "even assuming such a broad constitutional right exists." *Juliana II*, 947 F.3d at 1164–65, 1171–72.

plaintiffs' asserted right to a stable climate is a fundamental right—thus subjecting the government actions to strict scrutiny review.[206]

In determining that the right to a sustainable climate is a fundamental constitutional right, Judge Aiken followed the *McDonald* test that the right must be either "deeply rooted in this Nation's history and tradition" or "fundamental to our scheme of ordered liberty."[207] Accepting the plaintiffs' allegations as true, Judge Aiken focused on the ordered liberty principle to recognize the right to a sustainable climate.[208]

Judge Aiken relied in part on *Obergefell*, which "broke new legal ground" when it recognized same-sex marriage as a constitutional right.[209] As interpreted by Judge Aiken, *Obergefell* recognized marriage, regardless of the sexes involved, as a right which "underl[ies] and support[s] other vital liberties."[210] The district court saw a sustainable climate in the same light—"[j]ust as marriage is the foundation of the family," a sustainable climate is "the foundation 'of society, without which there would be neither civilization nor progress.'"[211]

Judge Aiken also cited *Roe* to demonstrate that certain rights can be recognized when they are necessary to exercise other rights, enumerated or not.[212] Though the *Roe* Court relied on the Fourteenth Amendment's concept of liberty, it acknowledged that the right of privacy was also rooted in the penumbras of the Bill of Rights, including the First, Fourth, Fifth, and Ninth Amendments.[213] *Roe* and *Obergefell* represent a line of fundamental rights recognized as underlying and supporting other vital liberties, rather than being rooted in history.[214]

Judge Aiken rejected the defendants' argument that the plaintiffs were asserting a right to be free from all pollution or climate change.[215] The court clarified that the right is to be free from climate change "on a catastrophic level."[216] In attempting to limit the scope of the right, Judge Aiken described it as a "right to a climate system capable of sustaining human life."[217] The intent of this description was to strike a balance between allowing the government to act, or fail to act, in ways that contribute to some anthropogenic climate change and preventing it from causing widespread death and destruction.[218] The court noted that not every minor act that contributes to climate change

206. *Juliana I*, 217 F. Supp. 3d at 1248–50.

207. *Id.* at 1249 (quoting McDonald v. City of Chicago, 561 U.S. 742, 767 (2010)).

208. *Id.* at 1250. Judge Aiken did not address whether history and tradition provide any support for the recognition of the right. *See id.* at 1248–50.

209. *Id.* at 1249.

210. *Id.* at 1250.

211. *Id.* (quoting Obergefell v. Hodges, 576 U.S. 644, 669 (2015)).

212. *Id.* at 1249.

213. *Id.* at 1249–50 (citing Roe v. Wade, 410 U.S. 113, 152–53 (1973)).

214. *See id.*

215. *Id.* at 1250.

216. *Id.*

217. *Id.*

218. *Id.* Judge Aiken concluded that the state-created danger doctrine applied, leaving plaintiffs to prove at trial their allegations that the government "played a unique and central role in the creation of our current climate crisis . . . with full knowledge of the significant and unreasonable risks posed by climate change." *Id.* at 1251–52.

is a constitutional violation, but that the effect of governmental action need not render the human race extinct to be deemed an unconstitutional infringement.[219]

Further, Judge Aiken recognized that judges must be careful to avoid imposing their policy preferences through the Due Process Clause,[220] but also noted that identifying fundamental rights is "an enduring part of the judicial duty to interpret the Constitution."[221] Ultimately, Judge Aiken, exercising reasoned judgment, determined that the right to a sustainable climate is protected by the Due Process Clauses.[222]

2. *Juliana v. United States*—The Ninth Circuit's Opinion

The *Juliana* defendants appealed Judge Aiken's order and the Ninth Circuit held oral arguments on June 4, 2019.[223] The Ninth Circuit, in a 2–1 vote, reversed Judge Aiken's ruling, holding that the plaintiffs lacked Article III standing to bring their claims.[224] The Ninth Circuit did not, however, address the merits of the substantive due process claims, instead assuming for the purposes of the appeal that the asserted right is fundamental.[225] The briefs from the defendants-appellants and plaintiffs-appellees did, however, dig into the due process arguments.[226]

Plaintiffs argued that the right to a sustainable climate is both deeply rooted in history and tradition and implicit in the concept of ordered liberty.[227] Plaintiffs pointed to the unalienable, natural rights—life, liberty, and the pursuit of happiness—enshrined in the nation's founding documents.[228] The framers of the new nation, they argued, "invoked 'the powers of the earth' and the 'Laws of Nature and of Nature's God'" to reject Britain's tyranny that had "plundered our seas, ravaged our coasts, burnt our towns, and destroyed the lives of our people."[229] Climate change, they asserted, will wreak the same havoc "in more profound and long-lasting ways."[230]

Plaintiffs' expert historian attested to the importance of a stable climate to liberty and history's support for it:

> The 'breath of life' that the atmosphere, forests, soils, waters (the climate system) was to the agrarian society in which the founding fathers lived was also foundational to the liberties they staked out for their new nation. There may be no other implicit liberty right more rooted in the history and traditions

219. *Id.* at 1250. ("[W]here a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation.").

220. *Id.* at 1249 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

221. *Id.* (quoting Obergefell v. Hodges, 576 U.S. 644, 663 (2015)).

222. *Id.* at 1249–50.

223. Juliana II, 947 F.3d 1159, 1160 (9th Cir. 2020).

224. *Id.* at 1164–65.

225. *See id.* at 1171.

226. Plaintiffs-Appellees' Answering Brief at 40–51, *Juliana II*, 947 F.3d 1159 (No. 18-36082); Appellants' Reply Brief at 23–25, *Juliana II*, 947 F.3d 1159 (No. 18-36082).

227. *See* Plaintiffs-Appellees' Answering Brief, *supra* note 226, at 40–50.

228. *Id.* at 42–43.

229. *Id.* at 44 (quoting THE DECLARATION OF INDEPENDENCE paras. 1, 26 (U.S. 1776)).

