TOWARD A CLIMATE-CONSCIOUS CONSTITUTION

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This Note argues that the allocations of power within the federal Constitution's separation-of-powers framework hinder effective governance of environmental issues. The true problem is more than the sum of its parts: Several key failings of domestic environmental law result not from the shortcomings of any given statutory scheme but from the relationship between such statutory schemes, the boundary-defying and factually messy nature of environmental problems, and the sovereignty allocations within our Constitution's structure. These mismatches allow federal actors to jeopardize American lives with impunity and risk the breakdown of both the nation's constitutional order and the rule of law. Engaging with two environmental issues that have caused escalating harm to the public since the 1970s—wetland degradation and climate change—this Note argues that a federal Environmental Amendment is necessary to enable environmentally sound governance.

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INTRODUCTION

On September 6, 1910, Thomas Stubbs fell ill with typhoid fever and was unable to work for twelve weeks.[1] The cause? Drinking contaminated water. A missing valve in Rochester's public water system caused city residents to drink contaminated water for three months.[2] Stubbs later sought to recover damages, arguing that the city caused his illness by negligently failing to protect its water supply from contamination.[3]

The trial hinged on factual causation, and Stubbs provided a nearly airtight case: Though he could not prove that he had not contracted typhoid from a different source, he provided water samples, expert testimony, behavioral and statistical evidence, and fifty-eight witnesses who had contracted typhoid during the same period after drinking water from the same part of the city.[4] The city health commissioner had even issued a boil water advisory and shut down the water system for several days due to known contamination.[5] While the jury found Stubbs's evidence convincing, the intermediate appellate court disagreed. Because some people in Rochester had contracted typhoid from other sources, and because Stubbs was unable to prove that he had not contracted it elsewhere, the court set the jury's finding aside as "conjecture and speculation."[6]

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1. Stubbs v. City of Rochester (*Stubbs II*), 124 N.E. 137, 138 (N.Y. 1919).
2. Id. at 137–38.
3. Id. at 137.
4. Id. at 137–40.
5. Id. at 138.
6. Stubbs v. City of Rochester (*Stubbs I*), 148 N.Y.S. 804, 808 (App. Div. 1914) (lower court decision).

This case provides an early example of the mismatch between the standards courts use in resolving societal conflicts and the factual uncertainties inherent in environmental harms. Stubbs ultimately succeeded: A divided New York Court of Appeals reversed, holding that such a strict proof standard would make recovery impossible.[7] Jurisprudence and legislation have since clarified the causation standards applicable in myriad environmental claims, but environmental harms remain complex and hard to prove definitively.[8] Plaintiffs seeking relief from real environmental harms continue to collide with the limitations of the judicial system; questions of justiciability, redressability, and attribution often frustrate relief.[9]

This disconnect between environmental harms and legal remediability extends beyond the judicial system to the overall allocations of power within the nation's governmental structure. The Constitution provides one federal government of limited, enumerated powers and reserves all other sovereign powers to the states.[10] It then separates that federal government's powers into three coequal branches.[11] This structure does not *itself* hinder effective environmental governance;[12] the problem stems from the allocations of key sovereign powers *within* that separation-of-powers structure—both vertically and horizontally.[13]

Vertically, the sovereign powers that directly address some necessarily interstate environmental issues facing the nation today—for one, wetland degradation—are traditionally the province of the states.[14] While the Congresses that have enacted federal environmental statutes

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7. *Stubbs II*, 124 N.E. at 140 ("[T]he evidence disclosed that typhoid fever was caused by sources unknown to medical science . . . . [T]o prevail plaintiff would be required to eliminate sources which had not yet been determined or ascertained.").

8. In the classic example of a now-ill plaintiff exposed to a toxic substance, courts require a level of certainty that can be nearly impossible to achieve unless traceable to an isolable incident of exposure to the specific pollutant. See Kristin E. Schleiter, Proving Causation in Environmental Litigation, 11 Virtual Mentor 456, 456 (2009) (describing several difficulties associated with proving causation, including limited scientific knowledge about "the toxicity of many substances," gaps in understanding of "how substances move through air, soil, and water," and traceability issues).

9. See infra section II.B (discussing Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020)).

10. U.S. Const. amend. X. While the sovereign powers of tribal governments are not reflected in this paradigm, they often oversee the execution of environmental laws on their lands. See, e.g., 33 U.S.C. § 1377(e) (2018) (authorizing the EPA Administrator to treat qualifying tribal governments as states for the purposes of certain Clean Water Act provisions); 40 C.F.R. § 123.31 (2024) (providing for tribal assumption of Clean Water Act authority).

11. See U.S. Const. arts. I–III.

12. See infra note 283 and accompanying text (highlighting Massachusetts as an example of sound environmental governance within a strict separation-of-powers framework).

13. See infra notes 202, 214 and accompanying text (elaborating on this distinction).

14. See infra section II.A.

have relied on the commerce power with some success,[15] this grounding has limited both the laws they have been able to enact[16] and the way those laws are now interpreted.[17] More importantly, these statutes' implementation has utterly failed to shield the nation from widespread ecosystem breakdown and the climate crisis.[18]

Horizontally, justiciability barriers hamper litigation to force federal greenhouse gas (GHG) emissions reduction in Article III courts, despite decades of inaction at the scale of the problem and despite the grave, well-documented harms such inaction causes to claimants.[19] In recent years, even for justiciable claims, the judicial branch has curbed agency flexibility to perform basic environmental governance under relevant statutory authority.[20]

This Note reframes the debate about federal environmental inaction by putting these structural issues in conversation with each other. It argues that the true problem is more than the sum of its parts: Several key failings of domestic environmental law result not from the shortcomings of any given statutory scheme but from the relationship between such statutory schemes, the boundary-defying and factually messy nature of environmental problems, and the sovereignty allocations within the nation's vertical and horizontal separation-of-powers structure. This structural mismatch allows federal actors to jeopardize American lives with impunity and risks the breakdown of both the nation's constitutional order and the rule of law.[21]

Part I serves as a primer on the factual backgrounds and domestic legal frameworks relevant to wetlands management and GHG emissions. Part II delves into the compounding separation-of-powers-induced governance challenges plaguing these issue areas: the vertical sovereignty problem of grounding federal intrastate wetlands protection in the commerce power and the horizontal justiciability barriers that hamper litigation to force federal GHG reduction. Part III concludes by calling for a constitutional Environmental Amendment, reallocating key sovereign powers to enable effective federal environmental governance.

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15. See U.S. Const. art. I, § 8, cl. 1, 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."); see also infra note 30 and accompanying text (discussing the partial success of federal environmental statutes).

16. See infra note 310 (discussing the Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703–712 (2018)).

17. See infra section II.A (discussing Sackett v. Env't Prot. Agency, 143 S. Ct. 1322 (2023)).

18. See infra Part I.

19. See infra section II.B (discussing Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020)).

20. See infra note 200 and accompanying text.

21. See infra notes 300, 304, 311, 319 and accompanying text (illustrating these risks in detail).

I. GOVERNING FRAMEWORKS: WETLAND ECOLOGY AND CLIMATE CHANGE

In the 1970s, domestic environmental law was transformed. Earlier in the century, industrial development enabled by the World War II–era manufacturing buildup dramatically changed the landscape of American society.[22] Industrial pollution went largely unchecked, leading to several high-profile disasters that rocked the nation.[23] Though similar disasters had occurred in the preceding decades,[24] public awareness of the harms of environmental degradation had grown.[25] Congress entered the 1970s ready to combat those harms, passing statutes to protect wildlife,[26] clean up the country's air and water,[27] manage toxic chemical use and disposal,[28] and bring environmental considerations into federal decisionmaking.[29]

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22. Megan E. Springate, The American Home Front and World War II, Nat'l Park Serv., https://www.nps.gov/articles/000/the-american-home-front-and-world-war-ii.htm [https://perma.cc/6RYJ-4QK3] (last updated Feb. 26, 2025).

23. See, e.g., Lorraine Boissoneault, The Cuyahoga River Caught Fire at Least a Dozen Times, but No One Cared Until 1969, Smithsonian Mag. (June 19, 2019), https://www.smithsonianmag.com/history/cuyahoga-river-caught-fire-least-dozen-times-no-one-cared-until-1969-180972444/ (on file with the *Columbia Law Review*); Jordan Kleiman, Love Canal: A Brief History, SUNY Geneseo, https://www.geneseo.edu/history/love_canal_history (on file with the *Columbia Law Review*) (last visited Aug. 21, 2025); Christine Mai-Duc, The 1969 Santa Barbara Oil Spill that Changed Oil and Gas Exploration Forever, L.A. Times (May 20, 2015), https://www.latimes.com/local/lanow/la-me-ln-santa-barbara-oil-spill-1969-20150520-htmlstory.html [https://perma.cc/Z4NF-JMNC]; Ann Murray, Smog Deaths in 1948 Led to Clean Air Laws, NPR: All Things Considered (Apr. 22, 2009), https://www.npr.org/2009/04/22/103359330/smog-deaths-in-1948-led-to-clean-air-laws [https://perma.cc/YFN2-V76X].

24. The Cuyahoga River, for one, had caught on fire several times prior to September 1969. See Jonathan H. Adler, Fables of the Cuyahoga: Reconstructing a History of Environmental Protection, 14 Fordham Envt'l L.J. 89, 95 (2002).

25. See Emily Martin, This Is the Story of the First Earth Day—and Why It Mattered, Nat'l Geographic (Apr. 21, 2022), https://www.nationalgeographic.com/history/article/first-earth-day-history-legacy (on file with the *Columbia Law Review*).

26. E.g., Endangered Species Act of 1973, Pub. L. No, 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531–1544 (2018)).

27. E.g., Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified at 33 U.S.C. §§ 1251–1389 (2018)); Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified at 42 U.S.C. §§ 300f–300j-27 (2018)); Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (codified at 42 U.S.C. §§ 7401–7671q (2018)).

28. E.g., Federal Insecticide, Fungicide, and Rodenticide Act, Pub. L. No. 92-516, 86 Stat. 973 (1972) (codified at 7 U.S.C. §§ 136–136y (2018)); Toxic Substances Control Act, Pub. L. No. 94-469, 90 Stat. 2003 (1976) (codified at 15 U.S.C. §§ 2601–2629 (2018)); Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, 90 Stat. 2795 (codified at 42 U.S.C. §§ 6901–6987 (2018)); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601–9615, 9651–9657 (2018)).

29. National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321–4347 (2018)).

By all accounts, these statutes have been extremely successful at improving the nation's environmental health and preventing significant harm.[30] Even so, they have failed to adequately address two key areas of concern—wetlands degradation and climate change—causing escalating harm to the public since the 1970s.[31] This Part provides a joint factual and legal backgrounder of each area, highlighting the strain that each of the issues discussed places on legal stability and on the ability of government actors to ensure that our system of government adequately protects our life and property interests.

A. *Wetland Protection*

1. *Importance of Wetlands.* — Wetlands are "areas where water covers the soil, or is present either at or near the surface of the soil all year or for varying periods of time during the year."[32] There are two main types of wetlands: coastal (tidal) and inland (non-tidal).[33] Coastal wetlands connect to "estuaries where sea water mixes with fresh water to form an environment of varying salinities."[34] Inland wetlands are often seasonal, especially in arid or semi-arid climates; they form along floodplain rivers and streams, in "isolated depressions," on the borders of lakes and ponds, or "in other low-lying areas where the groundwater intercepts the soil surface" or "precipitation . . . saturates the soil."[35] Wetlands historically comprised wide swaths of the forty-eight contiguous states, spanning approximately 221 million acres in the early 1600s.[36]

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30. See, e.g., Kristie Ross, James F. Chmiel & Thomas Ferkol, The Impact of the Clean Air Act, 161 J. Pediatrics 781, 784 (2012) ("Clean Air Act regulations [before 1990] prevented 205[,]000 premature deaths and avoided millions of other nonfatal illnesses, including severe cardiac and respiratory diseases."); 50 Years After the Clean Water Act—Gauging Progress, U.S. Gov't Accountability Off. (Oct. 17, 2022), https://www.gao.gov/blog/50-years-after-clean-water-act-gauging-progress (on file with the *Columbia Law Review*) ("Before the passage of the Clean Water Act, large numbers of our nation's lakes, rivers, and streams, were polluted with raw sewage, industrial chemicals, and dangerous metals . . . . [T]he sources of pollution that created such situations have largely been addressed . . . .").

31. See infra sections I.A.3, I.B.2 (discussing shortcomings of federal environmental statutes).

32. What Is a Wetland?, EPA, https://www.epa.gov/wetlands/what-wetland [https://perma.cc/Z2C9-8UVZ] [hereinafter EPA, Wetlands Defined] (last updated Apr. 25, 2024) (emphasis omitted).

33. Id.

34. Id.

35. Id.

36. Thomas E. Dahl & Gregory J. Allord, Technical Aspects of Wetlands: History of Wetlands in the Coterminous United States, *in* U.S. Geological Surv., National Water Summary on Wetland Resources 19, 19 (Water-Supply Paper No. 2425, 1996); see also M.W. Lang, J.C. Ingebritsen & R.K. Griffin, U.S. Dep't of the Interior, Status and Trends of Wetlands in the Conterminous United States 2009 to 2019, at 10 (2024), https://www.fws.gov/sites/default/files/documents/2024-03/wetlands-status-and-trends-2009-2019-signed.pdf [https://perma.cc/

Wetlands are "among the most productive habitats on earth,"[37] providing many benefits to society through ecosystem services.[38] They serve as "a critical driver of economic activity[,] . . . enhance water quality, control erosion, maintain stream flows, sequester carbon, and provide a home to about half of all threatened and endangered species."[39] Wetlands are thus "integral" to overall watershed ecology,[40] whether water-saturated year-round or only seasonally.[41] Beyond localized benefits, wetlands play a role in "global cycles for water, nitrogen and sulfur" and perform "atmospheric maintenance" that "moderate[s] global climate conditions."[42]

Of these benefits, wetlands' role in regulating water quality directly serves the interests articulated in the Clean Water Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[43] The nation's water faces grave, diffuse pollution: Fertilizer runoff from the Mississippi River feeds the growth of the "dead zone" in

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BW4P-8LYC] [hereinafter, Lang et al., Status and Trends of Wetlands] (noting that wetlands provide over $7.7 trillion in domestic benefit annually).

37. Why Are Wetlands Important?, U.S. Geological Surv., https://www.usgs.gov/faqs/why-are-wetlands-important [https://perma.cc/CHZ4-7MC9] (last updated Jan. 10, 2025); see also How Do Wetlands Function and Why Are They Valuable?, EPA, https://www.epa.gov/wetlands/how-do-wetlands-function-and-why-are-they-valuable [https://perma.cc/V8AT-M4AJ] [hereinafter EPA, Wetlands' Value] (last updated May 15, 2024) ("Wetlands are among the most productive ecosystems in the world, comparable to rain forests and coral reefs.").

38. Ecosystem services are defined as "the benefits people obtain from ecosystems." Walter V. Reid et al., Millenium Ecosystem Assessment, Ecosystems and Human Well-being: Synthesis, at v (2005), https://www.millenniumassessment.org/documents/document.356.aspx.pdf [https://perma.cc/SJ73-WMJL]. These services include "*provisioning services* such as food, water, timber, and fiber; *regulating services* that affect climate, floods, disease, wastes, and water quality; *cultural services* that provide recreational, aesthetic, and spiritual benefits; and *supporting services* such as soil formation, photosynthesis, and nutrient cycling." Id. Human society is "fundamentally dependent" on ecosystem services—they enable "freedom of choice and action" by providing the building blocks for human health; "good social relations;" the "basic material for a good life," such as shelter and adequate livelihood; and personal security. Id. at v–vi (emphasis omitted). Economically, the value they provide amounts to more than half of the global GDP. Chunquan Zhu & Siyu Wang, Why Measuring the Economic Value of Ecosystems Is Important, World Econ. F. (Feb. 27, 2023), https://www.weforum.org/stories/2023/02/an-ecosystems-economic-value-can-now-be-measured-heres-how/ [https://perma.cc/7YXB-4FV5] ("$44 trillion of economic value generation—over half the world's GDP—is moderately or highly dependent on nature . . . .").

39. Deb Haaland, Preface to Lang et al., Status and Trends of Wetlands, supra note 36, at 6.

40. EPA, Wetlands' Value, supra note 37 ("The combination of shallow water, high levels of nutrients and primary productivity is ideal for the development of organisms that form the base of the food web and feed many species of fish, amphibians, shellfish and insects.").

41. See EPA, Wetlands Defined, supra note 32 ("[W]etlands that appear dry . . . for significant parts of the year . . . often provide critical habitat for wildlife adapted to breeding exclusively in these areas.").

42. EPA, Wetlands' Value, supra note 37.

43. 33 U.S.C. § 1251 (2018).

the Gulf of Mexico,[44] toxic "forever chemicals" are estimated to persist in nearly half of domestic drinking water supplies,[45] and antibiotics pollute freshwater ecosystems across the globe.[46] Though wetlands do not wholly ameliorate these pollutions, intact wetlands are a significant asset to the nation's water quality.[47] By removing suspended sediments, absorbing nutrients such as nitrogen and phosphorus from agricultural runoff, and detoxifying chemical pollutants, wetlands contribute meaningfully to water quality management.[48]

2. *Threats to Wetlands.* — U.S. wetlands have faced an onslaught of drainage, devegetation, and overdevelopment since the Founding Era.[49] Until the mid-twentieth century, wetlands were deemed "obstacles to development" that spread disease and impeded travel and food production.[50] This ignorance led the federal government to incentivize wetland drainage through the 1970s.[51] In tandem with other anthropogenic stressors,[52] this approach caused severe losses. More than half of wetlands in the contiguous states have been destroyed since the 1700s.[53] From the mid-1950s through the mid-1970s, an average of 550,000 acres of wetlands were destroyed annually; the following decade, this rate slowed to 290,000 acres annually.[54] Wetland losses have slowed

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44. See Gulf of Mexico 'Dead Zone' Larger Than Average, Scientists Find, Nat'l Oceanic & Atmospheric Admin. (Aug. 1, 2024), https://www.noaa.gov/news-release/gulf-of-mexico-dead-zone-larger-than-average-scientists-find [https://perma.cc/ESW4-D6ZT] (describing how excess nutrients from the Mississippi River contribute to the overgrowth of algae, which leads to ocean hypoxia).

45. Kelly L. Smalling et al., Per- and Polyfluoroalkyl Substances (PFAS) in United States Tapwater: Comparison of Underserved Private-Well and Public-Supply Exposures and Associated Health Implications, Env't Int'l, Aug. 2023, at 1, 9 (2023) (internal quotation marks omitted).

46. See Marie-Claire Danner, Anne Robertson, Volker Behrends & Julia Reiss, Antibiotic Pollution in Surface Fresh Waters: Occurrence and Effects, 664 Sci. Total Env't 793, 794–95 (2019).

47. See Wetland Functions and Values: Surface and Ground Water Protection, Agency Nat. Res., Dep't Env't Conservation, https://dec.vermont.gov/watershed/wetlands/functions/water-quality [https://perma.cc/3E22-EL8U].

48. Id.

49. See Dahl & Allord, supra note 36, at 20.

50. Id.

51. Id. at 24.

52. See Threats to Wetlands, Me. Dep't Env't Prot., https://www.maine.gov/dep/water/wetlands/threats.htm [https://perma.cc/E66W-E7YC] (last visited Feb. 1, 2025) ("Human activities threaten wetlands in several different ways. Stressors to wetlands can be chemical (e.g., toxic chemicals), physical (e.g., sedimentation), or biological (e.g., non-native species).").

53. Id.

54. Dahl & Allord, supra note 36, at 24.

further in recent years due to policy changes,[55] but these ecosystems remain under siege.[56]

These losses have tangible negative effects on the public. Wetland loss and devegetation decrease resilience against "natural disasters like flood, drought, and wildfire" and lead to "decreased food security, reduction in clean water, increased harmful algal blooms . . . , greater vulnerability to sea level rise and storms, and reduced recreational opportunities."[57] These changes "reduce[] [the] health, safety, and prosperity of all Americans" and require corrective action.[58]

3. *Legal Framework Governing Wetland Management.* — The primary federal law governing inland wetland management is the Clean Water Act (CWA).[59] Prior to the 1970s, the states set the main standards for wetlands within their borders; that changed with the passage of the CWA.[60] Now, the U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) set the baseline standards for wetland management under CWA section 404.[61]

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55. See id. ("From about 1987 to the present, Federal efforts to restore wetlands have increased . . . . [B]etween 1987 and 1990 about 90,000 acres were added to the Nation's wetland inventory.").

56. See Haaland, supra note 39, at 6 ("[W]etland loss rates have increased by 50 percent over the last decade and continue to disproportionally impact vegetated wetlands . . . . Approximately 670,000 acres . . . , an area greater than the land extent of Rhode Island, disappeared between 2009 and 2019.").

57. Lang et al., supra note 36, at 9.

58. See Haaland, supra note 39, at 6 ("The important scientific information in this report is a call to action . . . . This report delivers the hard truth that we need to act now.").

59. Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251–1387 (2018).

60. Cf. Env't L. Inst., State Wetland Protection: Status, Trends & Model Approaches 6 (2008), https://www.eli.org/sites/default/files/eli-pubs/d18__06.pdf [https://perma.cc/K5YU-BR67] ("The principle regulatory authority governing the protection of wetlands at the federal level lies with the Clean Water Act (CWA) § 404 Program . . . . The role of states in wetland protection is a critically important one. States have long held the right and the responsibility to provide stewardship over their resources . . . .").

