STEPPING INTO THE BREACH: STATE CONSTITUTIONS AS A VEHICLE FOR ADVANCING RIGHTS-BASED CLIMATE LITIGATION

BENJAMIN T. SHARP*

The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.[1]

—William J. Brennan Jr., Associate Justice of the United States Supreme Court

INTRODUCTION

On October 8, 2018, the Intergovernmental Panel on Climate Change (IPCC) issued a report that painted a grim picture of the short-term consequences of unmitigated climate change.[2] According to the report, the Earth's temperature could increase by as much as 1.5°C above pre-industrial levels by 2040 if greenhouse gas (GHG) emissions continue at current levels.[3] Such an increase would kill off virtually all coral reefs,[4] exacerbate heat waves and wildfires,[5] and

* J.D. candidate, Duke University School of Law, Class of 2020. The author would like to thank Professor Stephen Roady and the editors of the Duke Journal of Constitutional Law & Public Policy for their assistance in preparing this piece for publication.

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

2. Intergovernmental Panel on Climate Change, *Summary for Policymakers. In: Global Warming of 1.5°C. An IPCC Special Report on the Impacts of Global Warming of 1.5°C Above Pre-Industrial Levels And Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty* 6 (V. Masson-Delmotte, et al. eds., 2018) [hereinafter IPCC Report].

3. *Id.*

4. *See id.* at 10 ("Coral reefs . . . are expected to decline by a further 70–90% at 1.5°C . . . .").

endanger the global food supply.[6] The IPCC report also anticipates that such natural disasters could cause political instability in developing nations, amplifying the worst effects of the temperature changes.[7]

These startling findings inspired immediate calls for aggressive action. In the United Kingdom, the government asked its Committee on Climate Change to investigate whether further action was needed to meet the goals set by the Paris Agreement.[8] In China, Xie Zhenhua, China's Special Representative of Climate Change Affairs, assured colleagues that his country would not "backtrack or renegotiate" on the environmental targets agreed to in Paris and restated his nation's commitment to "safeguard[ing] the shared future of humanity."[9] In the United States, however, the report did not raise an alarm. When asked if he had read the report, President Trump promised to look at it but expressed doubts as to its authority.[10]

Such disregard for climate change and its causes is typical of American politicians. Although ninety-seven percent of scientists studying the issue agree that human activities contribute to global warming,[11] some world leaders continue to refer to the science surrounding climate change as "unsettled."[12] Even many who acknowledge this consensus, raised questions concerning its trustworthiness.[13] Politicians frequently insinuate that the availability

5. *See id.* at 13 (predicting temperature increases will increase the occurrence of extreme weather events such as heat waves).

6. *See id.* at 18 (anticipating global temperature increases will reduce crop yields).

7. *See id.* at 23–24 (predicting governments in developing nations will require assistance to mitigate the effects of climate change on infrastructure and national budgets).

8. Memorandum from Roseanna Cunningham, Cabinet Secretary for Environment, Climate Change and Land Reform, et al., to Lord Deben, Chairman of Committee on Climate Change (Oct. 15, 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/748489/CCC_commission_for_Paris_Advice_-_Scot__UK.pdf.

9. Li Jing, *'We Will Not Backtrack or Renegotiate' Says China's Top Climate Negotiator*, CHINA DIALOGUE (Sept. 17, 2018), https://www.chinadialogue.net/blog/10820-We-will-not-backtrack-or-renegotiate-says-China-s-top-climate-negotiator/en.

10. Oliver Milman, *Trump Quiet as the UN Warns of Climate Change Catastrophe*, THE GUARDIAN (Oct. 9, 2018), https://www.theguardian.com/us-news/2018/oct/09/trump-climate-change-report-ipcc-response.

11. *See* John Cook et al., *Quantifying the Consensus on Anthropogenic Global Warming in the Scientific Literature*, 8 ENVTL. RES. LETT. 024024 (2013) (estimating that ninety-seven percent of papers expressing an opinion on the issue agreed climate change was attributable to human activity).

12. *See* Brief for Texas and Eleven Additional States as Amici Curiae in Support of Appellant and Urging Reversal at *13, Exxon Mobil Corp. v. Healey, No. 18-1170 (2d Cir. Aug. 10, 2018) (deeming the debate regarding humanity's effect on climate change to be "unsettled").

13. *See generally* Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came to View*

of federal funds for climate research affects the objectivity of climate research[14] and suppresses alternate viewpoints.[15] These claims have gained traction amongst portions of the American electorate, spawning significant political opposition to any action on climate change that would stifle economic development.[16] As a result, members of Congress, wary to do anything that could impair their reelection hopes, have struggled to pass meaningful environmental legislation.[17]

The Executive Branch has faced similar difficulty in generating the political will to address climate change. Under President Obama, the environmental lobby achieved some victories through executive action: most prominent among them, the Obama Administration joined nearly every nation on the planet in agreeing to the principles set forth by the Paris Climate Accords ("Paris Agreement").[18] The provisions of this treaty included "[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels."[19] This Agreement was hailed by climate activists as "the world's greatest diplomatic success,"[20] but the United States

Climate Change as Fake Science, N.Y. TIMES (June 3, 2017), https://www.nytimes.com/2017/06/03/us/politics/republican-leaders-climate-change.html (discussing generally the positions of conservative politicians regarding the validity of climate science).

14. *See*, *e.g.*, *Data or Dogma? Promoting Open Inquiry in the Debate Over the Magnitude of Human Impact on Earth's Climate: Hearing Before the Subcommittee on Space, Science, and Competitiveness of the Committee on Commerce, Science, and Transportation*, 114th Cong. 53 (2015) (statement of Judith A. Curry, Professor, Georgia Institute of Technology) (claiming climate scientists have "abandoned any pretense at nonpartisanship and objectivity" in pursuit of increased funding).

15. *Id*. at 33 (statement of John R. Christy, Distinguished Professor of Atmospheric Science, Univ. of Alabama, Huntsville) (insinuating the authors of IPCC reports use their editorial authority to suppress alternative viewpoints).

16. *See* Gary Langer, *Public Backs Action on Global Warming – but With Cost Concerns and Muted Urgency*, ABC NEWS (July 16, 2018), https://abcnews.go.com/Politics/public-backs-action-global-warming-cost-concerns-muted/story?id=56549874 (reporting only fifty-three percent of Americans favored immediate action on climate change over more study).

17. *See* Amber Phillips, *Congress's Long History of Doing Nothing on Climate Change, In 6 Acts*, WASH. POST. (Dec. 1, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/12/01/congresss-long-history-of-inaction-on-climate-change-in-6-parts/?utm_term=.8437222181f9 (surveying Congress's inaction on carbon emissions).

18. Paris Agreement, U.N. Framework Convention on Climate Change, Dec. 12, 2016, U.N. DOC. FCCC/CP/2015/Rev. 1 Apr. 22, 2016 [hereinafter, Paris Agreement], *available at* http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf.

19. *Id*. at art. 2(1)(a).

20. Fiona Harvey, *Paris Climate Change Agreement: The World's Greatest Diplomatic Success*, THE GUARDIAN (Dec. 14, 2015, 2:51 PM), https://www.theguardian.com/environment/

Senate, constitutionally mandated to concur with any treaty before it becomes the law of the land,[21] saw things differently.

Because the Senate did not ratify the Paris Agreement, President Obama's signature was only binding upon the United States if the executive branch chose to enforce it.[22] The drama surrounding whether to do so culminated in May of 2018, when President Trump announced that the United States would withdraw from the Paris Agreement.[23] Environmental activists decried the decision as "undermin[ing] America's standing in the world"[24] and "a serious setback for efforts to staunch the greenhouse gas emissions that are overheating the planet,"[25] yet they were unable to block the administration from taking this step.[26] Thus, although progress had been made, activists were forced to acknowledge that executive power was also insufficient to achieve the sweeping changes to energy policy needed to avert the worst effects of climate change.[27]

The perceived failures of the political branches to mitigate climate change have led climate change activists to seek alternative means to achieve reductions in GHG emissions; many are turning to litigation.[28] The claims in these cases rely on a variety of legal bases,[29] but this

---

2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations.

21. *See* U.S. CONST. art. II, § 2, cl. 2 (requiring two-thirds of the Senate to consent to any treaty before it holds the force of law).

22. *See generally* Jack Beerman, *Presidential Power in Transitions*, 83 B.U.L. REV. 947 (2003) (discussing the frequency with which executive orders are repealed by subsequent presidents).

23. *See* Paris Agreement, *supra* note 18, art. 28. Due to the terms of the agreement, the United States is unable to withdraw until 2020.

24. Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html.

25. Jason Mark, *Trump's Paris Withdrawal One Year Later: All Noise*, SIERRA CLUB (June 1, 2018), https://www.sierraclub.org/sierra/trump-s-paris-withdrawal-one-year-later-all-noise.

26. *See* Shear, *supra* note 24 (acknowledging "activists . . . failed to change [the President's] mind with an intense, last-minute lobbying blitz.").

27. *See*, *e.g.*, Karl S. Coplan, *Fossil Fuel Abolition: Legal and Social Issues*, 41 COLUM. J. ENVTL. L. 223, 225 (2016) ("There is no realistic prospect that sustainable global controls on greenhouse gas emissions will be adopted in the next decade. Instead, the global community is on track to surpass the one teraton available in the next fifteen to twenty years.").

28. *See*, *e.g.*, Exxon Mobil Corp. v. Schneiderman, 316 F. Supp. 3d 679, 712 (S.D.N.Y. 2018); Clean Air Council v. United States, No. 2:17-cv-04977-PD, at 53-57 (E.D. Pa. 2017).

29. *Compare* Exxon Mobil Corp. v. Schneiderman, 316 F. Supp. 3d 679, 712 (S.D.N.Y. 2018) (denying the defendant's motion to dismiss where a fossil fuel company was investigated for misleading investors as to its knowledge of the effects of climate change), *with* Clean Air Council v. United States, No. 2:17-cv-04977-PD, at 53-57 (E.D. Pa. 2017) (asserting constitutional claims to block deregulatory actions by the Trump administration).

Note will focus on those cases claiming that governments' failures to prevent climate change amount to violations of the plaintiffs' constitutional rights under the Due Process Clause of the Fifth Amendment.

