

**ENVIRONMENTAL CONSTITUTIONALISM: MARRYING THE
DUE PROCESS CLAUSE AND THE EQUAL PROTECTION
CLAUSE WITH CLIMATE CHANGE**

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INTRODUCTION

The environment is man's first right. Without a clean environment, man cannot exist to claim other rights, be they political, social, or economic.

- Ken Saro-Wiwa¹

Do the Fifth and Fourteenth Amendments provide citizens a private right of action to sue the United States (“U.S.”) for not protecting them against the adverse effects of climate change?² The short answer is yes. Legal scholars at the Environmental Law Institute (“ELI”) believe that “the text and history of the Constitution, as interpreted by courts and understood by most Americans, provide a firm legal basis for comprehensive, effective environmental protections.”³ It is on this premise that this Note argues that the Fifth and Fourteenth Amendments provide a firm legal basis for effective protections against climate change.⁴ The Fifth and Fourteenth Amendments list fundamental rights like the right to life, liberty, and property; fundamental rights also include unenumerated rights like the right to privacy and the right to marry.⁵ Articles II and VI of the U.S. Constitution compel the President and other officials—like judges and members of Congress—to uphold the

1. UNITED NATIONS ENV'T, NEW FRONTIERS IN ENVIRONMENTAL CONSTITUTIONALISM 24 (Erin Daly et al. eds., 2017), <http://wedocs.unep.org/bitstream/handle/20.500.11822/20819/Frontiers-Environmental-Constitutionalism.pdf?sequence=1&isAllowed=y>; see generally *Ken Saro-Wiwa: 1995 Goldman Prize Recipient Africa*, GOLDMAN ENV'T PRIZE, <https://www.goldmanprize.org/recipient/ken-saro-wiwa/> (last visited May 19, 2021) (providing background information on Ken Saro-Wiwa).

2. U.S. CONST. amend. V. (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”); U.S. CONST. amend. XIV § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

3. *Program on the Constitution, Courts, and Legislation*, ENV'T L. INST., <https://www.eli.org/constitution-courts-and-legislation> (last visited May 19, 2021).

4. U.S. CONST. amend. V.; U.S. CONST. amend. XIV § 1.

5. *Id.*

Constitution.⁶ It is no wonder that young climate activists like Greta Thunberg agree it is imperative that world leaders care about “collapsing ecosystems, mass extinctions and people suffering due to climate change,” instead of “caring more about money” and “fairy tales of eternal economic growth.”⁷ Greta’s 2019 Climate Strike message echoes back to 2016, when a group of young climate activists brought an unprecedented suit in U.S. courts, arguing that the Government must act with visible urgency to reduce CO2 emissions.⁸ These young activists argued that the U.S. President and executive agencies deliberately allowed pollution and climate change on a catastrophic level.⁹

While the cynics may cry foul, the language of the U.S. Constitution is clear. Because the Government is mandated to uphold the Constitution, the courts and Congress must do everything in their power to enforce it. The plaintiffs’ claims in *Juliana* are a simple revindication of these constitutional rights that government officials have sworn to protect.¹⁰ Conversely, *Juliana* has been called the “trial of the century” because, unlike other cases that have brought climate change claims, it is the first case in U.S. history to have withstood constitutional muster amidst claims of Due Process and Equal Protection violations.¹¹ Even though *Juliana* was dismissed by the Ninth Circuit in January 2020, this case still symbolizes a significant victory for Greta Thunberg and for other climate activists in the U.S. and around the world.¹² The fact that the courts can no longer deny that climate change is real is impactful for future environmental suits.¹³ Moreover, the substantive due process and equal protection claims set forth in *Juliana* have arguably taken the spotlight and have put the world on notice of bigger things to come for the advocates of environmental fundamental rights.

This Note argues for a U.S. framework on environmental constitutionalism to address the urgency of climate change.¹⁴ “Global

6. U.S. CONST. art. II, § 1; U.S. CONST. art. VI.

7. Kalhan Rosenblatt, *Teen Climate Activist Greta Thunberg Delivers Scathing Speech at U.N.*, NBCNEWS (Sept. 23, 2019), <https://www.nbcnews.com/news/world/teen-climate-activist-greta-thunberg-delivers-scathing-speech-u-n-n1057621>.

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

9. *Id.*

10. *Id.*

11. David A. Murray, *Will Climate Change the Courts?*, NEW ATLANTIS (2019) <https://www.thenewatlantis.com/publicaitons/will-climate-change-the-courts>.

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

13. Marisa Martin & James Landman, *Standing: Who Can Sue to Protect the Environment?*, AM. BAR. ASS’N, (Oct. 9, 2020), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol--19---issue-1/standing--who-can-sue-to-protect-the-environment-/.

14. See generally JAMES R. MAY AND ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (Cambridge Univ. Press 2015) (discussing the Constitutionalization of

environmental constitutionalism is a relatively recent phenomenon at the confluence of constitutional law, international law, human rights, and environmental law.”¹⁵ Over the past 50 years, environmental constitutionalism has provided “new causes of action and stretched environmental rights into new forms.”¹⁶ Countries all around the world have proven that constitutional texts effectively address environmental violations, including climate change.¹⁷ All around the world, countries have already implemented the practice of environmental constitutionalism as a global solution to a global problem.¹⁸ It is high time that the federal government here does the same. This Note takes the due process claims made in *Juliana* even further to argue that through application, the Fifth and Fourteenth Amendments already provide protection against the effects of climate change. The Ninth Circuit erroneously dismissed *Juliana III* because the relief that the climate activists sought is inherent and implied in the language of the Fifth and Fourteenth Amendments.¹⁹ To date, the young climate activists have submitted their *en banc* appeal and for just cause, because the time is ripe for the claims made in *Juliana* to become the norm in climate change litigation instead of the exception.²⁰

The language of the Equal Protection Clause of the Fourteenth Amendment supports the idea that unenumerated environmental protections must be recognized as fundamental rights because they are basic human rights. Finally, this Note addresses the critics of this constitutional approach and offers workable solutions to appease the cynicism of those left yet unconvinced. The goal of this Note is to prove that the Fifth and Fourteenth Amendments provide a firm legal basis for effective protections against climate change.

environmental norms witnessed in the last two decades and represent a significant but under-developed trend. Authors provide a critical examination of the usefulness of constitutional environmental provisions); *see infra* Section III.

15. ELGAR ENCYCL. OF ENV'T L., HUMAN RIGHTS AND THE ENVIRONMENT: LEGALITY, INDIVISIBILITY, DIGNITY AND GEOGRAPHY at 93 (James R May & Erin Daly eds., Elgar 2019) (probing key elements of environmental law that could model the International Covenants on Human Rights).

16. *Id.* at 94; *see also* Murray, *supra* note 11 (explaining how new constitutional rights came to be recognized).

17. ELGAR ENCYCL. OF ENV'T L., *supra* note 15 at 95–96.

18. *Id.* at 94.

19. *See Juliana III*, 947 F.3d at 1165 (discussing the 9th circuit’s decision to dismiss the case).

20. *See generally* John Schwartz, *Court Quashes Youth Climate Change Case Against Government*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/2020/01/17/climate/juliana-climate-case.html> (stating that this case was novel, and made it much further than anyone expected); *Juliana v. United States*, YOUTH V. GOV., <https://www.youthgov.org/our-case> (last visited May 19, 2021).