61. 33 U.S.C. § 1344. States and Tribal governments still play an active, albeit less centralized, role in wetlands management. State and Tribal governments can take over wetlands management under the CWA within their borders if they can meet the standards of a section 404 program. See 33 U.S.C. § 1344(g)(1); 404 State Program Regulation, 40 C.F.R. § 233 (2024). In practice, though, the requirements to operate such a program are demanding—only New Jersey and Michigan are currently approved to do so. See State or Tribal Assumption of the CWA Section 404 Permit Program, EPA, https://www.epa.gov/cwa-404/state-or-tribal-assumption-cwa-section-404-permit-program [https://perma.cc/YR6V-PE6V] (last updated Oct. 9, 2025) ("Reasons states have expressed . . . include lack of funding, lack of clarity on which waters are assumed . . . , concerns regarding Federal requirements and oversight, availability of alternative mechanisms for state/tribal wetlands protection, and the controversial nature of regulation of wetlands and other aquatic resources.").

Outside of the CWA, many states have independent wetland management laws. See James McElfish, Jonathan H. Adler, Robin Craig, Rebecca Kihslinger & Edward Ornstein, Analyzing the Consequences of *Sackett v. EPA*, 53 Env't L. Rep. 10693, 10699 (2023) (noting that, as of September 2023, "19 states" had "fairly comprehensive permitting programs" for dredge and

Coastal wetlands, like inland wetlands, are governed by the CWA.[62] They are additionally subject to the Coastal Zone Management Act (CZMA).[63] Coastal wetlands that serve as habitat for certain fish species are also subject to the Magnuson–Stevens Act (MSA).[64] But, given that the majority of the wetlands in the forty-eight contiguous states are non-coastal,[65] the CWA provides the governing framework for the bulk of such wetlands.

Additional federal policy has sought to improve wetlands management since the mid-twentieth century. Statutes and executive actions aside from the CWA, CZMA, and MSA have taken steps to improve wetland management, either directly—by requiring periodic assessments of the nation's wetlands or incentivizing restoration[66]—or indirectly—by preserving wetlands in order to protect habitat for at-risk species.[67] President Jimmy Carter sought to protect wetlands through an executive order.[68] President George H.W. Bush likewise pushed for federal protections, campaigning on a policy of "no net loss of wetlands" in 1988.[69] This policy was strengthened during the Clinton and George W. Bush Administrations.[70]

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fill activities in non-CWA covered waters, but "[n]early half the states" did "not operate any independent state permitting scheme regulating dredge and fill activities" beyond the CWA).

62. 33 U.S.C. § 1344.

63. See Coastal Zone Management Act, 16 U.S.C. §§ 1452, 1456b(a) (2018); Coastal Zone Enhancement Grants Program Objectives, 15 C.F.R. § 923.122 (2024).

64. Magnuson–Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801–1891d. If wetlands serve as "essential fish habitat" under the MSA, the Corps must consult with the National Oceanic & Atmospheric Administration (NOAA) during the CWA section 404 permit process. See 16 U.S.C. § 1802(10) (defining "essential fish habitat"); Contents of Fishery Management Plans, 50 C.F.R § 600.815(a) (2024).

65. See Thomas E. Dahl & Susan-Marie Stedman, U.S. Fish & Wildlife Serv. & Nat'l Oceanic & Atmospheric Admin., Status and Trends of Wetlands in the Coastal Watersheds of the Conterminous United States: 2004 to 2009, at 4 (2013), https://www.fws.gov/sites/default/files/documents/Status-and-Trends-of-Wetlands-In-the-Coastal-Watersheds-of-the-Conterminous-US-2004-to-2009.pdf [https://perma.cc/YFP5-NJ95] (noting that only thirty-eight percent of wetland acreage in the contiguous United States is coastal).

66. Emergency Wetlands Resources Act of 1986 §§ 401–402, 16 U.S.C. §§ 3931–3932 (periodic assessments); North American Wetlands Conservation Act § 2, 16 U.S.C. § 4401 (incentivizing restoration).

67. See, e.g., Endangered Species Act § 4(b)(2), 16 U.S.C. § 1533(b)(2). The Migratory Bird Treaty Act of 1918 similarly provides some protections for the wetland habitats of certain migratory birds. See Migratory Bird Treaty Act of 1918 § 2, 16 U.S.C. §§ 703–712.

68. See, e.g., Protection of Wetlands, Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (May 24, 1977).

69. Ariel Wittenberg, How George H.W. Bush (Eventually) Rescued U.S. Wetlands, E&E News (Dec. 3, 2018), https://www.eenews.net/articles/how-george-h-w-bush-eventually-rescued-u-s-wetlands/ [https://perma.cc/H49B-3Z8H] (internal quotation marks omitted).

70. Laura Gatz & Megan Stubbs, Cong. Rsch. Serv., RL33483, Wetlands: An Overview of Issues 5 (2017), https://crsreports.congress.gov/product/pdf/RL/RL33483 [https://perma.cc/ZCN2-JM6D].

In spite of these efforts, U.S. wetlands have been destroyed or degraded at alarming rates.[71] The federal policy of "no net loss" has been met only once in the seven decades during which the Department of the Interior has tracked it.[72] This failure to meet stated goals shows that domestic wetland law—in particular, section 404 of the CWA[73]—is not working as intended. Though there are many reasons for these losses, a key reason is the disconnect between which wetlands (defined scientifically) count as wetlands (defined legally) under the CWA. Section II.A explores the tension between these definitions and the accompanying legal disputes, arguing that the ultimate issue lies in the grounding of wetlands protections in the Commerce Clause.

B. *GHG Emissions Mitigation*

Anthropogenic climate change—caused in large part by GHG emissions[74]—also has detrimental impacts on domestic wetland integrity.[75] Like wetland management, federal attempts to address it to date have been too little, too late; in many cases, federal action has exacerbated the problem.[76] Unlike wetland management, though, climate change poses a genuine existential threat to the nation's governmental structures.[77] It has already caused significant harm to the life and property interests of Americans. Yet, despite growing popular will to transition away from fossil fuels, their extraction and use continue to

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71. See supra notes 49–56 and accompanying text.

72. Haaland, supra note 39, at 6.

73. 33 U.S.C. § 1344 (2018).

74. See IPCC, Summary for Policymakers, *in* Climate Change 2021: The Physical Science Basis 1, 4 (Valérie Masson-Delmotte et al. eds., 2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf [https://perma.cc/GB4X-RRX4] [hereinafter IPCC, 2021 Summary] (linking human-caused increases in GHG concentrations to "[w]idespread and rapid changes in the atmosphere, ocean, cryosphere and biosphere").

75. See Climate Adaptation and Wetland Protection, EPA, https://www.epa.gov/arc-x/climate-adaptation-and-wetland-protection [https://perma.cc/U93A-RCJK] (last updated May 30, 2024) ("Sea-level rise, drought, and wildfires can all contribute to displacing wetlands. Climate changes in combination with other stressors, such as land development, may further exacerbate the loss of wetlands . . . . Drought can also increase events such as wildfires . . . alter[ing] water quality and the structure and function of wetlands and watersheds.").

76. See, e.g., Juliana v. United States, 947 F.3d 1159, 1164 (9th Cir. 2020) ("[T]he federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse.").

77. See Mina Juhn, Note, Taking a Stand: Climate Change Litigants and the Viability of Constitutional Claims, 89 Fordham L. Rev. 2731, 2769 (2021) ("[T]he right to a stable climate system is 'quite literally the foundation "of society, without which there would be neither civilization nor progress."'" (quoting Juliana v. United States, 217 F. Supp. 3d 1224, 1250 (D. Or. 2016) (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)))); infra section II.B (discussing the risks of continued climate inaction).

receive federal encouragement via subsidies.[78] This section explores the present-day impacts of unchecked GHG emissions and legal landscape of domestic climate law.

1. *Impacts of Climate Change*. — Anthropogenic climate change has been called the greatest threat the world has ever faced.[79] According to the Intergovernmental Panel on Climate Change (IPCC),[80] it affects "every inhabited region across the globe, with human influence contributing to many observed changes in weather and climate extremes."[81] Its impacts are not merely aesthetic or philosophical; the day-to-day health and safety of individuals and communities is at stake.[82] It threatens water supplies, disrupts food systems, intensifies extreme weather events, jeopardizes property and critical infrastructure, displaces communities, exacerbates human health challenges, slows economic growth, disrupts cultural and spiritual practices, and threatens biodiversity.[83] Many of these impacts disproportionately affect communities already overburdened by socioeconomic and environmental stressors.[84]

Beyond physical impacts, climate change is politically destabilizing. Climate impacts cause global displacement,[85] "threatening human rights,

78. See Clayton Coleman & Emma Dietz, Fossil Fuel Subsidies: A Closer Look at Tax Breaks and Societal Costs 2–6, Env't & Energy Study Inst. (Brian LaShier, Jessie Stolark & Amaury Laporte eds., 2019), https://www.eesi.org/files/FactSheet_Fossil_Fuel_Subsidies_0719.pdf [https://perma.cc/GHY5-ADSE] (outlining the types of subsidies that the federal government provides to the fossil fuel industry).

79. Interview: Connection Between Human Rights and Climate Change 'Must Not Be Denied', UN News (Oct. 21, 2022), https://news.un.org/en/story/2022/10/1129767 [https://perma.cc/9GD5-6NAG] [hereinafter UN News, Interview] ("Human-induced climate change is the largest, most pervasive threat to . . . societies the world has ever experienced . . . ." (internal quotation marks omitted) (quoting Ian Fry, Special Rapporteur on the Prot. and Promotion of Hum. Rts. in the Context of Climate Change)).

80. The IPCC is "the United Nations body for assessing the science related to climate change." About the IPCC, IPCC, https://www.ipcc.ch/about/ [https://perma.cc/PE2W-67AN] (last visited Aug. 21, 2025). It seeks "to provide governments at all levels with scientific information that they can use to develop climate policies" and provide "input into international climate change negotiations." Id.

81. IPCC, 2021 Summary, supra note 74, at 10.

82. IPCC, Summary for Policymakers, *in* Climate Change 2022: Impacts, Adaptation and Vulnerability 1, 9–11 (H.O. Pörtner et al. eds. 2022), https://www.ipcc.ch/report/ar6/wg2/downloads/report/IPCC_AR6_WGII_SummaryForPolicymakers.pdf [https://perma.cc/EWU9-TGD9] [hereinafter IPCC, 2022 Summary].

83. Alexa K. Jay et al., Overview: Understanding Risks, Impacts, and Responses, *in* U.S. Glob. Change Rsch. Program, Fifth National Climate Assessment, at 1-16, 1-23 to 1-26, 1-28, 1-30 to 1-32 (A.R. Crimmins, C.W. Avery, D.R. Easterling, K.E. Kunkel, B.C. Stewart, & T.K. Maycock eds. 2023), https://repository.library.noaa.gov/view/noaa/61592 (on file with the *Columbia Law Review*) [hereinafter USGCRP, 2023 Overview].

84. Id. at 1-19.

85. See Joanna Apap & Sami James Harju, The Concept of 'Climate Refugee,' Eur. Parl. Rsch. Serv. 2 (2023), https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698753/EPRS_BRI(2021)698753_EN.pdf (on file with the *Columbia Law Review*) ("Since

increasing poverty and loss of livelihoods, [and] straining peaceful relations between communities" by "escalat[ing] tensions and conflicts over vital resources like water, fuel and arable land."[86] Resulting immigration surges often foment xenophobia and racism,[87] as shown by the current political climate of the United States.[88] Separately, frustration at governmental climate inaction has inspired a global movement of youth climate activism,[89] along with high-profile protest actions from pipeline construction disruption[90] to art museum vandalism.[91] Climate

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2008, over 376 million people have been displaced as a result of climate disasters. . . . [T]he projected number of people affected [is] expected to double by 2050 . . . .").

86. Climate Change and Displacement, UNHCR, https://www.unhcr.org/what-we-do/build-better-futures/climate-change-and-displacement (on file with the *Columbia Law Review*) (last visited Feb. 7, 2026).

87. Int'l Lab. Off., Int'l Org. for Migration & Off. of the UN Hum. Rts. Off. High Comm'r, International Migration, Racism, Discrimination and Xenophobia 1 (2001), https://publications.iom.int/system/files/pdf/international_migration_racism.pdf (on file with the *Columbia Law Review*) ("[X]enophobia and racism have become manifest in some societies which have received substantial numbers of immigrants . . . . [T]he migrants have become the targets in internal disputes about national identity."); The Pluralism Project, Harvard Univ., Xenophobia: Closing the Door 4 (2020), https://pluralism.org/files/pluralism/files/xenophobia-closing_the_door.pdf [https://perma.cc/B8JA-G26S].

88. See Baxter Oliphant, Jocelyn Kiley, Ted Van Green, Shanay Gracia & Joseph Copeland, Pew Rsch. Ctr., Americans Have Mixed to Negative Views of Trump Administration Immigration Actions 6, 8–9 (2025), https://www.pewresearch.org/wp-content/uploads/sites/20/2025/06/PP_2025-6-17_trump-immigration_report.pdf [https://perma.cc/VLJ9-P8CW] (describing how anti-immigrant sentiment has grown in the United States since Trump's first term); see also Protecting the Meaning and Value of American Citizenship, Exec. Order No. 14,160, 90 Fed. Reg. 8449 (Jan. 20, 2025) (suspending birthright citizenship); Stephen Miller (@StephenM), X (Apr. 1, 2025), https://x.com/StephenM/status/1907116768474071069 [https://perma.cc/A7D7-WR8T] ("Friendly reminder: If you illegally invaded our country the only 'process' you are entitled to is deportation."); Donald J. Trump (@realDonaldTrump), TRUTH Social (Oct. 24, 2024), https://truthsocial.com/@realDonaldTrump/posts/113363874230101273 (on file with the *Columbia Law Review*) ("We are the only 'stupid ones' that allow people, including hundreds of thousands of criminals, to freely come into the United States . . . . [I]t must be corrected IMMEDIATELY!"). But see Jazmine Ulloa & Ruth Igielnik, Support for Immigration Rebounds as Trump Cracks Down on It, Poll Finds, N.Y. Times (July 11, 2025), https://www.nytimes.com/2025/07/11/us/immigration-poll-trump.html (on file with the *Columbia Law Review*) ("[I]n the past year, Americans have grown less negative about the issue, with the share of those wanting to see immigration decrease now totaling 30 percent, compared to 55 percent in 2024 . . . .").

89. Rising Voices: Discover 6 Youth-Led Movements Taking on Climate Change, No Kill Mag., https://www.nokillmag.com/articles/6-youth-led-climate-change-activist-groups/ [https://perma.cc/V4MW-ZWYA] (last visited Aug. 18, 2025); Young Climate Activists Demand Action and Inspire Hope, UNICEF, https://www.unicef.org/stories/young-climate-activists-demand-action-inspire-hope (on file with the *Columbia Law Review*) (last visited Aug. 18, 2025) ("As the impacts of climate change intensify with each passing year, more and more young people are joining the movement for positive change.").

90. See, e.g., Keerti Gopal, To Stop the Mountain Valley Pipeline, a Young Activist Spends 36 Hours Inside It, Inside Climate News (Mar. 17, 2024), https://

protestors, especially land defenders,[92] face grave risks: They are "subjected to violent attacks and threats, enforced disappearances, illegal surveillance, travel bans, blackmail, [and] sexual harassment," if not killed outright.[93] Several U.S. state governments have responded to land defense actions by criminalizing protest activity or charging protestors with domestic terrorism,[94] worsening the "threat posed to democracy and civil and political rights" that underscores "the relationship between climate change and human rights."[95]

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insideclimatenews.org/news/17032024/activist-spends-36-hours-inside-mountain-valley-pipeline/ [https://perma.cc/36W4-5CGE].

91. See, e.g., Geraldine Kendall Adams, Climate Protestors Set Sights on Museums and Galleries, Museums Ass'n: Museums Journal (Nov. 7, 2023), https://www.museumsassociation.org/museums-journal/news/2023/11/climate-protesters-set-sights-on-museums-and-galleries/ [https://perma.cc/V7UH-A3SD].

92. Land or environmental defenders are "local and regional civil society organizations and community groups[,] including indigenous peoples[,]" from "a wide socio-demographic gradient" who work "[o]n the front lines of conservation" and "endeavor to conserve and preserve natural resources and the people that depend on them." Yiwen Zeng, Fangqi Twang & L. Roman Carrasco, Threats to Land and Environmental Defenders in Nature's Last Strongholds, 51 Ambio 269, 269 (2022). For a more comprehensive definition and a discussion of the rise in killings of land defenders worldwide, see generally id.

93. See UN Dep't of Pub. Info., Backgrounder: Indigenous Human Rights Defenders 1 (2016), https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2016/08/Indigenous-Human-Rights-Defenders.pdf [https://perma.cc/PR2C-JHGQ] ("281 human rights defenders were killed in 25 countries in 2016 . . . ."); see also Experts: Indigenous Human Rights Activists Should Be Protected Not Criminalised, UN Hum. Rts. Off. High Comm'r (Oct. 12, 2020), https://www.ohchr.org/en/stories/2020/10/experts-indigenous-human-rights-activists-should-be-protected-not-criminalised (on file with the *Columbia Law Review*) (noting "more than 10,000 cases of victimization and violent acts against indigenous human rights defenders in Colombia, many happening while people [were] protesting").

94. See Sean Keenan & Rick Rojas, 'Cop City' Prosecutions Hinge on a New Definition of Domestic Terrorism, N.Y. Times (Feb. 26, 2024), https://www.nytimes.com/2024/02/26/us/cop-city-domestic-terrorism.html (on file with the *Columbia Law Review*) (last updated Feb. 27, 2024); Tristam Korten, States Are Criminalizing Environmental Protest, Sierra (Sep. 17, 2023), https://www.sierraclub.org/sierra/2023-3-fall/notes-here-there/states-are-criminalizing-environmental-protest [https://perma.cc/CL9R-H2EU] ("Since the Dakota Access Pipeline conflict, 17 states have passed laws aimed at restricting protests . . . . Much of that legislation is aimed specifically at environmental protests, raising the penalties for gatherings . . . on 'critical infrastructure' sites like pipelines.").

Environmental groups have also been subjected to significant civil liability for their role in such activities. See, e.g., Jack Dura, Greenpeace Must Pay Over $660M in Case Over Dakota Access Protest Activities, Jury Finds, Associated Press (last updated Mar. 19, 2025), https://apnews.com/article/greenpeace-dakota-access-pipeline-lawsuit-verdict-5036944c1d2e7d3d7b704437e8110fbb (on file with the *Columbia Law Review*) ("Dallas-based Energy Transfer and subsidiary Dakota Access had accused Netherlands-based Greenpeace International, Greenpeace USA[,] and funding arm Greenpeace Fund Inc. of defamation, trespass, nuisance, civil conspiracy[,] and other acts. Greenpeace USA was found liable for all counts . . . .").

95. Philip Alston, International Human Rights 1063–65 (2024).

Climate change similarly destabilizes myriad legal frameworks that underlie disaster response financing, coastal property rights, and drinking water governance. Insurance markets are reeling in response to the uptick in frequency and severity of natural disasters, leading insurers in certain states to either hike up home insurance rates or stop coverage altogether.[96] Demands on federal disaster relief funding have exploded in recent years.[97] State governments are likewise stretched thin, with two states recently enacting "climate superfund" laws as a way to recoup relief funding from fossil fuel companies.[98] Sea level rise raises thorny property ownership issues, both domestic[99] and international.[100] It can also lead to salinization of drinking water supplies in coastal cities, complicating public water system management.[101] More severe water governance problems plague drought-prone regions: The allocation regime of the Colorado River, for example, fails to meet user needs as is, yet each

96. Judson Boomhower, Meredith Fowlie, Jacob Gellman & Andrew Plantinga, How Are Insurance Markets Adapting to Climate Change? Risk Classification and Pricing in the Market for Homeowners Insurance 2, 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32625, 2024), https://www.nber.org/system/files/working_papers/w32625/w32625.pdf [https://perma.cc/LRR3-KZAR]; Lucy Sherriff, Climate Change is Fuelling the US Insurance Problem, BBC (Mar. 18, 2024), https://www.bbc.com/future/article/20240318-climate-change-is-fuelling-the-us-insurance-problem [https://perma.cc/6AKT-V8CP].

97. See Laura H. Gillam & Wesley E. Yin, OMB, Responding to the Financial Impacts of Climate Change, White House (Apr. 22, 2024), https://bidenwhitehouse.archives.gov/omb/briefing-room/2024/04/22/responding-to-the-financial-impacts-of-climate-change/ [https://perma.cc/MEU5-JT5F] ("[T]he Nation experiences on average a billion-dollar disaster every three weeks, with 28 billion-dollar disasters occurring in 2023 alone . . . .").

98. Vermont and New York each passed such laws in 2024. The Department of Justice has sued to block these laws from going into effect. Associated Press & Alexa St. John, Justice Department Sues Hawaii, Michigan, Vermont and New York Over State Climate Actions, KBTX (May 4, 2025), https://www.kbtx.com/2025/05/04/justice-department-sues-hawaii-michigan-vermont-new-york-over-state-climate-actions/ [https://perma.cc/S3BD-6YQT].

