SHOULD HUMANITY HAVE STANDING? SECURING ENVIRONMENTAL RIGHTS IN THE UNITED STATES

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ABSTRACT

While courts around the world are increasingly recognizing rights of nature or the rights of individuals or communities to a safe and healthy environment, American courts have been much more skeptical of environmental rights claims. This Article examines this growing divergence and identifies trends in American law that might account for it, including explanations deeply rooted in U.S. constitutional history as well as recent doctrinal developments such as the major questions doctrine. More importantly, this Article offers a way forward for American law in the face of critical environmental challenges, most notably climate change. Specifically, it presents constitutional interpretive methods that might advance the interests of nature and individuals facing pollution impacts. It also explores the potential role for states and state constitutions in protecting the environment. But given the obstacles—both jurisprudential and political—to a more robust environmental rights framework in American courts, this Article concludes that the best path forward might be a theory of negative environmental rights—namely, the right to be free from harmful pollution. Such a narrowly constructed commitment to an end to uninternalized environmental externalities might offer a practical and politically feasibly way to move past the pervasive concerns of American courts about positive rights, separation of powers, the political question doctrine, and appropriate modes of judicial relief.

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INTRODUCTION

In his landmark *Should Trees Have Standing?* article, Professor Christopher Stone posed the question of whether Nature could, and indeed should, have legally enforceable rights.[1] Today, a handful of countries have granted rights—sometimes in the form of "legal personhood"—to Nature generally or to discrete geographic features, such as mountains or rivers.[2] Many more countries recognize their citizens' right to a healthy environment in one form or another.[3] And a growing number of litigants across the globe—spurred on perhaps by the youth movement for climate change action—have used these rights to force governments or businesses to reduce greenhouse gas emissions.[4] Courts in many nations around the world have been increasingly sympathetic to these claims, establishing the judiciary in many nations as an important point of leverage for moving society toward a more sustainable future in general and a more robust response to climate

1. *See generally* Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

2. *See, e.g.*, Mihnea Tănăsescu, *Rights of Nature, Legal Personality, and Indigenous Philosophies*, 9 J. TRANSNAT'L ENV'T L. 429, 429–31 (2020); Laura Schimmöller, *Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador*, 9 J. TRANSNAT'L ENV'T L. 569, 574–81 (2020); Kristen Stilt, *Rights of Nature, Rights of Animals*, 134 HARV. L. REV. F. 276, 280–81 (2021); JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM 255–56 (2015) (discussing rights of rivers and other rights of nature).

3. 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 17 (John H. Knox & Ramin Pejan eds., 2018); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 125–28 (1991); Alexandre C. Kiss, *Environment et Développement ou Environnement et Survie?*, 118 JOURNAL DU DROIT INTERNATIONAL [J. DR. INT'L] 263, 266–67 (1991) (Fr.).

4. Nathaniel Levy, *Juliana and the Political Generativity of Climate Litigation*, 43 HARV. ENV'T L. REV. 479, 480–81 (2019); Charles Beauregard, D'Arcy Carlson, Stacy-ann Robinson, Charles Cobb & Mykela Patton, *Climate Justice and Rights-Based Litigation in a Post-Paris World*, 21 CLIMATE POL'Y 652, 654 (2021); *see infra* Sections II.A–B; Larissa Parker, Juliette Mestre, Sébsdtien Jodoin & Margarentha Wewerinke-Singh, *When the Kids Put Climate Change on Trial: Youth-Focused Rights-Based Climate Litigation Around the World*, 13 J. HUM. RTS. & ENV'T 64, 71–78 (2022).

change in particular.[5]

In the United States, however, such efforts have met with little success. Recognition of environmental rights remains limited and largely in the background of the American legal system. Such rights are rarely constitutionally defined (and only at the state level) and have gone almost entirely unrecognized by courts.[6] Although Stone's argument altered the environmental rights conversation in the United States (particularly after being cited in Justice Douglas's dissent in *Sierra Club v. Morton*[7]), it has not translated into strengthened environmental rights in American courts. Indeed, both federal and state courts across the country have expressly declined to entertain climate change litigation, rejecting a range of legal theories and assertions of environmental rights advanced by a diverse set of plaintiffs. The judges in these cases consistently suggest that the remedies sought by the plaintiffs go beyond what the judiciary can order.[8]

This reality leads to the central puzzle of this Article: Why has the conception of environmental rights remained so crimped in the United States in contrast with other nations?

In seeking to answer this query, I also address another critical question: Are there legal avenues available to better secure environmental rights in the United States?

In Part I, I set the stage for these inquiries with a brief survey of environmental rights scholarship over the past fifty years, chronicling how such rights emerged from the human rights discourse and have now become *constitutionalized* in the vast majority of nations across the globe. I go on to document how environmental rights have become increasingly widely

5. Communiqué de Presse [Press Release], Conseil d'Etat (CE), Émissions de Gas À Effet de Serre: le Gouvernement Doit Justifier Sous 3 Mois Que la Trajectoire de Réduction À Horizon 2030 Pourra Être Respectée (Nov. 19, 2020) (Fr.); Corte Suprema de Justicia [C.S.J.] [Supreme Court] Sala Civ. febrero 12, 2018, Luis Armando Tolosa Villabona Sentencia C-4360-2018 (Colom.); Corte Constitutional [C.C.] [Constitutional Court], Sala Sexta de Revisión noviembre 10, 2016, Jorge Iván Palacio Palacio, Expediente T-5.016.242 (Colom.); Leghari v. Fed'n of Pak., (2015) W.P. No.25501 (HC Lahore) (Pak.); Complaint, Mbabazi v. AG, Civil Suit No. 283 of 2012 (2012) (Uganda); *see also* Daniel C. Esty, *Toward a Sustainable Future: Environmental Jurisprudence from France's Constitutional Council Breaks New Ground*, *in* FRENCH CONSTITUTIONAL COUNCIL: ANNUAL REPORT 2020, at 106, 106–07 (2020); Justine Bell-James & Briana Collins, *Human Rights and Climate Change Litigation: Should Temporal Imminence Form Part of Positive Rights Obligations?*, 13 J. HUM. RTS. & ENV'T 212, 212–15 (2022).

6. T. Quinn Yeargain, *Decarbonizing Constitutions*, 41 YALE L. & POL'Y REV. (forthcoming 2023).

7. Sierra Club v. Morton, 405 U.S. 727, 741–42 (1972) (Douglas, J., dissenting).

8. *E.g.*, Juliana v. United States, 947 F.3d 1159, 1169–75 (9th Cir. 2020); Chernaik v. Brown, 475 P.3d 68, 82–83 (Or. 2020); Piper v. State, 480 P.3d 438, 449–51 (Wash. Ct. App. 2021), *aff'd*, 497 P.3d 350 (Wash. 2021).

recognized in international law through treaties, resolutions, and declarations—including a 2022 United Nations ("U.N.") General Assembly Resolution declaring access to a clean, healthy, and sustainable environment to be a human right. Given this universality of commitment to environmental protection, I argue that environmental rights should be recognized as *natural rights* that need not be granted by a constitution or a statute but rather understood to be inherent in what it means to be human. In this regard, the failure of U.S. courts to recognize environmental rights seems out of step with modern mores and legal thinking across the globe—setting up the puzzles noted above.

In Part II, I undertake a comparative review of national case law around the world, noting how courts in many nations have strengthened environmental rights in recent years—particularly in the context of the need to shift our economic activities onto more sustainable underpinnings and to address the rising risks of climate change. In analyzing the global march of environmental rights, I note that while the trend is toward broader protection of peoples across the world from pollution, each nation's framing of environmental rights reflects the particular values, circumstances, and legal traditions of that society—with the United States in a relatively unique and lagging position.

I extend this analysis in Part III with a more detailed look at the reasons why environmental rights remain limited in the United States. I focus particular attention on the decisions in a number of recent climate change cases where courts have concluded that the judicial branch of government is not positioned to provide the relief that the plaintiffs sought. I go on to suggest that the narrow American view of environmental rights derives not only from the lack of a clear constitutional provision, but also from the U.S. judiciary's tradition of restraint in the face of cases that present political or "major" questions that might be seen as within the purview of the legislative and executive branches of government. I also note that, unlike civil rights, which have relatively clear lines, environmental protection inescapably entails tradeoffs and multidimensional policy choices. This reality makes climate change and other environmental policy issues *polycentric* problems, which present competing claims and no clear framework for balancing the contesting interests. In the face of such difficulties, many judges and scholars have concluded (following the conceptual framing of Professor Lon Fuller) that such issues are inappropriate for courts to adjudicate and must be left to political processes. Finally, I note that the approach to evaluating competing interests embedded in the U.S. framework of pollution control law and regulation—centered on benefit-cost analysis with particular reliance on the Kaldor-Hicks model of *net social benefits*—effectively privileges economic

activity and often treats individual environmental rights as inconsequential.[9]

In Part IV, I argue that the *sustainability imperative*[10] and the risks posed by climate change demand that U.S. courts revisit their hesitancy to vindicate environmental rights and respond to the need to address climate change and establish a more sustainable foundation for the American economy. I advance several legal theories and accompanying political strategies for expanding environmental rights in America—consistent with emerging norms across the country and around the world and the increasingly clear epidemiological and ecological evidence that deteriorating environmental conditions threaten the capacity of humanity to flourish in the years ahead. Ultimately, I argue that the key to progress might well *not* be found in the expansion of individual environmental rights *per se*, but rather in the emerging norm against *uninternalized environmental externalities*—the acceptance of which makes pollution spillovers unacceptable. Thus, the most promising pathway to expanded environmental rights in America might be through the assertion of the environmental rights of the people in a *negative* construct—that is, the right of individuals *not* to be harmed by pollution.

I conclude the Article with a reflection on the ongoing relevance of Christopher Stone's 1972 vision of humanity's moral development over time leading to the gradual extension of rights to those who (and that which) had previously been left out of legal personhood and thus the law's protection.[11] But rather than emphasize the value of extending legal rights to natural objects,[12] I urge that human rights be understood to encompass a natural law right to a habitable environment—accomplishing through a different route Stone's call for a "new conception of man's relationship to the rest of nature . . . [as] a step towards solving the material planetary problems."[13] Rather than give trees standing, I propose a narrower path forward based on

9. E. Donald Elliott & Daniel C. Esty, *The End Environmental Externalities Manifesto: A Rights-Based Foundation for Environmental Law*, 29 N.Y.U. ENV'T. L.J. 505, 507–10 (2021); Karl S. Coplan, *The Missing Element of Environmental Cost-Benefit Analysis: Compensation for the Loss of Regulatory Benefits*, 30 GEO. ENV'T L. REV. 281, 290–91 (2018).

10. The need to move the American and global economies onto a more sustainable trajectory—where market failures are addressed, externalities internalized, and (what former Bank of England Governor Mark Carney calls) the "tragedy of the horizon" overcome with a shift to a clean-energy economy—has been widely recognized. MARK CARNEY, VALUE(S): CLIMATE, CREDIT, COVID, AND HOW WE FOCUS ON WHAT MATTERS 264–65 (2021). *See generally* David A. Lubin & Daniel C. Esty, *The Sustainability Imperative*, HARV. BUS. REV., May 2010, at 44; REBECCA HENDERSON, REIMAGINING CAPITALISM IN A WORLD ON FIRE (2020); MARIANA MAZZUCATO, MISSION ECONOMY: A MOONSHOT GUIDE TO CHANGING CAPITALISM (2021); Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV., Jan.–Feb. 2011, at 4.

11. Stone, *supra* note 1, at 450.

12. *Id.* at 456.

13. *Id.* at 495.

declaring an end to uninternalized externalities and asserting the right of each person to physical integrity and freedom from pollution. In doing so, we can give American citizens standing to challenge harmful emissions and stop the damage to the Earth systems that threatens to make the planet uninhabitable for humanity.

I. ENVIRONMENTAL RIGHTS

Environmental rights have increasingly been recognized as foundational to human rights. In recent decades, many nations have enshrined rights to a healthy environment in one form or another in their constitutions. The near-universal acceptance of environmental rights provides a starting point for the argument that the right to a healthy environment should be recognized as an element of natural law.

A. ENVIRONMENTAL RIGHTS AS HUMAN RIGHTS

Over the past fifty years, much of the world has come to recognize environmental rights as fundamental to human existence—and therefore to be understood as natural rights that need not be expressly or specifically established by statute or governmental edict.[14] While the 1948 U.N. Universal Declaration of Human Rights does not mention the *environment* specifically, it does recognize rights to *life* and to *security*.[15] Moreover, just two decades later as environmental consciousness was rising around the world, the U.N. General Assembly adopted a resolution highlighting the relationship between environmental quality and human rights.[16] In reflecting on this resolution and the momentum building for greater focus on environmental protection at the time of the 1972 U.N. Conference on the Human Environment, Janusz Symonides, a prominent Polish jurist and academic, observed that the right to a clean environment must be understood as a universal human right because the ability to enjoy other fundamental

14. *See, e.g.*, Hari M. Osofsky, *Learning from Environmental Justice: A New Model for International Environmental Rights*, 24 STAN. ENV'T L.J. 71, 129 (2005); Lavanya Rajamani, *The Increasing Currency and Relevance of Rights-Based Perspectives in the International Negotiations on Climate Change*, 22 J. ENV'T L. 391, 391–430 (2010); Lavanya Rajamani, *Human Rights in the Climate Change Regime: From Rio to Paris and Beyond*, *in* THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 236–37 (John H. Knox & Ramin Pejan eds., 2018); Lavanya Rajamani, *Integrating Human Rights in the Paris Climate Architecture: Contest, Context, and Consequence*, 9 CLIMATE L. 180, 183–86 (2019); U.N. Off. of the High Comm'r for Hum. Rts., Rep. of the Off. of the U.N. High Comm'r for Hum. Rts. on the Relationship Between Climate Change and Hum. Rts., U.N. Doc. A/HRC/10/61 (Jan. 2009); Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation*, 7 TRANSNAT'L ENV'T L. 37, 42–45 (2017); Parker et al., *supra* note 4, at 67.

15. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

16. G.A. Res. 2398 (XXIII), Problems of the Human Environment (Dec. 3, 1968).

rights, including the right to life, depends on it.[17]

The 1972 Stockholm Declaration on the Human Environment, which emerged from the U.N. Conference, strengthened this conclusion with a further observation: "Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself."[18] But the governments in Stockholm declined to specify what might be encompassed by this right, encouraging scholars and rights activists to develop their own definitions and conceptions.[19] Most notably, Alexandre Kiss, a French diplomat and scholar, offered a series of publications that explored different dimensions of environmental rights centered on the theory that environmental protection is essential to what it is to be human.[20] Kiss argued that Principle I of the 1972 Stockholm Declaration—asserting a "fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being"—had become so well established as to be added to the category of fundamental rights, the enjoyment of which is guaranteed to all individuals.[21] He further explained that these environmental rights create obligations (not only for states but also for individuals), duties to future generations, and "remedies in the event of environmental harm."[22]

As the world community prepared to gather in 1992 for the second Earth Summit in Rio de Janeiro, Professor Dinah Shelton further developed the argument for recognizing environmental rights as fundamental to human rights. She critiqued many of the theories of environmental rights that were common at the time, noting that none of them was "fully articulated."[23] Shelton ultimately concluded that an approach that viewed "human rights and environmental protection as each representing different, but overlapping, societal values" showed the most promise—and that a "clearly

17. Janusz Symonides, *Human Right to a Clean, Balanced and Protected Environment*, 20 INT'L J. LEGAL INFO. 24, 24–25 (1992).

18. Rep. of the U.N. Conf. on the Hum. Env't, at 3–5, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972).

19. Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?*, 35 DENV. J. INT'L L & POL'Y 129, 132 (2006) ("The lack of state support at the Stockholm Conference for pronouncing a substantive right to environment (proposed by the United States) led scholars and activists during the following decade to consider human rights in a more instrumental fashion, to give content to environmental rights by identifying those rights whose enjoyment could be considered a prerequisite to effective environmental protection.").

20. Alexandre Kiss, *Définition et Nature Juridique d'un Droit de l'Homme à l'Environment, in* ENVIRONNEMENT ET DROITS DE L'HOMME 13, 16–17 (Pascale Kromarek ed., 1987) (Fr.).

21. *Id.* at 28.

22. *Id.* at 18, 23, 27; Alexandre Kiss, *Le Droit à la Conservation de l'Environnement*, 2 REVUE UNIVERSELLE DES DROITS DE L'HOMME 445 (1990) (Fr.); *see also* Shelton, *supra* note 19, at 132.

23. Shelton, *supra* note 3, at 106.

and narrowly defined international human right to a safe and healthy environment" could achieve objectives in human rights law and environmental law.[24]

The breadth of support for the recognition of environmental rights has strengthened in recent years. In 2008, the U.N. Human Rights Council adopted Council Resolution 7/23, which affirmed the council's view that "climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights."[25] The 2022 U.N. General Assembly Resolution—adopted with 161 votes in favor (including the United States) and just eight abstentions—declaring access to a clean, healthy, and sustainable environment to be a universal human right represents the latest manifestation of this growing consensus.[26] Momentum continues to build, as the fifteenth Conference of the Parties to the Convention on Biological Diversity adopted in 2022 a biodiversity conservation framework designed to accommodate the "rights of nature and rights of Mother Earth."[27]

B. CONSTITUTIONAL RECOGNITION OF ENVIRONMENTAL RIGHTS

The importance of environmental conditions to human flourishing is now so widely recognized and highly valued that 150 nations highlight the importance of the environment in their constitutions.[28] More than 100 nations now have constitutions that expressly recognize a right to a healthy environment in some form.[29] As David Boyd explains in his seminal study, *The Environmental Rights Revolution*, three concurrent waves of rights conceptualization in the second half of the 20th century contributed to the firm footing of environmental rights in constitutions today: (1) growth in democratic governance; (2) a global "rights revolution"; and (3) public awareness of severe environmental degradation.[30] Against the backdrop of expanding rights discourse and ecological consciousness, over half of the world's constitutions were written or re-written, with many of those doing

24. *Id.* at 103, 105.

25. *See* Peel & Osofsky, *supra* note 14, at 42.

26. G.A. Res. 76/300 (July 28, 2022); *see also UN General Assembly Declares Access to Clean and Healthy Environment a Universal Human Right*, UN NEWS (July 28, 2022), https://news.un.org/en/story/2022/07/1123482 [https://perma.cc/QG6J-AGA6].

27. Conference of the Parties to the Convention on Biological Diversity, *Kunming-Montreal Global Biodiversity Framework*, at 5, U.N. Doc. CBD/COP/15/L.25 (Dec. 18, 2022).

28. U.N. Envtl. Programme, Environmental Rule of Law: First Global Report, at 2 (Jan. 24, 2019), https://www.unep.org/resources/assessment/environmental-rule-law-first-global-report [https://perma.cc/QQ9M-LQKJ].

29. *See infra* Appendix.

30. DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT 3–19 (2011).

the drafting seizing this opportunity to establish a legal right to a healthy environment.[31] Indeed, over this period environmental rights have been the fastest-growing provision in constitutional revisions.[32] While it may be difficult to establish a precise causal link, Boyd demonstrates a consistent correlation between a formal right to a healthy environment and strengthened environmental governance and results.[33]

The extent to which nations have constitutionalized environmental rights depends on country-specific context. For example, some resource-rich countries explicitly connect environmental rights to public access to the benefits of the country's natural resources.[34] Many island nations, perhaps recognizing their vulnerability to ecosystem damage, instead highlight the government's duty to preserve an "ecologically balanced environment."[35] And a number of countries formerly constituting the Soviet Union include specific protections for the public's access to "information about the environment,"[36] likely inspired by the Soviet Union's tradition of state-sponsored disinformation and the specific failure to share critical facts about the Chernobyl nuclear crisis.

31. *See* VIVIEN HART, U.S. INSTIT. PEACE, SPECIAL REPORT 107: DEMOCRATIC CONSTITUTION MAKING 2 (2003) (stating that more than half of the world's national constitutions have been rewritten in the past half-century); *see also infra* Section II.B (outlining many of the instances in which nations have taken advantage of constitution-making to establish legal rights to a healthy environment).

32. David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 775 (2012).

33. BOYD, *supra* note 30, at 253–77.

34. *E.g.*, KONSTITUTSIIA ROSSIĬSKOĬ FEDERATSII [KONST. RF] [CONSTITUTION] art. 8 (Russ.) ("Land and other natural resources shall be utilized and protected in the Russian Federation as the basis of the life and activity of the peoples living on the territories concerned."); TÜRKMENISTANYN KONSTITUSIYASY [CONSTITUTION] art. 53 (Turkm.) ("The state shall control the rational use of natural resources in order to protect and improve healthy living conditions, as well as conservation of the stable natural environment."); KONSTYTUTSIYA UKRAYINY [CONSTITUTION] art. 13 (Ukr.) ("The land, its subsoil, atmosphere, water and other natural resources within the territory of Ukraine, the natural resources of its continental shelf, and the exclusive (maritime) economic zone, are objects of the right of property of the Ukrainian people."); CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 18 Jan. 2014, art. 32 ("The state shall preserve and effectively exploit [the State's natural resources] may not deplete them, and shall observe the rights of future generations to them.").

35. *E.g.*, CONSTITUIÇÃO DA REPÚBLICA DE CABO VERDE [CONSTITUTION] 1980, art. 70(1) (Cape Verde); CONSTITUTION OF THE REPUBLIC OF THE MALDIVES, 2008, art. 22; CONSTITUTION DE LA RÉPUBLIQUE DES SEYCHELLES [CONSTITUTION], June 18, 1993, art 38 (Sey.).

36. KONSTYTUTSIYA UKRAYINY [CONSTITUTION] art. 50 (Ukr.); KONST. RF [CONSTITUTION] art. 42 (Russ.); LATVIJAS REPUBLIKAS SATVERSME [CONSTITUTION], Nov. 18, 1918, *reinstated* May 4, 1990, art. 115 (Lat.); *see also* KANSTYTUCYJA RESPUBLIKI BIELARUŚ [CONSTITUTION], Mar. 15, 1994, art. 34 (Belr.) ("State bodies, public associations and officials shall afford citizens of the Republic of Belarus with an opportunity to familiarize themselves with material that affects their rights and legitimate interests.").

C. ENVIRONMENTAL RIGHTS AS NATURAL LAW

The increasingly universal recognition of environmental rights suggests that every person should have access to basic environmental amenities—including clean air to breathe, safe water to drink, freedom from exposure to toxic chemicals, and functioning Earth systems (including a stable climate) that provide a "safe operating space for humanity."[37] So fundamental is this right to human existence that it must be understood to have independent and intrinsic value—and not simply instrumental importance as a pathway to the fulfillment of other fundamental rights such as the right to life or health. Many legal commentators have thus concluded that the right to a healthy environment should be seen as an element of the universal moral principles that must be regarded as sacrosanct in all societies at all times.[38]

Along with my colleague Don Elliott, I have argued that the U.S. Congress highlighted the existence of environmental rights at the time of the 1970 adoption of the National Environmental Policy Act ("NEPA") when it declared: "The Congress *recognizes* that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment."[39] Note that the Congress did not e*stablish* this right, but rather *recognized* it. In doing so, the Congress suggested that NEPA was intended to provide mechanisms to vindicate a pre-existing natural law right to a "healthful environment" and to clarify the obligation of every American to protect the environment. But the central thrust of this Article is not to make the case for environmental rights as an element of natural law but rather to map the environmental rights terrain in search of an explanation as to why U.S. courts have been hesitant to accept such rights. Part II takes up this quest.

37. Johan Rockström, Will Steffen, Kevin Noone, Åsa Persson, F. Stuart Chapin III, Eric Lambin, Timothy M. Lenton, Marten Scheffer, Carl Folke, Hans Joachim Schellnhuber, Björn Nykvist, Cynthia A. de Wit, Terry Hughes, Sander van der Leeuw, Henning Rodhe, Sverker Sörlin, Peter K. Snyder, Robert Costanza, Uno Svedin, Malin Falkenmark, Louise Karlberg, Robert W. Corell, Victoria J. Fabry, James Hansen, Brian Walker, Diana Liverman, Katherine Richardson, Paul Crutzen & Jonathan Foley, *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, 14 ECOLOGY & SOC'Y 32, 33 (2009).

38. *See, e.g.*, Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741, 745–49 (2012) (arguing for a global analog to the public trust doctrine, including accompanying environmental rights, on the basis of natural law); Brendan F. Brown, *International Environmental Law and the Natural Law*, 18 LOY. L. REV. 679, 687–92 (1971) (exploring natural law implications of environmental rights internationally); Scott A. Davison, *A Natural Law Based Environmental Ethic*, 14 ETHICS & ENV'T 1, 1–5 (2009) (arguing that philosopher Mark Murphy's book *Natural Law and Practical Rationality* should be applicable in the environmental rights context).

39. Elliott & Esty, *supra* note 9, at 511 (emphasis added).

II. DEVELOPMENT OF AN ENVIRONMENTAL RIGHTS JURISPRUDENCE

In the face of the existential threat posed by climate change and a growing recognition that a commitment to sustainability must be a foundational feature of twenty-first-century life, courts around the world have advanced environmental rights in recent years and issued decisions that required both governments and corporations to address a diverse set of ecological and public health harms—including the risk of climate change from a build-up of greenhouse gases ("GHGs") in the atmosphere. In their totality, these decisions by trial courts, appeals courts, and constitutional courts across the world make clear that environmental protection is now seen as a fundamental right in many societies. I begin in Section II.A with a discussion of the international and transnational legal framework that has underpinned many of these decisions—and explore the decisions of the European Court of Human Rights ("ECtHR") in this respect. In Section II.B, I extract some common themes from the environmental decisions of national courts around the world.

A. TRANSNATIONAL COURTS AND ENVIRONMENTAL RIGHTS

In recent years, the belief that access to a healthy environment is essential to the fulfillment of other human rights has increasingly been upheld in international legal proceedings.[40] For example, Justice Weeramantry of the International Court of Justice observed in his *Gabcikovo-Nagymaros* opinion that protection of the environment is "a vital part of contemporary human rights doctrine, for it is *sine qua non* for numerous human rights such as the right to health and the right to life itself."[41]

This jurisprudence is underpinned in large part by language in a suite of treaties, which provide further international undergirding for environmental rights. Most notably, four regional agreements establish a *right to a healthy environment*: the African Charter on Human and Peoples' Rights, the Aarhus Convention, the San Salvador Protocol to the American Convention on Human Rights, and the 2004 Revised Arab Charter on Human

40. Bridget Lewis, *Environmental Rights or a Right to the Environment?: Exploring the Nexus Between Human Rights and Environmental Protection*, 8 MACQUARIE J. INT'L & COMP. ENV'T. L. 36, 37–39 (2012). *See generally* Annalisa Savaresi & Joana Setzer, *Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers*, 13 J. HUM. RTS. & ENV'T 7 (2022); Peel & Osofsky, *supra* note 14; Juan Auz, *Human Rights-Based Climate Litigation: A Latin American Cartography*, 13 J. HUM. RTS. & ENV'T 114 (2022).

41. Gabcikovo-Nagymaros Project (Hung. v. Slovk.), Judgment, 1997 I.C.J. 4, 91 (Sep. 25) (separate opinion by Weeramantry, J.).

Rights.[42] Together, these treaties have 126 independent signatories, comprising a healthy majority of all sovereign states.[43] While these treaties do not cover every nation—with the United States being one of the notable non-signatories—they bolster a global sentiment that humans have a fundamental right to a healthy environment.

Nowhere is the trend toward recognition of environmental rights more visible than at the ECtHR.[44] Indeed, while the European Convention on Human Rights ("ECHR") has no explicit reference to the environment, the ECtHR has developed "an elaborate and extensive body of case law which all but in name provides for a right to a healthy environment."[45] In fact, the ECtHR Registry (which acts as the administrative support structure for the Court) has produced an extensive "Guide to the Case-Law of the European Court of Human Rights" that explains ECtHR case law on environmental issues.[46]

The ECtHR has an environmental history going back to noise pollution cases in the 1980s.[47] In 1994, the court explicitly recognized that environmental harms may "affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family

42. African Charter on Human and Peoples' Rights (Banjul Charter) art. 24, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/ rev. 5; Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) art. 1, June 25, 1998, 2161 U.S.T. 447; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (San Salvador Protocol) art. 11, Nov. 17, 1988; Arab Charter on Human Rights art. 38, May 22, 2004, 12 Int'l Hum. Rts. Rep. 893.

43. David Boyd, John Knox & Marc Limon, *#TheTimeIsNow: The Case for Universal Recognition of the Right to a Safe, Clean, Healthy and Sustainable Environment*, UNIVERSAL RTS. GRP., 8 (2021), https://www.universal-rights.org/wp-content/uploads/2021/02/2021_URG_R2HE_TIME_REPORT_MM.pdf [https://perma.cc/4F83-PAP5].

44. *See* Peel & Osofsky, *supra* note 14, at 64; *see also* Jacques Hartmann & Marc Willers QC, *Protecting Rights Through Climate Change Litigation Before European Courts*, 13 J. HUM. RTS. & ENV'T 90 (2022).