230. *Id.*

> of the United States than the right to a climate that sustains life, the life that humans have enjoyed for generations and that is now catastrophically threatened.[231]

In response, the defendants argued that fundamental rights jurisprudence protected personal autonomy—an issue "wholly unrelated" to the right to a stable climate.[232] The defendants attacked plaintiffs' reliance on natural law as lacking context and concreteness, and therefore failing to support the assertion that the right to a stable climate is deeply rooted in history and tradition.[233]

Though the majority of the court did not address these arguments, District Court Judge Staton, in a dissenting opinion, offered an argument in support of the right to a sustainable climate.[234] Judge Staton, sitting on the appellate panel by designation, argued that "the perpetuity of the Republic" is a fundamental right because it is necessary to preserve other constitutional rights.[235] For support, she pointed to the original history of the Constitution.[236] The Articles of Confederation, for example, were abandoned because they failed to preserve and perpetuate the nation.[237]

Judge Staton also pointed to the text of the Constitution, beyond the Due Process Clauses.[238] The Constitution's Preamble, she noted, declares that the Constitution is designed to "secure 'the Blessings of Liberty' not just for one generation, but for all future generations—our 'Posterity.'"[239] Judge Staton then turned to the structure of the Constitution, pointing to the presidential oath to "preserve, protect and defend the Constitution," and Article IV's guarantee of a "Republican Form of Government" for every state.[240] Taken together, she reasoned that the Constitution's original history, structure, and text—including, but not limited to, the Due Process Clauses—identify a principle of perpetuity that prevents "the willful dissolution of the Republic."[241]

Judge Staton also clarified that the perpetuity principle "is not an environmental right" and does not protect a right to a healthy environment, only the perpetuity of the nation.[242] Though the principle has never been used by a court to limit government action, Judge Staton reasoned that this is because the United States has never before

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231. *Id.* at 49.

232. Appellants' Reply Brief, *supra* note 226, at 23–24. In their opening brief, appellants argued that climate change "is a public and generalized issue having no connection to personal liberty or personal privacy." Appellants' Opening Brief at 37, *Juliana II*, 947 F.3d 1159 (No. 18-36082).

233. Appellants' Reply Brief, *supra* note 226, at 24–25.

234. *See Juliana II*, 947 F.3d at1177 (Staton, J., dissenting).

235. *Id.* at 1178 ("Much like the right to vote, the perpetuity of the Republic occupies a central role in our constitutional structure as a 'guardian of all other rights.'" (quoting Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982))).

236. *See id.* ("George Washington recognized that 'the destiny of unborn millions' rested on the fate of the new Nation, cautioning that 'whatever measures have a tendency to dissolve the Union . . . ought to be considered as hostile to the Liberty and Independency of America.'").

237. *Id.*

238. *See id.*

239. *Id.*

240. *Id.* at 1178–79 (first quoting U.S. CONST. art. II, § 1, cl. 8; and then quoting *id.* art. IV).

241. *Id.*

242. *Id.* at 1179.

"confronted an existential threat . . . actively backed by the government."[243] In her view, climate change presents such an "actively backed" threat.[244]

3. *Clean Air Council v. United States*

In *Clean Air Council v. United States*,[245] the Eastern District of Pennsylvania was confronted with similar claims to those at issue in *Juliana*, including alleged violations of a constitutional right to a sustainable climate.[246] The *Clean Air Council* court declined to recognize the existence of such a right and granted the defendants' motion to dismiss for failure to state a claim.[247]

The court expressed great skepticism about the plaintiffs' claims as well as the *Juliana* court's analysis of similar claims.[248] One of the court's primary concerns was the apparently unlimited scope of the right recognized by *Juliana* and sought by the plaintiffs in *Clean Air Council*.[249] The court reasoned that the broad scope of relief requested indicated that the case was more an issue of policy than a legitimate legal dispute.[250]

The *Clean Air Council* court also criticized *Juliana* for ignoring precedent,[251] citing a variety of district and circuit court cases, including those rejecting constitutional rights to a "healthy environment," "health or freedom from bodily harm," "free[dom] from climate change pollution," a "healthful environment," and a "clean environment."[252] The *Clean Air Council* decision illustrates the difficulty and importance, highlighted in Part II.B.2.iv, in carefully describing the asserted right.[253]

D. Substantive Due Process and the Public Trust Doctrine

In addition to their due process claim, the *Juliana* plaintiffs brought claims under the public trust doctrine ("PTD").[254] The PTD, a common law principle dating back to the Roman Empire, "operates as a fiduciary duty" upon the government to preserve and maintain the resources of the trust—natural resources such as the air, water, sea, and

243. *Id.* at 1180.

244. *See id.* at 1180–81.

245. 362 F. Supp. 3d 237 (E.D. Pa. 2019).

246. *See Clean Air Council*, 362 F. Supp. 3d at 242.

247. *Id.* at 250.

248. *See id.* at 250–52.

249. *Id.* at 251.

250. *Id.* ("[T]he actions they ask me to address—including altering agency web pages, approving hiring decisions, and ratifying the President's cabinet appointments . . . underscore[] that Plaintiffs do not seek the Court's assistance in adjudicating a legal dispute.").

251. *Id.* at 250–51.

252. *See id.* at 251 (first citing Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971); then citing Lake v. City of Southgate, No. 16-10251, 2017 WL 767879, at *3–4 (E.D. Mich. Feb. 28, 2017); then citing SF Chapter of A. Philip Randolph Inst. v. U.S. EPA, No. 07-4936, 2008 WL 859985, at *7 (N.D. Cal. Mar. 28, 2008); then citing *In re* Agent Orange Prods. Liab. Litig., 475 F. Supp. 928, 934 (E.D.N.Y. 1979); and then citing Fed. Emp. for Non-Smokers' Rights v. United States, 446 F. Supp. 181, 185 (D.D.C. 1978)).

253. *See id.* at 251.

254. *See Juliana I*, 217 F. Supp. 3d 1224, 1252–53 (D. Or. 2016), *rev'd* 947 F.3d 1159 (9th Cir. 2020).

shores—for the good of the public.[255] Specifically, the PTD imposes three restrictions or duties on governments: (1) to hold trust property available for use by the general public, (2) to refrain from selling the property, and (3) to maintain the property for particular uses.[256] The *Juliana* plaintiffs asserted that the government has failed to maintain public trust assets and excluded public use by "allowing their depletion and destruction."[257]

In American law, the PTD was originally focused on submerged lands under navigable waters.[258] In a landmark opinion in 1892, the Supreme Court in *Illinois Central Railroad Co. v. Illinois*[259] held that the State of Illinois could not grant a portion of Lake Michigan to a private railroad.[260] The Court reasoned that the land was held in trust by the people to allow for public use of the waters.[261] Justice Fields, writing for the majority, compared the duties under the PTD to the state's police power, which cannot be abdicated.[262]

Since *Illinois Central*, the PTD has grown to be applied to other resources and activities on public lands.[263] One key issue in *Juliana* was whether the atmosphere is an asset of the public trust.[264] Judge Aiken sidestepped the issue at the motion to dismiss stage, finding that the plaintiffs adequately alleged injuries relating to a different trust asset.[265]

The specific legal source of the PTD remains a matter of some debate.[266] Some states recognize it as a matter of common law, while others have enshrined the doctrine in their constitutions.[267] Some scholars have pointed to various clauses of the federal

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255. Matthew Schneider, Comment, *Where* Juliana *Went Wrong: Applying the Public Trust Doctrine to Climate Adaptation at the State Level*, 41 ENVIRONS 47, 52 (2017); *see also* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

256. Sax, *supra* note 255, at 477.

257. *Juliana I*, 217 F. Supp. 3d at 1254.