99. Land loss, coastline shrinkage, and resulting coastal property damage and abandonment lead to "enormous cost[s]," yet the extreme variety in local government policies regulating abandoned coastal structures has led some to question whether such policies are prepared to manage those costs. Jake Hummer, Abandoning Structures to Rising Sea Levels, What Are the Legal Issues and Solutions?, Env't & Energy L. Program, Harv. L. Sch. (Nov. 3, 2020), https://eelp.law.harvard.edu/abandoning-structures-to-rising-seas/ [https://perma.cc/G3ZL-KK5K]. Interestingly, state governments have used coastline shrinkage to meet the concrete injury requirement for standing to force federal climate action. See Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 499 (2007) (relying in part on coastline shrinkage in Massachusetts to find that the state could challenge the EPA's failure to regulate motor vehicle GHG emissions).

100. Sea level rise may alter countries' Exclusive Economic Zone boundaries, disproportionately impacting low-lying island nations. See Levi Westerveld, Univ. of Bergen, The Potential Impacts of Climate Change on Exclusive Economic Zones Boundaries (2020), https://www.uib.no/sites/w3.uib.no/files/attachments/westerveldlevi_67098_2888248_levi_westerveld_milestone3_poster_final_03.11.2020-2.pdf [https://perma.cc/GZ9V-CEMQ].

101. Allison Lassiter, Rising Seas, Changing Salt Lines, and Drinking Water Salinization, 50 Current Op. Env't Sustainability 208, 208–09, 212–13 (2021).

degree Celsius of global warming is expected to cause a nine-percent decrease in the River's already strained levels.[102]

In short, climate change is here. It is creating novel challenges both for longstanding legal frameworks and institutions and for the people who depend on them. Those challenges will worsen—and sharply—without swift action to manage their cause: anthropogenic GHG emissions.[103] Yet despite this urgency, atmospheric GHGs are increasing at a record-setting pace,[104] and the United States plays an outsized role in their emission.[105]

GHG reduction is not a primarily technological problem;[106] the technologies required to slash U.S. GHGs in the short term are readily deployable and those required for long-term decarbonization are in development.[107] Rather, with the exploding development of low- or no-carbon technology, GHG emissions reduction has become a primarily

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102. Abrahm Lustgarten, A Water War Is Brewing Over the Dwindling Colorado River, ProPublica (Dec. 22, 2022), https://www.propublica.org/article/colorado-river-water-uncompahgre-california-arizona [https://perma.cc/5YMQ-Z3KT] (detailing the Colorado River system's "state of collapse" and political battles between dependent states).

103. See USGCRP, 2023 Overview, supra note 83, at 1-5 ("The effects of human-caused climate change are already far-reaching and worsening across every region of the United States. Rapidly reducing greenhouse gas emissions can limit future warming and associated increases in many risks."); see also IPCC, 2021 Summary, supra note 74, at 15 ("Many changes in the climate system become larger in direct relation to increasing global warming. They include increases in the frequency and intensity of hot extremes, marine heatwaves, heavy precipitation, and . . . agricultural and ecological droughts . . . .").

104. Robert Monroe, Largest Year-Over-Year Gain in Keeling Curve Set in March, Scripps Inst. Oceanography, U.C. San. Diego (May 8, 2024), https://keelingcurve.ucsd.edu/2024/05/08/largest-year-over-year-gain-in-keeling-curve-set-in-march/ (on file with the *Columbia Law Review*).

105. See Michon Scott, Does It Matter How Much the United States Reduces Its Carbon Dioxide Emissions if China Doesn't Do the Same?, Nat'l Oceanic & Atmospheric Admin.: Climate Q&A (Aug. 30, 2023), https://www.climate.gov/news-features/climate-qa/does-it-matter-how-much-united-states-reduces-its-carbon-dioxide-emissions [https://perma.cc/X9MF-RGUD] (noting that "the United States has released more heat-trapping gases to date than either China or India, the world's two most populous countries," and "was still, as of 2021, releasing . . . about 13.49 percent of the total global emissions").

106. Alexandra B. Klass & Matthew Appel, The Law of Energy Abundance, 104 N.C. L. Rev. 63, 94 (2025).

107. See John C. Dernbach, Introduction, *in* Legal Pathways to Deep Decarbonization in the United States: Summary and Key Recommendations 1, 1 (Michael B. Gerrard & John C. Dernbach eds., 2018) ("identifying well over one thousand legal options for enabling the United States" to reduce GHG emissions and noting that, while "it is not likely that all of the legal pathways will be used, . . . public and private decisionmakers can employ various combinations . . . to achieve the needed [GHG emissions] reductions"); see also Stéphanie Bouckaert et al., Int'l Energy Agency, Net Zero by 2050: A Roadmap for the Global Energy Sector 15 (2021), https://iea.blob.core.windows.net/assets/deebef5d-0c34-4539-9d0c-10b13d840027/NetZeroby2050-ARoadmapfortheGlobalEnergySector_CORR.pdf [https://perma.cc/FFG5-7529] ("Reaching net zero by 2050 requires further rapid deployment of available technologies as well as widespread use of technologies that are not on the market yet . . . . Most of the global reductions in CO_2 emissions through 2030 . . . [can] come from technologies readily available today.").

political problem.[108] It requires policy solutions that account for both its knottiness and its urgency.

2. *Federal Law and GHG Emissions Mitigation.* — Unfortunately, for decades, such solutions largely stalled out. In 1997, the Senate passed a resolution stating its opposition to ratifying an agreement structured like the Kyoto Protocol—an international treaty supported by the Clinton Administration that would have required the United States to slash its GHG emissions.[109] A decade later, the House passed the Waxman–Markey GHG cap-and-trade bill, but it died in the Senate.[110] Though Congress passed household appliance energy efficiency incentives and fuel emission efficiency requirements for vehicles,[111] efforts to bind the country to a GHG emissions reduction target have failed.[112]

Over the past decade, attempts to pass "sticks" such as binding emissions targets have continued to flounder, but Congress has passed notable "carrots" in the form of federal funding for green energy projects. Of the sticks, the most notable is the Paris Agreement: a 2015 treaty[113] signed by the Obama Administration that would require the country to cut its long-term GHG emissions.[114] President Donald Trump

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108. See Klass & Appel, supra note 106, at 94 ("Technological and economic constraints are no longer the primary barriers to a clean energy transition . . . . Instead, some of the energy transition's greatest challenges are structural and regulatory in nature.").

109. Jeffrey Pierre & Scott Neuman, How Decades of Disinformation About Fossil Fuels Halted U.S. Climate Policy, NPR (Oct. 27, 2021), https://www.npr.org/2021/10/27/1047583610/once-again-the-u-s-has-failed-to-take-sweeping-climate-action-heres-why [https://perma.cc/S9UT-3W5G] ("Before the treaty was completed, the Senate passed a resolution saying it would not ratify any agreement that did not include mandates requiring developing countries such as China and India to limit emissions."). See generally Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162.

110. Pierre & Neuman, supra note 109; see also H.R. 2454, 111th Cong. (2009).

111. E.g., Energy Policy Act of 2005 § 124, Pub. L. No 109-58, 119 Stat. 617–18 (codified at 42 U.S.C. § 15821 (2018)) (authorizing state funding for Energy Star appliance rebate programs); Energy Policy and Conservation Act § 502, Pub. L. No. 94-163, 89 Stat. 906 (1975) (codified at 15 U.S.C. § 2003 (2018)) (establishing fuel economy standards for passenger cars and heavy-duty vehicles).

112. See Pierre & Neuman, supra note 109 (detailing "a string of defeats to aggressive climate action that stretches back more than 25 years").

113. Though the Paris Agreement is often referred to as a treaty internationally, it does not have the legal force of a treaty in the United States because it has not been ratified by the Senate.

114. Paris Agreement art. 4, Dec. 12, 2015, 3156 U.N.T.S. 54113; see also Fact Sheet: President Biden Sets 2035 Climate Target Aimed at Creating Good-Paying Union Jobs, Reducing Costs for All Americans, and Securing U.S. Leadership in the Clean Energy Economy of the Future, White House (Dec. 19, 2024), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2024/12/19/fact-sheet-president-biden-sets-2035-climate-target-aimed-at-creating-good-paying-union-jobs-reducing-costs-for-all-americans-and-securing-u-s-leadership-in-the-clean-energy-economy-of-the-future/ [https://perma.cc/5NQK-HG24] (announcing the nation's commitment under the Paris Agreement as "an economy-wide, all [GHG] target of reducing net emissions by 61–66 percent below 2005 levels").

pulled the country out of the Paris Agreement—along with the United Nations Framework Convention on Climate Change (UNFCCC), the foundational global climate treaty on which the Agreement is grounded[115]—during both of his presidencies.[116] The Green New Deal, a 2019 resolution that would have committed the government to net-zero emissions by 2050,[117] shifted the national conversation around federal climate action.[118]

Biden shifted the landscape further, naming climate action as a key priority during his tenure in office.[119] His Administration pushed through Congress the most significant investment in clean energy infrastructure in the U.S. history, complete with the country's first carbon tax.[120] Biden likewise fostered climate consciousness throughout the executive branch through a slew of executive orders.[121]

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115. UNFCCC, May 9, 1992, 1771 U.N.T.S. 107; Presidential Memorandum: Withdrawing the United States from International Organizations, Conventions, and Treaties that Are Contrary to the Interests of the United States, White House (Jan. 7, 2026), https://www.whitehouse.gov/presidential-actions/2026/01/withdrawing-the-united-states-from-international-organizations-conventions-and-treaties-that-are-contrary-to-the-interests-of-the-united-states/ [https://perma.cc/USH3-MBZK].

116. See Press Release, Michael R. Pompeo, Sec'y of State, On the U.S. Withdrawal From the Paris Agreement (Nov. 4, 2019), https://2017-2021.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/ [https://perma.cc/4SK2-47HT] (withdrawal during the First Trump Administration); see also Putting America First in International Environmental Agreements, Exec. Order No. 14,162, 90 Fed. Reg. 8455, 8455 (Jan. 20, 2025) (withdrawal during the second Trump Administration).

President Joe Biden had reentered the Paris Agreement during his administration. Joseph R. Biden Jr., Paris Climate Agreement, White House (Jan. 20, 2021), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/ [https://perma.cc/7A94-WARN].

117. H.R. Res. 109, 116th Cong. (2019).

118. See Lisa Friedman, What Is the Green New Deal? A Climate Proposal, Explained, N.Y. Times (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/climate/green-new-deal-questions-answers.html (on file with the *Columbia Law Review*) (predicting that the Green New Deal would be a critical point of conversation throughout the 2020 presidential election cycle).

119. See Kevin Johnson, 'Climate Czar' Positions Point to Biden's Dual Approach to the Global Crisis, Audubon (Jan. 12, 2021), https://www.audubon.org/news/climate-czar-positions-point-bidens-dual-approach-global-crisis [https://perma.cc/T36J-AEHY] (detailing Biden's creation of two high-level climate advisory roles).

120. See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (authorizing major federal investments in clean energy infrastructure); Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 60113, 136 Stat. 1818, 2073–76 (establishing the "waste emissions charge," a tax on methane emissions).

121. See, e.g., Revitalizing Our Nation's Commitment to Environmental Justice for All, Exec. Order No. 14,096, 88 Fed. Reg. 25,251, 25,251 (Apr. 21, 2023); Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, Exec. Order No. 14,057, 86 Fed. Reg. 70,935, 70,935 (Dec. 8, 2021); Rebuilding and Enhancing Programs to Resettle Refugees and Planning for the Impact of Climate Change on Migration, Exec. Order No. 14,013, 86 Fed. Reg. 8839, 8839 (Feb. 4, 2021); Tackling the Climate Crisis at Home and Abroad, Exec. Order. No. 14,008, 86 Fed. Reg. 7619, 7619 (Jan. 27, 2021); Protecting

Unfortunately, the bulk of Biden's pro-climate actions have not survived the second Trump presidency. Trump has worked to "make coal king again"[122] and has all but declared war on clean energy, especially the offshore wind industry.[123] The President immediately repealed Biden's executive actions relating to climate policy.[124] Moreover, through his signature bill of 2025, the One Big Beautiful Bill Act, Congress axed key Biden-era climate provisions such as clean energy subsidies and the carbon tax.[125]

In short, despite the pro-climate policies of some presidential administrations, the federal government has created few avenues to curb GHG emissions. Limited action is possible under the Clean Air Act

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Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13990, 86 Fed. Reg. 7037, 7037 (Jan. 20, 2021).

122. Hannah Northey, Trump Has Vowed to Make Coal King Again. How's It Going?, E&E News: Greenwire (Sep. 26, 2025), https://www.eenews.net/articles/trump-has-vowed-to-make-coal-king-again-hows-it-going/ [https://perma.cc/586F-XMGT]; see also Reinvigorating America's Beautiful Clean Coal Industry and Amending Executive Order 14,241, Exec. Order No. 14,621, 90 Fed. Reg. 15,517, 15,517 (Apr. 8, 2025).

123. Clare Fieseler, How Trump Dismantled A Promising Energy Industry—and What America Lost, Canary Media (Dec. 31, 2025), https://www.canarymedia.com/articles/offshore-wind/how-trump-dismantled-a-promising-energy-industry-and-what-america-lost [https://perma.cc/F2FV-QTBR] (cataloging Trump's "grudge against offshore wind" and "demolition of the offshore wind sector in 2025"); The Trump Administration Protects U.S. National Security by Pausing Offshore Wind Leases, U.S. Dep't Interior (Dec. 22, 2025), https://www.doi.gov/pressreleases/trump-administration-protects-us-national-security-pausing-offshore-wind-leases [https://perma.cc/J2HV-MBHZ].

124. Unleashing American Energy, Exec. Order No. 14,154, 90 Fed. Reg. 8353 (Jan. 20, 2025) (revoking twelve Biden-issued executive orders addressing environmental or climate policy); see also Maxine Joselow, EPA Moves to Dismantle Dozens of Biden's Environmental Rules, Wash. Post (Mar. 12, 2025), https://www.washingtonpost.com/climate-environment/2025/03/12/epa-waters-of-united-states-wotus/ (on file with the *Columbia Law Review*) ("EPA Administrator Lee Zeldin said the agency will roll back some of President Joe Biden's most consequential climate and environmental regulations. He specifically cited rules aimed at speeding the nation's shift to electric vehicles, slashing planet-warming emissions from power plants and safeguarding waterways from harmful pollution."). These actions mirror those taken during Trump's first term, when he ordered the rollback of over one hundred environmental rules. Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, The Trump Administration Rolled Back More Than 100 Environmental Rules. Here's the Full List., N.Y. Times, https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html (last updated Jan. 20, 2021) (on file with the *Columbia Law Review*).

125. One Big Beautiful Bill Act, Pub. L. No. 119-21, 139 Stat. 72 (2025); see also Lucero Marquez & Jasia Smith, What Trump's Anti-Environment One Big Beautiful Bill Act Means for Your Wallet, Health, and Safety, Ctr. for Am. Progress (July 7, 2025), https://www.americanprogress.org/article/what-trumps-anti-environment-one-big-beautiful-bill-act-means-for-your-wallet-health-and-safety/ [https://perma.cc/5V7S-QCG7] ("[T]he [Act] . . . kills clean energy incentives and further subsidizes the oil and gas industry, resulting in even higher costs and health burdens for American families. . . .[It] will . . . worsen[] air quality and public health[] while putting Americans at greater risk from a less reliable power grid as extreme weather rises.").

(CAA)[126] (notwithstanding the rescission of the Endangerment Finding[127]) but almost universally faces extended litigation in a Supreme Court notoriously hostile to environmental governance.[128] Some state governments have stepped up to fill this void by suing to require federal agency action,[129] enacting binding GHG reduction commitments,[130] requiring mitigation of GHG emissions anticipated during the environmental review of state-approved projects,[131] or ratifying green amendments to their constitutions.[132] But for many of the millions of

126. See, e.g., Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 528 (2007) (holding that "§ 202(a)(1) of the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a 'judgment' that such emissions contribute to climate change"); see also Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2018) ("The [EPA] Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.").

127. See Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act, 91 Fed. Reg. 7686, 7686 (Feb. 18, 2026) (to be codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037, 1039).

128. See infra note 200 and accompanying text (discussing recent jurisprudence such as West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2626 (2022); Corner Post, Inc., v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2450 (2024); and Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024)); see also Coral Davenport, A String of Supreme Court Decisions Hits Hard at Environmental Rules, N.Y. Times (June 29, 2024), https://www.nytimes.com/2024/06/29/climate/supreme-court-epa.html (on file with the *Columbia Law Review*) (discussing the "steady erosion of environmental law" resulting from recent Supreme Court decisions (internal quotation marks omitted) (quoting Patrick Parenteau, Professor, Vt. L. Sch.)).

129. See, e.g., *Massachusetts v. Env't Prot. Agency*, 549 U.S. at 505 n.2 (listing petitioner states).

130. See State Climate Policy Maps, Ctr. for Climate & Energy Sols., https://www.c2es.org/content/state-climate-policy/ [https://perma.cc/647G-Q9YG] (last visited Aug. 21, 2025) ("Twenty-four states plus the District of Columbia have adopted specific greenhouse gas emissions targets.").

131. See, e.g., Mass. Gen. Laws Ann. ch. 30, § 61 (West 2025) ("All . . . authorities of the commonwealth shall . . . determine the impact on the natural environment of all works, projects or activities conducted by them and shall use all practicable means . . . to minimize damage to the environment.").

132. The Montana, New York, and Pennsylvania constitutions have strong environmental rights provisions. See Mont. Const. art. IX, §§ 1–3; N.Y. Const. art. I, § 19; id., art. XIV, §§ 1, 3–4; Pa. Const. art. I, § 27. A number of other states, such as Hawaii, Illinois, Massachusetts, and Rhode Island, have some level of express environmental protections in their constitutions. See, e.g., Haw. Const. art. IX, § 8; id., art. XI, §§ 1, 7, 9; Ill. Const. art. XI, §§ 1–2; Mass. Const. art. XCVII; R.I. Const. art. I, § 17. For a discussion of the history of state environmental constitutionalism and the relative strengths of various state constitutional provisions, see Maya K. van Rossum, The Green Amendment 46–52 (2022), and Amber Polk, The Unfulfilled Promise of Environmental Constitutionalism, 74 Hastings L.J. 123, 126–75 (2022). At least nine other states have recently sought to incorporate explicit environmental rights provisions into their constitutions. Green Amendments in 2023: States Continue Efforts to Make a Healthy Environment a Legal Right, Nat'l Caucus of Env't Legislators (Mar. 27, 2023), https://www.ncelenviro.org/

Americans[133] experiencing the impacts of unchecked GHG emissions in real time, this patchwork of state regulations provides little comfort—particularly as the executive branch offloads much of its climate-focused programming,[134] the EPA revokes its own longstanding finding that GHG emissions endanger human health,[135] and Congress reverses much the Biden-era progress through the One Big Beautiful Bill Act.[136]

In response to climate inaction, some have brought suit to force the government to fulfill its responsibility to "promote the general Welfare, and secure the Blessings of Liberty to" current and future Americans.[137] Such litigation has largely failed to date due to the second structural limitation impeding federal environmental governance: the justiciability concerns that plague a problem as complex and politically charged as GHG emissions reduction. Part II elaborates on this structural issue in conversation with that which hinders wetland governance, demonstrating that federal environmental legislation's inefficacy at addressing some of its target problems stems from these structural issues as much as any issues inherent in a given statute. It ultimately argues that these structural failures jeopardize the otherwise legally protected interests of Americans and the country's internal security and survival.

II. STRUCTURAL PROBLEMS UNDERLYING FEDERAL ENVIRONMENTAL GOVERNANCE

Having laid out the legal frameworks in place to manage wetlands and mitigate GHG emissions, this Part probes the structural problems

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articles/green-amendments-in-2023-states-continue-efforts-to-make-a-healthy-environment-a-legal-right/ [https://perma.cc/W8LC-J3KT].

133. All people in the United States are vulnerable to the impacts of environmental degradation and climate change. The uses of "Americans" and "the American people" throughout this Note are meant to include all people in the United States, not just U.S. citizens or noncitizens here permanently.

134. These cuts could drastically limit the climate-responsiveness of NOAA and the EPA. See Daniel Cusick, Chelsea Harvey & Scott Waldman, White House Outlines Plan to Gut NOAA, Smother Climate Research, Politico (Apr. 11, 2025), https://www.politico.com/news/2025/04/11/white-house-plan-guts-noaa-climate-research-00286408 [https://perma.cc/3RGS-SKKN] ("[A]ccording to a memo from the Office of Management and Budget[,] . . . [t]he Trump administration wants to effectively break up NOAA and end its climate work by abolishing its primary research office and forcing the agency to help boost U.S. fossil fuel production . . . ."); see also Jean Chemnick, What EPA's Reorganization Could Mean for Its Climate Staff, E&E News (May 2, 2025), https://www.eenews.net/articles/what-epas-reorganization-could-mean-for-its-climate-staff/ [https://perma.cc/M4HQ-CT4D] ("The Trump administration has already put a substantial dent in EPA's workforce . . . .").

135. See Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act, 91 Fed. Reg. 7686, 7686 (Feb. 18, 2026) (to be codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037, 1039).

136. See supra note 125 and accompanying text.

137. U.S. Const. pmbl.; see also infra section II.B (discussing Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020)).

that undermine effective federal governance of each issue. Section II.A analyzes the *Sackett* decision[138] to unpack the limitations of using the commerce power to ground federal statutory wetlands protections. Section II.B compares the *Juliana* decision with climate-harms jurisprudence in non-Article III courts to explore a second structural limit: justiciability. Section II.C highlights the ways that these structural issues compound to hinder federal environmental governance across the board.

