

## **NOTE:**

### **FOUNDATIONAL BUT NOT FUNDAMENTAL: NO RIGHT TO THE ENVIRONMENT**

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*The world is on fire, and despite a general consensus among scientists that climate change is an imminent threat, recent decades have been devoid of legislatures capable of enacting meaningful legislation. The flames rage on as our President, an outspoken denier of climate change, adds fuel to the fire by stripping whatever attempts had been previously made to mitigate the effects of climate change. Forced to live in what seems a forsaken world, nineteen youths, a nonprofit organization, and a scientist on behalf of all future generations brought suit against the United States government, seeking more robust environmental protections. In a landmark decision that garnered much thoughtful attention, *Juliana v. United States*, held, in pertinent part, that the U.S. Constitution protects a fundamental right to a climate system capable of sustaining human life. After nearly a century of looking past the written words of the Constitution to find intrinsic rights, twenty years ago the Supreme Court dictated a rigid two-part test for sustaining alleged fundamental rights. The *Glucksberg* test came to fruition despite decades of justices arguing for a more fluid analysis. That is until Justice Kennedy penned *Obergefell v. Hodges*. Justice Kennedy carefully sidestepped *Glucksberg* so as not to offend it and instead adopted that fluid approach in finding certain fundamental rights, leaving two possible paths. This Note argues that under the current formation of Supreme Court substantive due process jurisprudence, the Constitution does not protect a fundamental right to a climate capable of sustaining human life. Neither *Glucksberg* nor *Obergefell* provide a proper avenue through which plaintiffs may successfully seek redress. Rather, plaintiffs must utilize other mechanisms to effectuate a lasting change, such as*

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*amending the Constitution, employing the political process, or persistently litigating in a piecemeal fashion.*

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## INTRODUCTION

What's the point in trying? Why sprinkle the front door with water trickling from the garden hose when the entire house is ablaze? Certainly, though, the proper course would not be to turn the hose off and, instead, douse the house in kerosene, stand back, and revel in the warmth as everything turns to ash. No, the hose must stay wielded; the fate of future generations rests upon its continued effort, even if little progress is made. Relatively recent presidential action, coupled with decades of inaction by a seemingly indifferent legislature, has functioned as a catalyst in securing a future plagued by a volatile climate. Specifically, President Trump formally submitted an intent to withdraw from the Paris Climate Agreement,<sup>1</sup> rolled back automotive emissions standards,<sup>2</sup> and dropped climate change from the list of national security threats.<sup>3</sup> President Trump has not only actively sought to loosen regulations aimed at combating harmful emissions, he has

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1. Sarah Gibbens, *15 Ways the Trump Administration Has Changed Environmental Policies*, NAT'L GEOGRAPHIC (Feb. 1, 2019),

<https://www.nationalgeographic.com/environment/2019/02/15-ways-trump-administration-impacted-environment/>.

2. *See id.* (saying that under President Obama, the fuel economy targets were aimed at an average of fifty-four miles-per-gallon by 2025 for all cars made after 2012, but President Trump has dialed that target back to just thirty-four miles-per-gallon by 2021).

3. *See id.* (describing how removing climate change from the list of national security threats reduced the amount of funding for Department of Defense research and created rifts in societal perception of the impacts of natural weather phenomena).

also consistently and publicly mocked the very existence of global warming and climate change.<sup>4</sup>

Scientific evidence, however, unequivocally shows the climate system is warming, and human activity is an accelerant.<sup>5</sup> Caused by the emission of greenhouse gases (GHG), the fallout from climate change will be catastrophic.<sup>6</sup> By 2100, the projected rise in sea level resulting from melting ice caps will devastate coastal cities, drowning their infrastructure.<sup>7</sup> The already extreme natural events will worsen and become more prevalent, increasing the number of displaced communities.<sup>8</sup> Prolonged periods of drought will ensure wildfires have no shortage of fuel as they rage through communities, crops, and forests.<sup>9</sup> An increase in global temperature will leave the environment uninhabitable for certain species, causing extinction and destruction of

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4. See Dylan Matthews, *Donald Trump Has Tweeted Climate Change Skepticism 115 Times. Here's All of It*, VOX (June 1, 2017, 9:29 PM), <https://www.vox.com/policy-and-politics/2017/6/1/15726472/trump-tweets-global-warming-paris-climate-agreement> (collecting tweets from the president expressing skepticism for climate change science); see, e.g., Donald Trump (@realDonaldTrump), TWITTER (Jan. 25, 2014, 6:48 PM), <https://twitter.com/realDonaldTrump/status/427226424987385856> (“NBC News just called it the great freeze - coldest weather in years. Is our country still spending money on the GLOBAL WARMING HOAX?”); Donald Trump (@realDonaldTrump), TWITTER (Oct. 19, 2015, 8:43 PM), <https://twitter.com/realDonaldTrump/status/656100109386674176> (“It’s really cold outside, they are calling it a major freeze, weeks ahead of normal. Man, we could use a big fat dose of global warming!”).

5. See IPCC, CLIMATE CHANGE 2014: SYNTHESIS REPORT 48 (2014), [https://archive.ipcc.ch/pdf/assessment-report/ar5/syr/SYR\\_AR5\\_FINAL\\_full\\_wcover.pdf](https://archive.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf) (stating that it is “extremely likely that more than half of the observed increase in global average surface temperature from 1951 to 2010 was caused by anthropogenic increases in GHG concentrations and other anthropogenic forcings together”).

6. See THE NAT’L CLIMATE ASSESSMENT, RECENT U.S. TEMPERATURE TRENDS 29 <http://nca2014.globalchange.gov/report/our-changing-climate/recent-us-temperature-trends#narrative-page-16566> (last visited Nov. 19, 2019) (saying that by 2100, a lower emissions model would see national temperatures rise three to five degrees Fahrenheit, or five to ten degrees Fahrenheit under an increasing emissions model).

7. See Brady Dennis & Chris Moon, *Scientists Nearly Double Sea Level Rise Projections for 2100, Because of Antarctica*, WASH. POST (Mar. 30, 2016, 1:44 PM), <https://www.washingtonpost.com/news/energy-environment/wp/2016/03/30/antarctic-loss-could-double-expected-sea-level-rise-by-2100-scientists-say/> (“Places as far flung as South Florida, Bangladesh, Shanghai, Hampton Roads in Virginia and parts of Washington, D.C. could be engulfed by rising waters. . .”).

8. United States Geological Survey, *What are the Long-Term Effects of Climate Change*, [https://www.usgs.gov/faqs/what-are-long-term-effects-climate-change-1?qt-news\\_science\\_products=3#qt-news\\_science\\_products](https://www.usgs.gov/faqs/what-are-long-term-effects-climate-change-1?qt-news_science_products=3#qt-news_science_products) (last visited Nov. 29, 2020).

9. *Id.*

ecosystems.<sup>10</sup> To wit, the global community will even face an increase in the spread of infectious diseases.<sup>11</sup>

In fact, the battle to gain a consensus in the scientific community that climate change poses a very imminent and real threat was long fought and seldom saw advancements.<sup>12</sup> Since its inception more than 120 years ago, the idea asserted by Svante Arrhenius that the presence or absence of GHGs in the atmosphere dictates whether the Earth will be warmer or cooler had been widely met with criticism.<sup>13</sup> In 1896, obviously incapable of possessing the foresight necessary to fully appreciate the vast growth that would shortly ensue, Svante Arrhenius opined, based on GHG emissions at the time, that *thousands* of years would pass before the effects of global warming were realized.<sup>14</sup> Over just a century later, it is clear that the constant, almost completely unabated, GHG emissions have left us without thousands of years to act.<sup>15</sup>

Wary, the legislature is unwilling to (or incapable of) enacting meaningful environmental protection to remedy our forefathers' oversight.<sup>16</sup> Our Children's Trust, a nonprofit with a mission to preserve the climate for present and future generations alike, filed suit

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10. *How Climate Change Plunders the Planet*, ENV'T. DEF. FUND, <https://www.edf.org/climate/how-climate-change-plunders-planet> (last visited Sept. 18, 2020).

11. Mary E. Wilson, *Environmental Change and Infectious Diseases*, ECOSYSTEM HEALTH, Mar. 2000, at 7–12.

12. Stephan Harding, *The Long Road to Enlightenment*, THE GUARDIAN (Jan. 8, 2007), <https://www.theguardian.com/environment/2007/jan/08/climatechange.climatechangeenvironment>.

13. *See id.* (arguing that Arrhenius' findings that doubling carbon dioxide in the atmosphere could raise global temperatures by five to six degrees Celsius were “virtually ignored by scientists obsessed with explaining the ice ages”).

14. Svante Arrhenius, *On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground*, 41 PHIL. MAG. & J. SCI. 237 (1896).

15. *See* IPCC, *supra* note 5, at 65 (indicating climate change will risk food and water security, especially in poorer populations, and increase the likelihood of severe illness and disruptions of livelihoods due to storm surge, sea level rise, and coastal flooding, among many other potential consequences during the 21st century).

16. Credited with beginning the modern environmental movement, Rachel Carson in *Silent Spring* perhaps said it best: “If the Bill of Rights contains no guarantees that a citizen shall be secure against lethal poisons distributed either by private individuals or by public officials, it is surely only because our forefathers, despite their considerable wisdom and foresight, could conceive of no such problem.” Mia Hammersley, *The Right to a Healthy and Stable Climate: Fundamental or Unfounded?*, 7 ARIZ. J. ENV'T. L. & POL'Y 117, 120 (2017) (quoting RACHEL CARSON, *SILENT SPRING*, 12 (1962)).

in the United States District Court for the District of Oregon alleging, in pertinent part, a fundamental right to a healthy and stable climate.<sup>17</sup>

This Note analyzes whether the plaintiffs' claims in *Juliana v. United States*, under controlling substantive due process precedent, constitute a validly constructed fundamental right, providing protection from government infringement on the environment. Part One of this Note begins the analysis with an in-depth discussion of the holdings and procedural history of *Juliana* to provide an understanding of the gravitas of the complaint. Despite the many areas of controversy stemming from *Juliana*, this note only addresses the holding in which a fundamental right to a climate capable of sustaining human life is found. As such, Part Two, Subdivision A, necessarily combs through Supreme Court substantive due process jurisprudence leading up to *Washington v. Glucksberg*, illustrating how the Court's iteration of what constitutes a fundamental right has evolved over time. Part Two, Subdivision B, then introduces the *Glucksberg* test for finding a fundamental right and the Court's reasoning behind it. Part Two, Subdivision C, discusses the Court's later departure from the test articulated in *Glucksberg* for a more fluid analysis under *Obergefell*. Part Three, Subdivisions A and B, argue that a fundamental right to a climate capable of sustaining human life is not deeply rooted in our nation's history and was not carefully described when analyzed under *Glucksberg*. Part Three Subdivision C further argues that a fundamental right relating to the environment cannot be sustained under *Obergefell's* reasoning. In conclusion, this Note suggests alternative and perhaps more suitable mechanisms for plaintiffs to use, such as those in *Juliana*, to successfully pursue the rights and remedies these plaintiffs seek.

#### *JULIANA V. UNITED STATES: THE CASE OF THE CENTURY*

In what has been heralded as “the case of the century,”<sup>18</sup> twenty-one plaintiffs, most members of a disenfranchised class, sought recompense in the judiciary for generations of harmful conduct

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17. See First Am. Compl., ¶ 5, *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or. Sept. 10, 2015), ECF No. 7 (framing climate change as threatening fundamental rights to life, liberty, and property) [hereinafter “First Am. Compl.”].

