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Recognizing a Fundamental Right to a Clean Environment: Why the Juliana Court got it Wrong and How to Address the Issue Moving Forward

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RECOGNIZING A FUNDAMENTAL RIGHT TO A CLEAN ENVIRONMENT: WHY THE *JULIANA* COURT GOT IT WRONG AND HOW TO ADDRESS THE ISSUE MOVING FORWARD

Robert Kemper

ABSTRACT

As the existential threat of climate change becomes increasingly prevalent, U.S. plaintiffs, lawyers, and activists have begun seeking redress in federal courts arguing for recognition of a constitutional right to a clean environment. Recently, in *Juliana v. United States*, the Ninth Circuit explicitly recognized the grave threat of climate change for the health, well-being, and security of the American people and the nation as a whole. Additionally, the court found that the U.S. government has contributed to climate change through both inaction and policy decisions that promote the use of fossil fuels. The plaintiffs claimed that they had a *constitutional right* to a clean and safe environment. The court, however, side-stepped the constitutional question; even assuming Americans have a constitutional right to a clean environment, the court concluded that the plaintiffs lacked standing to pursue their claims. Specifically, any remedy, in the majority's view, would necessarily require a judicial encroachment on the legislative branch. The dissent vehemently disagreed with this conclusion and offered an analysis supporting a constitutional right to a clean environment.

Given the scientific consensus that climate change is a grave and increasing threat to the nation and the world at large, litigants will likely continue arguing for a constitutional right to a clean environment in federal courts. Accordingly, the federal judiciary should reconsider how substantive due process analysis might actually support a constitutional right to a clean environment. This paper argues that it does and more importantly, the federal judiciary can effectuate a remedy without violating separation of powers principles. Federal courts need only consider some of the most important Supreme Court cases in recent history and a turn to international law can provide additional, persuasive support to address the specific separation of powers problem. What will emerge is a framework the federal courts can employ when dealing with constitutional claims to a clean environment. An approach that is necessary, and an approach that works.

I. INTRODUCTION

Climate change is an increasing threat to the health, safety, and security of Americans and the planet at large. The consensus among experts is overwhelming; climate change is real and human activity is the major contributor to global warming.[1] Indeed, a survey of climate research concluded that ninety-seven percent of publishing climate scientists agree that climate change is a fundamental truth.[2] Further, global climate change has already had profound effects on the environment, "loss of sea ice, accelerated sea level rise and longer, more intense heat waves" have been reported by NASA.[3]

Given the scientific consensus and the environmental degradation already being recorded, it is unsurprising that the federal government and executive agencies have been named as defendants in lawsuits.[4] Although the science on climate change seems to be uncontroversial in the scientific community, the Environmental Protection Agency ("EPA")—the federal agency whose mission is to ensure Americans have clean air and water, as well as to promulgate rules and enforce regulations purported to protect the environment of the United States[5]—have been ignoring climate science and engaging in a series of deregulations.[6] To be sure, President Biden recently signed an Executive Order recommitting the United States to the Paris

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1 John Cook et al., *Consensus on Consensus: A Synthesis on Consensus Estimates on Human-Caused Global Warming*, ENV'T RES. LETTERS 1–2 (2016).

2 *Id.*

3 *The Effects of Climate Change*, NASA, https://climate.nasa.gov/effects/ (last visited Dec. 20, 2020).

4 *See generally* Massachusetts v. EPA, 549 U.S. 497 (2007); Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

5 *Our Mission and What We Do*, EPA, https://www.epa.gov/aboutepa/our-mission-and-what-we-do (last visited Feb. 5, 2021).

6 Juliet Eilperin, *EPA's Scientific Advisers Warn Its Regulatory Rollbacks Clash with Established Science*, WASH. POST (Dec. 31, 2019, 2:40 PM), https://www.washingtonpost.com/climate-solutions/epas-scientific-advisers-warn-its-regulatory-rollbacks-clash-with-established-science/2019/12/31/a1994f5a-227b-11ea-a153-dce4b94e4249_story.html.

Agreement,[7] a groundbreaking international treaty with a single goal: limiting global warming.[8] The legally binding Paris Agreement obligates the United States to develop a framework to reduce its own greenhouse gas emissions, and to submit that framework to an international body.[9] Re-entering the Paris Agreement is a step in the right direction, and it signals to the international community that the United States takes climate change seriously and is committed to doing its part to reduce its catastrophic effects.[10] However, the Paris Agreement only binds parties to set goals for reducing carbon emissions,[11] and some lawyers, activists, and plaintiffs have begun attempting to provoke more aggressive domestic policy changes by seeking redress for environmental harms in federal courts.[12]

One interesting case presented the issue of climate change from the perspective of individuals that have suffered distinct harms as a direct result of environmental degradation and unexpected environmental changes.[13] In *Juliana v. United States*, the plaintiffs illustrated that real individuals are suffering while the federal agencies tasked with protecting the environment are seemingly failing to fulfill their duties.[14] In *Juliana*, one plaintiff claimed she was forced to leave her home as a result of water scarcity and was separated from her relatives.[15] Another plaintiff in the case claimed that flooding had forced him to evacuate his home multiple times.[16] What is most interesting about this landmark Ninth Circuit case is that it presented the court with a truly novel claim:[17] the plaintiffs claimed that the federal Constitution guarantees them a "climate system capable of sustaining human life."[18]

The case was ultimately dismissed; the court found that the plaintiffs' claims failed for lack of Article III standing under the Constitution.[19]

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7 Nathan Rott, *Biden Moves to Have U.S. Rejoin Climate Accord*, NAT'L PUB. RADIO (Jan. 20, 2021, 5:42 PM), https://www.npr.org/sections/inauguration-day-live-updates/2021/01/20/958923821/biden-moves-to-have-u-s-rejoin-climate-accord.

8 *The Paris Agreement*, UNFCCC, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement, (last visited Dec. 23, 2020).

9 *Id.*

10 *Secretary-General Welcomes US Return to Paris Agreement on Climate Change*, UN NEWS (Jan. 20, 2021), https://news.un.org/en/story/2021/01/1082602.