A. Sackett *and the Limits of Federal Jurisdiction Over Wetlands*

For decades, wetlands adjacent to "waters of the United States" were also considered such waters for the purposes of the CWA.[139] In 1984, the Supreme Court held in *United States v. Riverside Bayview Homes, Inc.*, that "a wetland adjacent to a navigable waterway" was "part of the 'waters of the United States' as defined by" contemporaneous, valid Corps CWA section 404 regulations.[140] Nearly two decades later, the Court in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (*SWANCC*) held that section 404 jurisdiction did not extend to isolated, intrastate ponds solely due to their use as habitat for migratory birds.[141] In so holding, it narrowed the CWA's reach from "nonnavigable wetlands adjacent to open water" to "waters that were or had been navigable in fact or which could reasonably be so made."[142] Several years later, in *Rapanos v. United States*, the Court announced a new test for CWA section 404 jurisdiction—a "continuous surface connection" or "significant nexus" with "waters of the United States"—but its introduction in a plurality opinion limited its impact.[143]

Nearly two decades later, though, this test became governing law. In *Sackett*, the Court declared that wetlands adjacent to "waters of the United States" are not covered by the CWA section 404 unless they have a "continuous surface connection" to bodies of water that are themselves

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138. Sackett v. Env't Prot. Agency, 143 S. Ct. 1322 (2023).

139. See 33 U.S.C. § 1362(7) (2018) (defining "'navigable waters'" as "waters of the United States"); Definitions, 33 C.F.R. § 328.3(a)(4)(iii) (2023) (defining "waters of the United States" to include wetlands "adjacent to" other waters of the United States"); see also *Sackett*, 143 S. Ct. at 1332–35 (providing a chronology of CWA section 404 jurisdictional jurisprudence and related EPA and Corps actions).

140. 474 U.S. 121, 131, 138 (1985); see also 33 C.F.R. § 323.2(a)–(d) (1985) (the contemporaneous regulations).

141. 531 U.S. 159, 171–72 (2001) [hereinafter *SWANCC*].

142. Id. at 171–72 (noting that, although the Court had previously found "that the word 'navigable' in the statute was of 'limited import,'" it "[could not] agree that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute" (quoting *Riverside Bayview Homes*, 474 U.S. at 133)).

143. 547 U.S. 715, 742 (2006) (plurality opinion) (internal quotation marks omitted) (quoting *SWANCC*, 531 U.S. at 167).

"waters of the United States."[144] *Sackett* contributed to decades of confused jurisprudence on federal wetlands jurisdiction under the CWA,[145] gutting the federal government's ability to regulate wetlands and, by extension, the nation's water quality. Millions of acres of wetlands lost protection in its immediate wake.[146] Following the change in administration, the EPA and the Corps have initiated rulemaking to further narrow the scope of covered wetlands.[147]

This section delves into *Sackett*, using it to highlight the disconnect between the scientific relevance of inherently noncommercial things to environmental quality and the outer bounds of the commerce power. Section II.A.1 recounts the facts and opinions of the *Sackett* Court. Section II.A.2 details how the majority's "continuous surface connection" test does not align with principles of wetland ecology, laying out the concerns expressed by Justices Elena Kagan and Brett Kavanaugh. Section II.A.3 places the federalism concern expressed in Justice Clarence Thomas's concurrence in conversation with legal scholarship on the reach of the CWA and the commerce power, recognizing that, for many, such governance considerations are more significant than the practical outcome of the decision. Section II.A.4 contends that the tension between the national problem of wetlands management and the lack of federal jurisdiction to reach it is inherent in the nation's governance structure as-is.

1. Sackett*'s Continuous Surface Connection Test.* — Michael and Chantell Sackett bought land in Idaho in 2004.[148] After they began backfilling their property to build a home, the EPA informed them that their actions violated the CWA.[149] Their property was deemed to contain

144. *Sackett*, 143 S. Ct. at 1344 (internal quotation marks omitted) (quoting *Rapanos*, 547 U.S. at 742, 755).

145. See infra notes 178–182 and accompanying text (discussing said jurisprudence). The EPA's post-*Sackett* rule has deepened regulated entities' confusion. See, e.g., Patricia McKee, *Sackett II* and Its Ripple Effects: Uncertainty Remains for Developers and Communities, Nat'l Sea Grant L. Ctr. (June 27, 2024), https://nsglc.olemiss.edu/blog/2024/jun/27/index.html [https://perma.cc/9EJF-MT8W] (discussing one North Carolina landowner's legal challenge to the new rule on the grounds that it is "expansive and vague," "inhibiting him from identifying the federally-protected wetlands on his property and delaying development").

146. Alex Brown, After Clean Water Act Ruling, States that Want to Protect Affected Wetlands Need Millions, Stateline (Dec. 5, 2023), https://stateline.org/2023/12/05/after-clean-water-act-ruling-states-that-want-to-protect-affected-wetlands-need-millions/ (on file with the *Columbia Law Review*); see also Revised Definition of "Waters of the United States"; Conforming, 88 Fed. Reg. 61,964, 61,965–66 (Sep. 8, 2023) (codified at 33 C.F.R. pt. 328 & 40 C.F.R. pt. 120) (describing which wetlands lost CWA coverage post-*Sackett*).

147. See Updated Definition of "Waters of the United States", 90 Fed. Reg. 52,498, 54,542 (proposed Nov. 20, 2025) ("This proposed rule is expected to . . . narrow[] the scope of waters that are jurisdictional under the Clean Water Act in response to the *Sackett* decision.").

148. *Sackett*, 143 S. Ct. at 1331.

149. Id.

protected wetlands—that is, to have wetland features that had a "significant nexus" to nearby navigable waters when aggregated with another "large nearby wetland complex": The wetlands on their property were "adjacent to" an unnamed tributary that "fe[d] into a non-navigable creek, which, in turn, fe[d] into . . . an intrastate body of water that the EPA designated as traditionally navigable."[150] The EPA ordered the Sacketts to immediately restore the wetlands or face steep financial penalties.[151]

Sackett's impact is not really about the Sacketts; all nine Justices agreed that CWA section 404 jurisdiction should not reach the Sacketts' property.[152] Rather, the decision broke ground by stating the new test for courts to use in determining whether a given wetland is covered by the CWA.[153] Justice Samuel Alito, joined by Chief Justice John Roberts and Justices Clarence Thomas, Neil Gorsuch, and Amy Coney Barrett, found that CWA jurisdiction "extends to only those 'wetlands with a continuous surface connection to bodies that are "waters of the United States" . . . ,' so that they are 'indistinguishable' from those waters."[154] Justice Thomas, joined by Justice Gorsuch, emphasized separately that jurisdiction "extends only" as far as "traditional jurisdiction over navigable waters," not "New Deal era conceptions of [the] commerce power."[155]

Justices Brett Kavanaugh, Elena Kagan, Sonia Sotomayor, and Ketanji Brown Jackson deemed this test too narrow, instead finding that the CWA covers "not only *adjoining* wetlands but also *adjacent* wetlands."[156] This includes both wetlands "contiguous to or bordering a covered water" and wetlands "separated from a covered water only by a . . . barrier" like a "man-made dike" or "natural river berm."[157] While the primary concern of these Justices was the majority's departure from

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150. Id. at 1331–32.

151. Id. at 1331.

152. See id. at 1344; id. at 1362 (Kavanaugh, J., concurring in the judgment).

153. Id. at 1332 (majority opinion).

154. Id. at 1344 (quoting Rapanos v. United States, 547 U.S. 715, 742 (2006) (plurality opinion)).

155. Id. at 1359 (Thomas, J., concurring). Congress can exercise its commerce power over three types of subjects: "channels of commerce," "instrumentalities of commerce," or "activities that have a substantial impact or effect on interstate commerce." Kenneth R. Thomas, Cong. Rsch. Serv., The Power to Regulate Commerce: Limits on Congressional Power 7–9 (May 16, 2014), https://sgp.fas.org/crs/misc/RL32844.pdf (on file with the *Columbia Law Review*). As discussed in this Part, Justices Thomas and Gorsuch locate CWA section 404 jurisdiction in Congress's "channels of commerce" authority, while the other seven Justices locate this jurisdiction in Congress's "substantial effect" authority. See infra notes 176–184 and accompanying text.

156. *Sackett*, 143 S. Ct. at 1368 (Kavanaugh, J., concurring in the judgment) (emphasis added).

157. Id. at 1369.

the CWA's text, all four had well-founded concerns over the decision's impact on wetlands nationwide.[158]

2. *The Ecological Incoherence of the Test.* — The problem with the "continuous surface connection" test is that it does not align with wetland ecology. Wetlands are defined in opposition to continuously flowing water.[159] As Justice Kavanaugh noted, "[n]atural barriers such as berms and dunes . . . are in fact evidence of a regular connection between a water and a wetland."[160] Water flow through a wetland involves groundwater as much as surface water, creating the necessary conditions for wetland wildlife to thrive.[161] Seasonal and isolated wetlands are no less integral to water quality than wetlands with year-round connections to continuously flowing surfaces of water.[162] *Sackett*'s test therefore necessarily removes wetlands relevant to water quality from coverage, contravening the stated purpose of the CWA.[163]

Justices Kavanaugh and Kagan rejected the majority's continuous surface connection test in part for this reason.[164] They repeatedly emphasized that *Congress itself* chose the word "adjacent," rather than "adjoining," "to meet the [CWA]'s objective."[165] "Because of the movement of water between adjacent wetlands and other waters, pollutants in wetlands often end up in adjacent rivers, lakes, and other waters."[166] As "wetlands separated from covered waters . . . play an important role in protecting neighboring and downstream waters, including by filtering pollutants, storing water, and providing flood control," removing such wetlands from the ambit of the CWA will inevitably lead to "negative consequences" for CWA-covered waters.[167]

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158. See id. at 1368–69.

159. See supra notes 32–35 and accompanying text.

160. *Sackett*, 143 S. Ct. at 1368 (Kavanaugh, J., concurring in the judgment).

161. See Thomas C. Winter, Judson W. Harvey, O. Lehn Franke & William M. Alley, U.S. Geological Surv., Circular No. 1139, Ground Water and Surface Water: A Single Resource 19 (1999), https://pubs.usgs.gov/circ/1998/1139/report.pdf [https://perma.cc/X7P3-XABQ] (describing how "ground-water discharge directly to the land surface . . . permits the growth of wetland plants").

162. See supra note 41 and accompanying text.

163. See 33 U.S.C. § 1251 (2018) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.").

164. See *Sackett*, 143 S. Ct. at 1362 (Kavanaugh, J., concurring in the judgment) ("By narrowing the [CWA]'s coverage . . . to only adjoining wetlands, the Court's new test will leave some long-regulated adjacent wetlands no longer covered . . . with significant repercussions for water quality and flood control throughout the United States."); see also id. (Kagan, J., concurring in the judgment) ("The Court will not allow the [CWA] to work as Congress instructed.").

165. Id. at 1360 (Kagan, J., concurring in the judgment); see also id. at 1364 (Kavanaugh, J., concurring in the judgment) ("By contrast to the [CWA]'s express inclusion of 'adjacent' wetlands, other provisions of the [CWA] use the narrower term 'adjoining.'").

166. Id. at 1368.

167. Id.

Justice Kavanaugh additionally noted the practical difficulties of applying the test: Requiring a continuous surface connection would lead to further jurisdictional confusion in the Mississippi River system, whose wetlands are managed to prevent flooding by man-made levee systems.[168] In short, these Justices declared *Sackett*'s continuous surface connection test "overly narrow and inconsistent with" the plain text of the CWA, creating more problems than it solves.[169]

3. *Unpacking Federal Jurisdiction Over Wetlands Under the Commerce Power*. — While the Court's opinion limits jurisdiction based on the statutory text,[170] Justice Thomas would have reached the constitutional question.[171] He noted that the "CWA's jurisdictional terms," such as "'navigable waters' and 'the waters of the United States,'" each "have a long pedigree and are bound up with Congress's traditional authority over the channels of interstate commerce."[172] Congress enacted the CWA "against that key backdrop," cabining its jurisdiction to those waters "capable of being used as a highway for . . . commerce;"[173] the New Deal–era expansion of the commerce power "did not fundamentally change the Court's understanding" of these jurisdictional terms.[174] In his view, Congress reserved jurisdiction over most intrastate waters (and wetlands) to the states.[175]

Justice Thomas's arguments against commerce-based intrastate wetlands jurisdiction did not shock some experts.[176] Wetlands regulations under the CWA had been contentious for decades prior to *Sackett*, in part

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168. Id.

169. Id. at 1369.

170. Id. at 1343 (majority opinion).

171. Id. at 1344–45 (Thomas, J., concurring).

172. Id. (quoting 33 U.S.C. §§ 1311(a), 1362(7), 1362(12) (2018)) (citing *SWANCC*, 531 U.S. 159, 168 & n.3, 172, 173–74 (2001)).

173. Id. at 1345. Justice Thomas pointed to the highway-of-commerce limits of the term "navigable waters of the United States" as used in *The Daniel Ball*, along with the jurisdictional reach of the River and Harbor Acts as outlined in *Leovy v. United States*, as establishing the "narrow but deep" reach of the term "waters of the United States" as used in the CWA. Id. at 1348–51 (citing Leovy v. United States, 177 U.S. 621, 632–33 (1900); The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871)).

174. Id. at 1351–52. Justice Thomas provided *Wickard* and *Darby* as examples of this expanded New Deal understanding. Id. at 1351 (discussing Wickard v. Filburn, 317 U.S. 111, 127–29 (1942) (extending Congress's substantial effects jurisdiction to activities that impact interstate commerce in the aggregate); United States v. Darby, 312 U.S. 100, 119–20 (1941) (finding that "the power of Congress to regulate interstate commerce extends to . . . activities intrastate which have a substantial effect on the commerce or the exercise of the Congressional power over it")).

175. Id. at 1350.

176. Professor Jonathan Adler noted post-*Sackett* that "the wetlands program ha[d] for a few decades . . . been understood to be one of the environmental programs arguably most vulnerable to constitutional challenge on enumerated powers grounds." McElfish et al., supra note 61, at 10,696.

due to changes in commerce power jurisprudence.[177] Inquiry into the bounds of Congress's section 404 authority increased with the sea change of *United States v. Lopez* and subsequent commerce power jurisprudence.[178] Before *Lopez*, the link between CWA wetland regulations and the commerce power had been upheld based on the "use of land by migratory birds," but those same courts "acknowledged that '[t]he migratory bird rule . . . tests the limits of Congress's commerce powers and . . . the bounds of reason.'"[179] In the decade following *Lopez*, the Supreme Court twice revisited the bounds of federal jurisdiction under section 404 of the CWA.[180] Each time, the Court directly linked section

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177. See Jonathan H. Adler, Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation, 29 Env't L. 1, 4 & n.25 (1999) [hereinafter Adler, Wetlands & Waterfowl] ("Wetlands regulation may be the most controversial issue in environmental law. It pits America's most biologically-productive and most rapidly-diminishing ecosystems against rights of private ownership and property development in more than 10,000 individual permit decisions a year . . . ." (internal quotation marks omitted) (quoting Oliver A Houck & Michael Rolland, Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States, 54 Md. L. Rev. 1242, 1243 (1995))).

178. 514 U.S. 549 (1995) (striking down the federal Gun Free School Zones Act, finding that firearm possession does not "substantially affect interstate commerce" and that its regulation "is not an essential part of a larger regulation of economic activity" or "connected with a commercial transaction, which . . . substantially affects interstate commerce" in the aggregate).

Following *Lopez*, the Supreme Court clarified in *United States v. Morrison*, 529 U.S. 598 (2000), that Congress's 'substantial effects' jurisdiction does not reach certain activities that cannot reasonably be classified as economic in nature, limiting the scope of *Wickard*'s aggregation principle. See Thomas, supra note 155, at 10. In subsequent decisions, the Court upheld Congress's "power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce," Gonzales v. Raich, 545 U.S. 1, 17 (2005) (citation omitted), but found that Congress cannot compel individuals to act in commerce, National Federation of Independent Businesses v. Sebelius, 567 U.S. 519 (2012). For a fuller chronology of this jurisprudence through 2014, see Thomas, supra note 155, at 9–17.

179. Adler, Wetlands & Waterfowl, supra note 177, at 29–30 (quoting Leslie Salt Co. v. United States, 55 F.3d 1388, 1392, 1396 (9th Cir. 1995), cert. denied sub nom., Cargill, Inc. v. United States, 516 U.S. 955 (1995)). Justice Thomas noted in dissent from this denial of certiorari that there were "important constitutional questions about the limits of federal land-use regulation in the name of the [CWA]" left unresolved by earlier decisions. Cargill, 516 U.S. at 959 (Thomas, J., dissenting); see also Adler, Wetlands & Waterfowl, supra note 177, at 30 (discussing Justice Thomas's dissent in *Cargill*). But see United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 n.9 (1985) (pre-*Lopez* decision finding that the Corps had significant latitude to determine which wetlands were covered under the CWA).

180. *SWANCC*, 531 U.S. 159, 171–72 (2001) (holding that intrastate isolated ponds do not "fall under § 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds"); see also Rapanos v. United States, 547 U.S. 715, 730–31 (2006) (plurality opinion) (declining to limit the CWA's "terms 'navigable waters' and 'waters of the United States' . . . to the traditional definition of *The Daniel Ball*" (citing The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871))).

404 jurisdiction to navigable waters but did not resolve the Commerce Clause issue.[181]

This repeated revisiting of the question is unsurprising given that the link between intrastate wetlands development and interstate commerce can be tenuous.[182] The New Deal's expansion from Founding Era understandings of the reach of the Commerce Clause was generally merited. In the wake of the nation's growing railroad infrastructure and increasing industrialization, commercial activity had itself become more interconnected in nature.[183] But that expanded understanding still requires grounding in interstate commerce. Whether or not one agrees with Justice Thomas's rationale, the prior reach of section 404 jurisdiction arguably went a step too far.[184]

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181. See Jonathan H. Adler, Reckoning With *Rapanos*: Revisiting Waters of the United States and the Limits of Federal Wetland Regulation, 14 Mo. Env't L. & Pol'y Rev. 1, 6–7, 7 n.41, 9–14 (2006) [hereinafter Adler, Reckoning] (recounting this jurisprudence in detail).

182. See Adler, Wetlands & Waterfowl, supra note 177, at 33–34 (noting that "tabulating . . . economic benefits . . . wetlands provide" cannot justify jurisdiction because they "are no more relevant to the constitutional inquiry into whether the federal government may regulate wetlands than the tremendous economic impact of a poor educational environment was to the constitutionality of the Gun Free School Zone Act"); see also United States v. Wilson, 133 F.3d 251, 257 (4th Cir. 1997) (striking down a CWA regulation as overreach of the commerce power because it "require[d] neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters" (emphasis omitted)); Adler, Wetlands & Waterfowl, supra note 177, at 30–33 (noting that post-*Wilson* "policy changes" were "minimal and [did] not cure existing federal wetlands regulations of their constitutional deficiencies" because "the rationale set forth in *Lopez* requires more than the aggregation of an activity to produce a substantial economic effect").

183. The interstate nature of labor dynamics, for one, had a demonstrable influence on the Court's expansion of the commerce power in *National Labor Relations Board v. Jones & Laughlin Steel*, 301 U.S. 1 (1937). See Drew D. Hansen, The Sit-Down Strikes and the Switch in Time, 46 Wayne L. Rev. 49, 50 (2000) ("When it . . . up[held] the NLRA [Wagner Act] . . . , the Court made repeated references to how the effects of strikes on interstate commerce were matters of common knowledge and lived experience.").

184. See Adler, Wetlands & Waterfowl, supra note 177, at 33–36 ("Much of the activity . . . regulate[d] in wetlands is noncommercial—the building of an extension on one's own house, the planting of a garden, and so on . . . . [T]hat the activity in any given case is commercial in nature is completely incidental to the . . . assertion of jurisdiction. That is the defect."). Incidental justifications for jurisdiction are particularly questionable here because "[t]he regulation of wetlands, particularly when nonpolluting activities are involved, entails the regulation of a myriad of ordinary land uses, from building homes to filling ditches, and so on[;]" land use regulation "is perhaps the quintessential state activity." Id. at 36 (internal quotation marks omitted) (quoting Fed. Energy Regul. Comm'n v. Mississippi, 456 U.S. 742, 768 n.30 (1980)). Some commenters disagree, arguing that commerce-based federal regulation of development of intrastate wetlands is justified because "Congress could conclude that the cumulative impact of wetland destruction in one state encourages such destruction in others and thus affects the price of real estate there." Grant S. Nelson & Robert J. Pushaw, Jr., Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues, 85 Iowa L. Rev. 1, 141–47 (1999).

4. *The Need for New Constitutional Grounding*. — *Sackett* put a new, "substantial burden on many states to protect their state waters."[185] From a federalism perspective, this is a good thing, as it returns jurisdiction over some wetlands to its traditional home in state governments.[186] It also may be more efficient: Some have argued that state management is empirically better at protecting wetlands than federal management due to regional variation in wetland characteristics and management needs.[187] But, while state management could work well, it requires funding and staff that many states simply do not have. Such programs were often already cash-strapped when the EPA and the Corps played a more significant role as partners.[188] Moreover, some states see the removal of federal oversight as an opportunity to develop formerly protected wetlands, worsening existing overdevelopment problems.[189]

Despite the urgent need for effective management, this tension—between the national scope and interconnected nature of all wetlands feeding a given watershed, and the limits to commerce-based federal jurisdiction to reach them—is inherent in the nation's federalist structure as is.[190] The Commerce Clause provides an *enumerated* power of the federal government. This enumeration is "a detail of the division of jurisdiction between the state and federal governments."[191] Those powers not enumerated were reserved to the states in order to better protect Americans; a more expansive interpretation would remove that protection.[192] For better or worse, the "danger . . . that federal

185. McElfish et al., supra note 61, at 10,698 (quoting Rebecca Kihslinger, Dir. of the Wetlands Program, Env't L. Inst.).