45. Ole W. Pedersen, *The European Court of Human Rights and International Environmental Law*, *in* THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 86, 86 (John H. Knox & Ramin Pejan eds., 2018).

46. *See generally* EUR. CT. H.R. REGISTRY, GUIDE TO THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS (Aug. 31, 2022), https://echr.coe.int/Documents/Guide_Environment_ENG.pdf [https://perma.cc/K6ZV-D48U]. Likewise, the court's Press Unit has compiled a fact sheet with cases related to the environment. ECtHR Press Unit, *Environment and the European Convention on Human Rights* (June 2022), https://www.echr.coe.int/documents/fs_environment_eng.pdf [https://perma.cc/K6ZV-D48U].

47. Arrondelle v. United Kingdom, App No. 7889/77, 5 Eur. H.R. Rep. 118 (1982); Baggs v. United Kingdom, App. No. 9310/81, 44 Eur. Comm'n H.R. Dec. & Rep. 13 (1985); Powell v. United Kingdom, 172 Eur. Ct. H.R. (ser. A) 41, ¶¶ 40–46 (1990). *Arrondelle* and *Baggs* were accepted by the ECtHR but were settled before they made it to the court. The ECtHR made a decision in *Powell* and considered that noise pollution by airplanes can adversely affect the quality of someone's private life but ultimately did not determine that Article 8 was violated.

life adversely" as protected by Article 8 of the ECHR.[48] The ECtHR has found ECHR Article 8 violations related to air pollution[49] and other environmental risks, such as the proximity of a dangerous chemical plant,[50] mines,[51] or a waste treatment facility,[52] as well as potential water contamination by a cemetery close to a home.[53] The ECtHR has also invoked the right to life in Article 2 of the ECHR in a few cases when environmental harms posed a direct risk to someone's life.[54] But these cases remain rare and not central to the court's environmental rights jurisprudence.

The court's decisions suggest that governments retain a degree of flexibility in addressing environmental harms and weighing them against other interests, such as the country's economic well-being.[55] But the ECtHR has been clear that states have a *positive obligation* to take preventive measures to address environmental harms.[56]

B. ENVIRONMENTAL RIGHTS JURISPRUDENCE AROUND THE WORLD

An ever-growing list of countries around the world are seeing their courts act decisively in the face of environmental disputes. These courts have demonstrated a much greater willingness to make findings and order governmental action with regard to climate change and other sustainability threats than have American courts, as will be explored in Part III in greater detail. Many foreign courts have explicitly recognized substantive environmental rights and a governmental duty of care towards citizens with regards to environmental quality or climate stability, even if they have left the specific path forward to be defined by other branches of government.

A number of courts have questioned the adequacy of their government's

48. Ostra v. Spain, App No. 16798/90, ¶ 51 (1994). Also see an earlier case, in which the ECtHR considered that noise pollution by airplanes can adversely affect the quality of someone's private life but ultimately did not determine that Article 8 was violated, Powell v. United Kingdom, App. No. 9310/81, ¶¶ 40–46 (1990).

49. Çiçek v. Turkey, App. No. 44837/07, ¶¶ 22–26 (2020), http://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-201673&filename=%C3%87%C4%B0%C3%87EK%20AND%20OTHERS%20v.%20TURKEY.docx&logEvent=False [https://perma.cc/2ATH-EYWF]. See ¶¶ 22–26 for an overview of the case-law of the court where Article 8 was violated in cases about air pollution. *Id.*

50. Guerra v. Italy, App. No. 14967/89 (1998).

51. Taskin v. Turkey, App. No. 46117/99 (2004); Tătar v. Romania, App. No. 67021/01 (2009).

52. Giacomelli v. Italy, App. No. 59909/00 (2006).

53. Dzemyuk v. Ukraine, App. No. 42488/02 (2014).

54. Öneryıldız v. Turkey, App. No. 48939/99 (2004); Kolyadenko v. Russia, App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05, 35673/05 (2012).

55. Hatton v. United Kingdom, App. No. 36022/97, ¶ 97 (2003); Giacomelli v. Italy, App. No. 59909/00, ¶ 78 (2006).

56. *See* Hudorovič v. Slovenia, App. Nos. 24816/14 & 25140/14, ¶ 140 (2020) (finding no violation of Article 8), https://hudoc.echr.coe.int/fre?i=001-201646 [https://perma.cc/RE9Q-QQK3].

efforts to mitigate or adapt to climate change[57]—especially in light of the nationally determined contributions to which they committed as part of the 2015 Paris Agreement. Courts around the world have held that their country's respective governments had run afoul of their constitutional,[58] statutory,[59] or common-law[60] obligations (in some cases, violating the plaintiffs' individual rights to a healthy environment) because of the insufficiency of their plan to reduce GHG emissions. Many courts—including those of France, Germany, Pakistan, and the Netherlands—responded[61] to these violations by ordering the governments to develop new frameworks for reducing greenhouse gas emissions—with Germany's Constitutional Court ordering the federal parliament to adopt a new climate change mitigation plan.[62]

57. Savaresi & Setzer, *supra* note 40, at 21.

58. Leghari v. Fed'n of Pakistan, (2015) W.P. No.25501 (HC Lahore) (Pak.); Gerechtshof Den Haag 9 Oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) [hereinafter *Urgenda*]; Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], 1 BvR 2656/18, Mar. 24, 2021 [hereinafter *Neubauer*], https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html [https://perma.cc/RM93-SLZ9]; Conseil d'Etat (CE) [highest administrative court] Nov. 19, 2020, No. 427301 (Fr.), https://www.conseil-etat.fr/actualites/actualites/emissions-de-gaz-a-effet-de-serre-le-gouvernement-doit-justifier-sous-3-mois-que-la-trajectoire-de-reduction-a-horizon-2030-pourra-etre-respectee [https://perma.cc/G2C7-9LY4]; *see also Commune de Grande-Synthe v. France*, SABIN CTR. FOR CLIMATE CHANGE L.: GLOBAL CLIMATE CHANGE LITIGATION DATABASE [hereinafter *Grande-Synthe*], http://climatecasechart.com/non-us-case/commune-de-grande-synthe-v-france/ [https://perma.cc/4EDB-MWC3]; Plan B Earth & Others v. Secretary of State for Transport [2020] EWCA (Civ) 214 (Eng.) (ordering British government to consider climate goals committed to in the Paris Agreement in conducting environmental impact assessment of a runway at Heathrow International Airport), *rev'd*, [2020] UKSC 52 (appeal taken from Eng.).

59. Notre Affaire à Tous v. France, Administrative Court of Paris, No. 1904967, 1904968, 1904972, 1904976/4-1 (2021) (ordering the State and government ministers to take immediate and concrete actions to comply with its emissions-reduction objectives); Incident under Review R.A.(I) 81/2021, Eleventh Collegiate Court of the First Circuit in Administrative Matters, Mexico, [2021] FCA 560, 774 (2021); VZW Klimaatzaak v. Kingdom of Belgium, Brussels Court of First Instance, 2015/4548/A (2021) (Bel.) (finding that the State and several federated entities violated a statutory duty of care by failing to adequately reduce carbon emissions but declining, on separation of powers grounds, to issue an injunction against the executive bodies of the State); Bushfire Survivors for Climate Action, Inc. v. Environmental Protection Authority, Land and Environment Court of New South Wales, [2021] NSWLEC 92 (Aus.).

60. *See* Sharma v. Minister for the Environment, Federal Court of Australia, [2022] FCAFC 65 (Aus.) (finding a common-law duty of care on the Government relating to the effects of climate change on the nation's youth). *But cf.* Minister for the Environment v. Sharma, Federal Court of Australia, [2022] FCAFC 35 (Aus.) (overturning the lower court's decision on the grounds that the creation of such a duty of care implicates policy questions outside of the judiciary's competence).

61. *See* cases cited *supra* notes 58–60.

62. Louis J. Kotzé, *Neubauer et al. Versus Germany: Planetary Climate Litigation for the Anthropocene?*, 22 GER. L.J. 1423, 1424 (2021); *see also* Sher Singh v. Himachal Pradesh, No. 237 (THC)/2013 (CWPIL No.15 of 2010) (India) (in which India's Green Tribunal ordered the State of Himachal Pradesh to reduce carbon emissions); Savaresi & Setzer, *supra* note 40, at 20–24 (breaking

Some courts have been willing to entertain claims raised against private companies—or against the government vis-à-vis its failure to adequately regulate a private actor.[63] One of the first of such cases was the 2005 Nigerian case, *Gbemre v. Shell Petroleum*.[64] In that case, several plaintiffs filed suit against the Nigerian government for failing to stop Shell Petroleum from gas flaring, which they argued had devastating environmental effects in their local community. The Federal High Court—akin to a federal district court in the United States—ultimately found an environmental right in the Nigerian constitution and the African Charter on Human and Peoples' Rights, and it declared that Shell's gas flaring violated these rights as well as other human rights to life and dignity, and that provisions of Nigerian law that allowed the gas flaring to take place violated the country's constitution.[65] In the Netherlands, the same district court that ordered the government to reduce its greenhouse gas emissions concluded in a separate case that Royal Dutch Shell had violated the environmental plaintiffs' rights under the Dutch Civil Code and ordered Shell to reduce its GHG emissions by 45% by 2030 from the oil company's 2019 baseline.[66]

And while explicit rights for Nature remain rare in national constitutions or in global jurisprudence,[67] developments in Colombia and Ecuador have bucked this broader trend. In Ecuador, the *Pachamama* (or "Mother Earth" to indigenous Ecuadorians) has been protected in its constitution since the late 2000s. In 2021, the Constitutional Court gave this protection real force in holding that mining undertaken by Enami, the state mining company, in an ecologically sensitive part of the rainforest was unconstitutional. It grounded its decision not only in the rights of nature—but also tied *those* rights to human rights to the environment. Judge Agustín Grijalva Jiménez wrote:

down obligations imposed on state actors by the courts in response to human rights-based climate litigation).

63. *See* Savaresi & Setzer, *supra* note 40, at 24.

64. Gbemre v. Shell Petroleum Dev. Co. Nigeria, [2005] FHC/B/CS/53/05 AHRLR 151 (Nigeria).

65. *Id.*

66. Rb. Den Haag 26 mei 2021, JBPR 2021/43, m.nt. Barbiers, D.L. e.a. (*Milieudefensie/Royal Dutch Shell PLC*) (Neth.). As one law firm's "alert" to clients observed, "this decision marks the first time any court in the world has imposed a duty on a company to do its share to prevent dangerous climate change . . . . Similarly situated companies should expect to be bound by the same rules." Maurits Dolmans, Géraldine Bourguignon, Quinten De Keersmaecker, Michael J. Preston & Emma O'Brien, *Dutch Court Orders Shell to Reduce Emissions in First Climate Change Ruling Against Company*, CLEARY GOTTLIEB (June 30, 2021), clearygottlieb.com/-/media/files/alert-memos-2021/dutch-court-orders-shell-to-reduce-emissions-in-first-climate-change-ruling-against-company.pdf [https://perma.cc/GC3G-36MP].

67. *See generally* Stilt, *supra* note 2 (discussing global development of rights of nature and animals).

> The concept of nature that the Constitution develops in Article 71 includes human beings as an inextricable part of nature, and of the life it reproduces and realizes in its breast . . . . In order to highlight this relationship, the Constitution in its preamble states that Mother Nature is vital for our existence. Here the Constitution perceives (or pays close attention to) the fact that humanity's own existence is inevitably tied to that of nature, for he conceives it as part of himself. The rights of nature necessarily span to the rights of humanity as a species of nature.[68]

In a similar case, Colombia's Supreme Court accepted the claims of a group of youth plaintiffs who argued that their rights to a healthy environment were being debased by the government's failure to end deforestation in the Colombian Amazon region. In its 2018 *Future Generations* decision, the Court declared that "fundamental rights of life, health, the minimum substance, freedom, and human dignity are substantially linked and determined by the environment" and ordered development of a plan to address the deforestation concerns brought forward by the plaintiffs.[69] The Court also granted the Amazon Basin something akin to legal personhood, finding that it was a "subject of rights" and was therefore "entitled to protection, conservation, maintenance, and restoration."[70]

These decisions reflect the effect of international legal regimes in many countries around the world. Many of the decisions favorable to environmental rights have linked together generic rights in national constitutions—such as a general right to life—with more specific protections in transnational treaties or agreements to craft a right to a healthy environment.[71] The remedies that have been developed in these countries have not always been terribly specific. The orders in several European courts that governments reduce greenhouse gas emissions left the governments space to design their own plans—though in some cases, the government remained under the supervision of the court as it developed a plan.[72] Indeed, in Pakistan, the court-created Climate Change Commission was designed to facilitate cooperation among government officials—not to function as a

68. Constitutional Court of Ecuador, Case No. 1149-19-JP/21, Nov. 10, 2021. The author expresses appreciation to Sara Gomez for assistance in translating the Ecuadorian decision, which was published in Spanish.

69. Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Civ. abril 5, 2018, M.P: L. Villabona, Expediente 11001-22-03-000-2018-00319-01 (Colom.).

70. Rachel Shuen, Comment, *Addressing a Constitutional Right to Safe Climate: Using the Court System to Secure Climate Justice*, 24 J. GENDER RACE & JUST. 377, 394 (2021).

71. *Urgenda*, *supra* note 58; *Neubauer*, *supra* note 58; *Grande-Synthe*, *supra* note 58; Gbemre v. Shell Petroleum Dev. Co. Nigeria, [2005] FHC/B/CS/53/05 AHRLR 151 (Nigeria).

72. *Grande-Synthe*, *supra* note 58; Leghari v. Fed'n of Pakistan, (2018) W.P. No. 25501 (HC Lahore) (Pak.).

judicially imposed policymaking force.[73]

C. CONCLUSIONS FROM SURVEY OF GLOBAL ENVIRONMENTAL RIGHTS CASES

Three broad conclusions can be drawn from this survey of the judicial response to environmental claims. First, environmental rights are being recognized ever more broadly across the world. Second, the frame and scope of these rights and the underlying legal theories advanced vary across the world—reflecting the individual circumstances, judicial traditions, values, and political dynamics of each society. Finally, the United States stands apart from the rest of the world with regard to the broad trend toward court recognition of environmental rights, clearly suggesting a distinct legal framework and tradition, which is the subject of Part III.

