AGAINST ENVIRONMENTAL RIGHTS SUPREMACY

*Quinn Yeargain**

INTRODUCTION

Environmental rights are having a moment. Though only eight states and territories have expressed environmental rights provisions in their constitutions,[1] a trickle of positive developments has seemingly turned into a stream. Supreme courts in Hawai'i and Pennsylvania gave some force to their states' rights provisions beginning in the 2010s[2]—and the scope of

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1 HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; MASS. CONST. amend. art. XCVII; MONT. CONST. art. IX, § 1; N.Y. CONST. art. I, § 19; N. MAR. I. CONST. art. I, § 9; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17.

2 Cnty. of Haw. v. Ala Loop Homeowners, 235 P.3d 1103, 1137 (2010) (holding that plaintiff had a right of private action under Article XI, Section 9 of the Hawai'i Constitution); In re Application Maui Elec. Co., Ltd., 408 P.3d 1, 23 (Haw. 2017) ("MECO") (holding that a local Sierra Club chapter was entitled to a Public Utilities Commission hearing against a local coal plant under Article XI, Section 9 of the Hawai'i Constitution); Matter of Haw. Elec. Light Co., Inc., 445 P.3d 673, 697–98 (Haw. 2019) ("HELCO") (finding in favor of the environmental non-profit Life of the Land (LOL) to have their "property interest in a clean and healthful environment" be considered by the Public Utilities Commission); Matter of Gas Co., 465 P.3d 633, 650–51 (Haw. 2020) (finding in favor of local environmental nonprofits challenge to whether the Public Utilities Commission fulfilled its statutory and constitutional obligations in reviewing an application for a rate increase submitted by Hawai'i Gas); In re Hawai'i Elec. Light Co., 526 P.3d 329, 336 (Haw. 2023) ("HELCO II") (upholding the Public Utilities Commission's denial of an energy plant as appropriate under Article XI, Section 9 of the Hawai'i Constitution); Robinson Twp. v. Commonwealth, 83 A.3d 901, 951–52 (Pa. 2013) (interpreting Article 1, Section 27 of the Pennsylvania Constitution as "an obligation on the government's behalf to refrain from unduly infringing upon or violating the right" to a healthy environment); Pa. Env't Def. Found. v. Commonwealth, 161 A.3d 911, 938 (Pa. 2017) ("PEDF II") (holding that Article I, Section 27 of the Pennsylvania Constitution "imposes fiduciary duties consistent with trust law" in the Commonwealth's management of "Pennsylvania's environmental public trust"); Pa. Env't Def. Found. v. Commonwealth, 255 A.3d 289, 293 (Pa. 2021) ("PEDF IV") (holding that under Article I, Section 27 of the Pennsylvania Constitution, "incomes generated under . . . oil and gas leases must be returned to the corpus" of the environmental trust).

protections guaranteed by each right continues to be fine-tuned by litigation.[3] In 2021, New York voters added an environmental rights provision to their state's constitution[4]—the first such addition of the twenty-first century.[5] More states may well add similar amendments to their constitutions.[6]

And then there was *Held v. State*. In *Held*, a group of Montana youth argued that the state government's contribution to global climate change violated their environmental rights under the Montana Constitution. They sought a court order forcing decarbonization and a judicial declaration of their rights, including the invalidation of a statutory provision that prohibited state agencies from considering climate change in their administrative determinations.[7] The state trial court dismissed all of the plaintiffs' claims but their request for declaratory relief,[8] and in 2023, held the first trial in a climate case in the United States.[9] The court ultimately concluded that the statutory provision at issue violated the plaintiffs' rights and struck it down.[10]

The reaction from some advocates was immediate and enthusiastic. Our Children's Trust, which litigated *Held*, described the outcome as "a sweeping

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3 *See, e.g.*, Amber Polk, *The Unfilled Promise of Environmental Constitutionalism*, 74 HASTINGS L.J. 123, 130–55 (2022) (surveying environmental rights litigation).

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

5 *See* Quinn Yeargain, *Decarbonizing Constitutions*, 41 YALE L. & POL'Y REV. 1, 33–34 (2023).

6 *See, e.g.*, *Green Amendments in 2023: States Continue Efforts to Make a Healthy Environment a Legal Right*, NAT'L CAUCUS OF ENV'T LEGISLATORS (Mar. 27, 2023), https://www.ncelenviro.org/articles/green-amendments-in-2023-states-continue-efforts-to-make-a-healthy-environment-a-legal-right/[https://perma.cc/T9X8-XTHK].

7 Complaint at 102–04, Held v. State, No. CDV-2020-307 (Mont. Dist. Ct. Mar. 13, 2020), https://climatecasechart.com/wp-content/uploads/case-documents/2020/20200313_docket-CDV-2020-307_complaint.pdf [https://perma.cc/47PR-2KRF] [hereinafter Held v. State Complaint].

8 Held v. State, No. CDV-2020-307, at 25 (Mont. Dist. Ct. Aug. 4, 2021), https://climatecasechart.com/wp-content/uploads/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf [https://perma.cc/UX7Z-RA9M] [hereinafter Held v. State Order on Motion to Dismiss].

9 Lesley Clark, *First U.S. Climate Trial Begins and Is Led by Kids*, SCI. AM. (June 9, 2023), https://www.scientificamerican.com/article/first-u-s-climate-trial-begins-and-is-led-by-kids/ [https://perma.cc/C869-VZFM].

10 Held v. State, No. CDV-2020-307, at 101–02 (Mont. Dist. Ct. Aug. 14, 2023), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814_docket-CDV-2020-307_order.pdf [https://perma.cc/8BS9-MD3L] [hereinafter Held v. State Trial Court Order].

win,"[11] and declared that "[m]ore rulings like this will certainly come."[12] Commentators echoed this sentiment, noting that the outcome was a "big deal"[13] and a "monumental win,"[14] that "other courts in the U.S. and around the world will look to this decision,"[15] and that the outcome "changes everything."[16] Many predicted that more lawsuits like *Held* would be filed, and that there would be a renewed effort to add environmental rights provisions to state constitutions.[17]

Yet many of these prognostications overread the decision in *Held*. The gulf between the relief that the *Held* plaintiffs originally sought (a court order that the state of Montana dramatically reduce its greenhouse gas emissions)[18] and what they actually received (a declaratory judgment invalidating a state statute barring state agencies from considering climate change)[19] was massive. The rhetoric surrounding the outcome—"this changes

11 Press Release, Our Children's Trust, Sweeping Constitutional Win for Held v. State of Montana Youth Plaintiffs (Aug. 14, 2023), https://static1.squarespace.com/static/571d109b04426270152febe0/t/64da6d67161d05783fbca2f9/1692036457635/08.14.2023+Montana+Climate+Youth+Win.pdf [https://perma.cc/A6BA-95LQ].

12 Kate Selig, *Judge Rules in Favor of Montana Youths in Landmark Climate Decision*, WASH. POST (Aug. 14, 2023), https://www.washingtonpost.com/climate-environment/2023/08/14/youths-win-montana-climate-trial/ [https://perma.cc/H654-WHGR].

13 Gabriel Furshong, *16 Young People Sued Montana over the Climate. The Planet Won.*, THE NATION (Aug. 15, 2023), https://www.thenation.com/article/environment/montana-climate-change-court/ [https://perma.cc/7KTV-M9YQ].

14 Neel Dhanesha, Held v. Montana *Is Just the Beginning*, HEATMAP NEWS (Aug. 14, 2023), https://heatmap.news/politics/held-v-montana-plaintiffs-trial [https://perma.cc/QV87-T6RX].

15 David Gelles & Mike Baker, *Judge Rules in Favor of Montana Youths in a Landmark Climate Case*, N.Y. TIMES (Aug. 14, 2023), https://www.nytimes.com/2023/08/14/us/montana-youth-climate-ruling.html [https://perma.cc/P4WC-HLA4].

16 Micah Drew & Amanda Eggert, *'This Changes Everything': Experts Respond to* Held v. Montana *Climate Ruling*, MONT. FREE PRESS (Aug. 17, 2023), https://montanafreepress.org/2023/08/17/this-changes-everything-experts-respond-to-landmark-youth-climate-ruling/ [https://perma.cc/NSF2-PM8U].

17 Tim Dickinson, *Here's the Plan to Take Montana's Massive Climate Win Nationwide*, ROLLING STONE (Aug. 17, 2023), https://www.rollingstone.com/politics/politics-features/montana-youths-climate-lawsuit-win-blueprint-nationwide-1234807924/ [https://perma.cc/26KB-JT2W]; Jennifer Hijazi & Drew Hutchinson, *Montana Climate Ruling Boosts Case for States' Green Amendments*, BLOOMBERG L. (Aug. 29, 2023), https://news.bloomberglaw.com/environment-and-energy/montana-climate-ruling-boosts-case-for-states-green-amendments [https://perma.cc/4WRU-SYCV].

18 Held v. State Complaint, *supra* note 7, at 103 (requesting "[a]n order requiring Defendants to develop a remedial plan or policies to effectuate reductions of GHG emissions in Montana consistent with the best available science and reductions necessary to protect Youth Plaintiffs' constitutional rights from further infringement by Defendants, and to reduce the cumulative risk of harm to those rights").

19 Held v. State Trial Court Order, *supra* note 10, at 102 (striking down as unconstitutional MONT. CODE ANN. §§ 75-1-201(2)(a), (6)(a)(ii)).

everything"[20]—simply does not square with the actual ruling. But regardless of the characterization, if *Held* prompts more climate litigation and more "green amendments," that would be a strategic error.

While environmental rights-based litigation has seen success in achieving discrete outcomes, the most ambitious efforts to invoke environmental rights to achieve climate policy or other transformational outcomes have fallen flat. These failures reflect a fatal misunderstanding of the proper role of rights-focused approaches in environmental litigation, as well as what outcomes are possible in the American legal system. To that end, the few legal victories that these efforts have produced have been much like *Held*, in that they have tinkered environmental policies while falling far short of the litigants' goals for wide-scale decarbonization. More often, however, these ambitious lawsuits have been wholly unsuccessful. Courts have usually interpreted environmental rights provisions narrowly, and in jurisdictions without any such provision, courts have been unwilling to recognize any *implied* environmental rights—like, for example, a right to a stable climate system.[21]

There is little reason to believe that the *next* rights-based lawsuit will produce a dramatically different result, either. At its core, the strategy of using environmental rights litigation to achieve climate policy is centered around a fallacy. It seeks to persuade courts to take a generous view of redressability, disregard the political-question doctrine, and enlarge their own power to order the federal and state governments to adopt specific policies.[22] This seems unlikely. But even setting aside the likelihood of this strategy's success, it would be a bad way to set policy and would further entrench the judiciary's role in policymaking.[23]

In this article, I argue that a predominant focus on rights-based strategies—whether in the form of litigation or campaigns to adopt "green amendments"—would be a catastrophic error for the climate movement. While environmental rights can, and do, achieve specific policy outcomes, they cannot be contorted into a skeleton key to unlock decarbonization. In Part I, I discuss the recent history of environmental rights-based litigation. Here, I demonstrate that the outcomes of this litigation have produced narrow outcomes, which have frequently fallen far short when plaintiffs have sought sprawling relief—which is true in *Held v. State*. Then, in Part II, I argue that rights-focused litigation is poorly suited to achieving seismic policy

20 Drew & Eggert, *supra* note 1616.

21 *Infra* Part I.

22 *Infra* Part II.

23 *Id.*

shifts in the American legal system. The redressability prong of standing, as well as the political-question doctrine, seriously limit the power and willingness of courts to order the massive relief that plaintiffs are seeking. Moreover, forcing policy decisions into courts merely serves to entrench the United States' growing juristocracy.

Finally, in Part III, I argue that environmental rights should occupy a narrower role in our constitutional and legal parlance—and that the time, energy, and money spent on overly ambitious environmental rights-based litigation could be redirected to more fruitful endeavors. Though a broad interpretation of environmental rights is likely unworkable in the American legal system, a more targeted use of them can surely be part of a broader environmental policymaking strategy. Challenging discrete state and private actions, as well as seeking narrower remedies, would be a more effective, feasible use of environmental rights. To that end, there are also better ways to use constitutional law to achieve environmental policies. For example, advocates could organize campaigns to ratify policy-focused amendments to state constitutions, as has been done in a handful of states so far, or to elect environmentalist candidates to influential positions.

Moreover, my proposed approach—and my critique of the efficacy of a rights-based *legal* strategy—does not require sacrificing the powerful rhetoric, morality, and utility that the concept of environmental rights provides. Environmental policymaking, including the response to climate change, has frequently been discussed in the context of individualized protections and responsibilities. To that end, the ideas that no person should lose their life or livelihood to climate change, and that they should be protected from such loss by a stable climate system, are fundamentally consistent with this rhetoric. Concomitantly, the rhetoric of environmental rights has also encompassed the idea of community protections, especially in recent decades. The concept of environmental justice—and the need to mitigate *years* of environmental racism—has centered on the idea that communities of color have disproportionately experienced the harms of pollution and are also uniquely vulnerable to the threat of climate change. A rights-based dialogue, especially one that connects environmental policymaking to equality, fits comfortably in that conversation.

I. THE FAILURE OF OVERLY AMBITIOUS ENVIRONMENTAL RIGHTS-BASED LITIGATION

Environmental-rights litigation has set out to achieve a variety of bold goals. These goals have developed along a series of different tracks, guided by different constitutional theories, principles, and provisions, but all share a common goal—to use private actions to persuade courts to adopt environmental policies. Many of these lawsuits have their origin in the public-trust litigation that began in the mid-twentieth century.[24] Some of them have attempted to expand the corpus of the "trust" to include the atmosphere and to argue that a degradation of the public trust is cognizable as a substantive due process violation.[25] Others have latched onto express environmental-rights provisions in state constitutions, which were first adopted in the 1970s,[26] to challenge specific actions of state and local governments, including actions by regulatory agencies,[27] the constitutionality of natural resource laws,[28] and, in the case of *Held*, the aggregate effects of a state's policy decisions on climate change.[29]

This litigation is best understood as a response to a series of national environmental policymaking failures—most notably, the failure to adequately respond to, and mitigate, climate change.[30] Accordingly, where

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24 *See, e.g.*, Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 473 (1970) ("One dramatic result is a proliferation of lawsuits in which citizens, demanding judicial recognition of their rights as members of the public, sue the very governmental agencies which are supposed to be protecting the public interest.").

25 *See, e.g.*, Michael C. Blumm & Mary Christina Wood, *"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U.L. REV. 1, 22–23, 37–40 (2017) (explaining the public trust principle and its connection to substantive due process).

26 Yeargain, *supra* note 5, at 9 ("And during the zenith of the environmental movement, several states also adopted so-called 'environmental bills of rights' in their constitutions.").

27 *E.g.*, MECO, 408 P.3d 1, 23 (Haw. 2017) (considering a challenge to a power purchase agreement that would have relied on coal and petroleum); HELCO, 445 P.3d 673, 697–98 (Haw. 2019) (addressing an attempt by an environmental group to intervene in a proceeding considering a proposed biomass facility); Mont Env't Info. Ctr. v. Dep't of Env't Quality, 988 P.2d 1236, 1239 (Mont. 1999) [hereinafter MEIC] (considering a challenge to the Montana Department of Environmental Quality's approval of a mine).