186. See Adler, Wetlands & Waterfowl, supra note 177, at 36 ("[T]he regulation of wetlands is a traditional state function . . . ."); see also Jamison E. Colburn, Don't Go in the Water: On Pathological Jurisdiction Splitting, 39 Stan. Env't L.J. 3, 3 (2019) (highlighting the early twentieth-century view, stated in *Leovy v. United States*, that a state's "police power is never more legitimately exercised than in removing such nuisances" as "swamps and stagnant waters" (internal quotation marks omitted) (quoting *Leovy*, 177 U.S. 621, 636 (1900))).

187. E.g., Adler, Wetlands & Waterfowl, supra note 177, at 47–54.

188. Brown, supra note 146.

189. Id. (noting that, "[s]oon after the [*Sackett*] decision, North Carolina passed a law eliminating all state protections that exceeded the federal standard"); see also supra section I.A.2.

190. See Richard A. Epstein, The Proper Scope of the Commerce Power, 73 Va. L. Rev. 1387, 1396 (1987) [hereinafter Epstein, Proper Scope] ("A system which says that the commerce clause essentially allows the government to regulate anything that even indirectly burdens or affects commerce does away with the key understanding that the federal government has received only enumerated powers."); see also Akhil Reed Amar, America's Constitution: A Biography 320 (2005) ("The new federal government would enjoy only those powers explicitly enumerated or otherwise implicit in the Constitution's general framework.").

191. Raoul Berger, Judicial Manipulation of the Commerce Clause, 74 Tex. L. Rev. 695, 696 (1996).

192. See Epstein, Proper Scope, supra note 190, at 1390–92, 1397 ("Hamilton treated jurisdiction as a more effective guarantor of individual rights than a bill of rights, because

jurisdiction [would] be less comprehensive than is needed to perform a particular regulatory task" was deemed less risky than "the reverse danger of overinclusion."[193] Unless isolated and seasonal intrastate wetlands management can reasonably be understood as implicating commerce,[194] their commerce-based regulation flies in the face of the Constitution's *structural* protections for the interests of Americans.[195]

This lack of firm grounding for wetlands protection does not bode well for federal environmental management writ large. In a vacuum, *Sackett* has limited relevance to the Court's commerce power jurisprudence; the majority did not reach the constitutional question.[196] But in the context of recent administrative and environmental jurisprudence,[197] Justice Thomas's concurrence might be the canary in the coal mine for Commerce Clause–based environmental management.

If current trends continue, federal jurisdiction over environmental governance is at serious risk of judicial narrowing. The pendulum of the Court's commerce power jurisprudence has been swinging back from its New Deal–era expansiveness since *Lopez*.[198] Though lower courts have upheld federal power over certain intrastate environmental issues in the

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he believed that it provided clear and powerful lines to keep government from straying beyond its appointed limits." (citing The Federalist No. 84 (Alexander Hamilton))); see also U.S. Const. amend. X (reserving unenumerated powers to the states); Berger, supra note 191, at 698 ("[T]he Framers 'believed that state governments were, in some vital respects, safer repositories of power over individual liberties than the federal government.'" (quoting Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. Chi. L. Rev. 1484, 1506 (1987))).

193. Epstein, Proper Scope, supra note 190, at 1412.

194. But see supra section II.A.3.

195. See Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 659–60 (2012) (Scalia, J., dissenting) ("The Federal Government can address whatever problems it wants but can bring to their solution only those powers that the Constitution confers, among which is the power to regulate commerce . . . . Article I contains no whatever-it-takes-to-solve-a-national-problem power."); see also Epstein, Proper Scope, supra note 190, at 1392 (noting the tension in commerce clause jurisprudence between the "Progressive tradition of good government" and "the framers' view of government as a necessary evil"). But see Amar, supra note 190, at 107–08 ("Structurally, [a] broader reading of 'Commerce' . . . would seem to make better sense of the framers' general goals by enabling Congress to regulate *all* interactions . . . that, if improperly handled by a single state acting on its own, might lead to needless wars or otherwise compromise the interests of sister states.").

196. Sackett v. Env't Prot. Agency, 143 S. Ct. 1322, 1344 (2023).

197. See infra note 200 and accompanying text.

198. United States v. Lopez, 514 U.S. 549 (1995); see also supra notes 178–179, 182 (discussing *Lopez* and subsequent commerce power jurisprudence). This pendulum is bringing non-commerce power jurisprudence with it. Shortly after *Lopez*, commentators noted that it was "one of several recent decisions indicating that the Supreme Court will actively enforce constitutional limits on federal regulatory authority[,]" both in the commerce power context and otherwise. See Adler, Wetlands & Waterfowl, supra note 177, at 4 & n.26 (discussing decisions limiting federal regulatory authority under the Tenth, Eleventh, and Fourteenth Amendments and anticommandeering doctrine).

wake of *Lopez* and subsequent commerce power jurisprudence,[199] the Supreme Court has not squarely addressed such issues in decades. Outside of commerce power jurisprudence, the Court has recently curbed federal agency power to manage the environment even when the particulars have firm constitutional and statutory grounding.[200] Challenges to commerce-based federal jurisdiction over isolated and seasonal wetlands—and environmental issues generally—could be brought before the Court by a presidential administration generally hostile to environmental governance.[201] Stronger grounding is needed so that the federal government can confidently exercise jurisdiction to manage human actions that occur within one state but impact ecosystems that cross state lines.

Wetlands management is one of many environmental issues proving ungovernable under the Constitution's current interpretations and jurisdictional allocations. This difficulty stems from the disconnect between wetland ecology and the allocations of jurisdiction across the

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199. See, e.g., People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 852 F.3d 990, 1006 (10th Cir. 2017) (affirming the Endangered Species Act's link to interstate commerce).

200. See, e.g., West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2626 (2022) (Kagan, J., dissenting) ("Today, the Court strips the Environmental Protection Agency (EPA) of the power Congress gave it to respond to 'the most pressing environmental challenge of our time.'" (quoting Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 505 (2007))). The Court's administrative law jurisprudence has likewise opened up longstanding regulations to new challenges and limited the ability of federal agencies to perform environmental management. See Corner Post, Inc., v. Bd. of Governors of the Fed. Rsrv. Sys., 144 S. Ct. 2440, 2450 (2024) (holding that the statute of limitations to challenge a final agency action does not begin to run until the plaintiff is injured by the action); Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overruling the *Chevron* framework in response to a fisheries management controversy). A federal appellate court has joined this trend, weakening the authority of federal agencies to provide baseline standards for consistent environmental practice across other federal agencies. See Marin Audubon Soc'y v. Fed. Aviation Admin., 121 F.4th 902, 908 (D.C. Cir. 2024) (deeming National Environmental Policy Act regulations issued by the Council on Environmental Quality (CEQ) non-binding). But see Removal of National Environmental Policy Act Implementing Regulations, 91 Fed. Reg. 618, 618 (Jan. 8, 2026) (to be codified at 40 C.F.R. pts. 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508) ("removing all iterations of CEQ's regulations implementing the National Environmental Policy Act of 1969 (NEPA) from the Code of Federal Regulations").

201. Though the second Trump Administration has not targeted commerce-based federal jurisdiction over environmental issues to date, the Administration's deregulatory bent makes it a real risk. See Press Release, EPA, EPA Launches Biggest Deregulatory Action in U.S. History, EPA (Mar. 12, 2025), https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history [https://perma.cc/WR6M-3YKK] (last updated Mar. 14, 2025); see also Mandy M. Gunasekara, Environmental Protection Agency, *in* Mandate for Leadership: The Conservative Promise 417, 420 (Paul Dans & Steven Groves eds., 2023), https://static.project2025.org/2025_MandateForLeadership_FULL.pdf [https://perma.cc/YWN4-9YRR] ("EPA's structure and mission should be greatly circumscribed to reflect the principles of cooperative federalism and limited government.").

vertical separation of powers.[202] Unlike wetlands management, though, some environmental issues are governed relatively functionally under current federal environmental statutes.[203]

B. Juliana*: No Redress for Climate Harms*

Unfortunately, climate change is not one of them. In theory, the Commerce Clause provides firm constitutional grounding for GHG emissions control,[204] and the Clean Air Act provides a statutory hook for some federal climate action—to the point that it has long been understood to preempt federal common law nuisance claims and certain state legislative actions.[205] In practice, though, the political branches have dragged their feet for decades on using this authority to manage emissions at the scale of the problem,[206] while throwing fuel on the fire through fossil fuel subsidies.[207]

The actions of the political branches have directly contributed to a climate crisis that is causing significant, particularized injuries to individual Americans, including through well-documented property damage, health impacts, and risks to life.[208] In the long term, federal

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202. See Roland R. Rotunda, Vertical Federalism, the New States' Rights, and the Wisdom of Crowds, 11 FIU L. Rev. 307, 308 (2016) (describing vertical separation of powers as "using the states to check the power of the federal government").

203. See supra notes 27–30 and accompanying text (describing these statutes' successes). But see supra notes 198–200 and accompanying text (describing the statutes' limitations). Though functional in many ways, these laws generally draw arbitrary lines that do not align with the ecological realities of the environmental issues they purport to address. See Environmental Regulation: Law, Science, & Policy 59 (Robert V. Percival, Christopher H. Schroeder, Alan S. Miller & James P. Leape eds., 9th ed. 2022) ("Most of today's environmental law violates the basic principles of ecology . . . . mak[ing] sharp distinctions between safe and unsafe . . . [and] permissible versus impermissible levels of pollution." (quoting Donald Elliot, Toward Ecological Law and Policy, *in* Thinking Ecologically (M.R. Chertow & D.C. Esty eds., 1997))).

204. The links between interstate industrial activity and air pollution generally are detailed in the CAA. See 42 U.S.C. § 7401(a)(1) (2018) (grounding the need for the CAA in the finding "that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States"); id. § 7401(a)(2) (grounding the need for the CAA in the finding "that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare").

205. See supra note 126 and accompanying text (discussing the EPA's authority under the CAA to regulate GHG emissions from new motor vehicles). Though this authority is important, GHG emissions from new motor vehicles cause only a fraction of U.S. GHG emissions. The Supreme Court has routinely struck down other attempts to regulate GHG emissions under the CAA. See, e.g., *West Virginia v. Env't Prot. Agency*, 142 S. Ct. at 2615–16; Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 333 (2014).

206. See supra section I.B.2.

207. See Coleman & Dietz, supra note 78, at 2–6.

208. See, e.g., infra note 221 and accompanying text (discussing the harms alleged by the *Juliana* plaintiffs).

climate inaction[209] threatens the rule of law and the longevity of the Republic,[210] working against the values articulated in the Guarantee Clause and the perpetuity principle.[211] Some courts outside of our federal system have found these types of injuries redressable and otherwise justiciable.[212] Yet plaintiffs seeking redress for these harms in Article III courts are denied relief.[213]

Federal climate mismanagement is also rooted in a horizontal separation-of-powers issue[214]—one that is orders of magnitude more pressing than the vertical issue posed by wetlands management.[215] This section uses the Ninth Circuit decision in *Juliana v. United States*[216] to illuminate the disconnect between the judicial branch's reticence to interfere with discretionary policymaking actions of the political branches and the severe harms that those actions inflict on individual Americans. Beyond harms to individuals, though, this abdication of judicial responsibility threatens both the rule of law and the viability of the ecosystems we depend on for survival. This section uses a comparative approach to demonstrate that this abdication is not a foregone conclusion: Other courts have found justiciable litigation to force government actors to align their discretionary policymaking actions with science-backed emission reduction targets, and the Constitution does not prohibit Article III courts from adjudicating climate injury claims.[217] If the judicial branch continues to find these claims nonjusticiable, its abstention will have damning implications for federal climate governance and the future of the nation.

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209. See also supra note 78 and accompanying text (describing the federal government's encouragement of fossil fuel use through subsidies).

210. See Juliana v. United States, 947 F.3d 1159, 1164 (9th Cir. 2020) ("A substantial evidentiary record documents that the federal government has long promoted fossil fuel use despite knowing that it can cause catastrophic climate change, and that failure to change existing policy may hasten an environmental apocalypse."); supra notes 85–102 and accompanying text.

211. See U.S. Const. art. IV, § 4; id. pmbl.

212. See infra section II.B.2.

213. E.g., *Juliana*, 947 F.3d at 1165, 1167.

214. See Rotunda, supra note 202, at 307–08 (describing the horizontal separation of powers as that between the three branches of the federal government).

215. See UN News, Interview, supra note 79 (describing climate change as the "most pervasive threat to the natural environment and societies the world has ever experienced" (quoting Ian Fry, Special Rapporteur on the Prot. and Promotion of Hum. Rts. in the Context of Climate Change)). This urgency is felt in real time. When this Note was initially submitted for publication, the Palisades and Eaton Fires were scorching over thirty-seven thousand acres and destroying over seventeen thousand structures in Los Angeles. See Marc Sternfield, Updated Damage Assessment Maps for the Palisades, Eaton Wildfires, K.T.L.A. (Jan. 17, 2025), https://ktla.com/news/california/wildfires/palisades-eaton-wildfire-damage-maps/ (on file with the *Columbia Law Review*) (last updated Jan. 24, 2025).

216. 947 F.3d 1159.

217. See infra sections II.B.2–.3.

1. Juliana *and Federal-Constitutional Rights Claims.* — In *Juliana*, youth plaintiffs[218] brought suit to force the federal government[219] to "cease permitting, authorizing, and subsidizing fossil fuel use" and to "prepare a plan" to "draw down" GHG emissions.[220] In their complaint, the plaintiffs detailed the concrete impacts that the challenged federal actions (and inaction) have already had on their lives.[221] After significant procedural history,[222] the Ninth Circuit was charged with answering a critical question: Were "the plaintiffs' claimed injuries"—namely, "that the government has deprived them of a substantive constitutional right[223] to a 'climate system capable of sustaining human life'"—"redressable by

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218. Plaintiffs included "twenty-one young citizens, an environmental organization, and a 'representative of future generations.'" *Juliana*, 947 F.3d at 1165.

219. "Their original complaint named . . . the President, the United States, and federal agencies" as defendants, though the President was later dismissed as a defendant. Id. It accused defendants of "continuing to 'permit, authorize, and subsidize' fossil fuel use despite long being aware of its risks, thereby causing various climate-change related injuries to the plaintiffs," including "psychological harm," "impairment to recreational interests," "exacerbated medical conditions," and "damage to property." Id.

220. Id. at 1170. The plaintiffs also challenged the constitutionality of section 201 of the Energy Policy Act of 1992 (codified at 15 U.S.C. § 717b(c) (2018)), "requir[ing] expedited authorization for certain natural gas imports and exports" and a Department of Energy order "authoriz[ing] exports of liquefied natural gas" from a proposed terminal. Id. at 1165 n.2.

221. Plaintiffs alleged the following impacts:

> Lead plaintiff Kelsey Juliana allege[d] algae blooms harm the water she drinks, and low water levels caused by drought kill the wild salmon she eats. Plaintiff Xiuhtezcatl Roske–Martinez allege[d] increased wildfires and extreme flooding jeopardize his personal safety. Plaintiff Alexander Loznak allege[d] record-setting temperatures harm the health of the hazelnut orchard on his family farm, an important source of both revenue and food for him and his family. Plaintiff Jacob Lebel allege[d] drought conditions required his family to install an irrigation system at their farm. Plaintiff Zealand B. allege[d] he has been unable to ski during the winter as a result of decreased snowpack. Plaintiff Sahara V. alleges hot, dry conditions caused by forest fires aggravate her asthma.

Juliana v. United States, 217 F. Supp. 3d 1224, 1242 (D. Or. 2016) (citations omitted).

222. After the lower court denied the government's motion to dismiss the case, the Ninth Circuit and the Supreme Court each rejected the government's request for a writ of mandamus from the Ninth Circuit and stay of proceedings, respectively. *Juliana*, 947 F.3d at 1165 (citing In re United States, 884 F.3d 830, 837–38 (9th Cir. 2018); United States v. U.S. Dist. Ct. for Dist. of Or., 139 S. Ct. 1 (2018)). After additional proceedings below, the *Juliana* Court heard the case on a certified order for interlocutory appeal. Id. at 1165–66.

223. The plaintiffs originally "assert[ed] violations of: (1) the plaintiffs' substantive rights under the Due Process Clause of the Fifth Amendment; (2) the plaintiffs' rights under the Fifth Amendment to equal protection of the law; (3) the plaintiffs' rights under the Ninth Amendment; and (4) the public trust doctrine." *Juliana*, 947 F.3d at 1165. In earlier proceedings, the lower court had disposed of the Ninth Amendment claim in full and the equal protection claim in part but had otherwise found that the claims could proceed. Id.

an Article III court?"[224] Citing the horizontal separation of powers, it answered in the negative.[225]

In so finding, the court evaluated whether the declaratory and injunctive relief sought was both "substantially likely to redress their injuries" and "within the district court's power to award."[226] Addressing first the likelihood of redress, the court determined that declaratory relief was "unlikely by itself to remediate their alleged injuries absent further court action."[227] It was also "skeptical" that injunctive relief would "ameliorate [the plaintiffs'] injuries" or even "by itself prevent further injury to the plaintiffs": "[Plaintiffs] do not show that even the total elimination of the challenged programs would halt the growth of carbon dioxide levels in the atmosphere, let alone decrease that growth" without "a fundamental transformation of this country's energy system."[228]

Despite announcing its skepticism regarding that first prong, the court held that the plaintiffs' claims failed on the subsequent prong of the redressability inquiry—the power of an Article III court to award the

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224. Id. at 1169 (quoting the plaintiffs). The court also evaluated the first two prongs of the standing inquiry, see id. at 1168 ("To have standing under Article III, a plaintiff must have (1) a concrete and particularized injury that (2) is caused by the challenged conduct and (3) is likely redressable by a favorable judicial decision." (citing Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000); Jewel v. Nat'l Sec. Agency, 673 F.3d 902, 908 (9th Cir. 2011))), as well as whether the plaintiffs were required to proceed with their constitutional claims under the Administrative Procedure Act. Id. at 1167–68 (citing 5 U.S.C. § 706(2)(A), (C) (2018)). Both the lower court and the Ninth Circuit found for the plaintiffs on these issues. Id. at 1167–69.

225. *Juliana*, 947 F.3d at 1175 ("That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts . . . the ability to step into their shoes.").

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

227. Id.; see also Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671–74 (1950) (holding that, for a federal court to have subject matter jurisdiction over a claim for declaratory relief, there must also be a justiciable nondeclaratory action between the same parties).

228. *Juliana*, 947 F.3d at 1170–71. The court also expressed concern that such relief would enjoin both the executive and legislative branches from exercising "expressly granted" powers. Id. at 1170.

In finding "a perceptible reduction in the advance of climate change" not "sufficient to redress a plaintiff's climate change-induced harms," the *Juliana* majority distinguished this case on two grounds from Massachusetts v. Env't Prot. Agency, 549 U.S. 497 (2007). *Juliana*, 947 F.3d at 1171 n.7 (internal quotation marks omitted) (quoting id. at 1182 (Staton, J., dissenting)). First, the court noted that Massachusetts was "entitled to special solicitude in [the] standing analysis" as a sovereign state, whereas "the plaintiffs are not sovereigns." Id. (alteration in the original) (internal quotation marks omitted) (quoting Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 802 n.10 (2015)). Second, it remarked that *Massachusetts* "involved a *procedural* harm, whereas plaintiffs here assert a purely *substantive* right." Id. (emphasis added) (citing *Massachusetts v. Env't Prot. Agency*, 549 U.S. at 517–21). This compound distinction worked against the *Juliana* plaintiffs' request for even partial remedy but was foreseeable in the context of constitutional environmental rights adjudication more broadly. See infra notes 254–258 and accompanying text (discussing procedural and substantive environmental rights).

equitable relief sought.[229] The identified reasons why such courts lacked the authority to order a remedial plan fall into three categories: that the court would exceed the bounds of its role by determining policy (even in broad strokes),[230] stripping the political branches of their powers;[231] that the court lacked a constitutionally given standard for evaluating the requested relief;[232] and that the supervision required to ensure compliance with the plan would take decades.[233] Ultimately, because "redressability questions implicate the separation of powers," the court declined to grant extraordinary relief, even for a "clear and present danger . . . to the American Experiment" and to the plaintiffs' constitutional rights.[234]

This relief may not be as extraordinary as the majority claimed. Article III courts have used their equitable powers creatively in the past—ordering school desegregation[235] and prison decrowding[236]—to

229. *Juliana*, 947 F.3d at 1171 ("There is much to recommend the adoption of a comprehensive scheme to decrease fossil fuel emissions and combat climate change, . . . [as] a matter of national survival in particular. But it is beyond the power of an Article III court to order, design, supervise, or implement the . . . requested remedial plan.").