III. UNDERDEVELOPMENT OF ENVIRONMENTAL RIGHTS IN THE UNITED STATES

The pattern that emerges from Part II of expanding judicial recognition of environmental rights—except in the United States—requires us to delve into the issue of American judicial exceptionalism in the environmental context. Specifically, why are U.S. courts an outlier with regard to recognizing environmental rights? A number of explanatory factors are explored below in pursuit of a better understanding of the unique elements of America's legal structure and traditions that translate into a more constricted view of environmental rights than exists in other countries, particularly other economically advanced democracies.

A. THE STATE OF CLIMATE LITIGATION IN THE UNITED STATES

Litigants in the United States seeking to enforce their environmental rights or advance the U.S. response to climate change have faced a skeptical judiciary. Of particular note in this regard, in the 2022 case of *West Virginia v. EPA*, the Supreme Court found that the EPA lacked authority under the Clean Air Act's statutory framework to regulate greenhouse gas emissions from existing coal and gas-fired power plants via "generation-shifting"—a regulatory mechanism akin to a cap-and-trade system for greenhouse gases.[74] In coming to this conclusion, the Court relied on a *separation of powers* argument and a refinement of its political question jurisprudence—advanced

73. R. Henry Weaver & Douglas A. Kysar, *Courting Disaster: Climate Change and the Adjudication of Catastrophe*, 93 NOTRE DAME L. REV. 295, 343–44 (2017); Syed Mansoor Ali Shah, *Foreword* to CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC xi, xiii (Jolene Lin & Douglas A. Kysar eds., 2020).

74. West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

as a *major questions doctrine*.[75]

In *Juliana v. United States*, arguably the most high-profile climate case in the federal courts to date, twenty-one youth plaintiffs, organized by an Oregon-based environmental group called Our Children's Trust, asserted that their substantive due process rights to a life-sustaining climate system had been violated and, further, that the federal government had failed to uphold its public trust doctrine obligation to protect shared natural resources. The Oregon District Court initially ruled that the case could go forward based on the theory that "a climate system capable of sustaining human life" was a fundamental right under the Due Process Clause of the Fifth Amendment.[76] But the Ninth Circuit, while conceding that the plaintiffs had demonstrated the risks of climate change and the federal government's contribution to the build-up of GHGs in the atmosphere,[77] declared that the plaintiffs lacked standing. The panel majority based this conclusion on a legal finding that the injury plaintiffs sought to have addressed was not "redressable" by the courts.[78] More specifically, the majority opinion of the Ninth Circuit panel leans on *separation of powers* arguments[79] and the limits of authority of Article III judges[80] to suggest that, in providing equitable relief, courts are always constrained and can only act where they can identify "limited and precise" legal standards to follow.[81]

Climate change litigants in state courts have faced similar hurdles. In 2020, the Oregon Supreme Court rejected public trust doctrine claims from a group of similar youth climate plaintiffs—including the lead plaintiff in *Juliana*—in *Chernaik v. Brown*. The court majority concluded that the doctrine applied only to the management of navigable waters and underlying lands—and should not be extended to include the atmosphere, nor does it require state action to address climate change as a potential source of damage to these resources.[82]

In 2021, the Washington Court of Appeals rejected a similar claim in

75. *Id.* I also note that, unlike foreign and international courts, the Supreme Court made no mention of the Paris Agreement in its decision. *See id.*; *cf.* cases cited *supra* notes 58–60 and accompanying text.

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

77. Juliana v. United States, 947 F.3d 1159, 1166–67 (9th Cir. 2020).

78. *Id.* at 1175.

79. *Id.* at 1171–73 (citing Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019)).

80. *Id.* at 1174–75 (citing Stern v. Marshall, 564 U.S. 462, 483 (2011)).

81. *Id.* at 1173. *See generally* Juliana v. United States*: Ninth Circuit Holds that Developing and Supervising Plan to Mitigate Anthropogenic Climate Change Would Exceed Remedial Powers of Article III Court*, 134 HARV. L. REV. 1929 (2021). For a helpful discussion of proposed legal standards, see Lucy Maxwell, Sarah Mead & Dennis van Berkel, *Standards for Adjudicating the Next Generation of* Urgenda*-Style Climate Cases*, 13 J. HUM. RTS. & ENV'T 35 (2022).

82. Chernaik v. Brown, 475 P.3d 68, 80–82 (Or. 2020).

Aji P. ex rel. Piper v. State,[83] in which youth climate plaintiffs asserted fundamental rights to a stable climate system. The court ultimately held that the claims presented non-justiciable political questions. The Supreme Court of Washington denied review of the appellate court's decision,[84] with two justices dissenting.[85] While declaring that the "right to a stable environment should be fundamental,"[86] the Court of Appeals leaned heavily on the logic of separation of powers and the political question doctrine as spelled out in the Supreme Court's *Baker v. Carr* decision[87] in dismissing the plaintiffs' case.

The Alaska Supreme Court reached a similar decision in the 2022 *Sagoonick v. State* case.[88] There, the plaintiffs advanced arguments similar to those of the plaintiffs in *Juliana*, *Chernaik*, and *Aji P.*[89] But the court rejected their claims based on the conclusion that the plaintiffs raised non-justiciable political questions.[90] Though the court acknowledged that, under the Alaska Constitution, it did have a role to play in supervising the state's management of natural resources,[91] those same constitutional provisions also "expressly delegated to the legislature the duty to balance competing priorities for the collective benefit of all Alaskans."[92] The court declined to intervene in the face of these political questions, but it noted that the plaintiffs had several alternative avenues for recourse, including the challenging of "discrete actions implementing State resource development and environmental policies," pursuing a ballot initiative to codify their preferred policies, and lobbying state policymakers.[93]

In finding that the relief requested by plaintiffs (a court order for more

83. Aji P. *ex rel.* Piper v. State, 480 P.3d 438, 447–51 (Wash. Ct. App. 2021).
84. Aji P. v. State, 497 P.3d 350 (Wash. 2021).
85. *Id.* at 351–53 (González, C.J., dissenting).
86. *Aji P.*, 480 P.3d at 444.
87. *Id.* at 447 (citing Baker v. Carr, 369 U.S. 186, 210 (1962)).
88. Sagoonick v. State, 503 P.3d 777 (Alaska 2022).
89. *Id.* at 791 (laying out plaintiffs' claims, including an alleged "fundamental and inalienable right[] to . . . a stable climate system that sustains human life and liberty," a violation of the public trust doctrine, and age-based discrimination against the youth plaintiffs). *But see id.* at 789–90, 803–05 (noting that plaintiffs challenged the denial of a petition they made to the Alaska Department of Environmental Conservation "to adopt an agency rule ensuring carbon dioxide and greenhouse gas emissions . . . have a 'reduction trajectory that is based on best climate science' ").
90. *Id.* at 793.
91. *Id.* at 788 ("[O]ur role . . . is ensuring that constitutional principles are followed, particularly the mandate that 'natural resources are to be made available for maximum use consistent with the public interest.' ") (citing Sullivan v. Resisting Env't Destruction on Indigenous Lands, 311 P.3d 625, 634–35 (Alaska 2013)); *see also Sullivan*, 311 P.3d at 634 (holding that the "consideration of cumulative impacts" during environmental impact assessments "is constitutionally required throughout all the phases of a project").
92. *Sagoonick*, 503 P.3d at 796.
93. *Id.* at 798–99.

aggressive government policies to address climate change) has no *judicially manageable standards* and risks usurping the authority of the legislative and executive branches,[94] the courts here followed a venerable tradition of judicial restraint within U.S. courts, but one to which the judiciary does not always adhere—as I explore further below.

B. NO ENVIRONMENTAL PROVISION IN THE U.S. CONSTITUTION

Perhaps the most obvious place to start the search for an explanation for the resistance of U.S. courts to assertions of environmental rights lies in the absence of any explicit *environmental* or *public health* provision in the U.S. Constitution. Indeed, in almost all of the international environmental rights cases reviewed in Part II above, courts make reference to provisions in the country's constitution or other foundational legal documents (including reliance on the ECHR). But only in a minority of cases was the constitutional provision one that specifically mentions the *environment*. Much more often, courts read environmental rights into provisions for *life* or *health*. Of course, the U.S. Constitution does not make mention of these terms either.

But this explanation is not fully satisfactory. Other countries with constitutions that make no mention of the environment or related terms have seen the judiciary expand environmental rights and even extend legal protection to elements of Nature. In fact, my research suggests that thirty-seven other nations find themselves in a similar posture (see Appendix). But courts in many of these countries have advanced a broader view of environmental rights than is found in the United States. In fact, some of these nations have been trailblazers in judicial recognition of fundamental rights in support of environmental protection claims. In New Zealand, for example, where there is no constitutional provision for environmental rights, the Whanganui River has been given legal personhood with the Maori people who claim ancestral rights to the waterway acting in a trusteeship role to ensure the resource is protected.[95] Likewise, although Canada lacks explicit environmental language in its constitution, its courts have repeatedly affirmed the authority of federal policies that regulate for the purpose of environmental protection. And multiple Canadian courts have assigned environmental rights to Aboriginal titleholders as well as Aboriginal title

94. Juliana v. United States, 947 F.3d 1159, 1174 (9th Cir. 2020); *Sagoonick*, 503 P.3d at 797–99; Aji P. *ex rel.* Piper v. State, 480 P.3d 438, 448–49 (Wash. Ct. App. 2021).

95. David Takacs, *We Are the River*, 2021 U. ILL. L. REV. 545, 547 (2021); Katie Surma, *Does Nature Have Rights? A Burgeoning Legal Movement Says Rivers, Forests and Wildlife Have Standing, Too*, INSIDE CLIMATE NEWS (Sept. 19, 2021), https://insideclimatenews.org/news/19092021/rights-of-nature-legal-movement/ [https://perma.cc/5N6M-6MQC].

lands.[96]

In other countries, the executive branches have asserted environmental rights in advancing pollution control and sustainability initiatives. In Kiribati, for example, despite an absence of constitutionally enshrined environmental rights, the government has developed an extensive right-based national policy focused on a healthy environment, and the nation's political leaders have spoken at lengths on the global stage about the need to advance this right worldwide.[97] Similarly, Japan's legislature introduced a *mandamus action* within its Administrative Case Litigation Act in 2004, which the Japanese Supreme Court has interpreted as a rights-based obligation on the government to minimize damage to health from environmental pollution.[98]

While the lack of explicit or implicit environmental provisions in the U.S. Constitution starts to explain the narrow view of environmental rights emerging from American courts, it cannot be seen as a full explanation given the divergent outcomes across the world in climate change cases and other legal challenges based on environmental rights.

C. NON-JUSTICIABILITY AND JUDICIAL DEFERENCE TO THE POLITICAL BRANCHES

In the recent U.S. court decisions dismissing environmental rights claims, the *standing* of plaintiffs to bring a case has almost always been rejected based on the legal theory that courts cannot provide the remedy being sought—notably, a court order mandating more vigorous climate change policies. This conclusion builds on the *separation of powers*, *political question,* and the recently articulated *major questions* doctrines, as well as the longstanding *Baker v. Carr* framework, which suggests that courts should only take up cases where there are "appropriate modes of effective judicial relief."[99] But as noted in Part II above, other courts around the world have not hesitated to declare government policies inadequate and order the remedies requested in similar circumstances. So why does the

96. Lynda M. Collins, *Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution,* 71 SUP. CT. L. REV. 519, 527–28 (2015); Randy Kapashesit & Murray Klippenstein, *Aboriginal Group Rights and Environmental Protection*, 36 MCGILL L.J. 925 (1990).

97. MINISTRY OF ENV'T, LANDS, & AGRIC. DEV., KIRIBATI INTEGRATED ENVIRONMENT POLICY (2013); Silja Klepp & Johannes Herbeck, *The Politics of Environmental Migration and Climate Justice in the Pacific Region*, 7 J. HUM. RTS. & ENV'T. 54, 54–56 (2016).

98. Noriko Okubo, *Judicial Control over Acts of Administrative Omission: Environmental Rule of Law and Recent Case Law in Japan*, *in* LEGAL ASPECTS OF SUSTAINABLE DEVELOPMENT: HORIZONTAL AND SECTORIAL POLICY ISSUES 189–202 (Volker Mauerhofer ed., 2016); Yuichiro Tsuji, *The Legal Issues on Environmental Administrative Lawsuits Under the Amendment of ACLA in Japan*, 1 YONSEI L.J. 339, 339–62 (2010).

99. Baker v. Carr, 369 U.S. 186, 259 (1962).

United States stand apart?

Perhaps the real explanation lies in the seriousness with which courts in the United States struggle with the issue of whether the injuries for which plaintiffs seek redress are within the power of the judiciary to address. In the *Juliana* case, the Ninth Circuit agreed with the district court that the plaintiffs had alleged particularized claims of injury from GHG emissions that could be linked to federal government actions (including leases and subsidies) in support of fossil fuel producers.[100] But the court concluded that the plaintiffs had failed to meet the redressability requirement for standing. The majority opinion rejects the notion that courts could "order, design, supervise, or implement" the sort of climate change action plan that plaintiffs sought.[101] The two-judge majority goes on to declare that the plaintiffs must take their concerns to the "political branches" of the government.[102]

This line of reasoning fits into a long American tradition of courts steering clear of *political questions* that are deemed to be better resolved by the political branches of the government—including in a series of prior cases involving environmental claims.[103] The *Juliana* majority notes that the transition to renewable energy requires "a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."[104]

But is this outcome really mandated? Couldn't the court have declared the government's current climate change posture inadequate and ordered a ramped-up response to the build-up of GHGs in the atmosphere—while leaving the details of *how* to do so to the other branches? As Aharon Barak, former Justice of the Israeli Supreme Court, observes in *The Judge in a Democracy*, which analyzes the role of the judiciary, "[T]he separation of powers is not pure and . . . each branch performs some functions that belong to the other branches[] so long as they are intimately related to the branch's primary function."[105] Barak goes on to argue that the principle of *checks and balances* stands alongside the separation of powers as a foundational element

100. Juliana v. United States, 947 F.3d 1159, 1168–69 (9th Cir. 2020).

101. *Id.* at 1171–72.

102. *Id.* at 1175.

103. *See* California v. Gen. Motors Corp., No. C06-05755, 2007 U.S. Dist. LEXIS 68547 (N.D. Cal. Sept. 17, 2007); Connecticut v. Am. Elec. Power Co., 406 F. Supp. 2d 265 (S.D.N.Y. 2005), *rev'd*, 582 F.3d 309 (2d Cir. 2009); West Virginia v. EPA, 142 S. Ct. 2587 (2022). *See generally* Philip Weinberg, *Political Questions: An Invasive Species Infecting the Courts*, 19 DUKE ENV'T L. & POL'Y 155, 155–56 (2008). While invoking the political question doctrine to avoid adjudicating environmental cases is common in American courts, it is not *uniquely* American. *See, e.g.*, Greenpeace v. United Kingdom [2021] CSIH 53 (Scot.) ("The issue [of assessing "the environmental effects of a project for the extraction of fossil fuels"] is essentially a political and not a legal one . . . .").

