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NOTES

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NOTES

THE RIGHT TO BREATHE: A CONSTITUTIONAL PATH TO AN ENVIRONMENTAL AMENDMENT

Kyle J. Bobeck*

ABSTRACT

The constitutions of more than three-quarters of the countries on Earth explicitly reference environmental rights or responsibilities, but that is not the case in the United States.[1] The U.S. Constitution contains no unequivocal right to a clean environment, and attempts to sway federal judges to find an implied right have not been successful.[2] Recently, in *Juliana v. United States*, plaintiffs pursued an order requiring the federal government to reduce the country's carbon dioxide emissions.[3] While the Oregon district court ostensibly favored such an order, a divided Ninth Circuit held in 2020 that the plaintiffs lacked standing.[4]

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* J.D. Candidate, University of Pittsburgh School of Law, Class of 2024. I want to thank my parents, my twin brother Bradley, my grandparents, and my friends in Buffalo and Pittsburgh for always believing in me. I could not have done this without your support and unconditional love. Lastly, a special thank you to Madalyn Snyder, Claude Corbett, and David Puccio for providing the support that was instrumental in my attendance at law school. I am forever grateful.

[1] Romany Webb & Michael B. Gerrard, *Environmental Rights in State Constitutions*, SABIN CTR. FOR CLIMATE CHANGE L. (Aug. 31, 2021), https://blogs.law.columbia.edu/climatechange/2021/08/31/environmental-rights-in-state-constitutions/.

[2] *Id.*

[3] *Id.*; Juliana v. United States (*Juliana I*), 217 F. Supp. 3d 1224, 1233 (D. Or. 2016), *overruled by* Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020).

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

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Juliana v. United States is a case in point of the failures of the federal government to stem climate change and protect those most affected by it—minorities and, most notably, Black communities. Climate change and pollution have made the effects of racially biased urban and housing development increasingly salient.[5] The disproportionate location of highways, factories, and oil refineries in Black communities, rising air temperatures, and sea levels do not spread hate speech.[6] Still, their effects harm Black communities the most.[7] This results in Black communities facing the highest projected increases in childhood asthma diagnoses and extreme temperature-related deaths from global warming of any ethnicity.[8]

This Note explains why a Fundamental Environmental Right to the U.S. Constitution—on par with Trial by Jury or Freedom of Speech—is imperative for individual liberty, should be beyond the reach of the political process, and enshrined in the Constitution. This Note examines the effects of climate change and pollution on majority Black populations along a stretch of the Mississippi River and explains why climate suits are justiciable. Furthermore, it undertakes a comparative analysis of the South African Constitution and assesses state constitutions containing environmental amendments to demonstrate how a federal Fundamental Environmental Right can be created. In light of this analysis, this Note proposes four ways to create a federal Fundamental Environmental Right. First, by a congressional amendment and attaching quantifiable standards to it. Additionally, using natural laws, the Due Process Clause of the Fourteenth Amendment, and common law principles. Next, a medley of the Fifth and Fourteenth Amendments. Finally, the Equal Dignity doctrine from *Obergefell v. Hodges*.[9]

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[5] Casey Berkovitz, *Environmental Racism Has Left Black Communities Especially Vulnerable to COVID-19*, The Century Found. (May 19, 2020), https://tcf.org/content/commentary/environmental-racism-left-black-communities-especially-vulnerable-covid-19/?session=1&session=1.

[6] *Id.*; *Climate Change Impacts*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://www.noaa.gov/education/resource-collections/climate/climate-change-impacts (last updated Aug. 13, 2021).

[7] Berkovitz, *supra* note 5.

[8] *EPA Report Shows Disproportionate Impacts of Climate Change on Socially Vulnerable Populations in the United States*, U.S. ENV'T PROT. AGENCY (Sept. 2, 2021), https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable.

[9] 576 U.S. 644 (2015).

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I. INTRODUCTION

It has long been known that human activities can change a region's climate. For example, in the fourth Century B.C., Theophrastus, a pupil of the Ancient Greek Philosopher Aristotle, hypothesized that the clearing of Greek forests raised surface temperatures, and European Renaissance scholars observed that deforestation, irrigation, and grazing altered the lands surrounding the Mediterranean.[10] But, climatic changes observed by ancient scholars are minute compared to the pace of climatic changes over the past 300 years that coincide with the dawn of the Industrial Revolution.[11] Since then, Earth's average surface temperature has increased by 0.07-0.20° Celsius every decade, sea levels have risen by 3.2 millimeters a year, and atmospheric carbon dioxide levels are 50% higher than pre-industrial levels.[12]

What's damning is that the Industrial Revolution, to the present day, reflects 0.1% of human history, and our greenhouse gas emissions over that period have drastically impacted our climate and, as a consequence—human health and well-being.[13] For instance, as temperatures rise, hurricanes get stronger and wetter.[14] As the Earth gets drier, wildfires become more prevalent, significantly reduce air

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[10] J. Neumann, *Climatic Change as a Topic in the Classical Greek and Roman Literature*, 7 CLIMATIC CHANGE 441, 446–47 (1985); CLARENCE J. GLACKEN, TRACES ON THE RHODIAN SHORE: NATURE AND CULTURE IN WESTERN THOUGHT FROM ANCIENT TIMES TO THE END OF THE EIGHTEENTH CENTURY 121 (1967).

[11] Iman Ghosh, *Since 1850, These Historical Events Have Accelerated Climate Change*, WORLD ECON. F. (Feb. 9, 2021), https://www.weforum.org/agenda/2021/02/global-warming-climate-change-historical-human-development-industrial-revolution.

[12] *Id.*; *Climate Change Impacts*, *supra* note 6; *Carbon Dioxide Now More Than 50% Higher Than Pre-Industrial Levels*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (June 3, 2022), https://www.noaa.gov/news-release/carbon-dioxide-now-more-than-50-higher-than-pre-industrial-levels; *World of Change: Global Temperatures*, NASA EARTH OBSERVATORY, https://earthobservatory.nasa.gov/world-of-change/global-temperatures (last visited Apr. 10, 2024).

[13] Ghosh, *supra* note 11; Carina M. Schlebusch, Helena Malmström, Torsten Günther, Per Sjödin, Alexandra Coutinho, Hanna Edlund, Arielle R. Munters, Mário Vicente, Maryna Steyn, Himla Soodyall, Marlize Lombard & Mattias Jakobsson, *Southern African Ancient Genomes Estimate Modern Human Divergence to 350,000 to 260,000 Years Ago*, 358 SCIENCE 652 (Nov. 3, 2017), https://www.science.org/doi/epdf/10.1126/science.aao6266. The generally accepted date for when the first anatomically modern humans evolved was 300,000 years ago. Figures vary for the exact start of the Industrial Revolution, but it is generally accepted that it started 250–300 years ago. Therefore, the last 300 years represent 0.1% of human history (300 years/300,000 years * 100 = 0.1%).