18. See, e.g., Chelsea Harvey, *Trump Could Face the ‘Biggest Trial of the Century’ – Over Climate Change*, WASH. POST (Dec. 1, 2016, 3:20 PM), <https://www.washingtonpost.com/news/energy-environment/wp/2016/12/01/trump-could-face-the-biggest-trial-of-the-century-over-climate-change/> (quoting law professor Mary Wood).

sanctioned by the federal government in the hope that one branch would provide them the rights they know to be fundamental.<sup>19</sup>

Originally, the plaintiffs brought suit against President Obama<sup>20</sup> and numerous federal executive agencies alleging that the federal government for more than 50 years “permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels . . . deliberately allow[ing] atmospheric [Carbon Dioxide (CO<sub>2</sub>)] concentrations to escalate to levels *unprecedented in human history*, resulting in a dangerous destabilizing climate system.”<sup>21</sup> Such egregious conduct, the plaintiffs assert, constitutes a violation of rights owed to them pursuant to the Constitution of the United States.<sup>22</sup>

Specifically, the plaintiffs claim the defendants violated their substantive due process and equal protection rights under the Fifth Amendment, rights protected by the penumbra of the Ninth Amendment, and rights under the public trust doctrine.<sup>23</sup> Unsurprisingly, the government moved to dismiss the case, arguing that the plaintiffs lacked Article III standing for failure to plead a particularized injury; the plaintiffs could not sustain a claim under the Constitution because no right relating to GHG emissions exists; and the Court lacked jurisdiction over the public trust doctrine claims.<sup>24</sup>

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19. See *Juliana v. United States*, 217 F. Supp.3d 1224, 1241 (D. Or. 2016) (observing that the majority of the plaintiffs are unable to vote because they are below the age of eighteen, forcing them to rely on others to protect their political interests).

20. Once President Trump took office, he was replaced as the named defendant for the Office of the President until he was eventually dismissed from the case in 2018. *Juliana v. United States*, 339 F. Supp.3d 1062, 1080 (D. Or. 2018).

21. First Am. Compl., ¶ 5 (emphasis added).

22. *Id.*

23. See *id.* ¶¶ 277–310 (stating claims for relief based on each doctrine). The plaintiffs aver that the climate system is essential to their rights to life, liberty, and property, which are safeguarded by the Due Process Clause of the Fifth Amendment. These rights, they claim, have been, and are continuing to be, knowingly infringed upon by the government’s reliance on fossil fuels. *Id.* ¶¶ 84–85. Their equal protection claims are grounded in the argument that the effects of climate change will be inherently realized in the future; their generation and those that come after should be treated as a protected class to avoid any disproportionate discrimination. *Id.* ¶ 297. The Ninth Amendment penumbra, it is alleged, provides further protection as it mandates that the enumeration of certain rights “shall not be construed to deny or disparage others retained by the People.” *Id.* ¶ 303; U.S. Const. amend. IX. Finally, the plaintiffs claim the natural resources that are of public concern to citizens—such as the atmosphere, bodies of water, and biosphere—are the nation’s life-sustaining systems and they must be held in trust for the benefit of present and future citizens, something the government is failing to do. First Am. Compl., *supra* note 21, ¶ 308.

24. See Federal Defendants’ Memorandum of Points and Authority in Support of Their Motion to Dismiss, *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or. Nov. 27, 2015), ECF No. 27-1 (arguing that plaintiffs alleged a generalized grievance and not a particular harm, that

The decision to determine the fate of the lawsuit was first vested in Magistrate Judge Thomas Coffin. In the early spring of 2016, Judge Coffin denied the government's motion to dismiss.<sup>25</sup> Short-lived, though, was the plaintiffs' initial victory; the case was sent to the district court to determine if Judge Coffin's decision would be adopted.<sup>26</sup> After a hearing, District Court Judge Ann Aiken issued a first of its kind opinion.<sup>27</sup> In her groundbreaking opinion denying the government's motion, Judge Aiken not only echoed the reasoning of Judge Coffin but also clarified and articulated holes in the government's arguments.<sup>28</sup> Judge Aiken began by discussing whether the plaintiffs' claims raised a political question.<sup>29</sup> In summarizing her analysis of the case under factors laid out in *Baker v. Carr*,<sup>30</sup> Judge Aiken noted that a violation of constitutional rights is at the very epicenter of the allegations making the judiciary the proper forum for relief.<sup>31</sup>

Next, she addressed the question of standing. The government argued that the plaintiffs lacked standing under *Lujan v. Defenders of Wildlife*<sup>32</sup> because: their injury was not particularized; the

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there is no substantive due process right to be free of greenhouse gases and climate change, and that the Public Trust Doctrine claims belong in state court).

25. Order and Findings & Recommendations, *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or. Apr. 8, 2016), ECF No. 68.

26. See 28 U.S.C. § 636(b)(1) (2018) (saying that district court judges “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge”).

27. See *Juliana v. United States*, 217 F. Supp.3d 1224, 1262 (D. Or. 2016) (stating that the defense's argument that “recognizing a federal public trust and a fundamental right to climate system capable [sic] of sustaining human life would be unprecedented,” but rejecting the argument as justification for dismissal).

28. *Id.* at 1235.

29. *Id.* at 1235–42.

30. *Baker v. Carr*, 369 U.S. 186 (1962). *Baker* involved a claim by certain voters of counties in Tennessee in which they sought a declaration that a state apportionment statute was unconstitutional, depriving them of equal protection of the law. *Id.* at 187–88. The Supreme Court in holding that the plaintiffs presented a justiciable question espoused six factors, each capable of establishing a political question, to determine whether a plaintiff had, in fact, raised a non-justiciable political question. *Id.* at 217. Judge Aiken addressed each factor under *Baker*, finding: no constitutional provision puts the issue of climate change within the purview of other branches; the dispute at bar is neither beyond the competence of the court nor in want of a standard by which to be adjudicated; the redress plaintiffs seek would not offend another branch's current actions or ability to act in the area of climate change; and it was undisputed that the final *Baker* factors did not apply. *Juliana*, 217 F. Supp.3d at 1237–41.

31. *Juliana*, 217 F. Supp.3d at 1241. Judge Aiken, aware that if plaintiffs were to prevail on the merits her holding would require a carefully crafted remedy to avoid infringing upon the separation-of-powers, explained that federal courts are given wide latitude “to fashion practical remedies when confronted with complex and intractable constitutional violations.” *Id.* at 1242.

32. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). *Lujan* requires that three elements be met for plaintiffs to have standing. The first element, injury in fact, is met where there is an invasion of a legally protected interest that is concrete and particularized as well as actual or

government's conduct was far too attenuated to be causally linked to the plaintiffs' alleged injuries; and the relief the plaintiffs sought was too broad in scope to be implemented.<sup>33</sup> Judge Aiken remained unpersuaded. Citing Ninth Circuit and Supreme Court precedent, Judge Aiken explained that, although the injuries may have the same root and may be shared by every American, the specific concrete injuries plaintiffs allege were not generalized grievances.<sup>34</sup> Despite the concrete and particularized nature of plaintiffs' injuries, *Lujan* still required the judge to determine whether the injuries were either actual or imminent.<sup>35</sup> After referencing several portions of the plaintiffs' complaint, Judge Aiken found the injuries to be sufficiently imminent and actual.<sup>36</sup>

The Court also found the government's reliance on *Washington Environmental Council v. Bellon*<sup>37</sup> to support its causation argument to be misplaced because *Bellon* was easily distinguishable from *Juliana*. In *Bellon*, only five oil refineries were allegedly responsible for producing a mere six percent of Washington's total GHG emission which could not have reasonably been linked to the plaintiffs' injuries.<sup>38</sup> The plaintiffs in *Juliana*, however, allege that the United States government, over a 263-year period, was responsible for more than 25 percent of *global* emissions.<sup>39</sup> The *Bellon* holding, therefore, was not controlling in deciding the case at bar; the *Juliana* plaintiffs, at the

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imminent. *Id.* at 560. Second, a causal connection must be established between the conduct and the injury, meaning that the injury is traceable to the action of the defendant not some other third party. *Id.* Lastly, a favorable decision must likely redress the plaintiffs' injuries. *Id.*

33. *Juliana*, 217 F. Supp.3d at 1242–48.

34. *Id.* at 1243 (citing *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007) (“[I]t does not matter how many persons have been injured by the challenged action” so long as “the party bringing suit shows that the action injures him in a concrete and personal way.”)); see *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 24 (1998) (“[A]n injury . . . widely shared . . . does not, by itself, automatically disqualify an interest for Article III purposes. Such an interest, where sufficiently concrete, may count as an injury in fact.”).

35. See *Juliana*, 217 F. Supp.3d at 1243 (“In an environmental case, a plaintiff cannot demonstrate injury in fact merely by alleging injury to the environment; there must be an allegation that the challenged conduct is harming (or imminently will harm) the plaintiff.”).

36. *Id.* at 1244.

37. *Wash. Env't Council v. Bellon*, 732 F.3d 1131 (9th Cir. 2013).

38. See *Juliana*, 217 F. Supp.3d at 1245 (“[C]ausation was lacking because the defendant oil refineries were such minor contributors to greenhouse gas emissions, and the independent third-party causes of climate change were so numerous, that the contribution of the defendant oil refineries was ‘scientifically indiscernible.’” (quoting *Bellon*, 732 F.3d at 1144)).

39. *Id.* at 1243 (emphasis added). Additionally, *Bellon* was decided at a different procedural posture—the summary judgment phase of the case. This is important to note because the *Bellon* Court issued its decision based upon all the findings elucidated during discovery not simply the pleadings. *Bellon*, 732 F.3d at 1144–47.

motion to dismiss stage, had sufficiently drawn the connection between their injuries and the governmental action.<sup>40</sup>

Turning to redressability, the plaintiffs only had to show a substantial likelihood that a decision rendered in their favor would retard or eliminate the harm.<sup>41</sup> Judge Aiken determined that plaintiffs' request for relief sufficiently met the standard. The United States is one of the largest producers of GHGs in the world, and any reduction in the emission of GHGs would work to slow the devastating effects of climate change thereby redressing the plaintiffs' injuries.<sup>42</sup> Moreover, given the complex and intricate explanations required to answer the questions necessary to understand the scope of the plaintiffs' injuries, the defendants' causation, and the proper remedy, Judge Aiken noted expert testimony was necessary.<sup>43</sup> Dismissing the case at the current juncture, therefore, would be an improper exercise of judicial discretion.<sup>44</sup>

In perhaps the most famous and controversial portion of the opinion, Judge Aiken recognized the Due Process Clause of the Fifth Amendment protects "a right to a climate capable of sustaining human life" as it "is fundamental to a free and ordered society."<sup>45</sup> Recognizing the fundamental right afforded plaintiffs' claims of constitutional violations the highest standard of judicial review: strict scrutiny.<sup>46</sup> To establish the existence of the right, Judge Aiken first set out the test as iterated by the court in *McDonald v. City of Chicago*.<sup>47</sup> Under

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40. *Juliana*, 217 F. Supp.3d at 1243.

41. *See Massachusetts v. EPA*, 549 U.S. 497, 525 (2007) (saying that plaintiffs must show that a remedy will "slow or reduce" their particular harm).

42. Hammersley, *supra* note 16, at 13.

43. *See Juliana*, 217 F. Supp.3d at 1247–49 (noting how "scientifically complex" the redressability and causation issues at hand are, saying that none of the complex questions can be addressed at the motion to dismiss stage).

