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Abstract

The failure of the political process to produce meaningful policies to mitigate the threat of climate change has encouraged aggressive and innovative litigation strategies. An increasing number of climate lawsuits seek to control greenhouse gas emissions, impose liability on fossil fuel producers, or otherwise force greater action on climate change. In many of these cases, litigants have made aggressive constitutional claims that stretch the bounds of existing constitutional doctrine. This essay, prepared for the 2024 Drake University Constitutional Law Center Symposium, "Climate Change, the Environment, and Constitutions," critically assesses some of the constitutional arguments made in climate cases, including *Massachusetts v. EPA* and *Juliana v. U.S.*, as well as some of the constitutional claims made by states opposing efforts to limit greenhouse gas emissions.

CLIMATE CHANGE AND CONSTITUTIONAL OVERREACH

Jonathan H. Adler*

Climate change has sparked a "litigation boom."[1] In the U.S. and abroad, environmental advocates and others have filed an increasing number of lawsuits to address climate impacts and spur greater political action to address the accumulation of greenhouse gases in the atmosphere.[2] This litigation has taken many forms and has arisen in a broad range of contexts.[3] Some of the claims are rather mundane, while others raise serious questions of constitutional law and push against long-standing constraints on government power.

That climate litigation is increasing should be no surprise. Climate change is the preeminent environmental problem of the twenty-first century.[4] No other environmental concern matches the scale, scope and significance of the climate change. In a world of wicked

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[1] Katie Surma, *Climate Litigation Has Exploded, But Is It Making a Difference?*, INSIDE CLIMATE NEWS, July 27, 2023 (reporting that "climate change is sparking a litigation boom"); *see also* Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation*, 16 ANN. REV. L. & SOC. SCI. 21, 23 (2020) (noting "exponential growth in the number of climate cases").

[2] *Why a String of Court Victories Is Raising Hopes of Climate Advocates*, United Nations Environment Program, May 30, 2024, https://www.unep.org/news-and-stories/story/why-string-court-victories-raising-hopes-climate-advocates ("citizens, non-profit groups and disaster-wracked countries are increasingly turning to courts to compel governments and fossil fuel producers to address the climate crisis"); Gerald Torres, *No Ordinary Lawsuit: The Public Trust and the Duty to Confront Climate Disruption—Commentary on Blumm and Wood*, 67 AMER. U.L. REV. FORUM 49, 50 (2018) (noting *Juliana* suit discussed *infra* notes __ was filed "seeking to break the deadlock that has prevented the United States from aggressively confronting the challenge of climate change

[3] For a compilation of climate litigation, see *U.S. Climate Change Litigation*, SABIN CENTER FOR CLIMATE CHANGE LAW, https://climatecasechart.com/us-climate-change-litigation/ (last visited Aug. 6, 2024).

[4] *See* J.B. Ruhl & Robin Kundis Craig, *4°C*, 106 MINN. L. REV. 191 (2021) (discussing the magnitude of the climate challenge even if mitigation measures are adopted).

environmental concerns, climate change is the most "super-wicked" of all.[5] And like all "wicked" problems, it "defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution."[6] Compounding its wickedness, climate change is the sort of problem that may get more difficult to address over time, for which there is a mismatch between those most responsible for the problem and those who will bear the costs, and for which there is no ready institutional framework to address it in a fair and effective manner.[7] This feeds the sense of urgency that surrounds climate policy debates.

Perhaps because of climate change's super-wicked nature, there has yet been no meaningful policy response. Neither in the United States nor elsewhere have governments adopted the sorts of policies that can be reasonably anticipated to stabilize atmospheric concentrations of greenhouse gases in the coming decades.[8] Most international measures are largely symbolic,[9] and domestic enactments have been lacking.[10] Indeed, prior to 2022's

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[5] *See* Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1159-61 (2009)(defining climate change as a "super wicked problem).

[6] Lazarus, *supra* note _, at 1159.

[7] Lazarus, *supra* note _, at 1160. Others have described climate change's "super wickedness" in other terms. *See, e.g.*, Anne Saab, *The Super Wicked Problem of Climate Change Action*, https://www.graduateinstitute.ch/communications/news/super-wicked-problem-climate-change-action (characterizing climate change as a "super wicked" -problem because "its causes are multiple and complex, its impacts are uncertain and interrelated, and potential solutions to climate change might well cause further problems.").

[8] *See, e.g.*, Stella Levantesi, *Climate Policies Insufficient to Keep Global Warming Below 2ºC*, NATURE ITALY, Dec. 10, 2021 (discussing Ida Sogannes, et al., *A Multi-Model Analysis of Long-Term Emissions and Warming Implications of Current Mitigation Efforts*, 11 NATURE CLIMATE CHANGE 1055 (2021)); Max Bearak & Nadja Popovich, *The World is Falling Short of Its Climate Goals. Four Big Emitters Show Why*, THE NEW YORK TIMES (Nov. 8, 2022), https://www.nytimes.com/interactive/2022/11/08/climate/cop27-emissions-country-compare.html.

[9] *See* James R. May & Erin Daly, *Can the U.S. Constitution Encompass a Right to a Stable Climate? (Yes, it Can.)*, 39 UCLA J. ENVTL. L. 39, 41 (2021)(noting "international action hasn't made much of a dent in global carbon output, and well-intentioned international efforts . . . have lent little if any relief to those most affected").

[10] *See, e.g.*, Shaikh M. S. U. Eskander & Sam Fankhauser, *Reduction in Greenhouse Gas Emissions from National Climate Legislation*, 10 NATURE CLIMATE CHANGE 750 (2020).

Inflation Reduction Act, no serious climate measure had ever made it to a President's desk.[11] To this date, Congress has never passed legislation expressly authorizing the regulation of greenhouse gases as such.[12] States may have been more active, but state-level initiatives can only do so much.[13]

The failure of the political process to address climate change in a meaningful manner has no doubt fed the surge in climate litigation.[14] As noted, this litigation has taken a range of forms, from efforts to force greater consideration of climate-related impacts[15] and force federal agency action under existing laws,[16] to more ambitious efforts to assert legal rights to climate action under federal and state constitutional provisions.[17] Even when climate lawsuits have not been grounded in constitutional claims, they have still pressed against constitutional constraints. This is not only true of claims brought by those seeking greater action to address climate change.

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[11] *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1817.

[12]The closest Congress has come to enacting climate legislation has been to enact provisions in the IRA imposing a fee on methane emissions, and approving revisions to the Montreal Protocol to phase out ozone depleting substances that are also greenhouse gases.

Although Congress has not directly authorized the regulation of greenhouse gases, federal agencies have sought to target greenhouse gas emissions utilizing laws enacted for the control of traditional air pollutants and the Supreme Court has held that greenhouse gases may be regulated as air pollutants under the Clean Air Act. *See* Jonathan H. Adler, *Heat Expands All Things*, 34 HARV. J.L. & PUB. POL'Y 421 (2011).

[13] *See* Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PENN. L. REV. 101, 103 (2007) (noting it is "well understood that these state-level efforts, even those of large states such as California, will have little impact on global emissions and hence little impact on global climate.").

[14] See, e.g., Gerald Torres, *No Ordinary Lawsuit: The Public Trust and the Duty to Confront Climate Disruption—Commentary on Blumm and Wood*, 67 AMER. U.L. REV. FORUM 49, 50 (2018) (noting *Juliana* suit discussed *infra* notes __ was filed "seeking to break the deadlock that has prevented the United States from aggressively confronting the challenge of climate change

[15] Wildearth Guardians v. United States BLM, 870 F.3d 1222 (10th Cir. 2017) (plaintiff argued that the BLM violated NEPA by not giving adequate consideration to the CO2 emissions resulting from coal leases); Wildearth Guardians v. Jewell, 738 F.3d 298 (D.C. Cir. 2013) (same); Ctr. for Biological Diversity v. United States Forest Serv., 687 F. Supp. 3d 1053 (D. Mont. 2023) (holding that the USFS violated NEPA by not considering its project's climate impacts).

[16] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497 (2007)(suit to force EPA regulation of greenhouse gases). *See also infra* __.

[17] *See, e.g., Juliana v. United States*, 217 F.3d 1224 (D. Or. 2016). Held v. Montana, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023). *See also infra* __.

Defensive filings and some challenges to federal regulations have pressed ambitious constitutional claims as well.

This essay begins with the first major climate change case, *Massachusetts v. EPA* and its impact on standing jurisprudence. Though undoubtedly an important case for climate policy, it is possible that *Massachusetts* could have greater impact on the law of standing. Part II turns to the audacious constitutional claims made in the so-called "kids climate cases," *Juliana v. United States* in particular. Whereas some constitutional claims filed under state constitutions draw upon environmental provisions, there is no history of constitutional protections for the environment under the federal constitution, nor is there a tradition of recognizing positive rights of the sort that would authorize courts to order governments to take more direct action.