I. BACKGROUND

First, to better understand this Note's premise, it is important to clarify a few terms essential to the subject matter. Second, this section will demonstrate that combatting climate change means acknowledging that climate change is a global issue with far reaching effects. Third, any violation of the Fifth and Fourteenth Amendments is contrary to the rule of law because climate change requires the judicial protection of the unenumerated rights rooted in the Bill of Rights. Fourth, by way of the Constitution, the U.S. Government has an obligation to protect its populations against climate change. Finally, by dismissing the *Juliana* case, the U.S. Government has failed to uphold the Fifth and Fourteenth Amendments.

Human rights are fundamental rights in the U.S. context.²¹ Human rights are the “freedoms, immunities, and benefits that, according to modern values (especially at an international level), all human beings should be able to claim as a matter of right in the society in which they live.”²² Similarly, a fundamental right is a “right derived from natural or fundamental law.”²³ It is a significant component of liberty,” to which encroachments “are rigorously tested by courts to ascertain the soundness of purported governmental justifications.”²⁴ According to Professor Erwin Chemerinsky; specialist in constitutional law, Jesse H. Choper distinguished Professor of Law, and Dean at Berkeley Law: “some liberties are so important that they are deemed ‘fundamental rights’ and that generally, the Government cannot infringe upon them unless strict scrutiny is met.”²⁵ In the U.S., a “fundamental right triggers strict scrutiny to determine whether the law violates the Due Process Clause or the Equal Protection Clause of the 14th Amendment.”²⁶

21. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (stating that limits on substantive due process come from basic societal values); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Human Rights & The U.S.*, ADVOC. FOR HUM. RTS., https://www.theadvocatesforhumanrights.org/human_rights_and_the_united_states#:~:text=In%20the%20United%20States%2C%20the,provide%20broad%20human%20rights%20protections.&text=In%20a%20dition%2C%20the%20U.S.%20Supreme,trial%20and%20freedom%20of%20movement (last visited May 19, 2021).

22. *Human Rights*, BLACK'S LAW DICTIONARY (11th ed. 2019) (citing G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), <https://www.un.org/en/universal-declaration-human-rights/>).

23. *Fundamental Right*, BLACK'S LAW DICTIONARY (11th ed. 2019).

24. *Id.*

25. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1170 (Richard Epstein & Ronald Gilson eds., 5th ed. 2015).

26. BLACK'S LAW DICTIONARY, *supra* note 23.

A. *The U.S. is Yet to Recognize That Climate Change is a Global Issue That has Nefarious Effects on Human and Civil Rights*

Climate change, though complex, is perhaps the most important environmental challenge of the day, so governmental inaction is a far cry from what climate activists expect of their governments in this impending era.²⁷ Countless research shows that the major cause of climate change seems to be “anthropogenic greenhouse gas (“GHG”) emissions from the use of fossil fuels.”²⁸ The main issue with climate change is that it carries with it a “serious risk of major, irreversible change.”²⁹ Concrete evidence of climate change includes “ice sheet disintegration; regional climate disruptions . . . increasing storm intensity in the Americas . . . warming polar regions . . . and more extreme weather events including droughts, floods, and fires.”³⁰ The U.S. Supreme Court has even acknowledged that “[t]he harms associated with climate change are serious and well recognized.”³¹

Over the past 50 years or so, environmental constitutionalism experts have advocated tirelessly for basic human rights to be at the center of climate change protections, because climate change poses a serious threat to human existence.³² Despite scientific evidence, efforts by the U.S. Government to incorporate human and civil rights protections to combat climate change have been slow.³³ These efforts are important because addressing climate change requires “concerted and coordinated global efforts adjunct to mitigation, adaptation and compensation.”³⁴ For example, many people are currently forced to migrate away from areas vulnerable to rising sea levels, hurricanes, and ravaging forest fires.³⁵ Rising sea levels encroach on coastlines, destroy habitats, and inundate communities.³⁶ Changes in precipitation and temperature destroy agricultural systems, fisheries, water supplies, forests, and other “natural habitats upon which many people depend for their sustenance and livelihoods.”³⁷

27. See UNITED NATIONS ENV'T, *supra* note 1 (stating that although some governments are taking action, it is not yet enough to address the pressing issue of climate change).

28. Sir Nicholas Stern, *The Stern Review on The Economics of Climate Change*, http://mudancasclimaticas.cptec.inpe.br/~rmclima/pdfs/destaques/sternreview_report_complete.pdf (last visited May 19, 2021).

29. *Id.*

30. MAY & DALY *supra* note 14, at 269.

31. *Massachusetts v. EPA*, 549 U.S. 497, 521 (2007).

32. ELGAR ENCYCL. OF ENV'T L., *supra* note 15, at 101, 198.

33. Elaine Kamarck, *The Challenging Politics on Climate*, BROOKINGS (Sept. 23, 2019), <https://www.brookings.edu/research/the-challenging-politics-of-climate-change/>.

34. MAY & DALY, *supra* note 14, at 270, 272.

35. *Id.* at 269; Kamarck, *supra* note 33.

36. MAY & DALY, *supra* note 14, at 270.

37. *Id.*

The issue of basic human rights certainly came to the fore during the *Juliana III* ruling.³⁸ The Ninth Circuit conceded that the effects of climate change seem undeniably irreversible and catastrophic to the general population.³⁹ The majority opinion openly admitted that “copious expert evidence established that the unprecedented rise in atmospheric carbon dioxide levels stemmed from fossil fuel combustion and will wreak havoc on the Earth’s climate if unchecked.”⁴⁰ In a dissenting opinion almost as long as the majority opinion, Judge Staton zealously made the case that the young plaintiffs have a “constitutional right to be free from *irreversible* and *catastrophic* climate change.”⁴¹ Judge Staton made it unequivocally clear that she would not have dismissed the case because it has been long held that the court’s role is to rule on constitutional issues.⁴² To prove her point, Judge Staton quoted *Obergefell v. Hodges*: “when fundamental rights are at stake, individuals ‘need not await legislative action.’”⁴³ Judge Staton further supports the idea that the Government has more than just a moral responsibility to preserve the Union by protecting individuals from the effects of climate change.⁴⁴ Although the court dismissed the *Juliana* case, all is not lost. It is now more than ever up to climate activists and stakeholders to press the U.S. Government to recognize that protection against climate change is an inherent and implied right enforceable under the Fifth and Fourteenth Amendments.⁴⁵ The impetus is on the U.S. Government to begin implementing policies, procedure and legislation to reverse the effects of climate change and protect its populations from threats of extinction.⁴⁶

B. Violating the Fifth and Fourteenth Amendments is Contrary to the Rule of Law

Since the 19th century, fundamental rights have been an interwoven bedrock principle of U.S. jurisprudence.⁴⁷ For the purposes of this Note, the rule of law is a durable system of laws, institutions, and community

38. Amicus Curiae Brief of Int’l. Org. and Law. at 1-2, *Juliana v. United States*, No. 18-36082 (9th Cir. Mar. 12, 2020).

39. *Juliana III*, 947 F.3d at 1182.

40. *Id.* at 1166.

41. *Id.* at 1182.

42. *Id.* at 1191.

43. *Id.* at 1180.

44. *Id.* at 1177.

45. See MAY & DALY, *supra* note 14, at 202 (describing international cases that found a fundamental right to a healthy environment).