Rights-based climate change litigation is likely to increase in the future. International courts have evidenced a friendliness to this class of claims,[30] even going so far as to find "a personal constitutional right to an environment that is consistent with the human dignity and wellbeing of citizens at large."[31] In the United States, however, similar efforts have resulted in limited success.[32] Among the most prominent of the surviving rights-based cases is *Juliana v. United States,* currently awaiting trial in Oregon's Federal District Court.[33] This case presents a novel theory known as atmospheric trust litigation,[34] which alleges that because the Constitution guarantees rights to life and property, the government has a duty to protect the natural systems necessary for its citizens' survival.[35]

Although creative, some commentators have argued that federal courts are unlikely to look favorably on this claim, which some consider to be extrajudicial "rights innovation."[36] As referred to in

30. *See*, *e.g.*, Zaaknummer Urgenda Found. v. Neth., HA ZA 13-1396, The Hague Dist. Ct. (Chamber for Comm. Affairs June 24, 2015) (under appeal), http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf (determining the Dutch government's inaction on climate change was illegal and ordering them to reduce GHG emission by twenty-five percent); Leghari v. Federation of Pakistan, No. WP No 25501/2015 (Lahore High Court, Sept. 14, 2015), https://elaw.org/system/files/pk.leghari.091415_0.pdf.

31. Friends of the Irish Environment CLG v. Fingal County Council, et al., [2017] IEHC 695 P 264 (Nov. 21 2017) (finding the government's "lethargy" in implementing its National Climate Change Policy of 2012 violated its citizens' fundamental rights).

32. *Compare* Juliana v. United States, 217 F. Supp. 3d 1224, 1263 (D. Or. 2016) (declining to dismiss the plaintiffs' case which alleges that the government's failure to affirmatively mitigate climate change is a violation of the plaintiffs' right to substantive due process) *with* Farb v. Kansas, No. 12-C-1133, at 6 (D. Kan. June 4, 2013) (dismissing the plaintiffs' claim that the Kansas government had violated Kansans' constitutional right to the public trust by failing to mitigate climate change).

33. 217 F. Supp. 3d 1224 (D. Or. 2016).

34. *See id.* at 1255 n.10 (responding to the plaintiffs' contention, without holding either way, that the atmosphere is a public trust asset); *see also* Mary Wood, *Atmospheric Trust Litigation: Securing a Constitutional Right to a Stable Climate System*, 29 COLO. NAT. RES., ENERGY & ENVTL. L. REV. 321 (2018) [hereinafter "Atmospheric Trust Litigation"] (describing the purposes and theory of atmospheric trust litigation).

35. *See id.* at 14 (noting that suits brought under this theory draw on the Due Process Clause of the United States Constitution).

36. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 21 (2018) (noting that "most observers . . . would agree that the . . . Roberts Court[] [has] been less likely to innovate new constitutional rights than [its]

this Note, the term "rights innovation" denotes the theory that the Constitution's protection is not limited to the rights enumerated therein, but rather may extend to new rights as "new insight reveals discord between the Constitution's central protections and a received legal structure."[37] The Supreme Court has occasionally seen fit to recognize new rights as protected by the Due Process Clause,[38] but recent changes to the Court's composition seem unlikely to extend this practice.[39]

Thankfully for the plaintiffs in *Juliana* and others like them, the United States' federalist system--which treats the federal government and states as dual sovereigns--may provide an alternative path to success. This Note argues that climate change litigants may find a more plausible and efficacious means of achieving rights-based victories under the parallel rights guarantees of individual state constitutions.

This Note proceeds in four parts. Part I evaluates jurisdictional barriers to rights-based climate claims. Part II presents the novel constitutional claims involved in atmospheric trust litigation and analyzes the plaintiffs' strategy in asserting them. Part III argues generally why "rights innovation" of the type advocated in *Juliana* may be better suited to state courts. Part IV notes the limitations of making rights-based claims under state constitutions, but argues that these issues are ultimately insufficient to overcome its advantages.

I. THRESHOLD ISSUES: JURISDICTIONAL BARRIERS TO RIGHTS-BASED CLIMATE LITIGATION

Juliana v. United States is no ordinary lawsuit.[40] The plaintiffs in this action, young people between the ages of eight and nineteen at

forebears.").

37. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015) (implying the concern for "liberty" underlying the Constitution's explicit language may, at times, require the Court to recognize fundamental rights beyond those explicitly enumerated).

38. *See*, *e.g.*, *id.* (determining the Due Process Clause protects the right of same-sex couples to marry); *see also* McDonald v. City of Chicago, Ill., 561 U.S. 742, (2010) (holding the Due Process Clause protects the right to keep and bear firearms for self-defense).

39. *See* Stephen S. Trott, *Deciding Kavanaugh: Where Do Constitutional Rights Come From?*, IDAHO STATESMAN (Sept. 5, 2018, 3:39 PM), https://www.idahostatesman.com/opinion/readers-opinion/article217881970.html (describing Justice Kavanaugh as an "originalist" and thus, less likely to recognize new constitutional rights via judicial interpretation).

40. *See* 217 F. Supp. 3d 1224 (D. Or. 2016).

the time of trial,[41] brought action against the United States, alleging that despite the government's knowledge that the carbon dioxide produced by burning fossil fuels was destabilizing the climate in a manner that endangered the plaintiffs' rights to life, liberty, and property,[42] the defendants "permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels."[43] As redress, the plaintiffs seek an injunction directing the government to develop a plan to reduce carbon dioxide emissions to levels capable of sustaining certain climate conditions.[44] In doing so, the litigation presents a unique opportunity to redirect the focus of the climate debate away from regulation's potential impacts on industry and towards the ramifications of unmitigated climate change on posterity. For the court to reach this novel rights claim, however, the plaintiffs must overcome considerable procedural barriers.

The significance of these barriers is manifested by the winding path of this litigation. Originally filed in 2015, the case has yet to reach trial. The government has twice asked the Supreme Court to stay proceedings in the Oregon District Court pending the disposition of a petition for a writ of mandamus[45] that would direct the District Court to dismiss the case.[46] Although the Supreme Court denied these applications, its July 30, 2018 Order notes that the "breadth" of the case's claims present "substantial grounds" for difference of opinion on jurisdictional matters[47] and instructs the District Court to take these concerns into account in assessing the Government's dispositive motions.[48] This Part briefly analyzes two of these issues: Subpart A examines challenges the plaintiffs face in establishing Article III standing; Subpart B discusses whether climate change presents a nonjusticiable political question.

41. *Id.* at 1233.
42. *Id.*
43. *Id.*
44. *Id.*
45. *See* Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 ("The traditional use of the writ in aid of appellate jurisdiction . . . has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction . . . .").
46. *See* Application for a Stay, United States, et al. v. USDC Or., No. 18A65 (July 20, 2018); Application for a Stay, In re United States of America, et al., No. 18A-410 (Oct. 18, 2018).
47. Supreme Court Order in United States, et al. v. USDC Or., No. 18A65 (July 20, 2018).
48. *Id.*

A. Standing Doctrine: Adjudicating the Ripeness of Litigation

In most circumstances, the doctrine of standing, derived from Article III of the Constitution, serves as an important constitutional constraint on the authority of the federal government.[49] By limiting the jurisdiction of federal courts to cases where the court can address "questions presented in an adversary context and . . . capable of resolution through the judicial process,"[50] the doctrine ensures that only parties involved in justiciable cases and controversies are subjected to the coercive powers of the state.[51] In practice, the doctrine boils down to three elements.[52] Plaintiffs seeking federal jurisdiction bear the burden of proving injury in fact, causation, and redressability.[53] The nature of climate change, however, can make satisfying these elements uniquely difficult for environmental plaintiffs like those in *Juliana*.[54] This subpart considers each element of federal standing doctrine in more detail, but also briefly discusses the unique challenges awaiting environmental plaintiffs in establishing standing.

1. Injury

The first component of standing is injury.[55] To satisfy this element, a plaintiff must have suffered harm that is concrete, particularized,[56] and either actual or imminent.[57] In environmental cases, this standard requires plaintiffs to show more than a generalized injury to the environment: there must be an allegation that the challenged activity is either harming or imminently will harm the plaintiff.[58] For example, a plaintiff may satisfy this element by alleging that the challenged activity impairs their economic interests,[59] deprives them of

49. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (acknowledging that "standing is an essential and unchanging part of the case-or-controversy requirement of Article III").

50. Massachusetts v. EPA, 549 U.S. 497, 516 (2007) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)) (internal quotation marks omitted).

51. *See id.* at 505 (stating that Article III requires that the petitioner establish standing to invoke the jurisdiction of federal courts).

52. *Lujan*, 504 U.S. at 560.

53. *Id.* at 560–61.

54. *See*, *e.g.*, Wash. Envtl. Council v. Bellon, 732 F.3d 1131, 1147 (9th Cir. 2013) (rejecting the plaintiffs' suit on the basis of standing).

55. *Lujan*, 504 U.S. at 560–61.

56. *Id*. at 560 (citing Allen v. Wright, 468 U.S. 737, 756 (1984); Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740–741, n.16 (1972)).

57. *Id.* at 560 (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

58. Friends of the Earth, Inc. v. Laidlaw Envtl. Services, Inc., 528 U.S. 167, 181 (2000).

59. *See* Massachusetts v. EPA, 549 U.S. 497, 501 (2007) (finding the potential loss of

recreational opportunities,[60] or damages a favorite natural aesthetic.[61] This is relatively straightforward in litigation challenging individual actions;[62] it becomes more difficult, however, when one attempts to particularize the harms of worldwide phenomenon like climate change.

The government relied on this argument at *Juliana*'s motion to dismiss stage, asserting that the plaintiffs' injuries were nonjusticiable generalized grievances because climate change affects the entire planet.[63] A generalized grievance is a suit "claiming only harm to the plaintiff's and every citizen's interest in the proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large."[64] Such claims are outside of the court's jurisdiction because they do not present a case or controversy, as is required by Article III.[65]

The court, however, rejected the government's premise that breadth alone generalized the harm.[66] The proper inquiry, it stressed, was not whether the injury was "widely shared," but "whether that shared experience caused an injury that is concrete and particular to the plaintiff."[67] The *Juliana* plaintiffs cleared this bar by alleging harm to their individual economic, aesthetic, and recreational interests.[68] Thus, although proving injury is an obstacle to the standing of climate change litigants, it is not insurmountable if the plaintiffs' can show harm to their interests.

