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Authors

May, James R.
Daly, Erin

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Can the U.S. Constitution Encompass a Right to a Stable Climate? (Yes, it Can.)

James R. May & Erin Daly

ABSTRACT

Can the U.S. Constitution encompass a right to a stable climate? Courts around the world are finding that their constitutions afford a right to a clean and healthy environment, including to a safe climate. In the United States, this claim is being tested in the case of *Juliana v. U.S.*, brought by 21 children arguing that governmental actions and inaction have caused or contributed to an “environmental apocalypse” in violation of a fundamental constitutional right to a stable climate. In concluding that the Constitution can encompass a right to a stable climate, we make three principal arguments. First, the Constitution is relevant to the protection of people’s lives and liberties—a position that should be beyond cavil after more than 230 years of our constitutional experiment. Second, the Constitution’s protection is not abrogated simply because the threat to life and liberty comes from decades of governmental action contributing to climate change. The Constitution does not have a climate change, or even an environmental, exception. And third, the federal judiciary is the body that, in our constitutional system, is best suited to hold accountable government actors when they imperil constitutional rights. Five years after it was filed, the case was dismissed by the Ninth Circuit; as of this writing, plaintiffs are considering seeking review before the U.S. Supreme Court, and settlement with the Biden Administration.

ABOUT THE AUTHORS

Professors of Law, Widener University Delaware Law School. This Article is based in part on three *amicus* briefs that May and Daly filed in *Re Juliana v. U.S.* on behalf of Law Professors. The authors thank Professor Kang for her collaboration on the second brief and comments to this Article, and Professor Michael Pappas for hosting a workshop to discuss an early draft.

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INTRODUCTION

“Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.”

—*Juliana v. U.S.* (D. Or. 2016) (Aiken, J.)

“My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary. . . . [A] federal court need not manage all the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.”

—*Juliana v. U.S.* (9th Cir. 2020) (Staton, J., dissenting)

The climate crisis engenders visions of the Four Horsemen of the Apocalypse entering stage right, making the case for action—and causes of action—in the face of catastrophe. Climate change is raising global temperatures, heating oceans, melting glaciers and ice caps, and wreaking havoc on weather patterns.¹ Suffice it to say that an unstable climate disrupts most aspects of day-to-day life, including family, food, water, employment, education, and shelter, and the pursuit of equality, dignity, justice, peace and happiness. Climate change also increases human vulnerability to poverty and disease, which in turn creates opportunities for political oppression and myriad other forms of human rights abuses—all of which disproportionately threaten the lives and

1. See, e.g., NAT’L AERONAUTICS AND SPACE ADMIN., *The Effects of Climate Change* (last visited December 16, 2020), <https://climate.nasa.gov/effects> [<https://perma.cc/KBT2-DHYF>].

health and dignity of future generations. Climate change may well turn entire populations into refugees, raising human rights challenges at national and international levels.

What to do. Unfortunately, international action hasn't made much of a dent in global carbon output, and well-intentioned international efforts from the Paris Climate Accord² to Sustainable Development Goal 13 (climate action)³ have lent little if any relief to those most affected. Thus, courts are increasingly being pressed to consider rights-based climate-based claims, including in Norway,⁴ the Netherlands,⁵ Pakistan,⁶ Colombia,⁷ France,⁸ and elsewhere.⁹ Moreover, the Philippine Human Rights Commission is considering

2. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

3. See U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, *Sustainable Development Goals*, <https://sustainabledevelopment.un.org/?menu=1300> [<https://perma.cc/Q5BX-SYZB>]; see G.A. Res. A/70/L.1, Transforming Our World: the 2030 Agenda for Sustainable Development (Oct. 21, 2015).

4. *Nature and Youth and Greenpeace Nordic v. Norway*, no. 16-166674TVI-OTIR/06, judgment, (Oslo D.C. Jan. 4, 2018) (alleging that opening parts of the Arctic Barents Sea to new oil and gas exploration violates a constitutional right to a healthy environment). On December 22, 2020, the Supreme Court announced its 11-4 decision to dismiss the case, reasoning that the adverse effects of emissions from exported oil from the region are too unknown to violate the Constitution of Norway. *People vs. Arctic Oil—The Judgment*, GREENPEACE (Dec. 22, 2020), <https://www.greenpeace.org/norway/people-vs-arctic-oil-the-judgement>; see also CLIMATE CASE CHART, *Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy*, <http://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy> [<https://perma.cc/WL84-D5VP>] (last visited Feb. 12, 2021). See generally James R. May, *The Norwegian Constitutional Right to a Healthy Environment in Global Context*, MELLOM JUS OG POLITIKK, GRUNNLOVEN, § 112 (Fagbokforlaget 2019).

5. *Urgenda Found. v. Kingdom of the Netherlands*, C/09/456689/HA ZA 13-1396 (June 24, 2015) (ordering the federal government to reduce greenhouse gas emissions and to mitigate the effects of climate change as a means of fulfilling constitutionally recognized rights to health and welfare; subsequently confirmed but on different grounds by the Supreme Court of the Netherlands; see <http://climatecasechart.com/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands> [<https://perma.cc/2PKA-7P6E>]).

6. *Ashgar Leghari v. Fed'n of Pakistan*, (2015) W.P. No. 25501/201 (holding that the government's failure to develop a climate change plan violates the constitutional right to life and right to dignity). The Court subsequently established a permanent climate commission, see *Ashgar Leghari v. Fed'n of Pakistan*, PLD 2018 Lahore 364.

7. STC 4360-2018 *Radicacion no. 11001-22-03-000-2018-00319-01STC4360-2018* (Supreme Court of Colombia, April 4, 2018) (ruling in favor of children in granting justiciable rights to the Colombian Amazon).

8. *Notre Affaire à Tous and Others v. France*, (Filed December 17, 2018), <http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france> [<https://perma.cc/V7VT-J7D8>].

9. See generally Our Children's Trust, *Global Legal Actions*, <https://www.ourchildrenstrust.org/global-legal-actions> [<https://perma.cc/N8GP-M7ZK>] (last visited Dec. 16, 2020).

whether “carbon majors” have violated domestic human rights law,¹⁰ and the Committee On The Rights Of The Child whether “[t]he climate crisis is a children’s rights crisis . . . [so that] [m]itigating climate change is a human rights imperative.”¹¹ And in an asylum case, the United Nations Human Rights Committee determined that climate change *could* “become incompatible with the right to life with dignity before the risk is realized.”¹² These rights-based cases are only illustrative of similar cases in domestic and supra-national tribunals worldwide.¹³

Thus, it’s fair to say that rights-based approaches to addressing the climate crisis are finding footholds in courts around the globe. But not so much in the United States, owing to a conservative tradition of judicial deference if not diffidence on environmental issues.¹⁴ And recent appointments to the U.S. Supreme Court hardly suggest a warmer welcome of climate-based rights claims.¹⁵ Yet one case in particular continues to push precedent: *Juliana v. U.S.*, in which children are arguing that the U.S. government’s actions and inactions have caused or contributed to the climate crisis in violation of a fundamental constitutional right to a stable climate.¹⁶

The *Juliana* plaintiffs asked a federal court to do three things. First, to recognize that constitutional liberty includes a right to climate capable of sustaining human life. Second, to declare that the federal government has violated this right by decades of administrative policies and programs including

10. See PHIL. HUMAN RIGHTS COMM’N, *National Inquiry on Climate Change*, <http://chr.gov.ph/nicc-2> [<https://perma.cc/6Y39-K2B2>] (last visited Dec. 16, 2020).

11. Sacchi et al. v. Argentina et al., Communication to the Committee on the Rights of the Child, (Submitted September 23, 2019), at ¶ 13.