46. See Denise Chow, *Three Islands Disappeared in the Past Year. Is Climate Change to Blame?* June 9, 2019, NBCNEWS (June 9, 2019), <https://www.nbcnews.com/mach/science/three-islands-disappeared-past-year-climate-change-blame-ncna1015316> (stating that “governments should pay attention to the islands in the western Pacific and make their own coastal communities more resilient”).

47. Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, 10 S. CT. ECON. REV. 1, 3 (2003).

commitment that delivers four universal principles: (1) accountability; (2) just laws; (3) open government; (4) accessible and impartial dispute resolution.⁴⁸ In *Griswold v. Connecticut*, the Court defined fundamental rights as “[s]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”⁴⁹ In other words, “[v]arious guarantees create zones of privacy.”⁵⁰ Like the right to privacy, the right to a healthy environment “enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment.”⁵¹ Likewise, embedded in the Ninth Amendment is the principle that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”⁵² Protection against climate change in U.S. jurisprudence is anchored on the idea that certain fundamental freedoms permeate from these penumbras and emanations not to be trampled on by governmental action.⁵³

Judge Staton equally highlighted in her dissent that the “Supreme Court has recognized that the Due Process Clause, enshrined in the Fifth and Fourteenth Amendments, also safeguards certain ‘interests of the person so fundamental that the [government] must accord them its respect.’”⁵⁴ It is also true that the Constitution protects the right to life, liberty, and property as it protects free speech, freedom of the press, and freedom of worship and assembly.⁵⁵ Judge Staton’s dissent echoes the Supreme Court’s ruling in *Griswold* that “[th]e language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendment.”⁵⁶

The ruling in *Griswold* reiterates the point that fundamental rights can only be protected if the rule of law prevails.⁵⁷ Since the rule of law is a bedrock principle of U.S. jurisprudence, the U.S. Government is obligated to uphold fundamental freedoms, which include environmental protections against climate change.

48. WORLD JUST. PROJECT, *What is the Rule Of Law?*, <https://worldjusticeproject.org/about-us/overview/what-rule-law> (last visited May 19, 2021).

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

50. *Id.*

51. *Id.*

52. *Id.*

53. Hope M. Babcock, *The Federal Government Has an Implied Moral Constitutional Duty to Protect Individuals from Harm Due to Climate Change: Throwing Spaghetti Against the Wall to See What Sticks*, 45 *ECOLOGICAL L. & POL.* 735, 742 (2019).

54. *Juliana III*, 947 F.3d at 1177.

55. *Id.* at 1179.

56. *Griswold*, 381 U.S. at 488.

57. *Id.* at 485.

C. *Climate Change Imposes an Obligation to Protect Fundamental Rights*

The U.S. Constitution imposes an obligation on the U.S. Government to protect the individuals within its borders against factors like climate change.⁵⁸ This obligation stems from the same idea that certain rights are inherent and implied, such as the right to live in a healthy environment.⁵⁹ With regard to environmental protections, the Fifth and Fourteenth Amendments convey four basic responsibilities upon the government: (1) controlling greenhouse gas emissions; (2) promoting adaptation to climate change; (3) cooperating in international negotiations; and (4) providing support to developing countries that are most harmed by and least responsible for climate change.⁶⁰ One could interpret the Fifth and Fourteenth Amendments to convey these responsibilities because U.S. jurisprudence requires constitutional protections of fundamental rights.⁶¹ Therefore, the U.S. Government, as well as private actors, must respect substantive and procedural rights to safeguard against human rights violations. The plain language of the Fifth and Fourteenth Amendments already provide a firm legal basis for effective protections against climate change.

D. *The Juliana III Ruling Proves That the U.S. Government Continues to Violate the Fifth and Fourteenth Amendments Because It Failed to Protect Its Population from the Nefarious Effects of Climate Change*

The background to *Juliana* remains a significant victory for advocates in favor of applying the text of the Constitution to environmental protections, and for those in favor of judicial engagement in the fight against climate change.⁶² According to advocates for the Atmospheric Trust Litigation approach, like Professor Christina Wood, this is a strategy which “calls upon the judicial branches of governments to force carbon reduction on the basis of their fiduciary responsibility to protect the public trust.”⁶³ The Atmospheric Trust Litigation movement came about because “there has been little action at either the international or national level” to address the climate

58. *Substantive Due Process*, CORNELL L. INFO. INST., https://www.law.cornell.edu/wex/substantive_due_process (last visited May 19, 2021).

59. David R. Boyd, *Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 18 (John H. Knox & Ramin Pejan eds., Cambridge Univ. Press 2018).

60. ELGAR ENCYCL. OF ENV'T L., *supra* note 15.

61. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (ruling that fundamental rights are protected by the Fifth and Fourteenth amendments).

62. *Infra* Section III.

63. Ipshita Mukherjee, *Atmospheric Trust Litigation: Paving the Way for a Fossil-Fuel Free World*, STAN. L. SCH. (July 5, 2017), <https://law.stanford.edu/2017/07/05/atmospheric-trust-litigation-paving-the-way-for-a-fossil-fuel-free-world/>; Murray, *supra* note 11.

change crisis.⁶⁴ Proponents like Professor Wood argue that “exclusive reliance on the political branches for climate response now seems ill-advised.”⁶⁵ Proponents of the Atmospheric Trust Litigation aim to shape public opinion and turn the court system into a “sustained front in the war over climate change.”⁶⁶

In response to the 2016 filing of *Juliana*, a wave of lawsuits—numbering more than 80—with climate-related claims entered the courts in 2018 alone.⁶⁷ Arguably, *Juliana* earned its name as the “trial of the century” because of the public attention it garnered when a group known as “youth plaintiffs”—aged at the time from 10 to 19—joined forces with the Earth Guardians Group.⁶⁸ Along with guardian Dr. James Hanson, the youth plaintiffs filed claims against the U.S. government for its refusal to implement measures that combat the effects of climate change despite knowing about its effects for 50 years.⁶⁹ Unlike many climate lawsuits grounded in statutes like the Clean Air Act, *Juliana* puts forward a sweeping argument that the U.S. Government’s “failure to prevent the present and looming climate crisis constitutes a breach in the government’s basic duty of care to protect plaintiffs’ fundamental constitutional rights.”⁷⁰ Plaintiffs allege that the U.S. Government violated their rights to “life, liberty, and property; equal protection;” as well as their “rights as beneficiaries of the federal public trust.”⁷¹ The *Juliana* plaintiffs are correct in their assertions because these said rights are recognized by the Constitution; thus indicating that plaintiffs should be free from government actions that harm life, liberty, and property.⁷² According to the youth plaintiffs, the government has a contractual duty to protect its citizens.⁷³ Furthermore, it has been long accepted that inherent and inalienable rights evolve; thus demanding the Government to reassert its duties in protecting future generations.⁷⁴

In *Juliana II*, plaintiffs sought injunctive and declaratory relief, asserting that there is “an extremely limited amount of time to preserve a habitable climate system for our country” before “the warming of our nation will

64. Murray, *supra* note 11.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *The Science, OUR CHILDREN’S TR.*, <https://www.ourchildrenstrust.org/the-science> (last visited May 19, 2021); Murray, *supra* note 11; *Juliana I*, 217 F. Supp. 3d at 1252.