Those seeking climate action are not the only ones to push constitutional boundaries, however. As explored in Part III, state attorneys general have pressed aggressive environmental claims to push against actions taken by the EPA and the proliferation of state-law-based tort suits against fossil fuel companies. The essay then closes with some general observations.

I. *MASSACHUSETTS V. EPA*

The first major climate change case brought in federal court was *Massachusetts v. EPA*, arguably the most important environmental law case of the 21st century.[18] The suit arose out of activist frustration that neither Congress nor the Environmental Protection Agency was taking

[18] 549 U.S. 497 (2007).

action to address climate change.[19] Several environmental organizations filed a petition demanding the EPA take steps to control greenhouse gas emissions from motor vehicles under Section 202 of the Clean Air Act.[20] When the EPA ultimately refused,[21] the environmental organizations and several states filed suit.[22]

The ultimate issue in *Massachusetts* was whether the EPA had authority to regulate carbon dioxide and other greenhouse gases as "pollutants" under the Clean Air Act and, if so, whether the EPA had properly declined to exercise such authority in rejecting the environmentalist petition.[23] Yet before the Court could reach that question it had address the question of standing.

Under Article III of the Constitution, the jurisdiction of federal courts is limited to "cases and "controversies."[24] Under longstanding precedent, the party seeking to invoke the jurisdiction of a federal court must demonstrate that they have standing in order for there to be a justiciable

[19] For a thorough history of the *Mass v EPA* litigation and its significance, see RICHARD J. LAZARUS, THE RULE OF FIVE: MAKING CLIMATE HISTORY AT THE SUPREME COURT (2020). For this author's initial take, see Jonathan H. Adler, *Warming Up to Climate Change Litigation*, 3 VA. L. REV. IN BRIEF 61 (2007).

[20] *See* 42 U.S.C. § 7521(a)(1) (requiring the EPA Administration to set vehicle emission standards for "any air pollutant . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare").

[21] *See* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,925 (Sept. 8, 2003).

[22] LAZARUS, *supra* note __ at 65. The environmentalist petitioners were the Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group. The state petitioners were California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. Other government parties were the District of Columbia, American Samoa, New York City, and Baltimore. *See Massachusetts*, 549 U.S. at 505 nn.2–4. Various businesses also supported the state and environmentalist petitioners, including the Aspen Skiing Corporation, Calpine, and Entergy, as did some trade associations and groups representing renewable energy interests. *Id.* at 510 n.15.

[23] *Massachusetts v. EPA*, 549 U.S. 497, 504–514 (2007).

[24] U.S. CONST. art. III, § 2, cl. 2.

"case" or "controversy."[25] Among other things, this means that a plaintiff must be able to show that they have a sufficient and distinct stake in the legal dispute before the court.

Under *Lujan v. Defenders of Wildlife*, the "irreducible constitutional minimum of standing" has three parts.[26] First, the "plaintiff must have suffered an 'injury in fact,'" that is both "actual or imminent" and "concrete and particularized."[27] Second, there must be a "causal connection between the injury and the conduct complained of."[28] Third, there must be a sufficient likelihood that the "the injury will be 'redressed by a favorable decision.'"[29] *Lujan*'s formulation of standing's requirements has long been a challenge for environmental litigants.[30] Scholars and other jurists have also criticized the *Lujan* formulation, particularly the threshold requirement of an "injury-in-fact," as an improper reading of Article III.[31] Whether or not these

[25] *See* Sierra v. City of Hallandale Beach, 996 F.3d 1110, 1115 (11th Cir. 2021) (Newsom, J., concurring) ("It is now all but gospel that any plaintiff bringing suit in federal court must satisfy what the Supreme Court has called the 'irreducible minimum' of Article III standing. . . . [which includes] 'an injury in fact.'" (cleaned up)).

[26] 504 U.S. 555, 560 (1992).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] Indeed, Justice Blackmun labeled Justice Scalia's opinion a "slash-and-burn expedition through the law of environmental standing." *Id.* at 606 (Blackmun, J., dissenting).

[31] See Ernest A. Young, *Standing, Equity, and Injury in Fact*, 97 NOTRE DAME L. REV. 1885, 1888 (2022) (noting the injury requirement "while commanding the apparent assent of all recent justices on the Supreme Court, has long been under siege by academics, and, occasionally, lower court jurists"). For a sampling of scholarship criticizing the foundations of current Supreme Court standing doctrine, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141 (1993); Richard J. Pierce, Jr., Lujan v. Defenders of Wildlife: *Standing as a Judicially Imposed Limit on Legislative Power*, 42 DUKE L.J. 1170 (1993); Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741 (1999); Steven L. Winter, *What if Justice Scalia Took History and the Rule of Law Seriously?*, 12 DUKE ENV'T L. & POL'Y F. 155 (2001); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1009 (2002) Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008);); Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131 (2009). *See also Sierra*, 996 F.3d at 1115 (Newsom, J., concurring) (standing's injury-in-fact requirement is not "properly grounded in the Constitution's text and history, coherent in theory, or workable in practice.").

requirements are properly derived from the text of Article III, they have become established black-letter law.[32]

In 2005, whether environmental litigants pressing climate change-based claims could satisfy *Lujan*'s standing test was an interesting question.[33] The Court had long held that federal courts lack jurisdiction to hear "generalized grievance[s]" that are "common to all members of the public."[34] At first blush, this bar on hearing "generalized grievances" would seem to preclude standing for harms caused by increases in atmospheric concentrations of greenhouse gases.[35] By definition, global climate change is a *global* phenomenon. The emission of greenhouse gases from motor vehicles in the United States or anywhere else contributes to *global* atmospheric concentrations of greenhouse gases which, in turn, have an effect on *global* temperatures.[36] Thus, by definition, climate change would seem to present the sort of generalized grievance that is beyond the scope of Article III.[37] Much like an individual taxpayer cannot claim a judicially cognizable injury from the misuse of funds in the federal Treasury, an individual citizen of the

[32] *See* William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 199 (2016) (noting the "requirements of standing doctrine have grown relatively settled despite the debates");

[33] Since the time that *Massachusetts* was litigated, there have been significant advances in the science of climate attribution, and it is now possible to identify the likely effects of greenhouse warming, present and future, with greater precision. *See. e.g.*, Aisha I. Saad, *Attribution For Climate Torts*, 64 BOS. COLL. L. REV. 868, 877–879 (2023)(describing that it is now possible to determine how much individual countries contribute to global warming); Rupert F. Smith et. al., *Filling The Evidentiary Gap In Climate Litigation*, 11 NATURE CLIMATE CHANGE 651, 653 (2021) (stating that attribution science can now provide evidence the influence of individual actor's GHG emissions for both existing and projected impacts); Daniel J. Metzger, *Attribution Science In Takings Litigation*, 13–14, SABIN CENTER FOR CLIMATE CHANGE LAW (Jul. 2021) (discussing attribution science in context of potential takings claims); Michael Burger, Jessica Wentz, Radley Horton, *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENVTL. L. 57 (2020).

[34] United States v. Richardson, 418 U.S. 166, 176-77 (1974) (quoting *Ex parte* Levitt, 302 U.S. 633, 634 (1937) (per curiam)).

[35] In the U.S. Court of Appeals for the D.C. Circuit, one of the judges would have dismissed the case on precisely those grounds. *See* Massachusetts v. EPA, 415 F.3d 50, 60-61 (D.C. Cir. 2005)(Sentelle, J.., concurring).

[36] *See* LAZARUS, *supra* note __, at 194 ("There is no ready scientific formula for calculating what level of reduction of greenhouse gas emissions will avoid specific harms in a particular place at a particular time.").

[37] *See Massachusetts*, 549 U.S. at 541 (Roberts, C.J., dissenting) ("The very concept of global warming seems inconsistent with [the] particularization requirement.").

planet could not claim a judicially cognizable injury from a slight alteration of the planetary thermostat.[38]

In order to establish Article III standing under *Lujan*, plaintiffs need to identify an actual or imminent harm to a specific legally protected interest. Thus, in the context of climate change, the requisite injury is not climate change or the accumulation of greenhouse gases into the atmosphere, as such, but rather the resulting impacts in particular places as a result of the policies challenged—and therein lied the rub. While the global concentration of greenhouse gases is what matters for purposes of climate change, the effects of climate change are not uniformly distributed across the globe, nor are the effects of emissions in the present immediately felt.[39] Thus satisfying the Article III inquiry requires focusing on the downstream effects of climate change.