28 *See, e.g.*, Robinson Twp. v. Commonwealth, 83 A.3d 901, 951–52 (Pa. 2013) (evaluating a constitutional challenge to a proposed amendment to the Pennsylvania Oil and Gas Act); 988 P.2d at 1239 (considering a petition for writ of mandamus that would compel the Department of Environmental Quality to "comply with various statutory procedures prior to amendment of the exploration license").

29 *See generally* Held v. State Complaint, *supra* note 7, at 34–52 (pleading facts connecting Montana state policy to exacerbation of climate change).

30 *See, e.g.*, Richard J. Lazarus, *Judicial Missteps, Legislative Dysfunction, and the Public Trust Doctrine: Can Two Wrongs Make It Right?*, 45 ENV'T L. 1139, 1157 (2015) ("The filing of such lawsuits . . . provide

the normal political processes have not resulted in progress on environmental priorities, or have allowed degradation to continue, advocates have used lawsuits to do what executive branch officials and legislatures have either refused or been unable to do themselves. In the most ambitious cases that have relied on rights-based theories, plaintiffs have sought to rope in courts to force the federal and state governments to dramatically reduce carbon emissions. In other, more narrowly focused cases, litigants have responded to individual actions by the government—for example, the failure to consider climate change effects in policymaking or approving a permit to conduct environmentally harmful activity—by invoking environmental rights provisions.

But while litigation is a normal part of the policymaking process, the broader political context has not been lost on the courts hearing these cases.[31] In *Juliana v. United States*, for example, the plaintiffs sought an ambitious court order that would have forced the federal government to drastically reduce the country's carbon emissions. In rejecting the suit, the U.S. Court of Appeals for the Ninth Circuit noted, "[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."[32] Courts have largely rejected the most ambitious claims that plaintiffs have brought—either because the requested relief is beyond the power of the courts or because the policy questions at issue are political questions. Where courts have granted relief, the outcomes have usually been narrow wins that have guaranteed "procedural" rights.[33]

In this Part, I argue that environmental rights-based litigation has not achieved its most ambitious outcomes. The wins it has achieved are indicative of its potential to play a powerful role in policymaking, but one

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an opportunity for potentially effective political organizing and publicity with the ultimate goal of prompting legislatures to enact the laws we need."); Benjamin C. Skillin, Note, *Major Questions Require Major Coordination: Enhancing Regulatory Coordination to Combat Nondelegation and Antideference Judicial Scrutiny*, 64 B.C.L. REV. 1283, 1284–85 (2023) ("In addition to the ongoing global pandemic, climate change remains an existential threat to our world, and yet climate action in Congress has been desultory and virtually non-existent. The situation is so drastic that citizens have sued the U.S. government over climate inaction, arguing that such passivity violates their constitutional and fundamental rights.").

31 *E.g.*, Alec L. v. Jackson, 863 F. Supp. 2d 11, 16–17 (D.D.C. 2012) (noting that determinations "regarding carbon dioxide emissions . . . are best left to the federal agencies that are better equipped, and that have a Congressional mandate, to serve as the 'primary regulator of greenhouse gas emissions'") (citing Am. Elec. Power Co., Inc. v. Connecticut, 564 U.S. 410, 428 (2011)).

32 Juliana v. United States, 947 F.3d 1159, 1175 (9th Cir. 2020) [hereinafter *Juliana II*].

33 *See, e.g.*, Polk, *supra* note 3, at 165 (noting that "courts interpret their constitutional environmental rights as essentially procedural, not substantive, rights").

that is focused on gears and levers of environmental policies more than it is revolutionary shifts in environmental governance. Moreover, these victories have largely to required specific *processes*—not specific *outcomes*—in how natural-resource decisions are made. In Section A, I discuss environmental rights litigation in federal and state courts that have relied on public-trust principles or substantive due process rights. Then, in Section B, I discuss state-court cases that have focused on express environmental-rights provisions in state constitutions. My goal in these sections is not to comprehensively survey all of these cases,[34] but instead to compare and contrast the relief that plaintiffs in these cases have requested with the actual outcomes.

Finally, in Section C, I discuss *Held v. State*. Again, I compare the requested relief with the actual outcome in the case—and argue that the case has been dramatically overread and overinterpreted. While the outcome in *Held* is ultimately a net positive, it hardly warrants the significant attention that it has received from commentators. Instead, the actual holding of the case is extremely narrow, in keeping with the procedural focus of most state-court litigation over environmental-rights provisions.

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34 There is another class of cases that I have excluded from this survey—those that have sought to force state administrative agencies to adopt rules relating to emissions reduction. *See* Anna Christiansen, Note, *Up in the Air: A Fifty-State Survey of Atmospheric Trust Litigation Brought by Our Children's Trust*, 2020 UTAH L. REV. 867, 879 (2020) (summarizing state-level petitions for rulemaking). While many of these cases have invoked constitutional principles, they have frequently been resolved—which is to say, usually *rejected*—on the basis of the individual jurisdiction's rules of civil procedure and requirements for administrative procedure. For example, a ruling in *Foster v. Department of Ecology* by the King County, Washington Superior Court attracted significant attention for its order that the Washington Department of Ecology adopt rules requiring emissions reduction. *See, e.g.*, Mary Christina Wood & Charles W. Woodward, IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENV'T L. & POL'Y 633, 647 (2016):

> Just as *Brown v. Board of Education* marked the emergence of a new legal mechanism to confront racial inequality, and as *Obergefell v. Hodges* enumerated that same-sex marriage is a constitutional right, . . . *Foster* . . . similarly provides principles that forge important ground in the climate trust campaign.

However, the Washington Court of Appeals concluded that the Superior Court "abused its discretion" and reversed the decision in an unpublished order. *Foster v. Dep't of Ecology*, 2017 Wash. App. LEXIS 2083, at *17 (Wash. Ct. App. Sept. 5, 2017). The Court of Appeals concluded that, though the case involved a violation of the Washington Administrative Procedure Act, the Superior Court never established an APA violation; it did not adequately determine that "extraordinary circumstances" justified an order granting relief from its earlier judgment; and it was improper for the court to impose additional duties in such an order. *Id.* Outcomes in cases like *Foster*, while worth discussion given the comparative paucity of scholarship on state administrative law, *see* Jeffrey S. Sutton & John L. Rockenbach, *Respect and Deference in American Administrative Law*, 102 B.U.L. REV. 1937, 1938–39 (2022), are excluded from this survey.

A. PUBLIC TRUST AND IMPLIED RIGHTS LITIGATION

In the last decade, climate litigants have brought a significant number of lawsuits that have argued that the federal and state governments have neglected their duty to protect them from environmental degradation. In these cases, plaintiffs have centered their claims on alleged violations of the public trust,[35] infringements on their rights to substantive due process[36] or equal protection,[37] or some combination of the two.[38]

The public trust, which has been written about *ad nauseum*,[39] can be briefly described as a legal principle that the government serves as a quasi-trustee of natural resources for the benefit of the public.[40] Because the American conception of the public trust has traditionally encompassed shorelines and the lands "lying beneath navigable waters,"[41] not the atmosphere,[42] plaintiffs raising public trust-based claims commonly argued that the doctrine *also* encompassed the atmosphere and required the state, as trustee, to act as the public's fiduciary like it would in the context of a private trust.[43]

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35 *See, e.g.*, Chernaik v. Brown, 475 P.3d 68, 71 (Or. 2020) (arguing that "the state was required to act as a trustee under the public trust doctrine to protect various natural resources in Oregon from substantial impairment due to greenhouse gas emissions and resultant climate change and ocean acidification").

36 *See, e.g.*, Sagoonick v. State, 503 P.3d 777, 791 (Alaska 2022) (arguing that they have a "fundamental and inalienable constitutional right[] to . . . a stable climate system that sustains human life and liberty" that the state violated) (internal quotations omitted).

37 *See, e.g.*, Aji P. v. State, 480 P.3d 438, 455 (Wash. Ct. App. 2021) (arguing that their "right to equal protection of the law" under the Washington Constitution because "[t]he affirmative aggregate acts of Defendants [the State of Washington] reflect a *de facto* policy choice to favor the present generation's interests to the long-term detriment of" the plaintiffs) (internal quotations omitted).

38 *See, e.g.*, Juliana v. United States, 217 F. Supp. 3d 1224, 1261 (D. Or. 2016) [hereinafter *Juliana I*] (noting that "plaintiffs' public trust claims are properly categorized as substantive due process claims").

39 *See* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W.L. REV. 239, 239 & n.1 (1992) (collecting research about public trust doctrine).

40 Blumm & Wood, *supra* note **Error! Bookmark not defined.**, at 22 ("The modernized principle characterizes essential natural resources as part of an enduring ecological endowment—a 'trust'—and designates government actors as trustees over essential resources, charging them with fiduciary duties of protection and restoration to sustain these resources for the benefit of the present and future public.").

41 Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 727–28 (1986).

42 *See, e.g.*, J. B. Ruhl & Thomas A.J. McGinn, *The Roman Public Trust Doctrine: What Was It, and Does It Support an Atmospheric Trust?*, 47 ECOLOGY L.Q. 117, 143–45 (2020) ("[T]hey could not point to air as being part of [American public trust jurisprudence] history.").

43 *See, e.g.*, Sagoonick v. State, 503 P.3d 777, 806 (Alaska 2022) (considering whether the state has a duty to "maintain control over and protect Alaska's . . . atmosphere"); Aji P. v. State, 480 P.3d 438,

The rights-based claims have more diverse sources. When raising such claims, plaintiffs have argued that the federal and state government's actions—or, really, their *inaction*—have violated one or more of their fundamental rights. These claims have been commonly raised by youth plaintiffs, most notably in *Juliana* and its sister cases,[44] and have focused on violations of alleged rights to a stable climate system.[45]

Plaintiffs in these cases sought ambitious outcomes, both in terms of declaratory and injunctive relief. Their requests for declaratory relief usually centered around declarations of their rights, the federal or state government's duty to protect its people from climate change, and the scope of the public trust doctrine.[46] The requests for injunctive relief have usually included court

457–58 (Wash. Ct. App. 2021) ("[B]ecause Washington has not yet expanded the public trust doctrine to encompass the atmosphere, we disagree."); Chernaik v. Brown, 475 P.3d 68, 72–73 (Or. 2020) ("[P]laintiffs sought . . . [a] declaration that the atmosphere is a trust resource."); 217 F. Supp. 3d at 1255 ("The complaint alleges defendants violated their duties as trustees by failing to protect the atmosphere . . . ."); Sanders-Reed v. Martinez, 350 P.3d 1221, 1222–23 (N.M. 2015) ("Plaintiffs' original complaint asked the district court to declare that the State has a public trust duty to protect the atmosphere . . . ."); Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1091 (Alaska 2014) ("The minors also sought a declaratory judgment on the nature of the State's duty to protect the atmosphere."); Svitak v. State, 2013 Wash. App. LEXIS 2836, at *3 (Wash. Ct. App. Dec. 16, 2013) ("[Plaintiff] sought a declaration that the public trust doctrine applies to the atmosphere."); Butler v. Brewer, 2013 Ariz. App. Unpub. LEXIS 272, at *1–2 (Ariz. Ct. App. Mar. 14, 2013) ("[Plaintiff] filed a complaint . . . requesting the superior court to declare the . . . atmosphere is a public trust asset."); Filippone v. Iowa Dep't of Nat. Res., 2013 Iowa App. LEXIS 279, at *5–7 (Iowa Ct. App. Mar. 13, 2013) ("[Plaintiff] also argues . . . the public trust doctrine applies to the atmosphere."); Aronow v. State, 2012 Minn. App. Unpub. LEXIS 961, at *7 (Minn. Ct. App. Oct. 1, 2012) ("His complaint repeatedly alleges only that the atmosphere is included in the natural resources protected by the public-trust doctrine."); Alec L. v. Jackson, 863 F. Supp. 2d 11, 13–14 (D.D.C. 2012) ("[Plaintiffs] have cited no cases . . . that have expanded the [public trust] doctrine to protect the environment.").

44 For example, Juliana and Chernaik involved overlapping plaintiffs with overlapping claims that were raised against different sovereigns. *See* James Conca, *In Court Fight, Two Women Aim to Force Oregon to Protect the Atmosphere*, FORBES (Apr. 14, 2015), https://www.forbes.com/sites/jamesconca/2015/04/14/protecting-the-atmosphere-puts-climate-change-back-in-court/?sh=c41baf4100f7 [https://perma.cc/H57R-SWJZ].

45 503 P.3d at 791 (considering a "fundamental and inalienable constitutional right[] to . . . a stable climate system that sustains human life and liberty"); 480 P.3d at 444–45 ("[F]undamental and inalienable constitutional right[] to . . . a healthful and pleasant environment, which includes a stable climate system that sustains human life and liberty."); *Juliana I*, 217 F. Supp. 3d at 1250 (framing "the fundamental right at issue as the right to a climate system capable of sustaining human life"); 2013 Iowa App. LEXIS 279, at *5 ("[C]onstitutionally-protected right to a life-sustaining atmosphere.").

46 *See, e.g.*, 503 P.3d at 791 (requesting declaration that: (1) they have a "fundamental and inalienable constitutional right[] to . . . a stable climate system that sustains human life and liberty; (2) the State has a duty under the public trust doctrine to protect Alaska's natural resources; (3) the State has exacerbated climate change in violation of plaintiffs' individual constitutional rights; (4) the State

orders that the government prepare "a complete and accurate accounting" of the jurisdiction's carbon emissions[47] and develop a plan to regularly reduce greenhouse gas emissions,[48] usually with continued oversight by the court.[49]

All of these cases have been unsuccessful. Turning first to the causes of action themselves, some courts were open to the possibility of expanding the scope of the public trust to include the atmosphere,[50] leading some commentators to declare that atmospheric trust litigation "has made significant progress in advancing its theory in U.S. and foreign domestic courts."[51] Yet most courts ultimately rejected these arguments. Several did

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has put plaintiffs in danger by failing to reduce Alaska's carbon emissions; (5) the State has discriminated against plaintiffs as members of a protected age-based class who will suffer from climate change effects for a longer period of time than will older people; (6) the State has violated its duty to protect Alaska's natural resources; and (7) the Department's denial of the rule-making petition violated plaintiffs' individual constitutional rights").

47 *See, e.g.*, 503 P.3d at 791; 475 P.3d at 72; 350 P.3d at 1223; 335 P.3d at 1091.