70. OUR CHILDREN’S TR., *supra* note 69; Murray, *supra* note 11.

71. *Juliana v. United States (Juliana II)*, 339 F. Supp. 3d., 1062, 1071 (D. Or. 2018); First Am. Compl. At 98, *Juliana v. United States*, 339 F. Supp. 3d 1062 (D. Or. 2018) (No. 6:15-cv-01517-TC) [hereinafter First Am. Compl.].

72. *Infra* Section II.

73. First Am. Compl. at 98.

74. *Id.* at 278.

become locked in or rendered increasingly severe.”⁷⁵ However, the U.S. has rebutted the plaintiffs’ case by submitting several motions for dismissal.⁷⁶ In the last motions filed, the U.S. contended that:

(1) there are no genuine issues of material fact; (2) plaintiffs lack Article III standing to sue; (3) plaintiffs have failed to assert a valid cause of action under the APA; (4) plaintiffs’ claims violate separation of powers principles; (5) plaintiffs have no due process right to a climate system capable of sustaining human life; and (6) the federal government has no obligations under the public trust doctrine.⁷⁷

At the time, the District Court held that the plaintiffs had standing and there had been a genuine dispute of material fact.⁷⁸ The court reasoned that although the U.S. was aware of the “effects of fossil fuel emissions on atmospheric concentrations of CO₂,” its awareness did not cause the plaintiffs’ injury.⁷⁹

However, upon appeal to the Ninth Circuit, the Ninth Circuit reversed the District Court’s decision and ruled instead that *Juliana* did not have Article III standing because the plaintiffs failed to show that their claims could be redressed at the judicial level.⁸⁰ The majority opinion differentiated *Juliana* from *Massachusetts v. EPA*, because unlike *Massachusetts*, the claimants in *Juliana* claimed substantive rights that the court regrettably could not allow them to assert without meeting all the normal standards of redressability.⁸¹ The Ninth Circuit also asserted that *Juliana* raised a political question that was beyond the scope of the judiciary.⁸² However, this Note, like Judge Staton, refutes the Ninth Circuit’s ruling as erroneous because, as Chief Justice Marshall aptly stated many years ago, “It is emphatically the province and duty of the judicial department to say what the law is.”⁸³ Judge Staton hammered home the point that she would not have dismissed the case because the evidence showed that the young plaintiffs suffered an injury that the court could redress. According to Justice Staton, “there are many constitutional doctrines that are not spelled out in the Constitution but are

75. *Id.* at 10.

76. *YOUTH V. GOV.*, *supra* note 20.

77. *See Juliana II*, 339 F. Supp. 3d at 1073 (discussing what the Defendant’s sought in their motion for summary judgement).

78. *Juliana II*, 339 F. Supp. 3d at 1095–96.

79. First Am. Compl. at 133.

80. *Juliana III*, 947 F.3d at 1175.

81. *Id.* at 1168.

82. *Id.* at 1187.

83. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

nonetheless enforceable as historically rooted principles embedded in the text and structure of the Constitution.”⁸⁴

This Note’s analysis is supported by Judge Staton’s reasoning that:

Plaintiffs bring suit to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction. So viewed, plaintiffs' claims adhere to a judicially administrable standard. And considering plaintiffs seek no less than to forestall the Nation's demise, even a partial and temporary reprieve would constitute meaningful redress. Such relief, much like the desegregation orders and statewide prison injunctions the Supreme Court has sanctioned, would vindicate plaintiffs' constitutional rights without exceeding the Judiciary's province.⁸⁵

Judge Staton further went on to highlight that the “Supreme Court was explicitly unconcerned with the fact that crafting relief would require individualized review of *thousands of state and local policies* that facilitated segregation. Rather, a unanimous Court held that the judiciary could work to disassemble segregation over time while remaining cognizant of the many public interests at stake.”⁸⁶

Like the vehement dissent of Judge Staton, this Note contends that the Ninth Circuit’s ruling was erroneous because, the judiciary has a duty to interpret the law. Additionally, the language of the Due Process and Equal Protection Clauses confirms procedural as well as substantive remedies for cases like *Juliana* in the struggle to save planet Earth. The current ruling has further set back the tireless efforts of climate activists and the *Juliana* lawyers will have to now work on appealing the case as they remain hopeful that the *en banc* Ninth Circuit will rule in their favor. This Note is therefore timely and will articulate in the next section the importance of upholding the Fifth and Fourteenth Amendments to protect against climate change.

II. ANALYSIS

U.S. courts have long established that fundamental rights tied to life, liberty, and property include even those not enumerated in the Due Process and Equal Protection Clauses.⁸⁷ Courts across the country should well-

84. *Juliana III*, 947 F.3d at 1179.

85. *Id.* at 1175.

86. *Id.* at 1188.

87. See CHEMERINSKY, *supra* note 25, at 1173 (holding that fundamental rights are those that are deeply embedded in the Nation’s traditions).

receive the idea that humans have an implicit right to life in a healthy environment. Plaintiffs posited this argument since predictions about climate change indicate that failure to act will lead to ultimate extinction, as clean air is necessary for humans to survive. However, this is not presently the case.⁸⁸ Unlike the *Juliana* example, courts must recognize the right to a healthy environment and apply it to the Fifth and Fourteenth Amendments. The right to a healthy environment is a fundamental right because it is tied to life, liberty, and property.⁸⁹ This Note will analyze the idea of life, liberty, and property in support of the premise that environmental protections should be treated as fundamental rights under the Constitution. Next, this Note will demonstrate how the constitutional protection against climate change is embedded in the unenumerated rights of the Fifth and Fourteenth Amendments.

*A. No State Shall Deprive Any Person of Life, Liberty, or Property,
Without Due Process of Law and No Person Shall Be Deprived of Life,
Liberty, or Property Without Due Process of Law*

The climate activists in *Juliana* argue that the Government's failure to act on climate change constitutes a "deprivation of life" and many legal scholars agree. According to Ylan Nguyen's article, *Constitutional Protection for Future Generations from Climate Change*, "[t]he right to a secure climate system is critical to future generations' fundamental rights of life"⁹⁰ Nguyen argues that "the Constitution's preamble describes a broad intergenerational goal to 'secure the blessings of liberty to ourselves and our Posterity'"⁹¹ Many rights like "abortion, the right to marry, the right to use contraceptives, among many others," already fall under the constitutional protection of the Fifth Amendment.⁹² It is therefore reasonable to deduce that protection from climate change implies a right to life.

88. See First Am. Compl. at 88 (discussing how a Louisiana resident will not enjoy the beaches of the Gulf of Mexico forever, as a result of the country's lack of unified fight against climate change).

89. Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TULANE ENV'T L. J. 65, 69 (2002) (discussing the right to a healthy environment as a fundamental right).

90. Ylan Nguyen, *Constitutional Protection for Future Generations from Climate Change*, HASTINGS ENV'T L. J. 183, 199 (2017) (discussing the fundamental right of a healthy environment).