12. Ioane Teitiota v. New Zealand, CCPR/C/127/D/2728/2016, U.N. Human Rights Committee (H.R.C.) (Jan. 7, 2020), <https://www.refworld.org/cases,HRC,5e26f7134.html> [<https://perma.cc/M649-2AGZ>].

13. See generally, GLOB. INITIATIVE FOR ECON., SOC. AND CULTURAL RIGHTS, ‘States’ *Human Rights Obligations in the Context of Climate Change—2020 Update*, <https://www.gi-escr.org/publications/states-human-rights-obligations-in-the-context-of-climate-change-2020-update> [<https://perma.cc/N2QQ-BRE4>] (last visited 30 November 2020). See also James R. May & Erin Daly, *Global Climate Constitutionalism in Courts*, CLIMATE CONSTITUTIONALISM (Jordi Jaria i Manzano et al. eds. (Edward Elgar Pub. 2019)).

14. In this Article, we focus on the United States because it is unusual in two relevant regards. First, the political branches have not been as responsive to the needs of climate as either the situation requires or as the population would want. Second, the United States Constitution is and has been interpreted by federal courts to be particularly restrictive in allowing the political branches to act. These two facts—combined with America’s seemingly insatiable appetite for fossil fuels—have made the country an outlier in its failure to address the threats of climate change.

15. Ellen M. Gilmer, *Barrett as Justice Gives Climate Cases Tougher Path to Court*, BLOOMBERG LAW, <https://news.bloomberglaw.com/environment-and-energy/bar-for-environmental-cases-seen-higher-with-a-justice-barrett> [<https://perma.cc/F9YN-YGFQ>] (September 28, 2020).

16. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233 (D. Or. 2016), *rev’d*, 947 F.3d 1159 (9th Cir. 2020).

subsidies, taxes, and other favorable economic advantages that have promoted the use of fossil fuels. And third, to require the government to cease violating the plaintiffs' rights by developing and implementing a plan to reduce climate threats. This may sound complex but, as pleaded, it was in fact an ordinary case: plaintiffs ask the court to define the contours of a constitutional right, to find a violation, and then to issue a remedy to redress the violation. This is what courts do. In response, the U.S. government argues no such right exists, and even if it does that federal courts can't do anything about it.

We contend that the U.S. Constitution can encompass such a right. Three caveats should be recognized from the outset. First, the point here *is not* that the Constitution *necessarily* protects people from climate change, but that courts should be open to deciding whether it does. Second, and relatedly, we *do not* argue that bringing such constitutional claims in federal court is the best or only way to address climate change. Of course, legislative action at the international, regional, national and subnational levels is preferable, with enforceable emission limits and/or workable market-based mechanisms, with mitigation and relief available to the most vulnerable first. Last, we *do not* here address related issues, such as the role of the Equal Protection Clause,¹⁷ preemption,¹⁸ civil litigation,¹⁹ the Clean Air Act,²⁰ or the standing doctrine²¹ (except to the extent it involves the political question doctrine,²² which we do

17. See, e.g., Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 Ecology L. Q. 731 (2019) (in context of intergenerational equity); Terry Ann Campbell, *Environmental Constitutionalism: Marrying the Due Process Clause and the Equal Protection Clause with Climate Change* (September 20, 2019), <https://ssrn.com/abstract=3457043> [<https://perma.cc/A7ML-SHFT>].

18. See, e.g., James R. May, *Of Happy Incidents, Climate, Federalism, and Preemption*, 17 TEMP. POL. & CIV. RTS. L. REV. 465 (2008).

19. James R. May, *Civil Litigation as a Tool for Regulating Climate Change: An Introduction*, 46 VAL. U. L. REV. 357 (2012).

20. See, e.g., SABIN CTR. FOR CLIMATE CHANGE L., CLEAN AIR ACT AND CLIMATE POLICY, <https://climate.law.columbia.edu/content/clean-air-act> [<https://perma.cc/BA4W-5RTU>] (last visited Dec 16, 2020); Erin McKenzie, *Our Impact: Recognizing the Clean Air Act's Potential to Address Climate Change*, Nicholas Inst. for Env't Pol. Solutions, <https://nicholasinstitute.duke.edu/our-impact/recognizing-clean-air-act-potential-to-address-climate-change> [<https://perma.cc/9WPW-G9LB>] (last visited Dec. 16, 2020).

21. See, e.g., Marisa Martin & James Landman, *Standing: Who Can Sue to Protect the Environment?*, AM. BAR ASS'N https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol-19-issue-1/standing-who-can-sue-to-protect-the-environment [<https://perma.cc/ZGD4-EUWS>] (Oct. 9 2020) (recapitulating standing issues in climate litigation, including *Juliana*); Bradford Mank, *Article III Standing for Private Plaintiffs Challenging Greenhouse Gas Regulations*, 53 SAN DIEGO L. REV. 287 (2016) (skeptical take on establishing standing in climate cases in general).

22. See, e.g., James R. May, *Climate Change and the Future of the Political Question Doctrine*, 121 YALE L.J. ONLINE 127 (2011); James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine, Symposium: Global Climate Change: Integrating Environmental Justice into Policy, Regulation, and Litigation*, 85 DENV. U. L. REV. 919 (2008).

address), in the climate context. The argument here is simply that once a court has found that a constitutional claim has been properly put forth, the judicial department should hear it.

The Constitution is relevant to the protection of people's lives and liberties—a position that should be beyond cavil after more than 230 years of our constitutional experiment. And the federal judiciary is the body that, in our constitutional system, is best suited to hold accountable government actors when they imperil the constitutional rights of the people. Moreover, the Constitution does not have a climate change, or even an environmental, exception, any more than it has a Covid-19 exception.²³ Hence, we inquire as to whether the United States Constitution can encompass a right to a stable climate. We believe it can (and should) for three reasons addressed in the Parts that follow. First, federal courts should not shirk their constitutional obligations when presented with novel or controversial claims. Second, a right to a stable climate can be a constitutionally cognizable cause of action under the Due Process Clause because such a right is arguably both deeply rooted in American legal history and essential to ordered liberty. Third, climate claims are justiciable because the political question doctrine does not apply to individual constitutional rights, and even if it does, well-established judicially discoverable and manageable constitutional standards exist to evaluate such claims. As a case in point, we turn to *Juliana v. U.S.* in concluding that the U.S. Constitution can encompass a claim based on a right to a healthy climate and that the federal judiciary should be available to hear it.

I. FEDERAL COURTS HAVE THE AUTHORITY TO CONSIDER CONSTITUTIONAL CLAIMS INVOLVING THE CLIMATE

A claim based on a due process right to a stable climate is within judicial cognizance. To determine the constitutional merits of such claims through trial is the core function of the federal judiciary. Federal courts should be permitted to perform their constitutional functions to manage a case “preservative of [other] rights,”²⁴ including developing a record, issuing rulings, and reaching a decision, as they would in any other constitutional case. The Supreme Court has held that “where the complaint . . . is so drawn as to seek recovery directly under the Constitution . . . the federal court . . . *must* entertain the suit . . .” and that “the court *must* assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief, as well as to determine issues of fact arising in the controversy.”²⁵ This follows from the mandatory language of Article III, which establishes that the federal judicial power *shall* extend to all cases or controversies arising under the federal Constitution

23. *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87 (U.S. 2020).

24. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

25. *Bell v. Hood*, 327 U.S. 678, 681–82 (1946) (emphasis added).