258. O'Loughlin, *supra* note 93, at 1335.

259. 146 U.S. 387 (1892).

260. *Ill. Cent. R.R. Co.*, 146 U.S. at 464; *see also* O'Loughlin, *supra* note 93, at 1335.

261. *Ill. Cent. R.R. Co.*, 146 U.S. at 452; *see also* O'Loughlin, *supra* note 93, at 1335.

262. *Ill. Cent. R.R. Co.*, 146 U.S. at 453 ("The state can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers . . . ."); *see also* O'Loughlin, *supra* note 93, at 1335.

263. *See* Eric Pearson, Illinois Central *and the Public Trust Doctrine in State Law*, 15 VA. ENVTL. L.J. 713, 714–15 (1996) ("Courts continue to use the public trust doctrine in this classic form, but also have applied the doctrine to a host of resources other than submerged lands, including marine life, wildlife, sand and gravel, rural park lands, battlefields, archeological remains, and a downtown area. Courts also use the doctrine to protect such time-honored public pursuits as hunting, fishing, boating, scientific study, wildlife habitat preservation, swimming, the maintenance of ecological integrity and aesthetic beauty, and the retention of open space. Thus, a doctrine originally applicable to submerged lands may now serve to promote resource conservation and protection." (citations omitted)).

264. Juliana I, 217 F. Supp. 3d 1224, 1255 (D. Or. 2016), *rev'd* 947 F.3d 1159 (9th Cir. 2020).

265. *Id.* at 1255–56 ("Because a number of plaintiffs' injuries relate to the effects of ocean acidification and rising ocean temperatures, they have adequately alleged harm to public trust assets." (citations omitted) (footnotes omitted)).

266. *E.g.*, O'Loughlin, *supra* note 93, at 1323.

267. Kacy Manahan, Comment, *The Constitutional Public Trust Doctrine*, 49 ENVTL. L. 263, 266 (2019); O'Loughlin, *supra* note 93, at 1337 ("Many states have gone beyond common law and have expressly incorporated the PTD into their constitutions or into the public rights they protect.").

Constitution, including the Commerce Clause, Property Clause, and Tenth Amendment, as supporting sources.[268] In her *Juliana* opinion, Judge Aiken endorsed the view that public trust rights are fundamental and therefore protected by the federal Constitution's Due Process Clauses.[269]

Judge Aiken found that the PTD is both implicit in the concept of ordered liberty and deeply rooted in the nation's history and tradition.[270] Public trust rights are "inherent aspects of sovereignty and the consent of the governed from which the United States' authority derives."[271] Therefore, public trust rights are fundamental and protected by the Due Process Clauses.[272] The public trust duty, according to Judge Aiken, preserves for future legislatures "the natural resources necessary to provide for the well-being and survival of its citizens."[273]

E. Substantive Due Process and Environmental Rights

In the absence of explicit protection by the Constitution,[274] litigants have sought recognition of unenumerated environmental rights as a matter of substantive due process.[275] In 1971, the Environmental Defense Fund, along with others, sued to prevent the construction of a dam in Arkansas, asserting that it violated a constitutional right to a healthy environment.[276] The plaintiffs argued that the right to enjoy the natural world and "live in an environment that preserves the unquantified amenities of life" is a matter of liberty protected by the Due Process Clauses.[277] The Eastern District of Arkansas reasoned that, though it was "not insensitive" to this argument, the argument was without precedential support, and it was not yet time to recognize such a constitutional right.[278]

Later in 1971, the Fourth Circuit recognized that "a growing number of commentators" at the time were arguing in support of a constitutional right to a healthy

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268. *See, e.g.*, O'Loughlin, *supra* note 93, at 1323.

269. *Juliana I*, 217 F. Supp. 3d at 1261. This view has also been endorsed by other legal scholars. *See, e.g.*, O'Loughlin, *supra* note 93, at 1324–25.

270. *Juliana I*, 217 F. Supp. 3d at 1261.

271. *Id.*

272. *Id.*

273. *Id.* at 1253.

274. There have been three proposals, in 1968, 1970, and 2003, for amendments to the federal Constitution that provide for a right to a healthy environment, but none succeeded. Mia Hammersley, *The Right to a Healthy and Stable Climate: Fundamental or Unfounded?*, 7 ARIZ. J. ENVTL. L. & POL'Y 117, 120 (2017). The first and second attempts were for a "decent environment"; the third was for a "clean, safe, and sustainable environment." *Id.*

275. *See, e.g.*, *id.* at 120–21.

276. *See* Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army, 325 F. Supp. 728, 730–31 (E.D. Ark. 1971), *aff'd* 470 F.2d 289 (8th Cir. 1972).

277. *Id.* at 739.

278. *Id.* at 739–40 ("Those who would attempt to protect the environment through the courts are striving mightily to carve out a mandate from the existing provisions of our Constitution. . . . Such claims, even under our present Constitution, are not fanciful and may, indeed, some day, in one way or another, obtain judicial recognition. But, as stated by Judge Learned Hand . . . 'Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.'" (citations omitted) (quoting Spector Motor Serv., Inc. v. Walsh, 139 F.2d 809 (2d Cir. 1944))).

environment.[279] However, the court noted that the plaintiffs asserting the right did so "without citation of a single relevant authority and with no attempt to develop supporting reasons."[280] Though support for environmental protection had been growing, the court declined to recognize a right in the absence of convincing precedential support.[281]

More recently, in *Lake v. City of Southgate*,[282] the Eastern District of Michigan refused to recognize a right to "health or freedom from bodily harm."[283] The court reasoned that the plaintiff had "not provided a 'careful description' of the right," because her asserted right "to be free from bodily harm" was too broad.[284] Furthermore, the court found no evidence that the asserted right is rooted in our traditions or implicit in ordered liberty, noting the lack of precedential support.[285]