104. *Juliana*, 947 F.3d at 1171.

105. AHARON BARAK, THE JUDGE IN A DEMOCRACY 37 (2006).

of a functioning democracy—thus requiring the judiciary to act if the other branches fail to uphold the law or otherwise perform their duties.[106] He concludes:

> The more non-justiciability is expounded, the less opportunity judges have for bridging the gap between law and society and for protecting the constitution and democracy. . . . [T]he court should not abdicate its role in a democracy merely because it is uncomfortable or fears tension with the other branches of the state.[107]

As Part II demonstrates, courts around the world seem to follow this principle in their willingness to step into environmental controversies, including cases that require them to declare the policies of the government inadequate—and to order more robust responses, including but not limited to climate change policies, to the claims of a diverse set of plaintiffs.

But the U.S. judiciary has traditionally taken a much narrower view of its proper role—and concomitantly has been much more likely than courts elsewhere to declare a matter non-justiciable when confronted with cases that seem to present political questions—following the Supreme Court's guidance and multi-factor test established in *Baker v. Carr*.[108] In *Juliana*, for example, the Ninth Circuit concluded that the plaintiffs' request for relief would have entailed handling an issue committed to other branches of government (*Baker v. Carr* factor 1), forcing them into establishing a remedy where there were no judicially manageable standards (factor 2), and requiring the court to make policy determinations (factor 3). In finding the matter non-justiciable, the majority declared that they were "bound 'to exercise a discretion informed by tradition, methodized by analogy, and disciplined by system' "[109] and that "the plaintiffs' case must be made to the political branches,"[110] noting further and somewhat curiously "[t]hat the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes."[111]

But this restraint is not mandated, as the dissent in *Juliana* makes clear. The dissenting Ninth Circuit judge signals that she would *not* have found the requested relief non-justiciable and believes that a court order that the federal government take more vigorous action to address climate change would be

106. *Id.* at 42–44.
107. *Id.* at 177–78.
108. Baker v. Carr, 369 U.S. 186, 217 (1962) (laying out six-factor test).
109. *Juliana*, 947 F.3d at 1174 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921)).
110. *Id.* at 1175.
111. *Id.*

efficacious, even if such a command were not likely to fully solve the problem.[112] She rejects the majority's "deference-to-a-fault" approach and highlights a "countervailing constitutional mandate to intervene where the other branches run afoul of our foundational principles."[113]

Similar separation of powers and political question arguments dominate *Aji P.*, in which the Washington Court of Appeals found plaintiffs' claims nonjusticiable based on four of the *Baker v. Carr* factors. Notably, the majority concluded that: (1) the issues on which the plaintiffs sought judicial relief were "constitutionally committed" to the legislative and executive branches of government; (2) there exists no "judicially manageable standard" for providing relief; (3) the legislature and executive agencies have established climate change policies (albeit ones that plaintiffs believe are inadequate); and (4) judicial intervention in this case would "disrespect[] the coordinate branches" of government.[114] While the Court of Appeals decision was upheld by the Washington Supreme Court, the Chief Justice dissented and indicated that he would have allowed the plaintiffs' case to go forward, observing that "the Court of Appeals decision unnecessarily expanded the political question doctrine" and that "considerable statutory authority" supports the plaintiffs' claim of fundamental environmental rights.[115]

Similarly, the decision in *Sagoonick* was decided by just one vote and was issued over a vigorous dissent by Justice Peter Maassen, who noted that the state's public trust doctrine incorporated a "constitutional right to a livable climate."[116] Justice Maassen criticized the majority for failing to issue a declaratory judgment "recogniz[ing] a constitutional right to a livable climate—arguably the bare minimum when it comes to the inherent human rights to which the Alaska Constitution is dedicated."[117] Justice Maassen further noted that the court had been repeatedly presented with the same question and that declining to answer it on justiciability grounds "will not eliminate it but will only postpone our answer, in the meantime putting the burden of redundantly litigating it on plaintiffs, the State, and the trial courts."[118] He added that recognition of the right does not require the court to develop a remedy itself, to immediately and fully "answer every subsequent question" about how the right might be invoked, or to convert any policy that harms the climate in the slightest into a rights violation—but

112. *Id.* at 1181–82 (Staton, J., dissenting).
113. *Id.* at 1184.
114. Aji P. *ex rel.* Piper v. State, 480 P.3d 438, 447–48 (Wash. Ct. App. 2021).
115. Aji P. v. State, 497 P.3d 350, 351–53 (Wash. 2021) (González, C.J., dissenting).
116. Sagoonick v. State, 503 P.3d 777, 811 (Alaska 2022) (Maassen, J., dissenting in part).
117. *Id.* at 805.
118. *Id.* at 807.

that the court had a duty to answer the question.[119]

Although the outcome in the *Chernaik* case in Oregon turned on the court's unwillingness to expand the reach of the public trust doctrine, dissenting Chief Justice Martha Walters expressly rejected the suggestion that a judicial declaration regarding climate change would be inappropriate and such matters should be left to the legislative and executive branches. In fact, she concluded that "the judicial branch also has a role to play."[120] The dissenting opinion turns aside the separation of powers argument for judicial restraint, citing *Marbury v. Madison* and declaring that one of the core functions of the judicial branch "is to determine the legal authority and obligations of the other two branches of government."[121] In addition, the dissent takes apart the suggestion that the relief plaintiffs seek lacks *judicially manageable standards* (citing *Baker v. Carr*) and would require the court to make "particular policy decisions."[122] In rejecting the need for the court to show deference to the other branches in the face of a "political question," Chief Justice Walters makes it clear that a court invalidating a policy decision of another branch is not the same thing as the court itself making a policy decision[123]—and explains that she would have stepped up to the "obligation to determine what the law requires" and ordered a more robust state response to the threat climate change poses for public trust resources.[124]

Signs that the tide may be turning in U.S. climate litigation have begun to emerge. Most notably, a trial court in Montana recently allowed the legal challenge brought by a group of youth plaintiffs to proceed to trial. In this case, the plaintiffs argued that several state statutory provisions violated the Montana Constitution's environmental rights provision, the public trust doctrine, and their right to a stable climate system.[125] The state argued that the claims presented by the plaintiffs presented non-justiciable political questions.[126] In 2021, the trial court partially granted the state's motion to dismiss on all requests for relief—except for the plaintiffs' request for declaratory judgment that the state had violated the plaintiffs' rights.[127]

119. *Id.* at 808–11.
120. Chernaik v. Brown, 475 P.3d 68, 84 (Or. 2020) (Walters, C.J., dissenting).
121. *Id.* at 88.
122. *Id.* at 89.
123. *Id.* at 89–92.
124. *Id.* at 93.
125. Alec Skuntz, Case Note, *Held v. State, No. CDV-2020-307 (Mont. 1st Dist. Ct. Aug. 4, 2021)*, 1 PUB. LAND & RES. L. REV. 1, 9 (2021).
126. *Id.* at 8.
127. Order Denying Motion to Dismiss at 19, Held v. State, No. CDV-2020-307 (Mont. 1st Dist. Ct. Aug. 4, 2021).

Accordingly, a trial will take place in 2023 on this question.[128]

Judges and justices in other countries have not felt constrained by separation of powers or political question concerns—nor about the risk that ordering action on climate change involves decisions that have no judicially manageable standards. Scholars have similarly raised questions about the logic and advisability of declaring cases to be non-justiciable. Justice Barak, for instance, condemns the concept *of normative non-justiciability* (of the sort Justice Brennan develops in *Baker v. Carr* in concluding that there will be no judicially manageable standards for addressing some issues). He argues that every dispute has "criteria for its resolution . . . . There is no sphere containing no law and no legal criteria . . . . The mere fact that an issue is 'political'—that is, holding political ramifications and predominant political elements—does not mean that it cannot be resolved by a court."[129] Justice Barak likewise rejects the notion of *institutional non-justiciability*. He declares Justice Brennan's *Baker v. Carr* argument—that for a court to take up an issue that has been committed to another branch risks disrespecting a coordinate branch of the government or creating chaos with "multifarious pronouncements by various departments on one question"[130]—to be "unconvincing."[131] As Justice Barak observes, "*all* of the issues that are considered in constitutional or administrative law" have been entrusted to political authorities.[132]

The jurisprudence of non-justiciability—and the tradition of judicial restraint in the face of cases that raise separation of powers issues or political questions—clearly represents a distinct element of the American legal tradition. U.S. judicial norms in this regard stand apart from the legal frameworks in place in other nations—as the next section explores in more detail.

D. NEGATIVE RIGHTS

While the opinions in U.S. environmental rights cases and the related academic literature focus on various elements of the separations of powers and political question doctrine, what more notably underlies the U.S. legal framework and sets the nation apart from the practice of judges elsewhere in the world (and particularly in Europe) is the American constitutional

128. Lucas Thompson, *Date Set for First Youth-Led Climate Trial in U.S. History*, NBC NEWS (Feb. 7, 2022), https://www.nbcnews.com/science/environment/date-set-first-youth-led-climate-trial-us-history-rcna11793 [https://perma.cc/8LQ4-AYR2].

129. BARAK, *supra* note 105, at 179.

130. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

131. BARAK, *supra* note 105, at 183.

132. *Id.* at 184.

emphasis on securing *negative* rights and wariness about assertions of *positive* rights[133]—at least at the federal level. So while the commentary centers on non-justiciability and the various *Baker v. Carr* factors, what undergirds the American exceptionalism is a distinct approach to rights—building, of course, on a federal Constitution that emerged at a moment in time when the critical issue was protecting the citizen from an abusive state, therefore translating into a document that emphasizes *negative rights*.

1. Positive Rights in State Constitutions

In fact, the U.S. structure of rights is somewhat more complicated than just suggested. Notably, some U.S. state constitutions explicitly secure positive rights.[134] Indeed, the Massachusetts Constitution (of 1780) establishes a right to education.[135] Other states have also written positive rights into their constitutions with a number of states having constitutionalized rights to education,[136] labor protections,[137] and protections for arrestees and prisoners.[138] Many other states have adopted expansive legal interpretations of their state-level equivalents to the Bill of Rights in the context of abortion,[139] death penalty,[140] and criminal justice litigation.[141]

133. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18 (1973) (declining to hold that education is a "fundamental right" within the context of the Fourteenth Amendment); Dandridge v. Williams, 397 U.S. 471, 484–85 (1970) (rejecting the idea that access to welfare is a fundamental right); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (requiring that, "to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence *deliberate indifference to serious medical needs*," rejecting the argument that higher standard of care is required (emphasis added)); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989) (rejecting the argument that a government agency's failure to prevent child abuse does not violate the child's right to liberty). The context of prisoner medical care is especially helpful for illustrating this point. Some circuits have adopted a standard that prisons are only required "to provide *minimally adequate* medical care." Harris v. Thigpen, 941 F.2d 1495, 1504 (11th Cir. 1991) (emphasis added); *see also* Wellman v. Faulkner, 715 F.2d 269, 271 (7th Cir. 1983) (applying a "minimal standards of adequacy" standard).

134. *See* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 135–92 (2009) (discussing the development of positive rights in state constitutions). *See generally* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999); EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013).

135. MASS. CONST. pt. 2, ch. 5, § 2; *see also* LAWRENCE FRIEDMAN & LYNNEA THODY, THE MASSACHUSETTS CONSTITUTION 144 (2011) (discussing the development of Massachusetts's right to education).

136. ZACKIN, *supra* note 134, at 67–105; Allen W. Hubsch, *Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1343–48 (1992).

137. *E.g.*, ZACKIN, *supra* note 134, at 106–45.

138. *E.g.*, Caroline Davidson, *State Constitutions and the Humane Treatment of Arrestees and Pretrial Detainees*, 19 BERKLEY J. CRIM. L. 1, 23–47 (2014).

139. *E.g.*, Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469 (2009).

140. James R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299 (1989).

141. Davidson, *supra* note 138, at 23–47.

And seven states have expressly defined environmental rights in one form or another[142]—with New York amending its constitution in 2021 to add an environmental rights amendment.[143]

2. Federal Positive Constitutional Rights

I note further that, while the federal Constitution largely takes the form of establishing rights against government intrusion on the liberties of the people, there are some exceptions where positive rights have been established.[144] For example, American courts have come to recognize the right of an accused person to testify in court in their own defense. As my Yale colleague Akhil Amar notes, this reversal of the prior legal tradition came to be accepted because the old rules raised problems of "legal coherence."[145] Likewise, the advance of civil rights in the 1960s[146] and gay rights in the 2000s[147] might also be seen as the recognition of positive rights under the federal Constitution.[148] The U.S. Supreme Court's jurisprudence paints an inconsistent picture, however, of the legal logic the Court perceives itself to be advancing. A number of the Court's civil rights opinions raise doubts about whether these rulings should be understood as advancing positive rights.[149] Indeed, constitutional law scholars have criticized the landmark decisions in *Lawrence v. Texas* and *Obergefell v. Hodges* as rather imprecise in specifying the rights being extended.[150]

3. European Tradition of Positive Rights with Horizontal Effect

European courts (and a number of other judicial systems around the world) have taken another tack. Not only have they been more willing to

142. HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; MASS. CONST. amend. XLIX; MONT. CONST. art. II, § 3; N.Y. CONST. art. I, § 19; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17; *see also* Yeargain, *supra* note 6 (discussing adoption and impact of these provisions).

143. N.Y. CONST. art. I, § 19 (amended 2021).

144. AKHIL REED AMAR, AMERICA'S CONSTITUTION 327–28 (2005); JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART 68–86 (2021).

145. Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1748–52 (2011).

146. *See generally* Albert M. Bendich, *Privacy, Poverty, and the Constitution*, 54 CAL. L. REV. 407 (1966); Arthur Selwyn Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199 (1968).

147. *See generally* Lawrence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004) (discussing the implicit expansion of fundamental rights in *Lawrence v. Texas*); Peter Nicolas, *Fundamental Rights in a Post-*Obergefell *World*, 27 YALE J.L. & FEMINISM 331 (2016) (discussing the state of fundamental rights following *Obergefell v. Hodges*).

148. Indeed, litigants in *Urgenda*, the landmark climate case decided in the Netherlands, explicitly linked their court battle to that of *Brown v. Board of Education*, with attorney Roger Cox noting that there was "a parallel" between *Urgenda* and "the situation in the 1950s in the United States" with school desegregation. Ketan Jha, *Networked Public Interest Litigation: A Novel Framework for Climate Claims?*, *in* CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC 38, 39 (Jolene Lin & Douglas A. Kysar eds., 2020).