(among other things).²⁶ Moreover, a judicial audience is especially necessary where the plaintiffs *have no alternative for redress* for reasons both factual (the government has proven unwilling to curb its appetite for fossil fuels) and legal (plaintiffs are denied the right to vote due to their age).²⁷

There is little question that federal courts can handle the constitutional claims presented to it under the Due Process clauses. For more than 230 years, they have been deciding constitutional claims. Some of these claims were novel²⁸; some asked the courts to extend the understanding of an established constitutional principle²⁹; some asked the courts to apply constitutional rights to new situations³⁰ or to recognize for the values which, though not express, have always undergirded our constitutional system³¹; and some asked the courts to harmonize U.S. law with the law in other democratic countries.³² Courts have resolved even the most contentious and profound questions, including the constitutionality of slavery³³ and the constitutionality of discrimination and affirmative action in a series of cases spanning more than 50 years.³⁴ In all of these cases, regardless of the novelty of the claims, the complexity of the issues, the importance of the case, or the social or political implications of the judicial determination, lower courts were able to make an independent judgment of the claims, and any errors were engaged by federal courts of appeal and/or the Supreme Court. Regardless of the final outcome, litigants had their day in court.

That a right to a stable climate is novel or controversial makes it all the more amenable to judicial resolution. The Constitution protects what is of fundamental importance and what cannot be relegated to protection in the political branches alone. A stable climate system satisfies both of these and does so, arguably more than anything else in history. Protection against the degradation of the environment is precisely the kind of problem that the political branches are *least* likely to be able to protect: it requires long-term thinking

26. U.S. CONST. art. III, § 2.

27. See U.S. CONST. amend. XXVI.

28. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 322 (1819) (whether Congress had the power to charter a bank).

29. See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952) (whether entry into a home and pumping stomach violated liberty interest); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (whether a prohibition on the distribution and use of contraceptives violated liberty interest).

30. E.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996) (whether state sovereignty limited federal power); *Moore v. City of East Cleveland*, 431 U.S. 494, 499–500 (1977) (whether liberty protections extended to non-nuclear family structures).

31. E.g., *Washington v. Glucksberg*, 521 U.S. 702, 734–35 (1997), *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding the death penalty unconstitutional for youths).

32. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 542 (1842).

33. E.g., *Cooper v. Aaron*, 358 U.S. 1 (1958); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

34. E.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

for the benefit of those who have no political voice, including children and future generations.

Resistance to judicial engagement rests on two fundamental errors. First, it makes the profoundly misplaced argument that it is clearly erroneous for federal courts to consider tough cases involving the government. Second, it ignores the core federal judicial function of holding a trial to determine the meaning of a constitutionally protected fundamental right. Simply, disappointed parties have at their disposal the same rights, defenses and ability for appeal as they would in other constitutional cases.

Separation of powers considerations should not be a bar to judicial engagement of cases alleging a constitutional right to a stable climate just because these are cases of first impression. Every case involves a controversy, and many of them tough. That is what makes it a “case or controversy.” Every federal case involving the federal government implicates separation of powers. That is why powers are separated. Federal courts should be permitted to perform their constitutional functions under our tripartite system to adjudicate cases raising constitutional rights, develop a record, issue rulings, and reach a decision, even in cases that raise factual issues the framers might not even have dimly foreseen:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.³⁵

Nor is it a jurisdictional bar when a claim concerns important questions that are essential to our system of ordered liberty—that is, to the various crises of human affairs. Rather, to determine the constitutional merits of such claims is the core function of the federal judiciary. Through the ages, federal courts have been the locus for resolving even the most contentious and profound questions: slavery in *Pennsylvania v. Prigg*,³⁶ presidential authority in *Youngstown Sheet & Tube Co. v. Sawyer*,³⁷ segregation in *Cooper v. Aaron*,³⁸ affirmative action in *Grutter v. Bollinger*,³⁹ immigration in *Department of Homeland Security v. Regents of California*,⁴⁰ health care in *Sebelius v. NFIB*,⁴¹ and elections in *Bush v. Gore*.⁴² In the due process context in particu-

35. *Obergefell v. Hodges*, 135 S. Ct. 2598 (2015).

36. 41 U.S. 539 (1842).

37. 343 U.S. 579 (1952).

38. 358 U.S. 1 (1958).

39. 539 U.S. 306 (2003).

40. 140 S. Ct. 1891 (2020).

41. 567 U.S. 519 (2012).

42. 531 U.S. 98 (2000).

lar federal courts have not demurred from deciding cases that raise profound and complex questions of policy: nationalism in *Meyer v. Nebraska*,⁴³ reproductive rights in *Griswold v. Connecticut*,⁴⁴ the nature of family in *Moore v. City of East Cleveland*,⁴⁵ marriage equality in *Obergefell v. Hodges*,⁴⁶ and even the war on terror in *Boumediene v. Bush*.⁴⁷ Providing a forum to hear a constitutional claim does not mean that the plaintiffs prevail but only that they have their day in court. Whether a constitutional right partakes of global phenomena or implicates sensitive political matters is irrelevant to a federal court's authority to hear a well-pleaded claim.

The climate context of this case makes it all the more amenable to judicial resolution. Government action can and does impact the stability of the climate system and the ability of American citizens to own property along the shoreline for fishing and farming, to exercise all their other rights, and indeed to live full and free lives from a young age onward. Federal courts can apply well-entrenched constitutional principles to determine the limits of governmental power to infringe on these liberty interests.

Rather than violating separation of powers, the federal judicial department's assertion of jurisdiction over substantive due process claims implicates the core function of the federal courts in our system of separation of powers: to determine the meaning and scope of constitutionally protected fundamental rights. This is, essentially, the power to say what the law is, a power that has been allocated to the federal judicial department since *Marbury v. Madison* and repeated ever since Chief Justice John Marshall's determination that it is "emphatically the province and duty of the judicial department to say what the law is,"⁴⁸ such as in *Cooper v. Aaron*, in which the Court "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."⁴⁹

To place the question before the federal courts is not to remove it from the political sphere. As the *Obergefell* court reminded us in the context of marriage, "changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."⁵⁰ In our constitutional democracy, policies are shaped within the limits of the Constitution. The question

43. 262 U.S. 390 (1923).

44. 381 U.S. 479 (1965).

45. 431 U.S. 494 (1977).

46. 135 S. Ct. 2584 (2015).

47. 553 U.S. 723 (2008).

48. 5 U.S. 137 (1803).

49. *Cooper v. Aaron*, 358 U.S. 18 (1958) (citing *Marbury*, 5 U.S. at 177).

50. 135 S. Ct. at 2596 (2015).

before federal courts concerns not the wisdom of policies but their compliance with constitutional rights. That is fundamentally a judicial question, a “claim to liberty [that] must be addressed.”⁵¹

The Court has so held even in the most controversial domains of public life. In a case involving New York’s prohibition of religious gatherings to stem the spike of Covid-19 cases, the Court acknowledged that “[m]embers of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But “even in a pandemic,” the *per curiam* opinion said, “the Constitution cannot be put away and forgotten. The restrictions at issue here . . . strike at the very heart of the First Amendment’s guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious measure.”⁵² In that case, the Court struck down a state measure designed to promote public health; in this case, the judiciary is asked to review the constitutionality of measures that have imperiled public health and the health of the individual plaintiffs.

In a case involving the power of the executive to fight the so-called war on terror, the Supreme Court also rejected a similar claim of political branch authority “to govern without legal constraint.” In a brief but firm paragraph in *Boumediene v. Bush* the Court wrote: “Even when the United States acts outside its borders, its powers are not absolute and unlimited but are subject to such restrictions as are expressed in the Constitution . . . [t]o hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say what the law is.”⁵³ Indeed, it would be an unprecedented abdication of the role of the federal courts to cede its role of interpreting the law to a coordinate branch. Such an abdication of the role of the court to say what the law is would undermine the separation of powers on which the rule of law depends and breach the duty of the court to fulfill its constitutional role. It would allow the executive to hold itself immune from judicial scrutiny despite violating due process rights of its citizens—a result profoundly inconsistent with the constitutional design. Climate change does not justify departing from these principles.