In another recent case, *Animal Legal Defense Fund v. United States*,[286] the plaintiffs asserted that the government's failure to combat climate change violated their "right to wilderness."[287] The plaintiffs argued that "a 'state of nature,' or wilderness, must exist for citizens to meaningfully consent to the social contract."[288] The District Court of Oregon reasoned that the asserted right was unsupported by precedent, was not rooted in our history and tradition, and was not carefully described.[289] The court noted that courts have consistently agreed that there is no fundamental right to "a particular type of environment."[290]

The *Animal Legal Defense Fund* plaintiffs also argued that the District Court of Oregon's *Juliana* decision established a right to a sustainable climate and therefore, "the government has a continued affirmative duty to safeguard public trust assets, or the literal state of nature."[291] The court rejected this argument, distinguishing *Juliana* as seeking a narrower right—the right to be free from catastrophic climate change—rather than the "right to wilderness."[292]

Though the environmental rights movement has failed to find broad success in the federal courts, it has won key legislation.[293] The National Environmental Policy Act and the Clean Air Act were both passed in 1970.[294] Shortly thereafter, Pennsylvania was the

279. Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971).

280. *Id.*

281. *Id.* ("While a growing number of commentators argue in support of a constitutional protection for the environment, this newly-advanced constitutional doctrine has not yet been accorded judicial sanction; and appellants do not present a convincing case for doing so." (footnote omitted)).

282. No. 16-10251, 2017 WL 767879 (E.D. Mich. Feb. 28, 2017).

283. *Lake*, 2017 WL 767879, at *3.

284. *Id.* at *4 (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)).

285. *Id.* ("[W]henever federal courts have faced assertions of fundamental rights to a 'healthful environment' or to freedom from harmful contaminants, they have invariably rejected those claims.").

286. 404 F. Supp. 3d 1294 (D. Or. 2019).

287. *Animal Legal Def. Fund*, 404 F. Supp. 3d at 1298.

288. *Id.* at 1301.

289. *See id.* at 1301–02.

290. *Id.* at 1302.

291. *Id.* (internal quotation marks omitted).

292. *Id.*

293. *See* Hammersley, *supra* note 274, at 120–22.

294. *Id.* at 121.

first state to adopt an environmental amendment to its constitution.[295] Over thirty states followed Pennsylvania's example and adopted their own constitutional amendments providing for environmental rights.[296] These amendments have been worded and interpreted differently throughout the states, and some state courts have significantly weakened the force of such amendments.[297] For example, after Illinois enacted a constitutional amendment providing an individual right to a healthful environment, the Illinois Supreme Court held that the right was not fundamental.[298]

Other state courts, however, have given teeth to the environmental amendments of their respective constitutions.[299] There is some evidence that state courts have looked most favorably upon constitutional environmental protection when public health issues are at stake.[300] The Montana Supreme Court, for example, was confronted with carcinogens being added to drinking water and unanimously held that the right to a clean and healthful environment (explicitly provided by its state constitution) is fundamental.[301]

III. DISCUSSION

This Comment analyzes whether the Constitution allows the United States to light the world on fire and watch idly as it burns.[302] This Section discusses whether the right to a sustainable climate is fundamental. Recognition of such a right would subject governmental action to strict scrutiny when it contributes to catastrophic climate change.[303] The key inquiry is whether the asserted right is deeply rooted in the nation's history and traditions or is implicit in the concept of ordered liberty.[304] Though lawsuits asserting this fundamental right have yet to find broad success, the cases have stalled

295. *See* 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 the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."); s*ee also* Franklin L. Kury, *The Environmental Amendment to the Pennsylvania Constitution: Twenty Years Later and Largely Untested*, 1 VILL. ENVTL. L.J. 123, 123 (1990).

296. Hammersley, *supra* note 274, at 122.

297. *See* Jack R. Tuholske, *U.S. State Constitutions and Environmental Protection: Diamonds in the Rough*, 21 WIDENER L. REV. 239, 240 (2015) ("The enforcement of environmental rights has a checkered history in the U.S. As Professor Barton Thompson concluded, '[s]tate courts also have helped ease most of the constitutional provisions into relative obscurity by holding that the provisions are not self-executing, by denying standing to private citizens and groups trying to enforce the provisions, or by establishing relatively easy standards for meeting the constitutional requirements.'" (alteration in original) (quoting Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 158 (2003))).

298. *Id.* at 241 (citing Ill. Pure Water Comm., Inc. v. Director of Pub. Health, 470 N.E.2d 988, 992 (Ill. 1984)).

299. *See id.* at 240.

300. *See id.* at 247.

301. *See id.* at 242–44 (citing Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236 (Mont. 1999)).

302. *See* Juliana II, 947 F.3d 1159, 1175 (9th Cir. 2020) (Staton, J., dissenting) ("[T]he Constitution does not condone the Nation's willful destruction.").

303. *See* Juliana I, 217 F. Supp. 3d 1224, 1248–49 (D. Or. 2016), *rev'd* 947 F.3d 1175 (9th Cir. 2020).

304. *See supra* Part II.B.

largely on justiciability grounds.[305] Should a lawsuit clear those justiciability hurdles, there are valid arguments to be made on the merits of the substantive due process issue.

When presented with an asserted fundamental right, courts often consider whether the right is deeply rooted in the history and tradition of the nation.[306] In the context of climate change, there is no rich history of legal protection for obvious reasons: knowledge of the catastrophic threat is relatively new.[307] However, the right is not entirely unsupported by history and tradition—the public trust doctrine,[308] a recent history of increased environmental protection,[309] and the perpetuity of the nation[310] can animate the analysis.[311]

Importantly, the courts need not rely on historical support, which binds society to the past and ignores the new insights so crucial to moving the country forward.[312] Proponents in favor of recognizing a constitutional right to a sustainable climate argue that a stable climate is essential to our continued existence and is, therefore, implicit in the concept of ordered liberty.[313] Climate change will throw our "critical systems" into chaos,[314] having drastic effects on life, liberty, and property.[315] Property, both public and private, will be damaged, some lost entirely.[316] People will suffer from famine, disease, financial instability, and powerful natural disasters.[317] Lives will be lost.[318] Some of these dire consequences may already be unavoidable, but they are not incapable of

305. *See supra* notes 221–223 and accompanying text.

306. *See supra* Part II.B.2.a.

307. It was not until the 1930s that any scientist suggested that carbon emissions were warming the globe. *Climate Change History*, HISTORY (Nov. 20, 2020), http://history.com/topics/natural-disasters-and-environment/history-of-climate-change [https://perma.cc/N7C7-SCMT]. The Intergovernmental Panel on Climate Change was not established until 1989, one year after the hottest summer on record "placed global warming in the spotlight." *Id.*

308. *See supra* Part II.D.