---

beachfront property due to erosion constituted injury in fact for the purposes of standing).

60. *Bellon*, 732 F.3d at 1140 (finding a shortened ski season caused by decreased snowpack constituted injury in fact).

61. *See id.* at 1141 (finding that diminished of enjoyment a tree-lined ridge due to warming-induced wildfires constituted injury in fact).

62. *See*, *e.g.*, Western Watersheds Project v. Zinke, 2018 U.S. Dist. LEXIS 162279, *1 (D. Id. September 21, 2018) (challenging the Bureau of Land Management's sale of certain oil and gas leases based on harm to the sage grouse's natural habitat).

63. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1243 (D. Or. 2016).

64. Lujan v. Defenders of Wildlife, 504 U.S. 555, 573–74 (1992).

65. *See* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 127 n.3 (2014) (explaining that the Court's reluctance to hear cases involving generalized grievances is grounded in Article III).

66. *See Juliana*, 217 F. Supp. 3d at 1243–44.

67. *Id*.

68. *See id.* at 1244 (determining that under the correct formulation of the generalized grievance rule, the plaintiffs' alleged injuries—e.g., a shortened ski season due to decreased snowpack—satisfied the standing's injury component).

2. Causation

The second component of standing is causation.[69] To satisfy this element, a plaintiff must show that the alleged injury is "fairly traceable" to the challenged action of the defendant and is not the result of "the independent action of some third party."[70] Making this showing can be particularly difficult for environmental litigants. Given the indeterminate number of emitters, the accumulation of GHGs in the atmosphere, and the temporal distance between emissions and effects, linking "specific climate injuries" to "specific causes" is difficult at best.[71]

For example, a chain of proximate causation might look like this in climate change litigation: (1) the government fails to adequately limit GHG emissions by power plants; (2) power plants generate GHG emissions, which rise into the atmosphere; (3) over time, these emissions accumulate and combine with emissions from vehicles, consumers, etc., to warm the earth; (4) this warming causes snowpack to melt; (5) the decreased snowpack shortens the ski season, reducing the plaintiffs' recreational opportunities.[72] This sort of causal distance is not inherently fatal to a plaintiffs' claim, as courts have been clear that a "causal chain does not fail simply because it has several links," but still, "[t]he line of causation . . . must be more than attenuated."[73]

It is unclear, however, where courts draw this line. The court's causation analysis in *Juliana* typifies this tension. At the motion to dismiss stage, the court rejected the government's insistence that the plaintiff's causation theory was covered by the Ninth Circuit's ruling in *Washington Environmental Council v. Bellon*.[74] In *Bellon*, the plaintiffs sought to compel the State of Washington's regulatory agencies to regulate GHGs from five oil refineries that cumulatively produced just under six percent of the state's total GHG emissions.[75] The Ninth Circuit determined the effect of that level of emissions on

69. *Lujan*, 504 U.S. at 560–61.

70. *Id.* at 560 (citation and quotation marks omitted).

71. *See* Marilyn Averill, *Climate Litigation: Ethical Implications and Societal Impacts*, 85 DENV. U. L. REV. 899, 910 (2008) (elaborating on the inherent challenges of adjudicating causation in climate change litigation).

72. *See* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 25–28 (2003) (hypothesizing as to what kinds of plaintiffs could appropriately bring tort-based climate change claims).

73. Wash. Envtl. Council v. Bellon, 732 F.3d 1131, 1141–42. (9th Cir. 2013).

74. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1245 (D. Or. 2016) ("This case is distinguishable from *Bellon* . . . .").

75. *Id.* at 1143–44.

global climate change was "scientifically indiscernible," and concluded that the "causal chain [was] too tenuous to support standing."[76]

The court distinguished *Juliana*'s facts from *Bellon*'s on two grounds. First, the court noted that climate science is constantly evolving; thus, a court's inability to link certain emissions to specific effects in 2013 could not be interpreted as "forever clos[ing] the courthouse doors to climate change claims."[77] Second, the court acknowledged that unlike the emissions challenged in *Bellon*, those at issue in *Juliana* comprised a significant share of global emissions.[78] The court held that these distinctions were sufficient to justify extending the plaintiffs the opportunity to present further evidence.[79]

In doing so, the court provided a roadmap for climate change litigants to navigate the causation requirement. First, the plaintiffs must challenge the actions of a power with the ability to affect a statistically significant amount of GHG emissions.[80] Second, the plaintiffs must scientifically link the effects of said emissions to their injuries.[81] Although these causal chains may be difficult to prove at present, the science of measuring climate change is improving rapidly.[82] From 2012 to 2015, the number of research groups studying whether extreme weather events—such as floods, hurricanes, and wildfires—are attributable to climate change has increased fivefold.[83] Furthermore, a 2016 report from the National Academy of Science's

76. *Id.* at 1144.

77. Juliana, 217 F. Supp. 3d at 1245.

78. *See id.* (noting the plaintiffs allege that "between 1751 and 2014, the United States produced more than twenty-five percent of global CO_2 emissions.").

79. *See id.* at 1246 ("At the pleading stage, plaintiffs have adequately alleged a causal link between defendants' conduct and the asserted injuries.").

80. *See id.* (determining *Bellon*'s reasoning did not apply because it rested on a determination that the emissions in controversy were only minor contributors to climate change).

81. *See* Connecticut v. Am. Elec. Power Co., Inc. 582 F.3d 309, 347 (2d Cir. 2009) (holding that causation in climate change cases should be determined by "the rigors of evidentiary proof"), *rev'd on other grounds*, Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 429 (2011).

82. *See* Kirsten Engel & Johnathan Overpeck, *Adaptation and the Courtroom: Judging Climate Science*, 3 MICH. J. ENVTL & ADMIN L. 1, 25 (2013) (stating "our knowledge of the climate is developing at a breakneck pace").

83. *See* THE NATIONAL ACADEMIES OF SCIENCES, ENGINEERING, AND MEDICINE, ATTRIBUTION OF EXTREME WEATHER EVENTS IN THE CONTEXT OF CLIMATE CHANGE (The National Academies Press 2016) [hereinafter Attribution of Extreme Weather Events]; *see also* IPCC Report, *supra* note 2, at 6 (predicting severe weather patterns will increase in frequency and intensity as the Earth's temperature rises, perhaps providing scientists additional data to be used in developing attribution techniques).

Committee on Extreme Weather Events and Climate Change Attribution reported that scientists have high or medium confidence in their ability to attribute specific wildfires, droughts, extreme rainfall, extratropical cyclones, and extreme heat and cold to anthropogenic global warming.[84] The report also postulates that similar research will continue to take place and improve in the future;[85] thus, it seems possible that climate change litigants may soon find more success in attributing their injuries to the effects of global warming.

3. Redressability

The final component of standing is redressability.[86] Redressability largely overlaps with the causation component, but the two components are distinct: whereas causation "examines the connection between the alleged misconduct and injury," redressability "analyzes the connection between the alleged injury and requested judicial relief."[87] A single court's judgment, of course, cannot halt anthropogenic global warming. Were a court to order the United States government to immediately prohibit all GHG emissions, third parties such as China and India would continue to emit greenhouse gases at unsustainable levels.[88] Fortunately for the *Juliana* plaintiffs, however, standing jurisprudence has shifted away from a literal reading of redressability.

Modern redressability doctrine extends the court's jurisdiction to cases where it has the capacity to affect change, whether total or incremental.[89] Thus, to satisfy the redressability element, a plaintiff must show only that there is a substantial likelihood that the requested relief would at minimum "slow or reduce" the harm.[90] This bodes well for climate change litigants. The shift from literal redress—

84. IPCC Report, *supra* note 2, at 9.

85. *Id.* at 13–16.

86. *Lujan*, 504 U.S. at 560–61.

87. Wash. Envt'l. Council v. Bellon, 732 F.3d 1131, 1146 (9th Cir. 2013) (citing Allen v. Wright 468 U.S. 737, 753 n.19).

88. *See* Massachusetts v. EPA, 549 U.S. 497, 525–26 (2007) ("[D]eveloping countries such as China and India are poised to increase greenhouse gas emissions substantially over the next century. . . .").

89. *See* Erica D. Kassman, *Note: How Local Courts Address Global Problems: The Case of Climate Change*, 24 DUKE J. COMP. & INT'L L., 201, 232 (2013) ("the redressability prong concerns the court's ability to effect change.").

90. *See Massachusetts*, 549 U.S. at 525 (determining the plaintiffs' requested relief need not reverse climate change so long as it would slow or reduce it) (referencing Larson v. Valente, 456 U.S. 228, 244 n. 15 (1982)).

i.e., completely alleviating a plaintiff's injury—to symbolic redress—e.g. requiring an agency to regulate an industry or other emissions—enables courts to address climate change without exceeding Article III's jurisdictional constraints.[91]

Juliana's reasoning provides evidence of this transition. There, the court stated that if the plaintiffs could show that a reduction in the emissions controlled by the defendants would reduce GHG concentrations and slow climate change, they have satisfied the redressability requirement.[92] The irreversibility of GHG emissions may make such a showing legally and scientifically complex, as plaintiffs may be required to show the defendants have the power to avert reaching the "point of no return, beyond which climate change's irreversible consequences become inevitable," without cooperation from third parties.[93] But, as noted above, the progress of climate science should simplify this analysis in the future.[94]

4. Conclusions on Standing Doctrine

Article III standing represents a serious, but not insurmountable, obstacle to climate change claims in federal court. Climate change, with its latent effects caused by decades of cumulative emissions, does not fit neatly into existing standing doctrine. Proving each of its three elements is challenging and often requires expensive expert testimony.[95] As a result, many seemingly legitimate claims will inevitably fail before courts may consider their merits.[96] This result, however, is not necessarily a "flaw in the system"; an inescapable result of any standing doctrine application is that at least some disputes will not receive judicial review."[97] Still, although navigating it may be extraordinarily complex, *Juliana* makes clear that there is a

91. *See* Kassman, *supra* note 89, at 232–40 (discussing Article III's redressability requirement in the context of climate change litigation).

92. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1247 (D. Or. 2016) (determining the plaintiffs had carried their burden for redressability at the motion-to-dismiss stage of the litigation).

93. *See id.* (implying plaintiffs may be unlikely to satisfy the redressability prong if the harms to be brought by climate change are inevitable and declining to acknowledge the value of delayed onset).

94. *See supra* text accompanying note 82.

95. *See supra* Part I(A) (1–3) (discussing the obstacles posed to climate change litigants by each element of the Article III standing analysis).

96. *See*, *e.g.*, Wash. Envtl. Council v. Bellon, 732 F.3d 1131, 1147 (9th Cir. 2013) (concluding the plaintiffs failed to meet Article III's standing requirements and thus the district court lacked jurisdiction to adjudicate the merits of their claims).

97. Fla. Audubon Soc. v. Bentsen, 94 F.3d 658, 665 (D.C. Cir. 1996).

path to Article III standing for climate change litigants.

B. The Political Question Doctrine: Separation of Powers as a Jurisdictional Limitation

At its heart, the political question doctrine is a function of the separation of powers. The doctrine, first articulated by Chief Justice Marshall in *Marbury v. Madison*[98] serves to ensure that the judicial branch does not interfere with the functions of the political branches by deciding questions "in their nature political, or which are, by the Constitution and laws, submitted to the executive."[99] Consequently, if an issue is found to be "political," it is imperative that a court respect its coordinate branches and deem the issue nonjusticiable.[100] The scope of this limitation, however, is frequently litigated. As Alexis de Tocqueville observed in his seminal work *Democracy in America*, "[scarcely] any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[101] Thus, determining whether a question is political is rarely straightforward.

To assist courts in this task, the Supreme Court has identified six indicators of a political question. These factors, commonly known as the *Baker* test, are:

> (1) A textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[102]

Despite ample litigation as to the applicability of these formulations, the Supreme Court has only rarely determined that a political

98. 5 U.S. 137, 165–66 (1803).

99. *Id.* at 170.

100. *See generally* Schneider v. Kissinger, 412 F.3d 190, 194–96 (D.C. Cir. 2005) (discussing the Constitution's allocation of authority between the three branches of government).

101. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Phillips Bradley ed., 1945).

102. Juliana v. United States, 217 F. Supp. 3d 1224, 1236 (D. Or. 2016) (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).

question barred adjudication.[103] The bar for dismissal is high, requiring one of the formulations to be "*inextricable* from the case at bar."[104]

As a result, federal courts have regularly adjudicated claims involving politically charged issues.[105] Climate change is certainly "political" in that it has motivated intense partisan debate and appeared as a platform item for major political parties.[106] Nevertheless, as the court in *Juliana* noted, the political question doctrine does not bar adjudication merely because a case "raises an issue of great importance to the political branches."[107] Instead, courts must undertake a rigorous factual analysis before concluding a controversy is nonjusticiable.[108] In three sections, this subpart summarizes the *Juliana* court's analysis and then analogizes its findings to climate change litigants more generally.

1. The First *Baker* Factor: Textual Commitments

The first *Baker* factor counsels dismissal if a case would require a court to decide "an issue whose resolution is textually committed to a coordinate political department"[109] and ruling thereon would require the court to second-guess another branch's decisions.[110] In general, the Supreme Court has been loath to find such "textual commitments," but the rulings in which it has done so followed two paths. The Court's decision in *Davis v. Passman* is emblematic of the first path.[111] There, the Court characterized the Speech or Debate Clause as a "paradigm

103. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine & the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 267–68 (2002) (stating the Court has only twice found an issue to be a political question, and "both [instances] involved strong textual anchors for finding a constitutional question rested with the political branches").

104. Baker v. Carr, 369 U.S. 186, 217 (1962) (emphasis added).

105. *See*, *e.g.*, Trump v. Hawaii, 138 S. Ct. 2392 (2018) (examining the constitutionality of an executive order barring the entrance of foreign nationals from certain Muslim majority nations); Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017) (adjudicating whether the government's refusal to facilitate an abortion procedure for an alien minor in federal custody constituted an undue burden).

106. *See*, *e.g.*, Democratic National Committee, *Party Platform, Environmental Justice*, DEMOCRATS.COM, https://democrats.org/about/party-platform/#environment (last visited Feb. 13, 2019).

107. *Juliana*, 217 F. Supp. 3d at 1236 (quoting United States Dep't of Commerce v. Montana, 503 U.S. 442, 458 (1992)).

108. *See generally Baker*, 369 U.S. 217 (enunciating the federal political question doctrine).

109. Zivotofsky v. Clinton, 566 U.S. 189, 202 (2012) (Sotomayor, J., concurring) (referencing *Baker*, 369 U.S. at 217).

110. *See Juliana*, 217 F. Supp. 3d at 1238 ("The question is whether adjudicating a claim would require the Judicial Branch to second-guess decisions committed exclusively to another branch of government.").

111. Davis v. Passman, 442 U.S. 228 (1979).

example" of a "textually demonstrable constitutional commitment."[112] In providing that members of Congress "shall not be questioned in any other place" for "any speech or debate in either House,"[113] the Clause shields statements made during the business of Congress from any sort of judicial review.[114] Thereby, it directly enforces the separation of powers.[115]

The second path holds that if a power is fundamental to the exercise of an enumerated power, it may also be textually committed. The Court's decision in *Zivotofsky v. Kerry* is a prime example of this reasoning.[116] There, the Court held that the Constitution gives the President exclusive authority to recognize foreign governments.[117] Although the Constitution never uses the term "recognition," the Court determined that the Constitution's structure granted the office this authority because without it the President would be unable to manifest the constitutional authority to receive ambassadors and to negotiate treaties.[118]

Neither of these paths is particularly troublesome for climate change litigants. First, it is unlikely that courts will find an explicit textual basis for declaring the matter political. As the court noted in *Juliana*, "the Constitution does not mention environmental policy, atmospheric emissions, or global warming."[119] Courts also seem unlikely to find that crafting climate change policy is a "fundamental power on which any other power . . . rests."[120] The Constitution does give the political branches authority over commerce, foreign relations, and federal land—all areas affected by climate change.[121] According to the *Juliana* court, however, the inquiry is not whether a judicial decision would implicate a power granted to the political branches; were this the case, all executive and legislative action would be immune from judicial review.[122] Rather, the proper inquiry is

112. *Id.* at 235 n. 11 (citing *Baker*, 369 U.S. at 217).

113. U.S. CONST. art. 1, § 6, cl. 1.

114. *See Davis*, 442 U.S. at 235 n.11 (acknowledging "the Speech and Debate Clause speaks directly to . . . separation-of-powers concerns")

115. *Id.*

116. *See generally* 135 S. Ct. 2076 (2015).

117. *Id.* at 2086.

118. *Id.* at 2084–86 (finding that because recognition was "a topic on which the nation must speak with one voice," that power must be vested in the executive).

119. Juliana v. United States, 217 F. Supp. 3d 1224, 1237 (D. Or. 2016).

120. *Id.* at 1237–38.

121. *See id.* at 1237.

122. *See id.* at 1238 ("[T]he question is not whether a case implicates issues that appear in the portion of the Constitution allocating power to the Legislative and Executive Branches –

narrower, requiring courts to determine whether adjudicating a claim would oblige the judicial branch to "second-guess decisions committed exclusively to another branch."[123] In *Juliana*, the court determined climate change was not such an issue.[124]

2. The Second & Third *Baker* Factors: Judicial Competence

The second and third *Baker* factors counsel dismissal if a case would require a court to make policy determinations beyond its competence.[125] Generally, courts have interpreted this factor to mean that a case must involve the "application of some manageable and cognizable standard within the competence of the Judiciary to ascertain and employ to the facts."[126] If no such standard is given, or a court cannot determine such a standard in the absence of a yet-unmade policy determination, then resolution of the suit is beyond the reach of the judiciary.[127] For example, in *Vieth v. Jubelirer*[128] the Supreme Court considered the constitutionality of political gerrymandering in Pennsylvania.[129] Writing for the Court, Justice Scalia acknowledged the Constitution's general policy of preventing political gerrymandering,[130] but ultimately determined the case was nonjusticiable due to the absence of a judicially manageable standard against which to judge the defendant's actions.[131] Such reasoning typifies these decisions; thus, in cases involving controversial issues, articulating a judicially discernible and manageable standard is a prerequisite to success.

According to the Oregon district court, the plaintiffs articulated such a standard in *Juliana* by alleging infringement of their due

---

such a test would, by definition, shield nearly all legislative and executive action from legal challenge.").

123. *Id.*

124. *See id.* (finding "[t]he first *Baker* factor does not apply.").

125. *See* Zivotofsky v. Clinton, 566 U.S. 189, 203 (2012) (Sotomayor, J., concurring) ("The second and third *Baker* factors reflect circumstances in which a dispute calls for decision-making beyond courts' competence.").

126. *Id.* at 204.

127. *See id.* (stating suits that require the judicial branch to make policy determinations are "beyond the judicial role envisioned by Article III") (referencing Gilligan v. Morgan, 413 U.S. 1, 10 (1973); Vieth v. Jubelirer, 541 U.S. 267, 278 (2004)).

128. 541 U.S. 267 (2004).

129. *Id.* at 271.

130. *See id*. at 275–76 (surveying evidence of the founders' desire to prevent political gerrymandering in the legislative history of Article I, § 4 of the Constitution).

131. *See id.* at 281 ("No judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged. Lacking them, we must conclude that political gerrymandering claims are nonjusticiable.").

process rights.[132] This inquiry did not require the court to pinpoint a level of GHG emissions that would best balance competing economic and environmental concerns, a decidedly political task.[133] Instead, it required the court to determine only an emissions level that would prevent further harm.[134] Although admittedly complex, this standard would provide a framework by which the court could evaluate the plaintiffs' claims, the touchstone of justiciability.[135]

Furthermore, this standard is enforceable without requiring the court to direct individual agency actions.[136] The plaintiffs did not seek any particular regulation.[137] Instead, they asked the court to require the government to develop "an enforceable national remedial plan" to redress the harms suffered.[138] This remedy would not necessarily require the court to direct how the government reaches its targets, but only mandate that it does so.[139] Thus, like the first factor, the second and third factors of the *Baker* test do not reveal a political question.