II. THE DUE PROCESS CLAUSE CAN ENCOMPASS A RIGHT TO A STABLE CLIMATE

The Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution can encompass a right to a stable climate. As applied to federal action, it provides: “No person shall be . . . deprived of life, liberty or property, without due process of law,”⁵⁴ and as to state action, “nor

51. *Obergefell*, 135 S. Ct. at 2598.

52. *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87 (U.S. 2020).

53. 553 U.S. 723, 765 (2008) (internal quotations omitted).

54. U.S. CONST. amend. V.

shall any State deprive any person of life, liberty or property, without due process of law.”⁵⁵ How can this seemingly simple phrasing reach something as stark as the climate crisis?

Landmark decisions from almost every decade of the last one hundred years establish and reaffirm that, in addition to incorporating most of the enumerated rights, the liberty clauses of the Fifth and Fourteenth Amendments protects rights that the Constitution’s drafters did not enumerate. These include rights to direct the education and upbringing of one’s children,⁵⁶ as well as to procreation,⁵⁷ bodily integrity,⁵⁸ contraception,⁵⁹ abortion,⁶⁰ sexual intimacy,⁶¹ family,⁶² marriage,⁶³ and possession of weapons,⁶⁴ and against grossly excessive punitive damages.⁶⁵ Moreover, the Court’s liberty jurisprudence shows special concern for children.⁶⁶

The Supreme Court has always understood that history and traditions are relevant to how it interprets the Due Process Clause. For decades, it has recognized fundamental rights under the Due Process Clause as those that are (1) deeply rooted in American history and tradition or (2) essential to ordered liberty.⁶⁷ We posit that a right to a stable climate is arguably both deeply rooted in our nation’s history and tradition and implicit in the concept of ordered liberty.

A. *The Right to a Stable Climate is Deeply Rooted in the Nation’s History*

A stable climate is no less a liberty interest protected the Due Process Clauses than privacy,⁶⁸ family, child protection,⁶⁹ and other recognized fundamental rights. As the district court in *Juliana* correctly reasoned, a right to a stable climate is deeply rooted in the longstanding recognition that the

55. U.S. CONST. amend. XIV.

56. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

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

58. *Rochin v. California*, 342 U.S. 165, 172–73 (1952).

59. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965).

60. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

61. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

62. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

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

64. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

65. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

66. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944); *Troxel v. Granville*, 530 U.S. 57 (2000).

67. *Washington v. Glucksberg*, 521 U.S. 702 (1997); *McDonald, v. City of Chicago*, 561 U.S. at 742, 744 (2010); *see also Obergefell v. Hodges*, 576 U.S. 644, 663–64 135 S. Ct. 2584, 2598–99 (2015) (applying “reasoned judgment” to identify fundamental personal interests).

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

69. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

government holds resources in public trust both as a matter of common law and as a constitutional imperative.⁷⁰

Protection of environmental conditions is deeply rooted in Anglo-Saxon law and legal traditions. The public trust doctrine, for example, derives from a historical notion that the sovereign holds certain natural resources and objects of nature in trust for the benefit of current and future generations. In 533, Rome codified the right of public ownership of important natural resources: “The things which are naturally everybody’s are: air, flowing water, the sea, and the sea-shore.”⁷¹

Moreover, the *Magna Carta Libertatum*, where the due process clause finds its earliest roots, drew a direct link between the environment and individual liberties.⁷² It resulted in the Carta de Foresta (Forest Charter) in 1217. This guaranteed the “liberties of the forest and free customs traditionally had, both within and without the royal forests” and obliged all “to observe the liberties and customs granted in the Forest Charter.”⁷³

In addition, English common law continued the public trust tradition: “There are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common Such (among others) are the elements of light, air, and water”⁷⁴ The doctrine was since incorporated into common and statutory laws throughout the United States, amply “rooted in the precept that some resources are so central to the well-being of the community that they must be protected by distinctive, judge-made principles.”⁷⁵ The principle was then incorporated into American constitutional law, including in 1892 by the Supreme Court in *Illinois Central Railroad Company v Illinois*.⁷⁶ The government’s obligation to hold resources—including the atmosphere—in trust is deeply rooted.

These roots find footing in the due process clauses. The outer boundaries of the due process clauses—no more than any other aspect of the Constitution—are not frozen in time. As Justice Frankfurter explained, “[t]o believe that this judicial exercise of judgment could be avoided by freezing ‘due process of

70. *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev’d*, 947 F.3d 1159 (9th Cir. 2020).

71. CAESAR FLAVIUS JUSTINIAN, ROMAN CODE OF JUSTINIAN, J. INST. 2.1.1 (J.B. Moyle trans.).

72. See Nicholas A. Robinson, *The Most Fundamental Right*, THE ENV’T F. 46, 48 (2019) (“These environmental liberties are reserved to all people, forever. These rights exist apart from those enumerated rights in what became America’s Bill of Rights.”).

73. William Blackstone celebrated “these two sacred charters” in his Commentaries, upon which the courts at Westminster (and throughout England) relied heavily. WILLIAM BLACKSTONE, THE CHARTER OF THE FOREST 1765–69 (Clarendon Press at Oxford).

74. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 311 (1753).

75. Charles L. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 315 (1980).

76. 146 U.S. 387 (1892).

law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges."⁷⁷ Rather, for nearly 200 years, the Constitution has been understood to be adaptive: it was, Chief Justice John Marshall said:

[I]ntended to endure for ages to come, and consequently to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers would have been to change entirely the character of the instrument It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.⁷⁸

And, as the second Justice Harlan said, and as others have often repeated:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.⁷⁹

The Supreme Court has long treated the Due Process Clause as a living thing. For example, in elucidating "[t]he identification and protection of fundamental rights," *Obergefell* emphasized that courts must "exercise reasoned judgment in identifying interests of the person so fundamental that the State must *accord* them its respect."⁸⁰ In exercising such "reasoned judgment," courts should keep in mind that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries."⁸¹ This approach allows "future generations [to] protect . . . the right of all persons to enjoy liberty as we learn its meaning."⁸²

Indeed, the Court has shown a capacity to adapt the Constitution to contemporary conditions. It has coupled a willingness to protect modern day interests with the true meaning of the Constitution, even if the eighteenth-century framers could not have foreseen modern social, technological, or environmental conditions. For example, just as the Court can stretch the language of the First Amendment to address speech on the internet and the Fourth Amendment to address surveillance, the Due Process Clauses of the

77. *Rochin v. California*, 342 U.S. 165, 171–72 (1952).

78. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1824).

79. *Poe v. Ullman*, 367 U.S. 497 523–24 (1961) (Harlan, J., dissenting).

80. *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

81. *Id.*

82. *Id.* See generally, Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015).

Fifth and Fourteenth Amendments can encompass rights beyond the framers' imaginations, such as that to a stable climate.⁸³

By contrast, the U.S. government maintains that the unenumerated rights stemming from the Due Process Clause are limited to what rights were recognized at the time of the Court of Westminster.⁸⁴ This would freeze rights only to those afforded by the British Empire in the 17th Century—prior to women's suffrage, the Civil War, abolishment of slavery in the United Kingdom, the ratification of the Constitution, and even the American Revolution. Yet, there is no basis for freezing federal court jurisdiction to a time before the existence of federal courts, not to mention what was in the Court at Westminster. Simply, it is hard to see how the judicial power of the Courts at Westminster should hold any sway as a matter of *American constitutional* law, given that (1) those courts decided cases under *common* law, (2) England lacked (and still lacks) a constitutional document, and (3) its decisions were not final insofar as they could be overturned by the Parliament. The Westminster courts are an irrelevant baseline.