Recognizing this concern, Massachusetts sought to establish the requisite injury by focusing the Court's attention on sea-level rise.[40] The state submitted affidavits asserting that anthropogenic emissions of greenhouse gases would contribute to sea-level rise which would, in turn, lead to a loss of sovereign territory. This focus on sea-level rise simplified the Court's inquiry insofar as identified a concrete injury that was particularized to Massachusetts, but it did not make the standing concern go away. An "injury-in-fact" must be *both* concrete and

[38] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342–347 (2006).

[39] *See* Lazarus, *supra* note __, at 193 ("Although some harm from climate change occurs 'right now,' that harm is not a direct result of current greenhouse gas emissions. It results from past greenhouse gas emissions that have been settling in the atmosphere over decades—even centuries—leading to higher and higher concentrations. Greenhouse gas emissions today will cause harm not in the next days or months, but in the next decades or even centuries").

[40] *See* Burger, et al.,, *supra* note __, at 154 (describing some of the specific claims made by Massachusetts about sea-level rise and the scientific support for those claims).

particularized as well as actual or imminent. Therein lied a potential rub, particularly given the state of climate attribution science at the time.

Insofar as Massachusetts wanted to show a concrete and particularized injury—the impact on the Massachusetts coastline—it was more difficult to show that the harm was actual or imminent. At the same time, insofar as Massachusetts wanted to show that it was suffering climate injuries in the here and now, it was more difficult to identify concrete and particularized harms that were distinct to Massachusetts. The affidavit submitted focused on the potential loss of coastline due to sea-level rise "by 2100,"[41] not any observable loss of territory that could be definitively attributed to anthropogenic contributions to climate change.

Massachusetts suit not only sought to expand the EPA's regulatory authority, it also sought to broaden the sorts of claims that were sufficient to establish standing, and the Supreme Court obliged. While purporting to adhere to the *Lujan* test as it had been applied over the prior decade, the Court took two steps to ease the plaintiffs' legal burden, each of which constitutes a potentially significant change in the law of standing. First, and most conspicuously, the Court declared that states were entitled to a "special solicitude" when seeking to invoke the jurisdiction of federal courts. "States are not normal litigants for the purposes of invoking federal jurisdiction," Justice Stevens explained.[42] Having ceded a portion of their sovereign authority to the federal government, including the authority to take interstate disputes into their own hands, states should have an easier time invoking federal jurisdiction.[43] With this newfound solicitude

[41] *Massachusetts*, 549 U.S. at 523 n.20 (discussing "possible" effects of sea level rise over the next century).
[42] *Massachusetts*, 549 U.S. at 536
[43] *Massachusetts*, 549 U.S. at 519–521.

"in mind," the Court had little difficulty concluding that a miniscule increase in sea-level rise satisfied the injury-in-fact requirement.[44]

The majority purported to ground "special solicitude" for states in *Georgia v. Tennessee Copper Company,* a century-old case in which the state of Georgia brought suit in federal court against a polluting factory across the border in Tennessee in federal court under the federal common law of nuisance.[45] This case had nothing to do with standing, however. The only "special solicitude" shown to Georgia in the case was the Court's willingness to consider providing Georgia with equitable relief of the sort unavailable to private parties under federal common law due to the state's "quasi-sovereign" interest in its territory. This is a far cry from a state seeking to sue the federal government for failing to properly implement a federal statute.

Georgia v. Tennessee Copper provides little, if any, support to the majority's newfound doctrine of "special solicitude."[46] This may explain why the case was not cited in Massachusetts' briefs. Indeed, the case was not cited in *any* brief filed by *any* party or amicus in the case.[47] While one brief filed by state *amici* did argue that states have special interests that should be

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[44] Justice Stevens actually overstated the extent of sea-level rise attributable to anthropogenic emissions of greenhouse gases alleged by the petitioners. Justice Stevens wrote that "global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming." 549 U.S. at 522. This is not what the petitioners alleged, nor what the Intergovernmental Panel on Climate Change (IPCC) reported at the time, however. The relevant affidavit claimed only that anthropogenic warming is responsible for "major" contributions to observed sea-level rise over the 20th century, not all of it. See MacCracken Decl. ¶5(c), Jt. App. at 225, Massachusetts, 504 U.S. 555. (No. 05-1120). The IPCC likewise did not attribute all observed sea-level rise to anthropogenic emissions. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS 665 (J.T. Houghton et al. eds., 2001). *See also* Burger, et al., *supra* note __ at 84 (discussing sea-level rise due to anthropogenic emissions).

[45]206 U.S. 230 (1907).

[46] As Richard Lazarus notes, the petitioners had looked at the case and determined it provided "thin support" for their position. *See* LAZARUS, *supra* note __,a t 250.

[47] The first appearance of the case came during oral argument, when it was raised by Justice Kennedy. *See* Transcript of Oral Argument at 14-15, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120). This exchange supports the claim that this aspect of the majority's standing analysis was necessary to ensure Justice Kennedy joined the majority. *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 67 (2007).

taken into consideration as part of the standing analysis, it focused on the potential of federal law to preempt state regulatory initiatives.[48] Even those who believe states should receive such consideration recognize the Court's reasoning on this point was quite confused.[49]

The Court further eased the standing inquiry by expanding the notion of what constitutes a "procedural right" that would justify relaxing the traditional standing requirements. In *Lujan*, the court noted that "normal standards for redressability and immediacy" are relaxed when a statute vests a litigant with a "procedural right."[50] This is because, as Justice Kennedy explained, "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."[51] Yet for there to be such a procedural right, "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[52]

In *Massachusetts* Justice Stevens said it was "of critical importance" that Congress had "authorized this type of challenge to EPA action."[53] The Clean Air Act provision the Court cited, however, had never been understood to do any such thing. Prior to *Massachusetts*, Section 307(b)(1) had been recognized as little more than a jurisdictional provision, identifying which petitions for review of EPA action under the Clean Air Act must be filed in the U.S. Court of

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[48] *See* Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120). For a critique of these alternative arguments for state standing, see Brief of The Cato Institute and Law Professors Jonathan H. Adler, James L. Huffman, and Andrew P. Morriss as Amici Curiae in Support of Respondents at 14–17, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120).

[49] *See* Kathryn A. Watts & Amy J. Wildermuth, Massachusetts v. EPA*: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. COLLOQUY 1 (2007) (noting "confusion" about the nature of Massachusetts sovereign interest in the case).

[50] *Defenders of Wildlife*, 504 U.S. at 560–61.

[51] *Massachusetts*, 549 U.S. at 516 (quoting *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring)).

[52] *Id*. (quoting *Defenders of Wildlife*, 504 U.S. at 580 (Kennedy, J., concurring)).

[53] *Id*.(citing 42 U.S.C. § 7607(b)(1)).

Appeals for the D.C. Circuit as opposed to other courts.[54] By its terms, this provision does not create a new procedural right, let alone "identify" an injury and "relate the injury to the class of persons entitled to bring suit."[55] The Clean Air Act actually contains a citizen suit provision that is virtually identical to the provision found to be insufficient to create the requisite procedural right in *Lujan*.[56] If there was no procedural right to lower the standing hurdle in *Lujan*, there should not have been one in *Massachusetts* either—unless, of course, the Court was redefining what it takes to create a procedural right.

Between the newly announced "special solicitude" and the newly discovered "procedural right" within the Clean Air Act, the Court had little problem concluding that these requirements had been met. While citing the longstanding rule that a favorable decision must "relieve a *discrete injury*" to the plaintiff,[57] the majority held that any government action that, all else equal, reduces (or at least retards the growth of) global emissions of greenhouse gases by any amount will suffice to redress some portion of the warming-induced injury. After all, Justice Stevens explained, "a reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[58] And this, in turn, would have *some* effect on future projections of sea-level rise – even if only by less than one inch between now and 2100. Under this loosened standard, *any* contribution of *any* size to a cognizable injury would be

[54] See 42 U.S.C. § 7607(b)(1) (2000) (42 U.S.C. § 7607(b)(1) (2000) (providing, in pertinent part, that "[a] petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard . . . or any other nationally applicable regulations promulgated, or final actions taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia . . . .").

[55] *See* Ronald A. Cass, *Massachusetts v. EPA*: The Inconvenient Truth About Precedent, 93 Va. L. Rev. In Brief 75 (2007), http://www.virginialawreview.org/inbrief/2007/05/21/cass.pdf.

[56] 42 U.S.C. § 7604. This provision was not at issue in *Massachusetts v. EPA*.

[57] *Massachusetts*, 549 U.S. at 525 (emphasis added).