48 *See, e.g.*, 503 P.3d at 791 ("[D]evelop and submit to the court 'an enforceable state climate recovery plan . . . consistent with global emissions reductions rates necessary to stabilize the climate system.'"); 480 P.3d at 445 ("'[D]evelop and submit to the [c]ourt . . . an enforceable state climate recovery plan . . . .'"); 475 P.3d at 72 ("[I]mplement a carbon reduction plan protecting the natural resources . . . ."); Juliana II, 947 F.3d 1159, 1170 (9th Cir. 2020) ("[C]ease permitting, authorizing, and subsidizing fossil fuel use, but also to prepare a plan subject to judicial approval to draw down harmful emissions."); 350 P.3d at 1223 ("[P]lans for redressing and preventing the impairment to the atmosphere caused by greenhouse gases, thereby mitigating the effects of climate change."); 335 P.3d at 1091 ("[R]educe the carbon dioxide emissions from Alaska by at least 6% per year from 2013 through at least 2050 . . . ."); 2013 Wash. App. LEXIS 2836, at *7 ("[R]educe carbon dioxide emissions by six percent per year to achieve a certain numeric goal of carbon dioxide atmospheric concentration by the year 2100"); 2013 Ariz. App. Unpub. LEXIS 272, at *1–2 (seeking an order "mandating that the Defendants institute reductions in Carbon Dioxide (CO2) emissions in Arizona of at least six percent on an annual basis"); 2013 Iowa App. LEXIS 279, at *2 (requiring the Iowa Department of Natural Resources to "adopt new rules restricting greenhouse gas emissions"); 2012 Minn. App. Unpub. LEXIS 961, at *3 ("'Compel [respondents] to take the necessary steps to reduce the State's carbon dioxide output by at least 6% per year, from 2013 to 2050, in order to help stabilize and eventually reduce the amount of carbon dioxide in the atmosphere.'"); *see also* Iowa Citizens for Cmty. Improvement v. State, 962 N.W.2d 780, 785 (Iowa 2021) (describing the desire of two social justice organizations to "force the defendants to enact legislation that will compel Iowa farmers to take steps that will have the effect of significantly reducing levels of nitrogen and phosphorous in the Raccoon River").

49 *See, e.g.*, 480 P.3d at 445 (detailing the request to the court to "'[r]etain jurisdiction over this action to approve, monitor and enforce compliance' therewith"); 475 P.3d at 72 (describing the plaintiffs' request for a carbon reduction plan "which the court would supervise to ensure enforcement").

50 *E.g.*, 350 P.3d at 1225 ("We agree that Article XX, Section 21 of our state constitution recognizes that a public trust duty exists for the protection of New Mexico's natural resources, including the atmosphere, for the benefit of the people of this state.").

51 Randall S. Abate, *Atmospheric Trust Litigation in the United States: Pipe Dream or Pipeline to Justice for Future Generations?*, *in* CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES 543, 561 (Randall S. Abate ed., 2016) (describing the transition of climate justice litigation in the United States and the success of atmospheric trust litigation).

so on the merits,[52] but others did so on jurisprudential grounds.[53] Courts were warier of incorporating private trust principles into the public trust doctrine[54] and in recognizing the rights asserted by plaintiffs.[55]

In virtually all of these cases, however, the failure was ultimately tied not to the merits of the claims themselves, but to the infeasibility or impracticability of the relief. When *Juliana II*, the most prominent climate case before *Held*, was appealed to the Ninth Circuit, the panel held that—though plaintiffs had suffered "a concrete and particularized injury" that was causally connected to the government's actions[56]—their proposed remedy would not redress their injuries. The majority concluded that "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan," which consisted of a "comprehensive scheme to decrease fossil fuel emissions and combat climate change."[57]

Similar concerns echoed throughout the other cases. While the Oregon Supreme Court sidestepped the separation-of-powers claim by rejecting the

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52 480 P.3d at 457–58 (affirming a rejection of the youths' claims on the public trust doctrine); 475 P.3d at 80–82 (rejecting the plaintiffs' desired expansion of the resources included in the public trust doctrine); 2013 Iowa App. LEXIS 279, at *5–6 (affirming the lower court's conclusion that the Iowa Department of Natural Resources (DNR) gave fair consideration to the appellant's petition to adopt new rules on emissions).

53 Alec L. v. Jackson, 863 F. Supp. 2d 11, 15 (D.D.C. 2012) (concluding that an alleged violation of the public trust doctrine had not "raised a federal question to invoke this Court's jurisdiction"); 2013 Ariz. App. Unpub. LEXIS 272, at *25 (concluding that the plaintiff was challenging state *inaction*, not action, and lacked a justiciable claim); 2013 Wash. App. LEXIS 2836, at *8–9 (failing Svitak's claim as a matter of law in its not challenging any affirmative state action); 2012 Minn. App. Unpub. LEXIS 961, at *6–7 (concluding that the court was without the power to expand the public trust to include the atmosphere because "[t]he authority to create new law rests not in this court [the Court of Appeals] but in the legislature and supreme court").

54 *See, e.g.*, 475 P.3d at 83 (rejecting "plaintiffs' argument in this case that the public trust doctrine imposes obligations on the state like those that trustees of private trusts owe to trust beneficiaries").

55 *See, e.g.*, 480 P.3d at 452–55 (rejecting claim that the Washington Constitution "provide[s] a fundamental right to a healthful and peaceful environment").

56 947 F.3d at 1168–69 (acknowledging the case's more difficult question as not whether the plaintiffs met the injury requirement, but whether the plaintiffs' claimed injuries were redressable by an Article III court).

57 *Id.* at 1171. After the panel decision, the District of Oregon allowed the plaintiffs to amend their complaint. In the *Juliana* plaintiffs' second amended complaint, they focused on declaratory relief, seeking a declaration that "'the national energy system' violates the Constitution and the public trust doctrine." Juliana v. United States, No. 6:15-cv-01517-AA, at *28 (D. Or. Dec. 29, 2023), https://fingfx.thomsonreuters.com/gfx/legaldocs/myvmkmwezvr/Juliana%20v%20United%20States%20-%20D.Oregon%20-%2020231230.pdf [https://perma.cc/42PU-295W]. On December 29, 2023, the court largely denied the government's motion to dismiss, allowing the case to proceed to trial. *See id.* at 48–49.

public-trust expansion on the merits,[58] most courts balanced sympathy for the plaintiffs' claims with consternation at the injunctive relief that the plaintiffs were seeking.[59] And once the requested injunctive relief was knocked out as a non-justiciable political question,[60] the declaratory relief—usually consisting of recognition of rights and state duties—no longer presented a justiciable case or controversy.[61] In *Sagoonick*, for example, the Alaska Supreme Court noted that the "declaratory relief claims . . . do not necessarily present non-justiciable political questions," because the plaintiffs sought "an interpretation of the Alaska Constitution," and the court has "a 'constitutionally mandated duty to ensure [executive and legislative branch] compliance with the provisions of the Alaska Constitution.'"[62] However, the court concluded that the claims, in the absence of injunctive relief, did not "present an actual controversy."[63] Granting the requested declaratory relief "would not compel the State to take any particular action, [] would not protect the plaintiffs from the injuries they allege[,]" and "would not tell the State how to fulfill its constitutional obligations or help plaintiffs determine when their constitutional rights [had] been violated."[64] Accordingly, "[w]ithout judicially enforceable standards, which the political question doctrine prevents us from developing, declaring the existence or even violation of plaintiffs' various purported constitutional rights would not settle the parties' legal relations[.]"[65]

In sum total, the public trust- and implied rights-based climate cases were roundly rejected by virtually every court that heard them. These rejections sometimes reached the merits of the underlying claims, but were largely resolved on standing or prudential grounds.

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58 475 P.3d at 83 (rejecting the plaintiffs' argument about the scope of the public trust doctrine's imposed duties on the state).

59 *E.g.*, 480 P.3d at 458 ("The Youths deserve a stable environment and a legislative and executive branch that work hard to preserve it. However, this court is not the vehicle by which the Youths may establish and enforce their policy goals. Because resolution of the Youths' claims would require this court to violate the separation of powers doctrine, we affirm.").

60 *E.g.*, 503 P.3d at 795–99; 480 P.3d at 447–51; Iowa Citizens for Cmty. Improvement v. State, 962 N.W.2d 780, 794–99 (Iowa 2021); Kanuk v. State, Dep't of Nat. Res., 335 P.3d 1088, 1096–99 (Alaska 2014); Svitak v. State, 2013 Wash. App. LEXIS 2836, at *5 (Wash. Ct. App. Dec. 16, 2013); *see also* 947 F.3d at 1173; Sanders-Reed v. Martinez, 350 P.3d 1221, 1226–27 (N.M. 2015).

61 503 P.3d at 799–801; 480 P.3d at 451–42; 962 N.W.2d at 793–94; 947 F.3d at 1170; 335 P.3d at 1099–1103.

62 503 P.3d at 799 (citation omitted).

63 *Id.* at 800.

64 *Id.* at 801 (internal quotation and citation omitted).

65 *Id.*

B. LITIGATION UNDER ENVIRONMENTAL RIGHTS PROVISIONS

In eight states and territories throughout the country—Hawai'i, Illinois, Massachusetts, Montana, New York, the Northern Mariana Islands, Pennsylvania, and Rhode Island—residents enjoy some protection of environmental rights in their constitutions.[66] Of these eight jurisdictions, only Hawai'i, Montana, and Pennsylvania have seen state courts develop the meaning of these provisions.[67] In the remaining states, there has been little significant caselaw that has interpreted or applied the constitution's environmental-rights provision.[68]

Prior to *Held v. State*, these rights were not invoked in the specific context of climate litigation. Instead, they were largely used, with varying degrees of success, to challenge either individual actions of the government, including those of regulatory agencies,[69] or the constitutionality of specific pieces of legislation.[70]

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66 HAW. CONST. art. XI, § 9; ILL. CONST. art. XI, § 2; MASS. CONST. amend. art. XCVII; MONT. CONST. art. II, § 3; N.Y. CONST. art. I, § 19; N. MAR. I. CONST. art. I, § 9; PA. CONST. art. I, § 27; R.I. CONST. art. I, § 17.

67 Yeargain, *supra* note 5, at 36–42; Polk, *supra* note 3, at 130–55.

68 Polk, *supra* note 3, at 155–61 (discussing the development of case law in Massachusetts); *id.* at 161–64 (discussing the development of case law in Illinois). New York's provision, which was just ratified in 2021, is too new to have produced significant litigation. The Northern Mariana Islands Supreme Court articulated a broad vision of the territorial constitution's environmental-rights provision in 1992—the first jurisdiction in the United States to do so. Its decision in *Govendo v. Marianas Public Land Corporation* held that if the right "is violated by either a private person, private entity, or government agency," or if "a proposed government or private activity which, if allowed, would adversely and unconstitutionally affect the cleanliness of the air, land, or water," "then a private person or the government, its proper agencies and instrumentalities, may bring an action to enjoin such violation and recover damages for injuries sustained." 2 Mar. I. 482, 501–02 (N. Mar. I. 1992). However, no significant litigation has taken place after the decision in *Govendo*. Finally, though including Rhode Island in the list of states with environmental-rights provisions is debatable, *see* Polk, *supra* note 3, at 127 n.17 (declining to do so because Rhode Island's right is a "'privilege right,' not a 'claim right,'"), in any event, Rhode Island has failed to see significant development of its right, however conceived. PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION 102–10 (2007).

69 *See, e.g.*, MEIC, 988 P.2d 1236, 1239 (Mont. 1999) (challenging the Montana Department of Environmental Quality's issuance of a license for gold mining); N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs, 288 P.3d 169, 171 (Mont. 2012) (challenging the State Land Board's decision to enter into a lease of state land with a coal company); Park Cnty. Env't Council v. Mont. Dep't of Env't Quality, 477 P.3d 288, 294–95 (Mont. 2020) (challenging DEQ's issuance of a mining exploration license); MECO, 408 P.3d 1, 23 (Haw. 2017) (challenging Hawai'i Public Utility Commission's approval of a power purchase agreement with an energy producer).

70 988 P.2d at 1239 (challenging constitutionality of the Water Quality Act, MONT. CODE ANN. § 75-5-317(2)(j) (1995)); Robinson Twp. v. Commonwealth, 83 A.3d 901, 951–52 (Pa. 2013) (challenging individual provisions of the Pennsylvania Oil and Gas Act); PEDF II, 161 A.3d 911 (challenging individual provisions of Pennsylvania law regarding the distribution of oil and gas royalties).

The outcome of this litigation has been largely constructive. The successes include decisions that:

- struck down a statute in a facial constitutional challenge that exempted certain activities from environmental review;[71]
- allowed private landowners to pursue a private right of action to enforce a permitting requirement;[72]
- struck down a statute that pre-empted municipal governments from regulating oil and gas operations;[73]
- struck down statutes that redirected royalties from oil and gas extraction from conservation purposes into the state general fund;[74]
- allowed an environmental advocacy group to intervene in a public utility commission proceeding[75] and simultaneously required the commission to consider greenhouse gas emission reduction in its decision-making;[76] and
- struck down a statute that barred equitable remedies for state environmental policy act violations.[77]

The state supreme courts vindicating these rights have used lofty language to speak about the importance of the rights at stake,[78] the

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71 988 P.2d at 1249.

72 Cnty. of Haw. v. Ala Loop Homeowners, 235 P.3d 1103, 1137 (Haw. 2010).

73 83 A.3d at 951–52.

74 161 A.3d at 938; PEDF IV, 255 A.3d 289, 293 (Pa. 2021).

75 408 P.3d at 23. Significantly, the Hawai'i Constitution's environmental rights provision makes clear that "a clean and healthful environment" is "defined by laws relating to environmental quality . . . ." HAW. CONST. art. XI, § 9. Accordingly, the scope of what is protected by this right is "defined in reference to laws related to environmental quality," 408 P.3d at 13, an exercise that requires the Hawai'i Supreme Court to determine whether an invoked law is "relat[ed] to environmental quality." *See, e.g.*, 235 P.3d at 1121–22 (quoting HAW. CONST. art. XI, § 9).

76 408 P.3d at 16; HELCO, 445 P.3d 673, 697–98 (Haw. 2019); In re. Gas Co., 465 P.3d 633, 650–51 (Haw. 2020).

77 Park Cnty. Env't Council v. Dep't Env't Quality, 477 P.3d 288, 310–11 (Mont. 2020).

78 MEIC, 988 P.2d 1236, 1249 (Mont. 1999) ("Our constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked."); 477 P.3d at 304 ("Montanans' right to a clean and healthful environment is complemented by an affirmative duty upon their government to take active steps to realize this right."); 83 A.3d at 963 ("The drafters and the citizens of the Commonwealth who ratified the Environmental Rights Amendment, aware of this history, articulated the people's rights and the government's duties to the people in broad and flexible terms that would permit not only reactive but also anticipatory protection of the environment for the benefit of current and future generations."); *see also* HELCO II, 526 P.3d 329, 369 (Haw. 2023) (Wilson, J., concurring) ("It is beyond cavil that a life-sustaining climate system is implicit in the concept of ordered liberty and lies 'at the base of all our civil and political institutions.' Indeed, a stable climate is the foundation upon which society and civilization exist in Hawai'i and throughout the globe.") (citation omitted).

uniqueness of the provisions,[79] and the reasons for their addition to the constitutional text by the drafters.[80] These decisions have been described by courts and commentators as "landmark" decisions.[81] Yet the tangible outcomes of these cases, while positive, have been quite limited—and intertwined amidst the judicial flourishes are clear warning signs that the rights cannot be used to achieve broader change.

Challenges to permitting decisions, public utility commission actions, and discrete statutes can certainly help produce better-functioning environmental policy and mitigate the effects of climate change. Reforms to public utility regulation and permitting have been rightly heralded as necessary pieces of any comprehensive climate policy.[82] But *pieces* of an approach should not be confused with the approach itself. Indeed, Professor Amber Polk has observed that the product of environmental-rights litigation has been the creation of rights to procedure or process, not substance.[83]

Moreover, there appear to be limits to how far these courts may be willing to go in vindicating their constitutions' environmental rights. In *Robinson Township*, the Pennsylvania Supreme Court's heralded decision that struck

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79 83 A.3d at 962 ("The decision to affirm the people's environmental rights in a Declaration or Bill of Rights, alongside political rights, is relatively rare in American constitutional law.").