11 *The Paris Agreement*, UNFCCC, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement, (last visited Dec. 23, 2020).

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

13 *See generally id.*

14 *Id.* at 1168.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

Accordingly, it was not the merits of the claims or the substantiality and credibility of the evidence presented that precluded the *Juliana* court from recognizing a constitutional right to a clean environment, but rather the court's belief that it lacked the power to enforce a meaningful remedy.[20] Indeed, the court chose not to definitively rule on the constitutional issue and framed the case in terms of redressability: "The central issue before us is whether, even assuming such a broad constitutional right exists, an Article III court can provide the plaintiffs the redress they seek. . . ."[21]

Much of the scholarship that has developed concerning the *Juliana* case focuses on the discreet issue of whether a right to a clean environment is appropriately grounded in traditional substantive due process analysis.[22] The criticism largely focuses on Justice Kennedy's approach to substantive due process analysis in *Obergefell v. Hodges*,[23] and argues that a right to a clean environment is not significantly rooted in constitutional history and tradition, such that it can be recognized appropriately through a traditional due process analysis.[24] This criticism is directed toward the district court's reliance on the *Obergefell* due process analysis in denying the federal government's motion to dismiss the *Juliana* case for failure to state a claim upon which relief can be granted.[25] The scholarship, however, fails to adequately address why the *Juliana* plaintiffs ultimately failed in the Ninth Circuit, for lack of standing and the court's concern for traditional separation of powers principles.[26]

Taking a different approach, this comment will argue that the *Juliana* plaintiffs should have succeeded by showing: (1) that Supreme Court precedent supports recognizing a fundamental right to a clean environment, and (2) that both existing Supreme Court precedent and comparative foreign law supports the notion that the federal judiciary can recognize a fundamental right to a clean environment without violating separation of powers principles. First, this comment will explain the background of U.S. and foreign climate change litigation generally. Second, a discussion of Supreme Court fundamental rights cases will demonstrate that the groundwork for the federal judiciary to recognize a constitutional right to a clean environment already exists. Third, having explained the basis for a constitutional right to

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20 *See id.* at 1169–73.

21 *Id.* at 1164.

22 *See generally* Robert Torres, *Foundational but Not Fundamental: No Right to the Environment*, 31 DUKE ENV'T L. & POL'Y F. 175 (2020); Bradford C. Mank, *Can Judges Use Due Process Concepts in Obergefell to Impose Judicial Regulation of Greenhouse Gases and Climate Change?: The Crucial Case of Juliana v. United States*, 7 BELMONT L. REV. 277 (2020).

23 Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015).

24 *See generally* Torres, *supra* note 22; Mank, *supra* note 22.

25 *See* Torres, *supra* note 22, at 201–06; Mank, *supra* note 22, at 287–89. *See generally* Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016), *rev'd*, 947 F.3d 1159 (9th Cir. 2020).

26 *Juliana*, 947 F.3d at 1165.

a clean environment, the focus shifts to considering why the doctrine of standing and separation of powers principles doomed the *Juliana* plaintiffs. Finally, a comparative analysis of international climate litigation will offer an approach that allows the U.S. federal courts to recognize a constitutional right to a clean environment without violating separation of powers principles.

II. CLIMATE CHANGE LITIGATION IN THE U.S. AND ABROAD

Recent climate change litigation reveals that the biggest challenge to plaintiffs seeking redress in the federal courts is overcoming the doctrine of Article III standing.[27] To establish Article III standing, "the plaintiff must have suffered or be imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be *redressed* by a favorable judicial decision."[28] An injury in fact for Article III standing purposes is an invasion of a legally protected interest, which is concrete, particularized, and actual or imminent, not conjectural or hypothetical.[29]

In one of the first landmark climate change cases, *Massachusetts v. EPA*, the Supreme Court, in a 5–4 decision, found that several American states had standing to sue the EPA for failing to regulate greenhouse gasses and carbon dioxide emissions.[30] While *Massachusetts* was certainly a landmark case, it did not announce a new substantive individual right to environmental protections, it only held that the EPA must fulfill its statutory obligations under the Clean Air Act, which the Court found authorized the EPA to regulate carbon emissions.[31] The EPA was still free to choose not to regulate such emissions, the only restriction the Court placed on the Agency was that its reasons for action or *inaction* in regulating emissions must be grounded in the statute itself.[32]

The *Massachusetts v. EPA* decision was important for two reasons: (1) the Court acknowledged the gravity of climate change and its grave threat to the safety and security of the nation, and (2) the decision interpreted the Clean Air Act to permit the EPA to regulate carbon emissions, thus forcing the Agency to ground any decision to not regulate emissions in the Clean Air Act

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27 *See generally Juliana*, 947 F.3d at 1159; Lujan v. Defs. of Wildlife, 504 U.S. 555 (2000).

28 Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125 (2014) (quoting *Lujan*, 504 U.S. at 560) (emphasis added).

29 *Lujan*, 504 U.S. at 560.

30 *See generally* Massachusetts v. EPA, 549 U.S. 497, 528–31 (2007).

31 42 U.S.C. § 7521(a)(1); *Massachusetts*, 549 U.S. at 528–31.

32 *Massachusetts*, 549 U.S. at 528–31.

itself.[33] The case did not, however, consider whether the Constitution affords Americans a constitutional right to a clean and safe environment.[34] So while the Supreme Court found that several states had standing "to challenge agency action unlawfully withheld,"[35] the Ninth Circuit was unwilling to allow the *Juliana* plaintiffs to assert broad constitutional claims against the federal government, regardless of whether they thought those claims were meritorious, these plaintiffs lacked standing to sue.[36]

Another hurdle for the *Juliana* plaintiffs was the separation of powers doctrine, a doctrine intimately associated with the Article III standing doctrine.[37] Separation of powers principles preclude federal courts from ordering the executive and legislative branches to take any actions deemed to be reserved to the political branches of government.[38] The doctrine serves to maintain the balance of federal power and although the principle is not set forth explicitly in the Constitution itself, the framers were careful to clearly delineate the powers of the three branches of the federal government.[39] Indeed, the Supreme Court has opined that the "[t]he separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787."[40] Throughout U.S. history, the Court has taken great care to uphold the delineation of power, striking down legislation encroaching on the powers of the executive branch,[41] striking down Executive Orders exceeding the President's Article II powers,[42] and the Court has continually declined to consider any issue it has deemed reserved to the political branches.[43] Because it is so firmly rooted in our constitutional system, the Court is careful to afford the doctrine its due respect, and has stated that its maintenance requires that "the carefully defined limits on the power of each Branch must not be

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33 *Id.* at 497.