Moreover, the U.S. government misconstrues precedent,⁸⁵ including *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, for the proposition that “[t]he [judicial] power can ‘come into play only in matters that were the traditional concern of the courts at Westminster’ and only in ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’”⁸⁶ But the Government omits an edifying portion of the quoted passage that changes its meaning. The full passage is provided here, with the omitted section in italics:

[J]udicial power could ‘come into play only in matters that were the traditional concern of the courts at Westminster *and only if they arose in ways that to the expert feel of lawyers constituted ‘Cases’ or ‘Controversies.’*⁸⁷

83. See, e.g., *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (“We have kept this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools.”); *Kyllo v. United States*, 533 U. S. 27, 34 (2001) (finding that the use of a thermal imager to detect heat radiating from the side of the home was a search because any other conclusion would leave homeowners “at the mercy of advancing technology”); *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (applying the First Amendment to the internet); *Bucklew v. Precythe*, 139 S. Ct. 1112 (2018) (applying the Eighth Amendment to lethal injection).

84. See Respondent-Appellant’s Opening Brief, *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020) (No. 18-505), 2019 WL 439256, at *24 [hereinafter *Government’s Brief*] (“[judicial] power can come into play only in matters that were the traditional concern of the courts at Westminster.”); *id.* at 25 (“No federal court, nor the courts at Westminster, has ever purported to use the “judicial Power” to perform such a sweeping policy review”); *id.* at 26 (arguing that the equitable power of federal courts “must be within the traditional scope of equity as historically evolved in the English Court of Chancery.”).

85. *Id.* at 24–27.

86. *Id.* at 24 (citing *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000)).

87. *Stevens*, 529 U.S. at 774 (quoting *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting) (emphasis added)).

The omitted portion alters the quotation's purported meaning from one about concerns of *courts* to one about concerns of *litigants*. This removes the absolute bar to jurisdiction that those favoring this view would impose on the federal judiciary. Furthermore, the (mis)quoted passage was made by Justice Frankfurter *in dissent* from the majority's finding that plaintiff-state legislators had standing in *Coleman v. Miller*, a 1939 case that supports the well-established principle that federal courts *have a duty to resolve constitutional questions*.⁸⁸ Regardless, *Vermont Agency* does not involve a constitutional claim. Thus, reliance on this line of reasoning to significantly restrict the jurisdictional authority of the federal courts is unavailing.

B. *A Stable Climate is Essential to Ordered Liberty*

A stable climate is also essential to ordered liberty such that “neither liberty nor justice would exist if [it] were sacrificed.”⁸⁹ As the district court in *Juliana* correctly reasoned, “a stable climate system is quite literally the foundation ‘of society, without which there would be neither civilization nor progress.’”⁹⁰ Interests essential to ordered liberty are undoubtedly at stake in this case.

Ordered liberty means more than freedom from bodily restraint. As the Court wrote nearly 100 years ago:

While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.⁹¹

Furthermore, constitutional ‘liberty’ is not fixed in time but is instead a rational continuum requiring close examination of governmental justification of deprivation:

[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.⁹²

88. 307 U.S. at 460 (Frankfurter, J., dissenting).

89. *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937).

90. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020) (quoting *Obergefell*, 135 S. Ct. at 2598).

91. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (citations omitted).

92. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848–49, (1992) (plurality

Supreme Court jurisprudence insists that the right to liberty requires close examination of governmental justification of deprivation in a wide range of areas. Ordered liberty cannot exist in an unstable climate, where increasingly severe storms, fires, and floods threaten every American's home, family, and community. An unstable climate system can also adversely affect many profound extensions of liberty, including occupation, education, family, food, shelter, travel, drinking water, residence, and relationships. Thus, the district court in *Juliana* was correct to find that a stable climate is essential to ordered liberty: "I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society."⁹³

III. THE RIGHT TO A STABLE CLIMATE IS JUSTICIABLE

In addition to being within judicial authority and constitutionally cognizable, the right to a stable climate is justiciable. The Due Process Clauses of the United States Constitution can encompass a fundamental right to a climate capable of sustaining human life. However, the federal judiciary has, over time, established several doctrines that would limit their availability to hear their claim. The most significant of these is the political question doctrine, acceptance of which prevents claims from even being heard.

Yet the political question doctrine, by definition, does not apply: if the right exists under the Constitution, it is a legal right, not a political question. The Court has been making this distinction since *Marbury v. Madison*. Second, if the right exists under the Constitution, then the Court can discern and manage the standards by which a violation is to be identified and a remedy to be assessed.

A. *Constitutional Rights are Not Political Questions*

While the Constitution does not identify a field of 'political questions' beyond the reach of the federal judiciary, the Supreme Court has concluded that matters that are textually committed to an elected branch of government, or otherwise imprudent for judicial evaluation, are not justiciable.⁹⁴ The doctrine's political philosophy is "essentially a function of the separation of powers"⁹⁵ rooted in Jeffersonian notions of constitutional theory that democracy is best served by having coordinate elected branches resolve political questions rather than politically unaccountable federal judges.⁹⁶ The doctrine applies to disable federal courts from reviewing matters when they "ought not enter [the] political thicket."⁹⁷ Yet the political question doctrine never applies to claims asserting individual rights, including to a stable climate.

opinion) (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan J., dissenting)).

93. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

94. *Baker v. Carr*, 369 U.S. 186, 198–204 (1962).

95. *U.S. Dep't of Com. v. Montana*, 503 U.S. 442, 456 (quoting *Baker*, 369 U.S. at 217).

96. *See id.*

97. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

In *Marbury v. Madison*, Chief Justice John Marshall wrote that there are “irksome” and “delicate” questions that are inherently political and out of reach to the federal judiciary.⁹⁸ This anticipated two strands of cases that engender judicial forbearance, and with them, the framework of the political question doctrine: first, cases that are textually committed to an elected branch, and second, cases that as a matter of prudence should be avoided because they are political “in their nature.”⁹⁹

In *Baker v. Carr*, the Supreme Court listed “formulations” to describe when prior cases had found an issue non-justiciable.¹⁰⁰ These “formulations” are relevant to discerning questions committed to coordinate branches of government. Individual rights, by definition, stand outside the political process; they cannot be committed to it. The Supreme Court makes clear in *Baker* that while these formulations help determine “whether some action denominated ‘political’ exceeds constitutional authority,” they are not relevant in determining whether an action violates a *constitutional* right.¹⁰¹

None of the Supreme Court’s cases that applied the *Baker* formulations have found claims of violations of individual constitutional rights to be non-justiciable.¹⁰² To the contrary, the Supreme Court consistently reserved application of the political question doctrine to cases where plaintiffs sought structural changes in political governance or where a political realignment was necessary.¹⁰³

98. 5 U.S. 137 (1803) (“Questions, in their nature political or which are, by the Constitution and laws, submitted to the executive can never be made to this court.”).

99. *Id.* at 170.

100. 369 U.S. at 217 (1962).

101. *Id.* See, e.g., Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other Nixon v. United States*, SUP. CT. REV. 125, 142 (1993) (“to the Baker Court, *Gomillion* was evidence that the political-question doctrine had no place in denying the enforcement of individual rights.”) (citing 364 U.S. 339 (1960)); see also, *Obergefell v. Hodges*, 567 U.S. 644, 677 (2015) (“the Nation’s courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter”).