80 988 P.2d at 1246–49 ("We conclude, based on the eloquent record of the Montana Constitutional Convention . . . that the delegates' intention was to provide language and protections which are both anticipatory and preventative. The delegates did not intend to merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment."); 235 P.3d at 1121, 1125–29; 408 P.3d at 13; 83 A.3d at 951–63.

81 *See, e.g.*, ION Geophysical Corp. v. Hempfield Twp., No. 14-410, 2014 U.S. Dist. LEXIS 49549, at *17 (W.D. Pa. Apr. 10, 2014); Pa. Env't Def. Found. v. Commonwealth ("PEDF VI"), 279 A.3d 1194, 1199 (Pa. 2022); John C. Dernbach et al., *Recognition of Environmental Rights for Pennsylvania Citizens: Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 70 RUTGERS UNIV. L. REV. 803, 806, 813, 856 (2018); Martha F. Davis, *Hawaii Supreme Court Takes on the Climate Crisis*, STATE CT. REP. (Apr. 5, 2023), https://statecourtreport.org/our-work/analysis-opinion/hawaii-supreme-court-takes-climate-crisis [https://perma.cc/U7QE-4TCB] (noting the "remarkable concurrence by Justice Michael Wilson" in *HELCO II*).

82 *See, e.g.*, Shelley Welton, *Rethinking Grid Governance for the Climate Change Era*, 109 CAL. L. REV. 209, 264–73 (2021); Daniel C. Esty, *Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability*, 47 ENV'T L. 1, 21–22 (2017); Inara Scott, *Teaching an Old Dog New Tricks: Adapting Public Utility Commission to Meet Twenty-First Century Climate Challenges*, 38 HARV. ENV'T L. REV. 371, 400–11 (2014). *But see* David E. Adelman, *Permitting Reform's False Choice* 33–38 (Aug. 14, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4540734 [https://perma.cc/7DA8-6C6A] (arguing that the perceived need for permitting reform is overstated).

83 Polk, *supra* note 3, at 165–66 ("The first lesson from the states is that courts interpret their constitutional environmental rights as essentially procedural, not substantive, rights . . . . Procedural environmental rights focus not on substantive environmental outcomes but on citizens' access to information, participation in decision-making, access to justice, and remedies for environmental harms."); *see also* Yeargain, *supra* note 5, at 36 (arguing that "[environmental] rights frequently became rights to a *process* in setting environmental policy, not rights to substance or an outcome").

down parts of the state's Oil and Gas Act, the court took pains to note that its interpretation of the state constitution's environmental rights provision did *not* require the state to stop its use of fossil fuels.[84] "The Environmental Rights Amendment does not call for a stagnant landscape," the court explained, and the directive of the public trust, created by the provision, "to conserve and maintain public natural resources *do not require a freeze of the existing public natural resource stock*."[85] Moreover, as I have pointed out,[86] the high words of the *Robinson Township* decision were undermined significantly by the court's follow-up decision in *Frederick v. Allegheny Township Zoning Hearing Board*—in which it upheld a municipality's decision to make "oil and gas development a permitted use by right in all Zoning Districts[.]"[87]

Moreover, while the Pennsylvania Supreme Court has articulated a broad commitment to the public trust doctrine encompassed in the rights provision,[88] its ability to follow through on that commitment is left lacking. In a series of cases brought by the Pennsylvania Environmental Defense Foundation (PEDF), the court addressed the appropriate use of proceeds—including royalties and lease payments—from oil and gas extraction on state lands. The state legislature had transferred the proceeds to the state's general fund, where they could be expended for any purpose,[89] and the PEDF challenged these transfers. The court held that the royalty payments were properly understood as trust assets and must "be used for conservation and maintenance purposes."[90] It remanded to the appellate court to determine whether the other "revenue streams," like "upfront bonus payments, yearly rental fees, and interest penalties for late payments,"[91] were likewise part of the trust.[92] In a successive case, it concluded that they were.[93]

The legislature's response to the litigation was to adopt a series of statutory changes—including the use of oil and gas lease fund proceeds to pay for the general operations of the Department of Conservation and

84 83 A.3d at 953.

85 *Id.*; *id.* at 958 (emphasis added).

86 Yeargain, *supra* note 5, at 41–42 (discussing *Robinson Township* and its progeny).

87 Frederick v. Allegheny Twp. Zoning Hearing Bd., 196 A.3d 677, 680 (Pa. Commw. Ct. 2018) (internal quotation omitted).

88 83 A.3d at 951–63.

89 John C. Dernbach, *The Potential Meanings of a Constitutional Public Trust*, 45 ENV'T L. 463, 488 (2015).

90 PEDF II, 161 A.3d 911, 934–35 (Pa. 2017).

91 PEDF IV, 255 A.3d 289, 292 (Pa. 2021).

92 161 A.3d at 935.

93 255 A.3d at 293.

Natural Resources[94]—which were, in turn, challenged yet again by the PEDF.[95]

But this time, the court rejected the challenge. It noted that the usage of trust assets to fund the DCNR was of no moment because "basic trust law clearly empowers the Commonwealth, as trustee, to incur reasonable costs in administering the trust to conserve and maintain Pennsylvania's public natural resources."[96] The alleged comingling of trust and non-trust assets was not a basis for invalidating the fund's fiscal structure, either, because the state was required to engage in an accounting to ensure compliance with trust principles, even if state law did not expressly require it to.[97] In sum, as Justice Kevin Dougherty noted in dissent, the court's opinion allowed the DCNR to use trust assets—proceeds from oil and gas leases—to support its mission generally, which extends beyond its trustee duties,[98] and to "shift[] the cost burden for enforcing the Commonwealth's constitutional fiduciary duties to third parties who must then find and spend funds and other resources needed to challenge the legislation in court."[99]

An even starker example comes from Montana. Though the Montana Supreme Court recognized its environmental rights provision as a fundamental right—specifically noting that "[o]ur constitution does not require that dead fish float on the surface of our state's rivers and streams before its farsighted environmental protections can be invoked"[100]—its subsequent cases demonstrated a general ambivalence toward the right. In a 2012 decision, the court rejected a challenge to leases that the state land board entered into with a private coal company, noting that the lease did not exempt the company from any environmental review required under state law.[101] Yet a central component of the Northern Plains Resource Council's challenge to the lease was that "mining and burning the coal may result in a broad range of environmental and other effects including air and water pollution, boom and bust economic cycles and global warming,"[102] a claim that the Montana Supreme Court did not meaningfully address.

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94 H.B. 674, Act No. 44, 2017 Pa. Laws 725.

95 PEDF VI, 279 A.3d 1194, at 1203–06 (Pa. 2022).

96 *Id.* at 1205.

97 *Id.* at 1212–13.

98 *Id.* at 1223–24 (Dougherty, J., dissenting) (citing 71 P.S. § 1340.101(b)).

99 *Id.* at 1235 n.39.

100 MEIC, 988 P.2d 1236, 1249 (Mont. 1999).

101 N. Plains Res. Council, Inc. v. Mont. Bd. of Land Comm'rs, 288 P.3d 169, 173–75 (Mont. 2012).

102 *Id.* at 172.

The requests of the plaintiffs in both cases described above were comparatively narrow. The Pennsylvania Environmental Defense Foundation sought to restrict the Pennsylvania Department of Conservation and Natural Resources' use of trust assets for trust purposes or management—and to avoid the comingling of trust and non-trust assets. The Northern Plains Resource Council sought to invalidate a coal lease entered into by the Montana Board of Land Commissioners—which, if followed through, would inevitably increase the state's greenhouse gas emissions. If *those* challenges could not be sustained on the grounds that they violated each state constitution's protection of environmental rights, a broader challenge would be an even longer shot.

C. THE OVERBLOWN OUTCOME OF *HELD V. STATE*

Held v. State was the first climate case brought in a state on the basis of a state constitution's express environmental-rights provision. In *Held*, a group of youth plaintiffs, represented by Our Children's Trust, challenged Montana's State Energy Policy and the "climate change exception" to the Montana Environmental Policy Act before the First Judicial District Court, based in Lewis and Clark County.[103] The energy policy—which was repealed in 2023, as the litigation was ongoing[104]—was a nonbinding policy statement that represented the state's goals in energy development.[105] The energy policy included a variety of priorities, many of which were centered

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103 Held v. State Complaint, *supra* note 7, at 35.

104 H.B. 170, ch. 73, 68th Leg., Reg. Sess., 2023 Mont. Laws. [Not yet on HeinOnline]. The reasons for the repeal are not entirely clear. The repeal was backed by Republican Governor Greg Gianforte, and his allies in the legislature argued that the energy policy was "a bag of air" without any force behind it, and that repealing it was consistent with the Governor's "red tape reduction plan." Keila Szpaller, *Bill to Abolish Montana Energy Policy Sparks Debate About Climate, Separation of Powers*, DAILY MONTANAN (Jan. 11, 2023, 7:16 PM), https://dailymontanan.com/2023/01/11/bill-to-abolish-montana-energy-policy-sparks-debate-about-climate-separation-of-powers/ [https://perma.cc/6FEK-6G4T]. The timing of the repeal led some observers to suggest that it was connected to the *Held* litigation. *See* Dana Drugmand, *Montana Repeals State Energy Policy as Climate Trial Nears*, DESMOG (Apr. 3, 2023, 1:46 PM), https://www.desmog.com/2023/04/03/montana-repeals-state-energy-policy-as-climate-trial-nears/ [https://perma.cc/WQ6Q-UFUW] (citing an expert witness in *Held* who noted the correlation between the repeal and the *Held* litigation). In the leadup to the trial, the court dismissed the *Held* plaintiffs' claims about the State Energy Policy. Held v. State, No. CDV-2020-307, 3–4 (Mont. Dist. Ct. May 23, 2023), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230523_docket-CDV-2020-307_order.pdf [https://perma.cc/F8XJ-8EET].

105 *See, e.g.*, H.B. 170, ch. 291, 67th Leg., Reg. Sess., 2021 Mont. Laws 947, *codified at* MONT. CODE ANN. § 90-4-1001 (2021) (stating the energy policies of the state of Montana).

around fossil-fuel development,[106] but some of which also included broader statements about diversification, energy efficiency, and renewable energy production.[107] The climate change exception provided that, when environmental reviews were conducted under the state Environmental Policy Act, they "may not include an evaluation of greenhouse gas emissions and corresponding impacts to the climate in the state or beyond the state's borders,"[108] *unless* such analysis was required under a joint federal–state review or the Clean Air Act was amended to regulate carbon dioxide pollution.[109]

The *Held* plaintiffs argued that, though State Energy Policy ostensibly prioritized energy production that "represent[s] the least social, environmental, and economic costs and the greatest long-term benefits to Montana citizens,"[110] the Policy simultaneously "explicitly promotes the use of dangerous fossil fuels that cause numerous social, environmental, and economic costs and harms to the short- and long-term detriment of Montana citizens."[111] They argued that the state's "fossil fuel-based energy system is the result of Montana's State Energy Policy, and actions taken pursuant to that policy[.]"[112]

With respect to the climate change exception, the *Held* plaintiffs pointed out that, by refusing to consider the effects of proposed projects on greenhouse gas emissions, the state "deliberately ignored the dangerous impacts of the climate crisis."[113] They linked this to several decisions of the Department of Environmental Quality in the preceding decade, including a series of significant expansions of coal mining that would lead to sizable greenhouse gas emissions.[114]

Through the combination of the State Energy Policy and the climate change exception, the plaintiffs alleged that the state of Montana was

106 *See also*, MONT. CODE ANN. §§ 90-4-1001(1)(c)–(g) (2021) (prioritizing development of coal resources, including conversion to other products, and oil resources, and the expansion of "petroleum refining industry").

107 *See id.*, §§ (1)(a)–(b), (h)–(x) (prioritizing energy efficiency; diversification; development of biomass and wind energy; investment in transmission and distribution infrastructure; regional participation; research; minimization of effects on wildlife, agricultural activities, and property owners; and low electricity costs to consumers).

108 *Id.* § 75-1-201(2)(a).

109 *Id.* § (2)(b).

110 *Id.* § 90-4-1001(1)(a).

111 Held v. State Complaint, *supra* note 7, at 35.

112 *Id.* at 36.

113 *Id.* at 34.

114 *Id.* at 39–42.

"responsible for dangerous amounts of GHG emissions from Montana—both cumulative emissions and ongoing emissions, which in turn causes and contributes to the Youth Plaintiffs' injuries."[115] After detailing the extent of Montana's contribution to climate change and the unique effects that are, and will be, felt in the state,[116] the plaintiffs then reached their claims.

Most obviously, the *Held* plaintiffs first argued that the state's actions violated their state constitutional right to "a clean and healthful environment."[117] They connected this claim to the state legislature's obligation to "provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources,"[118] their right to due process,[119] and the extension of fundamental rights under the constitution to those under 18.[120]

Their second, third, and fourth claims hit similar notes—that the state's actions violated their right "to seek safety, health, and happiness" (Count II);[121] their right to "individual dignity and equal protection" (Count III);[122] and the state's obligations under the public trust doctrine (Count IV).[123]

The plaintiffs sought a combination of declaratory and equitable relief. They requested that the court strike down the State Energy Policy and the climate change exception—as well as a judicial recognition that their "fundamental constitutional right to a clean and healthful environment includes a stable climate system that sustains human lives and liberties and that said right is being violated."[124] If declaratory relief was awarded, they also requested that the state "prepare a complete and accurate accounting of Montana's GHG emissions"; "develop a remedial plan or policies to effectuate reductions of GHG emissions in Montana"; and that the court "retain[] jurisdiction over this action" as the plan is implemented.[125]

In response, the state defendants moved to dismiss the claims, arguing that the plaintiffs lacked standing, their claims were non-justiciable, and that

115 *Id.* at 44.

116 *Id.* at 44–90.

117 *Id.* at 91 (citing MONT. CONST. art. II, § 3).

118 MONT. CONST. art. IX, § 1.

119 *Id.* art. II, § 17.

120 *Id.* § 15.

121 Held v. State Complaint, *supra* note 7, at 93–95 (citing MONT. CONST. art. II, §§ 4, 15, 17; art. IX, § 1).

122 *Id.* at 95–98 (citing MONT. CONST. art. II, §§ 4, 15).

123 *Id.* at 98–102 (citing MONT. CONST. art. IX, §§ 1, 3).

124 *Id.* at 102–03.