34 *Id.* at 532–35.

35 *Id.* at 517.

36 *See generally* Juliana v. United States, 947 F.3d 1159, 1164–65 (9th Cir. 2020).

37 *Id.* at 1173–75.

38 *Id.* at 1171–72.

39 *See, e.g.*, U.S. CONST. art. I; U.S. CONST. art. II; U.S. CONST. art. III.

40 Buckley v. Valeo, 424 U.S. 1, 124 (1976).

41 INS v. Chada, 462 U.S. 919, 956–59 (1983) (finding that the legislative veto unconstitutionally encroached on the powers of the executive branch).

42 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585–89 (1952) (finding that President Truman's Executive Order seizing the nation's steel mills exceeded the scope of the President's constitutional powers, "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

43 *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2500–08 (2019) (finding that claims of partisan gerrymandering present non-justiciable political questions). *See generally* Baker v. Carr, 369 U.S. 186 (1962) (discussing the political questions doctrine).

eroded."[44] Citing many of these principles, the Ninth Circuit sealed the fate of the *Juliana* plaintiffs, finding that the court lacked the ability, without violating the separation of powers, to effectuate a remedy.[45]

Foreign jurisdictions have taken different approaches to climate change cases and foreign courts are seemingly more amenable to judicial intervention. When a French Mayor petitioned the highest administrative court in France complaining of the French government's lack of action on climate change, the Council of State ordered the French government to make a showing, within three months of the action, that it is taking measures to meet its commitments to reduce global warming.[46] In a similar ruling, the Supreme Court of Justice of Colombia ordered the Colombian government to effectuate a plan to protect the Colombian Amazon and ordered municipalities in Colombia to update land-management plans to reduce deforestation.[47] In 2015, the District Court of the Hague in the Netherlands handed down a landmark decision declaring that the Dutch citizens have a right to a clean environment and ordered the Dutch government to enact emission reducing policies.[48]

Interestingly, the District Court of the Hague had to deal with a separation of powers problem.[49] This was because the Dutch government is a parliamentary system organized, similarly to the U.S., in three branches: executive, legislative, and judicial.[50] Just like the U.S., the Dutch system of government relies on a clear delineation of power and a system of checks and balances.[51] However, when the Netherlands argued that the court lacked the power to order the legislative branch to enact emission reducing policies, the court disagreed, contending that because the order left the actual policy making to the legislature, the separation of powers was not violated: the Dutch appellate court agreed.[52]

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44 *Chada*, 462 U.S. at 958.

45 Juliana v. United States, 947 F.3d 1159, 1169–73 (9th Cir. 2020).

46 *France's Top Court Gives Government Three Months to Honour Climate Commitments*, RFI (Nov. 19, 2020), https://www.rfi.fr/en/france/20201119-three-month-deadline-for-france-to-honour-climate-commitments-cop-21.

47 *In Historic Ruling, Colombian Court Protects Youth Suing the National Government for Failing to Curb Deforestation*, DEJUSTICIA (Apr. 5, 2018), https://www.dejusticia.org/en/en-fallo-historico-corte-suprema-concede-tutela-de-cambio-climatico-y-generaciones-futuras/.

48 RB Den Haag 24 juni 2015, C/09/456689/HA ZA 13-1396 m.nt. Hofhuis, Bockwinkel en Brand, para. 4.83 (Urgenda Foundation/Netherlands) (Neth.) [hereinafter *Urgenda Decision*].

49 Hof's-Gravenhage 9 oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda) (Neth.) [hereinafter *Urgenda Appellate Opinion*].

50 Chuka Nwanazia, *Trias Politica: Dutch System of Government and Why It Matters*, DUTCH REV. (Mar. 17, 2021), https://dutchreview.com/culture/society/the-trias-politica-dutch-system-of-government/.

51 *Id.*

52 *Urgenda Appellate Opinion*, *supra* note 49, at ¶ 68.

Perhaps the reason why the Dutch court was willing to issue an order that arguably overstepped the boundary between the legislative and judicial arms of the government is because the court grounded the right to a clean Dutch environment in international human rights law, specifically Articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, rather than on the Dutch Constitution itself.[53] It was the court's position that it was obligated to enforce human rights law even if traditional separation of powers principles would normally preclude the court from issuing similar orders effectively telling the legislative branch to legislate.[54]

While the United States is obviously not a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitution affords American citizens with certain fundamental rights, some of which are not firmly grounded in the text of the Constitution itself, but are nonetheless important.[55] So while the Dutch court found that it was obligated to uphold the fundamental rights afforded to its citizens in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the U.S. Supreme Court takes seriously its obligation to protect the fundamental rights of Americans.[56] The Court has taken care to enforce even those rights that do not appear in the Constitution whatsoever, but exist as an extension of what the Court has described as the penumbras of the Bill of Rights.[57] In a line of cases, the Court developed and expounded on the idea that "specific guarantees in the bill of rights have penumbras, forced by emanations from those guarantees that help give them life and substance."[58] As the next section explains, it is in these penumbras that the right to a clean and sustainable environment exists that should be recognized by the federal courts.

III. PRECEDENT SUPPORTING A RIGHT TO A CLEAN ENVIRONMENT

The majority and dissenting opinions in *Juliana* agreed on the crucial issue; climate change presents a grave threat to the security of the American people and absent action to mitigate its effects, it presents life threatening

53 *Id.* at ¶ 76; *see also* Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, 8, Nov. 4, 1950, 213 U.N.T.S.

54 *Urgenda Appellate Opinion*, *supra* note 49, at ¶ 69.