91. *Id.*

92. *Id.*

Moreover, Professor Chemerinsky states that “liberty” includes those rights that are “expressly stated in the text, such as free exercise of religion, and rights that are not enumerated, such as the right to marry.”⁹³ The right to a healthy environment should be included as one of those non-enumerated rights. Freedom from the effects of climate change is a personal right, just like the one established in *Loving v. Virginia* where the Supreme Court held that “the freedom to marry is one of the vital personal rights protected by the Due Process Clause of the Fourteenth Amendment as essential to the orderly pursuit of happiness by free men.”⁹⁴

The Supreme Court further reinforced the concept of individual autonomy in *Obergefell v. Hodges* where the right to marry was considered a fundamental right.⁹⁵ In *Obergefell*, same-sex couples sued various states for violating both the Due Process and Equal Protection Clauses because these states upheld statutes that prevented same-sex marriages.⁹⁶ In his majority opinion, Justice Kennedy ruled that “the right to marry is a fundamental right inherent in the liberty of the person, and under the due process and equal protection clauses of the Fourteenth Amendment, couples of the same-sex may not be deprived of that right and that liberty.”⁹⁷ Justice Kennedy affirmed that “Same-sex couples may exercise the fundamental right to marry,” and because this was a fundamental right, the Constitution prohibited that this “liberty be denied to them.”⁹⁸ Following the standard set in *Obergefell*, the Government’s reluctance to protect future generations from the adverse effects of climate change is a violation of their due process and equal protection rights. The right to live in a healthy environment can be analogous to the inherent rights established in *Loving* and *Obergefell* because these are rights that are tied to life, liberty, and property. Climate change threatens these basic constitutional rights; therefore, courts must begin to enforce the Fifth and Fourteenth Amendments as a firm legal basis for effective protections against climate change.

The *Juliana* litigants also claim that the Government deprived them of property.⁹⁹ Professor Chemerinsky defines a property right as a “crucial

93. CHEMERINSKY, *supra* note 25, at 837.

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

95. *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

96. *Id.* at 654–55.

97. *Id.* at 675.

98. *Id.*

99. *Juliana II*, 339 F. Supp. 3d. at 1071.

significance in a person's life."¹⁰⁰ One also has a claim of deprivation of property in cases where "the law creates a justifiable expectation that the benefit will be received in the future."¹⁰¹ *Goldberg v. Kelly* clearly illustrated that plaintiffs were entitled to their food stamps. In other words, plaintiffs had a property interest that could not be deprived without due process of the law.¹⁰² Therefore, the court reasoned that terminating their welfare benefits, deprived plaintiffs (who lacked independent resources) "of the very means necessary to live."¹⁰³ Likewise, future generations have an entitlement against the effects of climate change, which can be asserted through the Fifth Amendment.¹⁰⁴

Notwithstanding, in the summer of 2019, the United States District Court for the District of Oregon ruled against plaintiffs making similar claims in *Animal Legal Def. Fund v. United States*.¹⁰⁵ In *Animal Legal Def. Fund*, plaintiffs claimed that "the government's failure to protect them from the effects of climate change has violated their constitutional right to a safe and sustainable environment."¹⁰⁶ The District Court denied the claims due to a "failure to state a claim" and "lack of standing."¹⁰⁷ Judge Michael J. McShane, dismissed the claims with prejudice because he believed that the plaintiffs' claims were too "revolutionary" in nature.¹⁰⁸ Judge McShane explicitly rejected a ruling that would create a new fundamental right.¹⁰⁹ Judge McShane stated that he cannot recognize a "right to wilderness" under the Fifth and Fourteenth Amendments.¹¹⁰ The Judge distinguished this case from the *Juliana* case because the plaintiffs' claims were overly broad and "sweeping," and were not narrow enough to seek redressability.¹¹¹ Whereas, Judge McShane acknowledges that the courts will recognize claims that are "particularized harms" associated with climate change, the court cannot address "generalized grievances."¹¹²

100. CHEMERINSKY, *supra* note 25, at 830, 836.

101. *Id.*

102. *Goldberg v. Kelly*, 397 U.S. 254, 260–61 (1970).

103. *Id.* at 263–64.

104. Nguyen, *supra* note 90, at 199.

105. *Animal L. Def. Fund v. United States*, 404 F. Supp. 3d 1294, 1297 (D. Or. 2019).

106. *Id.* at 1297, 1299.

107. *Id.* at 1299.

108. *Id.* at 1297.

109. Karen Savage, *Judge Dismisses 'Right to Wilderness' Climate Suit Against U.S. Government*, CLIMATE DOCKET (Aug. 1, 2019), <https://www.climatedocket.com/2019/08/01/right-to-wilderness-climate-lawsuit/>.

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

111. *Id.* at 1297–98.

112. *Id.* at 1300.

Although Judge McShane noted that the “right to a stable climate” claims in *Juliana* are viable under the Fifth and Fourteenth Amendments, sweeping claims like the “right to wilderness” made in *Animal Legal Def. Fund*, are too generalized for the courts to address.¹¹³ This Note is not arguing against the principles of justiciability. Instead, this Note argues that courts throughout the country must begin to recognize that Fifth and Fourteenth Amendments provide a firm legal basis for effective protections against climate change. If courts were to accept and recognize that protection from climate change is a fundamental right, this would create more positive outcomes.¹¹⁴ For example, this would provide speedy relief for climate change victims.¹¹⁵ This recognition would further implore Congress to pass more cutting-edge legislation to reduce carbon emissions and implement policies and guidelines beneficial to vulnerable populations in the U.S.¹¹⁶

B. No State Shall Deny to Any Person Within Its Jurisdictions the Equal Protection of the Laws.

Professor Chemerinsky agrees that substantive due process is the principle that allows courts to protect certain fundamental rights from government interference, even when procedural protections are present or the rights are not specifically mentioned elsewhere in the U.S. Constitution.¹¹⁷ The Constitution should always apply in cases involving protections against climate change because the effects of climate change erode the principle of fundamental rights.¹¹⁸ Combatting climate change means protecting the basic existence of human beings.¹¹⁹ Therefore, climate activists would find it easier to litigate in court when asserting due process and equal protection claims if courts begin to recognize the right to living in a healthy environment as a fundamental right under the Constitution.¹²⁰ The Constitution provides environmental protections for individuals because protection against climate

113. *Id.* at 1302.

114. Carolyn Kormann, *The Right to a Stable Climate is the Constitutional Question of the Twenty-First Century*, NEW YORKER (June 15, 2019), <https://www.newyorker.com/news/daily-comment/the-right-to-a-stable-climate-is-the-constitutional-question-of-the-twenty-first-century>.

115. Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, 9 CLIMATE L. 224, 227 (2019).

116. Yvette D. Clarke & Michael Shank, Opinion, *California Fires, Rising Seas: Millions of Climate Refugees Will Dwarf Dust Bowl by 2100*, USA TODAY (Nov. 4, 2019), <https://www.usatoday.com/story/opinion/2019/11/04/california-fires-climate-change-millions-refugees-by-2100-column/2452937001/>.

117. CHEMERINSKY, *supra* note 25, at 825.

118. Neal S. Rubin, *Does Climate Change Compromise Fundamental Human Rights?*, AM. PSYCH. ASS'N (Oct. 2013), <https://www.apa.org/international/pi/2013/10/un-climate>.

119. U.N. OFF. OF THE HIGH COMM'R, *Understanding Human Rights and Climate Change*, <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf> (last visited May 19, 2021).