149. *E.g.*, Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 859–60 (2001).

150. *E.g.*, Tribe, *supra* note 147; Nicolas, *supra* note 147.

specify positive rights, they have increasingly moved toward giving human rights *horizontal effect*—meaning that the courts have been willing to define rights (including environmental rights) that create obligations not only for governments but also for other citizens and corporate entities.[151] This tradition has resulted in a framework of environmental rights that are not just broader than in the United States, but also deeper in that they have *direct effect* on private parties—creating affirmative duties to which companies (and others) must adhere.

Most notably, the ECtHR requires the parties to the ECHR to "secure to everyone within their jurisdiction the rights and freedoms defined in . . . [the] Convention."[152] The ECtHR has declared that states have a positive obligation to protect the rights under the ECHR,[153] including the adoption of an adequate regulatory framework[154] and a duty to prevent indirect or *horizontal* effects caused by other citizens or entities.[155] Note that while individuals cannot make a claim of human rights violations against other private individuals, they can call upon the state to enforce their human rights vis-à-vis private parties. In *Pla and Puncernau v. Andorra*, a case involving the interpretation of a will, the ECtHR famously stated:

> Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary or, as in the present case, blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention.[156]

151. *See* cases cited *supra* notes 58–60.

152. European Convention on Human Rights art. 1, Sept. 3, 1953.

153. They were for the first time stated in Marckx v. Belgium, App. No. 6833/74, ¶ 31 (June 13, 1979*)*, see Article 8 ECHR, summarized in Dickson v. United Kingdom, App. No. 44362/04, ¶ 70 (Dec. 4, 2007), and recently stated in Lozovyye v. Russia, App. No. 4587/09, ¶ 36 (Apr. 24, 2018). In an environmental context, see Hatton v. United Kingdom, App. No. 36022/97, ¶ 98 (July 8, 2003).

154. For Article 8, the court expressed this requirement in Marckx v. Belgium, App. No. 6833/74, ¶ 31 (June 13, 1979). For the right to life (Article 2), see Öneryıldız v. Turkey, App. No. 48939/99, ¶ 89 (Nov. 30, 2004).

155. For the theory, see ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 365 (2010). For the terms, see Eleni Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*, 21 EUR. L.J. 657, 663 (2015).

156. Pla & Puncernau v. Andorra, App. No. 69498/01, ¶ 59 (July 13, 2004). For a case concerning two contracting parties, see Mustafa and Tarzibachi v. Sweden, App. No. 23883/06, ¶¶ 30–34 (Dec. 16, 2008).

E. POLYCENTRIC PROBLEMS AND JUDICIAL OVERREACH

The American judiciary's hesitance to take up climate change cases reflects a further distinct legal tradition: a concern that *polycentric problems*—ones that involve balancing of interests and apportioning of costs—are particularly unsuitable for adjudication by the courts. This theory is often associated with Professor Lon Fuller, who analogized polycentric problems to a spider web, where a pull on one strand puts stress across the many other strands and leads to instability.[157] Fuller thus argued that complex policy problems must be left to political processes and not resolved by the judiciary. His theorizing has had a broad impact within the Anglo-American legal tradition.[158]

1. Environmental Issues as Polycentric Problems

Environmental problems generally, and climate change in particular, present just the sort of polycentric policy challenge that Fuller warned was inappropriate for courts to adjudicate.[159] Not only does climate change policy involve many elements and choices—involving production processes, pollution control possibilities, transportation systems, power generation and energy strategies, clean technology development, and many other aspects of life in modern society—but it also involves multiple trade-offs in which environmental gains for some almost always imply environmental costs for others.

Thus, unlike assertions of civil rights, which will often present bright line choices with clear underlying moral imperatives, environmental rights seem much less clear—and indeed, potentially quite intricate and hard to specify with precision. In asserting a moral right and constitutional claim that Black citizens should have a right to vote, there is no balancing to be done nor really any legitimate other side to the argument. No one can claim a right to prevent Black citizens from voting. Likewise, when gay rights are asserted, those that might wish to prevent gay citizens from living their lives as they wish have no firm foundation on which to build. These rights are relatively absolute.

In contrast, assertions of environmental rights might seem to be relatively unbounded. Do my environmental rights extend to a *pristine* environment? To a *habitable* environment? How much money should

157. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 395 (1978).

158. *See generally* Jeff A. King, *The Pervasiveness of Polycentricity*, PUB. L. 101 (2008); Edward L. Rubin & Malcolm M. Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617 (2003); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982).

159. *See, e.g.*, Brian J. Preston, *The Contribution of the Courts in Tackling Climate Change*, 28 J. ENV'T L. 11, 16 (2016).

society (or polluters) be forced to spend to vindicate my right? Do I have a right to experience Nature as it is? Does the fact that Nature is not static but rather in a constant state of flux change the scope of the rights?[160] Simply put, if I have a right to a *healthy* environment, who owes me what duties and to what extent—and at what cost?

Moreover, the resolution of these questions is likely to have externalities on other citizens and private actors in society. A judicial order that a government adopt an emissions-reduction plan, while ostensibly requiring *government* action, will inevitably require private action to comply with the government regulations that follow. Courts may be more reluctant to order remedies that have these sort of economic impacts—as the Alaska Supreme Court in *Sagoonick* suggested. There, in rejecting the plaintiffs' assertion of a right to a healthy environment and denying their requested relief, the court noted that the Alaska Constitution "directs the legislature (and not the judiciary) to manage and develop the State's natural resources for the maximum common use and benefit *of all Alaskans*."[161] As the court made clear, the *legislature* is responsible for striking "the proper balance between development and environmental concerns," and that the court "cannot, and should not, substitute [its] judgment for that of the political branches."[162]

While legal cases that require analysis of policy choices present challenges for the judiciary, a number of scholars, including Professor Owen Fiss, have pushed back on Lon Fuller's arguments. Fiss suggests that the judiciary must not shy away from upholding fundamental rights even in the face of polycentric problems.[163] He argues that "courts should not be viewed in isolation but as a coordinate source of governmental power, as an integral part of the larger political system."[164] In the American legal system, "the legitimacy of the courts and the power judges exercise in structural reform . . . are founded on the unique competence of the judiciary to . . . give concrete meaning and application to the public values embodied in an authoritative text such as the Constitution."[165] Cass Sunstein raises a parallel argument, that the task of judges in adjudicating disputes—even those

160. *See* Oswald J. Schmitz, *Sustaining Humans and Nature as One: Ecological Science and Environmental Stewardship*, *in* A BETTER PLANET: 40 BIG IDEAS FOR A SUSTAINABLE FUTURE 11, 11 (Daniel C. Esty ed., 2019) (explaining the dynamic nature of ecosystems).

161. Sagoonick v. State, 503 P.3d 777, 795 (Alaska 2022) (emphasis added).

162. *Id.* (citing Sullivan v. Resisting Env't Destruction on Indigenous Lands, 311 P.3d 625, 635 (Alaska 2013)).

163. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 40–41, 44 (1979).

164. Owen M. Fiss, *Two Models of Adjudication*, *in* HOW DOES THE CONSTITUTION SECURE RIGHTS? 43 (Robert A. Goldwin & William A. Schambra eds., 1985).

165. *Id.*

seemingly governed by "some preexisting rule"—is intricate and necessarily requires value judgments.[166] Moreover, it is a fiction that courts are not *already* making the sort of decisions that Fuller argues that they should not or do not.[167] And as Abram Chayes argued, the scope and breath of injunctive relief—including that which is widely accepted in the American legal system—involves the precise sort of value judgments that courts *theoretically* ought to shy away from.[168]

In the context of environmental rights, it is inapposite to suggest that the questions involve too many imprecise calculations or debatable values. If the judiciary is able to weigh the competing concerns of other rights, both those presently enshrined in the Constitution *and* those recognized in common law, which implicate nearly identical concerns, it is capable of doing so here. As the dissent in *Juliana* noted, if courts are skeptical of granting the kind of relief sought by plaintiffs—that is, a broad order to do something that requires a coordinated effort at all levels of government, likely needing to be overseen by individual judges or special masters—there is a readily available example in *Brown v. Board of Education*.[169] There, "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."[170]

2. Politicization of the Judiciary

A related argument suggests that courts are obliged to steer clear of cases that require making policy choices for fear of *politicizing* the judiciary. Under this line of thinking, courts in the United States are more concerned about politicization or the political nature of climate policy questions than are courts of other nations, perhaps reflecting the deep partisan divides in American politics over environmental issues and climate change—rifts that do not exist to the same extent in most other nations. Concerns over judicial policymaking are arguably reflected in the Supreme Court's recent invocation of *major questions doctrine* to invalidate proposed climate regulations which, in leaving significant policy choices to Congress, could be read as the Court declining to resolve questions with partisan overtones.[171]

But the Court's reliance on the *major questions doctrine* to steer clear

166. Cass R. Sunstein, *Politics and Adjudication*, 94 ETHICS 126, 134 (1983).

167. Amelia Thorpe, *Tort-Based Climate Change Litigation and the Political Question Doctrine*, 24 J. LAND USE & ENV'T L. 79, 93–94 (2008).

168. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292–96 (1976).

169. Juliana v. United States, 947 F.3d 1159, 1188 (9th Cir. 2020) (Staton, J., dissenting).

170. *Id.*

171. *See supra* note 103 and accompanying text.

of hot political questions—and the argument that the Court is hyper-protective of its legitimacy as an apolitical arbiter—hardly seem convincing in a post-*Dobbs v. Jackson Women's Health Organization* world.[172] Justice Alito opens the majority opinion of *Dobbs*, in fact, with an acknowledgement that the issue of abortion is "a profound moral issue on which Americans hold sharply conflicting views."[173] The majority opinion recognizes the criticisms that a "decision overruling Roe would be perceived as having been made 'under fire' and as a 'surrender to political pressure,' "[174] but it concedes that political or politicized responses to the decision are immaterial in the Court's eyes: "We do not pretend to know how our political system or society will respond to today's decision. And even if we could foresee what will happen, we would have no authority to let that knowledge influence our decision."[175] In other words, fear of politicization was expressly waved away by the Supreme Court in *Dobbs*. That climate change *also* represents a profound moral or political issue (or that there would no doubt be partisan backlash to a judicial decision demanding governmental action in the face of climate change) does not seem immediately distinguishable from the Court's eagerness to take up arms in *Dobbs*.

Besides, concerns over politicized climate-related decision-making beg the question of whether adjudicating political matters relating to climate change would threaten the legitimacy of the judiciary to the extent that critics claim. The presumption of grave risk seems overstated. In "invalidating actions by other branches of the state . . . the court does not criticize the internal logic or practical efficiency of such political considerations," instead solely focusing on the legality of the action taken.[176] In this respect, it is entirely possible for a court to assert a right, *and* hold that a legislature's action violates that right, without actually infringing on the legislature's policymaking discretion.[177] In *Robinson Township v. Commonwealth*, for example, the Pennsylvania Supreme Court invalidated portions of an oil and gas regulation passed by the legislature on the basis that it violated the plaintiffs' state constitutional right to a healthy environment.[178] In response to arguments that the plaintiffs' claims presented non-justiciable political questions, the court had a forceful response. It noted that a court's review of policy choices made by the legislature "does not challenge [its] power" to

172. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
173. *Id.* at 2240.
174. *Id.* at 2278.
175. *Id.* at 2279.
176. BARAK, *supra* note 105, at 186; *see also* Amar, *supra* note 145, at 1786.
177. Robinson Twp. v. Commonwealth, 83 A.3d 901, 928–29 (Pa. 2013); *see also* Sagoonick v. State, 503 P.3d 777, 810–11 (Alaska 2022) (Maassen, J., dissenting in part).
178. *Robinson Twp.*, 83 A.3d at 985.

set policy; "it challenges whether, in the exercise of the power, the legislation produced by the policy runs afoul of constitutional command."[179] "[T]he political question doctrine," it added, "is a shield and not a sword to deflect judicial review."[180] Thus, the idea that judicial restraint is to be applauded when courts face a case with political overtones should be questioned if not rejected outright, especially in the face of fundamental threats to society, such as those posed by climate change.

While it is understandable that the deep political divides that now riven America have pushed U.S. judges to be extra cautious about taking up *political questions*, there are good arguments to suggest that this posture is not just inappropriate but constitutionally incorrect. To the contrary, it may be that with regard to the *most political* issues—where the legislative branch is too divided to act—courts have a special obligation to step into the breach. In fact, in explaining when the Ninth and Fourteenth Amendments provide a foundation for unenumerated rights that should be acknowledged by courts, Akhil Amar notes that such rights are most easily recognized when there exists clear national support and particularly when Congress has recognized such rights. But he goes on to say courts may need to secure fundamental rights even without these signals of broader support because the judiciary has a "role as a critical backstop in the event that Congress ever fails to act with proper vigor."[181]

F. AMERICA'S BENEFIT-COST APPROACH TO ENVIRONMENTAL REGULATION

One further explanation for the U.S. judiciary's exceptionalism on environmental rights might be found in the relatively unique structure of American environmental law and regulations. In particular, American regulatory practice has developed around a *law and economics* approach to environmental protection that permits powerplants, mines, factories, and other entities to pollute (literally issuing these facilities *permits*) so long as the benefits to society of the economic activity exceed the emissions harms created by the enterprise. As Don Elliott and I explain, this *net social benefits* approach to pollution control—which builds on a Kaldor-Hicks economic efficiency logic (rather than a Pareto optimization that would require compensation to those suffering the pollution impacts)—results in significant unabated emissions in many instances.[182] In privileging economic activities over environmental rights, this environmental policy framework

179. *Id.* at 928.
180. *Id.* (citing Council 13 v. Commonwealth, 986 A.2d 63, 75–76 (Pa. 2009)).
181. Amar, *supra* note 145, at 1782 n.116. *See generally* AMAR, *supra* note 144.
182. Elliott & Esty, *supra* note 9.

could be read as a signal that America's political branches have established a mechanism for balancing the competing interests discussed above and concluded that environmental rights should give way to economic growth and jobs as the priority. Such an observation might well lead U.S. judges to conclude that they should not take up cases that tread on this policy domain—particularly to the extent that the environmental arena is one of contested rights and divergent values.

IV. THE SUSTAINABILITY IMPERATIVE AND PATHWAYS TO SECURING U.S. ENVIRONMENTAL RIGHTS

Perhaps the most curious aspect of the recent environmental-rights-based climate change decisions across several federal and state courts is the broad recognition that the problem plaintiffs seek to address is both real and significant. The *Juliana* majority says, in particular: "There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change."[183] They further suggest that a more vigorous climate change policy response is "a matter of national survival."[184] Yet the court declines to act.