125 *Id.* at 103.

they had failed to exhaust their administrative remedies.[126] The parties did not dispute that the plaintiffs had suffered injuries, but disagreed over causation and redressability.[127] In an order on the motion to dismiss issued on August 4, 2021, the court granted the motion in part and denied it in part.[128] The court rejected the argument that the plaintiffs lacked standing, concluding—as the Ninth Circuit did in *Juliana II*—that the plaintiffs' injuries were "fairly traceable" to the state's conduct.[129]

But unlike the *Juliana II* panel, the court here also concluded that the injuries were redressable by the requested relief. It concluded that Montana's legal standard for redressability was lower than the federal standard, insofar as plaintiffs merely needed to demonstrate that the relief "can effectively alleviate, remedy, or prevent" the injury, rather than a "likelihood" that the relief "will redress" the injury.[130] Accordingly, though the court declined to order any of the requested equitable relief, it concluded that, if it struck down the challenged statutes, that would establish redressability because the laws at issue "contributed to" the plaintiffs' injuries.[131]

However, the court reached the same conclusion that virtually every other court considering the same question has—that the requested equitable relief exceeded the court's powers. The requested "remedial plan violates the political question doctrine," it concluded, because ordering "a remedial plan or policies that adequately reduce GHG emissions to a constitutionally permissible level . . . would require the court to make or evaluate complex policy decision[s] entrusted to the discretion of other governmental branches."[132] Accordingly, the court granted the motion to dismiss with respect to the requested equitable relief, but denied it with respect to the declaratory relief.[133] Several months thereafter, the court scheduled a trial to take place—the first one in the country's history.[134]

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126 Held v. State Order on Motion to Dismiss, *supra* note 8, at 6–7.

127 *Id.* at 7.

128 *Id.* at 25.

129 *Id.* at 8–15.

130 *Id.* at 15 (citing Larson v. State, 434 P.3d 241, 262 (Mont. 2019)).

131 *Id.* at 16–17.

132 *Id.* at 21 (citations omitted).

133 *Id.* at 25.

134 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/RT35-3KH9].

The trial's conduct was widely reported[135]—and will not be recapped here. The outcome of the trial also received significant attention,[136] most of which missed the forest for the trees. First, the court held that the state constitutional protection of a "clean and healthful environment"[137] "includes climate as part of the environmental life-support system."[138] Second, the court struck down the climate change exception to the Montana Environmental Policy Act.[139]

That was it.[140]

The magnitude of the reaction to such a narrow ruling—which treated the outcome as a revolutionary event that would precipitate similar constitutional changes and even more litigation[141]—is genuinely difficult to fathom. If the result of over three years of litigation is that the state of Montana no longer prohibits environmental regulatory agencies from considering climate change in their environmental impact assessments, why should this be treated as a victory?

II. MISALIGNMENTS BETWEEN U.S. COURTS AND ENVIRONMENTAL RIGHTS

The "success" in *Held v. State* prompted Our Children's Trust—which has litigated many climate cases, including *Held*—to promise that further actions were forthcoming. But this proclamation fails to grapple with the narrowness of the case's outcome, as well as the widespread rejection of the claims raised in similar cases. Those advocating for the judiciary to take charge of climate policy by issuing orders to decarbonize have not articulated a theory that would overcome the basic prudential limitations that foreclose any such relief. Likewise, these cases are hobbled by the fact that

135 *See, e.g.*, Micah Drew, *Landmark Climate Trial Over. Youth Plaintiffs Describe It as 'Just the Beginning.'*, MONT. FREE PRESS (June 21, 2023), https://montanafreepress.org/2023/06/21/landmark-climate-trial-closes-in-montana/ [https://perma.cc/93YK-XPE7] (referencing the "national attention" the trial has received).

136 *Supra* INTRODUCTION.

137 MONT. CONST. art. II, § 3.

138 *Held v. State* Trial Court Order, *supra* note 10, at 102.

139 *Id.*

140 The decision was also appealed to the Montana Supreme Court. *See* Micah Drew, *State of Montana Appeals Landmark Climate Change Decision in Youth-Led Case*, FLATHEAD BEACON (Oct. 2, 2023), https://flatheadbeacon.com/2023/10/02/state-of-montana-appeals-landmark-climate-change-decision-in-youth-led-case/ [https://perma.cc/UNN8-7Y3S] ("The state filed its notice of appeal on Sept. 29 with the Montana Supreme Court, sending the Aug. 14 ruling by Lewis and Clark County District Judge Kathy Seeley to the state's high court.").

141 *Supra* INTRODUCTION.

empowering the judiciary to set climate policy would further entrench juristocracy in the United States—which could have significant harms in other areas of the law and policy.

In this Part, I argue that there are fundamental misalignments between U.S. courts and claims centered on environmental rights for two separate reasons. First, in Section A, I argue that these claims are unlikely to produce their intended outcomes—*i.e.*, court orders to produce widescale plans to decarbonize. While courts might be inclined to grant discrete, manageable requests for injunctive relief,[142] the idea that any court would order the federal government or a state government to massively reduce greenhouse gas emissions simply beggars belief. Well-established limitations on courts' jurisdiction and judicial powers—constitutional and prudential standing, as well as the political question doctrine[143]—constrain courts from issuing such an order.

Second, in Section B, I posit that even if courts *would* issue such an order, doing so would simply inject the judiciary into *another* policymaking arena, further strengthening juristocratic assumptions about how policy is made in the United States. American courts have assumed a growing and outsized role in policy discussions that would otherwise be left to the political branches, which some commentators have referred to as juristocracy[144] or judicial aggrandizement.[145] While judicial involvement in setting climate policy may not, itself, be problematic, it would likely invite similar participation in *other* areas of policy, which could have disastrous effects.

A. THE UNFRIENDLINESS OF U.S. COURTS TO ENVIRONMENTAL RIGHTS

Rights-based climate litigation has not been successful.[146] But this failure is not about any inadequacies with the specific cases that were brought—it's

142 John C. Dernbach & Patrick Parenteau, *Judicial Remedies for Climate Disruption*, 53 ENV'T L. REP. 10574, 10575–78 (2023).

143 *See, e.g.*, Daniel C. Esty, *Should Humanity Have Standing? Securing Environmental Rights in the United States*, 95 S. CAL. L. REV. 1345, 1366–71 (2022) (addressing the traditional restraint courts have shown in ruling in favor of climate plaintiffs, particularly due to the political questions doctrine).

144 RAN HIRSCHL, TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 1 (2004)

145 *See, e.g.*, Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. 125, 129–44 (2021) (describing the U.S. Supreme Court's strategy of "aggrandizing judicial institutions at the expense of Congress."); Allen C. Sumrall & Beau J. Baumann, *Clarifying Judicial Aggrandizement*, 172 U. PA. L. REV. ONLINE 24 (2023) (emphasizing the self-aggrandizement of the Roberts Court).

146 *Supra* PART I.

instead about the reality that U.S. courts are simply not going to grant the sprawling relief that the litigants have sought. Litigants in these cases have failed to convincingly explain why the injunctive or equitable relief they have sought is within the power of a court to award. And though few of these cases have been rejected for lack of standing, even if the litigants narrow the scope of their requested remedy to avoid other justiciability problems, they will likely face greater problems with standing, too.

Regardless of the wisdom of the constitutional and prudential limitations established by federal and state courts, justiciability is an omnipresent obstacle that climate litigants need to overcome—which they have had consistent difficulties doing.[147] The U.S. Supreme Court's three-part requirement for constitutional standing—injury, causation, and redressability[148]—has long been an obstacle to environmental litigation.[149] Federal and state standards for constitutional standing differ somewhat, and many states have adopted looser, more forgiving standards,[150] but the basic *requirements* of standing nonetheless persist.[151] Likewise, the Court's development of the political question doctrine in *Baker v. Carr* has generally barred consideration of political disputes.[152] While the political question

147 *See, e.g.*, Michael Burger, Jessica Wentz & Radley Horton, *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENV'T L. 57, 148 (2020) (noting that the "federal standards" for standing "are among the most restrictive in the world.")

148 Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992) (discussing redressability in the context of "asserted injury aris[ing] from the government's allegedly unlawful regulation (or lack thereof) of someone else") (emphasis omitted).

149 Burger, Wentz & Horton, *supra* note 147, at 149 (noting the difficulty of the particularized injury requirement for climate-based litigants in obtaining standing).

150 *See, e.g.*, Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1852–59 (2001) (discussing state court standing considerations); William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CAL. L. REV. 263, 286–94 (1990) (discussing state court autonomy and comparative case and controversy requirements); *see generally* Jack L. Landau, *State Constitutionalism and the Limits of Judicial Power*, 69 RUTGERS UNIV. L. REV. 1309 (2017) (discussing justiciability and standing limitations in state court); Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263 (2012) (discussing looser standing requirements in the context of taxpayer litigation); John DiManno, Note, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 CONN. L. REV. 639 (2008) (same, with respect to public interest litigation); Wyatt Sassman, *A Survey of Constitutional Standing in State Courts*, 8 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 349 (2015) (same, with respect to constitutional standing).

151 *Cf.* John C. Reitz, *Standing to Raise Constitutional Issues*, 50 AM. J. COMP. L. 437, 459–61 (2002) (discussing state provisions "for broad, general citizen standing to raise issues of great importance and interest to the public.")

152 Baker v. Carr, 369 U.S. 186, 217 (1962):

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department;

doctrine has not historically impeded much environmental litigation, it was extended to the context of climate litigation in *Juliana II*.[153] And while states have varied from the political question doctrine in some cases, most notably in the context of partisan gerrymandering,[154] many state courts have followed the Court's jurisprudence, too.[155]

Constitutional standing will almost always be a minefield in the context of climate litigation, regardless of whether it is predicated on the public trust, a new substantive due process right, or an express environmental-rights provision in a state constitution.[156] Standing featured most prominently in *Juliana II*, in which the Ninth Circuit held that the plaintiffs' injury was not redressable.[157] Most state courts hearing climate cases have either not discussed standing or have expressly held that the plaintiffs had standing under more permissive state conceptions of standing.[158]

> or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

See generally Curtis A. Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031 (2023) (surveying the invocation of the political question doctrine).

153 Juliana v. U.S., 947 F.3d 1159, 1173 (9th Cir. 2020) ("*Juliana II*") ("We doubt that any such plan can be supervised or enforced by an Article III court."); *see also* Michael Gentithes, *A Manageable Constitution*, 64 B.C. L. REV. 1331, 1349–52 (2023) (discussing the application of *Rucho* to environmental cases in *Juliana II*).

154 *See* Jonathan Cervas, Bernard Grofman & Scott Matsuda, *The Role of State Courts in Constraining Partisan Gerrymandering in Congressional Elections*, 21 U.N.H. L. REV. 421, 455–89 (2023) (comprehensively surveying partisan gerrymandering challenges in state courts after the 2020 redistricting cycle).

155 *See, e.g.*, Nat Stern, *Don't Answer That: Revisiting the Political Question Doctrine in State Courts*, 21 U. PA. J. CONST. L. 153, 180–88 (2018) (discussing "pervasive impact of federal precedent on state political question doctrine"); Daniel B. Rodriguez, *The Political Question Doctrine in State Constitutional Law*, 43 RUTGERS L.J. 573, 580 (2013) ("The vocabulary of the [state court] cases is drawn squarely from the key federal cases."); *see also* Bradley & Posner, *supra* note 152, at 1046 (noting some state courts "have looser justiciability limitations than the federal courts.") .

156 *See* Burger, Wentz & Horton, *supra* note 147, at 148–50 (discussing the injury-in-fact, causation, and redressability requirements of standing).

157 947 F.3d at 1173.

158 *See, e.g.*, Kanuk v. State, Dep't of Natural Res., 335 P.3d 1088, 1092–95 (Alaska 2014) (holding that the plaintiffs had "interest-injury standing," which requires that the plaintiffs show "sufficient personal stake in the outcome of the controversy to ensure the requisite adversity," which merely requires "identifiable trifle . . . to fight out a question of principle"). *But see* Butler v. Brewer, 2013 Ariz. App. Unpub. LEXIS 272, at *20 (Ariz. Ct. App. 2013) (determining that the plaintiff lacked standing under the state's Uniform Declaratory Judgments Act where the state government was statutorily "preclude[d] . . . from acting to redress [her] grievances").

Instead, where the litigation has been tossed on procedural or prudential grounds, the likelier culprit has been the political question doctrine or the broader concept of justiciability. These obstacles are likely to continue. Climate plaintiffs have not adequately explained why a court order that a government undertake massive decarbonization efforts is within the scope of judicial power. It's true that courts "often order remedial plans, supervise their implementation, and retain jurisdiction to supervise it," as commentators and the dissent in *Juliana II* have observed.[159] These critics have cited school desegregation following *Brown v. Board of Education*, as well as prison reform under *Brown v. Plata*, as examples of complex, judicially constructed remedial plans.[160] At the state level, litigants and critics alike have pointed to the willingness of state courts to operationalize state constitutional guarantees of public education to order changes to school funding structures.[161]

These analogies are inherently flawed—and, simultaneously, revealing of the logistical challenges that climate litigation faces. There are certainly facial similarities between a judicial order that a government must adopt a plan to reduce greenhouse gas emissions and the analogized contexts, whether a nationwide judicial order that public schools must integrate,[162] that a prison must reduce its population,[163] or that the state government must adequately fund public education.[164] All require the involvement of political actors to propose a remedial plan and the continued supervision of courts to approve and supervise the plan. Both also involve a significant intervention

159 *See, e.g.*, Oliver A. Houck, *Polluters Paradise: The Dark Canon of the United States Supreme Court in Pollution Control Law*, 72 AM. U. L. REV. 61, 133 (2022); 947 F.3d at 1188–91 (Staton, J., dissenting) ("[O]ur history is no stranger to widespread, programmatic changes in government functions ushered in by the judiciary[]").

160 *See id. See generally* Maxine Burkett, *Litigating Separate and Equal: Climate Justice and the Fourth Branch*, 72 STAN. L. REV. ONLINE 145 (2020) (drawing analogies between *Juliana* and *Brown v. Board of Education*).

161 Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 138–43 (1995) (discussing state holdings relating to educational funding and outcomes); William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J. L. & POL. 525, 529–34 (1998) (theorizing a way to approach school finance litigation that "balances the principles of judicial review and judicial restraint.").

162 Brown v. Bd. of Educ., 349 U.S. 294, 300 (1955) (requiring "admission to public schools as soon as practicable on a nondiscriminatory basis.")

163 Brown v. Plata, 563 U.S. 493, 541–45 (2011) ("[A] remedy will not be achieved without a reduction in overcrowding.".

164 *See, e.g.*, William Penn Sch. v. Pa. Dep't of Educ., 294 A.3d 537, 962–64 (Pa. Commw. 2023) (holding that the PA Constitution "requires that every student receive a meaningful opportunity to succeed academically, socially, and civilly, which requires that all students have access to a comprehensive, effective, and contemporary system of public education").

by courts into matters ordinarily reserved to determination by state and local officials—and, where federal courts are the ones issuing the orders, the intervention is exacerbated by the clash between federal judicial power and state sovereignty.[165]

But these analogized contexts involved *existing* government undertakings and agencies, not the creation of *new* actions or administrative structures. State and local governments have long been involved in the provision of education to all eligible students, which is recognized as one of the core duties of state governments.[166] Likewise, state governments have developed separate criminal legal systems, and have punished violations with incarceration, since the founding.[167] Moreover, state prison administration has been highly regulated and overseen by federal regulation, most notably the Prison Litigation Reform Act, for half a century—which authorizes federal courts to issue orders relating to prison conditions, including prison populations, under certain conditions.[168] So the outcomes in *Brown v. Board*, *Brown v. Plata*, and the host of state education-funding cases merely related back to preexisting undertakings of the government or powers of the judiciary.[169]

Most of the logistical complications of integrating schools, equalizing funding, or reducing a prison population, therefore, were borne by the governments themselves. This is not to say that private parties were not affected, or that they did not incur *any* of the complications in how these plans were administered—they certainly were, and they certainly did—but the effects on private parties did not really create new constitutional violations to be remedied. That is, the effects of these remedial plans did *not*

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165 *See, e.g.*, 563 U.S. at 560 (Alito, J., dissenting) ("It seems the Court's respect for state sovereignty has vanished in the case where it most matters.").