120. CORNELL L. INFO. INST., *supra* note 58.

change is an innate right that is “deeply rooted in this Nation’s history and tradition.”¹²¹ *Washington v. Glucksberg* confirmed that fundamental liberty interests are protected by the Due Process Clause, and that a fundamental right is “implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.”¹²²

Tracing the Fourteenth Amendment to its creation reveals that John Bingham “envisioned a federal Constitution that would protect the *fundamental freedoms* and equality of all Americans.”¹²³ Historical records show that the Fourteenth Amendment was modified several times before it was ratified in 1868.¹²⁴ However, the Congressional documents trace back to Bingham’s original intent that all men had equal protection under the law.¹²⁵ Leading from the premise that man has a natural right, Bingham expressly wrote that everyone had natural rights to be revenged under the Fourteenth Amendment.¹²⁶ Justice Black gave a lengthy dissent in *Adamson v. California*,¹²⁷ arguing that the Court’s reading was overly narrow and against Bingham’s original intent.¹²⁸ He starts by stating, “this Court is endowed by the Constitution with boundless power under ‘natural law’ periodically to expand and contract constitutional standards to conform to the Court’s conception of what at a particular time constitutes ‘civilized decency’ and ‘fundamental liberty and justice.’”¹²⁹ Black continued by scolding the Court for giving “much less effect to the Fourteenth Amendment than some of the public men active in framing it’ had intended it to have.”¹³⁰ Justice Black’s dissent clearly demonstrates the void between how the Fourteenth Amendment is being interpreted today and its original intent. Following this argument, Judge McShane could have created a new fundamental right that would have been more favorable to plaintiffs in climate change cases.

The courts must enforce the fundamental right of climate change protection by applying strict scrutiny.¹³¹ The Supreme Court has long

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

122. *Id.* at 721.

123. Tom Donnelly, *John Bingham: One of America’s Forgotten “Second Founders,”* NAT’L CONST. CTR. (July 9, 2018), <https://constitutioncenter.org/blog/happy-birthday-john-bingham-one-of-americas-forgotten-second-founders> (emphasis added); Cong. Globe, 34th Cong. 1st Sess. 1580 (1856); Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the “Lost Clause,”* 36 AKRON L. REV. 617, 632–63, 635 (2003).

124. *10 Supreme Court Cases About the 14th Amendment*, NAT’L CONST. CTR. (July 9, 2020) <https://constitutioncenter.org/blog/10-huge-supreme-court-cases-about-the-14th-amendment>.

125. Cong. Globe, *supra* note 123.

126. *Twining v. New Jersey*, 211 U.S. 78 (1908).

127. *Adamson v. California*, 332 U.S. 46, 69 (1947).

128. *Id.*

129. *Griswold*, 381 U.S. at 488.

130. *Adamson*, 332 U.S. at 74.

131. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (explaining that a court would exercise a stricter standard of review when a law violates a provision of the constitution).

established that a fundamental right triggers the application of strict scrutiny.¹³² *United States v. Carolene Products Co.*¹³³ established that under the strict scrutiny test, the Government must show a compelling interest that the means taken are narrowly tailored to achieve these interests.¹³⁴ *Carolene Products* established that the Fifth and Fourteenth Amendments protect “discrete and insular minorities” that: (1) have suffered a history of discrimination; (2) have distinguishing characteristics that do not inhibit the group from contributing meaningfully to society; (3) the characteristic must be immutable; and (4) they must be politically powerless.¹³⁵ The *Carolene Products* criteria formalized levels of abstraction under the strict scrutiny standard for cases of a similar nature. The criteria originating in *Carolene Products* applies to climate change cases. First, for at least fifty years, the Government knows or has reason to know that catastrophic levels of pollution are detrimental to vulnerable communities.¹³⁶ Second, the Government has done nothing to protect these vulnerable communities.¹³⁷ Third, the effects of climate change have been attributed to cause the onset of certain illnesses like respiratory illness.¹³⁸ Further, many people are being displaced all over the U.S. because of changing weather patterns.¹³⁹ Lastly, these vulnerable populations rarely benefit from political representation and litigation is the only viable solution to protect their interests.¹⁴⁰

These levels of abstraction highlight even further that the U.S. Government has failed to protect “discrete and insular minorities” from the effects of climate change.¹⁴¹ Courts must apply the Fifth and Fourteenth Amendments to climate change cases to offer remedies against recurring violations of people’s fundamental rights. Furthermore, in *Washington v. Davis*, the Supreme Court established that a claim of disparate impact was not enough and that parties must have proof of discrimination or discriminatory purpose.¹⁴² Inaction from the federal government is evidence that discrimination against climate change victims continues to occur.¹⁴³ The

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. Clarke & Shank, *supra* note 116.

137. *Juliana I*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016).

138. *Id.*

139. Clarke & Shank, *supra* note 116.

140. Wewerinke-Singh, *supra* note 115 at 243.

141. *Carolene Prods. Co.*, 304 U.S. at 152.

142. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

143. See generally Kristen Lombardi et al., *Environmental Racism Persists, and The EPA is One Reason Why*, CTR. FOR PUB. INTEGRITY (updated Sept. 4, 2015), <https://publicintegrity.org/environment/environmental-racism-persists-and-the-epa-is-one-reason-why/> (describing, “[t]he EPA office tasked with policing alleged civil rights abuses is chronically unresponsive to complaints and has never made a formal finding of discrimination”).

threat of climate change remains imminent. Humans continue to die or have their lifespan shortened.¹⁴⁴ Food shortages and widespread damage to property are on the rise and the planet's ecosystem continues to deteriorate.¹⁴⁵

At the same time, the recent ruling in *Clean Air Council v. United States* further highlights challenges for plaintiffs wanting to move forward with constitutional claims against climate change.¹⁴⁶ In *Clean Air Council*, the United States Eastern District Court of Pennsylvania rejected plaintiffs' prayer to "declare that the United States of America...have violated and will violate plaintiffs' rights by considering amendments to environmental laws, by 'rolling back' environmental regulations, and by making related personnel and budget changes."¹⁴⁷ The District Court denied the plaintiffs' claims because they did not have any "legally cognizable due process right to environmental quality" ¹⁴⁸ Until courts begin to apply a broader interpretation of the Fifth and Fourteenth Amendment, it will be difficult for climate change victims to receive the redress they deserve. The courts need to apply climate change protections to the Fifth and Fourteenth Amendments because they provide a firm legal basis for effective protections against climate change.

III. SOLUTIONS

Historically, when compared to other methods of environmental protections, constitutional protections against environmental violations have not been the most effective solution.¹⁴⁹ However, this section will demonstrate that when applied effectively, the Fifth and Fourteenth Amendments provide a firm legal basis for effective protections against climate change. When properly applied, the "constitutional incorporation, implementation, and jurisprudence of environmental rights, duties, procedures, policies and other provisions" promote effective environmental

144. *Juliana I*, 217 F. Supp. 3d. at 1250; see *Juliana II*, 339 F. Supp. 3d. at 1098 (explaining that a claim for a due process violation is established when a complaint alleges governmental action that knowingly will cause human deaths); *Juliana III*, 947 F.3d at 1164.

145. *Juliana I*, 217 F. Supp. 3d. at 1250; see *Juliana II*, 339 F. Supp. 3d. at 1098 (explaining that a claim for a due process violation is established when a complaint alleges governmental action that knowingly will cause human deaths); *Juliana III*, 947 F.3d at 1164.

146. *Clean Air Council v. United States*, 362 F. Supp. 3d 237, 242 (E.D. Pa. 2019).

147. *Id.*

148. *Id.* at 250.