44. *See id.*

45. *Id.* at 1250 ("Exercising my 'reasoned judgment,' I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.").

46. *See Reno v. Flores*, 507 U.S. 292, 301–02 (1993) (describing how strict scrutiny under due process "forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest").

47. *Juliana*, 217 F. Supp.3d at 1249. The plaintiffs in *McDonald* alleged a fundamental right to possess firearms when arguing that a Chicago law restricting the possession of firearms to those with the proper certification infringed on their rights under the Second Amendment. *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Judge Aiken, after listing the prongs of the test, *then* cited to *Washington v. Glucksberg*, 521 U.S. 702 (1997), to explain judges must be wary of expanding the list of fundamental rights. *Juliana*, 217 F. Supp.3d at 1249. Importantly, *Glucksberg*, a case alleging a violation of a fundamental right under the Due Process clause of the Fourteenth

*McDonald*, a fundamental right will be sustained should it be shown that the right for which protection is sought is either “deeply rooted in this Nation’s history and tradition” or “fundamental to our scheme of ordered liberty[.]”<sup>48</sup> Judge Aiken, having exploited *McDonald*’s disjunctive by resting the right in its latter prong, effectively circumventing the rigidity of the *Glucksberg*<sup>49</sup> test, took to a more recent Supreme Court precedent.<sup>50</sup>

*Obergefell v. Hodges* instead provided Judge Aiken with the framework to uphold her finding of the plaintiffs’ claimed fundamental right.<sup>51</sup> Justice Kennedy’s “reasoned judgment” analysis allowed Judge Aiken to be guided rather than bound by history.<sup>52</sup> Judge Aiken drew comparisons with other landmark cases, such as *Roe v. Wade*, to show that Supreme Court Substantive Due Process jurisprudence is wrought with instances of the Court finding unenumerated rights in more than one Constitutional source where such right is vital to the exercise of other protected rights.<sup>53</sup>

*Juliana*’s one-of-a-kind holding did not aver that the right as defined therein meant just *any* claim where it could be argued that harm was inflicted unto the environment was an infringement of the fundamental right.<sup>54</sup> Instead, Judge Aiken attempted to define the scope of the right she articulated by narrowing its application to only cases where “a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage

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Amendment, clearly set out a two-pronged test for finding a fundamental right. *Glucksberg*, 521 U.S. at 720–21.

48. *McDonald*, 561 U.S. at 767 (internal citations, quotations, and emphasis omitted).

49. For a discussion on *Glucksberg*, see *infra* Part Two Subdivision B.

50. See *Juliana*, 217 F. Supp.3d at 1249 (relying on *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

51. For a discussion on *Obergefell*, see *infra* Part Two Subdivision C.

52. *Juliana*, 217 F. Supp.3d at 1249–50 (citing *Obergefell*, 576 U.S. at 664 (internal quotations omitted)).

53. See *id.* (describing how the fundamental right to privacy in *Roe v. Wade*, 410 U.S. 113 (1973), was nested in the Due Process Clause, but also had roots in the First, Fourth, Fifth, and Ninth amendments, while the right to marry in *Obergefell* was seen as a right supporting many other fundamental liberties).

54. See *id.* at 1250 (describing how Aiken sought to “strike a balance and to provide some protection against the constitutionalization of all environmental claims” by “framing the fundamental right at issue as the right to a climate system capable of sustaining human life”).

to property, threaten human food sources, and dramatically alter the planet's ecosystem[.]”<sup>55</sup>

Successfully arguing the existence of a fundamental right, however, only provides protection from government action infringing upon that right. Generally, fundamental rights do not impose a duty to affirmatively remedy injury caused by a party's actions.<sup>56</sup> Judge Aiken, however, noted two exceptions to this rule, one of which she found relevant: the “danger creation” exception.<sup>57</sup> The plaintiffs alleged the defendants were fully aware of the consequences associated with continued reliance on the consumption of fossil fuels as a main source of energy.<sup>58</sup> They further alleged the Due Process Clause imposed a special duty on defendants to use their statutory and regulatory authority to reduce greenhouse gas emissions *because* of their knowledge.<sup>59</sup> Accepting the factual allegations as set forth in the complaint to be true—a requirement at the motion to dismiss stage, Judge Aiken sustained plaintiffs' due process claims, finding the plaintiffs met their burden in pleading that the government created danger.<sup>60</sup>

Finally, the court addressed whether the plaintiffs' claims sounding in the public trust doctrine may proceed.<sup>61</sup> The government

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55. *See id.* (“To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink.”).

56. *See DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (saying that “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors”).

57. *Juliana*, 217 F. Supp.3d at 1251. Under the “danger creation” exception, a plaintiff must show the government created the danger he or she would not have otherwise faced, placing them in a worse position; the plaintiff must then show the government knew the risks plaintiff would face but still acted intending to subject plaintiff to such risks, and did so with deliberate indifference or culpability which exceeds that associated with gross negligence. *Id.* The other exception to the general rule that there is no right to government aid is the “special relationship” exception, which maintains that an individual's safety becomes the government's responsibility when taken into government custody against their will. *Ketchum v. Alameda Cty.*, 811 F.2d 1243, 1247 (9th Cir. 1987).

58. *First Am. Compl.* ¶¶ 278–79.

59. *Id.* at ¶ 278–280.

60. *Juliana*, 217 F. Supp.3d at 1252.

61. *Id.* at 1253–61. The Public Trust Doctrine provides public lands, waters, and living resources in a State are held in trust by the State for the benefit of all of the people. It establishes the right of the public to fully enjoy public lands, waters, and living resources for a host of recognized public uses. The doctrine also sets limitations on the States, the public, and private owners, as well as establishing the responsibilities of the States when managing these public trust assets. John Arnold, *Examining the Public Trust Doctrine's Role in Conserving Natural Resources on Louisiana's Public Lands*, 29 TUL. ENV'T. L.J. 149, 195 (2017).

argued they must not because: the atmosphere is not a public trust asset; the federal government has no public trust obligations, as any common law claims have been displaced by federal statutes; and plaintiffs lack the ability to enforce the federal public trust doctrine, should it exist.<sup>62</sup> Addressing the scope of “assets” held in trust for the public first, the court declined to determine whether it included the atmosphere as the plaintiffs only complained of a violation of the public trust doctrine with respect to the ocean.<sup>63</sup>

Next, in finding that *PPL Montana, LLC v. Montana*<sup>64</sup> could not be read to relegate the doctrine’s application to only that which may be used against a state, the court found the doctrine could, in fact, be applied to the federal government.<sup>65</sup> Judge Aiken then explained that common law had not been displaced by federal legislation as the defendants further contended, again distinguishing the government’s supporting case law from the case at bar.<sup>66</sup>

Lastly, Judge Aiken began her analysis of whether the plaintiffs had the ability to enforce the public trust doctrine by identifying its constitutional origin.<sup>67</sup> Agreeing with Judge Coffin’s findings that the Public Trust claims are properly delineated as substantive due process claims, she referred to her prior discussion that “the Due Process Clause’s substantive component safeguards fundamental rights that are ‘implicit in the concept of ordered liberty’ or ‘deeply rooted in this Nation’s history and tradition.’”<sup>68</sup> The plaintiffs’ claims satisfied both tests.<sup>69</sup> Therefore, all of the plaintiffs’ claims were allowed to proceed

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62. *Juliana*, 217 F. Supp.3d at 1255.

63. *See id.* (emphasizing that because plaintiffs “have alleged violations of the public trust doctrine in relation with the territorial sea,” it was not yet necessary to determine if the doctrine extended to the atmosphere).

64. *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012).

65. *See Juliana*, 217 F. Supp.3d at 1256 (saying that *PPL Montana* “cannot fairly be read to foreclose application of the public trust doctrine to assets owned by the federal government” and could not support the government’s position).

66. *Id.* at 1257–60.

67. *See id.* at 1260–61 (arguing that “the public trust predates the Constitution” in defining “inherent aspects of sovereignty” that existed under Social Contract theory).

68. *Id.* at 1261 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)).

69. *See id.* (specifying that the public trust claim satisfied both tests). Judge Aiken also noted that “[b]ecause the public trust is not enumerated in the Constitution, substantive due process protection also derives from the Ninth Amendment.” *Id.* (citing U.S. Const. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”)).

to the discovery phase, and the government's motion to dismiss was denied.<sup>70</sup>

The government, however, remained undeterred and sought relief through an application for interlocutory appeal in March of 2017.<sup>71</sup> A few months later in June, the government's order was denied.<sup>72</sup> The very next day, the government sought mandamus relief in the Ninth Circuit, requesting a stay of district court proceedings.<sup>73</sup> The Ninth Circuit ordered a stay and further ordered the plaintiffs to submit opposition papers.<sup>74</sup> After hearing oral arguments in December, the Ninth Circuit denied the government's petition as premature.<sup>75</sup> Trial was again set, but the government attempted to avoid it by filing several more motions, and in July of 2018, Judge Aiken, again, sat for oral arguments.<sup>76</sup> Without waiting for her opinion, the government filed another writ of mandamus in the Ninth Circuit to no avail.<sup>77</sup>

Days later, the Supreme Court weighed in on the litigation, responding to the government's petition.<sup>78</sup> The Court dismissed the request without prejudice, finding it premature.<sup>79</sup> The Court did take the opportunity to call the "breadth of plaintiffs' claims striking" and note that the "justiciability of those claims presents substantial grounds for difference of opinion."<sup>80</sup> The Court also encouraged the District Court to take the aforementioned concerns into account when assessing "the burdens of discovery and trial, as well as the desirability for a prompt ruling on the government's pending dispositive motions."<sup>81</sup>

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70. *See id.* at 1261–62 (asserting that because the plaintiffs' claims are based in the Due Process Clause of the Fifth Amendment, they may assert their claims in federal court, and denying defendants' and intervenors' motions to dismiss).

71. Order Adopting Judge Coffin's Findings, *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. June 8, 2017).

72. *Id.*

73. Petition for Writ of Mandamus, *Juliana v. United States*, No. 17-71692 (9th Cir. June 9, 2017). Trial had previously been set for February 5, 2018. OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/juliana-v-us>.

74. Order Staying Proceedings, *Juliana v. United States*, No. 17-71692 (9th Cir. July 25, 2017).

75. *See In re United States*, 884 F.3d 830, 835 (9th Cir. 2018) ("[T]heir current request for mandamus relief is entirely premature.").

76. Oral Argument, *Julianna v. United States*, No. 6:15-cv-01517-TC (D. Or. July 18, 2018).

77. *In re United States*, 895 F.3d 1101 (9th Cir. 2018).

78. *United States v. United States Dist. Court for Dist. of Or.*, 139 S. Ct. 1 (Mem.) (2018) (denying the Government's application for stay).

79. *Id.*

80. *Id.*

81. *Id.*

The government unabashedly filed another motion to stay discovery and trial, which was set for October 29, 2018, as well as another writ of mandamus in the Ninth Circuit and the Supreme Court.<sup>82</sup> The Supreme Court again denied the government's petition.<sup>83</sup> On November 8, after a panel of the Ninth Circuit granted the government a stay of trial, pending consideration of the defendant's most recent writ of mandamus, the government moved for yet another stay.<sup>84</sup> Judge Aiken then certified the case for interlocutory appeal, and the Ninth Circuit granted the defendant's petition for interlocutory appeal thereafter.<sup>85</sup> Oral Arguments were then scheduled and heard.<sup>86</sup>

In a two to one split decision with a blistering dissent, the judgment of the district court was reversed on January 17, 2020.<sup>87</sup> The Ninth Circuit, however, did not reach the merits of the plaintiffs' arguments. Instead, the three-judge panel decided the case on the threshold question of standing, requiring the court to assume the validity of the plaintiffs' substantive claims.<sup>88</sup> The majority embraced with open arms the evidence showing that "climate change is occurring at an increasingly rapid pace" due to the consumption of fossil fuels.<sup>89</sup> The factual findings notwithstanding, and despite the majority's finding that the plaintiffs' injuries were particularized and caused by the government's conduct, the court held that an order requiring the federal government to phase out fossil fuels was outside the scope of the court's power.<sup>90</sup> Exploiting the impassioned arguments of the dissenting opinion, on March 2, 2020, the plaintiffs filed a petition for

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82. *In re* United States, 139 S. Ct. 452 (Mem.) (2018).