3. The Fourth through Sixth *Baker* Factors: Judicial Prudence

The fourth, fifth, and sixth *Baker* factors require dismissal if prudence "may counsel against a court's resolution of an issue presented."[140] Generally, these final factors have applied only in cases where the initial resolution is better suited to another time or forum or where resolving the issue could be deemed disrespectful to a political branch.[141] Only in exceptional cases, however, have these "final factors alone render[ed] a case nonjusticiable."[142]

132. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1240 (D. Or. 2016) (determining that neither the second nor the third *Baker* factors divested the court's jurisdiction because "[e]very day, federal courts apply the legal standards governing due process claims").

133. *See id.* at 1238–39 (explaining the plaintiffs did not ask the court to pinpoint a "best" emissions level).

134. *See id.* at 1239 (analyzing the plaintiffs' claims under prongs two and three of the *Baker* test).

135. *See* Alperin v. Vatican Bank, 410 F.3d 532, 555 (9th Cir. 2005) (determining a case does not present a political question if "a legal framework exists by which courts can evaluate . . . [its] claims in a reasoned manner") (citing *Vieth*, 541 U.S. at 278).

136. *Juliana*, 217 F. Supp. 3d at 1239.

137. *Id.*

138. *Id.* (quoting First Amended Complaint at 94).

139. See *id.* (asserting the court could remedy the plaintiffs' harm "without directing an individual agency to take any particular action.").

140. Zivotofsky v. Clinton, 566 U.S. 189, 206–07 (2012) (Sotomayor, J., concurring).

141. *See id.* (2012) (listing the rare circumstances in which the fourth through sixth *Baker* factors have been found to apply).

142. *Id.* at 207.

Only the fourth *Baker* factor was raised by the defendants in *Juliana*.[143] This factor is relevant in cases where ruling "would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests."[144] The defendants contended that this factor prevents courts from addressing violations of constitutional rights if the government has taken some step to mitigate this damage.[145] The court, however, rejected this broad formulation, and instead interpreted the rule as barring adjudication only when judicial resolution would be "wholly incompatible" with the decision of a political branch.[146] It went on to assert that a judicial remedy in *Juliana* would be "fully consistent" with the United States' efforts to prevent climate change given it would likely go beyond the United States' standing commitments to reduce GHG emissions.[147]

4. Conclusions on the Political Question Doctrine

Like Article III standing, the political question doctrine presents a serious obstacle for climate change litigants. Regardless of the validity of individual claims, the political rhetoric surrounding the issue will lead many courts, right or wrong, to take caution and declare these claims nonjusticiable.[148] The *Juliana* court, however, rejected this trend.[149] In dispatching the defendants' arguments for the political question doctrine's applicability in cases involving climate change, the court again laid out a roadmap for future litigants. Not all its arguments, however, are equally convincing.

Specifically, its justification for the fourth *Baker* factor's inapplicability, that its judicial determination would "more aggressively" reduce GHG emissions and thus did not contradict the executive branch's policy decisions,[150] seems tenuous at best. Whether

143. *See Juliana*, 217 F. Supp. 3d at 1239 ("Neither intervenors nor defendants suggest the fifth or sixth *Baker* factors apply here.").

144. Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995).

145. *Juliana*, 217 F. Supp. 3d at 1240.

146. *See id.* ("[F]ederal appellate courts have found the fourth *Baker* factor present when judicial adjudication . . . would be wholly incompatible with . . . [a] decision[] made by one of the political branches.").

147. *Id.*

148. *See*, *e.g.*, Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (noting that climate change was a "patently" political issue and "transcendently legislative" in nature), *overturned by* Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009).

149. *See Juliana*, 217 F. Supp. 3d at 1241 ("There is no need to step outside the core role of the judiciary to decide this case.").

150. *See id.* at 1240–41 ("There is no contradiction between promising other nations the

to more aggressively reduce climate change is hotly debated throughout American society. A *Washington Post* poll, taken shortly after President Trump withdrew the United States from the Paris Climate Accords, revealed that although sixty-nine percent of Americans favored regulation of carbon emissions, a majority of citizens in energy-producing states—such as West Virginia, Texas, and North Dakota—opposed such regulation.[151] Thus, Judge Aiken's determination that additional regulation would be consistent with, rather than opposed to, the existing political decisions of the United States seems suspect.[152]

Regardless, climate change litigants are sure to face this type of challenge in federal court. Plaintiffs can prepare for this obstacle by articulating a judicially cognizable standard and providing evidence showing a judicial decision would be line with, rather than contradictory to, previous decisions of the executive branch,[153] but even then, the likelihood of navigating it successfully will still largely depend upon individual judges and courts.[154]

C. Conclusions on Threshold Jurisdictional Barriers Affecting Climate Change Litigants

Climate change litigants face significant jurisdictional barriers to even being heard in federal court. Cases like *Juliana* involve complex factual determinations, consume inordinate amounts of time, and attract troublesome media attention. Thus, courts have every incentive to try to resolve them as quickly as possible; in many cases, this will involve finding threshold issues such as the standing and political question doctrines dispositive.

United States will reduce CO_2 emissions and . . . *more aggressively* reduc[ing] CO_2 emissions.").

151. Lyle Scruggs & Clifford Vickrey, *Most Americans Support Government Regulation to Fight Climate Change. Including in Pittsburgh.*, WASHINGTON POST (June 5, 2017) https://www.washingtonpost.com/news/monkey-cage/wp/2017/06/05/most-americans-support-government-regulation-to-fight-climate-change-including-in-pittsburgh/?utm_term=.bacd18d550aa.

152. *See supra* Part I(B)(3) (concluding the fourth Baker factor did not bar adjudication because additional regulation would go beyond the United States standing commitments).

153. *See supra* part I(B)(2); I(B)(3).

154. *See* Mary C. Wood, *Atmospheric Trust Litigation*, *in* CLIMATE CHANGE READER 152 (W.H. Rodgers, Jr. and M. Robinson-Dorn, eds. 2011) [hereinafter Climate Change Reader] (anticipating that "[h]anded the right complaint, there will be judges who recognize this epochal moment in the course of human civilization and exert their common law authority to protect the globe's atmosphere – and the billions of people dependent on it for all time to come").

Juliana though, if nothing else, stands for the fact that these obstacles are not insurmountable. With a sympathetic judge, creativity, and patience, climate change litigants can have their claims heard on the merits in federal court. Success there, however, presents a new set of obstacles, and perhaps none is more daunting than articulating a legal basis for the government's liability for the harms the *Juliana* plaintiffs allegedly suffered.

II. STATE CREATED DANGER: MANUFACTURING A JUDICIAL OBLIGATION TO ENFORCE FUNDAMENTAL RIGHTS

The plaintiffs' claims rely upon a novel interpretation of the Due Process Clause[155]: namely, that it protects a fundamental right to a climate system capable of sustaining human life.[156] Fundamental rights are examined under strict scrutiny, meaning government action infringing such rights is invalid unless the government can prove that the action is narrowly tailored to serve a compelling state interest.[157]

No doubt a great deal of judicial and scholarly attention will be devoted to the merits of this claim, but this Note does not address these questions and assumes that such a right is desirable.[158] This Part summarizes the theory underlying a constitutional right to certain climate conditions, then discusses the plaintiffs' strategy in asserting that constitutional right.

The Fifth Amendment's Due Process Clause prohibits the federal government from depriving a person of "life, liberty, or property"

155. *See supra* Part I.

156. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) ("Exercising my 'reasoned judgement,' I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.") (quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2589 (2015)).

157. Id. at 1248-49 (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).

158. For a discussion of the merits of such a right, *see* Michael C. Blumm & Mary C. Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U.L. REV. 1 (2017) (exploring the *Juliana* court's due process ruling and the concept of fundamental rights in American constitutional law before describing the *Juliana* decision as a logical extension of existing jurisprudence); *see also* Atmospheric Trust Litigation, *supra* note 34, at 321 (explaining that a fundamental right to a climate capable of sustaining life extends from natural law theory that the earth is the property of all people and its health is a necessary prerequisite to human life). The concept has also engendered opposition. *See* Mark W. Smith, Founder, Smith Valliere PLLC, Address at The Federalist Society National Lawyers Convention: Climate Change Nuisance Suits (Nov. 17, 2018), https://fedsoc.org/conferences/2018-national-lawyers-convention#agenda-item-climate-change-nuisance-suits (describing atmospheric trust and other climate change focused lawsuits as an attempt to "rollback" the industrial revolution).

without "due process of law."[159] When a plaintiff challenges affirmative government action under this clause, the threshold inquiry is the applicable level of scrutiny.[160] Rational basis review is the default level of scrutiny,[161] but if the government infringes a "fundamental right," the reviewing court will apply strict scrutiny.[162] Under strict scrutiny, a government action will be declared invalid unless it "is narrowly tailored to serve a compelling state interest."[163] Fundamental liberties include rights enumerated in the Constitution—e.g., the right to keep and bear firearms for self-defense[164]—as well as rights that are "deeply rooted in this Nation's history and tradition" or "fundamental to our scheme of ordered liberty."[165] This second category has served as the basis for many of the Supreme Court's most controversial decisions,[166] and the plaintiffs' argument in *Juliana* draws on this tradition.

Relying on the Supreme Court's reasoning in *Obergefell v. Hodges*—i.e., that the Constitution's meaning is yet unknown but discoverable through the exercise of reasoned judgement regarding which unenumerated rights might be necessary to the exercise of other rights[167]—the district court determined that a stable climate system was "quite literally the foundation" of civilized society.[168] As such, any government action that impaired the plaintiffs' right to such a climate system is subject to strict scrutiny.[169]

---

159. U.S. CONST. amend. V.

160. *See* Lyng v. Int'l Union, 485 U.S. 360, 365 (1988) (stipulating that courts are obliged to decide whether a government action should be reviewed under rational-basis review or a stricter standard depending on the nature of the right infringed).