[58] *Id.*

sufficient for causation, and *any* step, no matter how small, is sufficient to provide the necessary redress.

In the years since *Massachusetts*, litigants have had an easier time establishing standing in climate-related cases.[59] This may well have been true even absent Justice Stevens' opinion, if for no other reason than improvements in climate attribution science make it easier to identify actual or imminent impacts of climate change and estimate the relative contribution of anthropogenic emissions to such impacts.[60] The Court's procedural rights holding does not appear too have mattered much. The ability to raise such concerns under NEPA and related statutes was relatively clear,[61] and litigants in other contexts have not capitalized on the Court's apparent expansion of the definition of a procedural right.

The Court's declaration that states are to receive 'special solicitude" when asserting standing appears to have been more consequential.[62] This has not been altogether positive for environmental protection. In the years since *Massachusetts* the volume of state litigation against the federal government has exploded.[63] This has included suits by states seeking greater federal

[59] *See e.g.*, Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 420 (2011)(noting the Court split 4-4 on the question of standing with Justice Sotomayor recused, even though the case did not involve a procedural right); Wildearth Guardians v. United States BLM, 870 F.3d 1222 (10th Cir. 2017)(suit to challenge the determinations about the environmental impacts of coal leases); Citizens for Clean Air v. United States DOT, 98 F.4th 178 (5th Cir. 2024)(suit challenging agency's evaluation of the impact an oil port would have on air quality).

[60] *See infra* note __, and sources cited therein.

[61] *See e.g.*, Border Power Plant Working Grp. v. DOE, 260 F. Supp. 2d 997 (S.D. Cal. 2003)(challenge to agency's finding of no significant impact for permits to construct electric lines); Ouachita Watch League v. Jacobs, 463 F.3d 1163 (11th Cir. 2006)(suit claiming the United States Forest Service violated NEPA when it altered forest plans); Wildearth Guardians v. Jewell, 738 F.3d 298 (2013)(suit challenging agency's determination about the environmental impact of coal leases); Mont. Envtl. Info. Ctr. v. United States BLM, 615 F. App'x 431 (9th Cir. 2015)(suit against BLM for its decision to grant oil and gas leases).

[62] *See* Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1082 (2015) (the "important" part of the *Massachusetts* standing analysis is the Court "either recognized or introduced special standing rules for states suing to protect their property and other quasi-sovereign interests"). For an overview of the scholarship on state standing in the wake of *Massachusetts*, see Tara Leigh Grove, *Foreword: Some Puzzles of State Standing*, 94 NOTRE DAME L. REV. 1883 (2019).

[63] *See* William Baude & Samuel L. Bray, *Proper Parties, Proper Relief*, 137 HARV. L. REV. 153, 154 (2023)(suggesting *Massachusetts* is one reason that "states have come to dominate the public law scene."); *see also*

environmental protection, to be sure.[64] It has also included suits filed by states seeking to challenge federal regulation, including EPA regulation related to greenhouse gases.[65] There is some debate on whether *Massachusetts* "special solicitude" has been outcome determinative in many of these cases,[66] but it seems apparent that many states have felt emboldened to challenge a broader array of federal initiatives, and claim "special solicitude" when they seek to do so.[67]

II. THE KIDS CLIMATE CASES

Massachusetts unleashed federal regulatory authority to regulate greenhouse gases under the Clean Air Act.[68] It did not, however, solve the problem of climate change. The Clean Air Act

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PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 21 (2015).

[64] See e.g., New York v. EPA, 781 F. App'x 4 (D.C. Cir. 2019)(challenge to EPA regulation under the Clean Air Act known as the Clouse-Out Rule); State v. EPA, 443 U.S. App. D.C. 350 (2019) (Suit by Wisconsin over Clean Air Act's good neighbor provision); New Mexico v. United States EPA, 310 F. Supp. 3d 1230 (D.N.M. 2018) (suit about disaster cleanup under CERCLA); California v. United States EPA, 385 F. Supp. 3d 903 (N.D. Cal. 2019) (suit over EPA's emission guidelines for solid waste landfills); Maryland v. EPA, 958 F.3d 1185 (2020) (suit over Good Neighbor provisions); New York v. Nat'l Highway Traffic Safety Admin., 974 F.3d 87 (2nd Cir. 2020) (suit claiming that the NHTSA erroneously reversed a decision to increase the base rate for the Corporate Average Fuel Economy Penalty).

[65] Texas v. EPA, 726 F.3d 180 (D.C. Cir. 2013)(issue about the permitting requirements for states that had no implementation plan for greenhouse gases); *Texas v. United States EPA*, No. 10-60961, 2011 U.S. App. LEXIS 5654 (5th Cir. Feb. 24, 2011) *Texas v. United States EPA*, No. 10-60961, 2011 U.S. App. LEXIS 5654 (5th Cir. Feb. 24, 2011)(arguing that greenhouse gases should not be a consideration of state implementation programs); Ohio v. EPA, 98 F.4th 288 (D.C. Cir. 2024)(attacking the EPA's uniform implementation plan for handling downwind pollution by states); West Virginia v. EPA, 597 U.S. 697 (2022) (questioning the EPA's authority to regulate already existing power plants); Kentucky v. United States EPA, No. 23-3216/3225, 2023 U.S. App. LEXIS 18981 (6th Cir. July 25, 2023)(Kentucky sought to attack the EPA's denial of their state implementation plan).

[66] *See* Katherine Mims Crocker, *Not-So-Special Solicitude*, 109 MINN. L. REV. (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4713677.

[67] *See* Baude & Bray, *supra* note __, at 154 *("*States — often large coalitions of states, all represented by attorneys general from the opposite political party of the President — now file suits challenging any important action taken by the executive branch."); *see also See* Adam Liptak, *Student Loan Case Before Supreme Court Poses Pressing Question: Who Can Sue?*, N.Y. TIMES (Feb. 26, 2023), https://www.nytimes.com/2023/02/26/us/politics/biden-student-loans-supreme-court.html.

[68] *See* Jonathan H. Adler, *Heat Expands All Things: The Proliferation of Greenhouse Gas Regulation under the Obama Administration*, 34 HARV. J. L. & PUB. POL'Y 421 (2011).

is not well-suited to address greenhouse gas emissions[69] and, contrary to some hopes, the prospect of Clean Air Act did not prompt legislative action. Thus *Massachusetts* did not stem the demand for climate action, or the impetus for climate litigation.

Among the more prominent waves of climate litigation in the past decade have been the so-called "kids climate" cases—cases brought by or on behalf of youth activists.[70] Whereas the constitutional questions in *Massachusetts* were incidental, constitutional questions are central to cases, such as *Juliana v. United States* and *Genesis B. v. Environmental Protection Agency.* While these cases also implicate standing doctrine, they overtly embrace substantive constitutional claims.[71] At the heart of cases like *Juliana* and *Genesis B.* are audacious constitutional claims that cut against the weight of existing doctrine and the nation's constitutional structure in significant ways.

Juliana was filed with much fanfare in 2015.[72] The combination of child plaintiffs and aggressive legal claims readily distinguished it from more mundane tort suits and administrative

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[69] See Arnold W. Reitze, Jr., *Federal Control of Greenhouse Gas Emissions*, 40 ENVTL. L. 1261, 1323 (2010) ("The CAA is not a tool designed to deal with GHG emissions, or more specifically CO2.")

[70] These cases have received substantial media attention. ; Laura Parker, *'Biggest Case on the Planet' Pits Kids vs. Climate Change*, NATIONAL GEOGRAPHIC (Nov. 9, 2018), https://www.nationalgeographic.com/science/article/kids-sue-us-government-climate-change; Carolyn Kormann, *The Right to a Stable Climate is The Constitutional Question of The Twenty-First* Century, THE NEW YORKER (Jun. 15, 2019), https://www.newyorker.com/news/daily-comment/the-right-to-a-stable-climate-is-the-constitutional-question-of-the-twenty-first-century; Steve Kroft, *The Climate Change Lawsuit That Could Stop The U.S. Government From Supporting Fossil Fuels*, CBS NEWS (Jun. 23, 2019, 7:29 PM), https://www.cbsnews.com/news/juliana-versus-united-states-climate-change-lawsuit-60-minutes-2019-06-23/; Lesley Clark, *Montana Kids' Climate Case Set to Make History*, E&E NEWS (Jun. 9, 2023, 6:56 AM), https://www.eenews.net/articles/montana-kids-climate-case-set-to-make-history/; Laura Parker, *Kids Suing Governments About Climate: It's a Global Trend*, NATIONAL GEOGRAPHIC (Jun. 26, 2019), https://www.nationalgeographic.com/environment/article/kids-suing-governments-about-climate-growing-trend; Cassidy Randall, *Sixteen Kids Are Fighting the Climate Crisis in Court*, ROLLING STONE (Apr. 7, 2023, 11:45 AM), https://www.rollingstone.com/politics/politics-features/youth-led-climate-trial-montana-1234709085/.