83. *Id.* at 453 ("At this time, however, the Government's petition for a writ of mandamus does not have a 'fair prospect' of success in this Court because adequate relief may be available in the United States Court of Appeals for the Ninth Circuit.").

84. Order to Stay Proceedings, *Juliana v. United States*, No. 18-73014 (9th Cir. Nov. 8, 2018).

85. Jenna Lewis, *In Atmosphere We Trust: Atmospheric Trust Litigation and the Environmental Advocate's Toolkit*, 30 COLO. NAT. RES., ENERGY & ENV'T. L. REV. 361, 372 (Summer 2019).

86. *See Hearing Reveals Little about Ninth Circuit's Upcoming Climate Decision*, 395 CORP. COUNSEL'S MONITOR, NL 18, Westlaw (July 2019). During oral arguments, when plaintiffs' counsel was asked if the judiciary has ever ordered government action on this scale before, she pointed to several segregation cases; defendants' counsel responded that those cases were brought in a piecemeal fashion, not "one gigantic case," but one Judge was critical of the assertion that a step-by-step approach was reasonable given the global nature of the issue. *See id.*

87. *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020).

88. *Id.* at 1170.

89. *Id.* at 1166.

90. *Id.* at 1173.

rehearing *en banc*.<sup>91</sup> As of the date of this writing, the Ninth Circuit has not issued a decision on the plaintiffs' petition.

Weathered and drawn out, *Juliana*'s controversial holdings have commanded national attention and spawned no shortage of scholarship.<sup>92</sup> Until *Juliana*'s recognition of a fundamental right, not a single federal court had held in favor of a plaintiff asserting such a right relating to the environment. In fact, when given the opportunity to break ground in the area, courts have repeatedly and explicitly declined to do so.<sup>93</sup>

Many courts have been careful when faced with claims similar to those in *Juliana* to leave open the possibility that a fundamental right to the environment exists.<sup>94</sup> For example, one court in particular, also out of the District of Oregon, was presented with an allegation similar to that in *Juliana*.<sup>95</sup> The plaintiffs in *Animal Defense Fund* cited to *Juliana* in support of their claim to a fundamental right to wilderness.<sup>96</sup> The Court distinguished the right claimed from *Juliana*, first noting that under *Glucksberg*, expanding the breadth of the substantive due process protections requires at least a "careful description" of the right

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91. OUR CHILDREN'S TRUST (last visited Sept. 18, 2020), <https://www.ourchildrenstrust.org/juliana-v-us>.

92. See, e.g., Daniel Brister, *Juliana v. United States*, PUB. LAND & RES. L. REV. (2019) (reviewing the facts and speculating on the possible impacts of the case); Steve Croft, *The Climate Change Lawsuit That Could Stop the U.S. Government from Supporting Fossil Fuels*, 60 MINUTES (CBS Broadcast June 23, 2019), <https://www.cbsnews.com/news/juliana-versus-united-states-climate-change-lawsuit-60-minutes-2019-06-23/>.

93. See *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1998) (no right to a healthy environment); *Animal Legal Def. Fund v. United States*, 404 F. Supp.3d 1294 (D. Or. 2019) (No. 6:18-cv-01860-MC) (no right to wilderness); *Clean Air Council v. United States*, 362 F. Supp.3d 237 (E.D. Pa. 2019) (no right to a life-sustaining climate system); *S.F. Chapter of A. Philip Randolph Inst. v. EPA*, 2008 WL 859985 (N.D. Cal. 2008) (No. C 07-04936 CRB) (no right to be free of climate change); *In re Agent Orange Prod. Liab. Litig.*, 475 F. Supp. 928 (E.D.N.Y. 1979) (no right to a healthful environment nor to be free of allegedly toxic chemicals); *Fed. Emps. for Non-Smokers' Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978) (no right to a clean environment); *Pinkney v. Ohio EPA*, 375 F. Supp. 305 (N.D. Ohio 1974) (no right to a healthful environment); *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532 (S.D. Tex. 1972) (no right to a healthful environment).

94. See *Ely*, 451 F.2d at 1139 ("While a growing number of commentators argue in support of a constitutional protection for the environment, this newly advanced constitutional doctrine has not yet been accorded judicial sanction. . . ."); *Pinkney*, 375 F. Supp. at 310 ("Therefore, in light of the prevailing test of a fundamental right, the Court is unable to rule that the right to a healthful environment is a fundamental right under the Constitution."); *Agent Orange*, 475 F. Supp. at 934 ("Since there is not yet a constitutional right to a healthful environment, (internal citation omitted), there is not yet any constitutional right under the fifth, ninth or fourteenth amendments to be free of the toxic chemicals involved in this litigation.").

95. *Animal Legal Def. Fund*, 404 F. Supp. 3d 1294 (D. Or. 2019).

96. *Id.* at 1302.

claimed.<sup>97</sup> *Juliana*'s right to a stable climate system is actually narrower than the "right to wilderness" plaintiffs sought, the court explained. Moreover, the *Juliana* plaintiffs did not take issue with just any pollution, they only sought recompense for catastrophic levels of pollution.<sup>98</sup> "Plaintiffs here allege nothing of the sort," the court asserted.<sup>99</sup> Perhaps, it is because other courts have consistently and expressly denied the existence of an environmental fundamental right that the District of Oregon's careful dance in distinguishing *Juliana* seems to be more of an acceptance of the possibility that such a right does exist—so long as it is properly articulated.<sup>100</sup>

#### SUBSTANTIVE DUE PROCESS JURISPRUDENCE: A HISTORY OF TRADITION

The Due Process Clause of the Fifth Amendment mandates that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law[.]"<sup>101</sup> While the Supreme Court has, since its inception, recognized the Due Process Clause applies to procedural matters, it was not until a decade before the first study linking human GHG emissions to climate change was published that the Supreme Court first expanded its interpretation of the Clause to safeguard substantive rights as well.<sup>102</sup> At the turn of the 20th century, the Court started to locate and articulate rights that, while not enumerated in the Constitution, were otherwise fundamental liberty interests, upon which neither state nor federal government could encroach.<sup>103</sup> Like everything else, though, the newly discovered rights were not absolute and were bound only by the exercise of certain government power.<sup>104</sup> Its limits notwithstanding, Justice Harlan noted:

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97. *Id.* at 1301.

98. *See id.* at 1302 (saying that the court in *Juliana* "noted that plaintiffs did not object to the government's role in just any pollution or climate change, but rather catastrophic levels of pollution or climate change.")

99. *Id.*

100. *See generally id.*

101. U.S. CONST. amend. V.

102. *Mugler v. Kansas*, 123 U.S. 623, 660–61 (1887).

103. *See, e.g., Lochner v. New York*, 198 U.S. 45 (1905) (finding a freedom to contract between private parties).

104. *Id.* at 53. Initially, *Lochner* described the limitations as relating to exercise of government power as it pertained to "the safety, health, morals, and general welfare of the public." *Id.* However, the Supreme Court eventually formulated a new limit, the current prescription as found in the "strict scrutiny" standard of review. *See generally Reno v. Flores*, 507 U.S. 292 (1993).

the guaranties of due process, though having their roots in Magna Carta's '*per legem terrae*'<sup>105</sup> and considered as procedural safeguards 'against executive usurpation and tyranny,' have in this country 'become bulwarks also against arbitrary legislation.'<sup>106</sup>

Though, technically, the first rights expressly recognized as "fundamental" spawned an era infamous for its jurisprudence,<sup>107</sup> subsequent decades were marked by the discovery of true fundamental rights, which are still enforced today. Despite its substantive due process jurisprudence spanning more than a century, the Supreme Court has frequently and, as such, seemingly unsuccessfully, aimed at dictating a test capable of properly outlining the composition of a fundamental right. Finally, the Court settled on its articulation in *Washington v. Glucksberg*.<sup>108</sup> Prior to *Glucksberg*, the Supreme Court read into the Constitution rights that were in some way established in American history and tradition, or so they argued.<sup>109</sup> Since the analyses varied, it is necessary to discuss the reasoning employed in determining what constituted a fundamental right in prior cases before discussing *Glucksberg*'s test to provide a comprehensive understanding of the Court's guiding framework.

### I. *Foundational Fundamental Rights*

The concept of fundamental rights has scarcely been widened. In fact, a single digit denotes the number of unenumerated rights safeguarded by the Due Process Clause of the Fifth and Fourteenth Amendments,<sup>110</sup> though many have been pleaded since the modern liberty right was thought into existence in 1923. Due in part to the judiciary's awareness that a decision to establish a new right bears a

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105. *Per legem terrae* is Latin for "by the law of the land." *Hovey v. Elliott*, 167 U.S. 409, 417 (1897).

106. *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (quoting *Hurtado v. California*, 110 U.S. 516, 532 (1884)).

107. Caleb Hall, *A Right Most Dear: The Case for a Constitutional Environmental Right*, 30 TUL. ENV'T. L.J. 85, 94–95 (2016); see also *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.").

108. See Adam Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101 (2002) (arguing that tradition should have no bearing on what constitutes a fundamental right).

109. *Id.* at 127–40 (suggesting that different rights beget different analyses).

110. In *Malinski v. N.Y.*, Justice Frankfurter, after discussing the Fifth Amendment Due Process Clause, bluntly asserted, "[o]f course the Due Process Clause of the Fourteenth Amendment has the same meaning." 342 U.S. 401, 415 (1942). He stated further that "[t]o suppose that 'due process of law' meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection." *Id.*

heavy burden, courts have repeatedly reminded their audience of their reluctance to do so.<sup>111</sup> The root of their apprehension likely stems from the fact that infringement of a fundamental right invokes strict judicial scrutiny,<sup>112</sup> effectively removing the controversy from the political process as well as the legislature's purview.<sup>113</sup> Strict scrutiny requires that the government show that it has a compelling interest for infringing upon a right and that the means are narrowly tailored to achieve that end.<sup>114</sup>

Before applying the strictures of strict scrutiny to a fundamental right, however, the Court would need to determine whether a fundamental right was implicated in the first place.<sup>115</sup> Only when the Court was satisfied that the alleged right is "so rooted in the traditions and conscience of our people as to be ranked fundamental[]" was the Constitution's shield wielded.<sup>116</sup> As the Court changed and society progressed, substantive due process jurisprudence evinced several fundamental rights that were safe from government action: the right to direct the education and upbringing of one's children,<sup>117</sup> the right to procreate,<sup>118</sup> the right to bodily integrity,<sup>119</sup> the right to marital privacy

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111. See *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended."); see also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (quoting *Collins* to argue that the Court must be careful when expanding substantive due process because doing so largely places the matter "outside the arena of public debate and legislative action.").

112. Russell Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 627 (1992).

113. *Glucksberg*, 521 U.S. 702, 720–21 (1997).