161. *See Juliana*, 217 F. Supp. 3d at 1249 (postulating that the government's "affirmative actions would survive rational basis review" before analyzing them under the more rigorous standard reserved for fundamental rights).

162. *Id.* at 817.

163. Reno v. Flores, 507 U.S. 292, 302 (1993).

164. *See* District of Columbia v. Heller, 554 U.S. 570, 595 (holding that the second amendment protects the right to keep and bear arms for self-defense).

165. McDonald v. City of Chicago, Ill., 561 U.S. 742, 767 (2010) (internal citations, quotations, and emphasis omitted).

166. *See*, *e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (recognizing the Due Process Clause protects a fundamental right to gay marriage); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) (determining the Due Process Clause protects the right to an abortion under most circumstances).

167. *See Juliana*, 217 F. Supp. 3d at 1249–50 (summarizing *Obergefell's* reasoning as "[t]he idea is that certain rights may be necessary to enable the exercise of other rights, whether enumerated or unenumerated").

168. *Id.* at 1250.

169. *See id.* at 1248 ("Substantive due process forbids the government to infringe certain fundamental liberty interests at all . . . ." (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)) (internal quotations, and emphasis omitted)).

The strategy behind the plaintiffs' decision to challenge the government's inaction under this theory is not immediately clear. The Due Process Clause does not impose an affirmative action on the government to act, even when "such aid may be necessary to secure life, liberty, or property interests."[170] This rule, however, is subject to an exception if the government "places a person in peril [with] deliberate indifference to their safety."[171] Were the plaintiffs able to establish the government's apathy towards them, the court could act in equity to develop and enforce whatever remedy it deemed necessary to mitigate further infringement of their civil rights.[172]

The flexible nature of this remedy is particularly attractive to climate change litigants as in *Juliana*. As discussed above,[173] courts must take care to avoid invading the province of the political branches, and a declaratory judgment may be an effective means of doing so. First, a declaratory judgment avoids separation of powers issues.[174] By merely declaring that a violation has occurred and that it must be remedied, a declaratory judgment does not ask the court to make value judgments—a task better suited to the political branches—as to how this should be accomplished.[175] Instead, the court would only need to ensure the political branches are taking appropriate steps to reach the mandated targets. Additionally, a declaratory judgment could be used as persuasive authority in other jurisdictions, providing citizens conceptual tools to bring similar suits against their own governments.[176] Finally, a declaratory judgment would be accompanied by injunctive relief,[177] opening the possibility of imposing affirmative obligations upon the government to remedy

170. Deshaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 196 (1989).

171. *Id.* at 197 (acknowledging that had the state created the situation in question, it may have acquired an affirmative duty "enforceable through the Due Process Clause").

172. *See* 42 U.S.C. § 1983 (empowering citizens of the United States, whose rights, privileges, or immunities secured by the Constitution have been deprived, to bring suits in equity of any other proceeding proper for redress*; see also* JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 8 (1836) ("[C]ases must occur to which the antecedent rules cannot be applied without injustice, or to which they cannot be applied at all.").

173. *See supra* Part I (concerning the political question doctrine).

174. *See Juliana*, 217 F. Supp. 3d at 1241–42 (discussing the care courts must take to avoid separation-of-powers problems in crafting remedies).

175. *See id.* at 1241 ("[S]eparation of powers might . . . permit the Court to direct defendants to ameliorate plaintiffs' injuries but limit its ability to specify precisely how to do so.").

176. *See* Climate Change Reader, *supra* note 154, at 5.

177. *See Juliana*, 217 F. Supp. 3d at 1233 (detailing the plaintiffs' requested remedies, including an order enjoining the defendants' violations of their civil rights and directing them to develop a plan to reduce emissions).

climate change. In view of these advantages, the *Juliana* plaintiffs' shrewdness in challenging the government's inaction on climate change as a violation of their civil rights becomes clear.

The probability of receiving such relief, however, is rather low. As the court in *Juliana* acknowledged, the Supreme Court has instructed federal courts to "exercise the utmost care" when asked to recognize new rights as encompassed by the due process clause,[178] and its recent decisions exhibit this caution. For example, in *Washington v. Glucksberg*[179] the Court declined to recognize a substantive due process violation when state law forbade assisted suicide, citing the importance of prudence in adjudicating issues of great public interest.[180] In view of this caution, as well as the massive economic implications of the plaintiffs' desired right,[181] the Oregon district court's decision to recognize the right to a climate capable of sustaining human life as "fundamental" is sure to be robustly challenged,[182] and its likelihood of survival on appeal seems slim.[183]

An appellate ruling denying the existence of this right would likely deal a fatal blow to this sort of rights-based litigation in federal court. If such a result does occur, climate change plaintiffs would be forced to again think creatively about how they might engage governmental mechanisms to prevent further damage to the atmosphere. Part III advocates for one possibility, arguing that climate change litigants may find a plausible means of achieving rights-based victories under the parallel rights guarantees of individual state constitutions.

178. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citation omitted).

179. *Id.*

180. *See id.* at 735 (holding Washington's ban on physician-assisted suicide did not violate the Fourteenth Amendment's Due Process Clause).

181. *See Juliana*, 217 F. Supp. 3d at 1267 (concluding the intractability of climate debates in Congress is in part caused by short term economic interests.).

182. *See*, *e.g.*, Petition for Writ of Mandamus, United States v. USDC Or. 2 (July 20, 2017) (deeming the *Juliana* court's due process ruling a "clear error"); *see also* Del. Riverkeeper Network v. FERC, 895 F.3d 102, 108 (2018) (denying the existence of a federally protected liberty interest in a "healthy environment").

183. *See* Order in United States, et al. v. USDC Or., No. 18A65 (July 30, 2018) (acknowledging the case raises issues about which there is a substantial room for differences of opinion).

III. STATE CONSTITUTIONS: AN UNDERUTILIZED MEANS OF SECURING CIVIL RIGHTS

In one of the most widely read law review articles of all time,[184] Justice William Brennan lauded state law as an "independent protective force" without which "the full realization of our liberties cannot be guaranteed."[185] A leader of the Court's liberal wing, Justice Brennan may at first seem an unlikely person to have made such a statement. After all, the late Justice was a decisive vote in many of the Court's decisions to strike down state laws for violating Constitutional rights guarantees.[186] The article, however, was written as the Court began to pull back from its enforcement of the *Boyd* principle[187] and restrain its application of the Due Process and Equal Protection Clauses.[188]

Recognizing this trend,[189] Brennan urged state courts—as an outworking of federalism—to join "the struggle to protect the people . . . from governmental intrusion on their freedoms" by "expand[ing] constitutional protections."[190] Because many state constitutions guarantee rights similar to, if not in excess of, those of the federal Constitution,[191] Justice Brennan implored state courts to interpret these provisions liberally, finding therein whatever rights may be necessary to secure justice.[192]

---

184. *See* Sutton, *supra* note 36, at 9.

185. *See* Brennan, *supra* note 1, at 491.

186. *See*, *e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (disallowing many state restrictions on abortion); Furman v. Georgia, 408 U.S. 238 (1972) (imposing a moratorium on states practicing the death penalty until such a time as they could remove arbitrary and discriminatory enforcement).

187. *See* Boyd v. United States, 116 U.S. 616, 635 (1886) (announcing that "constitutional provisions for the security of person and property should be liberally construed . . . ."). The *Boyd* principle refers to the notion that rights guarantees should be construed liberally to protect from infringement at the micro level. *See* Brennan, *supra* note 1, at 495.

188. *See* Brennan, *supra* note 1, at 495 (hypothesizing that state courts are enforcing state rights guarantees more liberally because the Supreme Court has chosen to construe federal guarantees narrowly).

189. *See id.* at 502 ("[T]he Court has condoned both isolated and systematic violations of civil liberties.") (citations omitted).

190. *Id.* at 503.

191. *See* Sutton, *supra* note 36, at 1 ("[I]t is the rare guarantee of any significance that appears just in the National Constitution as opposed to most (if not all) of the state constitutions."); *see also infra* note 220 (listing state constitutional provisions protecting environmental rights).

192. *See* Brennan, *supra* note 1, at 502 (denouncing the Supreme Court's decisions for "hardly bespeak[ing] a concern for equity").

In *Juliana*, the plaintiffs asked the court to constitutionalize such a right.[193] In his book, *51 Imperfect Solutions*, Judge Jeffrey Sutton, of the United States Court of Appeals for the Sixth Circuit, argues that for several reasons, state courts are a superior venue for this type of "rights innovation."[194] First, states can premise interpretations of rights guarantees on local conditions and traditions.[195] Second, an ill-conceived state-level constitutional decision is easier to correct than a federal-level decision.[196] Third, states may have constitutional provisions more "on point" than those in the federal Constitution.[197] Fourth, many states guarantee appellate review.[198] Fifth, advancing new constitutional rights in state courts may facilitate the development of federal constitutional law.[199] Finally, climate change litigants may find the jurisdictional barriers to having their claims heard are significantly lower in state courts.[200] This Part addresses each of these factors in turn, arguing that state courts should be more willing to engage with the *Juliana* plaintiffs' novel rights claims, and for that reason present better odds for achieving incremental gains in the fight against climate change.

A. State Courts May Adapt Their Rulings to Local Conditions

Any articulation of a new constitutional right also requires its management.[201] All judges must weigh the future implications of a ruling when dealing with the case before them.[202] This is especially true when judges consider identifying a new constitutional right at the

193. *See* Juliana v. United States, 817 F. Supp. 3d. 1224, 1248 (D. Or. 2016) ("Plaintiffs allege defendants have violated their due process rights by 'directly caus[ing] atmospheric CO_2 to rise . . . .'").

194. *See* Sutton, *supra* note 36, at 16 (noting federal courts "face[] several disadvantages relative to the state courts when it comes to defining constitutional rights").

195. *Id.* at 17.

196. *Id.* at 18.

197. *Id.* at 19.

198. *Id.*

199. *Id.*

200. *See* Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE, AGRIC. & NAT. RESOURCES. L. 349, 398 (2015) (concluding that federal doctrine influences, but does not control, standing analysis in state courts); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1863 (2001) (noting that state courts "hear an array of questions that would be nonjusticiable under federal law").

201. *See* Sutton, *supra* note 36, at 17.