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

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

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

58 *Griswold*, 381 U.S. at 484; *see also Loving*, 388 U.S. at 12 (1967); M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996).

risks in the form of natural disasters and diminished food and water supplies.[59] Indeed, the *Juliana* plaintiffs presented a mountain of credible evidence and the court did not mince words in its description of the evidence: "[a] substantial evidentiary record documents that the federal government has long promoted fossil fuels despite knowing that it can cause catastrophic climate change, and the failure to change existing policy may hasten an environmental apocalypse."[60] Given the substantial threat, it seems likely that the Supreme Court will eventually have to answer the ultimate question: does the Constitution support a fundamental right to a clean environment? Indeed, when the Supreme Court denied the government's motion to stay the *Juliana* proceedings in the district court they noted, "[t]he breadth of respondents' claims is striking . . . and the justiciability of those claims presents a substantial ground for difference of opinion."[61]

Given the gravity of the threat and the scholarly response to *Juliana*, it is useful to consider the Supreme Court precedent that already supports recognition of a fundamental right to a clean environment.[62] Of course, the Constitution does not textually support the right to a "climate system capable of sustaining human life," but the Court's fundamental rights and Fifth Amendment substantive due process jurisprudence makes clear that certain "interests of the person are so fundamental that the State must record them its respect."[63] Again, many of these fundamental rights appear nowhere within the text of the Constitution itself.[64]

A few examples illustrate this point. The Court has recognized the right to marry,[65] the right to maintain a family and rear children,[66] and the right to pursue one's chosen occupation.[67] In *Loving v. Virginia*, the Court struck down Virginia state legislation prohibiting interracial marriage, finding that the legislation violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment and that the "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[68] In *M.L.B v. S.L.J.*, the Court struck down

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59 *See generally* Juliana v. United States, 947 F.3d 1159, 1166–68, 1176 (9th Cir. 2020).

60 *Juliana*, 947 F.3d at 1164.

61 United States v. United States Dist. Court, 139 S. Ct. 1, 1 (2018).

62 *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).

63 *Id.* at 645.

64 *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (recognizing a fundamental right to marry); M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (recognizing a fundamental right to maintain a family and rear children); Schware v. Board of Bar Exam'rs of New Mexico, 353 U.S. 232, 238–39 (1957) (recognizing that individuals have a fundamental right to pursue their chosen occupation).

65 *Loving*, 388 U.S. at 12.

66 *M.L.B.*, 519 U.S. at 116.

67 *Schware*, 353 U.S. at 238–39.

68 *Loving*, 388 U.S. at 11–12.

legislation requiring an indigent mother to pay record preparation fees to appeal an adverse decision finding her to be an unfit mother.[69] As in *Loving*, the Court's decision was grounded in the Due Process Clause of the Fourteenth Amendment.[70] Judge Staton's dissent in *Juliana* cited these cases as support that the Due Process Clause, "enshrined in the Fifth and Fourteenth Amendments" support the claim that due process principles support a constitutional right to a clean environment.[71]

However fundamental these cases are, the scholarly response to *Juliana* accurately points out that recognizing new fundamental rights under substantive due process analysis should not be taken lightly.[72] The Court has stated that it must exercise the utmost care whenever pressed to recognize a new right under the Due Process Clause of the Fifth Amendment, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court."[73] Professor Bradford Mank, arguing against a fundamental right to a clean environment, contends that the Court's reasoning in *Obergefell v. Hodges*, recognizing a fundamental right to same-sex marriage, was fundamentally flawed and gave federal judges too much discretion in recognizing new fundamental rights.[74]

Professor Mank's criticism of the *Obergefell* decision is with Justice Kennedy's "reasoned judgment" analysis in which the Court concerns itself with "identifying interests so fundamental that the State must accord them its respect," a decision which is guided by history and tradition.[75] Under this "reasoned judgment" analysis, Professor Mank argues that federal judges are given too much authority to interfere and override the policy judgments of the political branches.[76] Substantive due process analysis should be limited "to protecting historically fundamental rights of individuals and vulnerable minority groups."[77] Picking up where Professor Mank leaves off, Robert Torres contends that the problem with recognizing a right to a clean environment under the Due Process Clause is that environmental preservation is a relatively new concept; thus, the right to a sustainable environment is not "deeply rooted in this nation's history and implicit to ordered liberty."[78]

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69 *M.L.B.*, 519 U.S. at 128.

70 *Id.* at 116.

71 Juliana v. United States, 947 F.3d 1159, 1177–79 (9th Cir. 2020) (Staton, J., dissenting).

72 *See generally* Mank, *supra* note 22; Torres, *supra* note 22.

73 Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

74 Mank, *supra* note 22, at 279.

75 Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015).

76 Mank, *supra* note 22, at 307.

77 *Id.*

78 Torres, *supra* note 22, at 204.

These critics point out the tension between the fundamental rights test espoused by the Court in *Washington v. Glucksberg*, which requires a newly recognized fundamental right to be firmly rooted in the nation's history,[79] and Justice Kennedy's reasoning in recognizing a right to same-sex marriage in *Obergefell v. Hodges*.[80] In *Obergefell*, Justice Kennedy espoused that the Court need only exercise "reasoned judgment" in "identifying interests of the person so fundamental that the state must accord them its respect."[81] Departing from the history and tradition approach espoused in *Glucksberg*, Justice Kennedy found that exercising "reasoned judgment" is guided by history and tradition, but that history and tradition "do not set its outer boundaries."[82]

Despite the controversy between the more traditional substantive due process rights analysis and Justice Kennedy's "reasoned judgment" analysis,[83] there is another ground for support, in addition to the "reasoned judgment" approach, that was highlighted by Judge Staton in her *Juliana* dissent.[84] This ground is that some rights are so fundamental, regardless of the analysis employed, that they are considered necessary for the protection of all other fundamental rights.[85]

The most obvious example of this is the right to vote. This right has been described as "the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[86] Moreover, the Court has further considered the right to vote as a "fundamental political right" and a "preservative of all rights."[87] As noted by Judge Staton, the right to vote itself is not expressly guaranteed by the Constitution.[88] Nonetheless, it serves "as the necessary predicate for other[] [rights]."[89]

While the right to vote precedent recognizes that some fundamental rights are necessary for the protection of other fundamental rights, Judge Staton also identified a perpetuity principle as further support for the recognition of a fundamental right to a clean and sustainable environment.[90] The perpetuity principle holds that the perpetuity of the Republic itself

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

80 *Obergefell*, 576 U.S. at 645–46.