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

115. *Juliana v. United States*, 217 F. Supp. 3d 1159, 1248 (2020).

116. See *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (outlining what composes a fundamental right when addressing a procedural due process issue).

117. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); see also *Moore v. City of East Cleveland*, 431 U.S. 494 (1932) (following *Meyer's* and *Pierce's* logic in holding that the Constitution forbids forcing all children and adults to live in certain narrowly defined family patterns).

118. See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 540–43 (1942) (deciding the case on Equal Protection grounds as the law at issue affected one class of criminals differently than it would affect another).

119. *Rochin v. California*, 342 U.S. 165 (1952).

and use of contraception;<sup>120</sup> the right to marry;<sup>121</sup> and the right to an abortion.<sup>122</sup>

One of the first fundamental rights was awarded to families and teachers. In *Meyer v. Nebraska*, the Court asserted its understanding that “liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary.”<sup>123</sup> At issue was a law that forbade teachers at both private and public schools alike from teaching any language other than English.<sup>124</sup> Noting the natural, strong desire immigrants had to instill values from their country of origin in their children, and that the American people always valued education as a matter of the utmost importance, the Court invalidated the law, as “a desirable end cannot be promoted by prohibited means.”<sup>125</sup> A person has certain fundamental rights that must be respected.<sup>126</sup>

Years later in *Skinner v. Oklahoma*, such a right was at issue. A repeat felon challenged a law that allowed the state of Oklahoma to sterilize him so that he could not reproduce any offspring unwanted by society.<sup>127</sup> In support of its reasoning, the Court, though ultimately deciding the case on equal protection grounds, averred that the sanctity of marriage and the right to procreate were—in an important use of words—labeled as “fundamental to the very existence and survival of the race.”<sup>128</sup> An exercise of the sterilization power would, thus,

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120. *Griswold v. Connecticut*, 381 U.S. 479 (1965); *see also Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding the existence of a fundamental right but deciding the case on Equal Protection grounds).

121. *See Loving v. Virginia*, 388 U.S. 1 (1967).

122. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). This list is not meant to be exhaustive of every fundamental right in existence. The Supreme Court has found fundamental rights in other areas of the Constitution that are outside the scope of this article. *See, e.g., McDonald v. Chicago*, 561 U.S. 742 (2010) (relating to the right to bear arms under the Second Amendment).

123. *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

124. *Id.* at 396.

125. *Id.* at 402. Just two years later in *Pierce v. Soc’y of Sisters*, the Court reaffirmed *Meyer*’s holdings, striking down a law that interfered with the liberty of parents to direct the upbringing and education of their children. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state. . . .”).

126. *Meyer*, 262 U.S. at 402 (“That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.”).

127. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 538 (1942).

128. *Id.* at 541.

constitute a deprivation of a basic liberty; the right to procreate was a basic civil right.<sup>129</sup>

In *Rochin v. California*,<sup>130</sup> the Court expanded the description of a fundamental right to not only be “so rooted in the traditions and conscience of our people as to be ranked as fundamental”<sup>131</sup> but to also include something “implicit in the concept of ordered liberty.”<sup>132</sup> While this description did not provide a conceivable scope, the words’ history, on one end, provided a historical context granting certain terms workable definitions.<sup>133</sup> The Court noted, for example, some words are so understood that they are merely visual symbols whose meaning cannot be changed.<sup>134</sup> On the other end, some words were not afforded the luxury of a fixed meaning, requiring courts to employ a “continuing process of application.”<sup>135</sup> Judges may not substitute their personal appreciations for the strictures that bind them.<sup>136</sup> “The vague contours of the Due Process Clause” are guided by considerations that are submerged in reason and in compelling legal traditions.<sup>137</sup> Due process requires a disinterested assessment of all the facts, detached evaluation of conflicting claims, and a judgment that reconciles “the needs both of continuity and *change in a progressive society*.”<sup>138</sup>

Moreover, representing a divergence from the traditional approach, *Griswold* and *Eisenstadt v. Baird* did not rely on whether the right to use contraception was rooted in American history.<sup>139</sup> Instead, the *Griswold* Court discussed the ‘penumbras’ associated with the Bill of Rights and determined that rights related to privacy were found in

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129. *Id.*

130. *Rochin v. California*, 342 U.S. 165 (1952).

131. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

132. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). *Palko* involved an appeal by a defendant after he was convicted of second-degree murder and subsequently ordered to have a retrial, which ended with him being convicted of first-degree murder and sentenced to death. He argued the retrial was an infringement of his Fifth Amendment safeguard from ‘double jeopardy,’ and thereby a violation of his Fourteenth Amendment Due Process rights. The Court disagreed. *See id.* at 325.

133. *Rochin*, 342 U.S. at 169–70.

134. *Id.* at 170.

135. *Id.*

136. *Id.*

137. *Id.* at 170–71.

138. *Id.* at 172 (“In each case ‘due process of law’ requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.”) (emphasis added) (internal citation omitted).

139. *Wolf*, *supra* note 108, at 119.

several amendments.<sup>140</sup> Relying on the newfound privacy rights, the Court then added, just before ending, that privacy (not the use of contraception) predates the Bill of Rights, political parties, and our school system.<sup>141</sup> Extending the application of *Griswold*, the *Eisenstadt* Court decided the case on Equal Protection grounds but noted, in dicta, that “[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters *so fundamentally affecting a person* as the decision whether to bear or beget a child.”<sup>142</sup> History was again mentioned, but no relation to the use of contraceptives was drawn.<sup>143</sup>

*Loving v. Virginia*, brought the return of tradition to fundamental right jurisprudence.<sup>144</sup> In few words, the Supreme Court reintroduced the notion that the freedom to marry has been a crucial personal right at the root of the orderly pursuit of happiness by free men.<sup>145</sup> An infringement on such a basic right on the basis of race was strictly prohibited by the Due Process Clause.<sup>146</sup> The Court here, as it did in *Griswold*, did not supplant a narrower right into a broader ‘penumbra’ in order to establish its fundamentality.<sup>147</sup>

An analysis of tradition in American legal history is found in *Roe v. Wade*.<sup>148</sup> The Court initially noted that criminal abortion laws were a “recent vintage” and not stemmed from ancient or common law origins.<sup>149</sup> In fact, early writings discussing abortion at common law show that the debate surrounding abortion had not been an advent of modern societies.<sup>150</sup> Early 20<sup>th</sup> century English cases and statutes even evinced an appreciation for the mother’s life, showing a trend that moved toward lifting criminal sanctions for abortions arising out of medical necessity.<sup>151</sup> American law showed something different; it

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140. *See* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding elements of privacy in the First, Third, Fourth, Fifth, and Ninth Amendments).

141. *Id.* at 486.

142. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis added).

143. *Id.*

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

145. *Id.*

146. *Id.*

147. *Compare id. with* *Griswold v. Connecticut*, 381 U.S. 479 (1965).

148. *See generally* *Roe v. Wade*, 410 U.S. 113 (1973) (analyzing American legal history in reaching its conclusion).

149. *Id.* at 134.

150. *Id.*

151. *See id.* at 137 (discussing a newly enacted abortion law at the time).

wasn't until the mid-1800s that abortion restrictions became commonplace.<sup>152</sup> Societal perception of the right sought did not vest solely in legislative enactments, the Court implied, as it also considered the stance the American Medical Association and the American Public Health Association took.<sup>153</sup> The historical evidence, thus, could only lead to one conclusion: the right to an abortion was deeply rooted in our nation's history.<sup>154</sup>

Just under two decades later, however, the Supreme Court in *Planned Parenthood v. Casey* did not employ such an extensive legal history analysis in revisiting the right to an abortion.<sup>155</sup> Rather, the Court turned back to a different type of tradition. Due process once again became a safeguard for rights that could not be determined by the mere reference to a standard; it was more fluid.<sup>156</sup> Instead, substantive due process claims called for the bench to exercise "reasoned judgment."<sup>157</sup> Conscious of their duty to define liberty for all, the Court referenced *Roe*, *Griswold*, and *Eisenstadt* to support their position because those cases involved personal decisions about the meaning of procreation and the responsibility and respect for it.<sup>158</sup>

While substantive due process cases prior to *Glucksberg* applied somewhat differing concepts when establishing a new right's existence, the lack of a cohesive standard did not leave future courts completely in want of some framework upon which to base their legal conclusions.<sup>159</sup> The prior decisions show that tradition, either legal

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152. *Id.*

153. *Id.*

154. *See generally id.*

155. *See generally* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (in reaching its decision the Court did not employ as extensive legal historical analysis when compared to earlier decisions like *Roe*).

156. *Id.* at 847–51. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J. dissenting) (“Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.”).

157. *Casey*, 505 U.S. at 849.

158. *Id.* at 853 (“These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*.”).

159. *See* discussion on Foundational Fundamental Rights, *supra* Part Two Subdivision A.

(seemingly American and English) or societal, is an important factor at the crux of forming a new right.<sup>160</sup> The intimacy and personal nature of the right claimed are likewise essential to the analysis.<sup>161</sup> Although the oft-quoted passage authored by Justice Harlan in *Poe* called for a fluid interpretation of the substantive due process rights,<sup>162</sup> *Glucksberg* shaped a test that is still observed when determining certain fundamental rights today.

## II. *Washington v. Glucksberg: A Fundamental Test*

After years of jurisprudence guided by nothing more than vague overtures and inconsistent analyses, the Supreme Court, in *Washington v. Glucksberg*, created a test for determining whether an alleged right was to be granted the status of “fundamental.”<sup>163</sup>

The respondents in *Glucksberg* sought to establish a fundamental right to physician-assisted suicide. The respondents were four physicians practicing in Washington, all of whom would occasionally treat terminally ill patients.<sup>164</sup> Washington, at the time, had criminalized “promoting a suicide attempt.”<sup>165</sup> The respondents claim that but for Washington’s anti-assisted suicide statutes, they would have helped patients end their suffering.<sup>166</sup> The plaintiffs’ asserted liberty interest sought protection for a “personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide.”<sup>167</sup> The District Court found the laws unconstitutional; the Ninth Circuit originally reversed stating that never once in the 205-year history of the Nation has the right to kill one’s self been found.<sup>168</sup> After an en banc

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160. See generally *Casey*, 505 U.S. 833; *Roe v. Wade*, 410 U.S. 113 (1973); *Rochin v. California*, 342 U.S. 165 (1952); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 538 (1942); *Moore v. City of East Cleveland*, 431 U.S. 494 (1932); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

161. See generally *Casey*, 505 U.S. 833; *Roe*, 410 U.S. 113; *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Rochin*, 342 U.S. 165; *Skinner*, 316 U.S. 535; *Moore*, 431 U.S. 494; *Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390.

162. See *supra* note 156 and accompanying text.

163. See generally *Washington v. Glucksberg*, 521 U.S. 702 (1997) (creating a test for determining whether a fundamental right exists).

164. *Id.* at 707.

165. *Id.*

166. *Id.*

167. *Id.* at 708.