[14] *Carbon Dioxide Now More Than 50% Higher Than Pre-Industrial Levels*, *supra* note 12.

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quality, and increase respiratory and cardiovascular hospitalizations.[15] And, as flooding becomes more common, the spread of waterborne diseases increases.[16]

Undoubtedly, these changes to Earth's climate affect us all, but climatic changes intertwine with environmental racism to harm communities of color the most.[17] Environmental racism is defined as "any policy, practice or directive that differentially affects or disadvantages (where intended or unintended) individuals, groups or communities based on race."[18] Environmental racism rears its ugly head in many forms. For example, the habitual construction of freeways through Black communities concentrates mobile sources of emissions and carbon dioxide pollution in minority communities.[19] And because of racially motivated redlining and zoning laws, land surrounding majority Black neighborhoods is historically cheaper for polluters to acquire than majority-white neighborhoods.[20] As a result, Black Americans are 75% more likely than other races to live near facilities that produce hazardous waste.[21]

A. The "Cancer Alley" Case Study

A case in point is the sacrifice zone anointed "Cancer Alley," an eighty-five-mile stretch of land along the Mississippi River between New Orleans and Baton Rouge.[22] A sacrifice zone is an area impaired or rendered uninhabitable by heavy environmental alterations and, because of socioeconomic factors, predominantly

[15] *Climate Effects on Health: Wildfires*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/climateandhealth/effects/wildfires.htm.

[16] *Carbon Dioxide Now More Than 50% Higher Than Pre-Industrial Levels*, *supra* note 12.

[17] Victoria Peña-Parr, *The Complicated History of Environmental Racism*, UNM NEWSROOM (Aug. 4, 2020), http://news.unm.edu/news/the-complicated-history-of-environmental-racism.

[18] *Id.*

[19] Berkovitz, *supra* note 5.

[20] *See id.*

[21] Linda Villarosa, *Pollution is Killing Black Americans. This Community Fought Back.*, N.Y. TIMES MAG. (July 28, 2020), https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html.

[22] Julie Schwartzwald Meaders, Comment, *Health Impacts of Petrochemical Expansion in Louisiana and Realistic Options for Affected Communities*, 34 TULANE ENV'T L.J. 113, 116, 120 (2021).

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arises in low-income and minority communities.[23] In Cancer Alley, over 150 chemical plants and refineries release 129.3 million pounds of toxic emissions a year, resulting in the predominantly Black population in some areas having a likelihood of developing cancer from air pollution over 700 times the national average.[24] Consequently, this Note advocates for a Fundamental Environmental Right and examines how communities aggrieved by climate change and pollution can constitutionalize environmental protections.

B. Constitutionalizing the Federal Fundamental Environmental Right

Environmental norms can be "constitutionalized" in one of three ways: (1) as statements of policy, (2) as working procedural norms, or (3) as fundamental environmental rights.[25] Of the 149 national constitutions that address the environment, most reflect policy-related statements that aim to influence decision-making but are neither substantive nor enforceable by citizens aggrieved by environmental degradation.[26] Fewer contain procedural norms for environmental interests, including access to information; public participation; and advanced notification.[27]

About 98 of the 149 national constitutions that address the environment grant a substantive Fundamental Right to live in a "healthy," "clean," "healthful," or "favorable" environment.[28] Of those 98, national courts regard a small minority as

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[23] Jessica Roake, *Think Globally, Act Locally: Steve Lerner, 'Sacrifice Zones,' at Politics and Prose*, WASH. POST EXPRESS (Sept. 22, 2010, 8:00 PM), https://www.washingtonpost.com/express/wp/2010/09/23/steve-lerner-book-sacrifice-zones/.

[24] J. TIMMONS ROBERTS & MELISSA M. TOFFOLON-WEISS, CHRONICLES FROM THE ENVIRONMENTAL JUSTICE FRONTLINE 5, 7 (2001); Rebecca Hersher, *After Decades of Air Pollution, a Louisiana Town Rebels Against a Chemical Giant*, NPR (Mar. 6, 2018, 3:23 PM), https://www.npr.org/sections/health-shots/2018/03/06/583973428/after-decades-of-air-pollution-a-louisiana-town-rebels-against-a-chemical-giant.

[25] Carl Bruch, Wole Coker & Chris VanArsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENV'T L. 131, 133 (2001); James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENV'T L. REV. 113, 114 (2006).

[26] David R. Boyd, *The Status of Constitutional Protection for the Environment in Other Nations*, DAVID SUZUKI FOUND., https://davidsuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations-SUMMARY.pdf (last visited Nov. 19, 2023); Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENV'T L. REV. 1, 82 (1992).

[27] Bruch et al., *supra* note 25, at 133–34.

[28] Boyd, *supra* note 26; May, *supra* note 25.

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enforceable.[29] For instance, South African courts have interpreted the nation's constitutional Fundamental Environmental Right as enforceable by aggrieved individuals, thus serving as inspiration for a similar amendment in the United States.[30]

II. COMPARATIVE ANALYSIS OF THE SOUTH AFRICAN CONSTITUTION

Section 24 of the South African Constitution, in relevant part, states: "Everyone has the right [(a)] to an environment that is not harmful to their health or well-being; and [(b)] to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that [(i)] prevent pollution and ecological degradation; [and] [(ii)] promote conservation[.]"[31] Unfortunately, while standards for a "healthy environment" and "protection from pollution" exist in South Africa, they lack precision.[32] Thus, the South African Constitution serves as a lesson to ensuring quantitative standards are attached to our federal Fundamental Environmental Right.[33]

There are three primary ways to express environmental protection standards: quantitative, qualitative, and directional.[34] Quantitative standards measure a specific aspect of a relevant right, such as how much water each person receives daily.[35] Qualitative standards focus on improving the quality of life and do not rely on quantifiable measurements, such as Section 24.[36] Finally, directional standards set the direction toward fully realizing a particular right.[37] For instance, Section 26

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[29] *Id.*

[30] May, *supra* note 25; Eric C. Christiansen, *Empowerment, Fairness, Integration: South African Answers to the Question of Constitutional Environmental Rights*, 32 STAN. ENV'T L.J. 215, 218–19 (2013).

[31] S. AFR. CONST., 1996, ch. 2, § 24(a)–(b).

[32] Nathan J. Cooper, *The South African Constitution—Standards of Environmental Protection*, *in* ENVIRONMENTAL RIGHTS: THE DEVELOPMENT OF STANDARDS 286, 286–87 (Stephen J. Turner et al. eds., 2019).