[71] Many of the state law cases brought on behalf of youth plaintiffs also raise constitutional claims. *See. e.g.*, Held v. Montana, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023).

[72] *Juliana v. U.S. Timeline*, CLIMATE CHANGE RESOURCES, https://climatechangeresources.org/learn-more/federal-government/judicial/juliana-v-u-s-timeline/ (last visited Aug. 22, 2024) (timeline of press coverage about the case).

law claims. Indeed, the district court judge who heard the case proclaimed that *Juliana* was "no ordinary lawsuit."[73]

The core of the arguments in *Juliana* were that the federal government's failure to take more meaningful action to control greenhouse gases is not merely a violation of federal law, but a violation of Constitutional guarantees.[74] Specifically, the litigants in both cases sought to argue that the federal government "permitted, encouraged, and otherwise enabled continued exploitation, production, and combustion of fossil fuels," that such "actions and omissions . . . allowed" an unprecedented increase in greenhouse gases in the atmosphere, "resulting in a dangerous destabilizing climate system."[75] Such actions and omissions, taken together, the plaintiffs argued, violate the Due Process Clause of the Fifth Amendment and the Constitution's guarantee of Equal Protection.[76] *Genesis B.*, filed seven years later, made similar claims against the Environmental Protection Agency, highlighting the Equal Protection claims and further suggesting that the EPA violated its constitutional obligation to "take care" that the nation's laws are executed by not doing more to limit greenhouse gas emissions.[77]

The district court in *Juliana* embraced the plaintiffs' claim that the Constitution protects a "fundamental right" to "a climate system capable of sustaining human life."[78] While recognizing

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[73] Juliana v. Unites States, 217 F.Supp.3d 1224, 1234 (D. Or. 2016). *See also* Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AMER. U. L. REV. 1 (2017).

[74] The plaintiffs in *Juliana v. United States* also argued that the United States violated the public trust doctrine. *See* First Amendment Complaint, Juliana v. Unites States, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 5:15-cv-01517-TC).

[75] First Amendment Complaint at ¶5, Juliana v. Unites States, 217 F.Supp.3d 1224 (D. Or. 2016) (No. 5:15-cv-01517-TC).

[76] *See* First Amendment Complaint at ¶¶ 277-301;

The plaintiffs in *Juliana v. United States* also argued that the United States violated unenumerated rights protected by the Ninth Amendment, *id.* at ¶¶ 302-306, and its "obligation to hold certain natural resources in trust for the people and for future generations." Juliana v. United States, 217 F.Supp.3d 1224, 1233 (D.Or. 2016).

[77] Complaint for Declaratory Relief, G.B. v. EPA, No. 23-10345-MWF, (C.D. Calif. 2023).

[78] *Juliana*, 217 F.Supp.3d at 1250. Note that the district court "fram[ed]" the plaintiffs' claim this way, *id.*, and further lumped the fundamental right claim under the Due Process Clause in with the plaintiffs' Equal Protection

that the Supreme Court had "cautioned that federal courts must 'exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into' judicial policy preferences,"[79] Judge Aiken had "no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society" and is thus a fundamental right guaranteed by the Constitution.[80] Relying on *Obergefell v. Hodges*[81] and *Roe v. Wade*[82], Judge Aiken reasoned that such a right was "necessary to enable the exercise of other rights, whether enumerated or unenumerated."[83]

While acknowledging that, as a general matter, "the Due Process Clause does not impose on the government an affirmative obligation to act, even when 'such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual," she concluded that "the government's failure to limit third-party" emissions of greenhouse gases could constitute a constitutional violation because government action contributed to the threat posed by climate change.[84] Recognizing the potential breadth of a "right to a climate system capable of sustaining human life," Judge Aiken noted her intent "strike a balance" between limiting protection of the right to "governmental action [that] will result in the extinction of humans as a species" and allowing litigation over "any minor or even moderate act that contributes to the warming of the planet" as "a constitutional violation," so as "to provide some protection against the constitutionalization of all environmental claims."[85] And to redress

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and Ninth Amendment claims. *Id.* at 1248 n.6 ("Plaintiffs' due process claims encompass asserted equal protection violations and violations of unenumerated rights secured by the Ninth Amendment. For simplicity's sake, this opinion refers to these claims collectively as 'due process claims.'").

[79] *Juliana*, 217 F.Supp.3d at 1249 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)), and *id.* at

[80] *Juliana*, 217 F.Supp.3d at 1250.

[81] 576 U.S. 644 (2015).

[82] 410 U.S. 113(1973).

[83] *Juliana*, 217 F.Supp.3d at 1249.

[84] *Juliana*, 217 F.Supp.3d at 1250-51.

[85] *Juliana*, 217 F.Supp.3d at 1250.

the alleged constitutional violations, Judge Aiken was willing to consider the plaintiffs' request to order the federal government "to prepare and implement an enforceable national remedial plan to phase out fossil fuel emissions and draw down" atmospheric concentrations of greenhouse gases.[86]

Even before the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*,[87] which made clear that lower courts should not readily find unenumerated rights protected by substantive due process, the underlying claims to unenumerated rights were quite aggressive. All prior attempts to establish the existence of a federal constitutional right to a clean environment or protection from pollution had failed.[88] Even at a time when federal courts were far more open to the idea that unenumerated rights merited constitutional protection, courts rejected claims that the constitution protected any such rights as contained within the right to life,[89] substantive due process,[90] a form of Equal Protection,[91] or an unenumerated right protected by the Ninth Amendment.[92]

The Supreme Court outlined the modern test for the recognition of unenumerated rights meriting constitutional protection in *Washington v. Glucksberg*, in which a unanimous Court rejected the claim that the Due Process Clause of the Fourteenth Amendment protected an

[86] *Juliana*, 217 F.Supp.3d at 1247.
[87] *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).
[88] *See* Robin Kundis Craig, Juliana, *Climate Change and the Constitution*, NAT. RES. & ENV. (Summer 2020) at 53-54.
[89] *See* Gasper v. Louisiana Stadium & Exposition District, 577 F.2d 897, 898–99 (5th Cir. 1978)
[90] *See* Valero Terrestrial Corp. v. McCoy, 36 F. Supp. 2d 724, 752-53 (N.D. W. Va. 1997).
[91] *See* Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1429–30 (9th Cir. 1989).
[92] *See* Concerned Citizens of Nebraska v. Nuclear Regualtory Commission, 970 F.2d 421, 426-27 (8th Cir. 1992). *See also* Guertin v. Michigan, 912 F.3d 907, 921-22 (6th Cir. 2019 ("Constitution does not guarantee a right to live in a contaminant-free healthy environment"); Nat'l Sea Clammers Ass'n v. City of New York, 616 F.2d 1222, 1237-38 (3rd Cir. 1980 ("there is no constitutional right to a pollution-free environment"), *acated on other grounds sub nom.* 453 U.S. 1 (1981); Ely v. Velde, 451 F.2d 1130, 1139 (4th Cir. 1971) (arguments "in support of a constitutional protection for the environment" have not "been accorded judicial sanction").

individual's right to seek a doctor's assistance in committing suicide.[93] In rejecting the claim, the Court explained unenumerated rights are those which are both objectively, "deeply rooted in this 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."[94] This test is designed to ensure that courts do not engage in freewheeling exercises of rights creation and recognition. *Glucksberg* further requires a "careful description" of the asserted fundamental liberty interest.[95] Broad appeals to "liberty" and the like are insufficient.

Under the *Glucksberg* formulation, that something is highly valued or essential is insufficient to make it a constitutional right. Rather it must be the sort of right recognized as woven into the constitutional fabric at the time of ratification, even if not made express. Under this formulation, it is conceivable that the certain rights related to marriage,[96] child-rearing,[97] or family may be protected (if defined sufficiently narrowly) as such may be said to be deeply rooted in the nation's legal history and traditions. Yet rights to environmental protection, or even a stable climate, are far more tenuous.