81 *Id.* at 645.

82 *Id.*

83 *Id.*

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

85 Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

86 *Id.* at 555.

87 Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

88 Juliana v. United States, 947 F.3d 1159, 1178 (2020) (Staton, J., dissenting).

89 *Id.* at 1177.

90 *Id.* at 1177–78.

"occupies a central role in our constitutional structure as a 'guardian of all other rights.'"[91] To be sure, there is nothing inherently environmental about this perpetuity principle, "and it does not task the courts with determining the optimal level of environmental regulation; rather, it prohibits only the willful dissolution of the republic."[92] The idea is that the principle exists almost as an insurance policy for other constitutional rights; if there is no Republic, then all constitutional rights are effectively meaningless.[93]

Judge Staton recognized that the perpetuity principle is "structural and implicit in our constitutional system," rather than explicit in the Constitution's text, but she noted the fact that that does not make it any less enforceable.[94] As examples of other non-textually supported constitutional principles, Judge Staton pointed out that the Constitution does not explicitly provide for judicial review or the tiers of scrutiny the Supreme Court applies to various constitutional rights and violations.[95] The point is that these principles are firmly entrenched in our constitutional system and their lack of textual support in the Constitution itself does not make them any less important or enforceable.[96]

The perpetuity principle, coupled with the notion that some rights are fundamental "preservative[s] of all rights,"[97] provides a response to the criticism surrounding the critiqued "reasoned judgment" analysis.[98] Indeed, it works under both the *Glucksberg* and *Obergefell* approaches, the preservation of constitutional rights is firmly rooted in the nation's history and "reasoned judgment" dictates that environmental protections are severely needed.[99]

IV. SO, THE RIGHT EXISTS, BUT WHAT ABOUT STANDING AND THE SEPARATION OF POWERS PROBLEM?

Even if the *Juliana* majority definitively sided with Judge Staton and ruled that the Constitution supports a fundamental right to a clean

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91 *Id.* at 1178 (quoting Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982)).

92 *Juliana*, 947 F.3d at 1179 (Staton, J., dissenting).

93 *Id.* at 1178–79.

94 *Id.* at 1179.

95 *Id.* at 1179–80.

96 *Id.* at 1180.

97 Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

98 Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015).

99 *Juliana*, 947 F.3d at 1175, 1777 ("The plaintiffs have made a compelling case that action is needed; it will be increasingly difficult . . . for the political branches to deny that climate change is occurring, that the government has had a role in causing it, and that our elected officials have a moral responsibility to seek solutions.").

environment, the case still would have been dismissed for lack of Article III standing.[100] The language of the *Juliana* majority makes clear that the court was sympathetic to the plaintiffs' arguments: "Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies."[101] The court went even further, noting that the record conclusively established that the federal government is a major contributor to the problem of climate change whether it be through affirmative action or inaction.[102]

Despite these findings, the Ninth Circuit held that the plaintiffs lacked standing to sue the federal government.[103] To have standing to sue in federal court, a plaintiff must allege: (1) a concrete and particularized harm that is (2) caused by the challenged conduct and (3) is likely to be redressed by a favorable judicial decision.[104] The court was unconcerned with the first prong; it was satisfied by the fact that there were individual plaintiffs that alleged individual and discreet harms due to rising climate temperatures.[105] The court cited, as an example, one plaintiff who was forced to leave her home because of water scarcity.[106] The court was also convinced that the plaintiffs had satisfied the causation requirement: "The plaintiffs' alleged injuries are caused by carbon emissions from fossil fuel production, extraction, and transportation," and "the United States accounted for 25% of worldwide emissions from 1850 to 2012, and currently accounts for about 15%."[107]

The problem for the *Juliana* plaintiffs was prong three, whether the injury is likely to be redressed by a favorable judicial decision.[108] In the Ninth Circuit's view, the remedy the plaintiffs sought, an order requiring the government to reduce carbon emissions by eliminating fossil fuels, was beyond the scope of an Article III court's power.[109] Article III redressability requires that the relief sought is both "(1) substantially likely to redress their injuries; and (2) within the district court's power to award."[110] Concerning the first prong, the court noted that an injunction requiring the government to "cease permitting, authorizing, and subsidizing fossil fuel use" and "a plan

100 *Juliana*, 947 F.3d at 1171–72 (majority opinion).

101 *Id.* at 1166.

102 *Id.* at 1167.

103 *Id.* at 1175.

104 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

105 *Juliana*, 947 F.3d at 1168.

106 *Id.*

107 *Id.* at 1169.

108 *See Lujan*, 504 U.S. at 560–61.

109 *Juliana*, 947 F.3d at 1164–65.

110 *Id.* at 1170 (citing M.S. v. Brown, 902 F.3d 1076, 1083 (9th Cir. 2018)).

subject to judicial approval to draw down harmful emissions" would not totally and completely redress the injuries suffered by the plaintiffs.[111] The court cited the plaintiffs' own experts who opined that reducing the global consequences of climate change would require "no less than a fundamental transformation of this country's energy system, if not that of the industrialized world."[112]

While the court was skeptical that the plaintiffs had satisfied the first prong of the redressability analysis, even assuming they had, the court was certain that they failed the second prong—within a federal district court's power to award.[113] The court was emphatic on this point: "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan."[114] Any effective plan to reduce carbon emissions would entail a plethora of complex policy decisions, decisions reserved to the legislative branch of government.[115] The issue boiled down to a separation of powers problem: "redressability questions implicate the separation of powers . . . federal courts 'have no commission to allocate political power and influence' without standards to guide in the exercise of such authority."[116] Ultimately, the court concluded that the plaintiffs must seek redress through the political branches, noting that the fact that "the other branches may have abdicated their responsibility to remediate the problem, does not confer on Article III courts, no matter how well-intentioned, the ability to step into their shoes."[117]

In her dissent, Judge Staton attempted to address the majority's contention that the plaintiffs' harms were simply not redressable by an Article III court.[118] Addressing the first prong of the redressability analysis, whether a court order can provide an adequate remedy to the plaintiffs, Judge Staton pointed to the plaintiffs' evidence "that there is a 'discernable tipping point' at which the government's conduct turns from facilitating mere polluting to inducing an unstoppable cataclysm in violation of plaintiffs' rights."[119] The discernable standard by which to determine the relief sufficient to remediate the claimed constitutional violation is "the amount of fossil fuel emissions that will irreparably devastate our nation."[120] Thus,

111 *Juliana*, 947 F.3d at 1170–71.