202. *See generally* Cass R. Sunstein, *If People Would Be Outraged by their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007) (arguing judges should weigh public opinion in adjudicating cases).

federal level,[203] which affects fifty-one different jurisdictions. This reality prevents the Supreme Court from allowing local traditions and conditions to guide its interpretation of constitutional guarantees and the remedies imposed to implement them.[204] State constitutions, on the other hand, are born of these differences.[205] Thus, they are better able, and more likely, to consider the unique history and traditions of jurisdiction in constitutional rulings, making them better suited to rights innovation.[206]

In the context of climate change, many states have long traditions of environmental activism, and each state has unique economic and geographic features that could guide a court's hand in protecting environmental rights under its state constitution.[207] For example, the environmental provision of Rhode Island's state constitution contains protections rooted in hundreds of years of fishing and shore rights long enjoyed by its people.[208] The provision begins specifically, protecting the people's access to the "rights of fishery and the privileges of the shore."[209] It then, however, becomes quite broad, directing the state "to adopt all means necessary and proper by law to protect the natural environment,"[210] protections rooted in the entitlements of the King Charles Charter, which governed the state until the Rhode Island Constitution of 1842.[211] Thus, although Rhode Island's environmental provision was not passed until 1987,[212] its protections take into account hundreds of years of tradition. Federal law, given the breadth of its jurisdiction, is simply incapable of such nuance.

203. *See* Sutton, *supra* note 36, at 17.

204. *Id.*

205. *See*, *e.g.*, Miller v. California, 413 U.S. 15, 32 (1973) (taking into account states' unique histories and cultures in acknowledging "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City").

206. *See id.*

207. *See infra* note 217 and accompanying discussion (listing states whose constitutions protect environmental rights in to some degree).

208. *See* Art English & John J. Carroll, *State Constitutions and Environmental Bills of Rights*, *in* THE BOOK OF THE STATES 2015 18, 20 (The Council of State Governments ed., 2015).

209. *Id.*

210. R.I. CONST. art. I, § 17.

211. *See* English & Carroll, *supra* note 208.

212. *Id.*

B. State Constitutions May Be Simpler to Amend

State constitutional law is also more amendable than its federal counterpart. Thus, in the event a new constitutional right is undesirable to the electorate, citizens have several remedies at their disposal to correct the issue. For example, many states have straightforward constitutional amendment processes as compared to the federal government.[213] Additionally, many states hold judicial elections.[214] The availability of these remedies gives state courts more freedom to "try novel social and economic experiments without risk to the rest of the country."[215]

In the context of climate change, this may increase the likelihood of state courts' recognizing environmental rights as protected by their state constitutions. State courts may be more willing to create rights to particular climate conditions if they know their results are not permanent if undesirable to the electorate. On the other hand, judicially enforceable environmental rights are attractive, in part, precisely because they are insulated from the political branches, which may be unduly influenced by outside interests. Thus, although the possibility of rescission may increase environmental plaintiffs' chances of succeeding on the merits, it may also jeopardize the permanence of these victories.

C. State Constitutions May Have Provisions on Point

A further distinction of note: state constitutions often contain different clauses or substantive content than those in the federal Constitution.[216] These clauses may provide an opportunity for relief that would otherwise be unavailable. In the context of climate change, several state constitutions contain provisions explicitly protecting its citizens right to certain climate conditions.[217] The Pennsylvania

213. *See* Ballotopedia, *Amending State Constitutions*, BALLOTPEDIA.ORG, https://ballotpedia.org/Amending_state_constitutions (surveying the procedures for amending each state's constitution).

214. *See generally* JED H. SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012) (discussing the purpose and effects of judicial elections on lawmaking and judicial accountability).

215. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

216. Sutton, *supra* note 36, at 19; *see also infra* note 217 (listing environmental provisions contained in state constitutions).

217. For example, many states have included environmental rights provisions in their state constitutions, although their enforcement mechanisms vary. *See*, *e.g.*, Haw. CONST. art. XI, § 9; Ill. CONST. art. XI; Mass. CONST. art. 97; Mont. CONST. Art II, § 3; Pa. CONST. art. I, § 27; R.I. CONST. art. I, § 17.

Environmental Rights Amendment, for example, guarantees its citizens the right to clean air, pure water, and the preservation of the natural, scenic, historic, and aesthetic values of the environment.[218] Although environmental litigants have only found limited success when litigating under this and other similar provisions,[219] their existence alone engenders strategies unavailable to those operating under the federal constitution. Furthermore, these amendments could serve as persuasive evidence to federal courts of a broad base of support for rights innovation of the type advocated by *Juliana*'s plaintiffs.[220]

D. Bringing Claims in State Courts Highlights the (Im)Possibility of Appellate Review

Additionally, approximately twenty percent of the states' high courts have mandatory appellate jurisdiction.[221] Thus, in contrast to the docket of the Supreme Court, which is almost wholly discretionary, claimants are guaranteed to receive review by a court of final review. This aspect of state constitutional law could be beneficial to environmental plaintiffs because it requires courts to examine the merits of their claim (assuming it is not dismissed on procedural grounds) and issue a final ruling. Although this by no means implies a favorable result, environmental plaintiffs will be able to learn from these rulings and improve their claims moving forward, increasing the probability of success in the future.

Furthermore, when state courts interpret their constitutions, their decisions are not reviewable by the Supreme Court. This power—which the founders deemed essential to a federalist system of government by the founders[222]—makes state courts the final authority

218. PA. CONST. art. I, § 27.

219. *See*, *e.g.*, Payne v. Kassab, 312 A.2d 86 (Pa. Cmwlth. Ct. 1973) (determining the Environmental Rights Amendment only applied to the state's management of public natural resources) *overruled by* PEDF v. Commonwealth, 108 A.3d 140 (Pa. Cmwlth. Ct. 2015) (dismantling the *Payne v. Kassab* test after determining it stripped the constitutional provision of its meaning).

220. *See* Sutton, *supra* note 36, at 20 (suggesting federal courts allow state courts to work their way through the constitutional issues under their own similarly worded constitutions, after which the federal courts can assess the states' experiences in developing its own tests and rules).

221. *See id.* at 19 n.50 (listing the states that permit direct appeal to the Supreme Court and those that provide appeals of right when a trial court declares a statute unconstitutional).

222. *See* California Constitution Center, *The Role of a State High Court at the Intersection of Federalism and State Sovereignty*, SCOCABLOG (Apr. 15, 2015), http://scocablog.com/the-role-of-a-state-high-court-at-the-intersection-of-federalism-and-state-sovereignty/ ("That founding principle necessarily contemplates some conflict between two roughly

on their constitutions. Thus, for example, if Wisconsin's Supreme Court found that its constitution's due process clause protected the right to particular climate conditions, that decision would be immune from review by the United States Supreme Court.

E. State Constitutional Law Facilitates the Development of Federal Constitutional Law

Bringing rights-based climate change litigation under state constitutions may facilitate the development of federal constitutional law in the future. As mentioned previously, state courts have much more freedom to experiment than their federal counterparts. Over time, the wisdom of these ideas (or lack thereof) will become apparent and may serve as a model for other states and the federal courts. This not only promotes better constitutional lawmaking, but also aligns with the experience of history, as much of the Bill of Rights was adopted from preexisting state constitutional guarantees.[223] Thus, although the widespread success of an innovative right is not guaranteed, more rights may have the opportunity to succeed or fail if they are brought in state courts.

In the context of climate change, state constitutional law may hold the possibility of ultimately achieving *Juliana*'s desired goal: constitutionalizing a federal right to an environment capable of sustaining life. Although such results would not be immediate, undergoing this sort of Darwinist process—observing the relative success of different states in implementing environmental rights—may benefit the plaintiffs by refining their litigation strategies and providing the Supreme Court evidence of broad legal support for asserting the requested right.

F. State Courts Often Have Lower Jurisdictional Barriers

In *51 Imperfect Solutions*, Judge Sutton laments the outsized influence of federal law on state courts. He writes, "[f]or too long we have lived in a top-down constitutional world, in which the U.S. Supreme Court announces a ruling, and the state supreme courts move in lockstep in construing the counterpart guarantees of their own constitutions."[224] This trend, however, is not universal. Some state

---

equivalent actors, rather than a master-servant relationship.").

223. Sutton, *supra* note 36, at 20.

224. *Id*.

courts have considerably lower barriers to justiciability than federal courts.[225]

Regarding standing, less than half the states have adopted *Lujan*'s three element test in full.[226] Many have chosen instead to conform their standing requirements to the demands of their own state constitutions.[227] This discrepancy results in many different analyses, some of which may help climate change litigants. For example, Alabama generally applies *Lujan*'s three element analysis, but the court has an exception for public interest standing, by which parties can enter Alabama courts if they can "show that they are seeking to require a public officer to perform a legal duty in which the public has an interest."[228] The applicability of such an exception to *Juliana* is intuitive, as the plaintiffs' central claim is that state officers failed to adequately protect their civil rights by enabling GHG emissions.[229]

Apropos political questions, the landscape is even more favorable. State courts frequently weigh in on questions that would be nonjusticiable under federal law,[230] including decisions involving fiscal matters, budgetary management, and claims regarding the proper allocation of government services.[231] This amenability bodes well for climate change litigants bringing rights-based claims in state courts.

G. Conclusions on Rights Innovation at the State Level

As the preceding discussion makes clear, state courts are uniquely situated to engage in the sort of rights innovation advocated by the plaintiffs in *Juliana*. Their amenability to change, regional character, and sheer numbers greatly increase the plaintiffs' odds of success. There are, however, some valid concerns regarding state-based environmental activism.

---

225. *See generally* Hershkoff, *supra* note 200, at 1833 (surveying state standards of justiciability).

226. *See* Sassman, *supra* note 200, at 353.

227. *See id.* at 353 n.16.

228. *Id.* at 355 (quoting State ex rel. Alabama Policy Inst., No. 1140460, 2015 WL 892752, at *16–19 (Ala. Mar. 3, 2015) (internal quotation marks omitted), *abrogated on other grounds by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015)).

229. Juliana v. United States, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016).

230. *See* Hershkoff, *supra* note 200, at 1863 ("[S]tate common law courts do tend to hear an array of questions that would be nonjusticiable under federal law.").