This paradox raises several important questions: Does the political dispute and ongoing contestation over environmental policy really justify the U.S. judiciary's dodging of questions involving fundamental rights to a habitable environment? Is the judiciary's restraint still justified if responding to climate change is seen as a matter of national survival? Or, to turn these questions around, what is the path forward that might allow environmental rights to be secured in the current U.S. political context? How might courts be positioned to respond to the threat posed by climate change and the need to put American society onto more sustainable footings?

In addressing these questions, the starting point must be the fact that climate science has established beyond any credible doubt the threat posed to humanity by the build-up of GHGs in the atmosphere.[185] More generally, society has begun to recognize a *sustainability imperative*[186] that derives from the ever-more-clear findings of ecosystems science, which suggest the need to restructure our economic activities to ensure that they do not create environmental impacts that transgress critical planetary boundaries in a

183. Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020).

184. *Id.*

185. *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS (2021) (discussing the science behind climate change).

186. *See supra* note 10 (explaining the concept and the array of voices calling for a more sustainable future).

manner that might destabilize the Earth systems on which all life depends.[187]

Policy emphasis on sustainability is not new. A commitment to *sustainable development* that "meets the needs of the present without compromising the ability of future generations to meet their own needs" (the Brundtland Commission's definition in the 1987 report, *Our Common Future*) has been a core commitment of the world community for decades[188] and understood to require limits on pollution and natural resource depletion.[189] The foundational importance of sustainability as a core principle for life in the twenty-first century has recently been reiterated with the adoption of the U.N. Sustainable Development Goals and the 2015 Paris Agreement on Climate Change, as well as the 2021 Glasgow Climate Pact, under which 197 nations (including the United States) committed to net-zero GHG emissions by mid-century.[190]

I have argued elsewhere that sustainability (by its very definition) requires a changed foundation for business and our economic life centered on bringing an end to uninternalized environmental externalities.[191] In this light, Part IV explores how environmental rights to a sustainable future might be established in the American political context.

A. READING POSITIVE ENVIRONMENTAL RIGHTS INTO U.S. CONSTITUTION

While the U.S. Constitution does not explicitly recognize environmental rights nor even rights to life or health, the Supreme Court has built upon the Due Process Clauses of the Fifth and Fourteenth Amendments a set of protections for fundamental interests of American citizens including

187. Rockström et al., *supra* note 37, at 32–37; *see also* JOHAN ROCKSTRÖM & MATTIAS KLUM, BIG WORLD, SMALL PLANET: ABUNDANCE WITHIN PLANETARY BOUNDARIES 14–31 (2015).

188. WORLD COMM'N ON ENV. & DEV., OUR COMMON FUTURE ¶ 27 (1987).

189. U.N. Conf. on Env't & Dev., at annex I, U.N. Doc. A/Conf.151/26 (1992). *See generally* Mark L. Brusseau, *Sustainable Development and Other Solutions to Pollution and Global Change*, *in* ENVIRONMENTAL AND POLLUTION SCIENCE 585 (Mark L. Brusseau, Ian L. Pepper & Charles P. Gerba eds., 2019); Kieran Mayers, Tom Davis & Luk N. Van Wassenhove, *The Limits of the "Sustainable" Economy*, HARV. BUS. REV. (June 16, 2021), https://hbr.org/2021/06/the-limits-of-the-sustainable-economy [https://perma.cc/W8LB-XL5A].

190. Paris Agreement, Dec. 12. 2015, 55 I.L.M. 740 (2016); *see The Glasgow Climate Pact—Key Outcomes from COP26*, U.N. CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/the-glasgow-climate-pact-key-outcomes-from-cop26 [https://perma.cc/JLX8-6JR3].

191. Daniel C. Esty, *Mastering the Labyrinth of Sustainability: Toward a New Foundation for the Market Economy*, REVUE EUROPÉENNE DU DROIT, Summer 2022, at 119, 120; *see also* Elliott & Esty, *supra* note 9.

the right to marry,[192] maintain a family,[193] and choose one's own occupation.[194] These fundamental rights have been judicially defined and as such "may not be submitted to vote; they depend on the outcome of no elections."[195] In citing these cases and the pathway by which these rights were recognized, the dissenting judge in the *Juliana* case observed that the judiciary need not stand by in the face of climate change and allow a "calamity."[196] Rather, courts could secure a fundamental right to a habitable environment in a similar fashion.

Finding constitutional space for new rights has been done in a variety of ways in other circumstances. For example, unenumerated rights can be found in the "penumbras" and "emanations" of the Bill of Rights as Justice Douglas observed in his *Griswold v. Connecticut* opinion that established a constitutional right to privacy.[197] Although the Supreme Court is increasingly strict in gatekeeping the Due Process Clause through the "deeply rooted" test on which it has relied in recent cases,[198] there may be significant foundations upon which to build upon in securing environmental rights. Notably, the Preamble to the Constitution declares the purpose of the document to be promotion of "the general welfare." For a court ready to take up the challenge of combating climate change, this phrase offers a foundation for an assertion of rights to a habitable environment, especially in the face of the threat to humanity posed by climate change. The Constitution should also be read in light of the natural rights beliefs that undergirded the American Revolution[199] and the intentions of the Founders as expressed in the Declaration of Independence with regard to inalienable rights to "Life, Liberty, and pursuit of Happiness" and the insistence that the "new Government" should be designed to "effect" the "Safety and Happiness" of the people[200]—all of which could be read as requiring courts to secure the

192. *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015) (establishing fundamental right to marry).

193. *See generally* M.L.B. v. S.L.J., 519 U.S. 102 (1996) (holding that inability to pay court fees cannot be used to deny parental rights).

194. *See generally* Schware v. Bd. of Bar Exam'rs, 353 U.S. 232 (1957) (establishing that occupational pursuits cannot be denied in a manner that violates the Due Process Clause).

195. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736 (1964) (quoting W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

196. Juliana v. United States, 947 F.3d 1159, 1175, 1177–81 (9th Cir. 2020) (Staton, J., dissenting).

197. Griswold v. Connecticut, 381 U.S. 479, 484 (1965); *see also* Amar, *supra* note 145, at 1761.

198. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022); *see also* Washington v. Glucksberg, 521 U. S. 702, 721 (1997).

199. *See* RANDY E. BARNETT, OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE (2016); Randy Barnett, Opinion, *What the Declaration of Independence Said and Meant*, WASH. POST (July 4, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/04/what-the-declaration-of-independence-said-and-meant/ [https://perma.cc/TV2B-5CG5].

200. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

environmental rights needed to avoid catastrophic climate change or "implicit in the concept of ordered liberty."[201]

As Akhil Amar suggests, unenumerated rights can alternatively be discovered in the "lived practices and beliefs of the American people."[202] As an example, he cites Justice Harlan's concurring opinion in *Griswold* as offering a better basis for inferring a right to privacy[203] than the majority opinion provides. Amar adds that such unenumerated rights are most easily advanced when they align with other "canonical sources" such as the Declaration of Independence or state constitutions[204]—factors that might well now argue for recognition of environmental rights. Moreover, the facts that (1) polling suggests that a very substantial majority of Americans now support a more comprehensive response to climate change;[205] and (2) businesses of all sizes and across virtually all industries across America have adopted net-zero GHG emissions targets[206] perhaps opens the way for U.S. courts to define the right to a habitable environmental as constitutionally protected—as made clear by the expectations and values of the people as expressed in both their daily and professional lives.

While there are solid constitutional foundations for securing environmental rights in America—especially for a judiciary that understands its obligation to act in the face of an overarching threat and inaction on the part of the political branches—political reality means a high hurdle must be overcome to get U.S. courts to recognize *positive* environmental rights.

201. *Glucksberg*, 521 U.S. at 721; *cf.* Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (2016) ("I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.").

202. Amar, *supra* note 145, at 1748–52.

203. *Id.* at 1762.

204. *Id.* at 1752.

205. James Bell, Jacob Poushter, Moira Fagan & Christine Huang, *In Response to Climate Change, Citizens in Advanced Economies Are Willing to Alter How They Live and Work*, PEW RSCH. CTR. (Sept. 14, 2021), https://www.pewresearch.org/global/2021/09/14/in-response-to-climate-change-citizens-in-advanced-economies-are-willing-to-alter-how-they-live-and-work/ [https://perma.cc/JN37-CWHP]; Danielle Deiseroth, *Voters Want America to Lead on Climate at Home and Abroad*, DATA FOR PROGRESS (Apr. 22, 2021), https://www.dataforprogress.org/blog/2021/4/22/voters-want-america-to-lead-on-climate-at-home-and-abroad [https://perma.cc/SY8J-J48K]; Lisa Martine Jenkins, *Half of U.S. Voters Now Characterize Climate Change as a 'Critical Threat*,*'* MORNING CONSULT (Apr. 27, 2021), https://morningconsult.com/2021/04/27/paris-agreement-climate-change-threat-poll/ [https://perma.cc/X3QG-K3GZ].

206. For a sense of which companies have made these targets, see *Companies Taking Action*, SCIENCE BASED TARGETS, https://sciencebasedtargets.org/companies-taking-action [https://perma.cc/Q6ZF-8KEK]; *Companies*, NET ZERO TRACKER, https://zerotracker.net/#companies-table [https://perma.cc/J4A9-A2LS].

B. RIGHTS FOR NATURE

Another path forward would be to heed Chris Stone's call to give Nature legal personhood. But in the United States, the argument for extending legal rights to natural objects is seen by many as "radical"[207] and has thus not gotten much traction—with one exception. In 2019, the citizens of Toledo, Ohio, voted to grant Lake Erie a "Bill of Rights,"[208] which included "the right to exist, flourish, and naturally evolve."[209] But this initiative was quickly struck down in federal court, with the judge ruling that the proposed legal rights for the lake were unconstitutionally vague. The court asked, "What conduct infringes the right of Lake Erie and its watershed to 'exist, flourish, and naturally evolve'?"[210] It went on to say, "The line between clean and unclean, and between healthy and unhealthy, depends on who you ask."[211]

While the *Toledo* court was perhaps too quick to dismiss the idea of rights for Lake Erie, the revered environmental law professor Joseph Sax decades ago offered a logic for not trying to advance "rights for objects" as Stone proposed. In a review of the standing issues addressed in the Supreme Court's *Sierra Club v. Morton* decision,[212] Sax noted: "If Stone is saying only that we should take account of diffuse citizen interests not routinely represented," then ascribing the rights to Nature is "verbal overkill."[213] What is really required, observed Sax, is "a more spacious view of the right of citizens"[214] to ensure that courts take seriously the "risks of long-term, large scale practically irreversible disruptions to ecosystems"[215]—thus specifying five decades ago the path forward that this Article seeks to advance.

C. STATE CONSTITUTIONS

As discussed in Part III, seven U.S. states have provisions that establish environmental rights in one form or another. Although these rights have not yet yielded promising outcomes for litigation to implement broad-based

207. Tănăsescu, *supra* note 2, at 452.

208. Sigal Samuel, *Lake Erie Now Has Legal Rights, Just Like You*, VOX (Feb. 26, 2019), https://www.vox.com/future-perfect/2019/2/26/18241904/lake-erie-legal-rights-personhood-nature-environment-toledo-ohio [https://perma.cc/SUE7-S67V].

209. Drewes Farm P'ship v. City of Toledo, 441 F. Supp. 3d 551, 554 (N.D. Ohio 2020).

210. *Id.* at 556.

211. *Id.*

212. Sierra Club v. Morton, 405 U.S. 727 (1972).

213. Joseph L. Sax, *Standing to Sue: A Critical Review of the Mineral King Decision*, 24 NAT. RES. J. 76, 84 n.37 (1973).

214. *Id.*

215. *Id at* 88.

climate change policies,[216] it may well be that vindication of these rights in state courts will provide a basis for mandating greater government action in the years ahead. State courts might also require a more vigorous climate change response by corporate entities, which could have implications more broadly across the national marketplace. If more states were to adopt New York's recent example[217] and adopt environmental rights constitutional amendments (a process that is much easier at the state level than the national one), this trend might be a further signal of changing values of the American people—therefore justifying the recognition of positive environmental rights by federal judges.

State experiences with rights to public education provide a theoretical, if incomplete, model of how an expansion of environmental rights might unfold driven by state leadership. In 1973, the Supreme Court held that education was not a fundamental right—and rejected claims brought regarding unequal funding of schools in Texas.[218] But because many state constitutions provide a right to public education, state-court litigants have been successful in vindicating these rights—either by themselves or by linking the right to education with state-level equal protection analogs.[219] As Professor Rob Klee has noted, it's possible that this strategy could prove viable with environmental rights, as well.[220]

Success at the state level could be critical to nudging federal courts to take similar action. Robinson Woodward-Burns observes that state constitutional change is "a steady, constant, quiet background process in American politics, the heretofore unnoticed channel for most American constitutional development."[221] He argues that "[n]ational outcomes attributed to the federal courts may instead be caused by state constitutional reform," pointing out that prior to the Supreme Court's decision in *Harper v. Virginia Board of Elections*, all but four states had already abolished poll taxes through constitutional amendments.[222] Indeed, in the long tradition of ideas getting tested out in the laboratory of the states, it might well be that the state-level experience will demonstrate that environmental rights can be

216. Yeargain, *supra* note 6. *But see* John C. Dernbach, *Thinking Anew About the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions*, 30 WIDENER COMMONWEALTH L. REV. 147 (2021).

217. *See* N.Y. CONST. art. 1, § 19.

218. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37, 54–55 (1973).

219. Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENV'T L. 135, 142–43 (2005).

220. *See id.* at 160–86.

221. ROBINSON WOODWARD-BURNS, HIDDEN LAWS: HOW STATE CONSTITUTIONS STABILIZE AMERICAN POLITICS 6 (2021).

222. *Id.* at 8–9.

judicially managed—thus stripping away one of the core concerns federal judges have advanced for declining to take up cases where positive environmental rights are being asserted.