112 *Id.*

113 *Id.* at 1171–72.

114 *Id.* at 1171.

115 *Id.* at 1171–72.

116 *Id.* at 1173 (quoting Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019)).

117 *Juliana*, 947 F.3d at 1175.

118 *Id.* at 1181–91 (Staton, J., dissenting).

119 *Id.* at 1187.

120 *Id.*

however difficult it would be to remediate the constitutional harms suffered by the plaintiffs, there is a scientific basis for determining how it could be done.[121]

Even the majority was willing to assume, hypothetically, that a legal standard could be discerned that would meet the threshold of an adequate remedy.[122] The second prong—whether an Article III court has the power to award a remedy—was the real crux of the disagreement, and it is also where the separation of powers problem emerges.[123] In the majority's view, the federal government's action or inaction concerning climate change is a political issue reserved to the political branches.[124] The judiciary stepping in and telling the legislative and executive branches that they must do something about climate change would necessarily involve the judiciary encroaching on the will of the political branches.[125] Interestingly, the majority relied heavily on *Rucho v. Common Cause*—a political gerrymandering case—in finding that the court lacked the power to enforce a meaningful remedy.[126] In its analysis, the court found that, just as the Supreme Court in *Rucho* concluded that judicially manageable standards could not be identified to redress an asserted gerrymandering violation, judicially manageable standards could not be identified to redress the asserted constitutional violations suffered by the *Juliana* plaintiffs.[127]

First, noting that political gerrymandering is not analogous to climate policy, Judge Staton argued that the *Rucho* reasoning is also inapposite because the *Rucho* Court was concerned with the lack of judicially manageable standards to determine when exactly partisan gerrymandering goes too far.[128] The "right at issue" in *Juliana*, Judge Staton argued, "is fundamentally one of a discernable standard: the amount of fossil-fuel emissions that will irreparably devastate our Nation."[129] Further, the *Juliana* case had not yet reached trial, which is the point at which the plaintiffs would be required to prove the definitive standard the judiciary would have to employ to effectuate any awarded remedy.[130] Accordingly, the posture of the case only called for there to be a genuine dispute concerning the requisite

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121 *Id.*

122 *Juliana*, 947 F.3d at 1164 ("The central issue before us is whether, even assuming such a broad constitutional right exists, an Article III court can provide the plaintiffs the redress they seek. . . .").

123 *See id.* at 1171.

124 *See id.*

125 *See id.* at 1175.

126 *Id.* at 1173.

127 *Id.*

128 *Juliana*, 947 F.3d at 1187 (Staton J., dissenting).

129 *Id.*

130 *See id.* at 1187–88.

level of government action necessary to effectively alleviate the plaintiffs' harms.[131]

Even assuming that Judge Staton was correct in her argument that the plaintiffs presented a justiciable case, the question of how the federal judiciary could enforce a constitutional right to a clean environment still remains. To address this problem, the judiciary should consider the famous case of *Brown v. Board of Education*.[132] In *Brown*, the Court recognized that segregated public schools violate the Equal Protection Clause of the Fourteenth Amendment.[133] While the decision was grounded in the Equal Protection Clause, the Court faced a similar problem as that of the *Juliana* court in determining how to enforce the remedy.[134] The solution for the *Brown II* Court was to rely on the lower federal courts to effectuate the remedy over time.[135] The lesson of *Brown II* is that if a constitutional right is being violated, it is the duty of the federal judiciary to effectuate a remedy regardless of the difficulty such enforcement entails. Indeed, Judge Staton recognized that *Brown* supports the proposition that the relief requested by the *Juliana* plaintiffs, a plan to curb human impact on climate change, is perhaps not as novel as it appears at first, "[r]ather, consistent with our historical practices, their request is a recognition that remedying decades of institutionalized violations may take some time."[136]

V. WHY TURN TO FOREIGN SUPPORT?

Given that climate change is a global issue, persuasive authority from foreign jurisdictions may shed additional light in helping U.S. federal courts recognize that a clean and sustainable environment should be a constitutionally protected right. While the following comparative analysis is useful, especially in addressing the separation of powers problem, the long history of debate over whether foreign law should ever be considered in U.S. courts, even as persuasive authority, must be addressed.[137]

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131 *Id.*

132 *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

133 *See id.* at 495.

134 *See id.* at 495–96.

135 *See* Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 300–01 (1955).

136 *Juliana*, 947 F.3d at 1189 (Staton J., dissenting).

137 *See* Roper v. Simmons, 543 U.S. 551, 576–79 (2005) (citing international law as persuasive support for abolition of the death penalty for juvenile offenders); *see also Roper*, 543 U.S. at 624–28 (Scalia J., dissenting) (arguing that international law and foreign judicial opinions should not inform U.S. law).