231. *See*, *e.g.*, DeRolph v. State, 677 N.E.2d 733, 737 (Ohio 1997) (rejecting the government's political question defense in a public education case by asserting "[w]e refuse to undermine our role as judicial arbiters and to pass our responsibilities onto the lap of the General Assembly").

IV. THE LIMITATIONS OF STATE CONSTITUTIONAL LAW IN MITIGATING CLIMATE CHANGE

Although climate change plaintiffs should have greater odds of successfully bringing rights-based claims in state courts,[232] doing so is not without its challenges. State courts have limited jurisdictions and unique political climates, which makes litigating in them individually a daunting task. Additionally, just as the federalist system provides hope for climate change litigants, it also presents problems. Primarily, the ability of states to regulate is limited by the supremacy of federal law. Finally, whether localized emissions will be substantial enough to establish causation for individualized harms is an open question.

A. The Urgency of Collective Action

The IPCC report makes clear that without urgent, collective action, the planet will soon begin suffering from the effects of climate change.[233] The approach advocated above may seem to run counter to achieving this goal. In contrast to bringing claims under the federal constitution in federal court, state-based rights would require litigants to find fifty different plaintiffs, bring their claims in fifty different jurisdictions, and litigate them under fifty different state constitutions. Each would require an investment of time and money, and despite their amenability to rights-based claims, some state courts may still reject the plaintiffs' claims. These realities will slow the progress of climate change litigants, perhaps leading some to question whether such an approach is worthy of the resources required to pursue it.

These difficulties, however daunting, should not prevent activists from pursuing state-based rights claims. First, incremental success is better than none. Environmental activists frequently make a similar argument when responding to arguments that reducing emissions in the United States will not prevent climate change if India and China continue to emit at greater rates.[234] Following this logic, the existence

232. *See supra* Part III (arguing rights-innovation is more likely to take place in state courts than in federal courts).

233. *See* IPCC Report, *supra* note 2, at 7 ("Reaching and sustaining net zero global anthropogenic CO2 emissions and declining net non-CO2 radiative forcing would halt anthropogenic global warming on multi-decadal time scales.").

234. David Bookbinder, Chief Counsel, Niskansen Center, Address at The Federalist Society National Lawyers Convention: Climate Change Nuisance Suits (Nov. 17, 2018), https://fedsoc.org/conferences/2018-national-lawyers-convention#agenda-item-climate-change-nuisance-suits (questioning the value of suppressing economic growth to prevent GHG emissions in view of China and India's growing emissions outputs).

of emissions in Kentucky should not prevent Ohio from protecting the rights of its citizens as protected by its state constitution. Additionally, the costs of litigating in individual states can be mitigated by employing the resources of local organizations concerned with the impacts of climate change. For example, many national environmental organizations, such as Sierra Club, have local chapters.[235] These chapters could recruit experienced litigators in their state to represent their interests in state court. Thus, although certainly a worthy concern, the insufficiency and expense of making rights-based claims under individual state constitutions should not dissuade climate change litigants.

B. The Supremacy of Federal Law

In declaring the "Laws of the United States" to be "the Supreme Law of the Land,"[236] the Constitution provides that where state and federal laws conflict, federal law will prevail.[237] Federal environmental regulation arguably represents the most expansive assertion of federal authority;[238] thus ample opportunity for conflict exists. For example, the Clean Air Act empowers the Environmental Protection Agency to regulate air pollution from motor vehicles; thus, states are generally barred from regulating car emissions.[239] This and similar regulations, in view of the Supremacy Clause, limit the ability of states to reduce carbon emissions.

Yet, federal environmental regulation is not all-encompassing and there are many actions states can take to reduce GHG emissions. Enshrining environmental rights in state constitutions, and proving the violation thereof, would compel states to use these mechanisms when they can. In fact, such suits would likely be more effective than

---

235. For a list of Sierra Club's local chapters, *see* https://www.sierraclub.org/chapters.

236. U.S. CONST. art. VI, cl. 2.

237. *See* Johnathan H. Adler, *When Is Two A Crowd? The Impact of Federal Action On State Environmental Regulation*, 31 HARV. ENVTL. L. REV. 67, 82 (2007) (reminding readers that under the Supremacy Clause, the federal government has authority to preempt contrary state laws).

238. *See id.* at 87 (stating that the environmental portions of the U.S. Code grant expansive regulatory authority to federal agencies).

239. *See*, *e.g.*, 42 U.S.C. § 7543(a) (2000) (preempting state automobile emissions standards);
Nicholas Bryner & Meredith Hankins, *Why California Gets to Write its Own Auto Emissions Standards: 5 Questions Answered*, THE CONVERSATION (Apr. 6, 2018), https://theconversation.com/why-california-gets-to-write-its-own-auto-emissions-standards-5-questions-answered-94379 (discussing the history and purpose of the Clean Air Act in allowing California to govern its own emissions standards).

much of the litigation brought by environmental activists in recent years. Recall *Bellon*, in which the plaintiffs sought to induce the State of Washington into regulating five oil refineries operating there.[240] The Ninth Circuit ruled the plaintiffs failed to establish standing, and thus never reached the underlying claims,[241] but the activists driving that case must have believed it was worth the time and resources expended to litigate it.

How much more valuable, then, would a state constitutional right that compels a state to regulate all its carbon emissions under its authority be to their cause? The aftermath of the Supreme Court's decision in *Buck v. Bell*[242] provides a useful parallel here. In that infamous decision, the Supreme Court declined to recognize involuntary sterilization as a violation of the Due Process Clause.[243] Some state courts, however, had interpreted their state constitutions as prohibiting this reprehensible practice.[244] In doing so, state constitutions protected individual rights where their federal counterpart was silent. They could do so again in the climate context.

C. The Inadequacy of State-Level Emissions to Prove Causation

One final difficulty is worthy of note: state emissions levels may make proving causation more challenging. In *Bellon*, the plaintiffs failed to establish standing because the court did not find the emissions of the five refineries at issue—which constituted approximately five percent of the state's total—to be substantial enough to have caused the plaintiffs' injuries.[245] Even in *Juliana*, where the plaintiffs are challenging the emissions of the entire United States, the court insinuated they may face difficulty in proving causation.[246] Thus, it is plausible that plaintiffs challenging the

240. *See* Wash. Envtl. Council v. Bellon, 732 F.3d 113, 1135–36 (9th Cir. 2013).

241. *See id.* at 1147 (determining that because the plaintiffs failed to meet the requirements of Article II standing, the district court lacked jurisdiction to hear the plaintiffs' arguments on the merits).

242. 274 U.S. 200 (1927).

243. *See id*. at 207 (holding the Fourteenth Amendment does not forbid states from sterilizing the cognitively disabled).

244. *See*, *e.g.*, Mickle v. Henrichs, 262 F. 687, 690–91 (D. Nev. 1918) (invalidating a forced-sterilization order under the State of Nevada's prohibition on "cruel or unusual punishment[]").

245. *See Bellon*, 732 F.3d at 1147 (determining the plaintiffs failed to establish standing because they could not show that decreasing the refineries' emission would redress their harms).

246. Juliana v. United States, 217 F. Supp. 3d 1224, 1269 (acknowledging the effects of regulating U.S. emission may be scientifically discernible, but declining to dismiss on this ground citing the early stage of the litigation).

emissions of individual states will face challenges in proving causation as well.

For several reasons, however, this challenge should not dissuade climate change litigants. First, *Bellon* stands only for the proposition that a fraction of a state's emissions is insufficient to establish standing;[247] plaintiffs in rights-based claims would presumably challenge their states' aggregate emissions.[248] Second, as noted above, standing analysis in state courts is often more relaxed than in federal courts. Thus, climate change litigants may be able to more easily surpass the causation requirement by assuming standing via public interest exceptions or other applicable provisions.[249] Finally, science's ability to attribute specific weather events—droughts, wildfires, and more—to global warming is constantly improving.[250] Thus, a future where the experts are capable of tying state-level emissions to individual injuries is conceivable.

D. sConclusions on the Inadequacy of State-Level Claims

Concerns that state-level rights claims are inadequate in view of the magnitude of climate change are well founded; climate change will not be mitigated by the action of a single state. Few would argue, however, that reducing the emissions of one state is valueless. Every victory, however small, reduces global emissions levels, delaying, if only incrementally, the worst effects of climate change. Every delay offers the opportunity for more advocacy and the possibility of a global solution. In view of this, it is imperative that climate litigants make use of whatever avenues offer a possibility of success, and, as this Note has argued, state constitutional claims do just that.

---

247. *See id.* at 1245 (distinguishing *Juliana* from *Bellon* by noting the disparity in the mass of the challenged emissions).

248. *See supra* part I(A)(2) (discussing the difficulty climate litigants face in proving a causal relationship between emissions and global warming). Until climate science improves such that particular harms can be attributed to specific emissions, plaintiffs would be wise to challenge a jurisdictions aggregate emissions. They should do so in order to stand the best chance at proving the state's emissions were a significant factor in causing the atmospheric conditions that harmed them.

249. *See supra* note 228 and accompanying text (describing Alabama state law's public interest exception to the *Lujan* test for standing).

250. *See* Engel & Overpeck, *supra* note 82, at 25 (anticipating breakthroughs in climate science will fundamentally change causation analysis in the future); *see also* Attribution of Extreme Weather Events, *supra* note 83, at 13–16 (explaining scientists' ability to attribute specific weather events to climate change has improved markedly in recent years).

CONCLUSION

The young plaintiffs in *Juliana v. United States* face serious challenges in federal court. As has been discussed, these challenges begin at the jurisdictional level—establishing standing and avoiding raising a political question—and intensify as courts consider their expansive interpretation of the Due Process Clause. When assessed as a whole, these issues make success at the federal level doubtful at best. However, state constitutional law may offer an alternative path. Although obstacles certainly remain, state courts are more likely to hear climate plaintiffs' claims on the merits and more likely to rule favorably upon them. Activists' dissatisfaction, and even frustration, with being forced to take an incremental approach when addressing an issue as important as climate change is understandable, but climate change plaintiffs should avoid letting the perfect be the enemy of the good and consider whether victory may be found in better as well as best.