[33] *See id.*

[34] *Id.* at 286.

[35] *Id.*

[36] *Id.*

[37] *Id.*

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requires the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."[38]

Qualitative and directional standards are imprecise and ineffective in enshrining a Fundamental Environmental Right. For instance, the limitations of seeking to use constitutional rights as environmental standards without sufficient substantive definition are exemplified by *HTF Developers (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others*.[39] In *HTF Developers*, the South African court stated that the term "well-being" in Section 24(a) is "manifestly incapable of precise definition."[40] Without a precise definition, a standard of well-being is left to one's subjective opinions, hindering the promulgation of quantitative environmental standards.[41]

However, a minimum core approach to interpreting Section 24(a) presents a solution to avoiding semantic pitfalls such as an "indeterminate" definition of "well-being."[42] Instead, it creates a clear and measurable quantitative standard for courts and environmental authorities to fulfill.[43] A minimum core approach is defined as "minimum essential levels" of a right, and aims to set a quantitative floor.[44] The Witswaterand High Court took this approach to determine a minimum quantitative measure for sufficient water in *Mazibuko and Others v. City of Johannesburg and Others*.[45]

Section 27 of the South African Constitution states, "[e]veryone has the right of access to . . . sufficient food and water[,]" and in *Mazibuko*, the High Court weighed if the City of Johannesburg violated this section by installing prepayment water meters in Phiri—a community on the outskirts of Johannesburg whose residents the court described as "poor, uneducated, unemployed and . . . ravaged by

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[38] S. AFR. CONST., 1996, ch. 2, § 26.

[39] Cooper, *supra* note 32, at 303.

[40] *Id.* at 303–04.

[41] *Id.* at 304.

[42] *Id.*

[43] *Id.*

[44] Angelina Fisher, *"Minimum Core" and the "Right to Education*,*"* THE WORLD BANK, Oct. 2017, at 1, https://openknowledge.worldbank.org/server/api/core/bitstreams/63a5432e-4de2-5d62-ac16-70d046e2f3c2/content.

[45] Mazibuko v. City of Johannesburg 2008 [2008] JOL 21829 (W) (S. Afr.).

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HIV/AIDS."[46] In addition to Section 27, regulations promulgated after the passage of the Water Services Act of 1997 set the quantification of sufficient water as a minimum standard of twenty-five liters per person, per day (or six kiloliters per household per month).[47] Johannesburg challenged this standard on the contention that a sufficient quantity of water depends on the "requirements of users in particular social circumstances" and that poor residents did not need as much water as wealthy landowners.[48]

Thus, the *Mazibuko* court reasoned that given Phiri's needs—and the state's obligation to "provide the poor with the necessary water and water facilities on a non-discriminatory basis"— that a volume of fifty liters per day was an appropriate quantifiable minimum standard of "sufficient water" rather than the statutory twenty-five liters per day limit.[49] This decision was heralded as a significant win for marginalized communities at the time.[50] But, the appellate Constitutional Court overturned the minimum core approach and the fifty liters per day in favor of a directional or "reasonableness" standard—"to refrain from encroaching on matters of resource allocation, under the purview of the legislature and executive."[51] Thus, as a directional standard points toward the eventual fulfillment of the constitutional right to water—which may never occur—it treats water as a commodity rather than a basic right and is a stark contrast to quantitative standards which provide tangible environmental protections.[52]

While the "minimum core" approach in South Africa was short-lived, it illustrates why quantitative standards are critical to creating enduring environmental

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[46] S. AFR. CONST., 1996, ch. 2, § 27; *Mazibuko* (W) at 3 para 5.

[47] Regulations Relating to Compulsory National Standards and Measures to Conserve Water, GN R.509 of GG 22355 § 3(b) (June 8, 2001).

[48] Cooper, *supra* note 32, at 296.

[49] *Mazibuko* (W) at 14 para 36; U.N., Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rts., General Comment No. 15: The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003).

[50] Cooper, *supra* note 32, at 297.

[51] *Id.* at 298–99; Mazibuko v. City of Johannesburg 2010 (4) SA 1 (CC) at 5 para. 9 (S. Afr.).

[52] Cooper, *supra* note 32, at 286; Nathan John Cooper, *After* Mazibuko*: Exploring the Responses of Communities Excluded From South Africa's Water Experiment*, 61 J. AFR. L. 57, 58 (2017).

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protections in poor communities that are particularly vulnerable to climate change.[53] Like Phiri, the communities surrounding Cancer Alley are poor and limited in resources.[54] Therefore, safeguarding the rights of communities—particularly those most vulnerable to climatic changes—preventing basic rights from becoming commodities, and ensuring a "reasonableness" approach does not undermine quantifiable gains, require using a minimum core approach and quantifiable standards while drafting the federal Fundamental Environmental Right.[55]

III. STATE CONSTITUTIONAL PROVISIONS

In addition to the South African Constitution, the constitutions of Hawaii, Illinois, Rhode Island, Pennsylvania, Montana, Massachusetts, and, most recently, New York contain amendments that afford environmental rights.[56] This Note will examine Pennsylvania's Article I, Section 27, the "Natural resources and the public estate" Amendment, and features of Section 27 that apply to enshrining a Fundamental Environmental Right at the federal level of government.

A. Environmental Rights Clause

The Pennsylvania state court case *Commonwealth v. National Gettysburg Battlefield Tower* serves as an example of the need for a federal Fundamental Environmental Right to be self-executing.[57] At the time of its ratification by voters in 1971, Article I, Section 27, the "Natural resources and public estate" Amendment to the Pennsylvania Constitution was neither self-executing nor able to provide much in the form of substantive environmental rights.[58] An amendment is self-executing if it "establishes substantive rules that can be enforced in the absence of implementing legislation."[59] Consequently, a nonself-executing amendment is toothless and can

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[53] WATER RSCH. COMM'N, CLIMATE CHANGE AND WATER RESOURCES IN SOUTHERN AFRICA: STUDIES ON SCENARIOS, IMPACTS, VULNERABILITIES AND ADAPTATION (R.E. Schulze ed., 2005), https://www.wrc.org.za/wp-content/uploads/mdocs/14302.pdf.

[54] Meaders, *supra* note 22, at 116.

[55] JOE WILLS, *A Commodity or a Right? Evoking the Human Right to Water to Challenge Neo-liberal Water Governance*, *in* CONTESTING WORLD ORDER: SOCIOECONOMIC RIGHTS AND GLOBAL JUSTICE MOVEMENTS 196, 235 (2017).

[56] Webb & Gerrard, *supra* note 1; N.Y. CONST. art. I, § 19.

[57] Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 311 A.2d 588, 595 (Pa. 1973).

[58] John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II—Environmental Rights and Public Trust*, 104 DICK. L. REV. 97, 101 (1999).