230. Id. at 1172. In response to the plaintiffs' argument "that the district court need not itself make policy decisions, because if their general request for a remedial plan is granted, the political branches can decide what policies will best 'phase out fossil fuel emissions and draw down excess atmospheric CO2,'" the court found that ordering "broad injunctive relief while leaving the 'details of implementation' to the government's discretion" would still exceed its powers. Id. (quoting Brown v. Plata, 563 U.S. 493, 537–38 (2011)) ("[E]ven under such a scenario, the plaintiffs' request for a remedial plan would subsequently require the judiciary to pass judgment on the sufficiency of the government's response to the order, which necessarily would entail a broad range of policymaking."). The court seemed particularly daunted by "determin[ing] whether the plan is sufficient to remediate the claimed constitutional violation of the plaintiffs' right to a 'climate system capable of sustaining human life.'" Id. at 1173.

231. Id. at 1172 ("[W]e cannot substitute our own assessment for the Executive's [or Legislature's] predictive judgments on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.'" (second alteration in original) (quoting Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018))).

232. Id. at 1173 ("'[A] constitutional directive or legal standards' must guide the courts' exercise of equitable power . . . . Absent those standards, federal judicial power could be 'unlimited in scope and duration,' and would inject 'the unelected and politically unaccountable branch of the Federal Government [into] assuming such an extraordinary and unprecedented role.'" (second alteration in original) (quoting Rucho v. Common Cause, 139 S. Ct. 2484, 2506–08 (2019))).

233. Id. at 1172 ("[G]iven the complexity and long-lasting nature of global climate change, the court would be required to supervise the government's compliance with any suggested plan for many decades."). The court noted that injunctive relief "may be inappropriate where it requires constant supervision." Id. (internal quotation marks omitted) (quoting Nat. Res. Def. Council, Inc. v. U.S. Env't Prot. Agency, 966 F.2d 1292, 1300 (9th Cir. 1992)).

234. Id. at 1167, 1172, 1173, 1174 (citing *Rucho*, 139 S. Ct. at 2506–07, 2508).

235. See Brown v. Bd. of Educ., 349 U.S. 294, 298–300 (1955) (declaring that racial discrimination in public schools violated the Fourteenth Amendment and remanding the determination of specific relief to the lower courts).

"vindicate plaintiffs' constitutional rights without exceeding the judiciary's province."[237] The majority distinguished those instances from the relief sought in *Juliana* by pointing to the inherently longer time horizons and greater complexities involved in mitigating climate harms, but the dissent was unconvinced.[238] Nevertheless, the majority found the claims unredressable by an Article III court.[239]

2. *Comparing Climate Litigation Redressability Challenges.* — Though Article III courts have not yet ordered relief for such harms, recent successes in state and foreign courts show that courts in a range of jurisdictions can vindicate plaintiffs' climate-related rights when infringed by government actions that harm their interests.

In *Held v. State*, another set of youth plaintiffs brought a successful challenge in state court alleging a violation of their state-constitutional environmental right.[240] Though the Montana Supreme Court declined to grant much of their requested relief,[241] it did strike down a procedural bar to the state's evaluation of GHG emissions through the state's environmental review act.[242] The state's procedural statutory provision

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236. See Brown v. Plata, 563 U.S. 493, 545 (2011) (holding that the overcrowding in California's prisons violated the Eighth Amendment and affirming the remedial measures ordered by the lower court).

237. *Juliana*, 947 F.3d at 1176 (Staton, J., dissenting).

238. Compare id. at 1172 (majority opinion) (noting that decades of supervision would be needed), with id. at 1189 (Staton, J., dissenting) ("Busing mandates, facilities allocation, and district-drawing were all 'complex policy decisions' faced by post-*Brown* trial courts, and . . . disentangling the government from promotion of fossil fuels will take an equally deft judicial hand. Mere complexity . . . does not put the issue out of the courts' reach." (citation omitted) (quoting id. at 1171 (majority opinion))). The dissent also found that plaintiffs had an actionable claim under the perpetuity principle. Id. at 1177–81 (Staton, J., dissenting).

239. Id. at 1173 (majority opinion) ("[I]n the end, any plan is only as good as the court's power to enforce it.").

240. 560 P.3d 1235, 1243–44 (Mont. 2024). This challenge was brought under the environmental rights provision of the Montana constitution:

> Protection and improvement. (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations. (2) The legislature shall provide for the administration and enforcement of this duty. (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

Mont. Const. art. IX, § 1.

241. The lower court held that the "requested injunctive relief of a remedial plan, a standing master, and retained jurisdiction was beyond its authority" and "dismissed all requested injunctive relief except that seeking to enjoin the State from acting in accordance with laws declared unconstitutional." *Held*, 560 P.3d at 1244.

242. Id. at 1260; see also Mont. Code Ann. §§ 75-1-201(2)(a), 75-1-201(6)(a)(ii) (2023) (the procedural bar).

and constitutional environmental right worked in tandem to vindicate the plaintiffs' and the public's rights.[243]

Outside of the United States, the developments are even more promising. In *Urgenda Foundation v. State of the Netherlands* (*Urgenda*), a private nonprofit organization in the Netherlands won a tort action against the Dutch government and a court order requiring governmental GHG emissions reduction.[244] In so finding, the court specifically rejected the separation-of-powers defense asserted by the Netherlands.[245] *Urgenda* has led to both emissions reductions in the Netherlands and a global wave of climate litigation,[246] along with landmark advisory opinions by international courts.[247]

These cases demonstrate that it is possible for the actions of private plaintiffs to force some governmental climate action under existing governance structures. Climate redressability issues are not unique to Article III courts: Nearly all of the relief sought in *Held* analogous to that sought in *Juliana* was denied,[248] and most of the claims in *Urgenda* were themselves dismissed.[249] Yet the plaintiffs in each nonfederal court were granted some relief. Why not in Article III courts?

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243. *Held*, 560 P.3d at 1251.

244. HR 20 december 2019, RvdW 2020, 19/00135 m.nt (The State of the Netherlands (Ministry of Economic Affairs and Climate Policy)/Stichting Urgenda) (Neth.) [hereinafter *Urgenda*], ¶¶ 2.2.1–.2, 2.3.1–.2, 8.2.7, 8.3.5, 8.4, 9; see also Paolo Davide Farah & Imad Antoine Ibrahim, *Urgenda* vs. *Juliana*: Lessons for Future Climate Change Litigation Cases, 84 U. Pitt. L. Rev. 547, 551–56 (2023) (discussing *Urgenda*).

245. *Urgenda*, supra note 244, ¶¶ 8.3.1–.5, 9; see also Alston, supra note 95, at 1043 (outlining the Dutch Supreme Court's finding that "under the European Convention on Human Rights and the global climate regime, 'the Netherlands is obliged'" under a "'minimum fair share'" theory "'to do "its part" in order to prevent dangerous climate change, even if it is a global problem'" (quoting *Urgenda*, supra note 244, ¶¶ 5.7.1, 6.3)).

246. See Isabella Kaminski, Urgenda Two Years On: What Impact Has the Landmark Climate Lawsuit Had?, The Wave (May 25, 2022), https://www.the-wave.net/urgenda-two-years-on/ [https://perma.cc/5C7E-L3DL] (describing the Dutch Government's post-*Urgenda* emissions reductions and the role the case played in inspiring a "surge in Urgenda-style cases brought before national courts from Asia Pacific, to the Americas to Europe[,] as well as before several international bodies").

247. See generally Obligations of States in Respect of Climate Change, Advisory Opinion, 2025 I.C.J. 36 (July 23); Climate Emergency and Human Rights, Advisory Opinion OC-32/25 (Interpretation and Scope of Arts. 1(1), 2, 4(1), 5(1), 8, 11(2), 13, 17(1), 19, 21, 22, 23, 25 and 26 of the American Convention on Human Rights; 1, 2, 3, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," and I, II, IV, V, VI, VII, VIII, XI, XII, XIII, XIV, XVI, XVIII, XX, XXIII, and XXVII, of the American Declaration of the Rights and Duties of Man), Inter-Am. Ct. H.R. (ser. A) No. 32 (May 29, 2025).

248. Held v. State, 560 P.3d 1235, 1244 (Mont. 2024). But see Juliana v. United States, 947 F.3d 1159, 1165 n.2 (9th Cir. 2020) (noting plaintiffs' challenges to the Energy Policy Act of 1992 (codified at 15 U.S.C. § 717b(c)) and a Department of Energy order).

249. Rb.'s-Gravenhage 24 juni 2015, ECLI:NL:RBDHA:2015:7196, C/09/456689 m.nt. (Urgenda Foundation/State of the Netherlands (Ministry of Infrastructure and the

To answer this question, the differences between the nature and source of the rights asserted in plaintiffs' unsuccessful claims in federal court and the successful claims asserted elsewhere are worth exploring. In *Urgenda*, the right was treaty-based. The Dutch Supreme Court found against the Dutch government on the grounds that its actions violated its citizens' substantive rights to life and to respect for private and family life, as enumerated in the European Convention on Human Rights (to which the Dutch government is a signatory).[250] In *Juliana,* by contrast, the rights violations asserted were substantive but constitutional: Fifth Amendment substantive due process, Fifth Amendment equal protection, Ninth Amendment reserved rights, and public trust rights.[251]

The rights asserted by the *Held* plaintiffs were, for the most part, similar to those asserted in *Juliana*. As in *Juliana*, all of the substantive constitutional environmental rights violations asserted by the *Held* plaintiffs were dismissed.[252] Only their procedural rights claim survived, and even then, it only served to invalidate a state statute rather than obligate action by either of Montana's political branches.[253]

This difference between substantive and procedural rights is critical in constitutional environmental rights litigation. "Substantive environmental rights require that courts assess what the environment is or requires in order to be safe, healthy, or clean. Procedural environmental rights, by contrast, demand only that courts identify specific procedures by which certain decisions are to be made."[254] In environmental adjudication, "'procedural rights' are special: The person who has been accorded a procedural right to protect . . . concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."[255]

U.S. courts—federal and state—are not alone in their reluctance to hear substantive environmental rights claims. Courts across the globe "have had widely varying reactions to the prospect of enforcing constitutional environmental rights" in part because such substantive rights have "divergent structures" and "perform distinct functions in the

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Environment)) (Neth.) ¶¶ 3.1, 5, available at https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2015:7196 [https://perma.cc/7X7K-7HGA] (listing the forms of declaratory and injunctive relief requested in the plaintiffs' amended complaint); see also Farah & Ibrahim, supra note 244, at 551–56 (discussing *Urgenda*).

250. *Urgenda*, supra note 244, ¶¶ 5.2.1–.3.4, 8.2.1–.7, 9 (citing Eur. Conv. on H.R., arts. 2, 8 (right to life; right to respect for private and family life)).

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

252. *Held*, 560 P.3d at 1251 n.6 (citing *Juliana*, 947 F.3d at 1171).

253. Id. at 1256–60.

254. Erin Daly, Constitutional Protection for Environmental Rights: The Benefits of Environmental Process., Int'l J. Peace Stud., Winter 2012, at 71, 76.

255. *Juliana*, 947 F.3d at 1171 n.7 (internal quotation marks omitted) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 572 n.7 (1992)); see also Polk, supra note 132, at 161–64 (describing the main success of the Illinois Constitution's environmental rights provision as the removal of special injury requirement for standing).

development of constitutional law" compared to procedural rights.[256] This is because the "uncertain boundaries of substantive environmental rights force courts onto a tightrope when they seek to enforce [them]" due to the risk of "unduly limit[ing] development and economic progress" through over-enforcement.[257] "Procedural rights do not raise the same concerns because there is virtually no danger to over-enforcement" aside from "over-democratization."[258] Even so, some courts—like the Dutch Supreme Court in *Urgenda*—have managed to thread the needle, imposing remedial measures on political entities within their own government.

Though the right at issue in *Urgenda* was treaty-based rather than constitutional, the challenge of structuring appropriate remedies for substantive environmental harms was similar across all three cases. The *Urgenda* court ordered the Dutch government to reduce national GHG emissions by twenty-five percent by 2020,[259] leaving it to the government to determine how to effectuate the reductions practically.[260] The Montana Supreme Court sidestepped the issue in *Held* by remedying only the plaintiffs' procedural-rights harms.[261] Unfortunately for the *Juliana* plaintiffs, the Ninth Circuit found no such procedural sidestep available in the substantive-rights claim presented to it and directed that the case be dismissed on redressability grounds.[262]

3. *The Limits of Article III Courts.* — As *Juliana* shows, Article III courts have found that redressability issues prevent them from issuing orders to compel government actors to curb GHG use without exceeding the bounds of their role. But redressability is just one of the justiciability issues that plague climate-harm-based claims. This section explores the

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256. Daly, supra note 254, at 71, 76.

257. Id. at 77.

258. Id.

259. *Urgenda*, supra note 244, ¶¶ 8.2.4, 8.2.7, 8.3.4–.5.

260. Id. ¶ 8.2.7. But see Kaminski, supra note 246 ("[E]ven though Urgenda had won its case in all the lower courts, government lawyers were anticipating that it would be overturned at some point. . . . It was only when the final Supreme Court ruling came through that major changes began.").

A more recent decision by the Hague District Court concerning the Dutch government's climate obligations to the people of Bonaire structured the judgment analogously, "adopt[ing] an 'overall assessment' of mitigation, adaptation, and procedural safeguards, while emphasizing that its orders set objectives rather than dictate legislative content." Luísa Netto, The Struggle is Now: Climate Urgency in the Bonaire Judgment, ICONnect (Feb. 19, 2026), https://www.iconnectblog.com/the-struggle-is-now-climate-urgency-in-the-bonaire-judgment/ [https://perma.cc/7DCS-TT42]; see also generally Rb.'s-Gravenhage 28 januari 2026, ECLI:NL:RBDHA 2026, C/09/659832 m.nt (Greenpeace Netherlands/The State of the Netherlands (Ministry of Climate Policy and Green Growth, Ministry of Infrastructure and Water Management, and Ministry of the Interior and Kingdom Relations)) (Neth.), available at https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2026:1347 [https://perma.cc/47CR-3P4L] (the Bonaire judgment).

261. See Held v. State, 560 P.3d 1235, 1252–53 (Mont. 2024).

262. Juliana v. United States, 947 F.3d 1159, 1171–72 (9th Cir. 2020).

limits of Article III courts under current constitutional interpretations and illustrates the long-term consequences of the failure of our governance model to provide a mechanism for resolving disputes asserting government-induced climate harms.

It bears noting at the outset that "[r]easonable jurists can disagree about whether" the substantive constitutional rights asserted in *Juliana* exist.[263] "The U.S. Constitution has no explicit right to a clean environment, and efforts to persuade judges to find an implied right have not succeeded."[264] To focus on justiciability issues, this section assumes for the sake of the argument—in line with the *Juliana* Court[265]—that an Article III court could reasonably find an implied right to a livable environment in the Constitution.

One key justiciability barrier to constitutional environmental rights cases is the political question doctrine. As outlined in *Baker v. Carr*, Article III courts can withhold judgment over matters before them if one of six factors is met.[266] These factors "reflect three distinct justifications" for abstention: the court's lack of authority due to a textual commitment to another branch, the court's lack of decisionmaking competence over the matter before it, and circumstances where "prudence may counsel

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263. *Juliana*, 947 F.3d at 1169; see also id. at 1169–70 (emphasizing "that the 'striking' breadth of plaintiffs' below claims 'presents substantial grounds for difference of opinion'" (quoting In re United States, 139 S. Ct. 452, 453 (2018))).

264. Michael B. Gerrard, Environmental Rights in State Constitutions, Sabin Ctr.: Climate L. Blog (Aug. 31, 2021), https://blogs.law.columbia.edu/climatechange/2021/08/31/environmental-rights-in-state-constitutions/ [https://perma.cc/9BJD-L88Y]. Such attempts began in the early 1970s. See Richard O. Brooks, A Constitutional Right to a Healthful Environment, 16 Vt. L. Rev. 1063, 1068–70, 1069 n.33 (1992) (noting that an appeal to the entire Constitution rather than a specific provision on the rationale "that a constitution of a society depends upon a viable ecosystem" was deemed to be "not a plain statement of the ground upon which the Court's jurisdiction depends, and is therefore insufficient pleading" (internal quotation marks omitted) (quoting Tanner v. Armco Steel Corp., 340 F. Supp. 532, 534 (S.D. Tex. 1972))). They have been revived in recent years with climate injury cases like *Juliana*.

265. *Juliana*, 947 F.3d at 1170 (assuming the existence of the right to analyze redressability).

266. 369 U.S. 186, 217 (1962). These factors include:

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

Id.

against a court's resolution of an issue presented."[267] Under *Baker*, courts should not deem a case nonjusticiable on these bases "[u]nless one of these formulations is inextricable from the case at bar."[268]

The redressability prong of the standing inquiry and the political question doctrine have "significant overlap": Analysis of both "stems from the same separation-of-powers principle."[269] Even so, some jurists disagree about whether the redressability issues that may render an issue nonjusticiable should be characterized as political questions in a given instance.[270]

The political question doctrine is a major issue in domestic climate change litigation. Article III courts typically "defer climate change issues to the political branches" using "a broad application of [the doctrine]."[271] The majority in *Juliana*, for one, expressed such concerns over usurping power from another branch in declining to reach the merits.[272] Yet "climate issues are not textually committed to any branch."[273] Though Congress and the executive branch are directly responsible for policymaking and carrying out the law,[274] it is the courts' responsibility to adjudicate claims that such actions "conflict with the Constitution."[275] This obligation to hear claims weighs against the conclusion that an *implied* textual commitment to the political branches, without more, meets the high bar for abstention set by *Baker*.

The *Juliana* majority did assert more. The court cited the lack of judicially manageable standards—either "to determine what relief 'is sufficient to remediate the claimed constitutional violation' or . . . to 'supervise[] or enforce[]' such relief"—as the primary reason for its

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267. Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 203–04 (2012) (Sotomayor, J., concurring in part and concurring in the judgment).

268. *Baker*, 369 U.S. at 217 ("The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority.").

269. Republic of Marshall Islands v. United States, 865 F.3d 1187, 1192 (9th Cir. 2017).

270. Compare Juliana v. United States, 947 F.3d 1159, 1174 n.9 (9th Cir. 2020) (stating that the case was not barred by the political question doctrine), with id. at 1187 (Staton, J., dissenting) (finding that "the majority's theory is grounded exclusively in the second *Baker* factor" as developed in *Rucho v. Common Cause*: "a (supposed) lack of clear judicial standards for shaping relief").

271. See Juhn, supra note 77, at 2760.

272. See *Juliana*, 947 F.3d at 1175 (Staton, J., dissenting) ("That the other branches may have abdicated their responsibility to remediate the problem does not confer on Article III courts . . . the ability to step into their shoes.").

273. Juhn, supra note 77, at 2760.

274. See U.S. Const. art. I, § 1; id. art. II, § 1.

275. Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012); see also id. ("'[I]t is emphatically the province and duty of the judicial department to say what the law is.' That duty will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches . . . .'" (citation omitted) (first quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); then quoting Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 943 (1983))).

holding.[276] Outside of the climate context, the presence of explicit statutory directives, as in *Zivotofsky*,[277] or numerical constitutional standards, as in *Reynolds v. Sims*,[278] has led courts to reach the merits of allegedly political questions. The *Juliana* plaintiffs attempted to provide such a numerical standard of 350 parts per million of atmospheric CO_2, but the court found it "too difficult for the judiciary to manage" because selecting such a target would only be the first step towards building and managing a long-term remedial plan.[279]

The challenge of developing a workable standard against which to measure governmental climate action is real. At the same time, it is not unique to Article III courts. In foreign and international tribunals, some successful litigation has utilized the defendant-country's commitments under the Paris Agreement as the standard.[280] Domestically, Article III judges may be legitimately wary of selecting a standard that has not been affirmed through a political process in the way that a country's international commitments would have been vetted by a country's representatives. Even so, any concerns over selecting an arbitrary number would result from a court's decision to choose a numerical standard in the first place. One alternative approach would be to fashion a limited remedy declaring unconstitutional the provisions of laws and regulations that incentivize or enable specific actions known to contribute significantly to climate change, without otherwise curbing discretionary policymaking by the political branches. Even partial relief like this could directly redress climate plaintiffs' injuries,[281] but federal courts have not taken such actions to date.

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276. *Juliana*, 947 F.3d at 1187 (Staton, J., dissenting) (second and third alterations in original) (quoting id. at 1173 (majority opinion)).

277. See *Zivotofsky*, 566 U.S. at 195–96 ("Zivotofsky requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if Zivotofsky's interpretation of the statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.").

278. See 377 U.S. 533, 566, 577–79, 582 (1964) ("holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis" under the Equal Protection Clause).

279. *Juliana*, 947 F.3d at 1173.

280. See *Urgenda*, supra note 244, ¶ 5.8 (using the Dutch government's Nationally Determined Contribution (NDC) as the standard); see also Verein KlimaSeniorinnen Schweiz v. Switzerland, App. No. 53600/20, ¶ 573 (Eur. Ct. H.R, Grand Chamber, Apr. 9, 2024), https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22002-14304%22]} (on file with the *Columbia Law Review*) (successfully challenging in the European Court of Human Rights the Swiss government's NDCs as not sufficiently ambitious to effectively counter the country's contributions to climate change).