166 *See* Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 718–25 (2012) (noting various state constitutions' education provisions); Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915, 923–24 (2016) ("[T]he right to education is the most widely enshrined socio-economic right present, present in more than three-quarters of the world.") (cleaned up).

167 *See* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 VA. L. REV. 965, 978–87 (2019 (discussing the existence of judicial crime creation in states).

168 18 U.S.C. § 3626(a).

169 As the Alaska Supreme Court explained in *Sagoonick v. State*, where the legislature "authorize[s] the requested remedy," the "separation of powers concerns [are] less salient." However, where the remedy "require[s] courts to make decisions that [the constitution] has committed to the legislature, . . . separation of powers considerations therefore are clearly implicated." 503 P.3d 777, 798 (Alaska 2022).

create externalities that meaningfully infringed upon any citizens' individual rights or liberties.[170]

An order forcing massive decarbonization, on the other hand, would function quite differently. It would, as many of the courts rejecting climate cases have noted, require a massive governmental undertaking *that does not currently exist*.[171] The government would not be required to do something differently that it is already doing—much less that it has a *recognized* constitutional obligation to do[172]—but instead to undertake an entirely new activity, which would require the creation of a new regulatory structure.[173]

Consider, for example, the recent Intergovernmental Panel on Climate Change's Synthesis Report, which recommends "a substantial reduction in overall fossil fuel use,"[174] or the International Energy Agency's 2021 report on how to achieve net-zero carbon emissions by 2050, which is dependent on no new fossil-fuel development.[175] If the federal or state governments were to take drastic action to comply with these recommendations in a response to a court order, they could arguably violate the constitutional rights of the affected private parties.

Suppose that a government decided to cancel leases for fossil-fuel extraction on public lands. Doing so could violate the Takings Clause, the

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170 Free-association challenges to Brown v. Board's mandate, for example, as well as other anti-discrimination requirements, were largely rejected. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 176 (1976) (rejecting challenge of White parents to Black students' enrollment at their children's school); Roberts v. United States Jaycees, 468 U.S. 609, 620 (1984) (rejecting challenge of private civic organization to being forced to admit female members).

171 *See, e.g.*, Aji P. v. State, 480 P.3d 438, 447-48 (Wash. Ct. App. 2021):

> To provide the . . . requested relief, we would be required to order the executive branch, through the power vested in it by the legislature, and the legislative branch to create and implement legislation, or, as the Youths call it, a 'climate recovery plan.' For all intents and purposes, we would be writing legislation and requiring the legislature to enact it . . . . [W]e cannot create a regulatory regime to replace one already enacted by the legislature and state agencies without an initial policy determination of a kind clearly for nonjudicial discretion.

947 F.3d 1159, 1171 (9th Cir. 2020):

> [I]t is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches.

172 *See, e.g.*, Bauries, *supra* note 166, at 718–25 (describing state governments' duties in the context of public education).

173 *See* 480 P.3d at 447-48 ("resolving the Youth's claims would require the judiciary to legislate...we cannot create a regulatory regime to replace one already enacted by the legislature").

174 INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023: SYNTHESIS REPORT 23, 28 (2023), https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_FullVolume.pdf.

175 INT'L ENERGY AGENCY, NET ZERO BY 2050: A ROADMAP FOR THE GLOBAL ENERGY SECTOR

Contracts Clause, or state variants of either.[176] To the extent that the government, in developing a remedial plan to reduce greenhouse gas emissions, limits the activities that could be conducted on private lands, it could give rise to regulatory takings claims.[177] To the extent that the court itself imposes such a limitation, it could also give rise to a judicial takings claim.[178] I don't mean to suggest that I agree with the underlying merits of any such claims—I certainly don't—but they are certainly plausible bases on which the U.S. Supreme Court could step in to reverse a lower federal court's

176 *See, e.g.*, Erin Ryan, *Privatization, Public Commons, and the Takingsification of Environmental Law*, 171 U. PA. L. REV. 617, 626 (2023) ("Private parties that acquire rights to extract from natural resource commons may seek to protect them from interference by later environmental regulation under the Takings and Contract Clauses, as well as separate administrative law remedies."). In the context of state contracts clauses, which are widespread, states have largely lockstepped with U.S. Supreme Court jurisprudence, but could very well develop varied interpretations. *See, e.g.*, Gary M. Dreyer, Note, *After* Patel*: State Constitutional Law & Twenty-First Century Defense of Economic Liberty*, 14 N.Y.U. J. L. & LIBERTY 800, 836–40 (2021) (noting that forty states have separate contracts clauses); *see also* Anthony Sanders, *State Courts Should Reject Federal Precedent When Interpreting State Contract Clauses*, STATE CT. REP. (Nov. 30, 2023), https://statecourtreport.org/our-work/analysis-opinion/state-courts-should-reject-federal-precedent-when-interpreting-state.

177 *See* Lynda L. Butler, *Property's Problem with Extremes*, 55 WAKE FOREST L. REV. 1, 27–28 (2020) (arguing that the constitutional status of property Poses a problem when "addressing extreme or improbable events," like climate change, because government decisions that run afoul of property rights "rais[e] the costs to the government and to the rest of society for handling the impacts"). *Cf.* Ryan, *supra* note 176, at 626 (noting that private rights complicates environmental changes because private rights mean policies limiting action on private property have "potential takings and administrative law liabilities."). Though I imagine that any such claim would likely be rejected under the test for regulatory takings in *Penn Central* in most circumstances, it is possible that the 6–3 conservative majority on the U.S. Supreme Court could revisit *Penn Central*. *See, e.g.*, *Murr v. Wisconsin*, 582 U.S. 383, 419 (2017) (Thomas, J., dissenting) ("It would be desirable for us to take a fresh look at our regulatory takings jurisprudence, to see whether it can be grounded in the original public meaning of the Takings Clause of the Fifth Amendment or the Privileges or Immunities Clause of the Fourteenth Amendment.").

178 The U.S. Supreme Court has not articulated a judicial takings test, *see* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Protection, 560 U.S. 702, 734 (2010) (Kennedy, J., concurring), and since its decision in *Stop the Beach*, "no federal court of appeals has recognized this judicial-takings theory. What has occurred instead is avoidance: every circuit to consider the issue has expressly declined to decide whether judicial takings are cognizable." Pavlock v. Holcomb, 35 F.4th 581, 587 (7th Cir. 2022).

decision,[179] or that could allow the Court to reverse a state supreme court's decision.[180]

Of course, these constitutional risks are inherent in any environmental policies that the federal or state governments decide to adopt. But the adoption of a policy that constitutes a regulatory taking, or effects an actual taking, to achieve a broader goal reflects a calculated decision by policymakers—that is, that the policy's benefits outweigh the costs that the government will be forced to internalize. *Forcing* the government to adopt a certain balance that will require it to involuntarily undertake such a risk could very well constitute a "lack of respect due [to] coordinate branches of government," and thus run afoul of the political-question doctrine.[181]

Moreover, these analogies are deeply flawed for a reason that has nothing to do with the legal success of the litigation—the analogized contexts have not really produced the desired outcomes. If *Brown v. Board* is the role model for how courts could fashion remedial plans in climate litigation, then these plans would likely fail. *Brown*'s mandate produced well-known, well-publicized, massive resistance.[182] Several Southern states ratified state constitutional amendments expressly barring integration,[183] segregationist

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179 *See, e.g.*, SAMUEL MOYN & AARON BELKIN, TAKE BACK THE COURT, THE ROBERTS COURT WOULD LIKELY STRIKE DOWN CLIMATE CHANGE LEGISLATION 9–14 (Sept. 2019), https://static1.squarespace.com/static/60383088576eb25a150fab7f/t/6049332cd733411f1654d27d/1618527381533/Supreme%2Bcourt%2Bwill%2Boverturn%2Bclimate%2Blegislation.pdf (discussing the Court's approach to issues pertinent in climate change litigation).

180 *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 79–80 (1980) (accepting an appeal of a decision under 28 U.S.C. § 1257 where the California Supreme Court interpreted the state constitution to give petitioners "the right to solicit signatures on appellants' property in exercising their state rights of free expression and petition," which appellants challenged argued "violated [their] 'right to exclude others,' which is a fundamental component of their federally protected property rights.").

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

182 *See, e.g.*, Mark Golub, *Remembering Massive Resistance to School Desegregation*, 31 L. & HIST. REV. 491, 511–29 (2013) (discussing framing resistance in the context of a constitutional claim).

183 ALA. CONST. art. XIV, § 256 (amended 1956):

> To avoid confusion and disorder and to promote effective and economical planning for education, the legislature may authorize the parents or guardians of minors, who desire that such minors shall attend schools provided for their own race, to make election to that end, such election to be effective for such period and to such extend as the legislature may provide.

LA. CONST. of 1921, art. XII, § 1 (amended 1954):

> All public and elementary secondary schools in the State of Louisiana shall be operated separately for white and colored children. This provision is made in the exercise of the state police power to promote and protect public health, morals, better education and the peace and good order in the State, and not because of race.

LA. CONST. of 1921, art. X, § 5.1 (amended 1960):

political candidates wielded the specter of federal intervention in state activities to win elections,[184] and integration certainly did not happen "with all deliberate speed."[185] The delay in *Brown*'s enforcement lasted, as W.E.B. Du Bois predicted, "long enough to ruin the education of millions of black and white children."[186]

Yet even once compliance with *Brown* started, it never really began in earnest. Consistent judicial enforcement was nonexistent and the country's political institutions were only weakly committed to forcing compliance.[187] As a result, American schools have been effectively re-segregated,[188] and local integration efforts have been stymied by the U.S. Supreme Court's continued retreat from *Brown*'s basic principle, as demonstrated by Chief Justice John Roberts's pithy assertion that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[189] After all, as Roberts noted in a related context, in the 50 years after the Civil Rights Movement, "things have changed dramatically."[190]

The other analogies are similarly flawed. State litigation based on rights and guarantees to public education in state constitutions began after the U.S. Supreme Court's decision in *San Antonio Independent School District v.*

> Whenever one or more facilities of government for the maintenance of which a tax has been voted . . . which was segregated according to race by existing law . . . and ordered integrated . . . the governing authority of the political subdivision shall recall the appointment of all members of the commission or board[.]

184 *See, e.g.*, Dan T. Carter, *Legacy of Rage: George Wallace and the Transformation of American Politics*, 62 J. S. HIST. 3, 8–10 (1996) (discussing George Wallace's use of racial appeals following integration).

185 Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (requiring that lower courts "enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.").

186 W.E.B. DU BOIS, THE AUTOBIOGRAPHY OF W.E.B. DU BOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE OF ITS FIRST CENTURY 333 (1968).

187 *See, e.g.*, Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. 847, 883–914 (2018) (detailing the federal government's weak interpretation of *Brown*'s mandate and continued provision of federal aid to segregated schools into the 1960s); MATTHEW F. DELMONT, WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION 96–114 (2016) (discussing anti-HEW measures taken by states in opposition); Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the* Brown v. Board of Education *Decision*, 2004 U. ILL. L. REV. 1099, 1107–09 (2004) (discussing the initial "timidity" of the federal courts in enforcing Brown).

188 *See, e.g.*, Laura R. McNeal, *The Re-Segregation of Public Education Now and After the End of* Brown v. Board of Education, 41 EDUC. & URB. SOC'Y 562, 563 (2009) (noting "the large number of school systems still under court-ordered mandates to desegregate" and the continued operation of "dual school systems"); Feagin & Barnett, *supra* note 187, at 1114–24 (noting that disparate treatment of Black students in integrated schools constitutes a form of continued segregation).

189 Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

190 Shelby Cnty. v. Holder, 570 U.S. 529, 547 (2013).

Rodriguez,[191] and a flurry of positive court decisions in the late twentieth century generated optimism that inequities between high- and low-resource school districts would be resolved.[192] But many of the court decisions have not been followed up with tangible results. Instead, they have triggered decades of ongoing litigation, ultimately culminating in judicial retreat.[193]

Prison litigation is even more of a cautionary tale. In theory, prisons represent one of the best cases for judicial supervision—while prisons are obviously not hermetically sealed, they are comparatively isolated areas entirely under government supervision. But while the U.S. Supreme Court has occasionally intervened to establish minimum standards for medical care[194] or to order remedies to overcrowding,[195] it would be difficult to argue that litigation over prison conditions or the treatment of prisoners has been successful.[196]

Suppose, nonetheless, that litigants in these cases were able to identify a possible remedy that did not violate the political-question doctrine—as, for example, the *Held* plaintiffs did, with respect to the state of Montana's climate change exception to its Environmental Policy Act.[197] Even if their claims were justiciable, establishing standing would be rough sledding. Admittedly, standing has—outside of *Juliana II*—not featured prominently in climate litigation, either because the easier grounds for rejection lie in non-justiciability, or because state-level standing requirements are more

191 San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

192 *See* ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 7–8 (2d ed. 2023) (describing education litigation under state constitutions).

193 Joshua E. Weishart, *Aligning Education Rights and Remedies*, 27 KAN. J.L. & PUB. POL'Y 346, 348–51 (2018); Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 1011 (2014).

194 *See, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104 (1976) (holding that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment") (citation omitted).

195 *Brown v. Plata*, 563 U.S. 493, 541–45 (2011).

196 *See, e.g.*, Hoffer v. Fla. Dep't of Corr. Sec'y, 973 F.3d 1263, 1277–78 (11th Cir. 2020) (rejecting claim that the state's refusal to treat inmates suffering from chronic Hepatitis C with direct acting antiviral drugs violated the Eighth Amendment); *see id.* at 1280 & n.1 (Martin, J., dissenting) (" . . . I am concerned that recent decisions of this Court will undermine the rights of our incarcerated citizens to maintain their health and safety while they serve their sentences."); Keohane v. Fla. Dep't of Corr. Sec'y, 952 F.3d 1257, 1277–78 (11th Cir. 2020) (rejecting claim that the state's refusal to accommodate a trans inmate's request to socially transition with access to female clothing and grooming standards violated the Eighth Amendment).

197 *Held v. State* Order on Motion to Dismiss, *supra* note 8, at 12–15.

permissive. Regardless, litigants face clear problems with respect to causation and redressability.

The Ninth Circuit in *Juliana II* concluded that plaintiffs had adequately established that their injuries were caused by the federal government's conduct that they were challenging.[198] The panel was satisfied that a clear causal chain existed from "carbon emissions from fossil fuel production, extraction, and transportation" that were ultimately approved or ratified by the federal government because "[a] significant portion of those emissions occur in this country[.]"[199] In reaching that conclusion, the panel relied on the U.S. Supreme Court's decision in *Massachusetts v. EPA*. There, the Court concluded that the carbon dioxide emissions from the domestic transportation industry—"more than 6% of worldwide carbon dioxide emissions"—was a "meaningful contribution to greenhouse gas concentrations" such that the EPA's refusal to regulate GHG emissions from motor vehicles caused a climate changed-related injury.[200] But *Massachusetts v. EPA* was decided on the basis of a 5–4 majority that no longer exists—and would very likely be decided differently today following Justice Anthony Kennedy's retirement and Justice Ruth Bader Ginsburg's death.