309. *See supra* Part II.E.

310. *See supra* notes 233–244 and accompanying text.

311. Plaintiffs-Appellees' Answering Brief, *supra* note 226, at 44 ("History bears favorably on the climate right and demonstrates its fundamental primacy in our Nation's concept of ordered liberty.").

312. *See* Toro, *supra* note 112, at 178.

313. *See, e.g.*, Juliana I, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd* 947 F.3d 1159 (9th Cir. 2020).

314. *See Summary Findings*, *in* 2 U.S. GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES 26 ("Extreme weather and climate-related impacts on one system can result in increased risks or failures in other critical systems, including water resources, food production and distribution, energy and transportation, public health, international trade, and national security.").

315. *See supra* Part II.A.1.

316. *See Climate Change Predictions*, OFF. FOR COASTAL MGMT.: NAT'L OCEANIC & ATMOSPHERIC ADMIN., http://coast.noaa.gov/states/fast-facts/climate-change.html [https://perma.cc/KM5M-68JR] (last modified May 3, 2021) ("By 2050, up to $106 billion worth of coastal property will likely be below sea level.").

317. *See supra* Part II.A.1.

318. Between 2030 and 2050, climate change is expected to cause approximately 250,000 additional deaths per year, from malnutrition, malaria, diarrhea and heat stress. *Climate Change and Health*, WORLD HEALTH ORG. (Feb. 1, 2018), http://www.who.int/news-room/fact-sheets/detail/climate-change-and-health [https://perma.cc/866H-Z8RZ]. The New England Journal of Medicine called this a "conservative estimate." Andy Haines & Kristie Ebi, *The Imperative for Climate Action To Protect Health*, 380 NEW ENG. J. MED. 263, 266 (2019).

mitigation.[319] These consequences will all serve to undercut individuals' vital liberties, threatening civilization, harming human health, and impeding Americans' rights to define their own existence.[320]

Critics of these arguments express concern that the asserted right to a sustainable climate is too broad in scope.[321] In response, the right should be carefully framed to protect only against catastrophic, anthropogenic climate change, rather than less dangerous levels of climate change.[322] Judge Aiken addressed this in her opinion, describing it as a "right to a climate system capable of sustaining human life."[323] Recognition of a constitutional right to a life-sustaining climate is a directive to the legislative and executive branches to perform their duty to protect American life, liberty, and property from destruction.[324]

A. History, Tradition, and the Right to a Sustainable Climate

The traditionalist theory of fundamental rights—that they must be "deeply rooted in this Nation's history and tradition"—has often been deployed by the Supreme Court to limit the doctrine of substantive due process.[325] More recently, however, the Court has diminished the role of history and tradition in its fundamental rights analysis.[326] Justice Kennedy's *Obergefell* opinion emphasized that the Constitution lives and breathes—that new insight allows for new understandings of constitutional rights.[327] As Justice Kennedy explained, "rights come not from ancient sources alone."[328]

Despite the movement away from the traditionalist theory, the Court has made clear that history and tradition should still be considered when identifying unenumerated rights.[329] For example, though Justice Kennedy stressed that the past should not "rule the present," he still embarked on a historical analysis and found the right to marry to be fundamental "as a matter of history and tradition."[330]

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319. *See Summary Findings*, *supra* note 314, at 26–27 (providing that the amount of future climate change will largely be determined by choices society makes about emissions.).

320. *See* Plaintiffs-Appellees' Answering Brief, *supra* note 226, at 48–49.

321. *See* Clean Air Council v. United States, 362 F. Supp. 3d 237, 251 (E.D. Pa. 2019).

322. *See* Juliana I, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd* 947 F.3d 1159 (9th Cir. 2020).

323. *Id.*

324. *See id.*

325. Bartlett, *supra* note 110, at 540.

326. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 663–64 (2016) (rejecting "any formula" for the fundamental rights analysis); McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (noting that a fundamental right can be *either* deeply rooted in history and tradition *or* implied in ordered liberty."); Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." (alteration in original) (quoting Cty. of Sacramento, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))).

327. *See Obergefell*, 576 U.S. at 664.

328. *Id.* at 671.

329. *Id.* at 664 ("History and tradition guide and discipline this inquiry but do not set its outer boundaries.").

330. *Id.* at 664, 671.

Using history and tradition to "guide and discipline" a fundamental rights analysis does not necessarily bar the right to a sustainable climate from recognition.[331] In the landmark substantive due process cases to date, the Court has addressed topics with rich historical context, including marriage, sodomy, and abortion.[332] A historical inquiry in a climate rights case, however, is more difficult because climate change is a relatively new phenomenon.[333] In fact, anthropogenic climate change is unprecedented in human history.[334] To put the issue in historical context, however, proponents of the right to a sustainable climate can point to past protections for natural resources and human health, and the perpetuity of the nation.[335]

First, historical support can be drawn from the public trust doctrine, which—like the concept of due process—has ancient roots.[336] The PTD is "inherent" in state sovereignty, is explicitly enshrined in a majority of state constitutions,[337] and may even be implicit in the federal Constitution.[338] The doctrine imposes a duty on state governments to protect and maintain natural resources for public use.[339] It has been applied to protect resources such as marine life, wildlife, and park lands, as well as "time-honored public pursuits" such as hunting, fishing, and swimming.[340]

Climate change litigants, including the *Juliana* plaintiffs, have argued for the extension of the PTD to be applied to both the atmosphere and to the federal government.[341] But even in the absence of such an extension, the PTD itself shows that there is precedent for imposing a duty on the government to protect the country's natural resources[342]—resources that are gravely threatened by climate change.[343] Protection of

331. *See id.* at 644, 671–72 (using history and tradition to guide its inquiry and holding that states cannot deny marriage licenses to same-sex couples).

332. *See, e.g.*, *id.* at 663–65; *Lawrence*, 539 U.S. at 596 (Scalia, J., dissenting) (noting the country's "longstanding history" of prohibiting sodomy); Roe v. Wade, 410 U.S. 113, 130 (1973) (analyzing "ancient attitudes" against abortion).

333. *See Study Finds Climate Change a New Phenomenon in Planet's 11,000-Year Cooling Trend*, CBS NEWS (March 7, 2013, 5:27 PM), http://www.cbsnews.com/news/study-finds-climate-change-a-new-phenomenon-in-planets-11000-year-cooling-trend/ [https://perma.cc/V38Q-8SQB].