Part of the problem with making the sort of constitutional rights claim forwarded by the *Juliana* plaintiffs is that it is a claim of positive rights—a claim that the federal government has an affirmative obligation to take actions to prevent harms caused by third-parties. At the Supreme Court has explained, the Due Process Clause "is phrased as a limitation on the State's

[93] *Washington v. Glucksberg*, 521 U.S. 702 (1997).
[94] *Id* at 721.
[95] *Id*.
[96] *Loving v. Virginia*, 388 U.S. 1 (1967), *see also Obergefell v. Hodges*, 576 U.S. 644 (2015).
[97] *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Troxel v. Granville*, 530 U.S. 57 (2000).

power to act, not as a guarantee of certain minimal levels of safety and security."[98] The specific language specifies what the government may not do, and what is forbidden is the deprivation of rights.[99] As generally understood, such rights are rights as against government action, not right's to affirmative government action. Thus the Due Process clauses of the Fifth and Fourteenth Amendments do not bar the deprivation of life, liberty or property, as such, but rather bar the deprivation of life, liberty or property without due process of law.[100]

The Due Process clauses of the Fifth and Fourteenth Amendments require that government action which may deprive individuals of a protected interest (life, liberty, or property) must be in accordance with law.[101] As the time these provisions were adopted, this guarantee was understood to mean, at the very least, that "the executive could not deprive anyone of a right except as authorized by law, and that to be legitimate, a deprivation of rights had to be preceded by certain procedural protections, characteristic of judicial process."[102] Insofar as the Due Process Clauses, and the Fourteenth Amendment's Privileges or Immunities

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[98] 489 U.S. 189, 195 (1989). *See also* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 865 (1986) ("the due process clause is phrased as a prohibition, not an affirmative command").

[99] *See* Currie, *supra* note __, at 865. As Judge Eric Murphy of the U.S. Court of Appeals for the Sixth Circuit observed, "[t]he text would be a poor choice of words if the clause's Framers meant to compel a state to protect its people's lives, to promote their liberties, or to provide them with property." *Gary B.*, 957 F.3d at 666 (Murphy, J., dissenting).

[100] It is fair to note that this requirement, in a sense, imposes an affirmative obligation on the government to provide due process, but this requirement (like most other affirmative obligations provided for in the federal constitution) is triggered by governmental action that would deprive an individual of their protected rights.

[101] Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1679 (2012) ("[f]undamentally, 'due process' meant that the government may not interfere with established rights without legal authorization and according to law"); *see also* BERNARD H. SIEGAN, PROPERTY RIGHTS: FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT 16-17 (2001) (noting due process traditionally required, among other things, that the reason for a deprivation be found in a "legitimately enacted law."). This understanding dates back to the Magna Carta which provided that that "no free man" would be "imprisoned or disseised or outlawed or exiled or in any way ruined . . . except by the lawful judgment of his peers or by the law of the land." *See* Magna Carta, art. 39. *See also Gary B.*, 957 F.3d at 663 (Murphy, J., dissenting) ("The Due Process Clause has historically been viewed, consistent with its plain text, as a negative limit on the states' power to 'deprive' a person of 'liberty' or 'property.'").

[102] Chapman & McConnell, *supra* note __, at 1679.

Clause, were also understood to provide substantive guarantees against the government, they still protected what we would understand as "negative" rights as against government deprivations, and not positive rights to government protection or provision.[103] Thus courts have refused to recognize affirmative rights to education or sustenance under the federal constitution.[104] Among other things, this means there is no constitutional right to government protection against private violence.[105]

This was made explicit in *DeShaney v. Winnebago County Department of Social Services*, in which the Court explained 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."[106] If this is true of direct assaults on a person, even a highly vulnerable person such as a four-year-old child, it is unquestionably so with private conduct that adversely affects the broader environment within which we live. If the state's failure to protect poor Joshua from his abusive father, did not violate Joshua's Due Process rights, even after the state was put on

[103] *See generally,* RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER & SPIRIT (2021). Note that insofar as the Equal Protection Clause of the Fourteenth Amendment is understood to impose affirmative obligations on the government to provide protection from private violence *equally*, this would not be the basis for asserting a substantive right to government control of greenhouse gas emissions or the right to a stable climate asserted by the *Juliana* plaintiffs. *See id.* at 351-361 (discussing implementation of the Equal Protection Clause).

[104] *See* Jackson v. City of Joliet, 715 F.2d 1200, 1203-04 (7th Cir. 1983)(" The modern expansion of government has led to proposals for reinterpreting the Fourteenth Amendment to guarantee the provision of basic services such as education, poor relief, and, presumably, police protection, even if they are not being withheld discriminatorily. . . . To adopt these proposals, however, would be more than an extension of traditional conceptions of the due process clause. It would turn the clause on its head. It would change it from a protection against coercion by state government to a command that the state use its taxing power to coerce some of its citizens to provide services to others").

[105] *See* DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 197 (1989) ("As a general matter . . . a state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."); *see also* Gary B. v. Whitmer, 957 F.3d 616, 663 (6th Cir. 2020)(Murphy, J., dissenting) ("While, for example, a party may have a constitutional right against state aggression, the party has no constitutional right to state protection against private violence."), reh'g en banc granted, vacated by 958 F.3d 1216 (6th Cir. 2020).

[106] 489 U.S. 189, 195 (1989). *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 616 (7th ed.2023)(noting the Court "broadly held that the government generally has no duty to protect individuals from privately inflicted harms").

notice of Joshua's peril,[107] it is hard to see how a failure to regulate or constrain GHG emissions could constitute a constitutional violation. It is one thing to say that government has affirmative obligations entrusted to government's care and control – as might occur in the prison context – but something quite different to claim government has affirmative obligation to control privately generated harms.[108] This would be true in any pollution context, but especially so with something as ubiquitous as greenhouse gas emissions.

The fundamental conceptual problem here is that the federal Constitution is a charter of negative liberty – delegating limited government power and protecting rights as against the government, not positive rights.

[109] Judge Aiken sought to avoid this distinction by eliding the distinction between government action that, itself, violates such rights, and government action that fails to control or prevent such actions by others and embracing the power of the judiciary to exercise "reasoned judgment" and discover previously unrecognized rights.[110]

There is a longstanding recognition of rights against pollution going back to 1600s, including the law of nuisance.[111] These rights are understood to allow individuals to bring actions in defense of their persons or property. But they have never been understood to protect an affirmative right to governmental intervention.[112] As Judge Aiken seemed to recognize, the

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

[108] *DeShaney*, 489 U.S at 198 ("It is true that, in certain limited circumstances, the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals."). As examples, the *DeShaney* Court cited cases involving incarceration and involuntary commitments. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 307 (1982); Estelle v. Gamble, 429 U.S. 97 (1976).

[109] 715 F.2d 1200, 1203 (7th Cir. 1983)("the Constitution is a charter of negative rather than positive liberties."); *id.* ("The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.").

[110] *Juliana*, 217 F.Supp.3d at 1250.

[111] *See, e.g.,* William Aldred's Case, 77 Eng. Rep. 816 (1610).

[112] It is possible, however, that government actions that deprive individuals of their rights to file nuisance or other actions in defense of their person or property might constitute a "taking" of property under the Fifth

recognition of right against disaster would be hard to cabin, and not merely in the environmental context. If the government is barred from allowing actions that could threaten the nation it is not clear why this right would not sustain legal action to challenge fiscal irresponsibility or national security policy. Even to countenance judicial resolution of such questions, let alone judicial authority to order injunctive relief to protect against such threats as a matter of constitutional law, would radically transform the nature of Article III.

Whereas the *Juliana* plaintiffs primarily sought to advance a due process argument,[113] the *Genesis B.* plaintiffs focused on Equal Protection.[114] Specifically they sought to argue that by not taking more aggressive actions to stabilize atmospheric concentrations of greenhouse gases the EPA, and the federal government more broadly, effectively discriminated against children. Setting aside that age-based classifications have never been subjected to any form of heightened scrutiny,[115] and setting aside that the *Genesis B.* plaintiffs (unlike those in *Massachusetts*) did not seek to identify any specific allegedly unlawful acts or omissions by the EPA, this is an audacious claim that (like the claim to a positive right to secure environment) would have profound implications across a broad range of policy areas. Among other things, the arguments would seem to suggest that any use of discounting in environmental or health-related policies would be unconstitutional. Taken serious, the claim that policies that shift risks or liabilities into

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Amendment. *See, e.g.,* Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 316–321 (Iowa 1998) (holding state right-to-farm law that barred some nuisance suits constituted an uncompensated taking). It may well be that positive rights are protected under state constitutions, but they are not protected under the federal constitution, and the existence of the former does not provide a basis for federal court jurisdiction. *See, e.g.,* Alec L. v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014)(holding state public-trust-doctrine-based clams do not arise under the U.S. Constitution for purposes of federal jurisdiction).

[113] The *Juliana* plaintiffs also devoted substantial attention to arguments grounded in the public trust doctrine. Those arguments are beyond the scope of this essay.

[114] *See* Complaint for Declaratory Relief, Genesis B. v. U.S. EPA.