Even assuming that *Massachusetts v. EPA* remains good law, such that a challenge to the *federal* government's inaction would adequately allege causation, it is difficult to grasp how a state-level challenge would do the same. In *Held v. State*, the trial court seemed to easily conclude that causation had been established. Relying on federal precedent,[201] the court viewed the causation as requiring that the injury is "'fairly traceable' to the defendant's injurious conduct,"[202] even where "the defendant was one of multiple sources of injury."[203] Under this standard, the court concluded, relying on the plaintiffs' evidence of Montana's contribution to the country's overall greenhouse gas emissions, that the plaintiffs had adequately demonstrated

198 947 F.3d 1159, 1168–69 (9th Cir. 2020).

199 *Id.* at 1169.

200 Massachusetts v. EPA, 549 U.S. 497, 524–25 (2007).

201 As the court explained, the Montana Supreme Court has held that "[c]ase-or-controversy standing derives from Article VII, Section 4(1) of the Montana Constitution, and Article III, Section 2 of the United States Constitution[,]" so "federal precedent interpreting the federal requirements for standing under the U.S. Constitution is 'persuasive authority' for interpreting Montana's constitutional requirements for standing." *Held v. State* Order on Motion to Dismiss, *supra* note 8, at 8 (quoting Bullock v. Fox, 435 P.3d 1187, 1194 (Mont. 2019)).

202 *Id.* (quoting Heffernan v. Missoula City Council, 255 P.3d 80, 91 (Mont. 2011)).

203 *Id.* (citing WildEarth Guardians v. United States Dep't of Agric., 795 F.3d 1148, 1157 (9th Cir. 2015)).

"that a genuine factual dispute exists with respect to whether Defendants' actions . . . were a *substantial factor* in Plaintiffs' injuries."[204]

This conclusion strains credulity. Even assuming that Montana's contribution to climate change is broader than the state's direct emissions—given Montana's high level coal and oil production, as well as its role in facilitating natural gas imports from Canada[205]—it is inconceivable that this contribution to *global* climate change is so substantial that it is "fairly traceable" to the plaintiffs' injuries.[206] The state's direct and indirect greenhouse gas emissions are certainly substantial in the abstract, but in the context of global emissions, this hardly seems a fair conclusion.

Noting that any response to climate change has a collective-action problem is not a novel observation. But it should be fatal in establishing causation in state-level climate lawsuits. Almost any state's contribution to global climate change, regardless of how significant in the abstract, is comparatively small in the global context. The fuzzy math used by the *Held* plaintiffs—which aggregated nearly fifty years of carbon-dioxide emissions and then asserted that "[t]his amount of cumulative emissions would rank as the third largest when compared to the annual emissions of countries"[207]—is not an escape hatch to this basic problem.

The causation problem bleeds right into redressability. Here, the *Juliana II* panel expressed caution even as it found causation. While the plaintiffs relied on *Massachusetts v. EPA* again, here to establish that "their 'injuries would be to some extent ameliorated," the panel was "skeptical."[208] It pointed out that *Massachusetts v. EPA* involved a state litigant (which the *Juliana* plaintiffs were not) asserting a procedural right (which the *Juliana* plaintiffs did not), both of which meant that the "normal standards for redressability" did not apply.[209] The panel did not expressly hold that the requested relief was not "substantially likely to redress" the plaintiffs' injuries, because it concluded that the relief was not "within the district court's power to award," but did express that it was "skeptical that the first redressability prong is satisfied."[210]

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204 *Id.* at 9 (emphasis added).

205 *Id.* at 10.

206 *See id.* at 8–9 (quotation and citations omitted).

207 *Id.* at 10.

208 947 F.3d 1159, 1171 (9th Cir. 2020).

209 *Id.* (quoting Massachusetts v. EPA, 549 U.S. 497, 517–18 (2007); Lujan v. Defenders of Wildlife, 504 U.S. 555, 572 n.7 (1992)).

210 *Id.* at 1170, 1171.

In sum, the issues of justiciability—and, secondarily, standing—represent meaningful obstacles to climate litigation. Moreover, assuming sea changes in the conceptions of these doctrines, or greater state deviation from federal jurisprudence in these areas, these obstacles will likely be insurmountable.

B. THE RISK OF ENTRENCHING JURISTOCRACY

Rights-based litigation that seeks the courts to adopt monumental change seems bound for failure. However, the near-certain risk of failure is not, itself, a reason not to try. Though there are some tail risks that an aggressive litigation position could undermine existing judicial precedent,[211] there isn't much favorable precedent to speak of. With that context in mind, climate litigation might, as Professor Richard Lazarus suggested in the early days of climate cases, be "best understood as part of an overall *political* strategy rather than as a viable, standalone *litigation* strategy."[212] When cases like *Juliana* or *Held* are litigated and fail to produce their desired outcomes, perhaps they can inspire positive political change that ultimately results in better climate policy.[213]

Maybe so. But the inherent problem with climate litigation is that it seeks to aggrandize the courts. If climate litigants win, they would be relying on judicial activism to further entrench the judiciary's power to decide policy-related questions.[214] A victory would pose questions as to the democratic legitimacy of the policy itself, and whether judges are appropriate decisionmakers in that context. And if they lose, they further normalize the idea that courts should be extrapolating vague rights, or inventing new rights, to justify an incursion into policymaking.[215]

There is certainly a strong case that judicial action in this space is in keeping with basic principles of democracy. As Judge Josephine Staton, the

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211 *See, e.g.*, Caroline Cress, Note, *It's Time to Let Go: Why the Atmospheric Trust Won't Help the World Breathe Easier*, 92 N.C. L. REV. 236, 265 (2013) (arguing that atmospheric trust litigation could "dilute the public trust doctrine itself, thereby weakening its power and import as an independent legal doctrine, distinct from the state's general police power").

212 Lazarus, *supra* note **Error! Bookmark not defined.**, at 1157 (emphasis in original).

213 Nathaniel Levy, Note, Juliana *and the Political Generativity of Climate Litigation*, 43 HARV. ENV'T L. REV. 479, 498–501 (2019).

214 *See, e.g.*, Paolo Davide Farah & Imad Antoine Ibrahim, Urgenda vs. Juliana*: Lessons for Future Climate Change Litigation Cases*, 84 U. PITT. L. REV. 547, 580–81 (2023) (arguing that "[j]udicial activism is extremely important to surpass the (divided) political interests of the different branches of governments, as well as the short-term benefits that may emerge by simply addressing nonaction in the field of climate friendly policies and regulations") (emphasis removed).

215 *See* HIRSCHL, *supra* note 144, at 100–01.

dissenting judge in *Juliana II*, noted, the U.S. Constitution contains a "perpetuity principle"—the idea that, to protect the civil rights and liberties protected in the Bill of Rights, the country itself must continue to exist.[216] This principle, she argued, "prohibits only the willful dissolution of the Republic," which supports judicial action to mitigate climate change.[217] Other commentators have raised similar arguments, and have suggested that courts are *well* positioned to make these decisions because of their unique ability to weigh evidence and balance equities.[218]

But even assuming that courts have an adequate democratic mandate to decide climate cases, empowering courts to decide *these* cases could have ripple effects in other contexts. At this particular moment in American history, the 6–3 conservative majority on the U.S. Supreme Court is "centraliz[ing] power" in itself,[219] and "[m]ovement judges" are embracing "non-mainstream arguments" to adopt their own ideological preferences.[220] In that context, it seems unwise to encourage the judiciary to wield *more* power and hear *more* cases. Establishing the precedent that courts can—and *should*—order the federal or state governments to start a new undertaking, especially one on the scale of a massive restructuring of the economy, would surely set a precedent in other areas of the law, with untold consequences.

Even tweaking the legal principles at play could produce externalities in other areas of law. Standing has long been a thorn in environmental litigation, and climate litigants might be tempted to push to expand federal standing doctrine to support their own claims.[221] But an extension of standing would affect all litigants. Consider, for example, the ongoing litigation over the legality of mifepristone. In 2023, the U.S. Court of Appeals for the Fifth Circuit determined that a group of medical organizations and doctors lacked standing to challenge the Food and Drug Administration's 2019 approval of a generic version of the drug, though they could challenge other FDA decisions relating to mifepristone.[222]

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216 947 F.3d 1159, 1178 (9th Cir. 2020) (Straton, J., dissenting).

217 *Id.* at 1179.

218 *See, e.g.*, Katrina Fischer Kuh, *The Legitimacy of Judicial Climate Engagement*, 46 ECOLOGY L.Q. 731, 746 (2019); Laura Burgers, *Should Judges Make Climate Change Law?*, 9 TRANS. ENV'T. L. 55, 75 (2020) (arguing that "the environment is a constitutional matter and therefore a prerequisite for democracy").

219 Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 113 (2022).

220 Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS L. REV. 2149, 2184–88 (2024).

221 *See, e.g.*, Levy, *supra* note 201, at 503–05.

222 All. For Hippocratic Med. V. United States Food & Drug Admin., 78 F.4th 210, 241 (5th Cir. 2023).

In a separate opinion that concurred in part and dissented in part, Judge James Ho argued that the doctors *also* had an "aesthetic injury they experience in the course of their work," because "[d]octors delight in working with their unborn patients—and experience an aesthetic injury when they are aborted."[223] In reaching this conclusion, Judge Ho relied on the expansive notions of standing in the environmental context and concluded that if Article III standing extended to an "aesthetic injury when it comes to animals and plants," it should also extend to "unborn human life."[224] While Judge Ho's conception of standing might be extreme,[225] is it so extreme as to preclude its adoption by other movement judges?

III. BETTER STRATEGIES FOR ENVIRONMENTAL RIGHTS AND CONSTITUTIONALISM

There are better uses for environmental rights than climate litigation, and better uses of constitutional law than environmental rights. The value of environmental rights, as a concept, is not reduceable to its ability to produce landmark legal victories. The idea that each of us possesses a right to not have our lives destroyed by a looming climate Armageddon is surely correct—but the moral clarity of a right does not mean that it translates into a legal victory that automatically achieves decarbonization. There are more efficacious strategies for climate activists than invoking implied or express rights to a clean environment and demanding far-reaching judicial orders. As I argue in Section A, the best use for environmental rights is for discrete policy goals in the course of litigation or for broader goals that are linked to equal protection guarantees.

In Section B, I outline what a more constitutionally focused climate strategy should look like. Most crucially, this strategy should be focused on state level opportunities, given the specificity of state constitutions and the ease with which they can be amended. This strategy, while perhaps less morally compelling than a rights-based strategy, is substantially likelier to produce the intended environmental outcomes.

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223 *Id.* at 258–9 (Ho, J., concurring in part and dissenting in part).

224 *Id.* at 260.

225 *See* Lydia Wheeler, *Ho Cites Doctor 'Aesthetic' Injuries in Abortion Pill Case*, BLOOMBERG L. (Aug. 17, 2023), https://news.bloomberglaw.com/us-law-week/judge-ho-cites-doctor-aesthetic-injuries-in-abortion-pill-case (in which Professor David Schraub observed "that there is something degrading about treating women as . . . akin to the kind of natural splendor of a sunset").

A. BETTER STRATEGIES FOR ENVIRONMENTAL RIGHTS

Environmental-rights provisions in state constitutions do not have obvious use cases. Judging from the state constitutional convention records, their additions to constitutional texts have a variety of apparent motivations.[226] The comparatively narrow uses of these provisions, especially prior to *Held*,[227] similarly suggest that advocates themselves were unsure what the parameters of the rights were. Yet these comparatively narrow uses—enforcing permitting requirements, challenging environmental impact assessments, and forcing public utility regulators to account for climate change and greenhouse gas emissions—are entirely valid, important uses of these provisions.

To that end, environmental rights provisions could be construed as expanding state governments' regulatory powers and duties.[228] Imposing an affirmative duty on the state government to safeguard a "clean and healthful environment" could be logically understood as imposing a "police power responsibility" on state and local governments "to exercise that authority" and a restraint on "operating otherwise."[229]

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226 *See, e.g.*, JOHN W. LEWIS, ILL. SEC'Y OF STATE, 6 RECORD OF PROCEEDINGS: SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 702 (1972):

> The [General Government] Committee emphasizes that this Section affords individuals the opportunity to seek relief. It wants to be very clear that it does *not*, but this Section . . . create or establish a new remedy. Nor does this Section assume the individual's ability to prove a violation of his right. It merely declares that individuals have "standing" to assert violations of his right.

MONT. LEG. COUNCIL, 5 MONT. CONST. CONVENTION: VERBATIM TRANSCRIPT, MARCH 1, 1972–MARCH 9, 1972 1638 (1981) (Delegate Dahood: " . . . is it your intention to provide the citizens of the State of Montana with the independent right to initiate a lawsuit when his own health and his own property is not affected within the contemplation of the present law?" Delegate Burkhardt: " . . . I do not see it as an overt attempt to slip in with the opportunity to sue."); John C. Dernbach & Edmund J. Sonnenberg, *Legislative History: A Legislative History of Article I, Section 27 of the Constitution of the Commonwealth of Pennsylvania*, 24 WIDENER L.J. 181, 198–99 (2015) (in which State Representative Franklin Kury, the author of Pennsylvania's Environmental Rights Amendment, noted:

> Most important this amendment will shift the burden of proof in future disputes from those who object to pollution or environmental impairment to those who would pollute or impair. Those who propose to disturb the environment or impair natural resources would in effect have to prove in advance that the proposed action is in the public interest.);

see also FRANKLIN L. KURY, THE CONSTITUTIONAL QUESTION TO SAVE THE PLANET: THE PEOPLES' RIGHT TO A HEALTHY ENVIRONMENT 25–31 (2021).

227 Yeargain, *supra* note 5, at 36–42; Polk, *supra* note 3, at 130–55.

228 *See, e.g.*, Sam Bookman, *Defensive Environmental Rights*, 26 U. PA. J. CONST. L. [pincite when one exists] (2024); John C. Dernbach, *The Value of Constitutional Environmental Rights and Public Trusts*, 41 PACE ENV'T L. REV. 153, 193–200 (2024).

229 *Id.*

If interpreted in that way, they very well serve as a *stronger* basis for modern-day iterations of the public-trust litigation that began in the 1970s. The outcome in *Held*, for example, while substantially narrower than its champions have claimed,[230] actually provides a strong starting point for litigation focused around this theory. Plaintiffs likely would not have needed to make out such a detailed case for Montana's allegedly disproportionate contribution to the United States' carbon emissions[231] to effectively challenge the "climate change exception" that existed under state law. It is hard to imagine that *barring* state regulatory agencies from considering climate-related effects in the scope of their environmental impact assessments[232] could possibly comport with an individual right to "a clean and healthful environment"[233] or with the legislature's express duty to "provide adequate remedies for the protection of the environmental life support system from degradation."[234] But declaring that statute unconstitutional certainly did not mandate any change to the administration of environmental policy in Montana. Litigants could have sought narrower equitable relief requiring regulatory agencies to affirmatively consider climate-related effects. That sort of equitable relief would have had a greater chance of success—and would have less obviously implicated the political-question doctrine.