[59] *Id.* at 103.

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only provide for judicially enforceable public rights if the legislature promulgates legislation that codifies those same public rights.[60]

In *Gettysburg Tower*, the Pennsylvania Attorney General contended a 307-foot tower defied the Environmental Rights Clause of Article I, Section 27, and that Section 27 imposed a substantive limitation on private development.[61] The Pennsylvania Environmental Rights Clause provides: "[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment."[62] However, the issue became whether the Environmental Rights Clause was self-executing.[63] And, if it was, did the proposed tower harm the "natural, scenic, historic and esthetic values" of the Gettysburg Battlefield National Park?[64]

The Pennsylvania Commonwealth Court concluded in *Gettysburg Tower*, and the Pennsylvania Supreme Court reaffirmed their position more than twenty years later in *In re Larsen*, that Article I, Section 27's Environmental Rights Clause was self-executing for two reasons. First, Section 27 contained no explicit language indicating "an intent to require legislation."[65] Because of this, it was distinguishable from other constitutional amendments approved in the same 1971 referendum requiring legislation.[66] Second, the location of Section 27 in Article I of the Pennsylvania Constitution, which contains a declaration of rights, lends itself to the conclusion that all amendments in Article I are self-executing.[67] Therefore, Article I, Section 27, was capable of being "given effect without the aid of legislation" and created judicially enforceable public rights.[68]

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[60] *Id.*

[61] Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 302 A.2d 886, 887 (Pa. Commw. Ct. 1973).

[62] PA. CONST. art. I, § 27.

[63] *Nat'l Gettysburg Battlefield Tower*, 302 A.2d at 892. Since the Pennsylvania Supreme Court's decision was a plurality opinion and not precedential, the Commonwealth Court's holding that the Environmental Rights Clause is self-executing stands.

[64] *Id.* at 888.

[65] *Id.* at 892; *In re* Larsen, 655 A.2d 239, 243 (Pa. 1995).

[66] *Nat'l Gettysburg Battlefield Tower, Inc.*, 311 A.2d at 588, 597 (Jones, J., dissenting) (discussing the reasoning behind the majority opinion).

[67] *Nat'l Gettysburg Battlefield Tower, Inc.*, 302 A.2d at 892.

[68] *In re* Larsen, 655 A.2d at 243 (citation omitted).

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B. Public Trust Clause

Furthermore, *Robinson Township v. Commonwealth* suggests that the state, in its capacity as trustee of the public lands, has a duty to utilize its police power to ensure their protection.[69] The statute at issue in *Robinson Township*, Act 13, comprehensively amended Pennsylvania's Oil and Gas Act and added Chapter 33, which prohibited local regulation of oil and gas operations, including environmental legislation.[70] Act 13 required municipal zoning ordinances statewide to allow oil and gas wells, essentially eliminating local governments' control over environmental resources in favor of the interests of oil and natural gas producers.[71]

The *Robinson Township* court concluded Section 3304 and Act 13 entitling private oil and gas operations—"as of right"—was irreconcilable with the Pennsylvania Constitution's Public Trust Clause in Article I, Section 27.[72] The Public Trust Clause provides: "Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."[73] The court held this clause creates "an obligation on the government's behalf to refrain from unduly infringing upon or violating the right, including by legislative enactment or executive action," and "that economic development cannot take place at the expense of an unreasonable degradation of the environment."[74] Accordingly, the Commonwealth, as the trustee of public lands, must use its police power to promote sustainable property use and economic development.[75]

C. Lessons Gleaned from the South African and Pennsylvanian Constitutions

Gettysburg Tower, *Robinson Township*, and Article I, Section 27 illustrate how a federal Fundamental Environmental Right should be designed. A federal Fundamental Environmental Right must contain (1) the environmental rights clause

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[69] Robinson Twp. v. Commonwealth, 83 A.3d 901 (Pa. 2013).

[70] 58 PA. CONS. STAT. §§ 2301–3504; *Robinson Twp.*, 83 A.3d at 915.

[71] 58 PA. CONS. STAT. § 3304(b)(5)–(6).

[72] *Id.*; *Robinson Twp.*, 83 A.3d at 937, 980.

[73] PA. CONST. art. I, § 27.

[74] *Robinson Twp.*, 83 A.3d at 952, 954.

[75] *Id.* at 981; *cf.* Schuylkill Tr. Co. v. Schuylkill Mining Co., 57 A.2d 833 (Pa. 1948).

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and (2) the public lands clause from Section 27—collectively referred to hereinafter as a right to a "safe, clean environment"—for several reasons.[76] First, this would elevate the "right to clean air, pure water" from beyond the reach of the political process, and laws encroaching upon it would need to pass strict scrutiny.[77] Strict scrutiny is the highest standard of review a court will use to evaluate the constitutionality of government discrimination, and it applies to "discrete and insular minorities. . . ."[78] These are generally groups that have been historically discriminated against, like Black Americans in Cancer Alley.[79] Accordingly, as discussed later on in the Equal Dignity Section of this Note, government zoning laws or tax breaks in Cancer Alley would have to then be necessary to achieve a "compelling government interest" to be deemed constitutional.[80]

Second, a federal Public Lands Clause would benefit communities like those in Cancer Alley.[81] For example, if a federal Public Lands Clause attached specific duties, including duties of loyalty and good faith, the state would be charged with maintaining the trust corpus, that being the public lands and natural resources.[82] Thus, the state as trustee would be prohibited from failing to act in the best interest of the trust corpus and the people of Pennsylvania as named beneficiaries.[83] For example, in *Robinson Township*, the court found that Pennsylvania, as "trustee" of the public lands and subject to a duty of care, could not promote economic development—i.e., oil and gas producers' economic interests "at the expense of an unreasonable degradation of the environment."[84] If applied to Cancer Alley, the same principle would necessitate that the state of Louisiana prioritize the interests of the

[76] PA. CONST. art. I, § 27.

[77] *Id.*; *Fundamental Right*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/fundamental_right (last visited Nov. 19, 2023).

[78] United States. v. Carolene Prods. Co., 304 U.S. 144, 153 (1938).

[79] *Equal Protection Clause*, CONST. L. REP., http://constitutionallawreporter.com/amendment-14-01/equal-protection-clause/ (last visited Nov. 19, 2023); Meaders, *supra* note 22, at 116–18.

[80] *Strict Scrutiny*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Nov. 19, 2023); *Carolene Products Co.*, 304 U.S. at 153. *See infra* Equal Dignity Section.

[81] Meaders, *supra* note 22, at 118.

[82] Payne v. Kassab, 361 A.2d 263, 270–71 (Pa. 1976); UNIF. TR. CODE §§ 802–804 (2000).