102. *Nixon v. United States*, 506 U.S. 224, 228 (1993) (Impeachment Trial Clause); *United States Dep’t of Com. v. Montana*, 503 U.S. 442, 456 (1992) (Article I); *United States v. Munoz-Flores*, 495 U.S. 385, 389–90 (1990) (Origination Clause); *Davis v. Bandemer*, 478 U.S. 109, 121–22 (1986) (Equal Protection Clause); *Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 248–50 (1985) (Indian Commerce Clause); *INS v. Chadha*, 462 U.S. 919, 940–42 (1983) (Article I); *Powell v. McCormack*, 395 U.S. 486, 518–19 (1969) (Article I).

103. See, e.g., *Nixon*, 506 U.S. 224 (1993) (Impeachment Trial Clause); *Coleman v. Miller*, 307 U.S. 433 (1939) (Article V); *Ohio ex rel. Bryant v. Akron Metro. Park Dist.*, 281 U.S. 74 (1930) (Guarantee Clause); *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (Tenth Amendment); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (Guarantee Clause); *Ohio ex rel. Davis v. Hildebrandt*, 241 U.S. 565 (1916) (same); *Kiernan v. City of Portland*, 223 U.S. 151 (1912) (same); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (same); *Taylor v. Beckham*, 178 U.S. 548 (1900) (Guarantee Clause and Due Process Clause); *Georgia v. Stanton*, 73 U.S. 50 (1867) (Constitutional challenge to Reconstruction Acts). See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION*, § 2.6 n. 7 (5th ed. 2007) (“If a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve a political

The Supreme Court has only dismissed cases involving individual rights claims when it has found an express textual commitment of the issue to a political branch, such as in the Impeachment Trial Clause or the Guarantee Clause.¹⁰⁴ Absent an express textual commitment to a political branch, the Court has never found that the doctrine precludes an individual rights claim, including invoking substantive due process.¹⁰⁵ Simply, the political question doctrine does not apply to cases seeking vindication of individual fundamental rights, such as a right to a stable climate.

Moreover, the political question doctrine does not apply to a claim seeking vindication of a constitutional right to a stable climate because such a claim is textually committed for *judicial branch* enforcement. Once a constitutional right is identified, it is the courts' province and duty to define the right's boundaries and to ensure governments do not transgress those limits.¹⁰⁶ Simply, the political question doctrine does not eliminate the judicial department's role in protecting the Bill of Rights.¹⁰⁷

B. *Constitutional Standards are Judicially Discoverable and Manageable*

Even if the political question doctrine were to apply to individual rights claims, climate-based claims are justiciable because applicable constitutional standards exist. The political question doctrine precludes jurisdiction not when

question") (quoting HOWARD FINK & MARK TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 231 (2d ed. 1987)); BROWN, *supra* note 101, at 144 ("The Court has tacitly reacted to the conflict between the political-question doctrine and the enforcement of individual rights by not applying the doctrine in a way that would defeat a right—but never for reasons arising out of the doctrine itself").

104. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 ("This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim."); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion) (textual commitment to Congress over districting in Article I § 4); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (textual commitment to Congress over National Guard in Article I, § 8, cl. 16).

105. See Michael A. Moorefield, *The Times Are They A-Changin'?: What Kivalina Says About the State of Environmental "Political Questions," Native Village of Kivalina v. Exxonmobil Corp.*, 17 MO. ENV'T L. & POL'Y REV. 606, 630 (2010) ("While the Judicial Branch is not in the business of rulemaking, it is in the business of protecting an individual's rights if other branches are not, or are failing to do so"). This includes individual rights claims addressing government actions and inactions contributing to climate change. See generally, James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 58 DENV. UNIV. L. REV. 919 (2008); James R. May, *AEP v. Connecticut and the Future of the Political Question Doctrine*, 121 YALE L.J. ONLINE 127 (2011).

106. *Marbury v. Madison*, 5 U.S. 137, 176–77 (1803) ("The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act").

107. See BROWN, *supra* note 101, at 137 ("Judges, at least in part, are the protectors in the constitutional scheme of individual rights.").

the question is novel, but when it is governed by *no standard at all*. For example, in *Vieth*, the plurality held that political gerrymandering claims are non-justiciable, not because they require courts to apply a broad standard like reasonableness, but because courts could not articulate any meaningful standard whatsoever.¹⁰⁸

The applicable standards are a function of the right or interest at issue, whether strict scrutiny, rational basis, or any other standard the Court has devised in its voluminous rights jurisprudence. Balancing individual liberties against governmental interests, as due process analysis requires courts to do, is a task presumptively appropriate for federal courts. Indeed, in *Baker*, the Court held reapportionment claims to be justiciable because “[j]udicial standards under the Equal Protection Clause are well developed and familiar.”¹⁰⁹ This is exactly what courts do in cases involving fundamental individual rights.¹¹⁰

Here, a legal framework of judicially discoverable and manageable standards exists for evaluating climate-based claims. Under the law of the Ninth Circuit, for instance, “the crux of this inquiry is . . . not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint,” but rather whether “a legal framework exists by which courts can evaluate . . . claims in a reasoned manner.”¹¹¹

The standards requested by the youth plaintiffs are judicially discoverable. Courts regularly engage with complex scientific issues and have established standards for resolving them.¹¹² As Justice Breyer has observed:

The Supreme Court has . . . decided basic questions of human liberty, the resolution of which demanded an understanding of scientific matters Scientific issues permeate the law . . . [W]e must search for law that reflects an understanding of the relevant underlying science, not for law that frees [defendants] to cause serious harm.¹¹³

To remedy systemic constitutional violations, courts have overseen remedial plans of much greater complexity, touching on difficult issues of social science, when compared with the hard science involved in climate change.¹¹⁴

108. *Vieth*, 541 U.S. at 278–90 (plurality opinion); see also *Coleman*, 307 U.S. at 450–54; *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring in the judgment) (concluding that a Senator’s challenge to the President’s abrogation of a treaty is non-justiciable, because, while the Constitution sets forth the manner in which the Senate participates in the ratification of treaties, it provides no standards for the Senate’s participation in their abrogation).

109. *Baker v. Carr*, 369 U.S. 186, 226 (1962).

110. See, e.g., *Los Angeles Cty. Bar Ass’n v. Eu*, 979 F.2d 697, 702 (9th Cir. 1992) (“Judicial standards for evaluating compliance with the constitutional dictates of due process and equal protection are well developed, although they have not often been applied to these facts”).

111. *Alperin v. Vatican Bank*, 410 F.3d 532, 552, 55 (9th Cir. 2005).

112. *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993).

113. Stephen Breyer, *Science in the Courtroom*, ISSUES IN SCI. AND TECH., No. 4 52, 53 (Summer 2000).

114. *Brown v. Bd. of Educ.*, 347 U.S. at 495; cf. *Brown v. Plata*, 563 U.S. 493, 526 (2011).

In sum, we conclude that there is a persuasive case to be made that the United States Constitution can encompass a claim asserting a fundamental right to a stable climate because such a right is both deeply rooted in American legal history and essential to ordered liberty. Moreover, the political question doctrine should not bar judicial review of constitutional claims, especially when there are well-established judicially discoverable and manageable constitutional standards. Federal courts should not shirk their constitutional obligations when presented with such claims, even if they are novel or controversial.