Supreme Court Justices regularly debate the value of turning to foreign court decisions and applying foreign legal principles to domestic law.[138] This debate is most noticeable in the Supreme Court's death penalty jurisprudence. In *Knight v. Florida*, the Court was asked to decide whether lengthy stays on death row prior to execution violate the Eighth Amendment.[139] The Court denied certiorari and Justice Breyer issued a dissenting opinion in which he cited the Privy Council, the United Nations Committee on Human Rights, the Supreme Court of India, the Supreme Court of Zimbabwe, and the European Court of Human Rights to illustrate that many courts outside the U.S. have held that lengthy delays in administering a death penalty is inhumane and unusually cruel.[140] Justice Breyer noted that foreign law is not binding on U.S. courts but has long been considered as informative and relevant "to our own constitutional standards in roughly comparable circumstances."[141] On the other side of the debate was Justice Thomas who brushed aside Justice Breyer's analysis of foreign law stating that had there been support for petitioner's argument in American constitutional jurisprudence, the Court would not turn to any foreign authority.[142]

The comparative law debate in the death penalty context is not all too helpful because the United States is in the minority, as now more than seventy percent of the world's nations have abolished the death penalty.[143] However, environmental concerns are uniquely situated as worldwide and international issues. One need only consider the Paris Agreement, a groundbreaking international treaty binding 196 parties with the goal of reducing global warming.[144] As one of the first international agreements of its kind, the treaty provides a framework for "financial, technical and capacity building support to those countries who need it" to effectuate a reduction in climate change.[145] Further, the Biden administration's recommitment of the United States to the Paris Agreement signals a stronger political will to engage in the international

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138 *Compare* Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer J., dissenting), *with Roper*, 543 U.S. at 624–28 (Scalia J., dissenting).

139 Knight v. Florida, 528 U.S. 990, 990 (1999).

140 *Id.* at 995–96 (Breyer J., dissenting).

141 *Id.* at 997; *see also* Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982) (considering foreign jurisprudence in the context of the death penalty as a punishment for the crime of felony murder).

142 *Knight*, 528 U.S. at 990 (Thomas, J., concurring).

143 *Policy Issues: International*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/policy-issues/international (last visited Feb. 12, 2021).

144 *The Paris Agreement*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (last visited Dec. 23, 2020).

145 *Id.*

conversation regarding climate change and perhaps to emerge as a world leader.[146]

However, the fact remains that the Paris Agreement is not a miracle solution; it merely binds its signatories to *committing* to reducing emissions.[147] Given the breadth of the *Juliana* claims, the argument for judicial action takes center stage. One recent decision from the District Court of the Hague might provide an answer to the *Juliana* court's conclusion that ordinary Americans lack standing to sue the federal government to effectuate policies that will aid in reducing carbon emissions.

In *Urgenda v. State of the Netherlands*, the District Court of the Hague effectively made the decision that the *Juliana* court was not willing to make.[148] The *Urgenda* court held that the Dutch government had an affirmative duty to take climate change mitigation measures and ordered the Dutch government to reduce carbon emissions by twenty-five percent by 2020 in order to fulfill its duty of care to the Dutch citizens.[149] The interesting component of the *Urgenda* decision, for U.S. courts, is that the Netherlands court did not attempt to prescribe how the Dutch Government could, or should, achieve the mandated twenty-five percent reduction.[150] Rather, the court left the task of prescribing the necessary policy changes to the Dutch legislators.[151]

This result was reached because the Dutch court, just like the U.S. federal courts, was bound to uphold strict separation of powers principles.[152] This is why the *Urgenda* decision should be considered by U.S. federal courts. As discussed, the *Juliana* majority and dissent were in agreement over the fact that climate change is a real and grave threat to the security of the American people; the majority, however, was concerned with encroaching on the political branches and violating separation of powers principles.[153] The *Urgenda* court effectively found a way around the problem of usurping the powers of the political branches; namely, find that the people have a right to

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146 *See* Susanne Brooks, *A Bold New Commitment to the Paris Agreement Is Achievable—and Essential for U.S. Leadership*, ENV'T DEF. FUND (Mar. 3, 2021), http://blogs.edf.org/climate411/2021/03/03/a-new-ndc-paris-agreement-ambitious-credible-u-s-leadership/.

147 *See The Paris Agreement*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement (last visited Dec. 23, 2020).

148 *See Urgenda Decision*, *supra* note 48, ¶¶ 4.83–.84.

149 *See id.* ¶¶ 4.83–.85.

150 *See id.* ¶ 5.1.

151 *See id.*

152 *See* Nwanazia, *supra* note 50.

153 *See generally* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020); *Juliana*, 947 F.3d 1159, 1175–91 (Staton J., dissenting).

a clean environment and leave it to the policymakers to implement a plan of action.[154] This approach, if adopted by U.S. courts, would allow the federal judiciary to recognize that the people have a right to a clean and sustainable environment without encroaching on the political branches and violating separation of powers principles.

Although many federal judges are skeptical of importing foreign legal principles into American jurisprudence, the similarities between *Juliana* and *Urgenda* are striking. Both courts faced the issue of whether their citizens have a right to a clean environment and both courts were satisfied that climate change presents a grave threat to the security of their respective countries.[155] More importantly, both courts had to grapple with the argument that the separation of powers doctrine barred the relief the plaintiffs were seeking.[156] The *Urgenda* court rejected this contention, finding that because it left to Dutch lawmakers the responsibility of crafting the policies that would achieve the ordered reduction in emissions, the judiciary had not usurped the powers of the legislature.[157]

The same approach makes sense for the U.S. constitutional system and the Supreme Court's historical fundamental rights jurisprudence. The Court recognizes the right and leaves it to the legislature to determine the best policies to reduce emissions. The Court took a similar route in *Brown II*.[158] Facing the seemingly insurmountable task of nationwide school desegregation, the Court relied on the lower courts to effectuate the remedy over time.[159] The Court, however, did not shy away from the problem, much like the *Urgenda* court refused to shy away from the climate change problem even in the face of a strong argument that its decision would violate separation of powers principles.

Moreover, the fact that the Dutch court found that the right to a clean environment was grounded in Articles 2 (the right to life) and 8 (the right to respect for private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms should not discourage U.S. federal courts from considering the decision.[160] Article 93 of the Dutch Constitution make the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms binding Dutch

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154 *Urgenda Decision*, *supra* note 48, ¶ 5.1.

155 *See Juliana*, 947 F.3d at 1166; *Urgenda Decision*, *supra* note 48, ¶¶ 4.64–.65.

156 *See Juliana*, 947 F.3d at 1173; *Urgenda Decision*, *supra* note 48, ¶¶ 4.94–.99.