168. *Id.*

rehearing, the decision was reversed, and the Supreme Court granted cert.<sup>169</sup>

Central to the opinion was the Court's demarcation of the proper test to use when breaking ground in the realm of fundamental rights. The newly formed test required the right to be "deeply rooted in the Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed" and carefully described.<sup>170</sup>

Since the institution of substantive due process jurisprudence, the concept that a fundamental right should be firmly established in the Nation's origins, in some form, was encompassed in the description of what constitutes such a right.<sup>171</sup> The history and legal traditions as well as the Nation's practices provide a framework that curtails the judiciary's inclination to shape the Due Process Clause according to its own ideas.<sup>172</sup> The Court made clear that its idea of substantive due process jurisprudence development has outlined the liberty harbored by the Due Process Clause through carefully refined concrete examples of rights found to be deeply rooted in American legal tradition.<sup>173</sup> This method removes, or lessens, the subjective components inherently involved in judicial review.<sup>174</sup> Further explaining its reasoning and seemingly addressing *Rochin*, the Court added that the inclusion of a threshold requirement, the implication of a fundamental right requiring a higher standard of scrutiny, avoids "the need for complex balancing of competing interests in every case."<sup>175</sup>

To determine whether the respondents' claims implicated a fundamental right, the Court first looked to the states' statutory history.<sup>176</sup> The Court found suicide bans had a long-standing place in history; the statutes, inclusive of nearly every state, established a commitment to protect and preserve all human life.<sup>177</sup> In support, the

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169. *Id.*

170. *Id.* at 721.

171. See discussion on Foundational Fundamental Rights, *supra* Part Two Subdivision A.

172. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.").

173. *Glucksberg*, 521 U.S. at 722.

174. *Id.*

175. *Id.*

176. *Id.* at 710.

177. *Id.* at 711 ("Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages.")

Court referenced Anglo-American law dating back 700 years as well as English treatises from the 18th and 19th centuries that condemned suicide.<sup>178</sup> By the time the Colonies were established, an overall shift in societal perception of suicide displaced harsh penalties that accompanied crimes relating thereto.<sup>179</sup> This change notwithstanding, society had not come to accept suicide; rather, society still thought suicide to be a grievous wrong, illustrated by enacting assisted-suicide bans.<sup>180</sup> Despite ample opportunity to reexamine the laws, the Court noted, states have continually reaffirmed their place in American law.<sup>181</sup>

Under the Court's reasoning, when determining whether a right is deeply rooted in this Nation's history, it is permissible, then, to assess: laws of the Nations that existed before the United States; laws and attitudes of other states; treatises discussing societal attitudes and perception of the right; and the nature of the change, if any, that is shown between time periods.<sup>182</sup>

More recent and less discussed than its counterpart, the second prong of the Court's test presents more of a challenge initially. What exactly is required to provide a "careful description" is difficult to articulate, as an explanation is rarely, if ever, provided.<sup>183</sup> The Court in *Glucksberg* offers little more. It states each of the ways in which the physician-assisted suicide right has been described, including the Ninth Circuit's description and the respondents' descriptions.<sup>184</sup> To provide further insight, Justice Rehnquist referred to *Cruzan* to show that it is often referred to as the "right to die" case when, in fact, the Court's iteration was "more precise:" the "right to refuse lifesaving hydration

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178. *Id.* (citing *Cruzan v. Dir. of Missouri Dep't of Health*, 497 U.S. 261, 294–95 (1990)).

179. *See id.* at 712–13 (citing *Cruzan*, 497 U.S. at 294 (holding that while many colonies started with harsh penalties for suicide, they later abolished those penalties)).

180. *Id.* at 714–15.

181. *Id.* at 716.

182. *See generally id.* (holding that review of laws, attitudes, treatises, perceptions, and changes over time about a right can inform courts as to whether the right is deeply rooted in the history of a nation).

183. *See, e.g., id.* at 721–24 (reviewing use of "careful description" analysis in substantive due process jurisprudence); *Animal Legal Def. Fund v. United States*, 404 F. Supp.3d 1294, 1301 (D. Or. 2019) (holding that a plaintiff must use a careful description to start the process of establishing a right as fundamental); *Reno v. Flores*, 507 U.S. 292, 302–04 (1993) (holding that substantive due process analysis must begin with a careful description of the right asserted); *Collins v. City of Harker Heights*, 503 U.S. 115, 125–27 (1992) (holding that courts have been reluctant to expand fundamental rights under substantive due process doctrine).

184. *Glucksberg*, 521 U.S. at 723 (referencing other descriptions of the right, such as "right to die," "liberty to choose how to die," "right to control of one's final days," "right to choose a humane, dignified death," and "liberty to shape death").

and nutrition.”<sup>185</sup> He quickly moved to the issue at bar, providing that the question in the case is actually whether due process safeguards a “right to commit suicide with another’s assistance,” the self-proclaimed carefully described right.<sup>186</sup>

The impression the Court leaves is that the description must not be overbroad, and, on the other end, it can’t be too narrow. It must describe exactly what the party is seeking.<sup>187</sup> In other words, the right must be considered in its most specific form.<sup>188</sup> Anything more, or less, would not meet the strict limits of the prong, relegating the claim to almost certain defeat, as a mere rational basis for infringing on the “right” would prevail.

The almost insurmountable *Glucksberg* test reaffirmed the Court’s reluctance to expand the scope of constitutional protection for unenumerated rights. Further, forcing complainants to not only describe their right with near perfect particularity but to also show that its roots are profoundly embedded in history, outright confronting the notion

that substantive due process protects an evolving scope of rights.<sup>189</sup> *Glucksberg*’s refusal to exact a standard that recognized the “change in a progressive society”<sup>190</sup> left proponents of the canons expressed in *Poe*’s dissent unsatisfied.<sup>191</sup> That is, until Justice Kennedy dug around *Glucksberg*’s wooden posts to carve out another avenue for finding fundamental rights.<sup>192</sup>

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185. *Id.* (quoting *Cruzan v. Dir. of Missouri Dep’t of Health*, 497 U.S. 261, 279 (1990)).

186. *Id.* at 724.

187. *See id.* at 724 (holding that “the right to commit suicide with another’s assistance” is a “careful description”); *Cruzan*, 497 U.S. at 279 (reflecting court’s hesitancy to extend end-of-life interests beyond denial of food and hydration); *Flores*, 507 U.S. at 302 (holding that judicial restraint called for courts to exercise caution when describing liberty interests); *Collins*, 503 U.S. at 125 (holding that the Court has been hesitant to extend liberty interests).

188. Dave Rodkey, *Making Sense of Obergefell: A Suggested Uniform Substantive Due Process Standard*, 79 U. PITT. L. REV. 753, 756 (2018).

189. Timothy Lydon, *If the Parole Board Blunders, Does the Fourteenth Amendment Set the Prisoner Free? Balancing the Liberty Interests of Erroneously Released Prisoners*, 88 GEO. L.J. 565, 578 (2000).

190. *C.f. Rochin v. California*, 342 U.S. 165, 172 (1952) (recognizing the balance that courts must strike between continuity and change in progressive society).

191. *See Glucksberg*, 521 U.S. at 756 (Souter, J., concurring) (supporting Harlan’s analysis); *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (arguing that due process requires a balancing between tradition and breaking tradition).

192. *See generally Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that the right to marry is a fundamental liberty).

### III. *Obergefell v. Hodges: A Break from Tradition*

Nearly two decades of adherence to the principles formulated in *Glucksberg* culminated in a controversy that could not be molded to fit the immovable boundaries set by the Court. Understanding the magnitude of its decision, the Court carefully crafted an opinion that threaded its reasoning through the strictures of *Glucksberg*, tailoring, not supplanting, a more fluid design to substantive due process jurisprudence.<sup>193</sup>

This tailoring process was conducted via *Obergefell*. The case involved 14 similarly situated plaintiffs, all of whom were denied the ability to legally marry their partner because they were of the same sex.<sup>194</sup> Justice Kennedy, writing for the Court, conceded that traditionally marriage had been the union between man and woman.<sup>195</sup> Over time, though, this union that was once viewed as a contract “based on political, religious, and financial concerns” transformed in several ways to keep up with changing perceptions.<sup>196</sup> To illustrate, the Court took to several decisions, each evincing not just a growing tolerance but an overall acceptance of same-sex relationships.<sup>197</sup> This change in societal perception and legal footing is at the very crux of Justice Kennedy’s argument.<sup>198</sup>

More specifically, the Court held that the Due Process Clause protects not only those interests enumerated in the Bill of Rights but also “certain personal choices central to individual dignity and autonomy, *including intimate choices that define personal identity and*

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193. *Id.* at 670–71.

194. *Id.* at 651–55.

195. *Id.* at 657.

196. *Id.* at 660 (“Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.”).

197. See generally *U.S. v. Windsor*, 570 U.S. 744 (2013) (invalidating the Defense of Marriage Act); *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick* and a Texas law that made same-sex intimacy a crime); *Romer v. Evans*, 517 U.S. 620 (1996) (invalidating an amendment to Colorado’s constitution that discriminated against people based on sexual orientation); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding the Massachusetts Constitution guaranteed same-sex couples the right to marry); *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (finding a law classified on the basis of sex was subject to strict scrutiny).

198. See Miriam Galston, *Polarization at the Supreme Court? Substantive Due Process Through the Prism of Legal Theory*, 11 WASH. U. JURIS. REV. 255, 282–83 (2019) (analyzing the majority opinion and Chief Justice Roberts’ dissenting opinion against the legal theories of H.L.A. Hart and Lon Fuller).

*beliefs*.”<sup>199</sup> Deciphering its scope is an enduring responsibility that “has not been reduced to any formula.”<sup>200</sup> With just one sentence stolen from Justice Harlan, *Obergefell* quickly strayed from *Glucksberg*, gifting an interpretation of the Due Process Clause that had long been sought.<sup>201</sup> Instead of applying a test, the Clause requires courts to simply exercise reasoned judgment when establishing liberty interests.<sup>202</sup> Seemingly addressing *Glucksberg*, the Court concedes that history and tradition may guide and discipline the assessment, however, they “do not set its outer boundaries.”<sup>203</sup> Using history as a mere guide and nothing more, thus, prevents the past from ruling the present.<sup>204</sup>

The Drafters did not claim to understand the breadth of the freedoms safeguarded by the Constitution; instead, they vested in future generations the privilege of enjoying liberty rights as its meaning is learned.<sup>205</sup> Having laid the guiding tenets for its new analysis, the Court referenced each of the prior cases in which it held the right to marry was fundamental to emphasize that the “essential attributes of the right [to marry] based in history, tradition, and other constitutional liberties inherent in [the] intimate bond” drive whether the rationale used in the prior cases should apply to same-sex couples.<sup>206</sup>

The Court found four principles that provide support for concluding the right to marry is fundamental. The first principle is couched in the idea that marriage is innate to the concept of individual autonomy.<sup>207</sup> Similar to choices regarding contraception, familial relationships, procreation and childrearing, choices regarding marriage are some of the *most intimate an individual can make*.<sup>208</sup> Second,

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199. See *Obergefell*, 576 U.S. at 663 (emphasis added) (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (upholding the right to marital privacy)); *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965) (establishing the right to use contraceptives).

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

201. *Id.* (citing *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

202. *Id.* at 664 (“That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements.”).

203. *Id.*

204. *Id.* (“The nature of injustice is that we may not always see it in our own times.”).

205. *Id.*

206. *Id.* at 665 (citation omitted).