IV. CASE STUDY: THE *JULIANA* v. U.S. CASE

Called “no ordinary lawsuit,”¹¹⁵ *Juliana* v. U.S. provides a case study of the three points made above. In 2015, Our Children’s Trust and Earth Guardians filed a lawsuit on behalf of 21 children against the U.S. government arguing that governmental policies and programs about climate change contravene their constitutional rights to life, liberty, property, equal protection, and public trust resources. Specifically, the plaintiffs claim that: (1) the federal government had authorized, funded, or carried out policies and programs that cause or contribute to an unstable climate system; (2) an unstable climate system diminishes a liberty interest protected by the U.S. Constitution; and therefore (3) the government’s actions had violated plaintiffs’ constitutional rights.¹¹⁶ Importantly, plaintiffs here do not allege that the government has an obligation to eliminate changes in the climate, but that it must refrain from actively exacerbating it to the point of injuring the plaintiffs. Nor did the plaintiffs ask the courts to write the policies; they ask, rather, that courts establish the boundaries of the constitutional right and ensure the government takes actions that stay within those boundaries. Properly understood, the plaintiffs ask the federal judiciary to do exactly what courts have done since the beginning of the Republic. Indeed, as the Ninth Circuit majority itself noted, “Absent court intervention, the political branches might conclude—however inappropriately in the plaintiffs’ view—that economic or defense considerations called for continuation of the very programs challenged in this suit, or a less robust approach to addressing climate change than the plaintiffs believe is necessary.”¹¹⁷ But when these programs violate the youths’ constitutionally protected liberty right, federal courts must step in, as the district court held when it initially set the case for trial:

Exercising my reasoned judgment, I have no doubt that a climate system capable of sustaining human life is fundamental to a free and ordered society . . . where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property,

115. Barry E. Hill *No Ordinary Lawsuit*, 35 *Env’t F.* 27, 30 (2018).

116. Amended Complaint, *Juliana* v. United States, No. 6:15-cv-01517-TC ¶¶ 283–99 (D. Or. Sept. 10, 2015).

117. *Juliana* v. United States, 947 F.3d 1159, 1166 (9th Cir. 2020).

threaten human food sources, and dramatically alter the planet’s ecosystem, it states a claim for a due process violation.¹¹⁸

The trial, however, has still not occurred.

Following two trips to the Supreme Court and three to the Ninth Circuit, several remands, and enough writs and remands in 2017 and 2018 for several seasons of future Civil Procedure final exams, the federal district court certified the case for interlocutory appeal. The Ninth Circuit Court of Appeals granted it and hosted argument in 2017—and following Judge Alex Kozinski’s resignation from the court—again in 2019. It issued a decision in 2020.

Nearly every word of the Ninth Circuit’s opinion reads as though the plaintiffs prevail. All three members of the panel agreed with the plaintiffs that:

- Climate change is real “and occurring at an increasingly rapid pace”¹¹⁹;
- The Globe is experiencing a human-induced ecological “apocalypse”;¹²⁰
- The Government knowingly caused and facilitated emissions of massive amounts of greenhouse gases for decades (“substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.”);¹²¹
- The Government’s administrative policies and programs promote the use of fossil fuels, threatening the climate (“A significant portion of those emissions occur in this country; the United States accounted for over 25 percent of worldwide emissions from 1850 to 2012, and currently accounts for about 15 percent.”);¹²²
- The Government *knew* their actions could contribute to “catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse”;¹²³
- The youth plaintiffs pled a constitutionally valid fundamental right;¹²⁴
- The youth plaintiffs have suffered imminent, ongoing, concrete, and particularized injuries (“The plaintiffs’ alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation”),¹²⁵ which the Government caused;¹²⁶
- The federal courts could help (“We do not dispute that the . . . relief the plaintiffs seek could well goad the political branches into action”);¹²⁷

118. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016), *rev’d*, 947 F.3d 1159 (9th Cir. 2020).

119. *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020).

120. *Id.* at 1164.

121. *Id.*

122. *Id.* at 1169.

123. *Id.* at 1164.

124. *Id.* at 1171.

125. *Id.* at 1169.

126. *Id.* at 1167.

127. *Id.* at 1175.

- Action is needed (“Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies”);¹²⁸ and
- The youth plaintiffs have pled meritorious claims (“The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, [and] that the government has had a role in causing it”);¹²⁹
- The Government had violated plaintiffs’ constitutionally protected liberty interest to live in a climate system capable of sustaining human life (“substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.”);¹³⁰ and,
- That plaintiffs met their *prima facie* burden of proof that climate change is real, “apocalyptic,” and caused in part by actions and inactions of the U.S. government (“The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult in light of that record for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions. We do not dispute that the broad judicial relief the plaintiffs seek could well goad the political branches into action.”)¹³¹

Nonetheless, two judges voted to dismiss the case for lack of standing, finding that plaintiffs’ injuries were not “redressable” by the Court because of the lack judicially discoverable and manageable standards.”¹³² The majority therefore opined that any remedy would require judicial action in areas entrusted to the other two branches of the government.¹³³

The majority’s reasoning sounded in the political question doctrine, finding that federal courts are not in a position to redress the injury (“That 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”).¹³⁴ Further, the court consoled, because the case involves “complex policy decisions,” the plaintiffs could appeal to the elected branches, the very branches the court agreed caused and refused to fix the problem in the first place (“We reluctantly conclude, however, that the plaintiffs’ case must be made to the political branches or to the elector-

128. *Id.* at 1166.

129. *Id.* at 1175.

130. *Id.* at 1173.

131. *Id.* at 1175.

132. *Id.* at 1175.

133. *Id.* at 1172–73.

134. *Id.*

ate at large”)¹³⁵ and the branches to which the plaintiffs, *as youths lacking the franchise*, have no recourse.

Yet the court analogized the case to the challenge of deciding when gerrymandering goes “too far.”¹³⁶ In *Rucho*, a 5–4 majority of the Supreme Court held the Guarantee Clause and other structural attributes of the U.S. Constitution consign certain political gerrymandering claims to the political branches.¹³⁷ This result follows a long line of cases regarding political apportionment.¹³⁸ Following *Rucho*’s determination that political re-apportionment involving a comparison to a baseline election map is too difficult for the judiciary to manage,¹³⁹ the majority determined “it is impossible to reach a different conclusion here.”¹⁴⁰

It is possible to reach a different conclusion. In *Rucho*, the Court upheld the plaintiffs’ constitutional standing prior to turning to political question analysis.¹⁴¹ In *Juliana*, the Government did not contest the district court’s thorough political question analysis. The majority should not have re-animated it under the guise of the standing doctrine. As the majority notes, the youth plaintiffs have presented a justiciable claim of an individual rights violation and seek relief within the court’s authority to grant, whether declaratory or remedial in nature.¹⁴² Either is sufficient for Article III standing.¹⁴³

135. *Id.*

136. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2497 (2019) (“Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, ‘a jurisdiction may engage in constitutional political gerrymandering’ The ‘central problem’ is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is ‘determining when political gerrymandering has gone too far.’”) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality opinion)).

137. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2492 (2019).

138. *Id.* at 2506 (“This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim.”).

139. *Id.* at 2500–02.

140. *Juliana*, 937 F.3d, at 1173.

141. 139 S. Ct. at 2492 (discussing *Gill v. Whitford*, 138 S. Ct. 1916 (2018)).

142. *Juliana*, 937 F.3d, at 1169 (in addition to violations of well established individual due process and equal protection rights, the youth plaintiffs claim “the government has deprived them of a substantive constitutional right to a ‘climate system capable of sustaining human life,’ and they seek remedial declaratory and injunctive relief”).