281. *Juliana*, 947 F.3d at 1175 ("[A] federal court need not manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution."); see also Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 525 (2007) ("While it may be true that regulating motor-vehicle

Courts' abstentions from exercising jurisdiction over climate rights claims are sometimes justified by a respect for the limits of the role of courts in the federal system and for the actions of the other branches.[282] Yet, horizontal separation-of-powers principles underlying this instinct do not bar effective environmental governance. Massachusetts provides an excellent example of how, when the political branches take action, good climate governance is possible while respecting strict, horizontal separation of powers.[283] The courts of the Netherlands likewise have structured remedies for climate harms in a way that "underscores respect for the separation of powers and leaves the choice of the means to be adopted to the political branches."[284]

This Note asserts that the complete abstention of Article III courts in climate-harm cases due to concerns over remedy management is an abdication of judges' duty to hear cases and controversies arising under federal law.[285] "Global warming is certainly an imposing conundrum, but so are diversity in higher education, the intersection between prenatal life and maternal health, the role of religion in civic society, and many other social concerns."[286] The complicated nature of the remedies required to address it are not wholly unique. In *Brown v. Board of Education*,[287] for example, the Supreme Court declared school segregation unconstitutional despite the uncertain nature of the remedies required and the need for lower court ingenuity.[288] Like the proposed relief in climate responsibility cases, the resulting court orders

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emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it.").

282. E.g., *Juliana*, 947 F.3d at 1175.

283. Article 30 of the Massachusetts Constitution calls for horizontal separation of powers more explicitly than the federal Constitution. See Mass. Const. art. XXX ("[T]he legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them . . . ."). This provision has not stopped the Commonwealth from otherwise providing for environmental rights, id. art. XCVII, conditioning approval of projects reviewed by the Commonwealth to mitigate their environmental impacts (including GHG emissions), Mass. Gen. Laws Ann. ch. 30, § 61 (West 2025), and setting a statewide goal of net-zero emissions by 2050, An Act Creating a Next-Generation Roadmap for Massachusetts Climate Policy, ch. 8, 2021 Mass. Acts (codified at scattered chapters of the Mass. Gen. Laws Ann.).

284. Netto, supra note 260; see also id. (comparing the judgments issued by Dutch courts and the European Court of Human Rights in recent climate rights cases).

285. See U.S. Const. art. III, § 2.

286. See *Juliana*, 947 F.3d at 1190 (Staton, J., dissenting).

287. 349 U.S. 294 (1955).

288. See David Marcus, Groups and Rights in Institutional Reform Litigation, 97 Notre Dame L. Rev. 619, 626 (2022); see also Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6 (1971) ("This Court, in *Brown I*, appropriately dealt with the large constitutional principles; other federal courts had to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands. Their efforts, of necessity, embraced a process of 'trial and error[.]' . . .").

required long-term supervision without fixed standards.[289] Such remedial challenges are sometimes incident to important structural change, especially in the absence of adequate action by the political branches or state government actors.

Article III courts' reticence to find constitutional environmental rights claims justiciable has damning consequences for both individual Americans and the long-term viability of our system of government. On a micro level, the decision to decline to hear these claims deprives harmed individuals and groups of their day in court. This refusal to adjudicate erodes public trust in institutions and leads to civil unrest.[290] It also disregards the legitimizing function of litigation success, which can build the support necessary to influence change through the political branches.[291] Thus, by denying relief despite recognizing that plaintiffs' constitutional rights had likely been violated, the judiciary itself may contribute to the perpetuation of such violations.

On a macro level, the failure of *any* branch to address the climate crisis is exacerbating the crisis, jeopardizing the rule of law and the country's long-term survival.[292] Climate change is destabilizing, politically and ecosystemically. In the coming years, we face a dramatic increase in human migration, an influx of international climate refugees, water rights disputes and salinization issues, disruptions to the global and domestic food supply, and disruptions to the provisioning of other ecosystem services on which our societies (and economies) depend.[293] As predictable disputes intensify, even if courts address the concrete disputes that will arise outside of constitutional rights claims, people may not abide by court-dictated outcomes if facing severe resource constraints.[294] Given this state of affairs, the justiciability barriers that prevent courts from hearing constitutional claims of particularized,

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289. See generally Luvern L. Cunningham & Lila N. Carol, Court Ordered Monitoring of School Desegregation, 59 Theory Into Prac. 81 (1978) (discussing the emergence and practices of court-supervised desegregation monitoring committees in the late 1970s).

290. See supra notes 89–91 (detailing instances of civil unrest linked to dissatisfaction with government action to address climate change).

291. See Sam Bookman, What We Learned in *Held v. Montana*, Harv. Env't L. Rev. (Apr. 7, 2024), https://journals.law.harvard.edu/elr/2024/04/07/what-we-learned-in-held-v-montana/ [https://perma.cc/YP24-YMBW] ("[L]itigation success can give these claims an imprimatur of legitimacy . . . [that] can be used as [a] political resource[], helping movements gain new followers and supporters, and persuade legislators to take stronger action." (citing Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 13–22 (2d. ed. 2004))).

292. See Scott Novak, The Role of Courts in Remedying Climate Chaos: Transcending Judicial Nihilism and Taking Survival Seriously, 32 Geo. Env't L. Rev. 743, 777 (2020) ("[I]t is as easy for the courts as it is for any other political body to reason that *they* did not cause the crisis and that *they* do not have a role to play in addressing it.").

293. See supra section I.B.1.

294. Novak, supra note 292, at 768 ("[W]ill people abide by riparian or prior appropriation water law systems if they desperately need water? Put another way: will people listen to court orders if their survival depends on disobeying them? Of course not.").

climate-related harms contravene the perpetuity principle—a principle just as structurally present in the constitutional scheme as the separation of powers.[295] By failing to stop other federal actors from hastening "the willful dissolution of the Republic"[296] and contributing to a climate crisis that causes concrete injuries to members of the public, this judicial restraint does real harm.[297]

C. *Federal Environmental Inaction: A Separation-of-Powers Problem*

The above sections highlight the ways in which the nation's governance structure is failing to provide effective environmental governance. Wetland degradation drains the nation of its natural water filtration system and imperils biodiversity, yet the basis for federal wetlands governance has been called into question. Given the disposition of the Supreme Court, this jurisdictional unsteadiness risks expanding to other areas of statutory environmental law. Likewise, though climate change is harming Americans in significant, measurable ways[298]—and though courts have recognized that the federal government has knowingly exacerbated the problem for decades[299]—the judicial branch has deemed unavailable the power to award remedies necessary to course-correct. Left unchecked, this impotence and restraint threaten the rule of law.[300]

Both issues can be traced to the current allocations of power within the nation's constitutional structure and its dual-dimensional separation of powers. These separations *do* protect the interests of Americans against tyrannical government action, providing a "double security . . . to the rights of the people."[301] But the allocation of powers within that structure—at least as currently interpreted by federal courts—is not tenable.[302] When the life, liberty, and property of the American People

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295. See Juliana v. United States, 947 F.3d 1159, 1179 (9th Cir. 2020) (Staton, J., dissenting) ("[P]erpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper ever had a provision in its organic law for its own termination." (alteration in original) (internal quotation marks omitted) (quoting President Abraham Lincoln, First Inaugural Address (Mar. 4, 1861))).

296. Id.

297. See Novak, supra note 292, at 772 ("U.S. courts also have a duty to prevent other branches of government from participating in behavior that violates the Constitution.").

298. See supra section I.B.1; supra note 221.

299. E.g., *Juliana*, 947 F.3d at 1164.

300. See supra section II.B.3.

301. The Federalist No. 51 (Alexander Hamilton); see also supra note 283 and accompanying text (discussing how Massachusetts's environmental governance efforts have been successful, even with an explicit separation-of-powers clause in the state's constitution).

302. See Novak, supra note 292, at 769 ("Courts need to take climate plaintiffs' survival seriously because their survival implicates the survival of the courts, and by extension, our system of governance."); see also *Juliana*, 947 F.3d at 1175 (acknowledging that "the political branches of government have to date been largely deaf to the pleas of the plaintiffs and other similarly situated individuals").

are threatened by existential problems arising from government *in*action, this double security becomes more akin to double jeopardy.

The grave environmental problems faced by Americans are a form of state violence.[303] By providing neither legislative jurisdiction over noncommercial yet necessarily interstate environmental problems, nor judicial jurisdiction to remedy the federal government's decades-long role in worsening the climate crisis, the current setup gambles with American lives and the survival of the Republic.[304]

III. TOWARD GREENER GOVERNANCE

The environmental challenges the country faces are dire.[305] The allocations of power—both vertical and horizontal—across its governance structure actively hamper the country's ability to meet these challenges.[306] But this federalist structure is not *itself* the problem[307]—the current allocations of power within it are. The Constitution is a document "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[308] Its interpretations have evolved as needed to meet novel challenges that the nation has faced.[309] And when they haven't, political actors have either amended it or worked creatively within its structure to make it meet the needs of the

303. See Emily Atkin, I Don't Know How to Do This, Heated (Jan. 25, 2026), https://heated.world/p/i-dont-know-how-to-do-this [https://perma.cc/KHR7-KD5B] ("The climate chaos we're experiencing now . . . is a direct, conscious choice by the state to allow certain people to die. It kills through heatwaves, asthma, hunger, and displacement instead of bullets and batons, but the logic behind both is identical: certain people, mostly brown, can be sacrificed.").

304. See *Juliana*, 947 F.3d at 1175–76 (Staton, J., dissenting) ("It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses.").

305. See Polk, supra note 132, at 179 ("The severity of our environmental crises should shock the conscience of any reasonable person. The fact that we have gotten to such a state, even though fifty years ago the people demanded we address our environmentally infirm ways, should make any reasonable person deeply angry."); supra sections I.A.2, I.B.1.

306. See supra sections II.A.3–.4, II.B.3, II.C; see also Lynton K. Caldwell, The Case for an Amendment to the Constitution of the United States for Protection of the Environment, 1 Duke Env't L. Pol'y F. 1, 1 (1991) ("[B]ecause of basic inconsistencies between traditional assumptions regarding property rights and the needs and obligations of environmental protection, the three divisions of government need a comprehensive statement of principles to guide policy making.").

307. See supra sections II.A.3–.4, II.B.3.

308. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (emphasis omitted).

309. See, e.g., *Juliana*, 947 F.3d at 1180 (Staton, J., dissenting) ("Only over time, as the Nation confronts new challenges, are constitutional principles tested . . . . [C]ourts did not recognize the anticommandeering doctrine until the 1970s because '[f]ederal commandeering of state governments [was] such a novel phenomenon.' And the Court did not recognize that cell-site data fell within the Fourth Amendment until 2018." (second and third alterations in original) (first quoting Printz v. United States, 521 U.S. 898, 925 (1997); then citing Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018))); see also New York v. United States, 505 U.S. 144, 149 (1992) (holding that the Tenth Amendment prevents the federal government from forcing "the States to provide for the disposal of the radioactive waste generated within their borders").

day.[310] To address the challenges the nation faces today, our Constitution must become climate conscious.

It is quite literally now or never.[311] The Framers "did not foresee the severe impacts that unprecedented expansion of population, technology and economic power would have upon the environment, and thus made no provision for its wise governance in the public interest."[312] In order to "promote the general Welfare, and secure the Blessings of Liberty" to current and future Americans,[313] political actors must take action to enable responsible governance.[314] This Part advocates for an Environmental Amendment to the Constitution as a part of a broader political mobilization towards environmentally sound governance. It first describes why an amendment is needed, then details its suggested substance, and concludes by addressing challenges to the proposal.

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310. One notable example of this creativity can be seen in the history of the Migratory Bird Treaty Act of 1918. 16 U.S.C. §§ 703–712 (2018). In response to the population declines of many migratory bird species in the early twentieth century, Congress enacted certain restrictions on migratory bird hunting through the Weeks–McLean Law of 1913, ch. 145, 37 Stat. 828, 847–48. Those provisions were struck down a year later as an unconstitutional exercise of the commerce power. See United States v. McCullagh, 221 Fed. 288, 292–94 (D. Kan. 1915); United States v. Shauver, 214 Fed. 154, 160 (E.D. Ark. 1914); see also Scott Finet, Habitat Protection and the Migratory Bird Treaty Act, 10 Tul. Env't L.J. 1, 6 & n.17 (1996) (describing the litigation). Supporters of the legislation responded by working to negotiate a treaty with Canada (controlled at the time by Great Britain) to ground bird protections in the treaty power in lieu of the commerce power. See Convention Between the United States and Great Britain for the Protection of Migratory Birds, Gr. Brit.–U.S., Aug. 16, 1916, T.S. No. 628; Finet, supra, at 6–7 & nn.18–19. This treaty was then ratified and enacted as a statute, Migratory Bird Treaty Act of 1918, ch. 128, 40 Stat. 755, 755 (codified as amended at 16 U.S.C. §§ 703–712 (1994)), which was then upheld under the treaty power. See Missouri v. Holland, 252 U.S. 416, 435 (1920); see also Finet, supra, at 5–7 (providing a more comprehensive history).

The treaty power has since been used to commit the federal government to additional environmental protections, though limited new commitments have been made in recent decades. See, e.g., Montreal Protocol on Substances that Deplete the Ozone Layer, Sep. 16, 1987, 1522 U.N.T.S. 3 (committing to the phaseout of ozone-depleting chemicals); UNFCCC art. 2, May 9, 1992, 1771 U.N.T.S. 107, 169 (seeking to stabilize atmospheric GHG concentrations to "a level that would prevent dangerous anthropogenic" climate change). But see supra notes 115–116 and accompanying text (detailing the U.S. exit from the UNFCCC and the Paris Agreement).

311. Novak, supra note 292, at 773 ("Unlike many other political issues, there exists only a limited amount of time to prevent truly catastrophic changes in the climate. At some point, humanity will not simply be able to try again in the next decade."); supra section I.B.1.

312. Caldwell, supra note 306, at 1.

313. U.S. Const. pmbl.

314. See Polk, supra note 132, at 179 ("It is not surprising that the environmental movement would look to new strategies . . . including environmental constitutionalism, given that the labyrinth of environmental statutory law has not stopped the reckless descent into environmental catastrophe.").

A. *The Call for a Federal Environmental Amendment*

An Environmental Amendment could enable sound environmental governance by filling two key gaps in the current governance structure. The horizontal separation-of-powers gap has been evident for decades: "[T]he current federal environmental law regime fails to portray clearly the reality that our citizens' substantive rights to protection of health and life are continuing to be violated by government-related actions, and that a full and fair remedy is often not forthcoming through statutory protections."[315] The *Juliana* plaintiffs got further than most but were stymied by redressability issues.[316]

The vertical gap, though, has not loomed so large until recently. Pre-*Lopez* commerce power jurisprudence upheld the nation's bedrock environmental statutes as constitutional.[317] In the wake of the Supreme Court's recent jurisprudence,[318] however, the limits of federal actors'

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315. Brooks, supra note 264, at 1067 (calling for "some form of a constitutional right to a healthful environment").

The use of the perpetuity principle as a basis for climate-harms claims was recently legitimized by the lower court and dissenting Ninth Circuit Judge Staton in the *Juliana* proceedings, but the majority held that any potential claims based on such a generalized right to a self-perpetuating government (rather than on the more tangible harms experienced by the claimants) would fail the "concrete and particularized injury" prong of the standing inquiry. Contrast Juliana v. United States, 947 F.3d 1159, 1177–81 (9th Cir. 2020) (Staton, J., dissenting) (finding the perpetuity principle enforceable against "an existential threat that has not only gone unremedied but is actively backed by the government"), with id. at 1174 (majority opinion) ("[I]f such broad constitutional rights exist, we doubt that the plaintiffs would have Article III standing to enforce them. Their alleged individual injuries do not flow from a violation of these claimed rights. Indeed, any injury from the dissolution of the Republic would be felt by all citizens equally . . . .").

If future jurisprudence affirms the perpetuity principle as an enforceable hook, litigants will need to overcome the particularized-injury barrier identified by the *Juliana* majority. See id. This necessity shows the potential value add of a federal Environmental Amendment. One of the key functions of a constitutional provision affirming environmental rights is the removal of the particularized injury barrier. See supra note 228 (discussing exceptions to the particularized-injury barrier); see also Ill. Const. art. XI, § 2 ("Each person has the right to a healthful environment. Each person may enforce this right against any party . . . through appropriate legal proceedings . . . ."); Polk, supra note 132, at 161–64 (describing the Illinois Constitution's provision's function as a work-around to the state's "special injury" requirement for standing). Even so, if an amendment campaign were to succeed, the resulting provision would likely provide more direct grounding for climate claims than the perpetuity principle.

316. See supra section II.B.

317. See Jay Austin & Bruce Myers, Env't L. Inst., Anchoring the Clean Water Act: Congress's Constitutional Sources of Power to Protect the Nation's Waters 2 & n.10 (2007), https://www.eli.org/sites/default/files/eli-pubs/d17__07.pdf [https://perma.cc/E4S9-VDHW] (collecting cases and noting that, as of 2007, "neither the Supreme Court nor federal appellate courts have ever struck down an environmental statute as exceeding Congress's power under the Commerce Clause" in spite of "repeated legal challenges to the constitutionality of these laws").

318. See supra notes 178–179, 182, 198 (discussing post-*Lopez* commerce power jurisprudence); supra note 200 and accompanying text (discussing recent administrative and environmental law decisions).

abilities to accomplish their statutory mandates are being newly called into question. Both to respond to the recent narrowing of federal agency powers, and to expand the jurisdictional basis for federal action to address interstate-but-noncommercial environmental problems, an Environmental Amendment could remedy this vertical power gap.

An Environmental Amendment clarifying the courts' abilities to order remedies for complex environmental harms would vindicate the interests of the Americans currently suffering such harms. From a federalism perspective, an amendment giving courts meaningful enforcement power would give the people a much-needed tool to stop the "unmitigated tyrannical authority" of the current regime that enables the federal government to "knowingly partake in actions that will destroy numerous U.S. cities and threaten the nation's foundation" with impunity.[319] If the federal legislative and executive branches continue to affirmatively worsen climate change, and Americans continue to experience tangible harms as a result, the judicial branch must be able to redress those harms.[320] If the latter continues to abdicate its responsibility to ensure the safety of the public by checking the knowingly harmful actions of the other branches, it risks delegitimizing our nation's governance structure on the whole.[321]

Adopting an Environmental Amendment would put the nation in good company: Over three-quarters of the world's countries "have explicit reference to environmental rights or responsibilities" in their constitutions.[322] Peru's constitution, for example, protects each person's right "to a balanced and appropriate environment for the development of [their] life."[323] Of such provisions, "roughly one-third . . . protect procedural, as well as substantive, environmental rights."[324] The French

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319. Novak, supra note 292, at 776. Viewed from this perspective, the criminalization of climate protest paints a grim picture for the future of protest speech in the United States. See supra notes 93–94 and accompanying text (discussing that criminalization).

320. See van Rossum, supra note 132, at 258–59 ("Without judicial review, constitutions tend to be worth little more than the paper on which they are written. They become mere words, or public relations documents, rather than instruments which confer genuine rights." (internal quotation marks omitted) (quoting Cass R. Sunstein, On Property and Constitutionalism, 14 Cardozo L. Rev. 907, 918 (1993))).

321. See Alston, supra note 95, at 1065 ("[L]egitimacy requires that governments ensure the safety and security of their citizens, now and into the future; governments that cannot or will not perform this function, are, for that reason, illegitimate." (alteration in original) (quoting Ross Mittiga, Political Legitimacy, Authoritarianism, and Climate Change, 116 Am. Pol. Sci. Rev. 998, 1009 (2022))).

322. Gerrard, supra note 264; see also David R. Boyd, The Status of Constitutional Protection for the Environment in Other Nations, David Suzuki Found., 6 (2013), https://davidsuzuki.org/wp-content/uploads/2013/11/status-constitutional-protection-environment-other-nations.pdf [https://perma.cc/KD6Z-2X2N] (surveying provisions and noting that, in "[e]very year since 1971, at least one nation has written or amended its constitution to include or strengthen provisions related to environmental protection").

323. Daly, supra note 254, at 74 (citing Constitution of Peru, Art. 2(22) (1993)).

324. Id. at 78 (citing David R. Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment 47–67 (2012)).

Constitution, following the Aarhus Convention,[325] emphasizes the link between procedural rights and environmental protections by safeguarding each person's "right, under conditions and limits defined by law, to access information relative to the environment that is held by government authorities and to participate in the development of public decisions having an impact on the environment."[326] Though these provisions have historically predominated in countries with civil law systems,[327] common law countries have also taken up the mantle in recent decades.[328]

A domestic amendment would necessarily require a different internal logic than many such environmental rights provisions to account for the nation's federalist structure. Crafted correctly, though, it could bridge two longstanding gaps[329] while bringing the United States into accordance with the international consensus "that the comprehensive protection of the environment is essential to the long-term meeting of many human needs."[330]

B. *Composition of the Amendment*

The development of the amendment's exact language should involve a wide range of stakeholders, given the varied interests involved and provisions after which its language could be modeled.[331] Even so, to be effective, it must comprise provisions (1) recognizing that certain environmental issues requiring federal governance are necessarily interstate in nature, (2) establishing procedural environmental rights,

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325. Id. at 72; see also Introduction, U.N. Econ. Comm'n for Europe, https://unece.org/environment-policy/public-participation/aarhus-convention/introduction (last visited Jan. 31, 2026) (on file with the *Columbia Law Review*) (describing the Aarhus Convention, also known as the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters).

326. Daly, supra note 254, at 72 (quoting the Charte de l'environnement [Charter for the Environment], loi constitutionnelle 2005-205 du 1 mars 2005 relative à la Charte de l'environnement [Constitutional Law 2005-205 of March 1, 2005 on the Charter for the Environment], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 2, 2005, p. 3697).