D. ESTABLISHING NEGATIVE ENVIRONMENTAL RIGHTS: END UNCOMPENSATED POLLUTION SPILLOVERS

Rather than seeking to establish a broad-based right to a healthy or habitable environment, it might be easier within the U.S. constitutional framework to secure *negative* environmental rights—specifically a right not to be harmed by pollution. Requiring an end to pollution spillovers or full compensation for all harms from residual emissions (mandating, as economists would say, an end to *uninternalized environmental externalities*) would simply align America's environmental law and policy framework with long-standing principles of the common law. Indeed, the right not to be harmed by pollution goes back at least four centuries in the Anglo-American legal tradition to the 1610 decision in *Aldred's Case*, which established an English plaintiff's cause of action against the stench from his neighbor's pigs.[223] And the government's obligation to protect shared natural resources has an even longer history insofar as the origins of the public trust doctrine[224] can be traced not only to old English law but also ultimately to Roman law before that.[225]

1. Securing a Right to Be Free from Harmful Pollution

Establishing a *right to be free from harmful pollution*—to each of us as individuals and to the resources on which we depend for life—might be seen by American judges as more consistent with the negative rights tradition of the U.S. Constitution. This kind of negative right would be consistent with the widely accepted principle that people have affirmative duties not to harm others—a concept key to modern tort and property law. A duty not to harm others has been justified and explained by many scholars, including John Stuart Mill in *On Liberty*—in which he outlined the argument for a "harm principle"—and more recently by William David Ross.[226]

Not only is such a conceptualization consistent with legal developments in the Anglo-American legal traditions, but the narrow frame of a right to be

223. Aldred's Case (1610) 77 Eng. Rep. 816 (K.B.).

224. *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475–77 (1970); *see also* Gerald Torres, *Who Owns the Sky?*, 19 PACE ENV'T L. REV. 515, 518–30 (2001).

225. *See* HELEN ALTHAUS, PUBLIC TRUST RIGHTS 1–23 (1978) (explaining the origins going back to the sixth century *Corpus Juris Civilis* and even earlier views of natural law rights).

226. Elliott & Esty, *supra* note 9, at 527 (citations omitted).

protected from damaging pollution impacts might also be seen as more judicially manageable and thus less of a worry with regard to the separation of powers and political question doctrines. As I have explained in some detail elsewhere,[227] establishing such a right would not necessarily translate into no pollution. But an environmental rights framework that forbids *uninternalized environmental externalities* might require emissions reductions to the extent feasible—and full compensation to be paid for any residual harms.

A degree of scientific knowledge and expert analysis would still be required to determine which pollutants cause damage and at what scale—and thus what the *harm charge* for unabated pollution should be. While such calculations might require a redeployment of resources within the U.S. Environmental Protection Agency, the enormous base of epidemiological and ecological information that has been developed in recent decades along with advances in valuation methodologies makes the task manageable—especially if one excludes from the calculus *de minimis* levels of pollution that produce no real harm.[228]

2. Horizontal Effect but Narrow Framing Consistent with Emerging American Norms

While a right to be free from harmful pollution would have a horizontal effect—establishing duties for private parties as well as the government—it would do so in the most constitutionally protected domain: the right of individuals to the sanctity of their person, their home, and the necessities of life.[229] Framed as a right against harmful pollution intrusions, these negative environmental rights would be seen as offering a bright line that keeps courts clear of the polycentric problem of trying to engage in setting policy goals, allocating costs, or making tradeoffs.

Even more usefully, the idea that pollution spillovers should not be countenanced has already gained widespread support—and would be seen as consistent with emerging public expectations and business ethics. Evidence of this new reality can be seen, for instance, in the widespread adoption of net-zero GHG emissions targets. Not only have governments around the world—including the U.S. government—committed to net-zero emissions by 2050, but this target and timetable has cascaded to the business community where thousands of companies have made net-zero GHG

227. *Id.* at 511–12.

228. One might also exclude cases where individuals have given their informed consent. *See id.* at 508 (discussing exceptions to the *end externalities* principle and the compensation that should be provided).

229. Amar, *supra* note 145, at 1772–73.

pledges.[230]

Growing public expectations of corporate *transparency* and reporting on sustainability performance more broadly has helped to reinforce the sustainability imperative framework. These new expectations around emissions disclosure reinforce corporate commitments to reduce pollution and end environmental externalities. Emissions disclosure, in turn, also provides the data needed to identify pollution spillovers that might be subject to legal action by a right to be free from harmful pollution.[231] The finance world has added momentum to this trend with a growing number of investment advisors demanding expanded ESG (environmental, social, and governance) disclosures from the companies in their portfolios. Likewise, a sweeping array of Wall Street leaders and finance experts from around the world have declared their support for net-zero GHG emissions as a corporate target across all industries and for commitments to internalize externalities more generally.[232]

In a similar vein, the Business Roundtable, a collection of 200 CEOs of America's largest companies, has announced its support for full GHG pricing, which, if implemented, would effectively bring an end to uninternalized externalities in the climate change context.[233] The Roundtable has also declared an end to the era of shareholder primacy (sometimes framed as the Friedman doctrine, which suggested that corporate leaders should seek to maximize the profits of their enterprises in any manner they could within the bounds of the law). Instead, these CEOs of the Business Roundtable have committed their companies to a mission of stakeholder responsibility in which companies have obligations beyond their owners to their customers, suppliers, employees, the communities in which they operate, and society as a whole (which would almost certainly include a duty

230. *See, e.g.*, Albert C. Lin, *Making Net Zero Matter*, 79 WASH. & LEE L. REV. 679, 681 (2022); *see also* Daniel C. Esty & Nathan de Arriba-Sellier, *Zeroing in on Net-Zero: Matching Hard Law to Soft Law Commitments*, 94 U. COLO. L. REV. (forthcoming 2023).

231. *See* DANIEL C. ESTY & TODD CORT, VALUES AT WORK: SUSTAINABLE INVESTING AND ESG REPORTING 13–34 (2020); *see also* Daniel C. Esty & Quentin Karpilow, *Harnessing Investor Interest in Sustainability: The Next Frontier in Environmental Information Regulation*, 37 YALE J. REG. 625, 631–36 (2019).

232. MARK CARNEY, VALUE(S): BUILDING A BETTER WORLD FOR ALL 280–83 (2021); Andrew Ross Sorkin & Michael J. de la Merced, *It's Not 'Woke' for Businesses to Think Beyond Profit, BlackRock Chief Says*, N.Y. TIMES (Jan. 17, 2022), https://www.nytimes.com/2022/01/17/business/dealbook/larry-fink-blackrock-letter.html [https://perma.cc/J79Z-F7BY] (highlighting the leadership of former Bank of England Governor Mark Carney and BlackRock CEO Larry Fink).

233. *A Call to Action from the Global Business Community: Global Businesses Support Climate Action that Enhances Competitiveness*, BUS. ROUNDTABLE (Oct. 28, 2021), https://www.businessroundtable.org/a-call-to-action-from-the-global-business-community-global-businesses-support-climate-action-that-enhances-competitiveness [https://perma.cc/4548-QR2H].

not to inflict environmental harms on people or the planet).[234] Simply put, private gain at public expense is increasingly seen as an inappropriate and unacceptable business model. Again, the emergence of what might be seen as a transformed base of business ethics makes a right to be free of uninternalized environmental externalities more of an incremental step than it might otherwise appear to be.

The momentum for net-zero GHG emissions and the broader movement away from a world where corporate pollution was seen as unavoidable has given way to a new reality where any company whose profitability depends on externalizing environmental costs faces ever greater scrutiny. Viewed cumulatively, these trends make clear the breadth of support for the new norm against uninternalized environmental externalities—making it ever easier for courts to adopt as a legal obligation what is already a pervasive business practice.

To draw the obvious conclusion: a right not to be polluted is not the same as having a right to a healthy environment. But the implication of a prohibition on harmful pollution spillovers is that individuals have environmental rights—albeit more narrowly defined. This backdoor into securing environmental rights in the United States might not be the full victory that some environmental advocates would have hoped for, but it is the most expedient path forward given America's legal traditions and political realities.

CONCLUSION

Fifty years ago, Christopher Stone launched a debate about environmental rights—and opened a conversation that has not yet come to an end, at least in the United States. This Article does not purport to bring the discussion to a close, but it offers a direction that might be taken up to ensure that U.S. courts are positioned to play an appropriate judicial role in addressing the threat of climate change and putting America on a trajectory toward a sustainable future.

I believe that there is ample basis for concluding that environmental rights should be understood as an element of natural law—meaning, as Dinah Shelton proposes,[235] that a narrowly crafted right to a safe and healthy environment should be recognized as an element of human rights and

234. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans*,*'* BUS. ROUNDTABLE (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans [https://perma.cc/YJ45-KLJY].

235. Shelton, *supra* note 3, at 103–06.

respected in all nations at all times. But to advance this agenda in the United States, the most promising path forward appears to me to be a focus in the federal context on securing negative environmental rights—defined concretely as a right not to be harmed by pollution. In advancing a right centered on enforcing an end to uninternalized environmental externalities, U.S. judges would be able to respond to climate change litigation and other sustainability-related cases in a thoughtful, serious, and tightly focused manner that steers clear of concerns about the separation of powers, the political question doctrine, and appropriate modes of effective judicial relief. Simply put, a narrowly constructed right to be free from harmful emissions would give pollution victims in America standing, which might just be enough to save the planet.

APPENDIX: ENVIRONMENTAL RIGHTS PROVISIONS BY COUNTRY

	National Constitution	*International Treaty*		*National Constitution*	*International Treaty*
Afghanistan	N	N	Liechtenstein	N	N
Albania	N	Y	Lithuania	Yi	Y
Algeria	Y	Y	Luxembourg	N	Y
Andorra	N	N	Madagascar	N	Y
Angola	Y	Y	Malawi	Y	Y
Antigua and Barbuda	N	N	Malaysia	Yi	N
Argentina	Y	Y	Maldives	Y	N
Armenia	N	Y	Mali	Y	Y
Australia	N	N	Malta	N	Y
Austria	N	Y	Marshall Islands	N	N
Azerbaijan	Y	Y	Mauritania	Y	Y
Bahamas	N	N	Mauritius	N	Y
Bahrain	N	Y	Mexico	Y	Y
Bangladesh	Yi	N	Micronesia (Federated States of)	N	N
Barbados	N	N	Monaco	N	N
Belarus	Y	Y	Mongolia	Y	N
Belgium	Y	Y	Montenegro	Y	Y
Belize	N	N	Morocco	Y	N
Benin	Y	Y	Mozambique	Y	Y
Bhutan	N	N	Myanmar	N	N
Bolivia (Plurinational State of)	Y	Y	Namibia	Yi	Y
Bosnia and Herzegovina	N	Y	Nauru	N	N
Botswana	N	Y	Nepal	Y	N

Brazil	Y	Y	Netherlands	N	Y
Brunei Darussalam	N	N	New Zealand	N	N
Bulgaria	Y	Y	Nicaragua	Y	Y
Burkina Faso	Y	Y	Niger	Y	Y
Burundi	Y	Y	Nigeria	Yi	Y
Cambodia	N	N	North Macedonia	Y	Y
Cabo Verde	Y	Y	Norway	Y	Y
Cameroon	Y	Y	Oman	N	N
Canada	N	N	Pakistan	Yi	N
Central African Republic	Y	Y	Palau	N	N
Chad	Y	Y	Panama	Yi	Y
Chile	Y	N	Papua New Guinea	N	N
China	N	N	Paraguay	Y	Y
Colombia	Y	Y	Peru	Y	Y
Comoros	Y	Y	Philippines	Y	N
Congo	Y	Y	Poland	N	Y
Costa Rica	Y	Y	Portugal	Y	Y
Cote d'Ivoire	Y	Y	Qatar	N	Y
Croatia	Y	Y	Republic of Korea	Y	N
Cuba	Y	N	Republic of Moldova	Y	Y
Cyprus	Yi	Y	Romania	Y	Y
Czechia	Y	Y	Russian Federation	Y	N
Democratic People's Republic of Korea	N	N	Rwanda	Y	Y
Democratic Republic of the Congo	Y	Y	Saint Kitts and Nevis	N	Y
Denmark	N	Y	Saint Lucia	N	N

Djibouti	N	Y	Saint Vincent and the Grenadines	N	Y
Dominica	N	N	Samoa	N	N
Dominican Republic	Y	N	San Marino	N	N
Ecuador	Y	Y	Sao Tome and Principe	Y	Y
Egypt	Y	Y	Saudi Arabia	N	Y
El Salvador	Yi	Y	Senegal	Y	Y
Equatorial Guinea	N	Y	Serbia	Y	Y
Eritrea	N	Y	Seychelles	Y	Y
Estonia	Yi	Y	Sierra Leone	N	Y
Eswatini	N	Y	Singapore	N	N
Ethiopia	Y	Y	Slovakia	Y	Y
Fiji	Y	N	Slovenia	Y	Y
Finland	Y	Y	Solomon Islands	N	N
France	Y	Y	Somalia	Y	Y
Gabon	Y	Y	South Africa	Y	Y
Gambia	N	Y	South Sudan	Y	N
Georgia	Y	Y	Spain	Y	Y
Germany	Yi	Y	Sri Lanka	Yi	N
Ghana	Yi	Y	Sudan	Y	Y
Greece	Y	Y	Suriname	N	Y
Grenada	N	N	Sweden	N	Y
Guatemala	Yi	Y	Switzerland	N	Y
Guinea	Y	Y	Syrian Arab Republic	N	Y
Guinea-Bissau	N	Y	Tajikistan	N	Y
Guyana	Y	Y	Thailand	Y	N
Haiti	N	N	Timor-Leste	Y	N
Honduras	Y	Y	Togo	Y	Y

Hungary	Y	Y	Tonga	N	N
Iceland	N	Y	Trinidad and Tobago	N	N
India	Yi	N	Tunisia	Y	Y
Indonesia	Y	N	Turkey	Y	N
Iran	Y	N	Turkmenistan	Y	Y
Iraq	Y	Y	Tuvalu	N	N
Ireland	Yi	Y	Uganda	Y	Y
Israel	N	N	Ukraine	Y	Y
Italy	Yi	Y	United Arab Emirates	N	Y
Jamaica	Y	N	United Kingdom of Great Britain and Northern Ireland	N	N
Japan	N	N	United Republic of Tanzania	Yi	Y
Jordan	N	Y	United States of America	N	N
Kazakhstan	N	Y	Uruguay	N	Y
Kenya	Y	Y	Uzbekistan	N	N
Kiribati	N	N	Vanuatu	N	N
Kuwait	N	Y	Venezuela (Bolivarian Republic of)	Y	N
Kyrgyzstan	Y	Y	Vietnam	Y	N
Lao People's Democratic Republic	N	N	Yemen	N	Y
Latvia	Y	Y	Zambia	N	Y
Lebanon	N	Y	Zimbabwe	Y	Y
Lesotho	N	Y	**TOTAL**	**110**	**126**
Liberia	Yi	Y			
Libya	N	Y			

* Yi indicates implicit constitutional language. Adapted from Boyd et al., *supra* note 43, at 50–55.