For example, *Navahine F. v. Hawai'i Department of Transportation*, a recently settled case, illustrates how such a case might be litigated. The plaintiffs in *Navahine F.* filed a lawsuit that used the state constitution's environmental rights provision to challenge the constitutionality of the state's transportation system, and specifically, policy decisions that have "prioritized infrastructure projects such as highway construction and expansion" without "mitigat[ing] greenhouse gas emissions" from the operation of the system.[235] This, the litigants argued, "results in high levels of greenhouse gas emissions and exacerbates Earth's energy imbalance, resulting in grave and existential harms to public trust resources, including the climate system and all other natural resources affected by climate change."[236] Accordingly, they sought seeking an injunction that orders the state to "cease establishing,

230 *Supra* Section I.C.

231 *See Held v. State* Complaint, *supra* note 7, at 34–52.

232 MONT. CODE ANN. § 75-1-201(2)(a).

233 MONT. CONST. art. II, § 3.

234 *Id.* art. IX, § 1(3).

235 Complaint for Declaratory and Injunctive Relief; Summons at 4, Navahine F., v. Haw. Dep't of Transp., No. 1CCV-22-0000631 (Haw. Cir. Ct. June 1, 2022), https://climatecasechart.com/wp-content/uploads/case-documents/2022/20220601_docket-1CCV-22-0000631_complaint.pdf.

236 *Id.* at 67.

maintaining, and operating the state transportation system in [such] a manner," and to "take concrete action steps under prescribed deadlines to confirm" the system in accordance with the constitution.[237] The settlement reached by the plaintiffs and the state obligated the state to reduce greenhouse gas emissions and integrate low- or zero-carbon policies into the state transportation system.[238] This outcome was certainly not guaranteed had the case gone to trial. The theory deployed, and remedy sought, in *Navahine F.* was ambitious, and perhaps not a strategy that could succeed nationally. Nonetheless, it is in keeping with the basic idea that environmental rights provisions could be understood as affecting state agencies' regulatory powers and responsibilities.

On a smaller scale, advocates could use environmental-rights amendments to challenge smaller-scale permitting or zoning decisions. The first invocations of New York's new environmental-rights provision involved a landfill in upstate New York,[239] and while not yet resolved, they have seen early signs of success.[240] Other such cases are pending.[241] However, these protections could very well be weaponized against housing and zoning reform efforts, decarbonization strategies, or any development at all—as has happened most prominently in California with the use of the California Environmental Quality Act's impact-assessment requirements,[242] and recently in Minneapolis, as well.[243] Accordingly, advocates should be careful to litigate their claims in such a manner that does not add fuel to these NIMBY fires.

The use of Hawai'i's environmental-rights provision and statutes to force the state Public Utilities Commission to consider the effects of its decisions

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237 *Id.* at 70.

238 Victoria Bisset, *Young Climate Activists Just Won a 'Historic' Settlement*, WASH. POST (June 22, 2024), https://www.washingtonpost.com/climate-environment/2024/06/21/hawaii-youth-climate-settlement-transport/.

239 *See* Emily Pontecorvo, *New York's New Constitutional Right to a Clean Environment Faces First Judicial Test*, GRIST (Feb. 15, 2023), https://grist.org/regulation/new-york-environmental-rights-green-amendment-first-court-test/.

240 Martha F. Davis, *The Greening of State Constitutions*, STATE CT. REP. (Aug. 14, 2023), https://statecourtreport.org/our-work/analysis-opinion/greening-state-constitutions.

241 *See Cases*, PACE UNIV. ELISABETH HAUB SCH. OF LAW: NEW YORK'S ENVIRONMENTAL RIGHTS REPOSITORY, https://nygreen.pace.edu/cases/ (last visited Jan. 1, 2024).

242 *See generally* Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENV'T L.J. 21 (2018) (discussing CEQA lawsuits in the context of housing reform in California).

243 *See* Christian Britschgi, *Judge Rules Minneapolis' Zoning Reforms Are Getting Too Much Housing Built*, REASON (Sept. 7, 2023), https://reason.com/2023/09/07/judge-rules-minneapolis-zoning-reforms-are-getting-too-much-housing-built.

on greenhouse gas emissions, both in the state and globally, illustrates another discrete use of rights provisions: reimagining the missions of utility regulators. Public utility commissions' primary duty is to ensure that utility rates are "just and reasonable,"[244] an obligation that frequently precludes the commission from considering the effects of their decisions on the climate.[245] The context of environmental rights in Hawai'i is slightly different than in other states,[246] but the underlying idea—that a constitutional guarantee of a clean environment ought to prevail over a narrow view of public utility commissions' powers—could motivate similar litigation.

Finally, environmental-rights provisions could be paired with state constitutions' equal protection guarantees to empower environmental justice-focused litigation.[247] Each state supreme court has adopted an interpretative framework that focuses on reading its state constitution holistically, which has, in some contexts, allowed different rights-related provisions to be read together.[248] Combining a right to a "clean and healthy environment," for example, with an equal protection analog could allow communities of color to challenge environmental regulations that have disparate impacts.[249]

B. BETTER STRATEGIES THAN ENVIRONMENTAL RIGHTS

Yet state constitutions allow environmental advocates many more avenues than just rights-focused provisions. State constitutions can be amended far more easily than the federal Constitution (both because of low approval thresholds and the opportunities afforded by direct democracy) and could easily allow the ratification of environmentally focused amendments. As I have argued elsewhere, state constitutions *already* contain a host of environmental provisions, but these provisions—favorable eminent domain and taxation rules for agricultural and extractive industries, for example—

244 Scott, *supra* note 82, at 379.

245 *Id.* at 394–98 (discussing 2010 decision by the Maryland Public Service Commission rejecting utility company's request for smart grid project and 2007 decision by the Washington Supreme Court holding that municipal utility could not "impose the cost of carbon offsets on utility customers") (citations omitted).

246 *Supra* note **Error! Bookmark not defined.** and accompanying text.

247 Yeargain, *supra* note 5, at 68–69.

248 Jessica Bulman-Pozen & Miriam Seifter, *State Constitutional Rights and Democratic Proportionality*, 123 COLUM. L. REV. 1855, 1897–99 (2023); Robert F. Williams, *Enhanced Constitutional Rights: Interpreting Two or More Provisions Together*, 2021 WIS. L. REV. 1001 (2021).

249 *See* Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 20 COLUM. J. ENV'T L. 135, 175–78 (2005).

frequently serve to entrench carbon-intensive practices.[250] These policies could be flipped to support environmental policies. Lower taxes on mineral extraction could be replaced with *higher* taxes on minerals and lower taxes on green energy production, for example.[251]

But environmentalists could also use state constitutional amendments to adopt specific policies, like ambitious renewable energy standards, new taxes on greenhouse gas emissions or fossil fuels, rules that relate to the usage of proceeds from fossil fuel taxes, or ESG-driven investment rules for state-owned funds.[252] While organizers in several states have attempted to use initiated amendments to adopt renewable energy standards, they have been met with mixed results so far.[253] These campaigns are few and far between, however, and would benefit from greater public attention and participation from national environmental advocacy groups.

While voters are generally wary of adopting new or higher taxes,[254] they may be more inclined to approve tax increases through constitutional amendments if the measures are framed as attacking corporate greed. In some states, the need to do so is especially severe. Nevada, for example, sets an artificially low tax rate on mineral extraction, capping taxes on the "net proceeds of all minerals, including oil, gas and other hydrocarbons," to just "5 percent of the net proceeds."[255] A 2014 effort to remove the cap only narrowly failed,[256] and lawmakers have yet to try again.

Where voters are unlikely to approve tax *increases*, they may be inclined to approve diversions of tax proceeds to new sources. Many states require that gas tax proceeds be earmarked for highway purposes, for example, though the list of permissible uses is sometimes lengthy.[257] A portion of these funds could be designated for public transportation or land conservation[258]—

250 Yeargain, *supra* note 5, at 10–21.

251 *See id.* at 52–55.

252 *See id.* at 66–67.

253 *Id.* at 54-55.

254 *See* DANIEL A. SMITH, TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY 6–8 (2011).

255 *E.g.*, NEV. CONST. art. X, §§ 1(1), 5(1).

256 Yeargain, *supra* note 5, at 54.

257 *See, e.g.*, FLA. CONST. art. XII, § 9(c); GA. CONST. art. III, § 9, ¶ 6(b); OR. CONST. art. IX, § 3a.

258 The Oregon Legislative Assembly has twice attempted similar changes, though both efforts were rejected by voters. H.R.J. Res. 7, 57th Leg. Assemb., Reg. Sess., 1973 Or. Laws 2862 (proposing an amendment to Article IX, Section 3, of the Oregon Constitution that would have allowed gas tax proceeds to be used for building "systems and facilities for the mass transportation of passengers and the transportation of property incidental to the mass transportation of passengers"); S.J. Res. 12, 65th Leg. Assemb., Reg. Sess., 1989 Or. Laws 2225 (proposing an amendment to Article IX, Section 3a, of the Oregon Constitution that would have allowed similar revenues "to be used for the acquisition, development, maintenance or care of parks or recreation areas").

and, to avoid degradation of the existing highway system, bar the funds from being spent on new highway construction, as opposed to maintaining and repairing the existing network. Other taxes could be allocated to similar uses, too. In 2014, Florida voters ratified an amendment to their state constitution that directed a third of the state revenue from documentary stamp taxes—excise taxes on deeds and mortgages[259]—for conservation purposes.[260]

And when states manage significant investment portfolios, constitutional amendments could mandate the investment of the funds in environmentally sustainable ways (or prohibit their investment in *unsustainable* ways). These portfolios take a variety of different forms. The most common portfolios are pension funds, which consist of several trillion dollars in assets across several thousand different plans.[261] Several states, including Montana, North Dakota, and Wyoming, have dedicated proceeds from natural resource taxes to trust funds.[262] And many western states manage investment funds that are derived from the proceeds of selling or leasing school trust lands.[263] However, the state authorities responsible for investing these funds—most commonly, state investment councils—are largely governed by *statutes*, not constitutions. Accordingly, environmental advocates could add rules to state constitutions that mandate certain types of investments and prohibit other types.

CONCLUSION

Decades after environmental-rights provisions were first added to state constitutions, interest has spiked in their potential as tools in setting

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259 FLA. STAT. ANN. § 201.02.

260 FLA. CONST. art. X, § 28 (amended 2014). Of note, however, because the amendment was poorly drafted and included too many eligible projects, the legislature was able to divert the funds to a variety of likely unintended purposes. *See* Jim Waymer, *Lawsuit: Put $237 Million Back into Florida Land Buying*, FLA. TODAY (Aug. 28, 2015), https://www.floridatoday.com/story/news/local/2015/08/28/amendment-lawsuit-florida/71317022/. Owing to the broad language used in the amendment, Florida courts have refused to invalidate these diversions. *Oliva v. Fla. Wildlife Fed'n Inc.*, 281 So.3d 531, 537–38 (Fla. Dist. Ct. App. 2019); Jenny Staletovich, *In 2018, A Judge Ruled that Lawmakers Misused Conservation Land Funds. A New Judge Tossed the Case*, WUSF NEWS (Jan. 4, 2022), https://www.wusf.org/courts-law/2022-01-04/in-2018-a-judge-ruled-that-lawmakers-misused-conservation-land-funds-a-new-judge-tossed-the-case.

261 *State and Local Government Pensions*, URB. INST., https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/projects/state-and-local-backgrounders/state-and-local-government-pensions (last visited Jan. 20, 2024).

262 MONT. CONST. art. IX, § 5; N.D. CONST. art. X, § 21; WYO. CONST. art. XV, § 19.

263 Yeargain, *supra* note 5, at 19–20.

climate policy. These rights have seen inconsistent development in state courts in the half-century since their initial adoption, but recent developments in litigation suggest that they might be wielded by plaintiffs more frequently.[264] *Held v. State*, a case currently on appeal before the Montana Supreme Court, was one of the first cases to use a state constitution's express environmental-rights provision to argue that the failure of the state government to mitigate climate change rose to the level of a constitutional violation. *Held* drew on the legal theories advanced by other climate lawsuits—like *Juliana v. United States*, which raised a similar argument under the Due Process Clause and the public trust doctrine—with the benefit of the Montana Constitution's ostensibly strong protection of environmental rights.[265]

Yet the outcome in *Held* fell far short of litigants' aspirations. The *Held* plaintiffs initially sought a sprawling judicial order that would have forced the state government to undertake a massive effort to reduce carbon emissions.[266] What they got instead was a declaration that a state law that prohibited agencies from considering climate change in their environmental impact assessments was unconstitutional.[267]

In this article, I have argued that *Held* is a case study in the successes, failures, and opportunities of environmental rights provisions. Environmental rights provisions have seen success—albeit limited success—in challenging specific actions or inactions of state governments, like the decisions of the public utility commission in Hawai'i or how the Pennsylvania state government has used oil and gas proceeds.[268] A straightforward challenge to the law ultimately struck down in *Held* would have represented a use of Montana's environmental-rights provision in keeping with these limited successes.

But environmental rights provisions are not sturdy enough to support claims that state governments are *obligated* to massively reduce greenhouse gas emissions—the main item of relief sought by the *Held* plaintiffs. American courts are severely constrained in their ability to order such sprawling relief. *Juliana* ultimately failed because the plaintiffs could not demonstrate that their requested relief was within the power of an Article III

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264 Polk, *supra* note 3, at 130–55; Yeargain, *supra* note 5, at 36–42.

265 Section I.C, *supra*.

266 *Held v. State* Complaint, *supra* note 7, at 103.

267 *Held v. State* Trial Court Order, *supra* note 10, at 102.

268 Section I.B., *supra*.

court to grant.[269] Analogous state-level litigation has failed because the relief sought by plaintiffs would run afoul of the political question doctrine.[270] Even if such relief were to be granted, courts have proven unable to effectively manage remedial plans in similarly intricate contexts, like school-desegregation and prison-condition orders.[271]

Accordingly, the best opportunity for environmental-rights provisions is to balance the boldness of climate litigation against the narrower successes that these provisions have won. The *Held* plaintiffs could have, for example, sought to not only invalidate the state law that prevented state agencies from considering climate change in their environmental permitting decisions, but also to *require* agencies to do so. The settled litigation in Hawai'i in *Navahine F. v. Hawai'i Department of Transportation*, for example, invoked the state constitution's guarantee of a "clean and healthful environment" to argue that the state's maintenance of its transportation system is unconstitutional.[272] The approach was, no doubt, ambitious, but the ambition was grounded in a more realistic request for relief, as demonstrated by the settlement that followed—in part because it tethered the environmental right to the state's policymaking authority.

In almost any other context, I would conclude by noting that, regardless of how litigation in these arenas plays out, litigants will learn valuable lessons about what approaches work in different contexts. But here, though lessons certainly may be learned, there is little time in which to apply them. The future of climate policy remains deeply uncertain, both in the United States and abroad, and dedicating limited resources to doomed litigation likely hurts more than it helps. If climate advocates are going to use litigation as a component of policymaking, they must pursue the most efficacious strategies. Environmental rights can, and should, be a part of that overarching strategy—so long as they are not viewed as "one weird trick" to unlock decarbonization.

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269 *Juliana II*, 947 F.3d 1159, 1173 (9th Cir. 2020).

270 *Supra* notes 60–65 and accompanying text.

271 *Supra* notes 160–169 and accompanying text.

272 *Supra* notes 235–237 and accompanying text.