334. *See* Joseph Romm, *Are Recent Climatic Changes Unprecedented?*, YEARS PROJECT, http://theyearsproject.com/ask-joe/recent-climatic-changes-unprecedented/ [https://perma.cc/69X4-Y53L] (last visited May 1, 2021) ("Many of the recently observed climate changes are unprecedented over decades to millennia.").

335. *See* Juliana II, 947 F.3d 1159, 1177–81 (9th Cir. 2020) (Staton, J., dissenting); Plaintiffs-Appellees' Answering Brief, *supra* note 226, at 40–50.

336. O'Loughlin, *supra* note 93, at 1325.

337. Manahan, *supra* note 267, at 266.

338. Juliana I, 217 F. Supp. 3d at 1224, 1261 (D. Or. 2016); *see also* O'Loughlin, *supra* note 93, at 1323–24.

339. Schneider, *supra* note 255, at 52.

340. Pearson, *supra* note 263, at 714–15.

341. *See, e.g.*, *Juliana I*, 217 F. Supp. 3d at 1255–56; Clean Air Council v. United States, 362 F. Supp. 3d 237, 253–54 (E.D. Pa. 2019).

342. *See* Schneider, *supra* note 255, at 52.

343. *See supra* Part II.A.1.

natural resources is a matter of sovereignty, and "no government can legitimately abdicate its core sovereign powers."[344]

Some scholars argue that the PTD is a little-used, irrelevant legal doctrine.[345] But others argue that the doctrine is implicit in the U.S. Constitution, whether through the Commerce Clause, Property Clause, Tenth Amendment, or (as Judge Aiken held) the Due Process Clauses.[346] The PTD does not, however, have to itself be a fundamental right, or even grounded in the Constitution, to serve as support for (rather than the basis of) the right to a sustainable climate.[347]

Second, environmental protection has seen great progress since the 1970s.[348] As seen in *Lawrence*, recent history should not be ignored in due process inquiries.[349] In that case, Justice Kennedy considered an "emerging trend" in the preceding half century of changing attitudes towards homosexual conduct, including new attitudes from the states as well as other countries.[350] That recent history was more persuasive to the Court than ancient history condemning such behavior.[351]

In environmental law, recent history likewise shows changing attitudes and emerging trends that should not be ignored.[352] Though cases in the early 1970s that asserted various environmental rights were unsuccessful, some courts acknowledged the growing clamor for constitutional protection of the environment.[353] The issue at the time was largely the lack of precedential support, but at least one court recognized that some right to a healthy environment "may, indeed, some day . . . obtain judicial recognition."[354]

Although the issue may not have been ripe for judicial recognition in the early 1970s, the environmental rights movement has since seen great progress.[355] First, Congress passed the Clean Air Act and Clean Water Act, then over thirty state constitutions were amended to include environmental protection provisions.[356] While some state courts have interpreted these environmental amendments narrowly, others

344. *Juliana I*, 217 F. Supp. 3d at 1252; *see also* Crystal S. Chase, Comment, *The* Illinois Central *Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 113, 114 (2010).

345. Michael C. Blumm & Mary Christina Wood, "*No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1, 42 (2017).

346. *See, e.g.*, *Juliana I*, 217 F. Supp. 3d at 1261; O'Loughlin, *supra* note 93, at 1323.

347. History and tradition are used as support for finding a right to be fundamental, but there is no requirement that one right be found to rest upon another constitutional right. In the words of Justice Harlan, the Due Process Clause "stands . . . on its own bottom." Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

348. *See supra* notes 293–301 and accompanying text.

349. Lawrence v. Texas, 539 U.S. 558, 559 (2003) ("The Nation's laws and traditions in the past half century are most relevant here.").

350. *Id.*

351. *See id.*

352. *See supra* Part II.E.

353. *See supra* notes 276–281 and accompanying text.

354. Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army, 325 F. Supp. 728, 739. (E.D. Ark. 1971), *aff'd* 470 F.2d 289 (8th Cir. 1972).

355. *See supra* notes 293–301 and accompanying text.

356. *See supra* notes 294–295 and accompanying text.

have recognized that they do prevent and compel certain government action.[357] Additionally, state courts seem to interpret these amendments more expansively when public health is at risk.[358]

This recent history demonstrates an appetite for environmental protection at the same level as other constitutional rights.[359] It remains true that the federal Constitution, unlike many state constitutions, does not explicitly provide environmental rights.[360] But state recognition that such rights are fundamental at least supports the historical inquiry into the fundamentality of the right to a sustainable climate.[361] Further, the right to a sustainable climate need not be found within some other, already-recognized right.[362] The prior lack of recognition for the right to a healthy environment does not preclude future recognition of it or a similar right.[363]

Finally, the right to a sustainable climate is not merely about healthy environments and human health, but also the perpetuity of the nation.[364] The Constitution itself was designed for the nation's perpetuity, replacing the Articles of Confederation when they had proven "ill-fitting to the task of safeguarding the Union."[365] This failure is why the Constitution's Preamble declares that the document's protections are for "our 'Posterity.'"[366] The Constitution simply does not "countenance its own destruction."[367]

B. Ordered Liberty and the Right to a Sustainable Climate

Climate change threatens liberty.[368] The concept of ordered liberty is ill-defined, but Supreme Court precedents still offer meaningful guidance.[369] Nearly one hundred years ago, the Court defined liberty as the individual right to "engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized

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357. *See supra* Part II.E.

358. *See supra* notes 297–301 and accompanying text.

359. *See* Tuholske, *supra* note 297, at 239 ("Protecting the environment was important to civil society, just like the other protections we elevate to constitutional right status.").

360. *See* Hammersley, *supra* note 274, at 119–20.

361. Again, the Due Process Clause "stands . . . on its own bottom." Griswold v. Connecticut, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

362. *See id.*

363. Envtl. Def. Fund, Inc. v. Corps of Eng'rs of U.S. Army, 325 F. Supp. 728, 739–740 (E.D. Ark. 1971) (recognizing that the right to a healthy environment may one day "obtain judicial recognition"), *aff'd* 470 F.2d 289 (8th Cir. 1972).

364. *See* Juliana II, 947 F.3d 1159, 1177–81 (9th Cir. 2020) (Staton, J., dissenting).

365. *Id.* at 1178.

366. *Id.*

367. *Id.* at 1179.