[83] Robinson Twp. v. Commonwealth, 83 A.3d 901, 959 (Pa. 2013); UNIF. TR. CODE §§ 802–804 (2000).

[84] *Robinson Twp.*, 83 A.3d at 954.

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beneficiaries'—i.e., the general public—interests in preserving the public lands and natural resources over the economic interests of toxin-producing companies.[85]

Also, the federal Fundamental Environmental Right must be self-executing. An amendment passed by both houses of Congress, and signed by the President, is innately self-executing.[86] Like Article I, Section 27, a federal Fundamental Environmental Right would be situated alongside the Bill of Rights and the Eleventh through Twenty-Seventh Amendments in the U.S. Constitution.[87] Thus, as the Pennsylvania court in *Gettysburg Tower* held that Article I, Section 27's location among a declaration of rights lent itself to the conclusion it was self-executing, the same could be said for a federal Fundamental Environmental Right's location in the vicinity of the Bill of Rights, and other Fundamental Rights such as Freedom of Speech and Trial by Jury.[88]

Lastly, the federal Fundamental Environmental Right must be expressed with quantifiable standards attached to the right. The pitfall of directional standards and a lack of precision was discussed in *Mazibuko and Others v. City of Johannesburg and Others*.[89] Accordingly, if the same language from Article I, Section 27 is used, the question remains of what constitutes "clean air" or what threshold of chemicals in water is too high to be defined as "pure water."[90] For example, 99% of the world's population breathes air that exceeds the World Health Organization's (WHO) air quality limits.[91] One such limit that could be adopted is nitrogen dioxide (NO_2) concentrations, a typical urban pollutant and precursor of particulate matter and ozone.[92] WHO Air Quality Guidelines recommends limiting nitrogen dioxide

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[85] *Id.* at 959.

[86] *Enforcement Clause Overview*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-13/section-2/enforcement-clause-overview (last visited Nov. 19, 2023).

[87] U.S. CONST. amend I–XXVII.

[88] Commonwealth v. Nat'l Gettysburg Battlefield Tower, Inc., 302 A.2d 886, 892 (Pa. Commw. Ct. 1973).

[89] Mazibuko v. City of Johannesburg 2008 [2008] JOL 21829 at 2 para 2 (W); Cooper, *supra* note 32, at 295.

[90] PA. CONST. art. I, § 27.

[91] *Billions of People Still Breathe Unhealthy Air: New WHO Data*, WORLD HEALTH ORG. (Apr. 4, 2022), https://www.who.int/news/item/04-04-2022-billions-of-people-still-breathe-unhealthy-air-new-who-data.

[92] *Id.*

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concentrations to an annual average of 10 $\mu g/m^3$.[93] Therefore, this quantifiable exposure limit would be included as part of the federal Fundamental Environmental Right, and polluters would be prohibited from exceeding this standard.

IV. CREATING AN IMPLIED FUNDAMENTAL ENVIRONMENTAL RIGHT

The "newest" Amendment to the U.S. Constitution was ratified in 1992.[94] However, due to partisan politics and political polarization, it is improbable that a super-majority of sixty-seven members in both houses of Congress will ratify a federal Fundamental Environmental Right as the Twenty-Eighth Amendment.[95] Despite this, the U.S. Supreme Court can create a judge-made implied federal Fundamental Environmental Right through inferences drawn from constitutional provisions, established legal principles and precedents, and the values and traditions of American society.[96] By drawing connections between natural laws, ideas cited in The Honorable Judge Josephine Staton's dissent in *Juliana v. United States*, the Supreme Court's decisions in *Loving v. Virginia*, *Obergefell v. Hodges*, and the relationship between the Fifth and Fourteenth Amendments, it is possible to raise a federal Fundamental Environmental Right to the same level of importance as other implied Fundamental Rights, such as the rights to marriage and privacy.[97]

A. Natural Law and Evidence of Environmental Protections as "Deeply Rooted" Principles

A Fundamental Right is defined as one that originates from "natural or fundamental law" and, according to Justice Rehnquist, to be safeguarded by the Due Process Clause of the Fourteenth Amendment, generally must meet a two-part test.[98] First, a court examines if the right is "deeply rooted in this Nation's history and tradition," meaning the right has a longstanding history of protection in American

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[93] *Id.*

[94] U.S. CONST. amend. XXVII.

[95] *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life*, PEW RSCH. CTR. (June 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/.

[96] *Fundamental Right*, *supra* note 77; Washington v. Glucksberg, 521 U.S. 702, 710 (1997).

[97] *Fundamental Right*, *supra* note 77.

[98] *Fundamental Right*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Glucksberg*, 521 U.S. at 721.

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society.[99] Second, a court examines whether the right is "implicit in the concept of ordered liberty," meaning the right is essential to the concept of a free and democratic society.[100] A right to a safe, clean environment satisfies prong one of Justice Rehnquist's test and the definition of a natural law because it is intrinsic to our species' health, chiefly as the earliest anatomically modern humans and individuals at the nation's founding enjoyed an Earth free from climate change and pollution.[101]

The earliest anatomically modern humans emerged 300,000 years ago, and for 99.9% of human history, climate change did not exist.[102] Our ancestors enjoyed clean air, water, and unblighted skies outside the limited circumstances outlined in the introduction of this Note.[103] The right to a safe, clean environment constitutes a natural law—defined as an observable law relating to natural phenomena—because but for human activities, air temperatures would neither be rising by 0.07-0.20° Celsius a decade nor would atmospheric carbon levels be 50% higher than preindustrial levels.[104] Consequently, a safe, clean environment is innate or naturally occurs without human interference on this Earth, and has a longstanding history of protection.[105]

Also, the fact that the Industrial Revolution was fledgling at the time of the nation's founding and the effects of climate change and pollution were nonexistent supports this deduction.[106] Studies show that greenhouse gases began warming the world's oceans in the early 1830s and air temperatures approximately in the 1880s.[107]

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[99] *Glucksberg*, 521 U.S. at 721.

[100] *Id.*

[101] *Id.*; Schlebusch et al., *supra* note 13; Roz Pidcock, *Scientists Clarify Starting Point for Human-Caused Climate Change*, CARBON BRIEF (Aug. 24, 2016, 6:00 PM), https://www.carbonbrief.org/scientists-clarify-starting-point-for-human-caused-climate-change/.

[102] Schlebusch et al., *supra* note 13; Ghosh, *supra* note 11. Again, the generally accepted date for the first anatomically modern humans evolved was 300,000 years ago, and the Industrial Revolution began 300 years ago. Therefore, the 299,700 years before the Industrial Revolution represent 99.9% of human history (100/300,000 years * 299,700 years = 99.9%).

[103] *See supra* Part I.