149. *Answer Constitutional Challenges To New Climate Change Initiatives*, ENV'T L. INST., <https://www.eli.org/climate-energy/answer-constitutional-challenges-new-climate-change-initiatives> (last visited May 19, 2021); Kyle Burns, *Constitutions & The Environment: Comparative Approaches To Environmental Protection And The Struggle To Translate Rights Into Enforcement* (Nov. 14, 2016), syndicated on Env't L. Rev. Syndicate, <https://harvardelr.com/2016/11/14/constitutions-the-environment-comparative-approaches-to-environmental-protection-and-the-struggle-to-translate-rights-into-enforcement/>.

protections against climate change.¹⁵⁰ This Note supports solutions anchored in the principle of environmental constitutionalism. This Note posits solutions in tandem with the following principles of environmental constitutionalism: (1) all countries should adapt textual incorporation and judicial engagement in the fight against climate change; (2) all countries should include the notion of environmental sustainability in their constitutions and; (3) giving nature itself rights as a legal personality to protect itself against threats to extinction.¹⁵¹ These principles can all serve as a template for plaintiffs in climate change suits to apply legislative and judicial pressure to demand a shift in U.S. constitutional protections.

A. Several International Developments Demonstrate How Constitutional Protections are at the Core of Creating the Right to a Healthy Environment; The U.S. Constitutional Framework Also Allows for the Creation of New Fundamental Rights

The broad scope of environmental constitutionalism has allowed several countries to broaden the paradigm to fit within their constitutional realities.¹⁵² Proponents of “climate constitutionalism” argue for the “express incorporation of climate change into constitutional texts and a judicial interpretation implying obligations to address climate change from other express constitutional rights to life, dignity, due process, or a healthy environment.”¹⁵³ Because of these far-reaching implications of climate change, there has been a “worldwide phase in constitutional litigation regarding the climate.”¹⁵⁴

In 2018, the Constitutional Court of Columbia handed down a landmark decision to protect the Amazon against climate change.¹⁵⁵ This is a riveting example of how 25 plaintiffs—varying from ages 7 to 26—successfully carried individualized constitutional claims that evidenced the loss of the Amazon from deforestation was occurring at such a rapid rate between 2015 and 2016, that Colombia had already lost roughly 44% of its Amazonian

150. ELGAR ENCYCL. OF ENV'T L., *supra* note 15, at 93.

151. *Id.* at 95–96.

152. Nathalie Rühs & Aled Jones, Review, *The Implementation Of Earth Jurisprudence Through Substantive Constitutional Rights Of Nature*, 8 SUSTAINABILITY 174 (2016).

153. ELGAR ENCYCL. OF ENV'T L., *supra* note 15, at 95–96.

154. *Id.* at 96.

155. Germán Gómez Rojas, *Corte Suprema ordena protección inmediata de la Amazonía Colombiana* [Supreme Court Orders Immediate Protection Of The Colombian Amazon], REPÚBLICA DE COLOMBIA CORTE SUPREMA DE Justicia (Apr. 5, 2018), <http://www.cortesuprema.gov.co/corte/index.php/2018/04/05051/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana/>; see *Sentencia 4360-2018 de la Corte Suprema de Justicia* [Judgment 4360-2018 of the Supreme Court of Justice], ENV'T L. ALL. WORLDWIDE (Apr. 05, 2018), https://www.elaw.org/CO_Amazon (showing that deforestation in the Amazon lead to a Supreme Court decision about human rights).

forest.¹⁵⁶ The plaintiffs were able to prove that the Colombian Government failed to prevent the deforestation even though they knew of the consequences.¹⁵⁷ The plaintiffs prevailed because the presiding judge ruled “the Amazonian ecosystem is vital for the future of the globe,” and the Colombian Amazon “enjoys legal rights to protection, conservation, maintenance, and restoration from the State.”¹⁵⁸

As of 2019, at least seven countries have expressly addressed climate change in their constitutions.¹⁵⁹ Namely, the Dominican Republic, Venezuela, Ecuador, Vietnam, Tunisia, Cote D’Ivoire, and Thailand.¹⁶⁰ Furthermore, activists and interest groups have successfully made advances in climate justice claims even in countries that have not expressly adapted their constitutions to reflect climate change protections. Climate activists manage to assert protections from their respective constitutions under the right to life and dignity; as well as the rights to health and welfare.¹⁶¹ The worldwide trend is therefore gaining momentum. Fortunately, the U.S. already has a constitutional framework to support environmental constitutionalism.¹⁶² Whereas enforcement is currently lacking, the U.S. Government must begin to apply the Fifth and Fourteenth Amendments as a firm legal basis for effective protections against climate change.

156. ELGAR ENCYCL. OF ENV’T L., *supra* note 15, at 97.

157. ENV’T L. ALL. WORLDWIDE, *supra* note 153.

158. CONST. of Viet. (2013), Ch. III. Art. 63, § 1; ELGAR ENCYCL. OF ENV’T L., *supra* note 15, at 96; Cote d’Ivoire’s Const., 2016, Preamble; DOM. REP. CONST. (2015) tit. IX, ch. 1, art. 194; CONST. OF THE REPUBLIC OF ECUADOR (2008), tit. VII, ch. 2 § 7, art. 414; CONST. OF THAILAND (2017), tit. 2, art. 45; CONST. OF THE TUNISIAN REPUBLIC tit. 2, art. 45 (2014); CONST. OF THE BOLIVARIAN REPUBLIC OF VENEZ., tit. III ch. IX, art. 127 (2017).

159. *Gbemre v. Shell Petroleum Dev. Co. Nigeria Ltd.* [2005] FHCLR 1 (Nigeria); *Urgenda Foundation v. Kingdom of the Netherlands* (2019) C/09/456689/HA_ZA 13-1396 (HR) (Neth.); see ELGAR ENCYCL. OF ENV’T L., *supra* note 15, at 96–99 (“Even in absence of express constitutional incorporation, there is a growing body of jurisprudence from international and regional courts and tribunals worldwide concerning climate change . . . an increasing number of courts has turned to other constitutional rights – including to life, health, dignity, or a healthy environment – to advance climate justice.”); see also *Ashgar Leghari v. Fed. of Pak.*, (2015) W.P. 25501 (Lahore) 1 (Pak.) (stating that fundamental rights to life include the right to a healthy environment).

160. INT’L. HUMAN RTS. CLINIC, HARV. L. SCH., AN ENVIRONMENTAL RIGHT FOR FUTURE GENERATIONS 5 (2008); see INT’L HUM. RTS. CLINIC, HARV. L. SCH., MODELS FOR PROTECTING THE ENVIRONMENT FOR FUTURE GENERATIONS 7 (2008) (“Several U.S. state constitutional provisions have . . . established duties to protect the implied rights of future generations to a healthy environment.”).

161. ELGAR ENCYCL. OF ENV’T L., *supra* note 15, at 99.

162. *Ecuador Adopts Rights of Nature in Constitution*, GLOB. ALL. FOR THE RTS. OF NATURE, <https://therightsofnature.org/ecuador-rights/> [*hereinafter* GARN 1] (last visited May 19, 2021); see *What is Rights of Nature?*, GLOB. ALL. FOR THE RTS. OF NATURE (2019), <https://www.therightsofnature.org/what-is-rights-of-nature/> [*hereinafter* GARN 2] (describing GARN, a network of organizations and individuals committed to the universal adoption and implementation of legal systems that recognize, respect and enforce “Rights of Nature.”).