368. *See* Naomi Oreskes & Nicholas Stern, *What's the Price of Ignoring Climate Change*, N.Y. TIMES (Nov. 5, 2019), http://www.nytimes.com/2019/11/05/opinion/climate-change-economics.html [https://perma.cc/7QHA-AAXE] ("Many who denied or disparaged the findings of climate science saw themselves as defenders of liberty and democracy. . . . However, by delaying a reasonable and orderly transition from the fossil fuel economy into one that is not carbon-based, these same deniers were increasing the odds that as climate change turned into a crisis, extreme—even authoritarian—methods would be called upon to address it. Just think about how we call out the National Guard when we have a weather emergency. Now imagine those emergencies as a more or less permanent state of affairs.").

369. *See infra* Part II.B.2.b.

at common law as essential to the orderly pursuit of happiness by free men."[370] The *Loving* Court considered whether the asserted right is "fundamental to our very existence and survival" and "essential to the orderly pursuit of happiness."[371] The *Roe* Court looked at the "detriment that the State would impose" by depriving the plaintiff of the asserted right, which included psychological harm and a "distressful life and future."[372] The *Obergefell* Court considered whether deprivation of the asserted right would extinguish civilization or progress.[373]

These are broad definitions, but they are meant to be so—"liberty" in the Due Process Clause is an intentionally vague concept.[374] How liberty is defined, and when it is threatened, is for each generation to decide.[375] The Due Process Clauses "entrust[] to future generations" the right to "enjoy liberty as we learn its meaning."[376]

Judge Staton's dissenting opinion in the Ninth Circuit's review of *Juliana* expanded on the idea of protecting rights that are fundamental to individuals' survival and pursuit of happiness.[377] She argued that it is not only the Due Process Clauses that protect rights that "serve as the necessary predicate for others" but also the structure of the Constitution as a whole.[378] For example, the Preamble identifies the security of the "Blessings of Liberty," for all future generations, as the Constitution's purpose.[379] In other words, the Constitution is designed to provide for the survival of the nation, and such survival guards "all other rights."[380]

Judge Staton's structural argument did not rely on the Due Process Clauses, but the Court has recognized substantive due process protection for rights found elsewhere in the Constitution.[381] For example, most of the Bill of Rights applies to the states by incorporation through the Fourteenth Amendment's Due Process Clause.[382] Further, in *Griswold*, the Court found that the right to use contraception was fundamental because it was within the "zones of privacy" created by the "penumbras" of the Bill of Rights.[383] *Roe* likewise found support for the right to abortion in the First, Fourth, Fifth, and Ninth

370. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

371. Loving v. Virginia, 388 U.S. 1, 12 (1967).

372. Roe v. Wade, 410 U.S. 113, 153 (1973).

373. *See* Obergefell v. Hodges, 576 U.S. 644, 669 (2015) ("[M]arriage is a keystone of our social order . . . [and] 'the foundation of the family and of society, without which there would be neither civilization nor progress.'" (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888))).

374. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) ("Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific.").

375. *Id.* at 578–79*; see also Obergefell*, 576 U.S. at 660.

376. *Obergefell*, 576 U.S. at 664.

377. *See* Juliana II, 947 F.3d 1159, 1177–81 (9th Cir. 2020) (Staton, J., dissenting).

378. *Id.* at 1177.

379. *Id.* at 1178.

380. *Id.* at 1178–79.

381. *See infra* notes 382–386 and accompanying text.

382. Duncan v. Louisiana, 391 U.S. 145, 147–48 (1968) ("[M]any of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.").

383. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

Amendments.[384] Though *Roe* ultimately held that the right to abortion is grounded within the Due Process Clauses, these other constitutional sources helped support that finding.[385] Therefore, certain unenumerated rights are protected by the Due Process Clauses because they are "necessary to enable the exercise of other [constitutional] rights."[386]

Is there any question that a stable climate is fundamental to our very existence and survival? Judge Aiken has no doubt.[387] She did not, however, elaborate on the relationship between liberty and a stable climate, stating only the powerful conclusion that a stable climate is the "foundation of society."[388] Support for that conclusion, though, is not hard to find.[389] A review of the countless warnings from scientists and others can help draw out the myriad ways anthropogenic climate change will affect individual Americans and America as a nation.[390]

Unmitigated climate change will have catastrophic effects on life, liberty, and property.[391] Damage to coastal property alone is projected to reach $120 billion per year by 2090.[392] Between the years of 2030 and 2050, about 250,000 deaths per year are expected to be attributable to climate change.[393] The changes to the ecosystem—ocean acidification, rising sea levels, shrinking ice sheets, extreme weather events, and more—will wreak havoc on "critical systems," including water and food resources, public health, and national security.[394]

Just as marriage is "unlike any other in its importance to the committed individuals," a stable climate is unlike any other in its importance to all living beings.[395] Like marriage, a stable climate system "safeguards children and families."[396] Moreover, just as marriage is a "keystone of our social order,"[397] a stable climate is a keystone "without which there would be neither civilization nor progress."[398]

Critics may argue that the concept of liberty as understood through the Court's substantive due process jurisprudence concerns personal autonomy rather than freedom

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384. Roe v. Wade, 410 U.S. 113, 152–53 (1973).

385. *See id.* at 153.

386. Juliana I, 217 F. Supp. 3d 1224, 1249 (D. Or. 2016), *rev'd* 946 F.3d 1159 (9th Cir. 2020).

387. *See id.* at 1250.

388. *Id.* (internal quotation mark omitted).

389. *See supra* Part II.A.1.

390. *See supra* Part II.A.1.

391. *See supra* Part II.A.1.

392. Pam Wright, *Climate Change Will Cost U.S. Hundreds of Billions, EPA Scientists Say*, WEATHER CHANNEL (Apr. 9, 2019), http://weather.com/science/environment/news/2019-04-09-climate-change-cost-epa [https://perma.cc/YJ5A-76WC].

393. *Climate Change and Health*, *supra* note 318.

394. *E.g.*, *Climate Change: How Do We Know?*, *supra* note 26; *Summary Findings*, *supra* note 314, at 26 ("Extreme weather and climate-related impacts on one system can result in increased risks or failures in other critical systems, including water resources, food production and distribution, energy and transportation, public health, international trade, and national security.").

395. Obergefell v. Hodges, 576 U.S. 644, 666 (2015); *see also* Juliana I, 217 F. Supp. 3d 1224, 1249–50 (D. Or. 2016), *rev'd* 947 F.3d 1159 (9th Cir. 2020).

396. *Obergefell*, 576 U.S. at 667; *see also Juliana I*, 217 F. Supp. 3d at 1249–50.

397. *Obergefell*, 576 U.S. at 669.