[104] *Climate Change Impacts*, *supra* note 6; Schlebusch et al., *supra* note 13; *World of Change: Global Temperatures*, *supra* note 12.

[105] *Climate Change Impacts*, *supra* note 6; Schlebusch et al., *supra* note 13.

[106] Pidcock, *supra* note 101.

[107] *Id.*

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Therefore, access to clean air and pure water was endemic at the nation's founding in 1776 and had a longstanding history of protection until at least 1830.[108]

The U.S. Supreme Court has used examples of endemic rights and those with a longstanding history of protection in their reasoning behind creating certain Fundamental Rights in the past. In *D.C. v. Heller*, the Supreme Court cited seventeenth-century common law rules which recognized self-defense as a basic right, and eighteenth-century colonial and state constitutions that recognized the same.[109] This was also the reasoning behind creating a Fundamental Right to abortion in *Roe v. Wade*, albeit a contemporary conservative majority Supreme Court took it away.[110] The *Roe* court cited eighteenth and nineteenth-century common law rules that allowed a woman to perform an abortion without penalty before the "quickening" at the sixteenth week of pregnancy as the basis for the state failing to have a "compelling interest" in protecting prenatal life until after the first trimester.[111] Thus, the materialization of climate change's effects after the nation's founding and the doctrinal arguments presented in *Heller* and *Roe* suggest a right to a safe, clean environment has a longstanding history of protection.[112]

Also, a right to a safe, clean environment satisfies prong two of Justice Rehnquist's test. Evidence that environmental protection is "implicit in the concept of ordered liberty" and essential to the concept of a free and democratic society is found in colonial laws.[113] Some of the first colonial statutes forbade cutting timber entirely, as colonial authorities came to the concept of preserving natural resources even though these resources were considered "boundless."[114] Specifically, a Virginia

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[108] *Id.*; Rebecca Lindsey & Luann Dahlman, *Climate Change: Global Temperature*, CLIMATE.GOV (Jan. 18, 2023), https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature.

[109] District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 55 (1769) (discussing the natural right of self-defense and the right to keep and bear arms for that purpose under English common law in the seventeenth century).

[110] Roe v. Wade, 410 U.S. 113, 131 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[111] *Id.* at 132.

[112] Pidcock, *supra* note 101; *Heller*, 554 U.S. at 582.

[113] Washington v. Glucksberg, 521 U.S. 720, 721 (1997); Yasuhide Kawashima & Ruth Tone, *Environmental Policy in Early America: A Survey of Colonial Statutes*, 27 J. FOREST HIST. 168, 169 (1983).

[114] Kawashima & Tone, *supra* note 113, at 169.

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statute of 1677 levied a penalty of five pounds per tree fell.[115] Likewise, the deepest doctrinal origins of modern environmental laws are found in nuisance law, defined as "when a person unreasonably interferes with a right that the general public shares in common."[116] For example, Connecticut utilized the nuisance doctrine in a judgment against a dam owner impeding access to clean water in 1705.[117] Thus, these colonial laws not only reflect that environmental rights have a longstanding history of protection—aka "deeply rooted"—but that environmental rights are utilitarian and essential to a free and democratic society.[118]

Furthermore, state constitutions, federal laws, and public perception exemplify environmental protections are "implicit in the concept of ordered liberty."[119] First, as discussed in Section III, seven state constitutions afford environmental rights.[120] Second, laws passed by the federal government, such as the Clean Air Act (1963), National Environmental Policy Act (1970), and the Clean Water Act (1972), recognize the importance of environmental protections and the need to restrict actions that harm the environment.[121] Third, public perception implies that environmental protections are among society's core values.[122] According to a study, 64.5% of the U.S. population believes, "[c]limate should be [a] top priority to ensure [a] sustainable planet for future generations."[123] Thus, these three points and colonial laws demonstrate that environmental protections are a core value of our society and why a federal Fundamental Environmental Right is essential to the concept of

[115] *Id.* at 170.

[116] *Nuisance*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/nuisance (last updated Aug. 2023).

[117] Kawashima & Tone, *supra* note 113, at 175.

[118] *Id.* at 169; *Glucksberg*, 521 U.S. at 721.

[119] *Glucksberg*, 521 U.S. at 721; *see* 42 U.S.C. § 7401; 42 U.S.C. § 4321; 33 U.S.C. § 1251.

[120] *See supra* Part III; Webb & Gerrard, *supra* note 1.

[121] *Laws and Executive Orders*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/laws-regulations/laws-and-executive-orders (last updated July 3, 2023).

[122] Cary Funk, *Key Findings: How Americans' Attitudes About Climate Change Differ by Generation, Party, and Other Factors*, PEW RSCH. CTR. (May 26, 2021), https://www.pewresearch.org/fact-tank/2021/05/26/key-findings-how-americans-attitudes-about-climate-change-differ-by-generation-party-and-other-factors/.

[123] *Id.* (average taken from figure).

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ordered liberty and necessary to the exercise of other Fundamental Rights, such as the rights to life, liberty, and property.[124]

B. Climate Suits According to Judge Staton's Reasoning Are Justiciable

Standing is the capacity of a party to bring suit in court, meaning a plaintiff must allege—a personal stake in the outcome of the controversy—and pass a three-part test from *Lujan v. Defenders of Wildlife*.[125] Otherwise, their claims will not be justiciable.[126] The *Lujan* standing test requires private parties to allege (1) an injury that is (2) fairly traceable to the defendant's conduct and (3) redressable.[127] Judge Staton's dissenting opinion in *Juliana v. U.S.* supports the conclusion that a right to a safe, clean environment is "deeply rooted in this Nation's history and tradition" and that climate suits against the government—such as those from residents of Cancer Alley—are justiciable.[128]

Juliana garnered public attention when a group known as "youth plaintiffs"—ages ten to nineteen—claimed the U.S. government violated their due process rights of life, liberty, and property contained in the Fifth and Fourteenth Amendments.[129] The youth plaintiffs alleged the government violated their due process rights by encouraging the use of fossil fuels and refusing to combat climate change despite knowing of its harmful effects since the 1970s.[130] While the majority opinion thought the plaintiffs did not satisfy the standing doctrine, Judge Staton, in her dissenting opinion, made the case that the youth plaintiffs have a "constitutional right to be free from *irreversible and catastrophic climate change*" for several reasons.[131]

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[124] *Id.*; Kawashima & Tone, *supra* note 113, at 169; *see* 42 U.S.C. § 7401; 42 U.S.C. § 4321; 33 U.S.C. § 1251; *supra* Part III.

[125] *Standing*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/standing (last visited Nov. 19, 2023); Baker v. Carr, 369 U.S. 186, 204 (1962); Lujan v. Defs. of Wildlife, 504 U.S. 555, 590 (1992).