B. Constitutional Protections Symbolize That Nature is the Bearer of Judicially Cognizable Rights

If nature has these judicially cognizable rights, then nature is the rights holder that can vindicate the integrity of its ecosystems, rather than any individual element thereof in isolation.¹⁶³ Proponents of the rights of nature argue that people “have the legal authority and responsibility to enforce these rights on behalf of ecosystems.”¹⁶⁴ GARN proponents affirm that “[t]he ecosystem itself can be named as the injured party, with its own legal standing rights, in cases alleging rights violations.”¹⁶⁵ Countries such as Ecuador, India, and Colombia have paved the way by creating legal structures that formally recognize these inalienable rights of nature.¹⁶⁶ The leading example has been Ecuador, which has been lauded as the first country to recognize Rights of Nature in its Constitution.¹⁶⁷ Ecuador’s rewritten Constitution was ratified by referendum in September 2008.¹⁶⁸ The Ecuadorian example has become a new driving force for climate litigants to mount cases against the respective governments to protect the Amazon.¹⁶⁹ In many instances, the Amazon cases have resulted in confirmed instance of due process rights violations where the courts would have otherwise ruled against the plaintiffs.¹⁷⁰ The above examples confirm that other countries are reshaping their constitutional protections to address the urgent matter of climate change. Therefore, the time is right for U.S. courts to recognize that the Fifth and Fourteenth Amendments provide a firm legal basis for effective protections against climate change.

163. GARN 2, *supra* note 162.

164. *See* ELGAR ENCYCL. OF ENV’T L., *supra* note 15, at 99–101 (“[A] series of cases recognized the rights of nature but, in 2016, the Constitutional Court of Ecuador firmly committed to its full implementation. . . . [T]he Indian High Court at Uttarakhand issued two decisions in March 2017 that would recognize the rights of important water bodies and flows. . . . In 2016, the Colombian Constitutional Court issued a landmark decision recognizing the Rio Atrato’s legal ability to assert its rights in court. And again in 2018, it recognized the rights of the Colombian Amazon to protect its rights.”); GARN 1, *supra* note 1; Rita Brara, *Courting Nature: Advances in Indian Jurisprudence*, 6 RCC PERSPECTIVES: TRANSFORMATIONS, 31, 32 (2017), <http://www.jstor.org/stable/26268373>; Héctor Herrera-Santoyo, *The Rights of Nature (Rivers) & Constitutional Actions In Colombia*, GLOB. NETWORK FOR HUM. RTS. AND THE ENV’T (GNHRE) (July 8, 2019), <https://gnhre.org/2019/07/08/the-rights-of-nature-rivers-and-constitutional-actions-in-colombia/>.

165. GARN 1, *supra* note 162.

166. *Id.*

167. *See generally* ELGAR ENCYCL. OF ENV’T L., *supra* note 15 (discussing the example of Ecuador as one of the countries to take the lead in protecting rights of nature).

168. GARN 1, *supra* note 162.

169. Justice Mensah, *Sustainable development: Meaning, History, Principles, Pillars, and Implications for Human Action: Literature Review*, 5 Cogent Social Sci. 1 (2019) <https://doi.org/10.1080/23311886.2019.1653531>.

170. *See* Rep. of the U.N. Conf. on the Human Env’t, U.N. Doc. A/CONF.48/14/Rev.1 (June 1972) (detailing that one main focus of the conference was environmental health and sustainability).

C. Environmental Sustainability Should be Incorporated as a Constitutional Right to Foster and Promote Environmental Protections

Sustainability is another viable solution geared towards implementing environmental protection mechanisms.¹⁷¹ The world's movement towards sustainability can be traced from the 1972 Stockholm Declaration on the Human Environment.¹⁷² The next important phase was the 1987 World Commission on Environment Development's report: *Our Common Future*.¹⁷³ The report defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."¹⁷⁴ Then came the Earth Summit Declaration of 1992, held in Rio de Janeiro, Brazil.¹⁷⁵ The first principle of the Earth Summit Declaration of 1992 is that "Human beings are at the center of concerns for sustainable development.¹⁷⁶ They are entitled to a healthy and productive life in harmony with nature."¹⁷⁷ This pact was renewed in 2015 with the 2030 Agenda for Sustainable Development.¹⁷⁸ The preamble for the agenda opens with: "This Agenda is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom."¹⁷⁹ As a result, on these Accords, more than 36 countries have already incorporated sustainability in their constitutions. The Paris Agreement, adopted in 2016, sought as one of its key prerogatives to "[r]ecogniz[e] the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge." Therefore, by applying a constitutional framework to environmental protections, the U.S. would fulfill its commitment to protecting its populations against the effects of climate change.

171. U.N. World Comm'n on Env't & Dev., *Report of the World Commission on Environment and Development: Our Common Future* (Oct. 27, 2019), <http://www.environmentandsociety.org/mml/un-world-commission-environment-and-development-ed-report-world-commission-environment-and>.

172. Report of the United Nations Conference on Human Environment, U.N. Doc. A/CONF.48/14/REV.1 (1972), https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.48/14/REV.1

173. U.N. Sustainable Development, U.N. Conference on Environment & Development, Rio de Janeiro [sic], Brazil, Agenda 21, <https://sustainabledevelopment.un.org/outcomedocuments/agenda21>.

174. *Report of the World Commission on Environment and Development: Our Common Future*, WORLD COMM'N. ON ENV'T DEV. (1987), <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>.

175. *Id.*

176. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/Conf.151/26/Rev.1 (Vol.1), annex 1 (Aug. 12, 1992).

177. *Id.*

178. See MAY & DALY, *supra* note 14, at 329–42 (providing international constitutions that include a fundamental right to a healthy environment); U.N. Conference on the Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (June 14, 1992) <https://www.cbd.int/doc/ref/rio-declaration.shtml>.

179. *Id.* art. 7 § 2.

CONCLUSION

To conclude, I agree with Ken Saro-Wiwa when he said that “[t]he environment is man’s first right. Without a clean environment, man cannot exist to claim other rights, be they political, social, or economic.”¹⁸⁰ Ken Saro-Wiwa died trying to protect the Ogoni people of Nigeria who were at the mercy of multinational oil companies that exploited their oil-rich land for profits.¹⁸¹ This is just one example of what happens when environmental violations go unpunished. With the express protection from the U.S. Constitution, cases like *Juliana* prove that protections against climate change are fundamental rights protected under the Constitution. As Judge Staton correctly stated in so many words, “the time is *now* for the Government to give its unwavering attention to stemming climate change.”¹⁸² The Ninth Circuit ruled erroneously. Climate activists await the Ninth Circuit’s reconsideration of *Juliana*. The time is right to expand the discussion for a U.S. framework on environmental constitutionalism. The U.S. Constitution already has the necessary provisions, and it will be up to us as law students, scholars, lawyers, advocates, and lawmakers to address the issue of climate change head on.

180. UNITED NATIONS ENV’T, *supra* note 1; Laura Westra, *Development and Environmental Racism: The Case Of Ken Saro-Wiwa And The Ogoni*, 6 RACE, GENDER, & CLASS 152, 155 (1998).

181. UNITED NATIONS ENV’T, *supra* note 1; *see* GOLDMAN ENV’T PRIZE, *supra* note 1 (providing a biography for Ken Saro-Wiwa).

182. *Juliana III*, 947 F.3d at 1191.