207. *Id.* (“This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause.”) (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

208. *Id.* at 666 (citing *Lawrence v. Texas*, 539 U.S. 558, 574 (2003)).

marriage supports a “two-person union unlike any other in its importance to the committed individuals,” a truly *intimate* association.<sup>209</sup> A third canon is that the right to marry protects children and families alike, drawing meaning from the tangential rights of procreation, education and childrearing.<sup>210</sup> Precluding same-sex couples from marrying would, thus, have harmful and humiliating effects on their children, the Court averred.<sup>211</sup> Lastly, marriage is a “keystone of our social order.”<sup>212</sup> These tenets when applied to the issue of same-sex marriage demonstrate that the Due Process Clause shields it from any encroachment.<sup>213</sup>

The Court then pointed out that a class of people is being prohibited from acting in a way that others were not. By connecting to the Equal Protection reasoning, the Court further secures the right to same-sex marriage.<sup>214</sup> But, camouflaged in the Equal Protection reasoning is the Court’s careful maneuvering of the *Glucksberg* test.<sup>215</sup> In no more than three paragraphs the Court acknowledges that *Glucksberg* did, indeed, call for a careful description.<sup>216</sup> However, under Supreme Court precedent, the test as used in *Glucksberg* was suitable for the right claimed therein, but applying it to a fundamental right relating to marriage and intimacy would be wholly inconsistent.<sup>217</sup> *Loving*, *Turner*, and *Zablocki* all addressed the “right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.”<sup>218</sup>

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209. Rodkey, *supra* note 188, at 762–63.

210. *Obergefell*, 576 U.S. at 668 (“By giving recognition and legal structure to their parents’ relationship, marriage allows children ‘to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.’”) (quoting *United States v. Windsor*, 570 U.S. 744, 772 (2013)).

211. *Id.* at 646.

212. *Id.* (holding that marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress.”) (citing *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

213. *See generally id.* (holding that the Equal Protection Clause and Due Process Clause ensure same-sex couples the right to marry).

214. *See* Rodkey, *supra* note 188, at 764 (citing Kenji Yoshino, *The Supreme Court 2014 Term: Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015)) (reasoning that invocation of both the Due Process and Equal Protection Clauses afforded plaintiffs a negative right to be free from government intervention and a positive right to enjoy the marital benefits that opposite-sex couples enjoy).

215. *Obergefell*, 576 U.S. at 671.

216. *Id.*

217. *Id.*

218. *Id.* (citations omitted).

Though critics argue that the majority's opinion effectively overruled *Glucksberg*,<sup>219</sup> Justice Kennedy meticulously articulated a new course for finding certain fundamental rights, careful not to offend *Glucksberg*.<sup>220</sup> Exceptionally intimate and personal rights relating to or stemming from the right to marry require courts to examine the alleged right through a more fluid, evolving lens, exercising reasoned judgment instead of the unyielding constraints of a test better suited to adjudge a right dissimilar to marriage.<sup>221</sup>

## NO FUNDAMENTAL RIGHT TO THE ENVIRONMENT

The fundamental right to a climate that can sustain life is not deeply rooted in the history and traditions of the United States. Under the current formulation in *Glucksberg*, as well as in cases that came before and after, a fundamental right must be shown to be deeply rooted in this Nation's history and implicit to ordered liberty.<sup>222</sup> While the *Juliana* court stated in a conclusory fashion that "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society[.]" the court provided no binding authority.<sup>223</sup> Before citing to another nation's precedent, Judge Aiken simply parsed a sentence from *Maynard v. Hill* to support her one-of-a-kind holding, drawing parallels between marriage as the foundation of the family and a stable climate as "quite literally the foundation 'of society, without which there would be neither civilization nor progress.'"<sup>224</sup> A closer look, though, proves otherwise.

### I. *Environmental Protection is Not Deeply Rooted in History*

This Nation's traditions and legal history show that environmental preservation in the United States is, when compared to other fundamental rights, a relatively new concept.<sup>225</sup> For instance, the first

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219. See *id.* at 702 (Roberts, C.J., dissenting) ("It is revealing that the majority's position requires it to effectively overrule *Glucksberg*, the leading modern case setting the bounds of substantive due process.").

220. See *id.* at 671 (holding that the standard in *Glucksberg* is useful for some cases, but it was not for marriage).

221. See generally *id.* (adopting a test for determining fundamental rights which respected *Glucksberg* but recognized its inability to apply to certain rights).

222. See *supra* Part Two Subdivision B.

223. *Juliana v. United States*, 217 F. Supp.3d 1224, 1250 (2016).

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

225. See *supra* Part Two Subdivision A.

federal environmental law was not enacted until 1899.<sup>226</sup> Major federal environmental legislation did not begin to take force until the 1960s, around the beginning of the modern environmental movement.<sup>227</sup> Moreover, Yosemite, one of the first parks preserving land for public enjoyment, was not established until 1864 by President Abraham Lincoln when it was ceded to California.<sup>228</sup> In fact, Yellowstone, the first *national* park, was created in 1872 when Ulysses S. Grant signed it into law.<sup>229</sup> Further, in 1892, the Supreme Court issued one of the first opinions that pertained to the preservation of the environment in *Illinois Central*.<sup>230</sup> In that decision, the Court decided that the Public Trust Doctrine applied to a portion of lakeshore in Illinois near Chicago, prohibiting its use to serve the railroad company and preserving the land in trust for the benefit of the People.<sup>231</sup> However, *Illinois Central* applied to the state government to hold land in trust for its constituents, not to the federal government.<sup>232</sup>

While the federal government has been slow to effectuate change regarding environmental policies, states have, to some extent, taken their own initiative. Indeed, six states have provided some element of environmental protection in their constitutions.<sup>233</sup> Arguably evidence of shifting attitudes, the change in the six states' constitutions took place over two decades only before coming to a dead stop—with environmental amendments remaining dormant since 1987.<sup>234</sup> In *Glucksberg*, nearly *every* state outlawed physician-assisted suicide, and

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226. See Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401–67 (2006) (prohibiting discarding of any refuse matter into navigable U.S. waters); see also Andrew Franz, *Crimes Against Water: The Rivers and Harbors Act of 1899*, 23 TUL. ENV'T L. J. 255, 255–57 (2010).

227. 42 U.S.C. § 9601 (1980) (Comprehensive Environmental Response, Compensation and Liability Act); 42 U.S.C. § 6901 (1976) (Resource Conservation and Recovery Act); 33 U.S.C. § 1251 (1972) (Clean Water Act); 42 U.S.C. § 7401 (1963) (Clean Air Act).

228. Sarah Corapi, *150 Years Ago, Abraham Lincoln Signed the Yosemite Grant Act*, PBS NEWS HOUR, (June 30, 2014), <https://www.pbs.org/newshour/nation/yosemite-turns-150>.

229. *Birth of a National Park*, NATIONAL PARK SERVICE, <https://www.nps.gov/yell/learn/historyculture/yellowstoneestablishment.htm> (last visited Sept. 25, 2020).

230. See generally *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (holding that the state of Illinois has fee simple over the lakebed of Lake Michigan).

231. *Id.* at 404.

232. Sharon Megdal, *The Forgotten Sector: Arizona Water Law and the Environment*, 1 ARIZ. J. ENV'T L. & POL'Y 243 (2011).

233. See generally Audrey Wall, *State Constitutions and Environmental Bills of Right*, THE COUNCIL OF STATE GOV'TS (Sept. 1, 2015), <https://knowledgecenter.csg.org/kc/content/state-constitutions-and-environmental-bills-rights> (discussing the environmental provisions in the State Constitutions of Illinois, Pennsylvania, Montana, Massachusetts, Hawaii, and Rhode Island).

234. *Id.* at 18 (showing Illinois was the first to amend its constitution in 1970 and Rhode Island was the last in 1987).

when the opportunity arose to remove those laws, the legislatures reaffirmed their positions.<sup>235</sup> Evidently, only when there is a general consensus will there be sufficient evidence to do more than tip the scale ever so slightly in favor of finding a fundamental right relating to the environment.<sup>236</sup>

Though the notion of *preserving* lands dates back more than 140 years, only in 1896 was society made aware of the possibility that GHG emissions could have a harmful effect on the climate.<sup>237</sup> Given the unprecedented nature of the findings, the study did not receive the credit it was due until the 1930s when the effects of the Second Industrial Revolution were more aptly realized.<sup>238</sup> For decades, still, Svante Arrhenius' study evaded peer review and expansion. It was not until relatively recently that a general consensus as to the existence of climate change in the scientific community was obtained.<sup>239</sup>

The mere fact that the threat from climate change has become widely recognized does not alone afford the environment protection implicitly safeguarded by the Constitution. The laws of this Nation have not proven that the environment, let alone the climate, is worthy of bearing the "fundamental" status. Perhaps, the failure to shield anything relating to the environment was an oversight justly imparted unto the Drafters. The refusal of subsequent generations to manifestly remedy their shortcomings has guaranteed that, under the current framework, the Due Process Clause is not the proper mechanism through which the *Juliana* plaintiffs may seek redress.

## II. *Plaintiffs' Claimed Right is Not Carefully Described*

Assuming the plaintiffs' claims satisfy the first prong contrary to the above analysis, they would still have to prove their fundamental right has been carefully described. A careful description requires the right to be labeled with precision. Plaintiffs allege that "fundamental to our scheme or ordered liberty . . . is the implied right to a stable climate system and an atmosphere and oceans that are free from dangerous levels of anthropogenic CO<sub>2</sub>."<sup>240</sup> Claiming a right to a stable

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235. See *Washington v. Glucksberg*, 521 U.S. 702, 717 (1997) (reviewing failure of legalization of physician-assisted suicide in states).

236. *C.f. id.* (implying that the recognition of a fundamental right only comes with widespread public consensus).

237. See generally Arrhenius, *supra* note 14 (discussing the harmful impacts of carbonic acid on the atmosphere).

238. Harding, *supra* note 12.

239. *Id.*

240. First Am. Compl., *supra* note 17, ¶ 304.

climate is overbroad and, if established, would cause a flurry of litigation. The climate is an inherently unpredictable system, determining the baseline of a stable climate would be nearly impossible, especially as GHGs continued to be emitted.<sup>241</sup>

Each of the established fundamental rights has an identifiable scope,<sup>242</sup> making a violation of it more easily ascertainable. The same cannot be said for a right relating to the environment. For example, an injury from a violation of the fundamental right to direct the upbringing of one's children will stem from a clear source and affect a family. Infringing on a fundamental right will likely have multiple sources and affect multiple people. The environment is vast, but fundamental rights require specificity and a narrow scope. Delineating what constitutes a violation would cause the right to be so narrow it only applies in very select situations, effectively caging its purpose, or so broad that nothing would offend it, rendering the right nothing more than a shell.

The district court, though, more aptly described the right as one to a "climate system capable of sustaining human life."<sup>243</sup> However, this too does not meet the stringent standard required by *Glucksberg*. Currently, nothing would offend this right, save a toxic pollution event so large that its effects would be felt immediately, in that instance there would be a clear source and a clear right infringed. Additionally, the injuries plaintiffs endured did not render their environment completely incapable of sustaining life and do not run afoul of the right created by Judge Aiken.<sup>244</sup> The right the plaintiffs seek is very particular and grand in scale, so a careful description is unlikely to be articulated given the breadth of plaintiffs' claims. Therefore, under *Glucksberg*, the plaintiffs' and the court's claims must fail as the right to a climate capable of sustaining human life is neither deeply rooted in this Nation's history nor is it carefully described.

### III. *Juliana's Reliance on Obergefell is Misplaced*

Perhaps, the reason why Judge Aiken attempted to exploit the fluidity espoused in *Obergefell* is that *Juliana's* fundamental right cannot pass *Glucksberg's* muster. *Juliana* requires more

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241. Michael Hopkin, *Climate Sensitivity 'Inherently Unpredictable,'* NATURE (Oct. 25, 2007), <https://www.nature.com/articles/news.2007.198>.

242. See cases cited *infra* note 187 (reviewing "careful description" doctrine).

243. *Juliana v. United States*, 217 F. Supp.3d 1224, 1250 (D. Or. 2016).