143. *See Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992) (“We may assume it is substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation . . . by the District Court, even though they would not be directly bound by such a determination.”); *Juliana*, 937 F.3d, at 1164 (“[Plaintiffs seek] an order requiring the government to develop a plan to ‘phase out fossil fuel emissions and draw down excess atmospheric CO2’”) (citing *Massachusetts v. EPA*, 549 U.S. 497, 525–26 (2007) (finding redressability where “the requested relief would likely slow or reduce emissions.”)); *Id.* at 1182 (Stanton, J., dissenting) (“a perceptible reduction in the advance of climate change is sufficient to redress a plaintiff’s climate change-induced harms.”).

The majority's Article III analysis also misperceives the role of federal courts in protecting youth plaintiffs' individual constitutional rights.¹⁴⁴ While the majority may be correct in saying "it is beyond the power of an Article III court to . . . design [] . . . or implement the plaintiffs' requested remedial plan," the youth plaintiffs did not ask the courts to make a plan or implement an action otherwise committed to an elected branch of government.¹⁴⁵ Instead, they seek *declaratory* relief and, if appropriate, following a bifurcated trial's remedial phase, an injunction ordering *the Government* to develop and implement a plan to reduce fossil fuel emissions and atmospheric carbon dioxide. These youth plaintiffs simply request that federal courts recognize contravention of a constitutional right and, if necessary, use reasoned judgment to dispense a remedy for the Government to implement.¹⁴⁶

In a spirited dissent, Judge Josephine L. Staton laments: "My colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary. On a fundamental point, we agree: No case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists. But a federal court need not manage all the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution."¹⁴⁷

The extraordinariness of this litigation is patent on both the plaintiff side and on the defense side. On the plaintiff side, the case serves as a stress test underlying the relationship between the climate crisis and the U.S. Constitution, with the underlying question being whether the Constitution can encompass a right to a stable climate. In *Juliana*, the Ninth Circuit *accepted* the opinion of the youth plaintiffs' experts that a stable climate—safe for the youth plaintiffs and capable of sustaining human life—requires atmospheric CO₂ levels of no more than 350 parts per million. Ignoring this profoundly stark conclusion, the majority pretermitted a trial that would help it utilize the scientific testimony and evidence to decide whether the defendant's knowing causation of catastrophic climate destabilization, and resulting endangerment of youth plaintiffs, violates their individual constitutional rights. Because executive officials presumptively "abide by an authoritative interpretation of the Constitution,"¹⁴⁸ declaratory relief would prompt the Defendants to reduce their contributions to the climate crisis—an outcome that should be sufficient for redressability.¹⁴⁹

144. *Id.* (Staton, J., dissenting).

145. *Id.* at 1171.

146. *Id.* at 1172 ("The plaintiffs argue that the district court need not itself make policy decisions, because if their general request for a remedial plan is granted, the political branches can decide what policies will best phase out fossil fuel emissions and draw down excess atmospheric CO₂.") (internal quotations omitted).

147. *Id.* at 1175 (Staton, J., dissenting).

148. *Franklin*, 505 U.S. at 803.

149. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

Bifurcating proceedings into two steps would also have provided a basis for marshaling arguments and evidence in the service of evaluating viable remedies. Step one would have been to determine whether it is necessary to order the Defendants to prepare and implement a remedial plan. Step two would have been to assess, utilizing the best available science (perhaps with the aid of special masters), whether the cumulative emissions reductions effectuated would put the Government on a path consistent with stabilizing the climate.

On the defense side, the case serves as a stress test for something almost as important as climate change: the rule of law. The government's position that its actions are judicially unreviewable does not contain a limiting principle or at least none is suggested by the government's position. But in our constitutional system, judicial review of governmental authority has been, at least since 1803, the single thing that ensures that ours is "a government of laws, and not of men."¹⁵⁰ It is the *only* form of accountability that exists at all to uphold fundamental rights, other than biennial elections—which, again, have no resonance for youths disallowed from voting. Rather than engage the argument that governmental action on climate change can constitute a constitutional deprivation of liberty, the U.S. government's official position is that the judicial department is not available to litigants who seek constitutional protection, even where the government's actions affect not only that litigant individually but the entire planet and generations to come. A change of Presidential Administrations might change perspectives, or not.

On February 10, 2021, the Ninth Circuit denied the Plaintiffs' Motion for Hearing En Banc, writing only:

A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of *en banc* consideration. Fed R. App. P. 35. The petition for rehearing en banc [] is DENIED. Judges McKeown, Collins, Bress and VanDyke did not participate in the consideration of the petition for rehearing en banc.¹⁵¹

Plaintiffs have expressed an intention to seek review before the U.S. Supreme Court, and settlement with the Biden Administration.¹⁵²

150. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

151. *Juliana v. United States*, No. 6:15-cv-01517-AA, 2021 WL 481156 (Mem) (9th Cir. Feb. 10, 2021). See also, Ellen M. Gilmer, *Young Climate Litigants Push High Court Fight Some Call Reckless*, BLOOMBERG (Feb. 11, 2021), https://www.bloomberglaw.com/bloomberglawnews/environment-and-energy/X6CIA1NO000000?bna_news_filter=environment-and-energy#jcite [<https://perma.cc/LW8W-PYGS>].

152. Press Release, Our Child's Trust, 9th Circuit Denies *En Banc* Review for *Juliana v. United States*; Youth Plaintiffs Will Take Their Case to Supreme Court (Feb. 10, 2021), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/6024303eba0e5b78c9b7a2fd/1612984382920/2021.02.10.Juliana+Press+Release.pdf> [<https://perma.cc/S368-3S5Z>].

CONCLUSION

The assertion of judicial authority to protect the climate has, perhaps, put too much pressure on the judiciary: how can one judge or even a bench of them be expected to stand up to the private and public power of the state? How can one judge (or a panel of judges) be expected to stop the advance of climate change? In an ideal world, this should not happen. In an ideal world, those who hold the power of state sovereignty in their hands would protect the people within their own countries and throughout the world—all of whom share the same human dignity as they—from the harms of environmental and climatic disaster. In an ideal world, courts would not have to step in to tell political actors what they should already know is right, morally or constitutionally. In an ideal world, judges could decide cases without having to call on their own moral courage. But as climate change advances on us at an alarming pace, we are more than any other generation in history aware that we do not live in an ideal world, and where political power fails, it falls to judges to guide societies toward what is right and necessary.

What is remarkable, then, is that some judges—a few but a growing number—have taken up the challenge, in forceful, eloquent and sometimes desperate terms. The 2–1 majority Ninth Circuit panel decision to dismiss the case on grounds of redressability was ill-advised, however, because courts should not shirk their constitutional function to review constitutional claims concerning climate change, the Constitution can encompass a right to a stable climate, and substantive due process claims are justiciable. The fact that this case challenges government action that promoted climate change is no reason to depart from well-settled principles of separation of powers and rule of law. But it was also wrong for a more profound and disturbing reason: assuming—as the panel did—that the plaintiffs have pled a cause of action establishing a constitutional right to a climate system capable of sustaining human life and that the United States government is continuing to take actions that are violating the plaintiffs' rights, and that such violations are hastening a global environmental apocalypse, how can courts avoid their responsibility to the young plaintiffs and to the world?

Judge Aiken from the original district court case in *Juliana* put it this way in reflecting on her profession's responsibility in protecting the earth from climate change:

Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it 'The current state of affairs . . . reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits [T]he modern judiciary has enfeebled itself to the point that law enforcement can rarely be accomplished by taking environmental predators to court.'¹⁵³

In the final analysis, can the U.S. Constitution encompass a claim pursuing a right to a stable climate? Yes, it can.

153. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1262 (D. Or. 2016) (quoting Alfred T. Goodwin, *A Wake-Up Call for Judges*, 2015 WIS. L. REV. 785, 785–86, 788 (2015)).