398. *Juliana I*, 217 F. Supp. 3d at 1249–50 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

from catastrophe and chaos.[399] There is certainly precedential support for the interpretation of liberty as a matter of autonomy.[400] In *Casey*, for example, the Court stated that "[a]t the heart of liberty is the right to define one's own concept of existence."[401]

Nevertheless liberty is not constrained to personal autonomy and the right to choose.[402] The connection between marriage and autonomy was but one of four principles supporting *Obergefell*'s holding.[403] Children's safety and the existence and progress of civilization were also considered.[404] In *Roe*, liberty meant freedom from government imposition of harm and a distressful life and future.[405] The Court has also made clear, in *Lawrence* and *Obergefell*, that liberty is an evolving concept, open to interpretation by each generation when new insight reveals itself.[406] It is time to recognize that the right to a sustainable climate is fundamental to ordered liberty.[407]

C. Carefully Describing the Right to a Sustainable Climate

A major concern of those opposed to the recognition of the right to a stable climate is the supposedly unlimited scope of the right.[408] The right to a life-sustaining climate, however, can (and must) be carefully described to fairly address this concern.[409] Though *Obergefell* did not apply *Glucksberg*'s careful description test, proponents of the climate right should be prepared to address it.[410] Even if the test is not explicitly applied, how an asserted right is described can guide a court's subsequent analysis.[411] For example, in *Lawrence*, the majority reframed the right of a person to engage in homosexual sodomy, instead describing it as the right of privacy between individuals in a personal relationship.[412]

Proponents should make it clear that the right to a sustainable climate is different from a right to a healthy environment, which would cover environmental harm much more broadly.[413] The right to a life-sustaining climate must apply only to greenhouse gas

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399. *See, e.g.*, Bronson J. Pace, Comment, *The Children's Climate Lawsuit: A Critique of the Substance and Science of the Preeminent Atmospheric Trust Litigation Case,* Juliana v. United States, 55 IDAHO L. REV. 85, 91 (2019) ("Substantive due process claims often concern the right to privacy or personal autonomy.").

400. *See supra* notes 148–160 and accompanying text.

401. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

402. *See supra* notes 157–160 and accompanying text.

403. *See* Obergefell v. Hodges, 574 U.S. 644, 665–70 (2015).

404. *See id.* at 667–68.

405. Roe v. Wade, 410 U.S. 113, 153 (1973).

406. *See Obergefell*, 574 U.S. at 664; Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

407. *See* Juliana I, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd* 947 F.3d 1159 (9th Cir. 2020).

408. *See* Clean Air Council v. United States, 362 F. Supp. 3d 237, 251 (E.D. Pa. 2019) ("Moreover, the 'right' the *Juliana* Court recognized is without apparent limit.").

409. *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

410. *See Juliana I*, 217 F. Supp. 3d at 1249–50; *see also Obergefell*, 576 U.S. 544.

411. Nicolas, *supra* note 193, at 337–38 ("[H]ow narrowly or broadly the right is framed [] will nearly always be outcome determinative. If the right at issue is phrased in extremely narrow and specific terms—such as the right to physician-assisted suicide—one is almost certain not to find support for the right in canvassing the nation's history and traditions.").

412. *See supra* notes 128–133 and accompanying text.

413. *See Juliana I*, 217 F. Supp. 3d at 1250.

emissions that contribute to *catastrophic* climate change.[414] There will surely be many environmental harms that follow as a consequence of climate change.[415] It is only those catastrophic harms that can be traced to anthropogenic climate change that may be considered injuries under the constitutional right to a stable climate.[416]

The court in *Clean Air Council* and the defendants in *Juliana* expressed concern that the asserted right to a stable climate is overly broad and will lead to the "constitutionalization of all environmental claims."[417] The *Juliana* court, however, sufficiently addressed this concern.[418] The asserted right is not freedom from "*any* climate change" but rather freedom from "[anthropogenic] climate change on a catastrophic level."[419] Judge Aiken explicitly stated that the right should not be interpreted to designate any act contributing to climate change as a constitutional violation.[420]

Further, the *Clean Air Council* court's concern appears not to be with the scope of the asserted right itself, but rather the type of relief the court would have to grant to remedy constitutional violations of the right.[421] The critique that the *Juliana* court "did not explain how it would" avoid the "constitutionalization of all environmental claims" ignores Judge Aiken's careful description of the right.[422]

IV. CONCLUSION

Constitutional climate change litigation has had a difficult path through the courts, and its future does not appear promising. Though the scientific community agrees that major action must be taken to avoid catastrophe,[423] the legal community disagrees about the Constitution's and judiciary's role in that process.[424] The issue of Article III standing, among others, continues to impede judicial recognition of the asserted right,[425] but there are valid arguments on the merits of substantive due process claims relating to climate

414. *See id.* (acknowledging that recognizing a right to a sustainable climate "does not transform any minor or even moderate act into a constitutional violation").

415. *See supra* Part II.A.1.

416. *Juliana I*, 217 F. Supp. 3d at 1250.

417. Clean Air Council v. United States, 362 F. Supp. 3d 237, 251 (2019) (quoting *Juliana I*, 217 F. Supp. 3d at 1250).

418. *See Juliana I*, 217 F. Supp. 3d at 1250.

419. *Id.*

420. *Id.*

421. *See Clean Air Council*, 362 F. Supp. 3d at 251.

422. *Id.*; *see also Juliana I*, 217 F. Supp. 3d at 1250.

423. Jonathan Watts, *'No Doubt Left' About Scientific Consensus on Global Warming, Say Experts*, GUARDIAN (July 24, 2019, 1:00 PM), http://www.theguardian.com/science/2019/jul/24/scientific-consensus-on-humans-causing-global-warming-passes-99 [https://perma.cc/2G4E-56KM].

424. *Compare, e.g.*, Blumm & Wood, *supra* note 345, at 86 (stating that the necessity of a fundamental right to a sustainable climate "will become only more obvious as climate chaos takes its toll on human survival and civilization"), *with* Bradford C. Mank, *Does the Evolving Concept of Due Process in* Obergefell *Justify Judicial Regulation of Greenhouse Gases and Climate Change?:* Juliana v. United States, 52 U.C. DAVIS L. REV. 855, 898 (2018) (offering "alternatives to addressing climate change without judicial intervention").

425. *See* Juliana II, 947 F.3d 1159, 1175 (9th Cir. 2020).

change.[426] Now is a "defining moment" in the fight against climate change.[427] Time is running out.[428] The United States is responsible for helping to create this danger, and the Constitution requires that it help fix it.

426. *See Juliana I*, 217 F. Supp. 3d at 1250.

427. *Climate Change*, UNITED NATIONS, *supra* note 1.

428. *See Juliana II*, 947 F.3d at 1166.