157 *See Urgenda Decision*, *supra* note 48, ¶ 5.1.

158 *See* Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 300–01 (1955).

159 *Id.*

160 *Urgenda Decision*, *supra* note 48, ¶ 4.52.

domestic law.[161] Similarly, U.S. Supreme Court cases announcing new fundamental rights become binding U.S. domestic law.[162] Accordingly, if the right exists, the federal judiciary has an obligation to recognize and enforce it, just as the Dutch court had an obligation to enforce the relevant provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The groundbreaking *Urgenda* decision can help the federal judiciary get over the "judicially manageable standards" hurdle of the redressability prong of the Article III Standing doctrine.[163] By approaching the standing issue from this perspective, the judiciary does not have to craft public policy, a task textually committed to the legislative branch, but can avoid abdicating its responsibility to interpret, apply, and enforce federal rights.[164] The Court has recognized that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."[165] Accordingly, if the right exists, the federal judiciary is obligated to enforce it, even if the judicial branch cannot craft the policy itself.

VI. CONCLUSION

Climate change is an existing and ongoing threat to the health, welfare, and security of the nation and the world at large. Notably, the *Juliana* majority conceded this point as well as the fact that the federal government is a major contributor to the problem, noting that the evidence presented by the plaintiffs "conclusively establish[ed] that the federal government has long understood the risk of fossil fuel use and increasing carbon dioxide emissions."[166] However, even assuming the plaintiffs had a constitutional right to a clean environment, the majority concluded that the plaintiffs lacked standing.[167] The Ninth Circuit found that a federal court could not redress the

161 GW. [CONSTITUTION] art. 93 ("Provisions of treaties and resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.").

162 *See* Loving v. Virginia, 388 U.S. 1, 12 (1967); M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996); Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 238–39 (1957).

163 Lujan v. Def. of Wildlife, 504 U.S. 555, 560–61 (1992).

164 *See Loving*, 388 U.S. at 12; *M.L.B.*, 519 U.S. at 116; *Schware*, 353 U.S. at 238–39.

165 Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

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

167 *Id.* at 1174.

injuries of the plaintiffs without encroaching on the legislative branch of the government.[168]

Two major issues emerge in the wake of *Juliana*: whether or not the Constitution supports a fundamental right to a clean environment and, if so, whether or not a federal court can effectuate a remedy without violating separation of powers principles. To address the first issue, federal courts can approach traditional substantive due process analysis from a new angle and consider the "perpetuity principle" described by Judge Staton in her dissenting opinion in *Juliana*.[169] Under the "perpetuity" principle, some fundamental rights serve as guardians of all other rights—the continuation and security of the Republic is necessary to ensure that all other constitutional rights are meaningful. This approach works under both the *Glucksberg* and the *Obergefell* approaches to substantive due process analysis.[170] First, preserving fundamental rights is certainly rooted in the nation's history, and under Justice Kennedy's "reasoned judgment" analysis, it is becoming increasingly difficult to claim that "reasoned judgment" does not dictate meaningful government action to reduce the harmful effects of global warming.[171]

Perhaps the second issue is more difficult, how federal courts can effectuate a meaningful remedy without violating separation of powers principles. First, federal courts should turn to Supreme Court precedent that supports the notion that regardless of the difficulty in enforcing certain rights, the judiciary is obligated to do so. The courts should consider the *Brown II* framework that relied on the lower federal courts to effectuate the remedy of mandated desegregation over time.[172] The *Brown II* Court took this more practical approach, understanding that remedying deeply rooted institutionalized harms cannot be done overnight.[173] The point is that the Court's interpretation of the Equal Protection Clause required desegregation of public schools. In a similar vein, if substantive due process analysis supports a fundamental right to a clean environment, then the Due Process Clause requires that action be taken to mitigate the effects of climate change.

Additionally, considering the global nature of climate change, federal courts should be more amenable to considering foreign cases and law as persuasive support for recognizing a fundamental right to a clean environment. Specifically, the similarities between the Dutch and American

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168 *Id.* at 1175.

169 *Juliana*, 947 F.3d at 1177 (Staton J., dissenting).

170 *See supra* Part III.

171 Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997); Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015).

172 Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 300–01 (1955).

173 *Juliana*, 947 F.3d at 1189 (Staton J., dissenting) (discussing the *Brown II* approach).

systems of government show how well the *Urgenda* decision fits in with American constitutional jurisprudence.[174] Both countries rely on a strict delineation of powers between their respective executive, legislative, and judicial branches. Indeed, both the *Urgenda* and *Juliana* courts faced similar separation of powers arguments. The *Urgenda* court, however, found that an order directing the Dutch government to enact policies that would reduce emissions would not violate separation of powers principles because the policy-making decisions were left to the legislative branch. This approach fits nicely within the *Brown II* framework discussed in Part IV.[175] The Court proclaims a fundamental right to a clean environment, the legislature enacts policies to reduce climate change, and the lower federal courts are available to ensure enforcement. This approach leaves legislating to legislators and interpretation and enforcement of constitutional rights to the federal courts.

As the evidence of climate change becomes increasingly overwhelming, environmental groups and individual plaintiffs will continue to seek redress in federal courts. Perhaps the Supreme Court signaled a willingness to consider constitutional claims to a clean environment when it dismissed the government's motion to stay the *Juliana* proceedings and stated: "[t]he breadth of respondents' claims is striking . . . and the justiciability of those claims presents a substantial ground for difference of opinion."[176] Given the likelihood of continued litigation on the question of a constitutional right to a clean environment, the federal judiciary should reconsider the *Juliana* majority's approach to the question and the separation of powers problem.

Absent some action, the results of climate change will continue to be devastating and threaten the very existence of the Republic.[177] If the right exists, the federal judiciary has an obligation to the American people to vigorously enforce and protect it no matter the level of difficulty such enforcement entails.

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174 *See supra* Parts II, V.

175 *See supra* Part IV.

176 United States v. U.S. Dist. Ct., 139 S. Ct. 1, 1 (2018).

177 *Juliana*, 947 F.3d at 1166.