[115] *See, e.g.*, Mass. Bd. Of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (explaining why age is not a suspect classification).

the future are constitutionally suspect would seem to have profound implications for fiscal policy as well.

In the end, neither the arguments made in *Juliana* nor *Genesis B.* went very far. Both cases were ultimately dismissed on standing grounds. After substantial legal wrangling (and what could properly be characterized as judicial intransigence at the district court[116]) the *Juliana* case was dismissed by the U.S. Court of Appeals for the Ninth Circuit.[117] In light of this holding, *Genesis B.* was dismissed as well.[118] Interestingly enough, because the cases were both dismissed on standing, appellate courts were never called upon to address, and thus had no opportunity to reject, the constitutional claims made.

III. BACKLASH

Environmental advocates are not the only ones to have advanced aggressive constitutional claims in the context of climate litigation. State attorneys general and others seeking to prevent the regulation of greenhouse gases or liability for fossil fuel companies have also put forward quite ambitious constitutional arguments that, if accepted, could have implications far beyond the specific context in which the claims are raised. They have also made

[116] *See* Jonathan H. Adler, *Ninth Circuit Puts an End To the Kids Cliamte Case*, The Volokh Conspiracy, May 1, 2024, https://reason.com/volokh/2024/05/01/ninth-circuit-puts-an-end-to-the-kids-climate-case/.

[117] *See* Juliana v. U.S., 947 F.3d 1159 (9th Cir. 2020) (suit dismissed for lack of standing due to lack of redressability). The Ninth Circuit had to subsequently reaffirm this holding and its order to dismiss in a subsequent order. *See* In re United States of America, No. 24-684 (9th Cir. May 1, 2024) (granting federal government's petition for writ of mandamus to enforce earlier mandate).

[118] G.B. v. U.S. Environmental Protection Agency, 2024 WL 3009302 (C.D. Calif. May 8 2024) (granting motion to dismiss on standing grounds).

broad constitutional arguments against the application of long-standing environmental programs in an effort to hamstring greenhouse gas emission reduction efforts.

For over a half-century, the state of California has enjoyed the unique ability to set emission standards for motor vehicles that are exempted from federal preemption under the Clean Air Act. Section 209(a) of the CAA provides that no state may adopt or enforce "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines" subject to regulation under the Act.[119] The purpose of this provision is to maintain a national market for motor vehicles by providing for uniformity in vehicle emission standards.[120] A uniform national standard prevents the balkanization of the national automobile market that could result if automakers were subject to different regulatory requirements in different states. California, and California alone, may seek a waiver of Clean Air Act preemption for its motor vehicle emission standards because California has long suffered from more severe air pollution than other states and, no less importantly, California adopted motor vehicle emission standards before the federal government did.[121] This provision leaves other states with a choice of accepting the federal vehicle emission standards adopted by the EPA and those adopted by California.[122]

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[119] 42 U.S.C. § 7543(a).

[120] *See* Motor & Equipment Mfrs. Ass'n v. EPA, 627 F.2d 1095, 1109 (D.C. Cir. 1979) ("Congress in 1967 expressed its intent to occupy the regulatory role over emissions control to the exclusion of all the states—all, that is, except California" due to "the spectre of an anarchic patchwork of federal and state regulatory programs . . . .").

[121] *See* 42 U.S.C. § 7543(b). The language in the U.S. Code does not specifically mention California. Rather, one condition for a state having the ability to set its own vehicle emission standards is that it had adopted its first standards prior to March 30, 1966, and California is the only state that complies with this condition. See 42 U.S.C. § 7543(b)(1). For discussions of the history of vehicle emission regulation, and the compromise that led to grandfathering California's regulatory program, see E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON & ORG. 313 (1985); JAMES E. KRIER & EDMUND URSIN, POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION 1940-1975 (1977).

[122] *See* 42 U.S.C. § 7507(2).

Because California has the unique ability to set vehicle emission standards, and because it represents the largest state automobile market in the country, California's authority to set its own vehicle emission standards has been controversial. This controversy has increased as California has sought to obtain waivers for greenhouse gas emission standards and electric vehicle mandates.[123] Recent presidential administrations have alternated in their support of California receiving waivers for this purpose, and most recent waiver decions have been subject to litigation.[124]

Most of the challenges to EPA waiver decisions have focused on traditional questions of statutory interpretation and administrative law.[125] Most recently, however, a coalition of state attorneys general led by Ohio have raised an aggressive constitutional claim: That the California Waiver provisions are unconstitutional.[126] Their argument is that insofar as the CAA allows California the ability to set vehicle emission standards that is denied to other states, this violates the "equal sovereignty principle" embodied in the Supreme Court's *Shelby County v. Holder* decision.[127] In their view, this principle, while not requiring the federal government to treat all states in a uniform manner in all respects, bars Congress from allowing California to exercise

[123] *See* Jonathan H. Adler, *Uncooperative Environmental Federalism 2.0*, 71 HASTINGS L. J. 1101, 1119–1123 (2020).

[124] *See e.g.*, Dalton Trucking, Inc. v. United States EPA, 808 F.3d 875 (D.C. Cir. 2015)(challenging California emissions regulations); Chamber of Commerce of the United States v. EPA, 642 F.3d 192 (D.C. Cir. 2011)(seeking judicial review of EPA's decision to grant California a waiver); Ohio v. EPA, 98 F.4th 288 (D.C. Cir. 2024)(same).

[125] For an overview of the relevant arguments, see the cases cited above and Jonathan H. Adler, *Hothouse Flowers: The Vices and Virtues of Climate Federalism*, 17 TEMPLE POLITICAL & CIVIL RIGHTS L. REV., Spring 2008 at 443,453–458.

[126] *See* Ohio v. EPA, 98 F.4th 288 (D.C. Cir. 2024).

[127] *See* Shelby County v. Holder, 570 U.S. 529, 544 (2013) (holding the Constitution embraces a "fundamental principle of equal sovereignty"). *See also generally*, Thomas Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L. J. 1087 (2016)

sovereign authority—here the authority to regulate motor vehicles sold within the state—that is denied to other states.[128]

The invocation of *Shelby County* was innovative, but ultimately insufficient, and the U.S. Court of Appeals for the D.C. Circuit rejected the claim.[129] In *Shelby County*, the Supreme Court concluded that Congress violated the equal sovereignty principle insofar as it imposed differential requirements on states under the Voting Rights Act that were not "sufficiently related to the problem it targets."[130] In *Ohio v. EPA*, however, the states did not argue that the CAA's waiver provision was similarly infirm. That would have been a difficult claim to make as Congress enacted the waiver provision for the precise purpose of accounting for differences between California and other states. Rather, they adopted the more aggressive argument that Congress may not use its Commerce Clause authority to enact a law that "leaves some states with more sovereign authority than others, regardless of Congress's reasons for doing so."[131] In effect, the states argued that Congress is more constrained in accounting for state differences when using its Commerce Clause authority than when using its Fifteenth Amendment authority. This is an untenable argument, a result the D.C. Circuit recognized as "counterintuitive," to say the least.[132]

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[128] *See Ohio*, 98 F.4th at 307,

[129] *See id.* Note that at the time of this writing, two petitions for certiorari are pending. Petition For Writ of Certiorari, Ohio v. EPA, No. 24–13 (U.S. Jul. 5, 2024); Petition For A Writ of Certiorari, Ohio v. EPA, No. 24–7 (U.S. Jul. 3, 2024).

[130] *Shelby County*, 570 U.S. at 542 (quoting NW Austin Muni. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 203 (2009)).

[131] *Ohio* 98 F.4th at 309.

[132] *Ohio* 98 F.4th at 310. The D.C. Circuit adopted a questionable argument of its own, insofar as it suggested that the power to enact "appropriate" legislation under the Fifteenth Amendment is more constrained than Congress ability to adopt "necessary and proper" legislation pursuant to Article I, Section 8. This is not at all clear.

None of this means that the EPA properly approved any given waiver application for California, or even that this provision is properly applied to greenhouse gases.[133] Those arguments, however, would be the sort of traditional statutory interpretation and administrative law claims that are commonplace within environmental policy. The "equal sovereignty" argument against Congress's ability to identify reasons why some states may merit greater flexibility than others in their ability to adopt environmental regulations is rather the sort of ambitious constitutional argument made when traditional legal arguments are insufficient.