244. See First Am. Compl., *supra* note 17 (discussing mostly psychological trauma as the past harm).

maneuverability, an analysis that is more malleable to stand a chance. The right established in *Juliana* was completely non-existent, requiring the court to employ its “reasoned judgment.”<sup>245</sup> Thereby, the Court relied heavily on the tenets of *Obergefell*,<sup>246</sup> but for several reasons, that reliance was fatally misguided.

*Obergefell* was revolutionary in its own right, not only for its holding but also for finally adopting the often-cited reasoning disseminated by Justice Harlan in *Poe*.<sup>247</sup> The evolving standard of a fundamental right allowed plaintiffs, such as those in *Juliana*, to argue that establishing a fundamental right was now justifiable, it could be couched in an idea that was no longer controlled by history. However, the *Obergefell* court was cautious in deviating from Supreme Court precedent: the fluid analysis penned by Justice Kennedy applied to liberty interests involving “marriage and intimacy.”<sup>248</sup> A right capable of sustaining human life cannot be said to be encompassed in any marital right, even if the environment may “underly[] and support[] other vital liberties.”<sup>249</sup> Finding a connection there would serve to further muddy the already murky water that is substantive due process jurisprudence.

Resting the right instead in the line of cases that sustain fundamental rights relating to intimacy provides more of a footing. But those rights, the right to an abortion and the right to contraception for example, are deeply personal and are experienced by no two persons the same.<sup>250</sup> They are very intimate decisions that dictate what one does with one’s own body. The right thus protects a person, exercising self-control, from any government intervening in or dictating how that person should exercise self-control. In contrast, protecting the environment from dangerous levels of GHG emissions does not protect an individual from employing their own faculties in making personal decisions.

Judge Aiken attempted to circumvent these limitations in *Obergefell* by reiterating that courts may find new fundamental rights,

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245. *Juliana*, 217 F. Supp.3d at 1250.

246. *Id.*

247. See *Poe v. Ullman*, 367 U.S. 497, 542–43 (1961) (Harlan, J., dissenting) (discussing liberty as a continuum which includes freedom from purposeless restraint).

248. *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (“Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.”).

249. *Juliana*, 217 F. Supp.3d at 1250.

250. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (discussing the effects of pregnancy).

as the “generations that wrote the Bill of Rights” did not purport to know the entire scope of the liberties protected therein.<sup>251</sup> *Obergefell* is distinguishable because it, as well as the cases on which it relies, address a discord between constitutional protections and “a received legal stricture.”<sup>252</sup> Surely, the absence of a stricture cannot itself be a stricture. The plaintiffs in *Juliana* do not seek to strike down a law that prohibits them from exercising fundamental liberties. Instead, they ask for the court to direct the federal government to develop a plan that moves away from the use of fossil fuels as the main source of energy.<sup>253</sup> They ask for positive rights to government action in lieu of negative rights to be free from government action.<sup>254</sup>

Importantly, *Obergefell* also notes in each line of cases involving the right to marry that the Court asked whether “there was sufficient justification for excluding the relevant class from the right.”<sup>255</sup> In *Juliana*, the plaintiffs seek to establish a right for all.<sup>256</sup> *Obergefell* merely addressed whether an expansion of the current right to marry was necessary to protect the liberty interests of same-sex couples.<sup>257</sup> The Court in *Obergefell* also noted that there were several decades of litigation, legislation, and scholarship that all culminated in its decision.<sup>258</sup> *Obergefell*, in this way, is more closely aligned with *Brown v. Board of Education*,<sup>259</sup> since the groundbreaking holding took place in a piecemeal fashion, not simply one fell swoop.<sup>260</sup> *Juliana* attempts the unprecedented: to create a fundamental right to the environment, do it with one case, and restrict the government’s abilities. This goes against a key portion of *Obergefell*, which simply expanded an already determined and identifiable scope of an existing right.

While a lack of history is not dispositive under *Obergefell*, Justice Kennedy still wrote at length about how both marriage and same-sex

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251. *Juliana*, 217 F. Supp.3d at 1249 (quoting *Obergefell*, 576 U.S. at 664).

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

253. *Juliana*, 217 F. Supp.3d at 1233.

254. Rodkey, *supra* note 188.

255. *Obergefell*, 576 U.S. at 671.

256. *See generally Juliana*, 217 F. Supp.3d 1224 (seeking a right to a habitable climate).

257. *See generally Obergefell*, 576 U.S. 644 (holding that the right to marry extends to couples of the same sex).

258. *Id.* at 661 (citing *United States v. Windsor*, 570 U.S. 744 (2013); *Lawrence v. Texas*, 539 U.S. 558, 575 (2003); *Romer v. Evans*, 517 U.S. 620 (1996)).

259. *See generally Brown v. Board of Ed.*, 347 U.S. 483 (1954). *Brown* was one of the only other instances in which the federal courts have directed the federal government to take action on such a large scale.

260. *See supra* note 86 and accompanying text.

relationships have changed in the eyes of the law and society.<sup>261</sup> It cannot be denied that society's views pertaining to climate change have also changed dramatically in the past decade alone, but in the eyes of the law it is still the 1970s. *Obergefell* made the last leap to align the jurisprudence of protected liberty interests up with society. *Juliana* seeks to bridge a gap that is far too wide to be done in one case. As with the right to marry, a fundamental right relating to the environment needs to be parsed out, the boundaries must be discovered before it can begin to be shaped.

Perhaps, *Juliana* is the *Bowers* equivalent, but a fundamental right to a climate capable of sustaining human life is not a liberty interest protected by the Constitution under the current formulations governing Substantive Due Process analysis.

### CONCLUSION

Twenty-one plaintiffs, most of whom cannot vote for themselves to obtain a future they desire, sought redress by instituting what would come to be a groundbreaking lawsuit. From the outset, the plaintiffs' ask was simple: constitutional protection for a right relating to the environment. Met by an adversary with seemingly unlimited legal resources, the plaintiffs managed to not only initially surmount the government's arguments seeking dismissal of the case in its entirety but also secure the very protection they sought. For the first time, District Court Judge Ann Aiken held the Due Process Clause protected a fundamental right to an environment that can sustain human life. In doing so, the judge relied heavily on Justice Kennedy's adoption of a fluid analysis for finding such a right as iterated in *Obergefell*.

However, while Justice Kennedy's formulation is more in line with nearly a century of Supreme Court precedent, his deviation from heavily relying on the history and traditions of the United States is not. As shown, decades of precedent unforgivingly live and die on the notion that only those things that are so rooted in the United States' history and tradition can be said to be essentially implied in the Constitution. It was these cases that had already culminated in the Supreme Court's attempt to delineate a test in *Glucksberg*. So long as those rights which were long-established in American history were carefully described, the Due Process Clause would afford them protection from government infringement.

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261. *Obergefell*, 574 U.S. at 660–63.

Understanding this rigidity, Judge Aiken utilized Justice Kennedy's model. However, under both analyses, the *Juliana* right was found in error. First, under *Glucksberg*, environmental conservation is not deeply rooted in American legal traditions. While instances of environmental conservation arguably predate the first national park, meaningful steps are few and far between. When compared to other rights, environmental protection cannot be said to be essentially implied in the Constitution. Additionally, the court's description was not careful enough. It would act to include environmental infringement not meant to be covered, and if construed narrowly to avoid overbreadth, it would become toothless.

Second, considering the analysis in *Obergefell* shows that the right sought in *Juliana* does not fit its mold. *Obergefell* was a part of piecemeal litigation which expanded a right that already had boundaries and an identifiable scope. *Juliana* broke new ground. Moreover, *Obergefell* explicitly applied to the most intimate of rights, the kind that fall under the umbrella of a right to privacy. All of those rights involve personal decisions, not a decision that will affect others. As such, the right found in *Juliana* cannot be sustained under the current substantive Due Process jurisprudence, leaving the plaintiffs to search for an alternative method to stave off the impending climate change threat. Simply because the claims are not supported by fundamental right jurisprudence does not mean they cannot be sought in other areas of law or under different doctrines supported by the Constitution. The Founding Fathers put into place the proper mechanisms through which the People may remedy their injuries when one avenue fails to provide the necessary protection.

Arguably the most radical and, perhaps improbable solution, would be to put the question of whether the Constitution protects the environment outside the scope of judicial review. Indeed, a constitutional amendment that shields the environment may be the answer to the otherwise avoided question.<sup>262</sup> The frequent refusal to

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262. See generally Daniel Reeder, *Federalism Does Well Enough Now: Why Federalism Provides Sufficient Protection for the Environment, and No Other Model is Needed*, 18 PENN ST. ENV'T L. REV. 293 (2010) (discussing the feasibility of amending the Constitution); Carole Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENV'T L.J. 107 (1997) (examining proposed amendments to the constitution, previous environmental legislation as well as environmental legislation since the beginning of the modern environmentalist movement); Dan Gildor, *Preserving the Priceless: A Constitutional Amendment to Empower Congress to Preserve, Protect, and Promote the Environment*, 32 ECOLOGY L.Q. 821 (2005) (exploring the environmental policy landscape before advocating for an amendment to the Constitution).

expand the unenumerated rights harbored by the Constitution to encompass a right pertaining to the environment is clearly indicative of the need for such an amendment. However, under the current political climate, it is unlikely that a significant alteration to the Constitution will be a successful path to securing environmental protection.

Rather, putting pressure on the legislature to enact meaningful legislation may be a more plausible approach. Less drastic than amending the Constitution, and still subject to the same political atmosphere, lobbying for congressional action allows for climate change and harmful emissions to be combatted with precision not simply an overarching idea. Over time, the continued passing of environmental legislation will make even stronger the argument for a fundamental right under the Due Process Clause, cutting the problem with both edges of the sword.

However, time is of the essence. Quick action is required, and a piecemeal plan runs the risk of coming too little, too late. As such, it may be prudent to address the largest contributors to climate change with small but still significant impacts, fostering innovation and technological advancements that are not offensive to important industries. The controlling ideology in Congress, though, would need to change presumably through the political process. Since the beginning of the case, some plaintiffs in *Juliana* have become of voting age, and each day more like-minded youths join their coalition. It is this generation's voice that Congress will heed.

Until then, constant and unrelenting litigation seeking to expand the already existing environmental safeguards provides a sound approach. The boundaries of established doctrines, such as the public trust doctrine, must be tested in both state and federal courts.<sup>263</sup> The approach taken by plaintiffs in *Juliana* should be mirrored and not discouraged by an unfavorable decision. *Juliana* had several pivotal holdings other than that which relates to a fundamental right. The plaintiffs also sought to expand the application of the public trust doctrine to the federal government, and as noted above, they were successful, a holding that garnered much scholarship. Several proponents have made compelling arguments in support of *Juliana's* application of the public trust doctrine.<sup>264</sup>

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263. See Richard Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553, 641 (2001) (advocating for environmental regulation primarily carried out by the States).

264. See generally Michael Blumm & Mary Wood, "No Ordinary Lawsuit": *Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1 (2017) (discussing the worldwide

In no way are these alternative mechanisms meant to be an exhaustive list of the remedies plaintiffs may plausibly pursue. A comprehensive approach is necessary to exact substantial and meaningful change, especially when faced with a Commander-in-Chief who is set on regressively revamping American industries hinged on the consumption and burning of fossil fuels. A continued, unified effort taking turns wielding the hose will turn the trickle into a force no flame could surmount.

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campaign of atmospheric trust litigation); Michael O'Loughlin, *Understanding the Public Trust Doctrine Through Due Process*, 58 B.C. L. REV. 1321 (2017) (analyzing the Public Trust Doctrine against public trust precedent).