[126] *Lujan*, 504 U.S. at 590.

[127] *Id.*

[128] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[129] David A. Murray, *Will Climate Change the Courts?*, THE NEW ATLANTIS (2019), https://www.thenewatlantis.com/publications/will-climate-change-the-courts; U.S. CONST. amends. V, XIV § 1.

[130] *Juliana v. United States*, OUR CHILDREN'S TR., https://www.ourchildrenstrust.org/juliana-v-usscience (last visited Nov. 19, 2023).

[131] Juliana v. United States (*Juliana III*), 947 F.3d 1159, 1182 (9th Cir. 2020) (Staton, J., dissenting).

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First, while implied rights are not spelled out in the Constitution, they are "nonetheless enforceable as 'historically rooted principle[s] embedded in the text and structure of the Constitution.'"[132] Because the nation at its founding was not subject to rising air or sea temperatures, and colonial environmental statutes emphasized utilitarianism, this supports the argument made in this Note that a right to a safe, clean environment derives from natural law and has a longstanding history of protection.[133]

Second, the youth plaintiffs clearly showed they suffered an injury the court could redress.[134] Her honor stated that the youth plaintiffs brought suit "to enforce the most basic structural principle embedded in our system of ordered liberty: that the Constitution does not condone the Nation's willful destruction."[135] Judge Staton compared the youth plaintiffs' demands to desegregation orders, and stated if desegregation orders were within the province of the judiciary, then the *Juliana* plaintiffs' requested relief was as well.[136]

For the same reasons as written in Judge Staton's dissent in *Juliana*, residents of Cancer Alley's claims against the government pass the three-part *Lujan* standing test and are justiciable. As to element (1), they suffered an injury—residents are more likely to develop cancer, and some have been forced from their homes.[137] As to element (2), the chemical plants are traceable to the government's conduct as a result of tax breaks.[138] Lastly, as to element (3), as Justice Staton stated, if desegregation orders are redressable—so are climate suits.[139] Consequently, there is evidence that some federal judges believe individuals aggrieved by climate change or pollution—like those in Cancer Alley—satisfy standing doctrine.[140]

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[132] *Id.* at 1179 (quoting Franchise Tax Bd. v. Hyatt, 139 S. Ct. 1485, 1498–99 (2019)).

[133] *See supra* Section IV.A.; Pidcock, *supra* note 101; Kawashima & Tone, *supra* note 113, at 169.

[134] *Juliana III*, 947 F.3d at 1181.

[135] *Id.* at 1175.

[136] *Id.* at 1176.

[137] Hersher, *supra* note 24; Meaders, *supra* note 22, at 128.

[138] Meaders, *supra* note 22, at 117.

[139] *Juliana III*, 947 F.3d at 1176.

[140] *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).

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C. Creating a Fundamental Environmental Right from Substantive Due Process, and the Fifth & Fourteenth Amendments

Substantive due process holds that the U.S. Constitution protects certain Fundamental Rights inherent to the concept of ordered liberty.[141] These rights can be implied or explicit, but they are considered essential to individuals' well-being and dignity.[142] Protection of these rights flows from the Due Process Clause of the Fifth and Fourteenth Amendments, which states, no person shall be "deprived of life, liberty, or property, without due process of law. . . ."[143] Accordingly, if the government deprives an individual of their rights, specific procedures, including a fair and impartial legal process, must be adhered to, but that has been anything but the case for the residents of Cancer Alley.[144]

The "right to marry, [and the] the right to use contraceptives" are implicit rights tied to life, liberty, and property and created by substantive due process by federal courts.[145] For example, in *Loving v. Virginia*, the Supreme Court held that "[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."[146] Following this reasoning, courts should find that a right to a safe, clean environment is "essential to the orderly pursuit of happiness by free men."[147] If courts applied this logic, they would find that the orderly pursuit of happiness cannot be attained when sacrifice zones are uninhabitable, and residents have no personal choice but to leave their homes.[148]

In sacrifice zones, personal choices, privacy, and individual autonomy are moot as, according to some researchers, "[a] sacrifice zone is when there is no choice in the sacrifice. Someone else is sacrificing people and their community or land without

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[141] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[142] *Fundamental Right*, *supra* note 77.

[143] U.S. CONST. amends. V, XIV § 1.

[144] *See* U.S. CONST. amends. V, XIV § 1.

[145] Ylam Nguyen, *Constitutional Protection for Future Generations From Climate Change*, HASTINGS ENV'T L.J. 183, 199 (2017).

[146] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[147] *Id.*

[148] *Id.*; Meaders, *supra* note 22, at 128; Roake, *supra* note 23.

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their permission."[149] For example, the historically Black town of Mossville in Cancer Alley has "been polluted so heavily that residents cannot physically bear to stay and are thus being wiped off the map."[150] Mossville residents' toxicology reports averaged vinyl chloride dioxin levels triple the national average—ironically the same chemical released in the East Palestine, Ohio train derailment that caused a national outcry.[151] A Mossville resident, Stacey Ryan described her situation by saying: "Against my will, my property has been rezoned from residential to heavy industrial."[152] Like *Griswold v. Connecticut*, viewing the right to privacy as "protect[ion] from governmental intrusion[,]" the right to a safe, clean environment "enables the citizen to create a zone of privacy which [the] government may not force him to surrender to his detriment."[153] In essence, cases such as *Griswold* and *Loving* empower residents of Cancer Alley to create a zone of privacy, safeguarding them from government actions that jeopardize their well-being or infringe upon their personal autonomy in their homes.[154] Accordingly, the personal choice to avoid exposure to pollution, the adverse impacts of climate change, or displacement caused by either or both phenomena is analogous to the freedom to marry and inherent to individual autonomy.[155]

This concept of individual autonomy is evidenced by Justice Kennedy's majority opinion in *Obergefell v. Hodges*.[156] Justice Kennedy wrote for the majority that "the right to marry is a fundamental right inherent in the liberty of the person" and relied on precedent from *Brown v. Board of Education*, that safeguarding children and families is fundamental under the Constitution.[157] However, the

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[149] Rosemarie Frascella, *Sacrifice Zones*, RETHINKING SCHOOLS, https://rethinkingschools.org/articles/sacrifice-zones/ (last visited Nov. 19, 2023).

[150] Meaders, *supra* note 22, at 128.

[151] *Id.* at 125; Kristina Sgueglia, *East Palestine Train Derailment Site Cleanup Will Likely Take About 3 Months, EPA Administrator Says*, CNN (Mar. 17, 2023, 1:41 PM), https://www.cnn.com/2023/03/17/us/east-palestine-ohio-derailment-cleanup/index.html.