327. See Boyd, supra note 322, at 9 ("Of the 23 nations employing predominantly common law systems, only three have environmental provisions in their constitutions . . . . In contrast, among the 77 nations with predominantly civil law systems, 73 have environmental provisions in their constitutions." (citations omitted)).

328. For example, Kenya, Jamaica, Zambia, and Zimbabwe. Id. at 24. Ireland is likewise working to amend its constitution to protect the rights of nature. Louise Cullen, Ireland Could Give Nature Constitutional Rights, BBC (Dec. 16, 2023), https://www.bbc.com/news/articles/cd1d959wkq0o [https://perma.cc/5ZZF-WW6S].

329. See supra notes 315–318 and accompanying text.

330. Brooks, supra note 264, at 1068; see also G.A. Res. 76/300, The Human Right to a Clean, Healthy and Sustainable Environment (July 28, 2022).

331. See Brooks, supra note 264, at 1105 (noting various goals of environmental constitutional provisions, including "legitimiz[ing] environmental protection of the commons," "mandat[ing] a long-term fiduciary obligation of public action to protect and preserve environmental resources," and "creat[ing] a priority of public expenditures for the protection of selected natural resources" and for "the freedom . . . from environmental abuses").

and (3) granting Congress the power to enact appropriate legislation related to the above provisions.[332] The amendment's proposal should not include an expiration date if politically feasible.[333]

The provision recognizing the necessarily interstate nature of certain environmental issues and the need for their governance would enumerate an explicit basis for Congress to act, outside of commerce or treaty. Though the exact language could take many forms, one approach would be to begin by naming those two findings using language borrowed in part from the National Environmental Policy Act (NEPA).[334] Having established these bases for action, the provision could continue by listing a congressional power modeled after the language in Article I, Section 8[335] and the Fifteenth and Sixteenth Amendments[336]:

> "[R]ecognizing the profound impact of [human] activity on the interrelations of all components of the natural environment"[337] and the interstate dimensions of components of the natural environment essential to support human life, the Congress shall have power to address matters impacting environmental quality by appropriate legislation.

The inclusion of this explicit power would allow future Congresses to overcome any potential hurdle posed by the Tenth Amendment against environmental governance for its own sake.

The procedural rights provision of the amendment would provide a hook for Article III courts to redress some of the injuries to Americans caused by federal actions that exacerbate climate change, such as those suffered by the *Juliana* plaintiffs.[338] Without a rights provision, the amendment would only address the extent of Congress's powers.[339] Yet a substantive rights provision would likely prove

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332. E.g., U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). Including such a provision, though useful insofar as it explicitly grants Congress *some* power, does not answer two questions that have haunted Fourteenth Amendment jurisprudence: "First, who may Congress regulate? Second, what may Congress do?" See Erwin Chemerinsky & Earl M. Maltz, The Fourteenth Amendment Enforcement Clause, Nat'l Const. Ctr., https://constitutioncenter.org/the-constitution/amendments/amendment-xiv/clauses/703 [https://perma.cc/EBB2-HL6D] (last visited Aug. 23, 2025) (surveying Fourteenth Amendment Enforcement Clause jurisprudence).

333. Cf. infra note 349 (detailing how amendment proposals often include such time limits).

334. See 42 U.S.C. § 4331(a) (2018).

335. U.S. Const. art. I, sec. 8 ("Congress shall have Power To . . . .").

336. U.S. Const. amend. XV, sec. 2 ("The Congress shall have power to enforce this article by appropriate legislation."); id., amend. XVI ("The Congress shall have power to . . . .").

337. 42 U.S.C. § 4331(a).

338. See supra note 221 (listing the plaintiffs' injuries).

339. It would also likely fail to overcome the "tendency of the American judiciary to defer to the executive branch in the interpretation of legal obligations in the absence of an explicit constitutional requirement regarding discretionary acts" in environmental matters. Caldwell, supra note 306, at 1.

unworkable or impractically vague, at least on its own.[340] Such provisions in state and foreign constitutions have proven difficult for courts to enforce due to far-reaching nature of substantive environmental rights: "comprehensive in scope," "generalized in character," and "open-ended."[341] Procedural rights provisions, on the other hand, "demand only that courts identify specific procedures by which certain decisions are to be made."[342]

This provision should incorporate the "pillars of procedural rights" identified by the international legal community in the Aarhus Convention: "access to information, participation in decision making, and access to justice."[343] Its language could be modeled after the Twenty-Sixth Amendment[344] and the French Constitution:

> The right of people of the United States "to access information relative to the environment that is held by government authorities and to participate in the development of public decisions having an impact on the environment"[345] shall not be abridged by the United States or by any State. The Congress

340. Caldwell, supra note 306, at 2 (discussing the practical issues with the language of one proposed federal environmental amendment, which would have provided that "every person has the inalienable right to a decent environment" and that "[t]he United States and every State shall guarantee this right" (internal quotation marks omitted) (quoting S.J. Res. 169, 91st Cong. (1970))); see also Daly, supra note 254, at 76 ("How can a court, with limited political authority and negligible enforcement power, actually determine the contours of the right 'to live in an environment free of pollution,' and enforce that judgment against public and private actors who . . . are beholden to a public that may be equally divided?" (quoting Corte Suprema de Justicia [C.S.J.] [Supreme Court], 28 julio 1988, "Flores, Pedro c. Corporación del Cobre (Codelco), División Salvador," Rol de la causa: 2.052 (Chile), translated in 2 Geo. Int'l Env't L. Rev. 251, 252 (1989))).

341. Daly, supra note 254, at 73 (quoting Oposa v. Factoran, 296 Phil. Rep. 694, 724 (July 30, 1993) (Phil.) (J. Feliciano, concurring)); Polk, supra note 132, at 176 ("While the substantive environmental rights language seems necessary to include in the [state] constitutional text, . . . courts actually shy away from providing content to substantive constitutional environmental rights claims, so such language ends up being the least useful in constitutional text.").

342. Daly, supra note 254, at 76; see also Caldwell, supra note 306, at 1 (noting that "[c]ourts can more readily ascertain whether procedural requirements have been met").

343. Daly, supra note 254, at 72. The need to include information-forcing language is less pressing in the United States, given the existence of the Freedom of Information Act, 5 U.S.C. § 552 (2018), analogous state laws, e.g., New York's Freedom of Information Law, N.Y. Pub. Off. Law §§ 84–90 (McKinney 2025), and other government transparency laws. Even so, constitutionalizing these provisions could protect against future legislative abuses.

344. U.S. Const. amend. XXVI ("The right of citizens of the United States . . . to vote shall not be denied or abridged by the United States or by any State on account of age . . . . The Congress shall have power to enforce this article by appropriate legislation.").

345. Daly, supra note 254, at 72 (quoting the Charte de l'environnement [Charter for the Environment], loi constitutionnelle 2005-205 du 1 mars 2005 relative à la Charte de l'environnement [Constitutional Law 2005-205 of March 1, 2005 on the Charter for the Environment], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Mar. 2, 2005, p. 3697).

> shall have power to enforce this article by appropriate legislation.

The amendment alone would not be a panacea. But it would provide a critical, missing tool to address the multidimensional structural problem plaguing environmental governance in the United States.

C. *Challenges to the Pursuit of an Amendment*

Adopting an Environmental Amendment of any structure would admittedly be a challenge.[346] The amendment process is arduous by design.[347] Though the Constitution has been amended twenty-seven times since its ratification, the majority of those amendments were adopted during the first century of the Republic.[348] Only one amendment has been successfully adopted during the past fifty years, and it was over two hundred years in the making.[349] Attempts by federal legislators in the late 1960s to use this process to incorporate environmental rights into the constitution were unsuccessful,[350] though

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346. Brooks, supra note 264, at 1070 ("The inherently conservative nature of the federal Constitution, and the historical infrequency of successful amendment, makes the adoption of an environmental right an uphill battle.").

347. See U.S. Const. art. V (requiring instigation by either "two thirds of both Houses" of Congress or "the Application of the Legislatures of two thirds of the several States," followed by ratification by three-fourths of the states by legislature or convention). Some have argued that the Constitution also provides for amendment by popular majority petition and simple majority vote. See Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457, 458–59 (1994).

348. See U.S. Const. amends. I–XV.

349. See U.S. Const. amend. XXVII (announced as ratified on May 7, 1992) (congressional compensation); see also Libr. of Cong., Overview of the Twenty-Seventh Amendment, Congressional Compensation, Const. Annotated, https://constitution.congress.gov/browse/essay/amdt27-1/ALDE_00013830/ (on file with the *Columbia Law Review*) (chronicling how the amendment was formally proposed in 1789, ratified by six states by 1791 and a seventh in 1873, then ratified by over thirty additional states beginning in the 1980s).

This low amendment rate is not a historical accident. When submitting proposals, certain Congresses have added seven-year expiration dates. See, e.g., U.S. Const. amend. XXII, § 2 ("This article shall be inoperative unless it shall have been ratified . . . within seven years from the date of its submission to the States by the Congress."). Such expiration dates were included in many amendments proposed during the twentieth century and have impeded ratification efforts for multiple proposed amendments. The Equal Rights Amendment, for example, has been ratified by the requisite thirty-eight state legislatures but has not been proclaimed ratified due to its seven-year expiration date. See H.R.J. Res. 208, 92d Cong. (1972) (enacted); Alex Cohen & Wilfred U. Codrington III, The Equal Rights Amendment, Explained, Brennan Ctr. for Just. (Jan. 23, 2020), https://www.brennancenter.org/our-work/research-reports/equal-rights-amendment-explained [https://perma.cc/33PQ-T3Y3] (noting Virginia's ratification on Jan. 15, 2020).

350. Brooks, supra note 264, at 1068–70. These attempts at federal action also spurred five state governments—Hawaii, Illinois, Massachusetts, Montana, Pennsylvania—to adopt environmental rights amendments in the 1970s. Polk, supra note 132, at 126–27.

related efforts brought environmental considerations into federal decisionmaking with the passage of NEPA.[351]

Beyond government actors, the people are ready for it. Extreme weather events worsened by climate change have pummeled the nation in recent years,[352] increasing public awareness and outcry. The youth climate movement has escalated national and international conversations surrounding the urgency of governmental environmental action.[353] This movement is not just for progressives—some young conservatives are working to push the Republican Party to embrace climate action.[354] A perspective shift has been documented in older generations as well.[355] Many climate-conscious Americans are experiencing "widespread concern and despair" in the wake of President Trump's election;[356] a campaign for an amendment could serve as an outlet for those fears by "galvaniz[ing] . . . advocacy" and spurring political engagement.[357]

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351. See Brooks, supra note 264, at 1068–69 & n.30 (citing 42 U.S.C. § 4331(c) (2018) ("The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.")); see also Wendy Read Wertz, Lynton Keith Caldwell: An Environmental Visionary and the National Environmental Policy Act 129–97 (2014) (detailing the environmental rights debate and politicking involved in NEPA's passage).

352. See Seth Borenstein, Why the U.S. Is Leading the World in Extreme Weather Catastrophes, PBS (Apr. 2, 2023), https://www.pbs.org/newshour/science/why-the-u-s-is-leading-the-world-in-extreme-weather-catastrophes (on file with the *Columbia Law Review*) ("It is a reality that regardless of where you are in the country, where you call home, you've likely experienced a high-impact weather event firsthand . . . ." (internal quotation marks omitted) (quoting Rick Spinrad, Adm'r, Nat'l Oceanic & Atmospheric Admin.)).

353. See supra note 89 and accompanying text (describing the youth climate movement).

354. Ximena Bustillo, Climate Hasn't Been Core to the GOP. These Conservatives Are Trying to Change That, NPR (July 19, 2024), https://www.npr.org/2024/07/19/nx-s1-5041975/young-republicans-advocate-climate-action [https://perma.cc/3GU5-45WE].

355. According to the Pew Research Center, sixty-four percent of American adults "say climate change currently affects their local community either a great deal or some[,]" seventy-five percent "expect they will need to make either major or minor sacrifices" in "their everyday lives due to climate change," and "[m]ajorities . . . view state elected officials (60%) and the energy industry (57%) as doing too little on climate." Brian Kennedy & Alec Tyson, Pew Rsch. Ctr., How Americans View Climate Change and Policies to Address the Issue 6, 11, 12 (2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/12/PS_2024.12.9_Climate_REPORT.pdf [https://perma.cc/Z3X7-FX6S].

356. Kiley Price, Reckoning With Climate Anxiety in the Wake of the US Election, Inside Climate News (Nov. 8, 2024), https://insideclimatenews.org/news/08112024/todays-climate-post-election-anxiety/ [https://perma.cc/2N6M-9EJU].

357. Dominique Browning, Giving Up on Climate Action in a Second Trump Term Isn't an Option, TIME (Nov. 8, 2024), https://time.com/7174164/fighting-climate-change-trump-2024-essay/ (on file with the *Columbia Law Review*) ("Everything I and the millions of others who fought so hard to achieve in beginning to secure a healthy planet . . . is imperiled. . . . I propose that we face our dread head-on and use it to galvanize our advocacy. . . . [P]eople did not vote to destroy the stability of our planetary climate.").

The reproductive rights movement again provides an instructive example. The Supreme Court's decision in Dobbs v. Jackson Women's Health Organization, 142 S. Ct.

The current political moment has created a crisis point in environmental governance. Using an amendment campaign as the rallying cry for the broader movement could lead to climate action at the scale of the crisis. Prior to the second Trump Administration, there was positive momentum in the federal climate space: The landscape shifted palpably with the introduction of the Green New Deal and the subsequent passage of the Bipartisan Infrastructure Law and the Inflation Reduction Act.[358] Many states are likewise ready to act. They have responded to federal inaction by enacting innovative environmental statutes,[359] taking legal action against the federal government,[360] and working to ratify environmental rights amendments in their own constitutions.[361] Tribes and tribal consortia across the United States have capitalized on federal funding to ready their communities for worsening climate impacts;[362] Indigenous groups globally are at the forefront of

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2228 (2022), sparked widespread public backlash. Kelly McCleary & Holly Yan, Protests Spread Across the US After the Supreme Court Overturns the Constitutional Right to Abortion, CNN, https://www.cnn.com/2022/06/27/us/supreme-court-overturns-roe-v-wade-monday/index.html [https://perma.cc/GJ3G-3U2B] (last updated June 27, 2022). This backlash has grown into ongoing public engagement with the issue of abortion rights, with ten states including ballot referenda on abortion access in 2024. See Chantelle Lee, How the 10 States' Abortion Ballot Initiatives Fared in the 2024 Election, TIME (Nov. 6, 2024), https://time.com/7173410/abortion-ballot-results-2024-election/ (on file with the *Columbia Law Review*) (last updated Jan. 19, 2026).

358. See supra notes 117–120 and accompanying text.

359. See Associated Press & St. John, supra note 98 (discussing Vermont's and New York's "Climate Superfund" laws).

360. See, e.g., Motion by the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, Vermont, and Washington; the District of Columbia; and the Cities of Chicago, Los Angeles, and New York for Leave to Intervene in Support of Respondents, Am. Petroleum Inst. v. U.S. Env't Prot. Agency, No. 25-1478 (9th Cir. filed Mar. 26, 2025), https://stateimpactcenter.org/files/AG_Actions_American_Petroleum_Institute_v_EPA_Motion_to_Intervene_03.26.2025.pdf [https://perma.cc/667C-U7GL] (intervening in "EPA's action to waive Clean Air Act preemption for the addition of the Advanced Clean Cars II regulation to California's vehicle emission control program"); Nineteen AGs Defended National Environmental Policy Act Regulations, St. Energy & Env't Impact Ctr. (Mar. 27, 2025), https://stateimpactcenter.org/ag-work/ag-actions/nineteen-ags-defended-national-environmental-policy-act-regulations [https://perma.cc/2UA2-YLFD] (describing a comment letter submitted by nineteen state attorneys general criticizing the CEQ's decision to repeal certain NEPA regulations).

361. Supra note 132 and accompanying text.

362. See, e.g., Press Release, EPA, More Than 200 Tribes and Four Territories Covered by Climate Action Plans With Support From President Biden's Inflation Reduction Act (May 6, 2024), https://www.epa.gov/newsreleases/more-200-tribes-and-four-territories-covered-climate-action-plans-support-president [https://perma.cc/7ZL9-XBPZ] (last updated May 7, 2024) ("An unprecedented number of Tribes and intertribal partnerships . . . create[d] . . . [p]lans to remediate climate pollution in their communities." (internal quotation marks omitted) (quoting Kenneth Martin, Dir. of Am. Indian Env't Off., EPA)).

sound environmental governance.[363] Though the second Trump Administration,[364] many members of Congress, and a vocal minority of state governments would oppose an Environmental Amendment fiercely, their bluster does not determine whether a campaign for its adoption would succeed.[365]

Even recognizing the need for an amendment, one could critique this proposal on the grounds that the resources required to pursue it would be better utilized pursuing more rapid avenues for change, given the urgency of the environmental crises faced by the United States today. If the campaign were to succeed, getting the amendment on the books would necessarily be just the beginning. Its use in post-ratification litigation and legislation—which would each take years post-enactment to test and implement—would be its real benefit.[366] But we need to think long term, and long-term strategy does not preclude actions with more immediate impacts. If political actors hope the nation will survive in perpetuity, they should take seriously the need to change its governance structure to enable it to do so. The only true solution to the governance problem created by the allocations of power within the Constitution—at least, as presently interpreted—is to amend it.

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363. See Our Story, Indigenous Climate Action, https://www.indigenousclimateaction.com/our-story [https://perma.cc/C6UZ-6AKZ] (last visited Aug. 23, 2025) ("Indigenous climate leadership is a movement that ignites the power that all Indigenous communities hold, to step into decision making spaces and demand necessary systemic change."); Indigenous Peoples: Leaders in Climate Action, UNFCCC (Aug. 8, 2024), https://unfccc.int/news/indigenous-peoples-leaders-in-climate-action [https://perma.cc/YWH7-KT2N] ("Indigenous Peoples . . . preserve 80% of the world's biodiversity and 36% of intact forests continuing to inhabit territories home to unique ecosystems . . . .").

364. See supra note 124 and accompanying text (discussing Trump's revocation of Biden-era executive actions).

365. Though not ultimately determinative, the instrumental role that Congress plays in developing and enacting proposals for constitutional amendment would admittedly be a significant roadblock to adoption. 123 members of the 118th Congress were public climate deniers. Kat So, Climate Deniers of the 118th Congress, Ctr. for Am. Progress (July 18, 2024), https://www.americanprogress.org/article/climate-deniers-of-the-118th-congress/ (on file with the *Columbia Law Review*). The 119th Congress appears to be even less climate-oriented than its predecessor. See James Bruggers, With Republicans Claiming the Senate and Possibly the House, Congress Expected to Reverse Course on Climate, Inside Climate News (Nov. 6, 2024), https://insideclimatenews.org/news/06112024/republican-congress-expected-to-reverse-climate-course/ [https://perma.cc/RQX5-3FFZ] (reporting that a Republican-majority House of Representatives, together with a Republican-controlled Senate, would "supercharge" the climate-denial agenda of President Trump).

366. And, as state-constitutional environmental rights jurisprudence has shown, these benefits are not guaranteed. See Polk, supra note 132, at 155, 165 (contrasting the successes of the jurisprudences of Pennsylvania, Montana, and Hawaii with the limits of those of Massachusetts and Illinois).

CONCLUSION

The environmental challenges facing the United States in the twenty-first century cut across the law. They test the limits of the nation's governance structure to address the problems of the day, compromising the people's rights and freedoms in the process.

But this test is one that the nation can pass. In the case that opened this Note, Thomas Stubbs was initially denied relief in court.[367] On appeal, however, the Justices recognized that a too-strict causation standard was at the root of his claim's alleged deficiency.[368] The problem of sovereign power allocation predates *Stubbs*; the Constitution itself was adopted partially in response to the League of Friendship's lack of a key power under the Articles of Confederation.[369] After witnessing the League's failure to govern effectively for want of that power, the Framers modified the nation's governance structure to ensure their new government's longevity.[370]

So too here. As in the 1970s, the American public again faces a time of environmental reckoning.[371] The "Life, Liberty and the pursuit of Happiness" of the people is at stake.[372] We cannot permit deference to the current allocations of powers within the Constitution to be its downfall. To ensure that it provides the tools necessary to govern the nation in perpetuity, political actors must amend the Constitution and actualize effective environmental governance.

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367. *Stubbs I*, 148 N.Y.S. 804, 808 (App. Div. 1914).

368. *Stubbs II*, 124 N.E. 137, 138 (N.Y. 1919); supra note 7 and accompanying text.

369. That power was the ability to tax state governments. See Gillian E. Metzger, To Tax, to Spend, to Regulate, 126 Harv. L. Rev. 83, 89 (2012) ("[P]roviding a mechanism by which the federal government could raise revenue . . . was a principal motivation behind the creation of a new constitutional order . . . . Congress was bankrupt. *The very ability of the federal government to survive and to be taken seriously by other countries was at stake*." (emphasis added)).

370. See id.

371. See supra notes 22–31 and accompanying text (recounting the increased public awareness of environmental harms and subsequent explosion of federal statutory environmental law in the 1970s).

372. The Declaration of Independence para. 2 (U.S. 1776); see also Novak, supra note 292, at 777 ("Without a habitable environment, the Republic will not continue, and the rights of life, liberty, and property guaranteed under the Constitution will not be preserved.").