A similar dynamic can be observed in the way fossil fuel defendants and allied state attorneys general have responded to state-law tort suits filed in recent years. Over the last seven years, an increasing number of local and state governments have filed state-law-based tort suits against fossil fuel producers seeking compensation for climate-related harms.[134] These suits have been filed in state courts, asserting state-law claims, so as to avoid the displacement of federal common law nuisance claims under *American Electric Power v. Connecticut*.[135] This has not prevented the fossil fuel defendants from attempting to have the cases dismissed, or at least removed to federal court—attempts that have been largely unsuccessful.[136]

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[133] *See* Adler, *supra* note __, at 458.

[134] *See, e.g.*, Complaint, City of New York v. BP P.L.C., No. 1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018); Complaint, City of Imperial Beach v. Chevron Corp., No. C17-01227 (Cal. App. Dep't Super. Ct. Jul. 17, 2017); Complaint for Public Nuisance, City of Oakland v. BP P.L.C., No. RG17875889 (Cal. App. Dep't Super. Ct. Sept. 19, 2017); Complaint, City of Santa Cruz v. Chevron Corp., No. 17CV03242 (Cal. app. Dep't Super. Ct. Jul. 17, 2017). Complaint for Public Nuisance, City of San Francisco v. BP P.L.C., No. CGC-17-561370 (Cal. App. Dep't Super. Ct. Sep. 19, 2017). Complaint, City of New York v. BP P.L.C., No. 1:18-cv-00182 (S.D.N.Y. Jan. 9, 2018); Complaint, City of Richmond v. Chevron Corp., No. C18-00055 (Cal. App. Dep't Super. Ct. Jan. 22, 2018); Complaint and Jury Demand, Bd. Of Cnty. Comm'rs of Boulder Cty. V. Suncor Energy (U.S.A.), No. 2018CV030349 (Colo. Dist. Ct. Apr. 17, 2018); Complaint, King County v. BP P.L.C., No. 18-2-11859-0 (Wash. Super. Ct. May 9, 2018); Plaintiff's Complaint, Mayor & City of Baltimore v. BP P.L.C., No. 24-C-18-004219 (Md. Cir. Ct. Jul. 20, 2018).

[135] Am. Elec. Power Co. v. Connecticut, 564 U.S. 410 (2011).

[136] *See e.g.*, City of Oakland v. BP P.L.C., 969 F.3d 8895, 906–08 (9th Cir. 2020) (rejecting claim state-law claims raised substantial federal question justifying removal); City of Hoboken v. Exxon Mobil Corp., 2021 WL 4077541 (D.N.J. 2021) (remanding nuisance claims); Bd. Of Cnty. Comm'rs of Boulder Cnty. V. Suncor Energy (U.S.A.) Inc., 25 F.4th 1238 (10th Cir. 2022) (affirming district court's remand over due to lack of federal

Lacking much of a common law or statutory basis for arguing that state-law tort claims are preempted by federal law, some have embraced broad constitutional arguments against the tort claims.[137] Seeking certiorari in *American Petroleum Institute v. Minnesota*, oil companies sought to argue that "the Constitution dictates that federal law must govern controversies over interstate pollution."[138] Yet neither the Constitution nor the cases cited by the petitioners require any such thing. A supporting *amicus* brief filed a group of state attorneys general likewise argued that any tort claim concerning interstate pollution, such as greenhouse gases, must be governed by federal law.[139] Although neither the Clean Air Act[140] nor existing Supreme Court precedent[141] imposes such a constraint, the state attorneys general argued that the Constitution requires that interstate pollution questions be governed by a single rule of federal law, even if Congress has

jurisdiction); Mayor & City of Baltimore, 31 F.4th 178 (4th Cir. 2022)(same); Rhode Island v. Chevron Corp., 383 F.Supp.3d 142 (D.R.I. 2019) (nuisance claims not completely preempted by Clean Air); County of San Mateo v. Chevron Corp., 294 F.Supp.3d 934 (N.D. Cal. 2018) (state law nuisance claims not preempted by Clean Air Act).

[137] *See, e.g.*., Wiliam P. Barr & Adam J. White, *Keith Ellison Wants to Run U.S. Energy Policy From Minnesota*, WALL ST. J. Nov 29, 2023, https://www.wsj.com/articles/keith-ellison-wants-to-run-energy-policy-from-minnesota-exxon-mobil-koch-industries-75995542 ("Choices about how to handle energy policy must be made through the Constitution's democratic processes, not by federal judges or administrative fiat—and certainly not by state and local judges."); *see also* O.H. Skinner & Beau Roysden, *The Next Big States' Rights Case Might Not Be What You Think*, HARV. J.L. & PUB. POL'Y (Summer 2024)(arguing state-law-based nuisance cases are "state sovereignty cases").

[138] Petition for a Writ of Certiorari, at 25, American Petroleum Inst. v. Minnesota, 144 S.Ct. 620 (No. 23-168).

[139] Motion for Leave to File *Amici Curiae* Brief and Brief of Alabama and 16 Other States as *Amici Curiae* in Support of Petitioners, American Petroleum Inst. v. Minnesota, 144 S.Ct. 620 (No. 23-168); *see also* Brief of American Free Enterprise Chamber of Commerce as *Amicus* Curiae in Support of Petitioners, American Petroleum Inst. v. Minnesota, 144 S.Ct. 620 (No. 23-168) (making a similar argument).

[140] *See,* 42 U.S.C. §7604(e) (preserving state common law pollution claims that do not conflict with the rest of the Act).

[141] *See, e.g.*, Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987) ("The CWA precludes only those suits that may require standards of effluent control that are incompatible with those established by the procedures set forth in the Act. The saving clause specifically precludes other state actions, and therefore nothing in the Act bars aggrieved individuals from bringing a nuisance claim pursuant to the law of the source state."). Under *Oullette*, suits alleging interstate pollution constitutes a nuisance may be heard in state court so long as the substantive law of the source state is applied.

not so provided.[142] While this makes sense as a policy argument, suits under state law have never been so limited absent Congressional enactment.[143]

The Supreme Court denied certiorari in *API v. Minnesota*.[144] The states responded both by supporting certiorari in another case, and by filing a motion for leave to file a bill of complaint in the Supreme Court's original jurisdiction to force an end to state government suits against fossil fuel companies.[145] What was particularly audacious about this filing was not the effort to invoke the Supreme Court's original jurisdiction, as there is a long history of the Court hearing environmental disputes between states,[146] but the effort to do so to prevent other states from the mere act of filing lawsuits. It is one thing for states to file suit against other states to challenge the implementation or enforcement of state law. It is quite another to seek Supreme Court intervention to prevent the initiation and prosecution of case in court, and to do so with substantive arguments that amount to preemption through penumbra.

CONCLUSION

Climate change is a serious problem. Yet the seriousness of a problem does not mean that courts have the jurisdiction or authority to act. That a problem is serious does not mean that we should take liberties with our constitution. It is possible that aggressive constitutional litigation

[142] Brief at 11 ("That one State might design state-law claims to intrude upon the policy choices of others is precisely why federal law must apply to protect the co-equal sovereignty of all States.").

[143] I address this issue at length in Jonathan H. Adler, *Displacement and Preemption of Climate Nuisance Claims*, 17.2 J. L. ECON. AND POL'Y 217, 220 (2022).

[144] Am. Petro. Inst. v. Minnesota, 144 S. Ct. 620 (2024)(cert. denied).

[145] Motion For Leave to File Bill of Complaint, Alabama v. California, No. 220158, (U.S. May 22, 2024).

[146] Robert D. Cheren, *Environmental Controversies "Between Two or More States,"* 31 PACE ENV'T L. REV. 105 (2014).

will help generate political action to address climate change, and that may be part of the point. The invocation of broad constitutional arguments nonetheless entails risks—risks that Courts may reject such arguments in sweeping opinions and risks that Courts may embrace such arguments, whether or not due to a particular concern for climate change—and that such decisions may have broader implications for the constitutional order.

In other contexts, such as national security, we recognize that pressing need is not a good reason to abandon constitutional constraints on government action. To the contrary, those cases in which courts have stretched constitutional doctrine to accommodate national security efforts are often viewed as among the judiciary's greatest errors.[147] Constitutional constraints on government power, and the power of the courts, are important precisely because they prevent actions even for the best of reasons. If that is a lesson that can bee heeded in the context of national security, it is a lesson that can be heeded in the context of environmental law as well.

At the same time, it is worth remembering that, as important as the judiciary may be, it is rarely capable of resolving the most contentious and consequential policy questions. Apart from what the Constitution may contemplate or require, the judiciary is not particularly good at directing public policy or forcing political action where political will is lacking. Insofar as climate change is a serious problem – and it is – the ultimate policy solutions will likely be found in the policy process.

[147] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944). Ex parte Quirin, 317 U.S. 1 (1942). *See also* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 380, 422-427 (2011) (discussing *Korematsu* as part of the constitutional "anticanon").