[152] Tom Valtin, *Louisiana Man Takes a Stand Against a Petrochemical Giant*, SIERRA CLUB (July 21, 2015), https://www.sierraclub.org/planet/2015/07/louisiana-man-takes-stand-against-petrochemical-giant.

[153] Griswold v. Connecticut, 381 U.S. 479, 483–84 (1965).

[154] *Id.* at 483; Loving v. Virginia, 388 U.S. 1, 12 (1967).

[155] *Griswold*, 381 U.S. at 483; *see* Loving v. Virginia, 388 U.S. 1, 12 (1967).

[156] *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

[157] *Obergefell*, 576 U.S. at 675; *see* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

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Fundamental Right to safeguard children and families established under this legal precedent is violated by current environmental practices.[158] Families are the majority of 1.2 million Americans deemed "climate migrants," meaning people displaced by the effects of climate change and natural disasters enhanced by it.[159] Displacement, and in extreme cases familial separation, rips away the ability of children to "understand the integrity and closeness of their own family" and may cause children to develop mental health problems like depression, anxiety, and PTSD.[160] Even if we remove the negative effects of displacement, studies show that air pollution from burning fossil fuels has been linked to children experiencing higher anxiety and depression.[161] Thus, as climate change has profound and detrimental effects on personal autonomy in one's home and on children's hearts and minds, according to *Loving*, *Griswold*, *Obergefell*, and *Brown*, an implied right to a "safe, clean environment" can be fashioned through substantive due process and principles of individual autonomy.[162]

D. Using Equal Dignity to Create a federal Fundamental Environmental Right

The Equal Dignity doctrine from *Obergefell v. Hodges* can be applied to fashion a federal Fundamental Environmental Right by acknowledging that all citizens are entitled to a safe, clean environment, regardless of their race, ethnicity, or socio-economic status. The Equal Dignity doctrine flows from both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.[163] The Due Process Clause is explained earlier in this Note, but the Equal Protection Clause provides: "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."[164] In *Obergefell*, Justice Kennedy wrote that the government must recognize the marriages of same-sex couples on "the same terms

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[158] *See* Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

[159] Carlos Martin, *Who are America's "Climate Migrants," and Where Will They Go?*, URB. INST. (Oct. 22, 2019), https://www.urban.org/urban-wire/who-are-americas-climate-migrants-and-where-will-they-go.

[160] *Obergefell*, 576 U.S. at 668; *Mental Health*, HARV. T.H. CHAN: SCH. OF PUB. HEALTH, https://www.hsph.harvard.edu/c-change/subtopics/climate-change-and-mental-health/ (last visited Nov. 19, 2023).

[161] HARV. T.H. CHAN SCH. OF PUB. HEALTH, *supra* note 160.

[162] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[163] *Obergefell*, 576 U.S. at 647.

[164] U.S. CONST. amend. XIV § 1; *supra* Section IV.C.

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and conditions as opposite-sex couples" and melded the Due Process and Equal Protection Clauses to accomplish this.[165] Thus, Equal Dignity doctrine holds that individuals are entitled to ask for "equal dignity in the eyes of the law," meaning the government has a duty to ensure all individuals are treated with equal respect.[166] In essence, it provides no citizen shall be relegated to second-class status.[167]

Political systems have relegated residents of Cancer Alley to second-class status through the use of tax breaks, discriminatory zoning, and voter suppression laws, concentrating Black Americans in communities that have become disempowered, both politically and financially.[168] A case in point is former Louisiana Governor John McKeithen, who in the mid-1960s attracted chemical producers to Cancer Alley through tax exemptions, alongside white officials from St. John the Baptist Parish rezoning the majority Black community of Wallace, Louisiana, from residential to industrial to accommodate the construction of a Formosa Plastics Corporation plant.[169] In addition, voter suppression laws like the "Understanding Clause" cemented Black Louisianans second-class status by leaving them unable to protest the actions of Governor McKeithen or officials from St. John the Baptist Parish.[170] The Clause, similar to "literacy tests" of the Jim Crow era, required voters to "reasonabl[y] interpre[t]" a section of the state's constitution.[171] Although the Clause was outlawed in 1965 following the Supreme Court's decision in *Louisiana v. United States*, studies indicate that in parishes where election officials enforced the Clause between 1955 and 1965, Black voter registration rates fell by 29.8%, while white voter registration rates remained unchanged.[172]

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[165] *Obergefell*, 576 U.S. at 676.

[166] *Id.* at 681.

[167] *Id.*

[168] Berkovitz, *supra* note 5.

[169] *Surviving Cancer Alley, The Stories of Five Communities*, DEEP SOUTH CTR. FOR ENV'T JUSTICE (2020), https://fluxconsole.com/files/item/211/87611/Surviving%20Cancer%20Alley%20-%20Report%20-%20DSCEJ%20-%20Final.pdf; Robert D. Bullard, *Unequal Environmental Protection: Incorporation Environmental Justice in Decisionmaking*, *in* WORST THINGS FIRST? THE DEBATE OVER RISK-BASED NATIONAL ENVIRONMENTAL PRIORITIES 237, 255 (Adam M. Finkel & Dominic Golding eds., 1994).

[170] Luke Keele, William Cubbison & Ismail White, *Suppressing Black Votes: A Historical Case Study of Voting Restrictions in Louisiana*, AM. POL. SCI. REV. 694, 695 (2021).

[171] *Id.* at 694–95.

[172] *Id.* at 695–98.

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Given this historical context of systematic disenfranchisement, the residents of Cancer Alley have the right to demand "equal dignity in the eyes of the law," as many of them, like Stacey Ryan, are unable to protest the sacrifice of their land due to their disenfranchisement and are 75% more likely than other races to reside close to toxic-waste producing facilities.[173] Therefore, the Equal Dignity doctrine can be applied to establish a federal Fundamental Environmental Right by equating the predicament of Black Americans with that of same-sex couples.[174]

V. CONCLUSION

Undoubtedly climate change and pollution infringe upon everyone's pursuit of happiness, but it renders that goal next to impossible in sacrifice zones and select majority Black populations. Therefore, a carefully worded—like Article I, Section 27—quantifiable—like limiting nitrogen dioxide levels to 10 $\mu g/m^3$—federal Fundamental Environmental Amendment, or implied Fundamental Environmental Right, can ensure that everyone, and generations yet to come can enjoy a safe, clean environment.[175] By using natural laws, the Due Process Clause of the Fourteenth Amendment, common law principles, a medley of the Fifth and Fourteenth Amendments, and the Equal Dignity doctrine, that goal is within reach.

[173] *Obergefell*, 576 U.S. at 681; Valtin, *supra* note 152; Villarosa, *supra* note 21.

[174] *Obergefell*, 576 U.S. at 681.

[175] *See supra* Part III.

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